

# Potential Sage Grouse Listing Continues to Shape Western Energy Development and Grazing Rights

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At the close of 2011, the Bureau of Land Management (“BLM”) issued two [instruction memoranda](#) addressing land use planning and management measures for the Greater Sage-grouse (*Centrocercus urophasianus*) in eleven Western states. The memoranda follow: 1) the U.S. Fish and Wildlife Service’s 2010 determination that an ESA listing of the sage grouse was warranted but precluded due to budget constraints and higher priority candidate species; and 2) the Idaho district court’s 2011 ruling requiring BLM to re-assess two test case resource management plans (“RMPs”) in Idaho and Wyoming, due largely to potential impacts on sage grouse. *W. Watersheds Proj. v. Salazar*, No. 08-516, Decision and Order (D. Idaho issued Sept. 28, 2011) (“*WWP v. Salazar*”).

The BLM memoranda may signal the start of a new management framework for sage grouse in the West, which will take shape during 2012 and govern oil and gas and renewable energy development, grazing, and other land uses over the next few years—until Fish and Wildlife makes a final decision on the bird’s ESA status in 2015, and while BLM continues its review of multiple RMPs governing public land in the West.

The latest BLM memoranda supplement several federal and state efforts to address sage grouse protection, including BLM’s July 2011 “strategy” document to protect the grouse and its habitat; BLM’s 2001 Special Status Species Policy, 2004 National Sage Grouse Habitat Conservation Strategy, and 2010 [Instruction Memorandum](#) governing sage grouse management considerations for energy development; Wyoming’s mapping program designed to protect millions of acres of sage grouse breeding grounds in the State, and additional individual state initiatives. Many of these efforts are aimed at avoiding a federal ESA listing of the bird. All of the federal initiatives, policies, and strategies, however, are discretionary and effectively unenforceable. Environmental groups are already criticizing BLM’s latest memoranda as inadequately protective of the species,<sup>[1]</sup> and are also asking the Idaho District Court to impose specific and expansive restrictions on grazing, renewable energy and oil and gas development and additional activities on or near sage grouse habitat in Idaho and Wyoming.<sup>[2]</sup>

While Fish and Wildlife is not expected to make a final decision on whether to list the sage grouse under the ESA until 2015, development and agricultural activity will certainly be limited—by courts, federal and state agencies, and even local governments—in order to avoid increasing extinction risks to the bird over the next three years. BLM’s latest memoranda and the Idaho district court’s recent opinion provide insights into what those restrictions might entail, and what management measures might protect the species while allowing reasonable development and grazing activity—avoiding an ESA listing that could have far more restrictive impacts on those activities than do current requirements.

## Background

The question of whether to list sage grouse under the ESA has been one of the most contentious natural resource conflicts in recent years because of its potential to impact millions of acres of Western land. Listing opponents argue that listing could devastate the economies and heritage of Western states. They are also concerned that listing would all but preclude renewable energy development in the eleven affected states, each of which contains a significant amount of the nation’s wind, solar, geothermal, coal, and hydroelectric energy resources. Listing supporters allege that the sage grouse, whose population has fallen approximately 90% from historical levels in some areas, is either in danger of extinction throughout all or a significant portion of its range, or likely to become endangered within the foreseeable future.

In 2010, the USFWS essentially split the difference between the two sides by finding its listing warranted but precluded. As a “candidate” species, the sage grouse is not provided any protection under the ESA, but the Service will review the species’ status annually, with the expectation of listing it in the future if its status does not improve. See J. Ferrell, [Sage Grouse Not Protected by ESA, But Will Still Play Role in Western Energy Development](#), Marten Law News (March 29, 2010).

The Service has determined that habitat destruction and fragmentation, wildfires, incursion of invasive plants, grazing, climate change, and direct displacement by energy development and other activities all threaten the grouse. While the species is in regulatory limbo, BLM and states are attempting to avoid a listing by addressing these and other threats. Establishing regulatory measures that curb the effects of these threats could, under the statutory factors for listing under ESA § 4(a)(1), cause the Service to determine that ESA listing is not necessary, thus allowing states and BLM, rather than the expert federal wildlife Service, to determine what rules must be followed to avoid increasing the likelihood of the grouse’s extinction.

## Regulatory Restrictions Affecting Development and Grazing in Grouse Habitat are Site-Specific and Standards are in Flux

Sage grouse depend on large areas of continuous sagebrush habitat. Sagebrush is the most widespread vegetation in the intermountain West, but the USFWS also considers it to be one of the most imperiled ecosystems in North America. Federal agencies manage about two-thirds of sagebrush habitat in the United States, with BLM managing over half, the U.S. Forest Service about eight percent, and additional federal agencies the remaining four percent. Approximately 31% of sagebrush habitat is privately-owned, and just five percent is state-owned.

Like BLM’s existing policies,<sup>[3]</sup> its December 2011 memoranda are fairly general, and depend largely on field office management decisions for implementation. BLM intends its [Greater Sage-Grouse Interim Management Policies and Procedures](#) to: 1) protect unfragmented habitats; 2) minimize habitat loss and fragmentation; and 3) manage habitats to maintain, enhance, or restore conditions that meet Greater Sage-Grouse life history needs. Toward that end, in its memorandum BLM proposes certain authorizations and activities specific to: Integrated Vegetation Management; Wildfire Suppression and Fuels Management; Rights-of-Way (ROW) (e.g., Renewable Energy Projects, Roads, Powerlines, Pipelines); Leasable Minerals (Energy and Non-energy); Grazing Permit/Leases Issuance/Grazing Management; fences and water development (applicable to all programs); Special Recreation Permits and Sites; minerals; pest control; and various realty transactions. The memo applies immediately to all field offices that authorize or carry out activities on public land, “while the BLM develops and decides how to best incorporate long-term conservation measures for Greater Sage-Grouse into applicable Land Use Plans [by FY 2014].”

The [BLM National Greater Sage-Grouse Land Use Planning Strategy](#), applicable for the same timeframe, provides that BLM “must consider all applicable conservation measures when revising or amending its RMPs in Greater Sage Grouse habitat,” but also allows for great variability among field offices and planning areas.

## Lessons from Judge Winmill’s September 2011 Decision

In *WWP v. Salazar*, Western Watersheds challenged 16 RMPs in six western states under the APA, NEPA, and FLPMA, arguing that the RMPs and associated EISs failed to adequately consider the environmental impacts of grazing and energy development on sage grouse. To streamline the case, U.S. District Court Judge B. Lynn Winmill approved the parties’ proposal to brief initial summary judgment motions on two test cases: the Craters of the Moon RMP in Idaho and the Pinedale RMP in Wyoming. On September 28, 2011, Judge Winmill granted Western Watersheds’ motion for partial summary judgment regarding the test case RMPs.

Judge Winmill took issue with several omissions in BLM’s NEPA documentation and analyses for the test cases. Specifically, he faulted the agency for:

1. failing to discuss a peer-reviewed, comprehensive Conservation Assessment prepared by 11 state fish and wildlife agencies for sage grouse management (the “WAFWA Conservation Assessment”);
2. not analyzing an alternative under which no grazing would occur, or under which grazing reduced from current levels would occur;
3. not addressing the reasons why almost a third of the acres covered by BLM allotments in the Pinedale RMP area failed to meet rangeland health standards;
4. failing to address BLM’s Special Status Species Policy and National Strategy (BLM’s key grouse policy documents extant during BLM’s NEPA review of the test case RMPs);
5. not using science from localized studies, including the WAFWA Conservation Assessment and a report prepared by the Nature Conservancy; and
6. failing to take into account effects from energy development, grazing, cheatgrass proliferation, and other activities, under a proper cumulative impacts analysis.

On these and other grounds, the court granted plaintiffs’ motion for partial summary judgment and denied defendants’ motions, requiring BLM to expand its NEPA analysis of the test RMPs.

The court’s September 2011 order does not explicitly affect the remaining 14 RMPs at issue in the case, which will each receive individual judicial review. Still, plaintiffs and environmental groups have hailed the order as an early major victory and a tell of things to come in the overall case.

BLM is reconsidering the test case and other RMPs, but administrative agencies only move so fast, and a completion date is far from assured. In the meantime, in the absence of explicit administrative rules, Judge Winnill may end up deciding the interim bounds of grazing and development mitigation measures aimed at avoiding grouse extinction.

In mid-December 2011, following up on the September 2011 order in its favor, Western Watersheds filed a motion for permanent injunctive relief. The parties are briefing the appropriate remedies on the test case RMPs, with reply briefs due February 24, 2012. Beginning on April 9, 2012, the Court will hold a three-day evidentiary hearing to address remedies.<sup>[4]</sup> If Western Watersheds prevails, BLM would be required to conduct specific analyses and mapping to follow the agency’s grouse-specific policies and otherwise comply with NEPA. In addition, in sage grouse habitat, livestock would have to be removed by August 1 annually, and grazing would be banned in grouse nesting and brood-rearing habitats from March through June annually; twice-over grazing would be banned; no new fences could be constructed, and unnecessary fences would be removed; BLM would defer issuing or renewing any mineral leases; certain areas could not be converted to oil and gas purposes; wind farms or towers could not be approved within 5 miles of active leks; and—outside of certain “core development areas” already designated—BLM could not authorize any surface disturbances or explorations within about three miles of any lek that has been active in the past ten years.<sup>[5]</sup>

## Future Restrictions and Stakeholder Involvement

BLM’s recent and historical sage grouse guidance is general, fact- and location-dependent, and largely discretionary. State and local government programs continue to evolve. Environmental groups continue to press BLM and the courts for stringent controls on energy development, grazing, and other agricultural uses to maximize protection of the grouse and its habitat. Through these disparate processes, the exact contours of regulatory measures in sage grouse habitat will take shape. Given the *ad hoc* nature of those developments, stakeholders interested in protecting their interests in ranching operations, renewable energy projects, and existing oil and gas projects should participate

in BLM's scoping and planning process in early 2012, as well as in state and local government initiatives designed to avoid a more restrictive ESA listing.<sup>[6]</sup>

Given the faster pace of litigation versus administrative action—as well as the apparently inevitable challenge to future BLM rules affecting grouse habitat—stakeholders on both sides should also be prepared to potentially file or intervene in suits against BLM, either against or on behalf of the agency, as necessary to protect their livelihoods or advance their policy interests.

For additional information, contact [Jessica Ferrell](#) or any member of Marten Law's [Natural Resources](#) or [Permit and Environmental Review](#) practice groups.

[1] See M. Gruver, BLM adopts temporary sage grouse strategy, Mercury News (Dec. 28, 2011), [http://www.mercurynews.com/breaking-news/ci\\_19632867](http://www.mercurynews.com/breaking-news/ci_19632867).

[2] See *WWP v. Salazar*, No. 08-516, Plaintiffs' Mot. for Remedies on Test Case RMPs, Dkt. 151 (D. Idaho filed Dec. 12, 2011).

[3] See J. Ferrell, [Sage Grouse Not Protected by ESA, But Will Still Play Role in Western Energy Development](#) (March 29, 2010) for details.

[4] See *WWP v. Salazar*, No. 08-516, Dkts. 156-157 (D. Idaho issued Jan. 10-11, 2012).

[5] See *WWP v. Salazar*, No. 08-516, Plaintiffs' Mot. for Remedies on Test Case RMPs, Dkt. 151 (D. Idaho filed Dec. 12, 2011).

[6] Until February 7, 2011, for example, stakeholders have an opportunity to comment on one element of that policy (BLM's Notice of Intent to Prepare Environmental Impact Statements ("EISs") and Supplemental EISs to Incorporate Greater Sage-Grouse Conservation Measures Into Land Use Plans and Land Management), the outcome of which may ultimately affect development and grazing activities in the West. See [76 FR 77008](#) (Dec. 9, 2011).