Defending Science and Collaborative Conservation: Sage-Grouse and *Western Watersheds Project v. Schneider* (D. Idaho 2019)

By Peter O. Daniels*

The continuing effort to prevent the greater sage-grouse from becoming threatened or endangered is the largest wildlife conservation effort in U.S. history. In March 2019, the Bureau of Land Management (BLM) amended its greater sage-grouse[1] plans across the American West, undoing a decade of science-based collaboration among federal agencies, western states, environmental groups, and private landowners.[2] These amendments would open significant portions of public land to expanded oil and gas leasing, to the detriment of the sage-grouse.

In October 2019, Judge Winmill of the U.S. District Court for the District of Idaho issued an injunction preventing BLM from implementing the plan amendments. The injunction was granted on the grounds that BLM violated the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA).[3]

Judge Winmill's decision drew attention in the legal community because of how the court reviewed BLM's actions. The court held that the new policies must be rationally and scientifically justified, and that BLM's decision to depart from its 2015 plans had to meet that standard as well. This requirement subtly stretches beyond the Supreme Court's holding in *FCC v. Fox Television Stations, Inc.*[4] This heightened standard of review might sharpen NEPA's procedural teeth, helping preserve earlier versions of federal policy from unsound revisions.

This case was also striking from a policy perspective. While it could be viewed as merely another instance of environmental groups seeking to block the Trump administration's deregulatory efforts, this case and its circumstances stand out due to the magnitude of the decision-making process spurned by BLM.

With the injunction in place, this case will proceed to evaluation on the merits. Whatever the outcome, the *Western Watersheds Project* case already stands for the capacity of the federal judiciary to defend rigorous, science-based collaborative processes. Federal agencies, especially land management agencies, should take notice—and if agencies contravene the outcomes of a

---

* J.D. Candidate, Harvard Law School, Class of 2021.

[1] The greater sage-grouse will be referred to as "sage-grouse" in this Comment.

[2] Approved Resource Management Plan Amendments, 84 Fed. Reg. 10,322–30 (Mar. 20, 2019).

[3] W. Watershed Project v. Schneider, No. 1:16-CV-83-BLW, 2019 WL 5225454 (D. Idaho Oct. 16, 2019).

[4] 556 U.S. 502, 514 (2009).

collaborative process, they should be prepared to justify that decision in open court, or face the threat of an injunction.

In this post, I will first provide some background on the sage-grouse and the historic conservation efforts made across the American West to preserve the bird and its habitat. I will also chronicle the battle over whether the sage-grouse should be listed as threatened or endangered under the Endangered Species Act (ESA). Second, I will discuss Judge Winmill's remarkable decision, and how it rejects BLM's proposed amendments as scientifically and procedurally unsound. Third, I will explore the potential legal implications of the decision, especially what it could mean for standards of review under NEPA. Finally, I will reflect on what lessons might be learned from how the court viewed BLM's departure from a policy forged through collaboration and its implications for future relationships between courts, agencies, and collaborative stakeholder efforts.

Background

Natural History

The greater sage-grouse (*Centrocercus urophasianus*) is a charismatic, chicken-like upland bird that has become an emblem of grassland conservation efforts in the American West.[5] Sage-grouse are known for their quirky mating displays that take place in communal mating display grounds called leks, which are used annually over decades.[6] Sage-grouse are highly habitat-dependent, [7] and development, range restrictions, and other challenges have resulted in significant population declines, to as little as 7% of presumed historic levels.

Sage-grouse population decline has multiple causes and factors. Oil and gas development is one.[8] Such development in sage-grouse habitat has continued, and dramatically expanded under the current administration—the rate of new acres of primary habitat leased per month has increased 970% between the Obama and Trump administrations.[9]

Conservation Effort: ESA Listing Conflicts and Collaboration

---

[5] *See generally* GREATER SAGE-GROUSE: ECOLOGY AND CONSERVATION OF A LANDSCAPE SPECIES AND ITS HABITATS (Steven T. Knick & John. W. Connelly eds., 2011).

[6] *See* Eric G. Bolen & John A. Crawford, *The Birds of Rangelands*, *in* RANGELAND WILDLIFE 15, 19 (Paul R. Krausman ed., 1996).

[7] David E. Naugle et al., *Energy Development and Greater Sage-Grouse*, in GREATER SAGE-GROUSE: ECOLOGY AND CONSERVATION OF A LANDSCAPE SPECIES AND ITS HABITATS 489, 490 (Steven T. Knick & John W. Connelly eds. 2011).

[8] Naugle, *supra* note 7, at 491.

[9] GRANT GARDNER, JASON CARLISLE, & CHAD LEBEAU, OIL AND GAS DEVELOPMENT ON FEDERAL LANDS AND SAGE-GROUSE HABITATS: OCTOBER 2015 TO MARCH 2019, at 7 (2019), https://www.audubon.org/sites/default/files/greater_sage-grouse_habitat_reportfinal_20190725.pdf.

In response to the population declines, stakeholders started a collaborative process around the sage-grouse and its habitat, which has become the largest land conservation effort in U.S. history. Stakeholders have been involved in these efforts at the local, state, national, and international levels for decades.

U.S. Federal	U.S. State	Non-governmental	International
Department of the Interior • Bureau of Land Management • Geological Survey • Fish and Wildlife Service ("FWS") • Bureau of Reclamation • National Park Service • Bureau of Indian Affairs Department of Agriculture • Forest Service • Farm Service Agency • National Resource Conservation Service ○ Sage Grouse Initiative Department of Energy • Federal Energy Regulatory Commission • Idaho National Laboratory Department of Defense • Army • Air Force	California Colorado Idaho Montana Nevada North Dakota Oregon South Dakota Utah Wyoming • Western Association of Fish and Wildlife Agencies ("WAFWA") • Western Governors' Association • At least thirteen state wildlife agencies • Multiple conservation districts • Over sixty "Local Working Groups" (state-run, including diverse stakeholders)	Numerous private landowners Corporations and industry • including PacifiCorp, ConocoPhillips, and the National Cattlemen's Beef Association Multiple Land Trusts Academic Institutions • including Utah State University, Colorado State University, the University of Montana, and Little Big Horn College Over twenty NGOs • including the National Audubon Society, Pheasants Forever, Rocky Mountain Elk Foundation, Nature Conservancy, and World Wildlife Fund	Provinces • Alberta • Saskatchewan Federal Canadian Government

Table 1. Summary of entities involved in greater sage-grouse conservation collaboration. This is not an exhaustive list.

Much of the sage-grouse conservation effort has centered on the question of whether or not to list the sage-grouse as threatened or endangered under the Endangered Species Act (ESA).[10] On one hand, listing the sage-grouse would offer the bird unparalleled legal protection from what has been deemed the "pit bull of environmental laws" due to its stringent requirements and criminal penalties.[11] On the other hand, the ideal outcome for most stakeholders—including the sage-grouse itself—is for sage-grouse populations and habitat to remain healthy enough not to require such listing. Thus far, the sage-grouse has not been listed under the ESA.[12]

Following a particularly effortful decade that included the launching of a National Technical Team (NTT) dedicated to sage-grouse,[13] BLM and the Forest Service adopted their 2015 sage-grouse plans.[14] These plans were heralded as the product of a high-quality collaborative process, which made a point of recognizing western landowners and ranchers as an internally diverse group that includes many who take seriously their roles as environmental stewards.[15] The collaboration between federal, state, non-governmental, and private actors has been one of the distinguishing characteristics of the sage-grouse conservation effort, much to its benefit. Due to these plans and continuing conservation efforts, FWS changed the listing status of the sage-grouse under the ESA back to unwarranted from its previous status of warranted-but-precluded (by other needed ESA actions).

This decision was due in large part to buy-in from private landowners cultivated by Interior's Task Force through public-private partnerships, voluntary conservation programs, and the purchase of conservation easements.[16]

In 2017, the Trump administration began to reorient sage-grouse policy away from collaborative efforts and toward a sole focus on expanding oil and gas development. Despite the fact that energy development is one of the primary threats to the sage-grouse,[17] Interior focused its

---

[10] 16 U.S.C. § 1533 (2018).

[11] Gina Guy, *Take Prohibitions and Section 9*, in THE ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 191, 191 (William Robert Irvin, ed., 2002).

[12] Following a petition by environmental groups, FWS determined that listing was unwarranted in 2005. The agency changed it determination to warranted-but-precluded following a 2007 court decision. *See* Complaint, W. Watersheds Project v. U.S. Fish & Wildlife Serv., 535 F. Supp. 2d 1173, 1189 (D. Idaho 2007) (No. 06-CV-277).

[13] W. Watersheds Project v. Schneider, No. 1:16-CV-83-BLW, 2019 WL 5225454, at *2 (D. Idaho Oct. 16, 2019).

[14] *See W. Watersheds Project*, 2019 WL 5225454, at *3.

[15] *See* Douglas Jackson-Smith, Urs Kreuter, & Richard S. Krannich, *Understanding the Multidimensionality of Property Rights Orientations: Evidence from Utah and Texas Ranchers*, 18 Soc'y & Nat. Res. 587, 606 (2005).

[16] *See* Lyons, *supra* note 2, at 5.

[17] *See* J.W. Connelly et al., *Conservation of Greater Sage-Grouse: A Synthesis of Current Trends and Future Management*, *in* GREATER SAGE-GROUSE: ECOLOGY AND CONSERVATION OF A LANDSCAPE SPECIES AND ITS HABITATS 549, 554–55 (Steven T. Knick & John W. Connelly eds., 2011).

policy on addressing invasive grasses and wildland fire instead and ignored comments from the Environmental Protection Agency in the process.[18]

In March 2019, BLM finalized revisions to sage-grouse Resource Management Plans to allow oil and gas drilling, mining, and other development near sensitive habitat across seven western states.[19] The plan amendments removed almost all 10 million acres of sagebrush focal areas, identified in the 2015 plans as habitat critical to the bird's survival, leaving only 1.8 million acres of these areas in Oregon and Montana. The amendments also removed the requirement for compensatory mitigation for impacts to grouse habitat. For more detail on the state by state impacts of each plan, see this post on the plan amendments.

This dramatic shift in federal policy prompted the Western Watersheds Project, Center for Biological Diversity, and Prairie Hills Audubon Society to submit a supplemental complaint, amending a 2016 lawsuit critiquing the 2015 plans[20] to defend those plans in a new challenge against the 2019 amendments.

The Decision

In *Western Watersheds Project*, Judge Winmill barred BLM from implementing its 2019 amendments to the 2015 sage-grouse plans. The challengers alleged that BLM failed to comply with NEPA when adopting the 2019 plan amendments. NEPA requires agencies to both disclose and consider significant environmental impacts of major federal actions. NEPA itself does not offer grounds for overturning or enjoining regulatory actions—instead, NEPA claims are evaluated under the Administrative Procedure Act's arbitrary and capricious standard.[21] This standard requires a "rational connection between the facts found and the choice made" by the agency.[22]

Western Watersheds Project involves a reversal or shift from existing policy. When reviewing an agency's change in policy, courts generally only evaluate the new policy itself to determine whether it is arbitrary and capricious. In this case, Judge Winmill analyzed the actual *shift* in agency policy and demanded that the shift not be arbitrary and capricious, as well as the new

---

[18] *W. Watersheds Project*, 2019 WL 5225454, at *4; *see* Notices of Availability of Records of Decision, 84 Fed. Reg. 10,322–30 (Mar. 20, 2019).

[19] The plan amendments are available for each state and are linked here: Oregon, Colorado, Idaho, Utah, Wyoming and Nevada/Northeastern California.

[20] *See* Complaint at 1–2, W. Watersheds Project v. Schneider, 2019 WL 5225454 (D. Idaho 2019) (No. 1:16-CV-83-BLW), 2016 WL 750826.

[21] *See* 5 U.S.C. § 706(2) (2018); San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014).

[22] Burlington Truck Lines, Inc. v. United States, 371 U.S 156, 168 (1962).

policy itself.[23] This slightly higher bar could mean the difference between a policy revision being upheld or overturned, whether solely in this instance or for other environmental rollbacks too.

Judge Winmill analyzed BLM's actions in the context of a request for a preliminary injunction to prevent BLM from implementing the plans. This means the decision is not yet a full ruling on the merits of the case. If a judge grants a preliminary injunction, however, it indicates there is a very strong chance that the party that requested the injunction will prevail on the merits.

To secure an injunction, the challengers needed to make a "clear showing" that they were likely to succeed on the merits, there was potential for irreparable harm, a balance of equities would be in favor of granting the injunction, and the injunction would protect the public interest.[24] Let's walk through these elements as the judge analyzed them.

(1) Likelihood of success

The court ruled that BLM's environmental analysis of the plan amendments likely violated NEPA.[25] NEPA requires federal agencies to disclose the potential environmental impacts of major proposed actions, and to consider alternatives to those actions.[26] BLM only considered the amendments versus the possibility of doing nothing. Furthermore, in examining BLM's analysis, Judge Winmill found that the amendments were contrary to the best available science, which had been produced by the National Technical Team.[27]

(2) Irreparable harm

The court cited a Trump administration spokesperson as saying the amendments "were designed to open up more land to oil, gas, and mineral extraction as soon as possible,"[28] and found that this increased development would likely result in irreparable harm to the sage-grouse.

(3) Balance of the Equities and (4) Public Interest

When "balancing equities," courts weigh substantive factors such as fairness, convenience, possible hardship to the parties, and public policy. In this case, the court weighed potential harm

---

[23] *W. Watersheds Project*, 2019 WL 5225454, at *6 (citing Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973)).

[24] *W. Watersheds Project*, 2019 WL 5225454, at *5 (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008)).

[25] *See* Protect our Communities Foundation v. LaCounte, 939 F.3d 1029 (9th Cir. 2019) (providing a detailed analysis of alternative analysis requirements and holding that analysis of five alternatives for a wind energy development project was sufficient).

[26] National Environmental Policy Act of 1969 § 102(C), 102(C)(iii), 42 U.S.C. § 4332(C), (C)(iii) (2018).

[27] *W. Watersheds Project*, 2019 WL 5225454, at *8.

[28] W. Watersheds Project v. Schneider, No. 1:16-CV-83-BLW, 2019 WL 5225454, at *10 (D. Idaho Oct. 16, 2019).

to the sage-grouse against the detriment of limiting BLM discretion. Since BLM will still be able to issue new leases and permits under the 2015 plans, the court found that the balance of hardships tipped in favor of the challengers and sage-grouse.[29] Making similarly fast work of the public interest requirement, the court cited Ninth Circuit precedent for the simple propositions that "preserving nature"[30] and "careful consideration of environmental impacts"[31] are within the public interest.[32]

After Judge Winmill granted the challengers' motion for a preliminary injunction against the 2019 amendments, BLM had a two-pronged response. On one hand, BLM issued supplemental environmental analyses in hopes of satisfying NEPA's requirements. On the other hand, BLM appealed the injunction decision to the Ninth Circuit[33]—but this appeal has since been withdrawn, leaving *Western Watersheds Project* to proceed to evaluation on its merits.

Legal Significance: Standards of Review under NEPA

NEPA is a go-to statute for environmental and other groups to challenge proposed agency actions. NEPA provides guidelines for the quality of environmental analysis required before federal agencies can undertake major actions. The standards used for NEPA review are therefore hotly contested by environmental, industry, and government stakeholders alike, as demonstrated by the recent controversy over the Council on Environmental Quality's proposed revisions to its NEPA regulations. NEPA is used in conjunction with the Administrative Procedure Act (APA), which governs the procedural aspects of rulemaking and provides for judicial review of final agency action.

In this case, a key question is what standard to apply to reversals of federal policy, or departures from "prior norms" established by agencies. The Supreme Court recently ruled that the general requirement under the APA (and by extension, NEPA) is the same for both new policies replacing old ones and new rules altogether[34]—both must simply have a "reasoned basis."[35] Under a typical review, an agency would only be required to explain why its new policy was rational, and would not have to explain why its decision to deviate from its previous policy was rational as well.

---

[29] *W. Watersheds Project*, 2019 WL 5225454, at *11.

[30] Lands Council v. McNair, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).

[31] S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior, 588 F.3d 718, 728 (9th Cir. 2009).

[32] *W. Watersheds Project*, 2019 WL 5225454, at *11.

[33] W. Watersheds Project v. Schneider, 2019 WL 5225454, No. 16-CV-83-BLW (D. Idaho Oct. 16, 2019), *appeal docketed*, Nos. 19-36065, 19-36067, 19-36068, 19-36069, 19-36070, 19-36072, 19-36073 (9th Cir. Dec. 17, 2019).

[34] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–15 (2009).

[35] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In this case, however, Judge Winmill was not quite so deferential. Instead of closely following the Court's rule explained above, Winmill followed Justice Kennedy's concurrence in that case, which would require rational justification not only for the new rule, but also for the *shift in policy itself.* Judge Winmill found the 2015 plans to be "prior norms" and determined that BLM had a duty to explain its deviation from them[36] as part of its burden to provide a reasoned basis for its actions.[37]

This subtle distinction has raised the bar for BLM decision-making. Going forward, BLM should show that they have a reasoned basis for their new policies, and that the new policies are more rational than those they replace. This is regularly being put to the test as BLM continues to take actions that depart from prior policy.

If other courts also adopt this higher bar, it could make it more difficult for new administrations to justify changes to federal policy through regulations—both in relation to the sage-grouse, and more broadly, since the APA governs all federal agencies. This could lead to a certain amount of stagnation in federal regulations—a phenomenon known as 'ossification,' because policies remain as they are. This would be to the benefit of whatever party is defending the original policy, including environmental advocates challenging regulatory rollbacks. This is especially significant for environmental policy, because most of the foundational environmental statutes have not been amended in the last three decades. So shifts in policy often take place in the regulatory realm rather than the statutory realm.

Conclusion

Western Watersheds Project will now proceed to evaluation on its merits in the District of Idaho. Since preliminary injunctions are generally regarded as dramatic interventions, courts do not often issue them unless they are fairly confident of a particular outcome on the merits. Assuming circumstances do not change dramatically, Judge Winmill is likely to rule against the BLM, either at trial or at the summary judgment stage.

It is unclear why BLM withdrew its appeal of the injunction. It may be due to lack of resources or bandwidth—at this time, BLM is continuing its move to Grand Junction, Colorado, the novel coronavirus is upending the U.S. economy and social fabric, and the Department of the Interior is under fire for its national park policies in response to the pandemic. Alternatively, BLM may have reprioritized its multiple legal battles over the sage-grouse. Two days after it dropped its appeal in this case, BLM filed a notice of intent to appeal a different decision from the same

---

[36] *See W. Watersheds Project*, 2019 WL 5225454, at *6, *10 (citing Atchison, Topeka, & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 US 800, 808 (1973) ("Whatever the ground for the departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.")).

[37] *See State Farm*, 463 U.S. at 43.

district court. That decision, also in a suit filed by Western Watersheds Project, invalidated three lease sales from 2018, requiring a return of $125 million to the lessees. Earlier that same month, BLM proposed adding a new shortcut to its NEPA regulations, which would allow it to conduct removal of pinyon pine and western juniper trees in swaths of up to 10,000 acres with minimal environmental review. FWS also decided not to list the bi-state sage-grouse, a particularly vulnerable subpopulation of the greater sage-grouse, under the ESA.

As this case proceeds to evaluation on the merits, this decision in particular stands for the importance of agencies relying on high-quality decision-making processes. BLM and other federal agencies should strive to give collaborative groups and their decisions greater credence, as they have done intermittently in the past.[38] Like agencies, collaboratively rational groups are, collectively, experts in their field.[39] Their expertise encompasses and extends beyond that of the agency alone, since the group includes both agency representatives and other stakeholders with different perspectives. This expanded competence should merit significant deference from agencies charged with final decision-making power.[40]

Agencies could elevate the importance of outcomes from collaborative groups as an expanded interpretation of NEPA's public participation requirements.[41] Agencies should therefore carefully review the analytical and procedural rigor of the collaborative process to ensure that the process is indeed producing collaboratively rational outcomes. Agencies should seriously consider deferring to the collective capacity of a diverse set of stakeholders (that includes the agency itself) when faced with a scientifically complex, politically controversial, and culturally conflicted situation. For agencies to reject the conclusions that collaborative groups arrive at, their analysis and logic should be expected to be more robust and rigorous than the groups' own deliberations—not less so.

Whatever the outcome on the merits, *Western Watersheds Project* already stands for the capacity of the federal judiciary to defend rigorous, science-based collaborative processes. Federal agencies, especially land management agencies, should take notice as they continue to move toward finalization of regulatory changes and such actions will almost inevitably face legal challenges.

---

[38] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[39] For a discussion of collaborative rationality and its relationship to policymaking, see JUDITH E. INNES & DAVID E. BOOHER, PLANNING WITH COMPLEXITY: AN INTRODUCTION TO COLLABORATIVE RATIONALITY FOR PUBLIC POLICY 6 (2010) (Collaborative rationality is defined by "the extent [to which] all the affected interests jointly engage in face to face dialogue, bringing their various perspectives to the table to deliberate on the problems they face together.").

[40] This deference should not be extended if the outcome of the collaborative group conflicts with a compelling national interest not represented in the group.

[41] *See* 40 C.F.R. § 1500.2(d) (2019).