



Warranted but Precluded: What That Means Under the Endangered Species Act (ESA)

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Summary

On March 5, 2010, the U.S. Fish and Wildlife Service (FWS) announced that the sage grouse (sometimes called the greater sage grouse) was facing risks to its population such that a listing under the Endangered Species Act (ESA) was warranted. However, in that same determination, FWS found that the sage grouse listing was precluded because listing other species was a priority. The agency made the same warranted but precluded determination regarding a distinct population segment of the sage grouse, the Mono Basin sage grouse (sometimes referred to as the Bi-State population).

This report analyzes the process behind a warranted but precluded determination under the ESA. It also discusses what impact a warranted but precluded determination has on federal actions that may affect a species, with a particular analysis of impacts on the sage grouse. In the case of the sage grouse, whose habitat covers so much of the western United States, agency decisions, such as oil and gas leasing, will have to take into account this listing decision. Both the Bureau of Land Management (BLM) and the Forest Service have existing policies addressing how land management planning must consider species for which this determination was made.

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Both the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together the Services) are authorized to list species under the Endangered Species Act (ESA).¹ When determining whether a species should be protected under the ESA, a Service may find that listing a species is *warranted but precluded*. This means the Service has determined that a species should be listed based on the available science, but that listing other species takes priority because they are more in need of protection. In March 2010, FWS determined that listing the sage grouse was warranted but precluded. Much of sage grouse habitat overlaps with energy production in the United States. Accordingly, this report examines the impact the warranted but precluded determination has on the sage grouse and on federal agency projects in sage grouse habitat.

The Endangered Species Act Listing Process

A species may be listed under the ESA in one of two ways: either FWS or NMFS decides to list a species on its own initiative; or after a petition is filed by the public to have a species listed. A warranted but precluded determination is one of three results that may occur after a petition is filed by the public to list a species under the ESA. It is not available if a Service seeks to list a species without a petition.

The ESA requires that the listing decisions be made “solely on the basis of the best scientific and commercial data available.”² Under the ESA petition process, once a petition has been filed to list a species, the appropriate Service has 90 days to determine whether there is substantial evidence to support a listing. If there is substantial scientific evidence, the Service has 12 months from the date the petition was filed to decide whether a species should be listed or not. The Service will publish one of three conclusions in the *Federal Register*: listing is not warranted; listing is warranted; or listing is warranted but precluded. The published notice must include information supporting the Service’s conclusion. If a Service decides a listing is warranted but precluded, the statute requires the *Federal Register* notice to include “a description and evaluation of the reasons and data on which the finding is based.”³ If instead, the Service plans to list the species, it must publish a proposal to list the species within 90 days of that determination, indicating whether the species is endangered (in danger of extinction throughout all or a significant portion of its range⁴) or threatened (likely to become an endangered species within the foreseeable future⁵).⁶ The listing process is concluded when the final rulemaking is published, which is set by statute as one year after publication of the notice of proposed listing.⁷ Regulations provide that a warranted but precluded decision stops the listing process and the remaining listing deadlines (for proposed and final listing publication) do not apply.⁸

¹ 16 U.S.C. §§ 1531-1544.

² 16 U.S.C. § 1533(b)(1)(A). For more analysis on the listing process, see “Listing” beginning on page 13 of CRS Report RL31654, *The Endangered Species Act: A Primer*, by M. Lynne Corn, Kristina Alexander, and Eugene H. Buck.

³ 16 U.S.C. § 1533(b)(3)(B)(iii); 50 C.F.R. § 424.14(b)(3).

⁴ 16 U.S.C. § 1532(6).

⁵ 16 U.S.C. § 1532(20).

⁶ 16 U.S.C. § 1533(b)(5)(A).

⁷ 16 U.S.C. § 1533(b)(6)(A).

⁸ 36 C.F.R. § 424.15(b).

Warranted but Precluded

After a Service has published its decision that a listing is warranted but precluded, it must show it is making “expeditious progress” to list, delist, or reclassify the species.⁹ Each warranted but precluded determination must be updated annually to indicate expeditious progress in listing those species.¹⁰ This includes the Service’s justification for why some species are more a priority in protecting under the act than others. In amending the ESA process to include this provision in 1982, Congress indicated it wanted to compel agencies to act: “The [ESA] imposes no deadlines within which such review is to be completed. In practice, such status reviews have often continued indefinitely, sometimes for many years. The amendments will force action on listing and delisting proposals ...”¹¹

Courts have found this legislative history persuasive when reviewing whether the Services justified expeditious progress: “the Secretary must be actively working on other listings and delistings and must determine and publish a finding that such other work has resulted in pending proposals which actually preclude his proposing the petitioned action at that time.”¹²

Candidate Notice of Review

To address the requirement of showing expeditious progress, FWS provides an annual publication called the Candidate Notice of Review (CNOR). The notice is an annual report on ESA listings, including changes in listing status of species during the year, an indication of the listing priority number given to the species, and any additions or deletions to the candidate list. *Candidate* is defined within the regulations as “any species being considered by the Secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule.”¹³ Candidates may be both those species for which a warranted but precluded determination has been made and also those candidate species that the Services believe scientific data exist to support its listing but that higher priority listings are more important.

A table within the CNOR lists all of the candidate species within the United States.¹⁴ The 2009 CNOR includes 305 species, including 56 for which rulemaking to list the species has already begun.¹⁵ The previous four CNORs showed the following numbers of candidates:

⁹ 16 U.S.C. § 1533(b)(3)(B)(iii)(II).

¹⁰ 16 U.S.C. § 1533(b)(3)(C)(i)

¹¹ H.R. Conf. Rep. 97-835; 1982 U.S.C.C.A.N. 2860, 2861-62 (Sept. 17, 1982).

¹² *Center for Biological Diversity v. Kempthorne*, 2008 WL 205253, *8 (N.D. Cal. Jan. 23, 2008); *Center for Biological Diversity v. Kempthorne*, 466 F.3d 1098, 1102 (9th Cir. 2006); *American Lands Alliance v. Norton*, 242 F. Supp. 2d 1, 17 (D.D.C. 2003); *Center for Biological Diversity v. Norton*, 254 F.3d 833, 838 (9th Cir. 2001).

¹³ 50 C.F.R. § 424.02(b).

¹⁴ A separate notice is published regarding non-U.S. species. According to the 2009 version of that list, there are 20 species for which listing was found to be warranted but precluded. 74 Fed. Reg. 40540 (Aug. 12, 2009). This list, unlike the list for U.S. species, indicates the date on which petitions for listing were received, which for some foreign species, dates back to 1980.

¹⁵ Of the species for which rulemaking has been initiated, 55 are proposed to be listed as endangered, and one as threatened. 74 Fed. Reg. at 57866.

- 2008: 251 species,¹⁶
- 2007: 280 species,¹⁷
- 2006: 279 species,¹⁸
- 2005: 286 species.¹⁹

Species stay on the lists until they are removed by listing or by a determination that listing is not warranted. Because of this, the species on the CNORs overlap significantly from year to year. The notices list both animals and plants. Slightly more than half of the species in the 2009 CNOR are plants; a significant majority of those plants are located in Hawaii.

The table organizes the species based on status—candidate species (C); whether there has been a second petition resulting in a warranted but precluded status (C*); and those species the Service has proposed for listing as either endangered (PE), threatened (PT), or threatened due to similarity of appearance to another species (PSAT). It does not indicate which candidates were originally brought by petition and which were at the initiation of a Service. The designation C* means a petition for listing was filed for the species, but it does not clarify whether that species was already a candidate prior to the petition. The text of the 2009 CNOR suggests of the 305 species in the table, 168 are included due to a petition.²⁰ The table appears to use the word *candidate* loosely, conflicting with the regulatory definition of candidate (above), which expressly does not include species for which there has been a proposed rule.

Listing Priority Number

The listing priority number (LPN) indicates how FWS has ranked the importance of listing to the survival of that species, ranging from one to 12. The lower the number, the higher the priority that species has. The Services work to resolve listing on species with the lowest numbers first. The 2009 CNOR does not have any species with an LPN of one, although there are over 120 species ranked as two. The LPN is based on three factors: magnitude, immediacy, and taxonomic status. Magnitude means whether the threats to the survival of the species are high. Immediacy is defined as when those threats will begin. Taxonomic status means the importance of that species biologically. That is, species with no close relatives will be ranked higher than species having many nearby and/or similar related species. The taxonomic status considers “the number of populations and/or extent of range of the species affected by the threat(s); the biological significance of the affected population(s), taking into consideration the life-history characteristics of the species and its current abundance and distribution; and whether the threats affect the species in only a portion of its range, and if so the likelihood of persistence of the species in the unaffected portions.”²¹

¹⁶ 73 Fed. Reg. 75176 (Dec. 10, 2008).

¹⁷ 72 Fed. Reg. 69034 (Dec. 6, 2007).

¹⁸ 71 Fed. Reg. 53756 (Sept. 12, 2006).

¹⁹ 70 Fed. Reg. 24870 (May 11, 2005).

²⁰ 74 Fed. Reg. at 57813 (“We reviewed the current status of, and threats to, the 162 candidates and 6 listed species for which we have received a petition and for which we have found listing or reclassification from threatened to endangered to be warranted but precluded”).

²¹ 74 Fed. Reg. at 57805.

FWS has indicated that the LPN for the sage grouse is eight. The LPN for the Mono Basin population of the sage grouse (a group for which geographic and genetic differences were found) is three.²² (For an examination of the types of sage grouse and their listing history, see CRS Report R40865, *Sage Grouse and the Endangered Species Act (ESA)*, by Kristina Alexander and M. Lynne Corn.) This indicates that listing the Mono Basin population is a greater priority than listing the greater sage grouse. It also means FWS believes that as of 2009, more than 120 species have a higher listing priority than the Mono Basin population.

The text of a CNOR provides details on the listing decision, which FWS says are provided in part to address court concerns.²³ Earlier methods of producing CNORs were rejected by courts as not sufficiently explaining why listing was precluded,²⁴ or what expeditious progress was being made by the Service,²⁵ or both.²⁶ Examples of the details provided in the 2009 CNOR include the following:

- an explanation of why an LPN changed for a species (8);
- the amount appropriated by Congress for the listing program (\$8.8 million);
- final listing decisions made, including 90-day and 12-month determinations (77);
- a description for each species removed from the CNOR (4); and
- a description of each new species added to the CNOR (5).

A species' presence in the CNOR is not a guarantee that it will be listed under the ESA. The purpose of a CNOR is to show that FWS is actively reviewing whether species should be listed. FWS can find that despite an initial finding of warranted but precluded, the best scientific evidence available no longer supports listing that species. For example, the 2009 CNOR removed four species from the 2008 CNOR.²⁷ All four of these species had been categorized as C* in 2008,²⁸ meaning that at least one petition had been filed for its listing and FWS at one time had found that listing was warranted. The CNOR serves as the *Federal Register* notice denying that listing is warranted and explaining the decision.

²² 75 Fed. Reg. 13909 (March 23, 2010).

²³ 74 Fed. Reg. at 57813.

²⁴ Center for Biological Diversity v. Norton, 254 F.3d 833 (9th Cir. 2001) (Chiricahua Leopard Frog and Gila Chub).

²⁵ Center for Biological Diversity v. Norton, 2004 WL 1406325 ((D. Or. June 21, 2004) (Tahoe yellow cress, southern Idaho ground squirrel, and sand dune lizard).

²⁶ California Native Plant Society v. Norton, No. 03-1540, 2005 WL 768444 (D.D.C. March 24, 2005) (San Fernando Valley Spineflower); Center for Biological Diversity v. U.S. Fish and Wildlife Service, 350 F. Supp. 2d 23 (D.D.C. 2004) (Montana fluvial arctic grayling).

²⁷ 74 Fed. Reg. at 57810-12.

²⁸ See 73 Fed. Reg. 75176.

Judicial Review

The ESA explicitly provides that a warranted but precluded determination is subject to judicial review.²⁹ Judicial review, according to the legislative history on the amendment, would force the Services to justify why the listing was precluded: “In cases challenging the secretary’s claim of inability to propose an otherwise warranted petitioned action, the court will, in essence, be called on to separate justifications grounded in the purposes of the act from the foot-dragging efforts of a delinquent agency.”³⁰

A complaint filed against the FWS for its determination regarding the sage grouse was dismissed on procedural grounds and can be refiled.³¹ The challenge had tried to amend a previous sage grouse suit to argue that the sage grouse should have been listed.

How a Warranted but Precluded Determination Affects Agency Action

The ESA does not have any explicit protections for species for which a warranted but precluded determination has been made. Had the species been listed, or proposed for listing, the ESA would have prescribed certain procedures for federal agencies whose activities may affect those species. For example, agencies are required to consult with the Services to ensure that the agency activity will not jeopardize the continued existence of a listed species nor destroy or adversely affect those species’ critical habitat.³² This process is called consultation.

The ESA also requires certain steps when a species is proposed to be listed.³³ The act requires agencies to *confer* with the Services on “any action which is likely to jeopardize the continued existence of any species proposed to be listed” or destroy or adversely modify critical habitat “proposed to be designated.”

A warranted but precluded species is not listed, nor proposed for listing. Accordingly, neither the requirement to consult nor the requirement to confer applies. While there are species on the CNOR that are proposed to be listed (they are indicated by PE, PT, or PSAT), most species on the CNOR do not fit this category. Notably, species for which a warranted but precluded determination has been made are not covered by these procedures unless subsequently, the formal procedure for proposing listing has been taken.

Agencies, however, may have their own guidance and internal protection policies for candidate species, which include those designated as warranted but precluded. These policies could alter how an agency may proceed with actions that could affect a candidate species, even if no ESA protections apply. Both the Bureau of Land Management (BLM) of the Department of the Interior and the Forest Service of the Department of Agriculture have provisions that require protection of

²⁹ 16 U.S.C. § 1533(b)(3)(C)(ii).

³⁰ H.R. Conf. Rep. 97-835; 1982 U.S.C.C.A.N. 2860, 2863 (Sept. 17, 1982).

³¹ *Western Watersheds Project v. U.S. Fish and Wildlife Service*, No. 06-CV-277-BLW (D. Idaho *filed* March 8, 2010).

³² 16 U.S.C. § 1536(a)(2).

³³ 16 U.S.C. § 1536(a)(4).

candidate species. These two agencies' policies are significant as regards the sage grouse because they manage so much of sage grouse habitat. BLM manages over half of the 57 million acres of sagebrush habitat, with 40 million of those acres either current grouse habitat (30 million acres) or suitable for habitat (10 million acres).³⁴ While the Forest Service does not manage as much sage grouse habitat as BLM, parts of its grazing lands include sagebrush.

Bureau of Land Management

BLM policy directs protection of *special status species* in the land use planning process, meaning if a species is defined as a special status species, BLM must take extra steps to protect it in BLM's planning process.³⁵ Special status species are those that are listed, proposed for listing, and *sensitive species*. Sensitive species include candidate species. Therefore, the sage grouse, as a warranted but precluded species, is covered by the special status species policy. Additionally, even before the warranted but precluded determination, BLM had added the sage grouse to its list of sensitive species.³⁶

The special status species policy was changed in 2008, arguably providing less protection to special status species than the earlier version from 2001. The 2008 policy requires BLM to manage its lands to “minimize the likelihood of and need for listing” the species and to “conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed.”³⁷ This language very nearly matches the statutory obligations within the ESA for listed species, suggesting that the BLM policy does not add much protection to what is already provided under the act.³⁸ This is a change from the previous version of the policy, which had *expanded* the statutory obligations to include extra responsibilities toward protecting species at risk that had not yet been listed. The previous version required the agency to “ensure that actions requiring authorization or approval by [BLM] are consistent with the conservation needs of special status species and do not contribute to the need to list any special status species.”³⁹ The difference between the two policies appears to be the changed goal of ensuring that BLM actions do not contribute to a species being listed versus one of minimizing the likelihood of a listing.

The 2001 and the 2008 policies share the goals of conserving listed species and taking conservation measures regarding sensitive species. However, the definition of conservation changed in 2008. The 2008 policies define *conservation*, *conserve*, and *conserving* as “the use of programs, plans, and management practices to reduce or eliminate threats affecting the status of the species, or improve the condition of the species' habitat on BLM-administered lands.”⁴⁰

³⁴ See BLM, *Sage-grouse and Sagebrush Conservation*, available at http://www.blm.gov/wo/st/en/prog/more/sage_grouse_home2.html.

³⁵ BLM Manual § 6840 (Dec. 2008). Available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.43545.File.dat/6840.pdf.

³⁶ 75 Fed. Reg. at 13975. CRS has been unable to determine the process by which BLM made this determination.

³⁷ BLM Manual 6840.02(B) (December 12, 2008).

³⁸ See 16 U.S.C. § 1536(a)(1)—“Federal agencies shall ... utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed] species;” 16 U.S.C. § 1531(b)—“The purposes of this chapter are to provide a means whereby the ecosystems upon which [listed] species depend may be conserved...”

³⁹ BLM Manual § 6840.02 (January 17, 2001). Available at http://www.blm.gov/pgdata/etc/medialib/blm/ca/pdf/pdfs/pa_pdfs/biology_pdfs.Par.9d22a8ee.File.dat/6840_ManualFinal.pdf.

⁴⁰ See § 6840 Glossary (2008 version).

Reduction of a threat would satisfy the BLM. In 2001, the requirement appeared to be stricter, requiring “the use of methods and procedures such that there is no longer any threat to their continued existence or need for continued listing as special status species.”⁴¹

The planning process in the 2008 version seems simpler when candidate species are involved compared to 2001. It also allows BLM to prioritize how it manages sensitive species based on other issues, including financial resources. BLM is no longer required to ensure its management plans do not contribute to the need for candidate species to become listed—a process that required BLM to develop range-wide population and habitat objectives, and request technical assistance from the FWS, if needed.⁴² Instead, BLM must prioritize sensitive species “based on considerations such as human and financial resource availability, immediacy of threats, and relationship to other BLM priority programs and activities.”⁴³ It must implement best management practices in its planning.⁴⁴

Forest Service

The Forest Service has a policy to protect species that are not covered under the ESA. The sensitive species policy requires regional foresters to designate those species in their areas that show a downward trend in population viability or habitat capability.⁴⁵ The Forest Service has the objective of developing management practices to “ensure that species do not become threatened or endangered because of Forest Service actions.”⁴⁶ Additionally, under Department of Agriculture Departmental Regulation 9500-4, the Forest Service is directed to avoid actions that “may cause a species to become threatened or endangered.” The Forest Service is also directed to help achieve its goals in protecting wildlife.⁴⁷

The sensitive species policy has proved controversial before. The requirement to maintain a viable population was at the center of contention regarding the spotted owl before the spotted owl was listed under the ESA.⁴⁸

Fish and Wildlife Service Review of the Policies

Because both the Forest Service and BLM had policies that addressed sage grouse protection, FWS evaluated the policies when deciding whether to list the sage grouse. When it is making a listing determination, FWS is required by the ESA to consider whether there are adequate regulatory mechanisms in place such that additional protection under the ESA is not needed.⁴⁹ FWS found that neither BLM nor Forest Service policies provided adequate protection. This was

⁴¹ See § 6840 Glossary (2001 version).

⁴² See § 6840.06C (2001 version).

⁴³ See § 6840.2C5 (2008 version).

⁴⁴ See § 6840.2C (2008 version).

⁴⁵ Forest Service Manual (FSM) 2670.5.19.

⁴⁶ FSM 2670.22.

⁴⁷ FSM 2670.32.1.

⁴⁸ See Steven Lewis Yaffee, *The Wisdom of the Spotted Owl* (Island Press: 1994).

⁴⁹ 16 U.S.C. § 1533(a)(1)(D).

one of the reasons given by FWS for why listing the sage grouse was warranted but precluded by species that more urgently needed listing.

In evaluating whether to list the sage grouse, FWS considered BLM policies suggesting that the special species status did not provide much additional protection in practice. It found that under the 2008 policy, BLM had the authority to address sage grouse threats to protect the bird. However, FWS found the application of the policies was inconsistent, especially in the area of energy development, including oil and gas: “BLM’s current application of these authorities in some areas falls short of meeting the conservation needs of the species.”⁵⁰ In fact, FWS said some BLM practices were “exacerbating the effects of threats” to the sage grouse.⁵¹ It refused to rely on BLM’s policies as a regulatory practice that would obviate the need to list the species.

According to FWS, the impact of the Forest Service policy on sage grouse protection is uncertain and inconsistent. FWS stated in the *Federal Register* notice regarding its warranted but precluded determination that there was not enough information available to evaluate the efficacy of the Forest Service’s policies regarding sage grouse. FWS indicated that habitat protection on grazing lands varied depending on the plan.⁵² FWS could not rely on Forest Service policy as a regulation that would avoid the need to list the sage grouse under the ESA.

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⁵⁰ 75 Fed. Reg. at 13979.

⁵¹ Id.

⁵² Id.