

Pacific Legal Foundation sues to enforce the Congressional Review Act

Federal agencies must give Congress the opportunity to oversee agency actions. That simple sentence sums up the Congressional Review Act, which was passed in 1996 and signed by President Bill Clinton. However, it's become glaringly apparent that many government agencies are failing to submit their rules for review as required by law.

On April 11, the Pacific Legal Foundation (PLF) filed two lawsuits regarding the lack of CRA overview: *Tugaw Ranches, LLC. v. Department of Interior*; and *Kansas Natural Resource Coalition v. Department of Interior*. The PLF explains that CRA "defines a "rule" very broadly to include both formal notice-and-comment regulations and informal agency statements regarding governing laws. Although it does not apply to presidential executive orders or proclamations, it applies to almost any regulatory agency document that impacts the general public, whether economically significant or not."

Tugaw Ranches, LLC. v. Department of Interior

The Departments of Interior and Agriculture issued heavy-handed sage grouse regulations in 2015, which imposed severe restrictions on federal land use in the West. Their new rules undermined widely supported state-led conservation efforts at the expense of those who rely on federal lands for their livelihoods. Under the CRA, Congress is authorized to exercise agency oversight and review these controversial and burdensome rules.

"Despite the western states developing sage grouse management plans which brought all the stakeholders to the table, the federal government rejected them and made their own rules to have control over millions of acres," said PLF Attorney Jonathan Wood. "Because the government thumbed its nose at the states, this rule has remained controversial for years. People see how disruptive the government restrictions are and the fact that the collaborative work of the states was not recognized."

The most disturbing part is that the government agency did not go through a required Congressional Review with their sage grouse management rules. That's why the PLF stepped in with the lawsuit, *Tugaw Ranches, LLC v. Department of the Interior*. Like many western U.S. ranching families, the Picketts have worked on the same land in Idaho for many gener-

ations and have a thriving business selling naturally raised beef. Like many ranchers, their business depends on grazing permissions on federal land. However, their livelihoods are threatened by rules that set aside over 65-million acres of federal land as a habitat for the sage-grouse — an animal that's neither threatened nor endangered.

The Picketts have been informed that the Forest Service land they have been grazing on has been subject to "studies." "Although they haven't been forced off that land yet, the Picketts see it coming down the pike. It's difficult because ranchers need to plan today for what's going to happen three years from now," Wood said. "They know the restrictions will be bad because they've been told the area they graze now will start being locked up."

Agencies implemented the sage-grouse plans without first submitting them to Congress as required under the Congressional Review Act (CRA). PLF argues the rule is unenforceable until the agencies comply with the CRA, and that it should be properly sent to Congress for consideration.

Wood said it's shocking that that an agency could lock up thousands of acres without any review. "This is exactly the type of regulations Congress wanted to ensure would be scrutinized with the CRA. Congress would shoot this down if it got a chance."

Kansas Natural Resource Coalition v. Department of Interior

In 2003, the Fish and Wildlife Service created the PECE Rule (Policy for Evaluating Conservation Efforts When Making Listing Decisions) that encourages states, local governments, property owners, and environmentalists to collaborate on innovative conservation programs. The resulting management plans have helped people and species alike. However, the Service implemented this rule without ever submitting to Congress for approval. If submitted to Congress now, the rule can lawfully take effect and give those who depend on it certainty to continue their effective conservation work.

PLF client, the Kansas Natural Resources Coalition, has found themselves in a bind: they are working with stakeholders in a five-state range to protect the lesser prairie chicken using the PECE rule to ensure it doesn't become listed as endangered. However, the PECE rule has not been approved under the CRA.

"It really is a Catch 22," Wood says. "The KNRC must prove to the Fish and Wildlife Service that their plan is certain to be implemented and effective but the Service's own failure to submit the rule undermines the incentives necessary to achieve that certainty."

Some of the steps made to help wildlife under the PECE rule include incentives for wildlife-friendly fencing and funding to remove noxious weeds that crowd out vegetation beneficial to the existence of certain wildlife; in this case, the lesser prairie chicken.

The Obama Administration encouraged states and stakeholders to work together with the FWS to protect the species. Despite the work being done, the FWS ignored the efforts and listed the species. However, in a resulting lawsuit, the listing was struck down by the courts because the FWS ignored the PECE Rule. Wood explains that certain environmental group still want the lesser prairie chicken listed as endangered because its habitat overlaps with the Permian Basin—an important area for energy development. These groups have petitioned to have the bird listed despite the fact that the population has grown tremendously. Wood believes attempts to list the less prairie chicken will surface again, so it is essential that PECE Rule receives Congressional approval.

"A lot of people rely on the PECE Rule for their conservation efforts, whether for the gopher tortoise, the lesser prairie chicken and so forth," said Wood. "The fact is the FWS ignored the efforts of the people who protected this species in good faith. If people can't rely on the PECE Rule to avoid ESA listings, they won't want to help in the future."

Wood says Congress would not likely disapprove of this beneficial rule if it was submitted but the CRA nonetheless makes clear that the agency's failure to submit this good rule means it cannot be lawfully in effect.

"We brought these lawsuits forward because we expect the CRA isn't the highest priority of the Trump Administration right now," Wood said. "This is a problem not only of agencies enforcing bad rules, but of agencies not being able to follow through on good ones. No matter whether it's a good or bad rule, everyone has a stake because everyone is affected. Everyone needs to support this basic democratic accountability."