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ENDANGERED SPECIES:

Mining groups, Nev. counties challenge settlements between FWS, greens

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A coalition of mining and ranching groups and Nevada counties has filed a federal lawsuit against the Obama administration, claiming a pair of sweeping 2011 legal settlements with two environmental groups violates the Endangered Species Act because it limits the federal government's options to manage the imperiled greater sage grouse.

The 48-page **complaint**, filed late yesterday in U.S. District Court for the District of Nevada, also says the 2011 settlements illegally force the Fish and Wildlife Service to decide whether to list the greater sage grouse as endangered or threatened by an "arbitrary" Sept. 30 deadline.

The complaint says that the settlement, in effect, removes the option for Fish and Wildlife to continue to manage the greater sage grouse as a candidate for ESA protection. The service in 2010 ruled that the greater sage grouse deserves federal protection but that other species took higher priority amid limited resources, and placed the bird on a "warranted but precluded" list of species that may be given protections in the future.

"The settlement is illegal because it eliminates the congressionally mandated warranted but precluded category for the greater sage grouse and the other 289 species included in the settlement, sets arbitrary decision deadlines and frustrates the very purposes of the Endangered Species Act," Laura Skaer, executive director of the American Exploration & Mining Association, said in a statement.

The lawsuit asks the federal court to invalidate the settlements, which FWS entered into with the Center for Biological Diversity and WildEarth Guardians.

"By entering into private settlement agreements ('Settlements') with special interest litigants, FWS has circumvented the legislative process and fundamentally changed its obligations under the ESA," the complaint said. "Having not had the opportunity to participate in shaping the substantive policy decisions embedded in FWS's Settlements, Plaintiffs have suffered injury from FWS's implementation of the Settlements' provisions which eliminate the statutory option under the ESA for FWS to conclude, based on the best available science and commercial data, that certain species be 'warranted but precluded' from listing as endangered or threatened, a determination which would leave primary jurisdiction for wildlife management with the State."

The American Exploration & Mining Association, the Nevada Mineral Resources Alliance, the Nevada Association of Counties, and Nevada ranchers filed the lawsuit, which names Interior Secretary Sally Jewell, FWS Director Dan Ashe and several other regional service administrators as defendants.

A spokeswoman for the Interior Department said the agency does not comment on pending litigation and declined to comment on the lawsuit.

The lawsuit is at least the second legal challenge filed this year against the settlements with the two green groups. The state of Oklahoma and the Domestic Energy Producers Alliance filed a separate lawsuit in the U.S. District Court for the Northern District of Oklahoma, claiming the settlements violated the Constitution and the Administrative Procedure Act ([*Greenwire*](#), March 18).

While that lawsuit is pending, Judge Emmet Sullivan of the U.S. District Court for the District of Columbia earlier this year in a separate lawsuit upheld the pair of settlements, concluding that a homebuilders coalition lacked standing to challenge them ([*E&ENews PM*](#), April 1).

Sullivan's ruling marked the fourth time in a row federal courts have determined groups have no basis for challenging the legal agreement.

The National Association of Home Builders had filed the lawsuit in December 2012, claiming the settlements force Fish and Wildlife to violate procedural requirements for listing under ESA. It also claimed the deadlines set by the settlements could force FWS to neglect conservation efforts that aim to reduce or eliminate the need to list the species.

Under terms of the settlements at issue, FWS agreed to make final listing determinations on 251 species that had been placed on a list of "candidate" species that warrant protection but that were precluded from listing due to other priorities and limited resources -- including the greater sage grouse. The settlement also directed the service to make initial ESA listing determinations on hundreds of other species nominated for protection. In exchange, the two green groups promised to limit future petitions and lawsuits.

Interior Department officials said at the time of the settlement three years ago that they hoped it would relieve the agency from an onslaught of litigation, noting that, since 2007, environmental groups had petitioned to list more than 1,000 species -- nearly as many as were listed in the previous 30 years ([*E&ENews PM*](#), Sept. 9, 2011).

John Buse, senior attorney and legal director for the Center for Biological Diversity in San Francisco, said today in an interview that the group is confident the settlements will survive the latest legal challenge and that the lawsuit mirrors the other unsuccessful challenges.

"So far, they've all been defeated and the settlements upheld," Buse said. "Some are still pending, but we think this is yet another copycat effort to collaterally attack the settlements."

The challengers are also forgetting that the settlements are the result of the green groups suing the service to compel it to meet statutory deadlines to determine whether species should be listed for ESA protections, said Erik Molvar, a WildEarth Guardians biologist.

"Congress requires that the service make 'expeditious progress' in delivering the legally required protections for imperiled species, and WildEarth Guardians' settlement put an end to the foot-dragging on wildlife protections and expedited implementation of the law," Molvar said in an emailed statement.

More uncertainty

Still, the latest lawsuit adds a legal wrinkle in the already contentious debate over how best to protect the sage grouse and its sagebrush steppe habitat that stretches across 11 Western states.

The Bureau of Land Management, Forest Service and states are undertaking an unprecedented effort to protect the grouse and its habitat in an effort to avoid an ESA listing that Western leaders fear will interfere with the region's energy, ranching and agriculture industries.

While state and federal regulators have argued over coordination of ongoing efforts to protect the bird and its habitat, an increasing point of contention is the Sept. 30 deadline for Fish and Wildlife to decide whether to propose listing the grouse for ESA protection.

States and some Western congressional leaders, as well as the oil and gas industry, have sharply criticized the deadline, saying it does not allow enough time for conservation efforts to fully kick in and demonstrate that an ESA listing is not necessary.

Rep. Cory Gardner (R-Colo.) and Sen. Mike Enzi (R-Wyo.) have filed legislation to push back a listing decision by at least a decade ([*Greenwire*](#), May 22).

In the latest lawsuit, the mining, county and ranching groups say the settlement violates the ESA by eliminating the warranted but precluded classification and candidate species status for the greater sage grouse and about 290 other species.

The complaint says Fish and Wildlife is legally compelled by ESA requirements to consider three options when deciding the status of species: listing as threatened or endangered is warranted, listing is not warranted, or listing is warranted but precluded by other species that are more imperiled and have a higher listing priority.

A "thorough and unbiased evaluation" of the greater sage grouse would support continuing to manage the grouse as a candidate species, according to an American Exploration & Mining Association summary of the lawsuit.

"The massive efforts underway to protect Greater Sage Grouse and conserve its habitat would clearly make listing the bird unnecessary if these measures could be given more time to work," the summary says. "The settlement September 2015 decision deadline forces a rush to judgment that prevents USFWS from fully considering recently collected data documenting conservation success."

The groups also argue that the "purpose of the ESA is not to list species as threatened or endangered -- rather it is to keep species off of the list."

Thus, they argue, the settlement essentially altered the intent of the ESA. The legal complaint claims that the settlements violate the separation of powers clause of the U.S. Constitution, which establishes that only Congress can enact and change laws.

"Eliminating the candidate species classification undermines a key objective of the ESA -- to incentivize species protection and habitat conservation and turns the velvet hammer into a sledgehammer," Skaer, the American Exploration & Mining Association official, said in her statement. "Listing a species as threatened or endangered should be an act of last resort and not a foregone conclusion to satisfy an illegal settlement."

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