

Remarks by Bruce Babbitt
"ESA at 40" Conference
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October 4, 2013

I am pleased to join you here at the California Environmental Law and Policy Center to celebrate the 40th anniversary of the Endangered Species Act (ESA). This anniversary is an appropriate time to celebrate four decades of wildlife conservation success. And this gathering is also an opportunity to reflect on lessons learned and to chart new directions for the next forty years.

The ESA has accumulated an impressive record of success. The bald eagle, our national emblem, is once again a common sight. The California condor, back from the brink of extinction, is now casting its giant shadow across the mesas of the Southwest. The gray wolf and the grizzly bear are once again thriving in the Yellowstone ecosystem. The Northwest Forest Plan has preserved millions of acres of majestic old growth forest and scores of obligate species. In the Southeast the red-cockaded woodpecker is again thriving in mature forests of long leaf and loblolly pine. Hundreds of lesser known species also owe their existence to ecosystems protected by the Act.

Perhaps the most important lesson from the last forty years is that most species have become endangered through loss of habitat. And during this time the Fish and Wildlife Service has developed an impressive series of innovations for protecting habitat through planning.

Habitat Conservation Plans originated here in California in the 1980s with the San Bruno Mountain HCP for protection of the Mission blue and several other butterfly species. From that beginning Habitat Conservation Plans have expanded with more than 300 such plans in effect across the country. The HCP has demonstrated its full potential by means of a pioneering partnership with the State of California, its endangered species law, and the Natural Communities Conservation Planning Act.

Then came Safe Harbor Agreements, the first developed in North Carolina, to encourage landowners to maintain and restore habitat for the red-cockaded woodpecker.

More recently the Candidate Conservation Agreement (CCA) has emerged as a promising tool for landscape protection. CCAs bring land owners, public officials and conservationists together, providing space to seek solutions without the overhang of a previous listing decision.

The flexibility provided by these planning innovations, however, does have limits. The ESA lays out clear legal standards to assure the survival of imperiled species. Habitat planning with the goal of preventing listing under the Act must meet these standards. It cannot be reduced to a process of political bargaining in a search for the lowest common denominator of agreement.

Today there are signs that the Bureau of Land Management (BLM), eager to avoid controversy, is attempting to skirt the legal and scientific requirements of the Act. And the Fish and Wildlife Service, reluctant to challenge BLM practices, is dangerously close to drifting into the role of

passive bystander.

The greater sage-grouse, a candidate for ESA listing, is a current example of these trends. These birds once ranged across more than two hundred million acres of sagebrush expanses that covered the basins and plateaus of the Intermountain West. Today the species is in significant decline. More than half of their sagebrush habitat has been lost, plowed up, burned, over grazed, or destroyed by strip mining, energy projects and well fields.

Most of the remaining habitat—approximately 70 million acres—are public lands administered by the BLM and the Forest Service. The fate of the sage-grouse will depend on the success of an unprecedented planning process to conserve sage-grouse across the West. The process now underway calls for the engaged attention of the entire conservation community.

In March 2010, the Fish and Wildlife Service concluded that listing the greater sage-grouse under the ESA was "warranted but precluded" due to other, higher priorities. Litigation followed and the Service eventually agreed to make a listing decision for the species no later than September 15, 2015

Only weeks after the new listing deadline was declared, the BLM announced it would initiate an unprecedented planning process to update management plans with new conservation measures to conserve sage-grouse. The Forest Service joined the effort, with both agencies identifying more than 100 management and land use plans for revision. High level meetings were convened and a committee of federal and state biologists and planners was established to guide the planning process.

From there, however, the administrative picture begins to darken. The oil and gas industry, a big and growing presence in sagebrush country, is lobbying for weak and ineffectual regulatory standards. Members of Congress have protested even middling conservation measures proposed for sage-grouse and even sought to delay listing for the species. And the Fish and Wildlife Service has failed to take a leadership role, which has only given credence to inadequate federal and state plans favored by industry.

The best place to examine these trends is Wyoming where another oil and gas boom is underway. BLM lands will soon blossom with drilling rigs; the *Casper Star Tribune* reports that 23,000 new wells, most of them on Federal land, are in the planning stage.

Anticipating the possible listing of the sage-grouse, Wyoming has taken a pre-emptive lead by publishing a state management plan, approved by the Governor and the state legislature, in an attempt to preclude the need to protect the species under the ESA.

Of the various activities covered in the Wyoming plan, those relating to oil and gas are the most critical to the future of sagebrush habitat. On first reading the plan appears to set at least some meaningful standards. For example, the plan provides for "well pad densities not to exceed an average of one pad per square mile."

However, this undemanding standard is then further weakened by exemption language providing for "less restrictive standards."

Another example: The Wyoming plan contains exception language that allows state officials to waive any regulation "on a case by case basis" on a showing that "the exception will not cause declines in sage grouse populations." It is a biological fact that no single case by case exception is likely to cause a provable population decline. It is the cumulative effects of multiple, repeated exceptions that can cause population declines. In the Wyoming plan the unlimited exception language could be sequentially invoked to effectively nullify any regulation.

In the two years since the Wyoming plan was put forward, the Fish and Wildlife Service has voiced few concerns regarding the plan. To the contrary the Service appears to have endorsed the plan, writing that the "core population area strategy ...is a sound framework for a policy by which to conserve greater sage grouse in Wyoming" and praised it as "an excellent model for meaningful conservation of sage-grouse."

Whatever one may think of the inadequate Wyoming plan, it is a federal agency, the Bureau of Land Management, that has principal responsibility for managing sage-grouse. More than 70 million acres of remaining sage brush habitat in the West is held by BLM and the Forest Service. These federal lands are public lands owned by you and me and the people of the United States. They are governed by federal law. They must be administered to ESA standards if federal agencies hope to avoid listing the sage grouse under the Endangered Species Act.

Unfortunately, the first plans released as part of BLM's "National Greater Sage-Grouse Planning Strategy" do not meet ESA standards. This could have been expected. The national strategy is notable mainly for its lack of prescriptions to conserve sage-grouse. The BLM has essentially delegated planning to agency managers across the West without delineating minimum standards that must be included if plans are to be successful. It is little short of fantasy to imagine that local and state BLM offices, without clear guidance from Washington, and under pressure from drillers, miners, ranchers and other resource users, can propose management prescriptions that will meet the legal test of the ESA.

The BLM, long subservient to the oil and gas industry, has already given over huge swaths of sagebrush steppe to the fossil fuel industry. For example, the Pinedale District Office has over the years passively authorized drilling of more than 5000 wells in the Jonah Gas Field that straddles the largest big game migratory route in the lower 48 states. The wreckage inflicted on this ecosystem can hardly be described in words; however, one need only go to Google Earth to view the devastation.

Throughout its history the Bureau of Land Management has conceived (or Congress has otherwise limited) its regulatory function in the oil and gas industry as limited to simply making an initial leasing decision, "yes or no," whether to lease or not to lease. Once that decision is made, it is then largely left to the lessee energy company to decide how to locate and manage roads, drilling pads, pipelines, storage tanks, compressor stations and other production facilities. To be sure, BLM oil and gas leases do contain some boilerplate language requiring lessees to use

"best practices." But what are BLM's recommended best practices?

To find an answer go to the BLM website and locate the agency "Gold Book" of Best Management Practices. The book is mostly "suggestions" to "consider." Actual standards are scarce, and limited to less consequential matters, such as culvert design and the correct cross section profiles for road construction.

The Gold Book, however, does offer detailed cosmetic advice such as choosing the appropriate color of paint for well field structures. The Book includes a color chart illustrating the "ten standard BLM colors", ranging from "military olive" to "covert green." It helpfully observes that "squinting can help determine the best overall colors choice," and admonishes "never paint white to match snow." It tells the reader "simulation software even allows you to pick custom colors that you can have mixed at a paint store."

In a section captioned "camouflage" the Gold Book informs us "camouflage may be the most appropriate solution for some highly sensitive sites" and "sometimes what is called for is a good disguise." The example offered is "a compressor station designed to look like a local barn."

The Gold Book does not include a word about use of extended reach drilling, standards for well spacing, roadless development, off site location of compressor stations and other infrastructure or any other essential matters.

The Jonah Field could have been painted "covert green" or disguised as a landscape of barns, but it would still remain witness to the continuing downward spiral of the sage grouse toward listing and possible extinction, and thus to the regulatory failures of the federal agencies.

More recently, the BLM has produced a document known as the National Technical Team (or NTT) report listing additional Best Management Practices applicable to "priority sage-grouse habitat." While the NTT report does recommend a stronger set of BMPs, it clearly states that its recommendations are not intended to create standards; the recommendations are only offered for BLM managers to "consider" and "evaluate" in preparing local management plans.

Meanwhile, a technological revolution in drilling and production has occurred within the oil and gas industry. It is a revolution that makes it possible to explore and produce oil and gas with minimal impact on the land. Extended reach drilling now makes it possible to drill more than two miles outward from a single well site. Dozens of wells can be drilled from a single pad. Modern helicopter transport makes it possible to put infrastructure in place without disruptive road networks----a model known as "offshore inland" now used in other parts of the world.

It is past time for the agency to set meaningful regulatory standards requiring the use of modern technology to minimize damage to public lands.

We now turn to the Fish and Wildlife Service. However inadequate the BLM response, the Fish and Wildlife Service is the agency with ultimate responsibility for administering the Endangered Species Act.

So far, the Fish and Wildlife Service has remained on the sidelines, effectively disclaiming any leadership role. Apart from endorsing the Wyoming plan, and recommending it as the template for BLM lands in Wyoming, the Service has offered little technical advice other than producing a "Conservation Objectives" report for sage-grouse in 2012 that, although it describes management goals for sage-grouse, it does not detail specific management prescriptions for the species.

The Fish and Wildlife Service will no doubt respond that the Bureau of Land Management has "declined to conference" on the BLM planning process, thereby shutting the Service out of a role in formulating uniform protective measures. And in the meantime the BLM, by passing off decision making to the local level, by endorsing inadequate state standards and by leaving local managers free to selectively adopt standards, is painting the Fish and Wildlife Service and the administration into a regulatory corner from which there will be no eleventh hour exit.

As the 2015 deadline for a listing decision (and another presidential election campaign) draws closer, political reality will dictate that the Fish and Wildlife Service may have little choice but to accept the industry dominated plans now taking shape. There will be no politically realistic alternative to outright capitulation.

There is still time, although not much, to restore integrity to the sage-grouse conservation planning process. It will require firm leadership, first from the Interior Secretary, who is responsible for both the BLM and the Fish and Wildlife Service, the key actors in this drama. She should forthwith order them to collaborate on the development of meaningful and mandatory standards to protect the sage grouse.

It will also require firm engagement from the White House, not least to bring the Forest Service in the Department of Agriculture into direct participation at the national level. And without engagement from the White House, the President's legacy may well be a failed process leading to another spotted owl/northwest forest train wreck.

To have a real chance at success, the Administration must produce a national plan, containing clear and consistent standards by which the public lands of the BLM and the Forest Service and the Fish and Wildlife Service will be administered in sagebrush habitat. A national plan should be tied together in one Record of Decision issued by and for all relevant federal agencies.

To assure the future of the sage-grouse some part of the 70 million acres of public land should be set aside and designated for the primary purpose of protecting and restoring the sage grouse and its habitat. This goal can best be achieved by placing lands within the National Wildlife Refuge system or within National Monuments where they can be administered with an overriding statutory mandate for wildlife protection.

Existing law gives the Interior Secretary and the President ample authority to establish and enforce durable protections for key wildlife habitat on federal lands, through the creation of new refuges or national monuments or through other measures. An effective national plan should include such measures.

Some may say that it is already too late to put the habitat planning process back on track. Others may counsel that, in this time of divided government and seeming ascendancy of anti-environment politicians, the best course is to retreat, even on public land, by scaling down to the lowest common denominator of "consensus" plans, whether or not that consensus meets the requirements of the ESA. Kick the can down the road into the courts. Leave the task of preserving our landed heritage to future administrations.

To them I say, history informs us, time and time again, that the best way to protect an environmental law is to use it vigorously. Especially on public lands, lands that belong to all of us, the American people. The sage-grouse and the Sagebrush Sea of the inland West are an enduring part of our national heritage and they must be preserved. It is the responsibility of the Obama administration to do so.