

To: NACO Public Lands and Natural Resources Subcommittee

From: Colby Prout, NACO Natural Resources Manager

Cc: NACO Staff

Re: U.S. District Court for the District of Idaho Enjoins BLM 2019 Sage-grouse Plan Amendments

Introduction

On October 16, 2019, the U.S. District Court for the District of Idaho, granted plaintiffs, Western Watersheds, Wildearth Guardian, Center for Biological Diversity, and Prairie Hills Audobon society, motion for a preliminary injunction to stop BLM's 2019 Plan amendments from being implemented. The effect of this injunction is to temporarily re-instate the Sage-grouse plans that were adopted by BLM in 2015 and which counties had been following prior to the March 2019 plan amendments.

Background/History

In 2011, the BLM and USFS launched a planning strategy to amend land use plans and to otherwise avoid possible ESA listing of Greater Sage-grouse. In 2015, BLM (and USFS) adopted plans that restricted activity in and around Sage-grouse habitat, and that required buffer areas between anthropogenic activity and Sage-grouse leks. Specifically, the plans created over 10 million acres of Sage-grouse focal areas (SFAs).

Because of the restrictiveness of 2015 Plan prescriptions, the FWS modified its listing for Sage-grouse from "warranted but precluded" to "not warranted." NACO sued to block the 2015 BLM plans prior to their implementation and alleged BLM violated NEPA. While NACO's motion for preliminary injunction was denied, they were successful in showing that BLM violated NEPA by failing to prepare a supplemental EIS for designation of SFAs in the 2015 Plan. The U.S. District Court for the District of Nevada ordered BLM to complete a Supplemental EIS. In 2017, Secretary Zinke's creation of a Sage grouse review team in response to Secretarial Order 3353 forced other lawsuits against the 2015 Plans (including the Idaho lawsuit) to be put on hold. The purpose of the review team was in part to enhance state participation in Sage-grouse planning.

In October 2017, BLM began the process of amending all 2015 Plans, including the Nevada plan. These modifications resulted in Final EIS's issued in December 2018, and RODs in March 2019. The amendments aligned significant portions of the plans with state plans and made them more favorable to local needs. For example, the 2019 Plans eliminated "Sage-grouse focal areas" (SFAs) in all states except Oregon and replaced "hard" and "soft" trigger requirements with "warnings" in areas other than lek clusters.

In October 2019, Western Watersheds et al. filed their motion for preliminary injunction against the 2019 Plans. The U.S. District Court for the District of Idaho granted the injunction and ordered the 2015 Plans to again take effect.

Basis of Decision

The District Court did not reach a decision on whether the 2019 Amendments are themselves legally deficient under NEPA. That decision will come after an appeal (if any) of the preliminary injunction. However, to grant a preliminary injunction, the plaintiff must convince the court that their case has a *likelihood of success on the merits*, failure to enjoin would result in *irreparable harm* to the plaintiff, the plaintiff suffers the *balance of the hardships*, and an injunction serves the *public interest*. By granting a preliminary injunction (an extraordinary remedy) the Court has found that it is more likely than not, that at trial the plaintiffs will be able to show by clear and convincing evidence that the 2019 Amendments violate NEPA.

On the merits, Plaintiffs offered four arguments where the 2019 Plans failed to satisfy NEPA requirements; 1) failed to consider reasonable alternative, 2) failed to take a “hard look”, 3) failed to consider cumulative impacts, and 4) eliminated compensatory mitigation requirement. The court determined that there was a *likelihood of success* that at trial the plaintiffs could show that 2019 Amendments failed to satisfy these four NEPA requirements.

a. Irreparable Harm

The Court’s decision was based on a declaration from Dr. Clait Braun. The declaration provided the court with evidence it viewed was sufficient to show that, absent an injunction, Sage-grouse and its habitat would suffer *irreparable harm*. Specifically, Braun’s analysis claimed “BLM essentially ignored analyzing current habitat condition and fragmentation, or how plan changes may impact sage-grouse habitats. “The failure of BLM to undertake such analysis in the 2019 Plan Amendments is wholly inconsistent with standard practices and the best available science.”

b. Balance of the Hardship

The Court reasoned that the Sage-grouse would suffer *greater hardship* if the 2019 Amendments were not enjoined than the BLM would suffer from having to revert to the 2015 Plans.

c. Public Interest

The Ninth Circuit has recognized “the well-established *public interest* in preserving nature and avoiding irreparable environmental injury.”

Conclusion

The 2015 Plans which include 10.7 million acres of Sage-grouse focal areas are now in effect. The BLM may appeal the ruling to the Ninth Circuit Court of Appeals. If the injunction is upheld, it will remain in effect until a resolution of whether or not the 2019 Plans violate NEPA. Because the U.S. District Court for the District Court ruled the 2015 Plans were deficient, it is unclear what the next step will be in Nevada. Specifically, will BLM now have to comply with the March 31, 2017 Order compelling preparation of a supplemental EIS?