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## Montana Wildlife Federation v. Bernhardt

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***Montana Wildlife Federation v. Bernhardt*, No. CV-18-69-GF-BMM, 2020 WL 2615631, 2020 U.S. Dist. LEXIS 90571 (D. Mont. May 22) appeal docketed, No. 20-35658 (9th Cir. July 22, 2020)**

**Henry D. O'Brien**

A federal court in Montana vacated the lease sale of several large oil and gas developments in Montana and Wyoming because BLM's revised guidance documents, which facilitated the lease sales, failed to prioritize development outside of sage-grouse habitat, as required by BLM land use plans. BLM adopted the prioritization requirement in 2015 as part of an effort to prevent the sage-grouse from being listed under the Endangered Species Act. The court held BLM violated the Federal Land Policy and Management Act when it essentially eliminated the prioritization requirement and approved the lease sales without properly amending the land use plans.

## I. INTRODUCTION

In *Montana Wildlife Federation v. Bernhardt*,<sup>1</sup> the United States District Court for the District of Montana vacated several Bureau of Land Management ("BLM") drilling lease sales totaling 338,889 acres in Montana and Wyoming. The court vacated the lease sales because BLM violated the Federal Land Policy and Management Act ("FLPMA") by failing to implement its own plan requiring prioritization of oil and gas drilling and development outside designated greater sage-grouse habitat. Environmental groups including the Montana Wildlife Federation, the Wilderness Society, and the National Audubon Society ("Plaintiffs") sued BLM under the Administrative Procedures Act ("APA"), claiming the lease sales and BLM's leasing guidance documents violated FLPMA and the National Environmental Policy Act ("NEPA").<sup>2</sup> The Western Energy Alliance, an industry group representing 300 oil and gas development companies,<sup>3</sup> as well as the States of Montana and Wyoming, intervened for the defense.<sup>4</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

In 2015, BLM revised 98 Resource Management Plans ("RMPs") (collectively, "2015 Plans") to protect sage-grouse in an effort to prevent the bird from being listed under the Endangered Species Act ("ESA").<sup>5</sup>

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1. No. CV-18-69-GF-BMM, 2020 WL 2615631, 2020 U.S. Dist. LEXIS 90571, at \*13, 14, 23, 30, 34, 35 (D. Mont. May 22) *appeal docketed*, No. 20-35658 (9th Cir. July 22, 2020).

2. *Id.* at \*1, 13, 35-36.

3. About the Alliance, WESTERN ENERGY ALLIANCE, <https://www.westernenergyalliance.org/about.html> (last visited July 20, 2020).

4. *Mont. Wildlife Fed'n*, 2020 WL, 2020 U.S. Dist. LEXIS at \*1.

5. *Id.* at \*5-6.

BLM feared all public lands could be closed to leasing if sage-grouse were listed under ESA.<sup>6</sup> The 2015 Plans instructed BLM field offices to prioritize leasing outside of identified sage-grouse habitat to mitigate impacts to sage-grouse.<sup>7</sup> Specifically, BLM instructed field offices to prioritize leasing and development of resource extraction first on lands not identified as habitat, and thereafter on lands representing low-value habitat.<sup>8</sup> In part because of the additional protections granted by BLM's 2015 Plans, the United States Fish and Wildlife Service ("FWS") decided not to list sage-grouse under the ESA.<sup>9</sup>

BLM followed with a 9.5 page Instruction Memorandum ("2016 IM") explaining to field offices how to implement the 2015 Plans.<sup>10</sup> The 2016 IM allowed leasing and development in sage-grouse habitat, but also provided detailed instructions for how BLM offices should prioritize non-habitat and low-value habitat areas at both the leasing and development stages.<sup>11</sup>

Shortly after taking office, President Trump issued an executive order directing agencies to review policies that encumbered domestic energy resource production.<sup>12</sup> In accordance with the executive order, then-Secretary of the Interior Ryan Zinke instructed BLM to modify the sage-grouse habitat prioritization policy ("Zinke Memo").<sup>13</sup> BLM then replaced the 2016 IM with a new Instruction Memorandum ("2018 IM").<sup>14</sup>

The 2018 IM was only five paragraphs long effectively eliminated the prioritization requirement.<sup>15</sup> Under the 2018 IM, BLM would prioritize non-habitat and low-priority habitat only when there was a backlog of interest from developers in leasing BLM lands.<sup>16</sup> Critically, neither the Zinke Memo nor the 2018 IM replaced or revised BLM's 2015 Plans; only BLM's instructions to field offices regarding how to implement the 2015 Plans were amended.<sup>17</sup>

The Plaintiffs protested three relevant lease sales covering 338,889 acres in Montana and Wyoming (collectively, the "Lease Sales"),<sup>18</sup> alleging BLM failed to prioritize leasing outside of sage-grouse habitat as the 2015 Plans and 2016 IM required.<sup>19</sup> In each of the three sales,

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6. *Id.* at \*6.

7. *Id.*

8. *Id.* at \*7.

9. *Id.* at \*24-25.

10. *Id.* at \*8, 12.

11. *Id.* at \*8-11.

12. *Id.* at \*11 (citing Promoting Energy Independence and Economic Growth, 82 Fed. Reg. 16,093, 16,093 (Mar. 28, 2017)).

13. *Id.* at \*12.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at \*23.

18. *Id.* (identifying 2017 Montana sale: 204 parcels, 98,889 acres; 2019 Montana sale: 83 parcels, 46,000 acres; 2018 Wyoming sale: 159 parcels, 194,000 acres).

19. *Id.* at \*13-15.

between seventy and 100 percent of the parcels leased were within identified sage-grouse habitat.<sup>20</sup> The Plaintiffs brought suit when their protests were dismissed.<sup>21</sup>

### III. ANALYSIS

In its analysis, the court first determined the 2018 IM was reviewable under the APA as a final agency action.<sup>22</sup> The court then held the 2018 IM violated FLPMA and vacated the Lease Sales because they were conducted under the 2018 IM.<sup>23</sup>

#### A. *The 2018 IM was Reviewable as a Final Agency Action*

Challenges to agency actions and their compliance with NEPA and FLPMA are only reviewable under the APA. The APA allows courts to review, and set aside, final agency actions deemed “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>24</sup> As a threshold issue, the court first considered whether the 2018 IM and the Zinke Memo were final agency actions subject to challenge under the APA.<sup>25</sup>

Applying a two-prong test outlined by the Supreme Court of the United States in *Bennett v. Spear*,<sup>26</sup> the court held the 2018 IM was a final agency action, but the Zinke Memo was not. Under the *Bennett* test, an action is final if it 1) “mark[s] the consummation of the agency’s [decision-making] process,” and 2) the action is “one by which rights or obligations have been determined, or from which legal consequences will flow.”<sup>27</sup>

The court held the 2018 IM satisfied the first prong.<sup>28</sup> The court found the agency’s decision-making process that began with the 2015 Plans concluded with the 2018 IM because the 2018 IM identified how the new policies would be implemented.<sup>29</sup> The court found it significant that BLM made the 2018 IM immediately effective and that field offices used the 2018 IM guidance.<sup>30</sup>

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20. *Id.*

21. *Id.* at \*1, 13-15.

22. *Id.* at \*16-18.

23. *Id.* at \*33-35.

24. *Id.* at \*3, 15 (quoting 5 U.S.C. § 706(2)(A) (2020)).

25. *Id.* at \*15-16 (citing 5 U.S.C. § 704 (2020)).

26. 520 U.S. 154, 177-78 (1997).

27. *Mont. Wildlife Fed’n*, 2020 WL, 2020 U.S. Dist. LEXIS at \*16 (quoting *Bennett*, 520 U.S. at 177-178) (internal quotation marks omitted).

28. *Id.*

29. *Id.*

30. *Id.* (citing *W. Watersheds Project v. Zinke*, 336 F. Supp. 3d 1204, 1226-27 (D. Idaho 2018) (noting an instruction memorandum can consummate the decision-making process)); *Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 350 (D.D.C. 2007) (noting an immediately effective agency decision satisfies the first *Bennett* prong)).

The court determined the 2018 IM also satisfied the second *Bennett* prong by repealing mandates from the 2016 IM that made explicit and material changes to BLM’s leasing operations.<sup>31</sup> By rescinding BLM’s power to suspend production in the interest of sage-grouse conservation, “the 2018 IM represent[ed] a decision ‘by which rights or obligations have been determined, or from which legal consequences will flow.’”<sup>32</sup>

The court held the Zinke Memo was not a final action because it failed the first prong of the *Bennett* test.<sup>33</sup> The Zinke Memo prompted BLM to release the 2018 IM, and therefore preceded the 2018 IM in the decision making process.<sup>34</sup> Because the court already decided the 2018 IM was the consummation of a decision-making process, a memo preceding the 2018 IM could not consummate the same decision-making process.<sup>35</sup>

*B. The 2018 IM and Lease Sales Violated FLPMA and Were Vacated*

FLPMA requires BLM to develop RMPs to guide land management, and prohibits BLM from violating its own RMPs.<sup>36</sup> When an agency wants to deviate from an RMP it must formally amend the plan under all pertinent regulations.<sup>37</sup> BLM never formally amended the 2015 Plans, it merely substituted one guidance document for another when it introduced the 2018 IM in place of the 2016 IM.<sup>38</sup> The court found the 2018 IM contradicted the 2015 Plans in two significant ways and therefore violated FLPMA.<sup>39</sup>

First, the 2018 IM allowed BLM to make decisions inconsistent with the 2015 Plans by implementing the prioritization requirement only when BLM faced a backlog of leasing interest.<sup>40</sup> The court found this approach allowed BLM to ignore the prioritization requirement in many cases but that the 2015 Plans intended the prioritization requirement to apply in all leasing and development inquiries.<sup>41</sup> The court referenced FWS’s reliance on the 2015 Plans when it declined to list sage-grouse under the ESA as evidence of an understanding that the protections in the 2015 Plans were mandatory.<sup>42</sup> The court also saw ample evidence in the administrative record that, prior to the 2018 IM, BLM itself viewed the

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31. *Id.* at \*18 (citing *W. Watersheds Project*, 336 F. Supp. 3d at 1227).

32. *Id.* (quoting *Bennett*, 520 U.S. at 178).

33. *Id.* at \*22.

34. *Id.*

35. *Id.*

36. *Id.* at \*22-23.

37. *Id.*

38. *See id.* at \*8-12, 22-23.

39. *Id.* at \*23.

40. *Id.* at \*23-24.

41. *Id.* at \*23 (“[t]he 2015 Plans do not say that BLM will prioritize non-sage-grouse habitat in *some* of its decisions”).

42. *Id.* at \*25.

prioritization requirement as universally applicable and had been deferring development in sage-grouse habitat in favor of non-habitat.<sup>43</sup>

Second, the court determined the 2018 IM violated FLPMA by turning the prioritization requirement into a “mere procedural hurdle.”<sup>44</sup> The court found the 2018 IM allowed for leasing in non-sage-grouse habitat, but not actively encourage that result.<sup>45</sup> To the court, this disregarded the purposes of the prioritization requirement.<sup>46</sup> Conversely, under the 2016 IM, BLM put potential lessees on notice that leases in non-sage-grouse habitat would be more likely to get approved by deferring certain lease sales because they contained sage-grouse habitat.<sup>47</sup>

The court held the Lease Sales themselves also violated FLPMA, because they followed from the 2018 IM.<sup>48</sup>

The court vacated the 2018 IM and Lease Sales<sup>49</sup> in accordance with “the normal procedure in the Ninth Circuit” when invalidating agency action under APA.<sup>50</sup> While a court may remand an agency decision without vacating in limited circumstances, here, the court found “no reason to leave the 2018 IM in place,” because it undermined the core goals of the 2015 Plans’ prioritization requirement and there was therefore no “serious possibility that the [agency would] be able to substantiate its decision on remand.”<sup>51</sup>

#### IV. CONCLUSION

This case presents as a simple and straightforward APA review of an agency action. However, in the context of the sage-grouse conservation saga in the West, the ruling is significant. The 2015 Plans comprised part of a momentous effort to keep the sage-grouse from ESA listing out of fears of the economic consequences of listing a ground-dwelling bird whose habitat spans hundreds of thousands of square miles of the intermountain west.<sup>52</sup> While this ruling temporarily restores sage-grouse conservation to BLM policy, the bird’s listing under ESA seems more likely given how delicate the administrative protections FWS relied on when declining to list the sage-grouse now appear.

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43. *Id.*

44. *Id.* at \*27.

45. *Id.*

46. *Id.* at \*27-28.

47. *Id.* at \*29.

48. *Id.* at \*30-31 (explaining that although the 2017 Montana sale predated the 2018 IM, that sale stated explicitly that it “did not apply the prioritization requirement of the 2016 IM” because there was no backlog).

49. The court left in place part of the 2018 Montana sale covered by the Butte field office, as the parties agreed there was no sage-grouse habitat in that portion. *Id.* at \*14.

50. *Id.* at \*33.

51. *Id.* at \*33-35 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted)).

52. See Justin R. Pidot, *Public-Private Conservation Agreements and the Greater Sage Grouse*, 39 PUB. LAND & RESOURCES L. REV. 161, 161, 183-87 (2018).