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ENERGY IN THE LAW

Federal court orders FWS to implement further protections for Uinta shale wildflowers

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A federal court recently ruled that the U.S. Fish and Wildlife Service (Service) must work with various stakeholders to strengthen protective measures included in a conservation agreement for the protection of the Graham's beardtongue and the White River beardtongue, two wildflowers that grow in Colorado and Utah on oil shale outcrops. If the Service cannot reach agreement, the court will vacate the Service's 2014 decision to not list the beardtongues as threatened under the Endangered Species Act (ESA).

The court's order in *Rocky Mountain Wild v. Walsh*, No. 15-cv-00615 (D. Colo. Oct. 25, 2016), available here, states that if the parties cannot reach agreement on an amended conservation agreement by February 21, 2017, the court will vacate the Service's "not warranted" listing determination and reinstate the Service's 2013 proposed listing.

The Service entered into a conservation agreement in 2014 with the states of Colorado and Utah, counties with oil shale potential, the Utah School and Institutional Trust Lands Administration (SITLA), and the oil and gas industry for the protection of the beardtongues. The agreement placed development caps on public lands across a substantial amount of habitat to protect the beardtongues, and included a 300-foot buffer around any beardtongue found on any land—public or private—in the designated conservation areas.

Environmental organizations, led by Earthjustice, sued the Service, arguing that the protective measures in the conservation agreement were not sufficient to prevent a listing.

District Court Decision

A federal judge in the U.S. District Court for the District of Colorado held that certain provisions of the conservation agreement were inadequate to protect the beardtongues. The court looked at the Service's 2013 proposed listing[1] and factors behind the Service's decision to propose a threatened listing for the Graham's and White River beardtongues. In its decision, the court explained that many of the concerns that the Service raised in its 2013 proposed listing decision had not been addressed by the conservation agreement, including duration of protections for the beardtongues, and the buffers included in the conservation agreement.

[1] 78 Fed. Reg. 47590 (Aug. 6, 2013).

The conservation agreement was set to expire in 15 years, which the court deemed insufficient, noting that the threats to the beardtongues would extend beyond the 15 years, and suggested that the Service should incorporate a renewal mechanism at the end of the 15 year term.

Further, the court noted that while the conservation agreement included a 300-foot buffer around the wildflower, this was perceived as the minimum needed distance based on literature relied on by the Service. The court questioned whether the 300-foot buffer was agreed upon as part of "a horse trade with energy developers" instead of based on science. The 2013 proposed listing decision indicated that a 700-meter buffer was needed around the Graham's beardtongue and a 500-meter buffer was needed around the White River beardtongue in order to protect the wildflowers and their pollinators. 78 Fed. Reg. at 47836. The court held that the difference between the 2013 proposed listing and the final determination in the conservation agreement was inappropriate.

Instead of outright vacating the Service's decision not to list the beardtongues, the court ordered the parties, including the states of Colorado and Utah along with the other stakeholders, to meet in person and reach agreement on sufficient protective measures for the beardtongues to be added into the conservation agreement. If the parties can reach agreement by February 21, 2017, the Service's not warranted determination will stand and the conservation agreement, as modified by the parties, will continue. If not, the court will vacate the Service's not warranted decision and the beardtongues will once again become candidate species pending a revised final determination by the Service.

Implications on Future ESA Listing Decisions

In making its decision, the Colorado federal court explained that it is wholly appropriate for the Service to preclude listing a species under the ESA because of conservation measures in place or to be implemented, but that the particular conservation agreement at issue had too many flaws. In September 2015 a federal court in Texas vacated the Service's decision to list the lesser prairie-chicken, finding that the Service did not sufficiently consider an oil and gas conservation plan newly in place for that species.

While there is no answer to what the Service and courts will find sufficient to preclude a listing decision, it is important to be involved in the conservation agreement planning process to ensure that industry has a seat at the table and to ensure that the agreed-upon conservation measures are sufficiently explained to withstand court review.

For questions regarding the beardtongue ruling or its implications, please contact Theresa Sauer.