



SAGE GROUSE

BLM may be forced to repay \$125M in latest legal setback

Scott Streater,
E&E News reporter
Published: Friday, February 28, 2020

A federal judge's order nixing yet another attempt by the Trump administration to revise greater sage grouse protections may prove to be a costly bureaucratic mess.

Chief Magistrate Judge Ronald Bush in the U.S. District Court for the District of Idaho yesterday threw out rule changes adopted by the Bureau of Land Management in 2018 that shortened public comment times and administrative protest periods involving oil and gas lease sale parcels that overlap sage grouse habitat.

In essence, Bush's order requires BLM to go back to the drawing board and conduct a "notice-and-comment rulemaking" to adopt these changes and comply with the National Environmental Policy Act and other federal laws. Until that time, BLM must comply with previous Obama-era policies adopted in 2010 when leasing in grouse habitat.



The greater sage grouse. Bureau of Land Management/Wikimedia Commons

But Bush's order also invalidated three lease sales held in 2018 in Nevada, Utah and Wyoming. Those lease sales resulted in bids on hundreds of parcels covering nearly 900,000 acres in the three states.

According to court documents BLM filed in a lawsuit challenging its policy changes, throwing out the lease sales held in June and September 2018 would require BLM "to return over \$125 million to the lessees, including revenues received from these lease sales already disbursed to the respective states."

An oil and gas industry representative called Bush's ruling "a big deal for the states," like Wyoming, that will lose revenue as a result — as well as a big deal for industry.

Kathleen Sgamma, president of the Denver-based Western Energy Alliance, which formally intervened in the litigation on behalf of BLM, said Bush has interpreted the law to mean the president cannot set policy.

She called Bush's ruling "completely unprecedented, absolutely ignoring basics of the regulatory process."

"He has ruled that a policy he disagrees with, which didn't go through the full regulatory process, must be replaced with the previous policy that didn't go through the [same] regulatory process," Sgamma said. "Further, NEPA is a procedural law, and the remedy for a NEPA deficiency, by decades of case law, is a correction of process, not a substantive result like canceling leases."

Bush, in considering the \$125 million, cited legal precedent established by the 9th U.S. Circuit Court of Appeals that "economic impacts are a worthy consideration with respect to the disruptive consequences of vacatur."

"If the need to return such sums is the equivalent of economic 'harm,' then the amount from the lease sales already received is undeniably significant, but still not of the magnitude that courts recognize as warranting a suspension over vacatur," he wrote in the order.

But in discussing whether to vacate the lease sales — rather than just suspend them until BLM corrects the NEPA deficiencies — Bush noted that just because there are economic consequences, that does not preclude him from determining the leases are invalid.

"Otherwise agencies would potentially be incentivized to invest heavily in potentially-illegal projects upfront, only to claim later that the economic consequences in setting aside those projects would be too massive to unwind," he wrote.

He also wrote that reverting to the Obama-era policies does not necessarily mean all the issued leases will need to be invalidated. Some might well still comply with the law.

Throwing out the lease sale, and reevaluating the parcels through the Obama-era policy, "will ensure the opportunity for objective evaluation of the lease sales, free of any taint," he concluded.

BLM's 'defective product'

In a statement, BLM said it remains "committed to a simpler, more effective leasing process."

The agency added: "To do this, we have been working within our legal authorities to alleviate or eliminate unnecessary and burdensome regulations, while at the same time upholding public health and environmental protections, including sage-grouse conservation."

Bush's latest order stems from a federal lawsuit filed by the Western Watersheds Project and the Center for Biological Diversity.

Greta Anderson, deputy director of the Western Watersheds Project, said if BLM has to reimburse the \$125 million it received from the invalidated lease sales, then it got what it deserved.

“Think of it as honoring a warranty on a defective product,” Anderson said.

The groups had wanted the court to throw out the revised BLM leasing policy regarding shortened public comment and protest periods from all oil and gas lease sales on federal lands, not just those affecting sage grouse habitat.

Bush’s order strictly applies to federal parcels that overlap, in whole or part, sage grouse habitat.

Sarah Stellberg, an attorney with Advocates for the West, which is representing the groups, told E&E News yesterday that they are not sure why Bush “limited the ruling” to grouse habitat (Energywire, Feb. 28).

“It wasn’t what any of the parties asked for,” she said.

But the ruling is another victory for conservation groups concerned about the Trump administration’s ongoing efforts to revise Obama-era grouse protection measures.

Bush in 2018 had issued a preliminary injunction temporarily blocking sections of the revised policy as it related to public comments and protest periods involving leasing in sage grouse habitat (Energywire, Sept. 24, 2018).

Bush’s order yesterday also follows a separate preliminary injunction issued last year by Judge B. Lynn Winmill, also in Idaho, blocking BLM’s attempts to put in place much broader sage grouse protection revisions that the Obama administration finalized in 2015.

Those revisions covered millions of acres in seven Western states.

BLM last week published six draft supplemental environmental impact statements that it says address deficiencies Winmill noted in his injunction order (E&E News PM, Feb. 19).

Casey Hammond, acting Interior assistant secretary for land and minerals, told reporters last week that the administration believes Winmill will ultimately lift the injunction.