

Oklahoma Enters the Fray of Endangered Species Sue-and-Settle

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On March 17, 2014, the State of Oklahoma sued the U.S. Department of the Interior, taking aim at the U.S. Fish and Wildlife Service's habit of settling large Endangered Species Act cases with Environmental Non-Governmental Organizations. The lawsuit signals an important escalation in the fight against such settlements. ESA lawsuits have become a key tool to prevent or delay project development activities, including in the oil and gas industry.

Over the last several years, FWS has repeatedly settled NGO lawsuits with consent agreements in which FWS commits to prioritize the NGOs' chosen species for potential listing – and on a fixed timetable. The largest settlement resulted in FWS agreeing to examine 455 different species over the course of five years.

These settlements draw substantial agency resources away from FWS's many other priorities, and they raise questions about FWS's independence in setting its priorities. Oklahoma's lawsuit highlights several additional concerns with these settlements, including:

- They eliminate FWS's discretion to keep species on the "candidate list" where FWS identifies species that are eligible for listing, but for which it lacks the resources to list.
- They foreshorten the listing process in order to meet an arbitrary schedule, without regard for whether the best science is available to make the listing decision.
- They limit FWS's ability to examine the positive efforts the State has made or supported to conserve certain species and their habitat.

Oklahoma's lawsuit is significant for a number of reasons.

First, this is the first time that a state has taken legal action to break the FWS sue-and-settle cycle.

Second, the lawsuit puts a new issue on the table: the impact on State economies and autonomy. While State sovereignty is frequently discussed with regard to the ESA, Oklahoma's lawsuit publicly presents (or at least implies) it in a manner not previously done.

Third, the lawsuit is a well-timed complement to the State of Texas' recent efforts to confront the ESA listing issue from the scientific perspective. Texas recently announced the appropriation of \$5 million for scientific research on three species that could be listed under the ESA. The purpose of the research, in line with Oklahoma's concerns, is "to further ensure[that] the best science is available when the federal government is determining if a species should be listed and raise[] the standard for data used in listing decisions."

Fourth, active legislation is pending in Congress to modify sue-and-settle practices – it has passed the House and is currently in a Senate Subcommittee. Oklahoma's lawsuit will serve to enhance public awareness of the issue.

Whether or not Oklahoma eventually wins its lawsuit, simply bringing it has underscored the importance of deciding whether regulation by lawsuit is a legitimate way to implement the ESA.

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