

DEFENDING SCIENCE & COLLABORATIVE  
CONSERVATION: SAGE-GROUSE &  
*WESTERN WATERSHEDS PROJECT V. SCHNEIDER*  
(D. IDAHO 2019)

*Peter O. Daniels\**

INTRODUCTION

In March 2019, the Bureau of Land Management (“BLM”) amended its Greater Sage-Grouse<sup>1</sup> Plans across the American West, undoing a decade of science-based collaboration among federal agencies, states, environmental groups, and private landowners.<sup>2</sup> The claimed intent of the 2019 amendments was to “improv[e] alignment with State management plans and strategies for Greater Sage-Grouse.”<sup>3</sup> These amendments, however, would open significant portions of public land to oil and gas leasing, to the detriment of the already vulnerable Sage-Grouse.<sup>4</sup> In October 2019, a federal district court judge in Idaho issued a preliminary injunction in *Western Watersheds Project v. Schneider*,<sup>5</sup> preventing the BLM from implementing the plan amendments<sup>6</sup> on the

---

\* J.D. Candidate, Harvard Law School, Class of 2021. The author would like to thank Richard Lazarus, Steve Daniels, and the editorial team of the *Harvard Environmental Law Review*. Any mistakes are the author’s own.

1. The Greater Sage-Grouse will also be referred to as “Sage-Grouse” in this Comment.
2. See Notices of Approved Resource Management Plan Amendments for Greater Sage-Grouse Conservation, 84 Fed. Reg. 10,322–30 (Mar. 20, 2019). For a description of the collaborative process undertaken, see JIM LYONS, CTR. FOR AM. PROGRESS, LESSONS LEARNED FROM THE STATE-FEDERAL EFFORT TO CONSERVE THE GREATER SAGE-GROUSE 2–5 (2017), <https://perma.cc/83CT-JR3Q>.
3. E.g., Notice of Approved Resource Management Plan Amendment for Greater Sage-Grouse Conservation, Idaho, 84 Fed. Reg. 10,325, 10,326 (Mar. 20, 2019). This was in response to then-Secretary of the Interior Ryan Zinke’s Order No. 3353. DEP’T OF THE INTERIOR, SECRETARIAL ORDER 3353: GREATER SAGE-GROUSE CONSERVATION AND COOPERATION WITH WESTERN STATES 3 (June 7, 2017) [hereinafter S.O. 3353], <https://perma.cc/7PLX-F8P2> (requiring “identification of provisions that may require modification or rescission . . . in order to give appropriate weight to the value of energy and other development of public lands”); see also DEP’T OF THE INTERIOR, SECRETARIAL ORDER 3349: AMERICAN ENERGY INDEPENDENCE (Mar. 29, 2017) [hereinafter S.O. 3349], <https://perma.cc/79JX-KUNZ>.
4. See, e.g., Scott Streater, *Revamp to Obama-Era Regs Highlights Deep Partisan Divide*, E&E NEWS (Mar. 15, 2019), <https://perma.cc/9D9A-S8PL>; Alex Thompson, *BLM Eliminates Key Protective Measures of Historic Sage-Grouse Conservation Plans*, THE WILDERNESS SOC’Y (Dec. 6, 2018), <https://perma.cc/4RPK-X2NZ> (discussing the amendments’ proposal); Grace Weatherall, *Greater Sage-Grouse Amended Resource Management Plans*, HARV. ENVTL. & ENERGY L. PROGRAM (Apr. 26, 2019), <https://perma.cc/R3EF-5VYQ>.
5. 417 F. Supp. 3d 1319 (D. Idaho 2019).
6. *Id.* at 1334–35.

grounds that they violated the National Environmental Policy Act<sup>7</sup> (“NEPA”) and Administrative Procedure Act<sup>8</sup> (“APA”).

In assessing the BLM’s amendments, the district court employed an unexpected standard of review under the APA. Instead of strictly following the Supreme Court’s holding in *FCC v. Fox Television Stations, Inc.*<sup>9</sup> (that an agency need not demonstrate that its new policies are superior to those they replace), the district court more closely followed Justice Kennedy’s concurrence in *Fox* and held that the BLM’s departure from its 2015 plans must be rationally and scientifically justified. This decision indicates a promising pathway for environmental advocacy groups and other entities to challenge rollbacks of federal regulations.

Furthermore, while *Western Watersheds Project* could be viewed as merely another instance of environmental groups seeking to block the Trump administration’s deregulatory efforts, this case stands out due to the magnitude of the decision-making process the BLM rejected through its amendments. The decades-long conservation effort at issue in this case represents a pinnacle of collaborative rationality, understood through the lens of multiple rationalities as described by Habermas and other social theorists.<sup>10</sup> Collaboratively rational processes yield more durable and effective outcomes, as well as positive shifts in participants’ agency and relationships.<sup>11</sup>

Dismissing this collaboration and its outcomes demonstrated a failure by the Department of the Interior and the Trump administration to recognize the express interests of their constituents. This rejection of regulatory science by the BLM is not abnormal for the Trump administration<sup>12</sup> and is a fundamentally antidemocratic move. The district court’s timely intervention has temporarily shielded this process and its outcomes, staking the territory of the federal judiciary in defense of collaborative rationality.

*Western Watersheds Project* upholds rigorous, science-based collaboration against subsequent attacks and expands NEPA’s potential to block unmerited changes in federal policy. Part I of this Comment discusses the natural history of the Sage-Grouse, the conservation efforts at the core of this case, and recent

---

7. 42 U.S.C. §§ 4321–47 (2018).

8. 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

9. 556 U.S. 502, 514 (2009).

10. Whereas logical rationality emphasizes formal reasoning and discursive rationality emphasizes successful communication, collaborative rationality depends on the rigorous deliberation of diverse groups of stakeholders with divergent perspectives. See JUDITH E. INNES & DAVID E. BOOHER, *PLANNING WITH COMPLEXITY: AN INTRODUCTION TO COLLABORATIVE RATIONALITY FOR PUBLIC POLICY* 6 (2010).

11. Discussed in more detail in Part IV, *infra*.

12. See *Regulatory Rollback Tracker*, HARVARD ENVTL. & ENERGY L. PROGRAM, <https://perma.cc/3X5D-SQY4>.

attempts to list the Sage-Grouse under the Endangered Species Act<sup>13</sup> (“ESA”). Part II describes the procedural posture, reasoning, and holding of the district court in *Western Watersheds Project*. Part III explores indications in the opinion of expanded opportunities under NEPA for challengers of federal policy reversals. Part IV argues that just as courts defer to agencies on some technical issues, agencies should more firmly rely on policy outcomes of rigorous collaborative decision-making processes instead of supplanting those outcomes with their own unilateral determinations.

## I. BACKGROUND: GREATER SAGE-GROUSE CONSERVATION AND COLLABORATION

### A. 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.<sup>14</sup> Sage-Grouse are known for their quirky mating displays<sup>15</sup> that take place in communal mating display grounds called leks, which are used annually over decades.<sup>16</sup> Habitat development, range restrictions, and other threats have resulted in population declines to as little as 7% of presumed historic levels.<sup>17</sup> This trend has continued in recent years, with data suggesting that state-by-state Sage-Grouse populations have declined 44% on average since 2015.<sup>18</sup>

---

13. 16 U.S.C. §§ 1531–44 (2018).

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

15. See Nature on PBS, *Sage-Grouse Mating Rituals in Groups Called Leks*, YOUTUBE (May 14, 2015), <https://perma.cc/AYS8-X335>.

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

17. See U.S. FISH & WILDLIFE SERV., BEGINNER’S GUIDE TO GREATER SAGE-GROUSE 4 (2010), <https://perma.cc/AA5P-TBPR> (reporting a 50–67% decrease from the 1960s and 1970s); W. ASS’N OF FISH & WILDLIFE AGENCIES, GREATER SAGE-GROUSE POPULATION TRENDS: AN ANALYSIS OF LEK COUNT DATABASES 1965–2015, at 1 (2015), <https://perma.cc/XHK7-RRKF> (finding an average population decline of 0.83% per year range-wide between 1965 and 2015); Marianne Lavelle, *U.S. Sage Grouse Plan Draws Divided Reaction*, SCIENCE (Sept. 22, 2015), <https://perma.cc/TW72-KTYV> (“Populations of greater sage grouse . . . have plummeted by an estimated 90% as oil and gas drilling, mining, ranching, wildfires, and invasive species have consumed its critical habitat in sage brush ecosystems.”).

18. See Mark Davis, *On the Lek: Sage Grouse Numbers Predicted to Fall for the Fourth Straight Year*, POWELL TRIB. (Apr. 23, 2020), <https://perma.cc/3U89-DFMK>; see also LEE FOSTER, OR. DEP’T OF FISH & WILDLIFE, OREGON GREATER SAGE-GROUSE POPULATION MONITORING: 2019 ANNUAL REPORT 1 (2019), <https://perma.cc/5XUX-2GES> (for Oregon data); Angus M. Thuermer Jr., *Wyoming’s 2019 Sage Grouse Count Dips 21%*, WYOFILE

Sage-Grouse population decline has multiple causes and factors. Energy and gas development is one.<sup>19</sup> Areas under development in the West often contain some of the highest densities of Sage-Grouse, and the species is particularly dependent on uninterrupted swaths of sagebrush habitat.<sup>20</sup> Energy development directly impacts survival and reproduction through introducing human infrastructure, and indirectly impacts overall habitat quality, disease dynamics, and other survival factors.<sup>21</sup> Energy development in Sage-Grouse habitat has both expanded and accelerated since 2017. The rate of new leasing of primary Sage-Grouse habitat increased 970% from the Obama to the Trump administration.<sup>22</sup> Of the more than five million acres leased since 2017, more than half were leased in 2019.<sup>23</sup> This primary habitat is the most essential to preserve for Sage-Grouse population health.<sup>24</sup>

Greater Sage-Grouse reproduction is particularly dependent on continuity in lek locations.<sup>25</sup> Indeed, some leks have likely been in use for over eighty years.<sup>26</sup> Because Sage-Grouse have such large communal and individual ranges, being able to return to a consistent location can be essential for the survival of

---

(Aug. 28, 2019), <https://perma.cc/W3FN-2NSZ> (for Wyoming data); MONT. FISH, WILD-LIFE & PARKS, MONTANA GREATER SAGE-GROUSE POPULATION REPORT 3 tbl.1 (2019), <https://perma.cc/N7XJ-TXMB> (for Montana data); 2019 *Sage-Grouse Season Scoping Proposal*, IDAHO DEP'T OF FISH & GAME, <https://perma.cc/3VLM-EGVX> (for Idaho data); Associated Press, *Sage Grouse Numbers in West Continue to Decline After Federal Protection Rejection*, COLO. PUB. RADIO NEWS, (Sept. 13, 2019), <https://perma.cc/SA3Z-U4JE> (for Utah data).

19. See GRANT GARDNER, JASON CARLISLE & CHAD LEBEAU, W. ECOSYSTEMS TECH., INC., OIL AND GAS DEVELOPMENT ON FEDERAL LANDS AND SAGE-GROUSE HABITATS: OCTOBER 2015 TO MARCH 2019, at 1–2 (2019), <https://perma.cc/LW9K-JY9R> (describing increases in oil and gas leases that coincide with observed declines in Sage-Grouse populations referenced above).
20. David E. Naugle et al., *Energy Development and Greater Sage-Grouse*, in GREATER SAGE-GROUSE: ECOLOGY AND CONSERVATION, *supra* note 14, at 490.
21. *Id.* at 491.
22. From 2575 to 25,002 acres per month. GARDNER ET AL., *supra* note 19, at 7 tbl.2; see also Angus M. Thuermer Jr., *Greater Sage Grouse Counts Show 3-Year Downward Trend*, WYOFILE (Aug. 6, 2019), <https://perma.cc/V57F-FSTR> (reporting an 863% increase in lands leased within Sage-Grouse habitat, from 2382 acres/month under Obama to 20,566 acres/month under Trump).
23. See Davis, *supra* note 18.
24. Priority Habitat Management Areas (“PHMAs”) are “BLM-administered lands identified as having highest habitat value for maintaining sustainable GRSG populations.” BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE ROCKY MOUNTAIN REGION, ch. 1, at 15 (2015), <https://perma.cc/DT94-TG28>.
25. See John W. Connelly, E. Thomas Rinkes & Clait E. Braun, *Characteristics of Greater Sage-Grouse Habitats*, in GREATER SAGE-GROUSE: ECOLOGY AND CONSERVATION, *supra* note 14, at 69, 88–89.
26. See *id.* at 71.

individual Sage-Grouse.<sup>27</sup> The successful maintenance of leks is also integral to the overall genetic well-being of the species since gathering around leks can help promote genetic diversity among offspring.<sup>28</sup> Leks are especially susceptible to anthropogenic disturbance because they tend to be clustered around riparian areas less than two kilometers from the nearest water source.<sup>29</sup> Those same riparian areas are far more likely to be privately owned and developed than the uplands nearby due to the desirability of water access in such an arid area.<sup>30</sup>

These threats to Sage-Grouse have been well documented and widely studied, and the bird has inspired attempts at conservation perhaps paralleled only by those for the bald and golden eagles and the spotted owl.

### B. Conservation Efforts

The Sage-Grouse conservation effort is the largest land conservation effort in U.S. history.<sup>31</sup> Local, state, national, and international stakeholders have been involved for decades. Table 1 offers an unexhaustive summary of the groups and individuals involved.

---

27. See *id.* at 80.

28. See Sara J. Oyler-McCance & Thomas W. Quinn, *Molecular Insights into the Biology of Greater Sage-Grouse*, in *GREATER SAGE-GROUSE: ECOLOGY AND CONSERVATION*, *supra* note 14, at 71–72, 85.

29. See Connelly et al., *supra* note 25, at 71.

30. See J.P. Donnelly et al., *Public Lands and Private Waters: Scarce Mesic Resources Structure Land Tenure and Sage-Grouse Distributions*, 7 *ECOSPHERE* e01208, at 8 (2016).

31. See *Top 5 Things You Should Know About the Sage Grouse*, U.S. DEP'T OF THE INTERIOR: BLOG (Sept. 22, 2015), <https://perma.cc/H4UZ-T468>. One of the few comparable collaborative efforts is the binational Great Lakes Regional Collaborative, which is arguably more cabined in terms of geographical scope and inclusion of private stakeholders. See generally PERVAZE A. SHEIKH, CONG. RESEARCH SERV., RL3411, *ECOSYSTEM RESTORATION IN THE GREAT LAKES: THE GREAT LAKES REGIONAL COLLABORATION STRATEGY* (2008), <https://perma.cc/RCA3-8KXW>; SIERRA CLUB, *A CITIZEN'S GUIDE TO PROTECTING THE GREAT LAKES* (2008), <https://perma.cc/6DDK-CP3Q>; *Welcome*, EPA & ENV'T AND CLIMATE CHANGE CANADA, BINATIONAL.NET, <https://perma.cc/R66H-Y7AS>; GREAT LAKES REG'L COLLABORATION, WIS. DEP'T OF NAT. RES., *GREAT LAKES REGIONAL COLLABORATION STRATEGY* (2005), <https://perma.cc/CDU5-A6Q3>; *The Great Lakes Regional Collaboration*, GREAT LAKES ST. LAWRENCE GOVERNORS & PREMIERS, <https://perma.cc/G9YZ-Y7QH>; *What is Regional Collaboration?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: GREAT LAKES REGION, <https://perma.cc/Y62Q-FV7D>.

U.S. Federal	U.S. State	Non-governmental	International
<p><u>Department of the Interior</u></p> <ul style="list-style-type: none"> <li>• Bureau of Land Management</li> <li>• Geological Survey</li> <li>• Fish and Wildlife Service (“FWS”)</li> <li>• Bureau of Reclamation</li> <li>• National Park Service</li> <li>• Bureau of Indian Affairs</li> </ul> <p><u>Department of Agriculture</u></p> <ul style="list-style-type: none"> <li>• Forest Service</li> <li>• Farm Service Agency</li> <li>• Natural Resources Conservation Service                             <ul style="list-style-type: none"> <li>◦ Sage Grouse Initiative</li> </ul> </li> </ul> <p><u>Department of Energy</u></p> <ul style="list-style-type: none"> <li>• Federal Energy Regulatory Commission</li> <li>• Idaho National Laboratory</li> </ul> <p><u>Department of Defense</u></p> <ul style="list-style-type: none"> <li>• Army</li> <li>• Air Force</li> </ul>	<p>California Colorado Idaho Montana Nevada North Dakota Oregon South Dakota Utah Wyoming</p> <ul style="list-style-type: none"> <li>• Western Association of Fish and Wildlife Agencies (“WAFWA”)</li> <li>• Western Governors’ Association</li> <li>• At least thirteen state wildlife agencies</li> <li>• Multiple conservation districts</li> <li>• Over sixty “Local Working Groups” (state-run, including diverse stakeholders)</li> </ul>	<p><u>Numerous private landowners</u></p> <p><u>Corporations and industry</u></p> <ul style="list-style-type: none"> <li>• including PacifiCorp, ConocoPhillips, and the National Cattlemen’s Beef Association</li> </ul> <p><u>Multiple Land Trusts</u></p> <p><u>Academic Institutions</u></p> <ul style="list-style-type: none"> <li>• including Utah State University, Colorado State University, the University of Montana, and Little Big Horn College</li> </ul> <p><u>Over twenty NGOs</u></p> <ul style="list-style-type: none"> <li>• including the National Audubon Society, Pheasants Forever, Rocky Mountain Elk Foundation, Nature Conservancy, and World Wildlife Fund</li> </ul>	<p><u>Provinces</u></p> <ul style="list-style-type: none"> <li>• Alberta</li> <li>• Saskatchewan</li> </ul> <p><u>Federal Canadian Government</u></p>

TABLE 1. SUMMARY OF ENTITIES INVOLVED IN GREATER SAGE-GROUSE CONSERVATION COLLABORATION.<sup>32</sup>

32. L.R. BELTON, DOUGLAS B. JACKSON-SMITH & T.A. MESSMER, ASSESSING THE NEEDS OF SAGE-GROUSE LOCAL WORKING GROUPS: FINAL TECHNICAL REPORT 7 (2009); D.J. MANIER ET AL., U.S. GEOLOGICAL SURVEY & U.S. DEP’T OF THE INTERIOR, OPEN-FILE REPORT NO. 2013-1098, SUMMARY OF SCIENCE, ACTIVITIES, PROGRAMS, AND POLICIES THAT INFLUENCE THE RANGEWIDE CONSERVATION OF GREATER SAGE-GROUSE (*Centrocercus urophasianus*) 117, 119–20, 123 (2013); Nat’l Biological Info. Infrastructure, U.S.

Sage-Grouse monitoring and management in the United States date to at least 1954, when WAFWA formed the Western States Sage-Grouse Technical Committee.<sup>33</sup> Conservation efforts commenced in earnest in 1995 with an agreement between western states and provinces,<sup>34</sup> once significant declines in Sage-Grouse populations and lek counts were documented.<sup>35</sup>

Much of the Greater Sage-Grouse conservation story has revolved around attempts to list the Sage-Grouse as threatened or endangered under the ESA.<sup>36</sup> The species has not yet received this level of protection.<sup>37</sup> Advocates have petitioned to list several “discrete population segments” of the Sage-Grouse, including the Mono Basin region subspecies in 2001, and the Western and Eastern subspecies in 2002.<sup>38</sup> The years 2002 and 2003 also saw three petitions for range-wide listing.<sup>39</sup> These three were eventually combined and, despite finding that further study was warranted after a ninety-day review,<sup>40</sup> the FWS eventually determined in 2005 that listing was not warranted.<sup>41</sup> Western Watersheds Project challenged that outcome, bringing the case before Judge B. Lynn Winmill,<sup>42</sup> who has since been the main representative<sup>43</sup> of the federal judiciary in Sage-Grouse conservation litigation.<sup>43</sup> Winmill rejected the finding

---

Geological Survey, The Sage Grouse Local Working Group Locator: A Geographic Perspective to Sage Grouse Conservation Efforts 1 (2006), <https://perma.cc/2LE4-X44B>; San J. Stiver, *The Legal Status of Greater Sage-Grouse: Organizational Structure of Planning Efforts, in Greater Sage-Grouse: Ecology and Conservation*, *supra* note 14, at 33, 37–40; *Partner List*, SAGE GROUSE INITIATIVE, <https://perma.cc/3S3T-UUHP>.

33. See Stiver, *supra* note 32, at 35.

34. See *id.*

35. See *id.*

36. 16 U.S.C. § 1533 (2018).

37. See *Listed Animals*, U.S. FISH & WILDLIFE SERV., ENVTL. CONSERVATION ONLINE SYS., <https://perma.cc/T5JB-3FKX>.

38. See Stiver, *supra* note 32, at 36.

39. See *id.*

40. 90-Day Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 69 Fed. Reg. 21,484 (Apr. 21, 2004).

41. 12-Month Finding for Petitions to List the Greater Sage-Grouse as Threatened or Endangered, 70 Fed. Reg. 2244 (Jan. 12, 2005).

42. See Complaint, *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007) (No. 06-CV-277).

43. While other cases have been brought regarding specific subspecies of the Greater Sage-Grouse and specific Resource Management Plans, the District of Idaho has been the main federal forum for systemic review of the BLM’s Sage-Grouse plans as a whole. *Compare* *Inst. for Wildlife Prot. v. Norton*, 174 Fed. Appx. 363 (9th Cir. 2006) (challenging an FWS decision to no longer recognize the Western Sage-Grouse as a subspecies) and *Desert Survivors v. U.S. Dep’t of the Interior*, 321 F. Supp. 3d 1011 (N.D. Cal. 2018) (challenging the U.S. Forest Service’s withdrawal of a proposed listing of the Bi-State Sage-Grouse as “threatened” under the ESA) *with* *W. Watersheds Project v. U.S. Fish & Wildlife Serv.*, 535 F. Supp. 2d 1173 (D. Idaho 2007) and *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319 (D. Idaho 2019).

that listing was unwarranted as arbitrary and capricious, in violation of the Administrative Procedure Act.<sup>44</sup> He remanded the finding to the FWS for further consideration.<sup>45</sup> The FWS subsequently determined that listing the Sage-Grouse was “warranted, but precluded by higher priority listing actions.”<sup>46</sup>

Sage-Grouse stakeholders disagree over the merits of listing the Greater Sage-Grouse as threatened or endangered. Western Watersheds Project has advocated for listing since 2004,<sup>47</sup> as has the Center for Biological Diversity.<sup>48</sup> State governments and private landowners have opposed listing, fearing negative regulatory impacts on ranching, energy development, and other activities.<sup>49</sup> Viewing endangered or threatened species as regulatory burdens on their property or livelihoods, some ranchers and landowners have opposed both listing and subsequent conservation efforts.<sup>50</sup>

Some stakeholders are concerned that listing the Sage-Grouse under the ESA would, counterintuitively, work against conservation efforts. The listing could, the argument goes, undermine the significant voluntary actions that private landowners have taken to avoid the more severe restrictions that come with listing and critical habitat designation.<sup>51</sup> Private land is especially significant to Sage-Grouse conservation since 85% of leks are within six miles of riparian areas and over three-quarters of riparian areas are privately owned.<sup>52</sup> Through public-private partnerships, voluntary conservation programs, and conservation

44. See 5 U.S.C. § 706(2)(A) (2018).

45. *W. Watersheds Project*, 535 F. Supp. 2d at 1189.

46. 12-Month Findings for Petitions to List the Greater Sage-Grouse, 75 Fed. Reg. 13,910 (Mar. 23, 2010).

47. *Greater Sage Grouse*, W. WATERSHEDS PROJECT, <https://perma.cc/F7BS-NWY4>.

48. See *Saving the Bi-State Sage Grouse*, CTR. FOR BIOLOGICAL DIVERSITY, <https://perma.cc/9VLD-BUF4>.

49. See, e.g., TEMPLE STOELLINGER & DAVID TAYLOR, A REPORT ON THE ECONOMIC IMPACT TO WYOMING’S ECONOMY FROM A POTENTIAL LISTING OF THE SAGE GROUSE (2016), <https://perma.cc/7X42-HK32>; Saige Albert, *SGI Offers Incidental Take Protections in Wake of Sage Grouse Decision*, WYO. LIVESTOCK ROUNDUP (Apr. 24, 2015), <https://perma.cc/SRD5-5DVK>; *General Application Questions*, MONT. SAGE GROUSE HABITAT CONSERVATION PROGRAM, <https://perma.cc/DMN3-N4C2>.

50. Paul Henson, Rollie White & Steven P. Thompson, *Improving Implementation of the Endangered Species Act: Finding Common Ground Through Common Sense*, 68 BIOSCIENCE 861, 864 (2018).

51. See Alisa Opar, *Unprecedented Conservation Efforts Keep Greater Sage-Grouse off Endangered Species List*, NAT’L AUDUBON SOC’Y (Sept. 22, 2015), <https://perma.cc/9H5H-AR8H>; Clifford Krauss, *U.S. Trying to Protect Sage Grouse Without Listing It as an Endangered Species*, N.Y. TIMES (Sept. 23, 2015), <https://perma.cc/Z63P-K5AH>.

52. CHRISTINE PAIGE, SAGE GROUSE INITIATIVE, PRIVATE LANDS VITAL TO CONSERVING WET AREAS FOR SAGE GROUSE SUMMER HABITAT 3 (2014), <https://perma.cc/2TFH-GC6J>; J.P. Donnelly et al., *supra* note 30, at 8.



easements, Interior's Task Force avoided listing while also garnering significant buy-in from private landowners.<sup>53</sup>

These partnerships also made clear that Western landowners, though sometimes portrayed as being pro-property rights and anti-federal government at all cost,<sup>54</sup> are in fact an internally diverse group. Rather than being fundamentally isolationist or antienvironmental, many (if not most) prioritize “a set of corollary responsibilities to neighbors, their community, and society in general,” and affirm that they have an obligation for environmental stewardship of their land.<sup>55</sup> The recognition of this fact and the ensuing 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.<sup>56</sup> This collaboration has involved significant amounts of face-to-face deliberation, especially among the more than sixty local working groups, who have also engaged in participatory research, collaborative learning, adaptive management, and other collaboratively rational techniques.<sup>57</sup>

As part of this endeavor to avoid listing the Sage-Grouse, in 2011 the BLM and Forest Service launched the National Greater Sage-Grouse Planning Strategy and convened a National Technical Team (“NTT”) to produce an evaluative report on conservation strategies for the Sage-Grouse.<sup>58</sup> Judge Winmill found that the NTT’s report<sup>59</sup> “contain[ed] the best available science concerning the sage grouse.”<sup>60</sup> The BLM and Forest Service subsequently adopted

- 
53. See LYONS, *supra* note 2, at 5; see also, e.g., PAIGE, *supra* note 52.
54. See, e.g., Jim Carlton, *In the Battle for the American West, the Cowboys Are Losing*, WALL ST. J. (Mar. 30, 2018), <https://perma.cc/84VX-UM8Y>; Jaime Fuller, *The Long Fight Between the Bundys and the Federal Government, from 1989 to Today*, WASH. POST (Jan. 4, 2016), <https://perma.cc/8LFG-7DZ5>; Jennifer Percy, *Fear of the Federal Government in the Ranchlands of Oregon*, N.Y. TIMES (Jan. 18, 2018), <https://perma.cc/RQW4-793U>; Brad Plumer, *It's Not Just the Oregon Militia: Why Many Westerners Get Angry About Federal Land Rights*, VOX (Jan. 5, 2016), <https://perma.cc/RL92-TTWN>; Kirk Siegler, *In Rural New Mexico, Ranchers Wage Their Battle Through the Courts*, NPR (Feb. 8, 2018), <https://perma.cc/3JDR-VE9V>; Keith Makoto Woodhouse, *Are Ranchers out West Really Oppressed by a Federal Government in League with Environmentalists?*, HIST. NEWS NETWORK (July 11, 2018), <https://perma.cc/K3CM-LE49>.
55. 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).
56. See generally *SGI Featured Ranchers*, SAGE GROUSE INITIATIVE, <https://perma.cc/Q5F3-3KPG>.
57. See, e.g., Lorien R. Belton, S. Nicole Frey, & David K. Dahlgren, *Case Study: Participatory Research in Sage-Grouse Local Working Groups: Case Studies from Utah*, 11 HUMAN-WILD-LIFE INTERACTIONS 287, 287–88 (2017), <https://perma.cc/35JE-97TR>.
58. W. Watersheds Project v. Schneider, 417 F. Supp. 3d 1319, 1325 (D. Idaho 2019).
59. SAGE-GROUSE NAT'L TECH. TEAM, A REPORT ON NATIONAL GREATER SAGE-GROUSE CONSERVATION MEASURES (2011), <https://perma.cc/C3HS-3RTD>.
60. W. Watersheds Project v. Salazar, No. 4:08-CV-516-BLW, 2012 WL 5880658, at \*2 (D. Idaho Nov. 20, 2012); see also *W. Watersheds Project*, 417 F. Supp. 3d at 1325.

its 2015 Sage-Grouse plans, spanning the ten relevant states and revising ninety-eight federal land use plans.<sup>61</sup> These plans established three types of habitat management areas: General Habitat Management Areas (“GHMAs”), Priority Habitat Management Areas (“PHMAs”), and Sagebrush Focal Areas (“SFAs”).<sup>62</sup> GHMAs contain habitat that requires some special management to sustain Sage-Grouse, while PHMAs are a higher-priority category for lands with the highest habitat value for Sage-Grouse. SFAs, a subset of PHMAs, are Sage-Grouse “strongholds” that are most vital to the species’ persistence, and are meant to be subject to the strictest regulation. New surface disturbance (e.g., from energy development and ranching) is to be mostly eliminated in SFAs, avoided or limited in PHMAs, and minimized in GHMAs.<sup>63</sup>

Partially in response to these plans, the FWS revised its previous “warranted but precluded” listing determination to “not warranted” because the plans “include[d] substantial provisions for addressing activities that occur in sage-grouse habitats and affect the species, including those threats identified in 2010 as having inadequate regulatory measures.”<sup>64</sup> The FWS specifically cited the 2015 plans’ emphases on protecting “high-quality sage grouse lands with substantial populations” and “requiring mitigation for residual impacts” from energy development and other BLM-approved actions.<sup>65</sup>

The Trump administration dramatically shifted the federal approach to Sage-Grouse conservation. Aspiring to spur American energy development,<sup>66</sup> Interior Secretary Ryan Zinke established a team to “evaluate both Federal sage-grouse plans and state plans and programs to ensure they are complementary.”<sup>67</sup> Citing no research, Zinke directed the team to focus on what he called “principal threats” to Sage-Grouse habitat: invasive grasses and wildland fire.<sup>68</sup> (While invasive species and wildfire do impact Sage-Grouse, experts generally recognize energy development, drought, and grazing management, along with

- 
61. See *W. Watersheds Project*, 417 F. Supp. 3d at 1326. For the 2015 plans state by state, see *BLM Greater Sage-Grouse Plans*, BUREAU OF LAND MGMT., <https://perma.cc/B99U-J84R>.
  62. BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE GREAT BASIN REGION, at S-1 (2015), <https://perma.cc/WQ6Y-RUVF>; see also *W. Watersheds Project*, 417 F. Supp. 3d at 1326.
  63. BUREAU OF LAND MGMT., *supra* note 62, at S-1.
  64. 12-Month Finding on a Petition to List Greater Sage-Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species, 80 Fed. Reg. 59,857, 59,887 (Oct. 2, 2015); *W. Watersheds Project*, 417 F. Supp. 3d at 1326.
  65. 12-Month Finding on a Petition to List Greater Sage-Grouse, 80 Fed. Reg. at 59,881–82; *W. Watersheds Project*, 417 F. Supp. 3d at 1327.
  66. See S.O. 3349, *supra* note 3.
  67. Press Release, Dep’t of the Interior, Secretary Zinke Signs Order to Improve Sage-Grouse Conservation, Strengthen Communication and Collaboration Between States and Feds, (June 8, 2017), <https://perma.cc/UGB5-5JQG>; see also S.O. 3353, *supra* note 3.
  68. Press Release, Dep’t of the Interior, *supra* note 67.

invasive species and wildfire, as the most significant threats.<sup>69</sup> Of those, energy development and grazing management are the most directly regulatable.) After ignoring EPA comments on its draft environmental review documents, the BLM finalized those reviews in December 2018.<sup>70</sup>

Most observers, including Judge Winmill, did not believe the stated intent of the amendments. Rather than primarily addressing the impacts of invasive grasses and wildland fire, “the effect on the ground [of the amendments] was to substantially reduce protections for sage grouse without any explanation,” especially with regard to those areas particularly threatened by energy development and other anthropogenic disturbance.<sup>71</sup> The court noted in particular the elimination of the “compensatory mitigation” and “net conservation gain” requirements that had been cited in the FWS 2015 “not warranted” finding.<sup>72</sup> It noted the decrease of lek buffers, expansion of potentially leasable acreage for energy development, and increased availability of buffer extensions, for example.<sup>73</sup>

This dramatic shift in federal policy prompted the plaintiffs in this case to submit a supplemental complaint amending their original lawsuit critiquing the 2015 plans<sup>74</sup> to instead defend those plans against the 2019 amendments.<sup>75</sup>

## II. WESTERN WATERSHEDS PROJECT V. SCHNEIDER

In *Western Watersheds Project*, Judge Winmill reviewed (and ultimately granted) the plaintiffs’ motion for summary judgment, barring the BLM from implementing its amendments to the 2015 Sage-Grouse plans. The plaintiffs’ action was brought under NEPA, the Federal Land Policy and Management Act (“FLPMA”) governing BLM actions, and the National Forest Management Act (“NFMA”) governing U.S. Forest Service planning procedures. The court employed a multivalent standard of review. For a preliminary injunction, the plaintiffs needed to make a “clear showing” that they were likely to succeed on the merits, there was potential for irreparable harm, a balance of the equities would be in favor of the injunction, and the injunction would protect the public

---

69. 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, *supra* note 14, at 549, 554–55.

70. *W. Watersheds Project*, 417 F. Supp. 3d at 1327; see Notices of Availability of Records of Decision, 84 Fed. Reg. 10,322–30 (Mar. 20, 2019).

71. *W. Watersheds Project*, 417 F. Supp. 3d at 1327; see, e.g., sources cited *supra* note 4.

72. *W. Watersheds Project*, 417 F. Supp. 3d at 1328.

73. *Id.*

74. See Complaint at 1–2, *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319 (D. Idaho 2019) (No. 1:16-CV-83-BLW).

75. See First Supplemental Complaint at 1, *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319 (D. Idaho 2019) (No. 1:16-CV-83-BLW).

interest.<sup>76</sup> For its review of the NEPA claims, the court employed the classic “hard look” doctrine, requiring agencies to both consider and disclose analysis of significant environmental impacts.<sup>77</sup> NEPA itself does not offer grounds for overturning or enjoining actions—instead, NEPA claims are evaluated under the arbitrary and capricious standard of the APA.<sup>78</sup> This standard requires a “rational connection between the facts found and the choice made” by the agency.<sup>79</sup>

The Supreme Court has considered similar situations in which the federal government is attempting to shift or reverse its established policy.<sup>80</sup> In general, the Court applies the “rational connection” test rooted in the APA.<sup>81</sup> In cases where an agency is rescinding or replacing an old rule, the Court in 2009 held in *FCC v. Fox Television Stations, Inc.* that such actions need not necessarily be “justified by reasons more substantial than those required to adopt a policy in the first instance.”<sup>82</sup> In other words, “the agency need not always provide a more detailed justification [for the new rule] than what would suffice for a new policy created on a blank slate.”<sup>83</sup> Despite this, in *Western Watersheds Project*, the district court emphasized an earlier Supreme Court decision which held that the APA’s “rational connection” standard “includes a duty to explain any ‘departure from prior norms.’”<sup>84</sup> In focusing on this obligation to explain such departures, the district court established a subtly higher standard for agency rule rescission and replacement. Although the reasons for adopting the new rule or action need not be “more substantial” than the reasons justifying the old policy, the explanation must recognize that the new rule is not, in fact, occurring on a blank slate, but is a *shift in policy*. That is, the new rule or action need not be *better justified* than the old rule, but rather the reasons for the *policy shift itself* (not only the new rule itself) must meet the same standards as did the old rule under the APA and *State Farm*.<sup>85</sup> The significance of this heightened standard is discussed in Part III.

Before proceeding to the merits of the motion for preliminary injunction, the court ruled that it could properly consider the declarations of three expert

---

76. *W. Watersheds Project*, 417 F. Supp. 3d at 1328 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

77. *Id.* at 1329 (citations omitted).

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

79. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

80. *See, e.g.*, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587 (argued Nov. 12, 2019); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 670–75 (1973).

81. *See State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168).

82. 556 U.S. 502, 514 (2009).

83. *Id.* at 515.

84. *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1329 (D. Idaho 2019) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)).

85. *State Farm*, 463 U.S. at 43.

witnesses (Drs. Clait Braun, Amy Haak, and John Connelly, academic experts in Sage-Grouse biology and conservation) despite the fact that the declarations were not included in the administrative record. This ruling, while largely procedural, is indicative of the district court's deference to and prioritization of science-based decision-making throughout this case.

The court finally turned to the four elements required to merit a preliminary injunction: (1) likelihood of success; (2) irreparable harm; (3) balance of the equities; and (4) public interest.<sup>86</sup> The court first considered the likelihood of success based on the merits of the plaintiffs' NEPA and APA claims. NEPA requires federal agencies to submit environmental impact statements ("EISs") for all "major Federal actions significantly affecting the quality of the human environment,"<sup>87</sup> which must include alternatives to the proposed action, including a "no action" alternative.<sup>88</sup> In this case, the BLM considered only a "no action" alternative retaining the 2015 plans and a "Management Alignment Alternative" representing the 2019 amendments. The district court ruled that this single-alternative approach failed to meet the standards in NEPA, relying on recent Ninth Circuit precedent in *Protect Our Communities Foundation v. LaCounte*.<sup>89</sup>

The BLM also failed to meet NEPA's "hard look" standard.<sup>90</sup> The court cited the BLM's ignoring of EPA's comments on the BLM's draft EISs. Judge Winmill noted that the amendments' "weakening of protections is *contrary to the science* contained in the NTT and [Conservation Objectives Team] Reports."<sup>91</sup> For the district court, this contradiction with science failed the "hard look" test.<sup>92</sup>

The BLM likely failed to properly gauge the scope of its review of cumulative impacts.<sup>93</sup> Not every EIS is required to consider cumulative impacts of the major federal action at issue, but regulations issued by the Council on Environmental Quality do require agencies to consider whether the cumulative impact

---

86. *W. Watersheds Project*, 417 F. Supp. 3d at 1328 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008)).

87. National Environmental Policy Act of 1969 § 102(C), (C)(iii), 42 U.S.C. § 4332(C), (C)(iii).

88. 40 C.F.R. § 1502.14(c), (d) (2019).

89. 939 F.3d 1029 (9th Cir. 2019) (providing a detailed review of the alternatives analysis requirement and holding that analysis of five alternatives for a wind energy development project was sufficient).

90. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989) (interpreting NEPA to require agencies making decisions to "have available, and . . . carefully consider, detailed information concerning significant environmental impacts"); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

91. *W. Watersheds Project*, 417 F. Supp. 3d at 1332 (emphasis added).

92. *Id.* (emphasis added) ("[W]hen the BLM substantially reduces protections for sage grouse contrary to the best science . . . there must be some analysis and justification – a hard look – in the NEPA documents.").

93. See 40 C.F.R. § 1508.7 (2019) (defining "cumulative impact").

of an action might make its impact “significant” in the first place.<sup>94</sup> In this case, the court held that, while courts must generally defer to “an agency’s determination of the scope of its cumulative effects review,” the failure to consider the multistate implications of EISs impacting a bird with an eleven-state range likely violated NEPA.<sup>95</sup>

The district court criticized the BLM’s elimination of the compensatory mitigation provisions in the 2015 plans. Instead of evaluating this under the “hard look” standard, Judge Winmill noted that this elimination was not included in the draft EISs, but only in the final EISs. It was therefore not explicitly open to public comment as were the other aspects of the 2019 amendments, in violation of NEPA’s public participation requirements. This “insulat[ion] of the agency’s] decision-making process from public scrutiny . . . renders NEPA’s procedures meaningless.”<sup>96</sup> As the Supreme Court has noted, NEPA’s requirements, while essentially procedural and not substantive,<sup>97</sup> are fundamentally based on both the consideration of environmental impacts and their disclosure.<sup>98</sup> Instead of eliminating these provisions in the final EISs without warning, the district court found, the BLM should have issued supplemental draft EISs to allow for proper scoping and public participation.<sup>99</sup> The district court found that, in violating the disclosure requirement, the BLM contravened not just a certain portion of NEPA, but all of its major components.<sup>100</sup>

Having established that the BLM violated NEPA and the APA, the district court proceeded to consider the potential harms. Judge Winmill did not sidestep this issue at all, but instead directly cited Trump Administration officials:

Defendants argue that such actions are not imminent, but the Court disagrees. The record shows that the 2019 Plan Amendments were designed to open up more land to oil, gas, and mineral extraction as soon as possible. That was the expressed intent of the Trump Administration and then-Secretary Ryan Zinke. There is no indication

---

94. *See id.* § 1508.27 (“Significantly as used in NEPA requires consideration of both context and intensity.”).

95. *W. Watersheds Project*, 417 F. Supp. 3d at 1332–33 (citing *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 959 (9th Cir. 2003)).

96. *California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982) (citing *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 121 (D.N.H. 1975)).

97. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

98. *See Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 96 (1983).

99. *W. Watersheds Project*, 417 F. Supp. 3d at 1333–34.

100. This repudiation of public participation is also a sharp divergence from what was previously a highly collaboratively rational conservation process, insofar as it denied stakeholders outside the BLM access to both essential information and a forum in which to discuss the provisions up for elimination and to be heard.

that current Secretary David Bernhardt is proceeding at any slower pace.<sup>101</sup>

In this section of the opinion, the court did not even mention the 2019 amendments' stated intent of "improving alignment with State management plans and strategies for Greater Sage-Grouse."<sup>102</sup> Instead, the court focused on the publicly professed purposes of prominent political appointees. This indicates a willingness in some federal courts to recognize political realities in preference to sticking strictly to a legal or administrative record.

The court quickly dispatched with the third and fourth elements for preliminary injunctions. In balancing equities, the court weighed potential harm to the Sage-Grouse versus limits on the discretion of the BLM. Since the BLM will still be able to issue new leases and permits under the 2015 plans, the court found that the balance of hardships tipped toward plaintiffs.<sup>103</sup> Making similarly fast work of the public interest requirement, the court cited Ninth Circuit precedent for the simple proposition that "preserving nature"<sup>104</sup> and "careful consideration of environmental impacts"<sup>105</sup> are within the public interest.<sup>106</sup>

A preliminary injunction against the 2019 amendments was granted. The BLM has since issued six supplemental EISs<sup>107</sup> in response to the explicit mention of such analysis in the opinion, and has even extended the public comment period beyond the requisite forty-five days.<sup>108</sup> To satisfy the standards laid out in *Western Watersheds Project*, however, the supplemental EISs will need to not

101. *W. Watersheds Project*, 417 F. Supp. 3d at 1334.

102. Approved Resource Management Plan Amendment for Greater Sage-Grouse Conservation, Idaho, 84 Fed. Reg. 10,325, 10,326 (Mar. 20, 2019).

103. *W. Watersheds Project*, 417 F. Supp. 3d at 1334.

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

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

106. *W. Watersheds Project*, 417 F. Supp. 3d at 1334.

107. BUREAU OF LAND MGMT., IDAHO DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, GREATER SAGE-GROUSE 2020 (Feb. 14, 2020), <https://perma.cc/3KML-ATVK>; BUREAU OF LAND MGMT., WYOMING DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, GREATER SAGE-GROUSE 2020 (Feb. 19, 2020), <https://perma.cc/5P49-PY6A>; BUREAU OF LAND MGMT., COLORADO DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, GREATER SAGE-GROUSE 2020 (Feb. 19, 2020), <https://perma.cc/HVW7-KWPN>; BUREAU OF LAND MGMT., UTAH DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, GREATER SAGE-GROUSE 2020 (Feb. 19, 2020), <https://perma.cc/5J9J-SS4W>; BUREAU OF LAND MGMT., NEVADA AND NORTHEASTERN CALIFORNIA DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, GREATER SAGE-GROUSE 2020 (Feb. 19, 2020), <https://perma.cc/QWG4-59PS>; BUREAU OF LAND MGMT., OREGON DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT, GREATER SAGE-GROUSE 2020 (Feb. 19, 2020), <https://perma.cc/232N-DPKX>.

108. See Press Release, Bureau of Land Mgmt., BLM Extends Comment Period on Greater Sage-Grouse Analysis (Apr. 6, 2020), <https://perma.cc/6EAB-ZKLB>; Scott Streater, *BLM*

only allow for public comment on those provisions, but also substantively consider new alternatives, respond to substantive comments such as EPA's, and consider the range-wide cumulative impacts of the proposed amendments. Despite the cabining of NEPA's substantive requirements, the BLM will likely be required *de facto* to demonstrate to Judge Winmill that any amendments to the 2015 plans are in fact based on the NTT Report or otherwise in the "best available science"—a term Winmill has borrowed from ESA case law and relied upon in almost every instantiation of the Sage-Grouse litigation as well as other environmental law cases dealing with NEPA and NFMA.<sup>109</sup>

### III. USING NEPA TO PRESERVE FEDERAL POLICY

Judge Winmill's decision indicated a potential pathway for advocacy groups or states to use NEPA (or likely NFMA or FLPMA) to challenge scientifically unsound reversals of federal policy. The 2019 amendments essentially rolled back the Obama-era 2015 plans.<sup>110</sup> Instead of requiring only a reasoned basis under *Fox* for the 2019 amendments,<sup>111</sup> Winmill found the 2015 plans to be "prior norms" from which the BLM had a duty to explain its deviation.<sup>112</sup> This standard of review is different from how *Fox* has generally been understood. *Fox* has been interpreted as holding that the APA burden for new policy is the same for a new policy replacing a previous one as it is for a new rule all

---

*Gives Public Extra Time to Review Revised Protections*, E&E NEWS (Apr. 6, 2020), <https://perma.cc/GL3R-WF2U>.

109. See, e.g., *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2012 WL 5880658, at \*2 (D. Idaho Nov. 20, 2012); *W. Watersheds Project v. Salazar*, No. 4:08-CV-516-BLW, 2011 WL 4526746, at \*13 (D. Idaho Sept. 28, 2011); *Jayne v. Rey*, 780 F. Supp. 2d 1099, 1107 (D. Idaho 2011). The "best available science standard" is based on the ESA's requirement to "use the best scientific and commercial data available" in jeopardy consultations. 16 U.S.C. § 1536(a)(2) (2018). Although some judges, such as Winmill, borrow and apply that standard to NEPA, the regulatory standards under NEPA are that science must be "high quality" and "accurate." 40 C.F.R. § 1500.1(b) (2019).
110. *W. Watersheds Project*, 417 F. Supp. 3d at 1328.
111. 556 U.S. 502, 514–15 (2009).
112. See *W. Watersheds Project*, 417 F. Supp. 3d at 1329, 1333 (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.")).



together.<sup>113</sup> Judge Winmill’s standard was slightly less deferential than the Supreme Court’s in *Fox*.<sup>114</sup>

The district court held that deviation from the 2015 plans equated to a deviation from “prior norms” that required its own rational basis under *State Farm*—it was not merely the 2019 amendments’ disregard of the underlying circumstances or scientific basis of the original policy that required explanation per se, but the departure itself. This holding goes beyond Scalia’s potential requirement in *Fox* for agencies to provide “a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.”<sup>115</sup> Instead, Judge Winmill’s order more closely tracks Justice Kennedy’s partial concurrence in *Fox*.<sup>116</sup> Disagreeing slightly with Scalia, Kennedy argued that there was no single rule that could determine the scope of “reasoned explanation” for a new policy required in comparison to the explanation for the original policy.<sup>117</sup> Instead, agency discretion was necessarily cabined to preserve the separation of powers, as specified by the APA.<sup>118</sup> The arbitrary and capricious standard, in Kennedy’s view, means that “[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”<sup>119</sup> Stated another way, Kennedy (like Winmill) would require agencies to show not only a rational basis for their new policy, but for the shift in policy itself.

Kennedy distinguished *Fox* from *State Farm*. *Fox* was a challenge of the FCC’s first-ever determination “that a nonliteral (expletive) use of the F- and S-Words could be actionably indecent, even when the word is used only once.”<sup>120</sup> With regard to this expansion of the prohibition on indecent language, Scalia argued, as above, that the shift in policy did not require any special explanation—i.e., the FCC was not required to explain why such uses were not banned before. In *State Farm*, Congress had directed the National Highway Traffic Safety Administration (“NHTSA”) to issue regulations regarding motor

113. See, e.g., Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349, 1367 & n.114 (2013); Daniel W. Morton-Bentley, Annotation, *Construction and Application of Administrative Procedure Act*, 5 U.S.C.A. §§ 500 et seq.—*Supreme Court Cases*, 24 A.L.R. Fed. 3d Art. 5, § 31 (2017); E.H. Schopler, Annotation, *Comment Note: Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R.2d 1126, § 6 (cumulative supp. 2020) (reading *Fox* to not require “that reasons for the new policy are better than reasons for the old one”); Leading Case, *FCC v. Fox Television Stations, Inc.*, 123 HARV. L. REV. 352 (2009) (incorrectly claiming that Scalia “held that courts should review revisions of prior agency actions under the same standard as initial agency actions”).

114. See Albert C. Lin, *President Trump’s War on Regulatory Science*, 43 HARV. ENVTL. L. REV. 248, 273 (2019).

115. 556 U.S. at 516.

116. *Id.* at 535–39 (Kennedy, J., concurring in part).

117. *Id.* at 535 (Kennedy, J., concurring in part).

118. *Id.* at 536 (Kennedy, J., concurring in part).

119. *Id.* at 537 (Kennedy, J., concurring in part).

120. *Id.* at 508 (majority opinion).

vehicle safety.<sup>121</sup> NHTSA, based on a factual finding that passive restraint systems (airbags and automatic seatbelts) save lives and prevent injuries,<sup>122</sup> promulgated a regulation requiring cars to have such systems.<sup>123</sup> When the next administration rescinded the regulation and failed to address its prior factual findings that had led to the original regulation, the rescission was overturned and the issue remanded to NHTSA for further explanation.<sup>124</sup>

Winmill was correct to follow in Kennedy's footsteps. *Western Watersheds Project* is closer to *State Farm* than to *Fox*. Rather than continuing the trend of expanding the class of a certain regulated object (i.e., indecent language in *Fox*), in this case the BLM was effectively reversing course, rescinding the 2015 plans. As Winmill noted, "the effect on the ground was to substantially reduce protections for sage grouse without any explanation that the reductions were justified by, say, changes in habitat, improvement in population numbers, or revisions to the best science contained in the NTT and CTO Reports."<sup>125</sup> The fact pattern of *Western Watersheds Project* therefore closely tracks that of *State Farm*: an agency tasked with a regulatory duty made a factual inquiry and promulgated a regulation, and a subsequent administration reversed or countermanded that policy with an insufficient scientific or factual foundation.

Despite the common interpretation of *Fox* to suggest that changes in federal policy have no heightened standard of review compared to the original policy under the APA, *Western Watersheds Project* makes clear that this is not precisely the case. While the difference between these standards of review is subtle, the holding that inadequate consideration of reasonable alternatives and cumulative impacts, as required under NEPA,<sup>126</sup> merits a preliminary injunction is striking. Judge Winmill's opinion offers a pathway that advocacy groups, states, municipalities, or other entities could take to challenge shifts in federal policy. This may be particularly effective for challenges based in NEPA, NFMA, FLPMA, the Clean Water Act, the Clean Air Act, or any other federal statute that mandates significant reliance of federal agencies on rigorous analysis.

This decision, depending on the extent to which other courts follow Judge Winmill's line of reasoning, may have the broader effect of increasing ossification of federal policy across administrations; which will, of course, be to the benefit of whatever party is defending the original policy. From a longer-term perspective, however, it is unclear (and highly debated) what advantages or dis-

---

121. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 33 (1983).

122. See *id.* at 35.

123. See *id.* at 37.

124. See *id.* at 57.

125. *W. Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1327–28 (D. Idaho 2019).

126. See *Ctr. for Biological Diversity v. Dep't of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (describing required impact and alternatives analysis under NEPA); *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) (describing how cumulative impacts must be considered in setting the scope of an EIS pursuant to NEPA even if the EIS itself is not required to contain a discussion of those cumulative impacts).

advantages ossification may have. On the one hand, increased ossification of administrative regulation may handicap the only tool remaining at the federal government's disposal to address environmental issues, since Congress has failed to pass any truly significant environmental legislation since the 1990 Clean Air Act amendments.<sup>127</sup> Increasing standards of review and outside constraints may in theory so overburden informal agency rulemaking that agency actions become substantially impeded,<sup>128</sup> especially with regard to complex and dynamic public land use planning.<sup>129</sup> On the other hand, ossification may result in increased regulatory stability, to the benefit of industry, private investors, and others.<sup>130</sup> In the short term, this heightened standard of review may be a boon to environmental advocates challenging the rollbacks of regulations of present and future administrations.<sup>131</sup>

#### IV. REJECTION OF COLLABORATIVE RATIONALITY

More than perhaps any other listing or conservation process, the National Greater Sage-Grouse Planning Strategy was marked with comprehensive collaboration between federal, state, environmental, and private stakeholders.<sup>132</sup>

- 
127. See Victor B. Flatt, *Frozen in Time: The Ossification of Environmental Statutory Change and the Theatre of the (Administrative) Absurd*, 24 *FORDHAM ENVTL. L. REV.* 125 (2017).
128. See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 *GEO. WASH. L. REV.* 1414, 1423–25 (2012). See generally Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 *TEX. L. REV.* 1701, 1704 n.7 (2008) (for a condensed list of relevant literature); Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 *ADMIN. L. REV.* 453 (1995).
129. See Mark Squillace, *Rethinking Public Land Use Planning*, 43 *HARV. ENVTL. L. REV.* 415, 434–37 (2019) (outlining the difficulty of planning for public lands with high potential for oil and gas development).
130. See Aaron L. Nielson, *Sticky Regulations*, 85 *U. CHI. L. REV.* 85, 116–25 (2018) (describing effects of regulatory ossification).
131. See, e.g., *Regulatory Rollback Tracker*, *supra* note 12.
132. The success of the collaborative conservation efforts regarding Sage Grouse has been attested to by entities across the political spectrum, including federal agencies, see *Collaborative Conservation Is Paying Off for the Sagebrush Ecosystem*, SAGE GROUSE INITIATIVE (Oct. 5, 2016), <https://perma.cc/3RK7-73LF>; DEP'T OF THE INTERIOR, DEP'T OF AGRIC. & W. ASS'N OF FISH & WILDLIFE AGENCIES, *GREATER SAGE-GROUSE CONSERVATION & THE SAGEBRUSH ECOSYSTEM: COLLABORATIVE CONSERVATION AT WORK 9* (2016), <https://perma.cc/GC45-ASGE> (quoting Secretary of the Interior Sally Jewell as referring to the sage-grouse effort as an “epic collaboration”); Christy Goldfuss, Sally Jewell & Tom Vilsack, *Unprecedented Collaboration to Save Sage-Grouse is the Largest Wildlife Conservation Effort in U.S.*, WHITE HOUSE: BLOG (Sept. 22, 2015), <https://perma.cc/7TLV-KHFG> (noting the “unprecedented conservation cooperation” between western governors, state and federal agencies, and more than 1100 ranchers), environmental groups, see Jonathan Carey, *The Collaborative Effort to Save the Greater Sage-Grouse Continues*, NAT'L AUDUBON SOC'Y (Sept. 22, 2016), <https://perma.cc/J76G-627R>; Eric Holst, *A Bird Has United Thousands. It Will Not Divide Us*, *ENVTL. DEF. FUND: GROWING RETURNS BLOG* (Aug. 18, 2017),

The process incorporated not just wildlife biology and environmental science, but also economics, law, and public policy.<sup>133</sup> The BLM's divergence from this process rejects not only science-based decision-making, but also hard-won partnerships among public, private, and nongovernmental stakeholders.

The collaborative decision-making process used for the Greater Sage-Grouse is best understood in the context of multiple overlapping rationalities.<sup>134</sup> Contemporary social theorists, drawing heavily from Habermas, Foucault, and Bourdieu, articulate this phenomenon as “the idea that different cultures and academic disciplines develop distinct understandings of what is ‘reasonable’, reflecting their specific contexts and tasks.”<sup>135</sup> This is often described in terms of cross-cultural communication or differences between academic disciplines, but it also applies to different political and private entities.

Consider, for example, the judicial and executive branches. While both are components of the same unitary government, the court and the agency each separately “develops its own specific implementation of rationality, adapted to the objects of its enquiry, and often demanding the application of wisdom, craft, and judgement rather than the mechanical application of procedural formulae.”<sup>136</sup> They “are distinguished by a distinct focal problem, a domain of facts related to the problem, explanatory goals, methods, and an associated vocabulary.”<sup>137</sup> More simply put, the court and the agency are faced with different tasks and challenges, and each has a specialized set of skills—a “craft”—with which to respond to those tasks and challenges.<sup>138</sup> And, most relevant to this case, the court and the agency each have different ways of *making sense* of a particular legal or political problem. The action or outcome that is “rational” for an agency to take in any given instance might be entirely irrational in the eyes of a court.<sup>139</sup> This gap is not only due to their different perspectives and obligations,

---

<https://perma.cc/WBK9-AUEC> (“one of the largest collaborative conservation efforts in America’s history”); Christy Plumer, *Five Organizations Leading Conservation Success in Sagebrush Country*, THEODORE ROOSEVELT CONSERVATION PARTNERSHIP (Dec. 8, 2017), <https://perma.cc/9XBW-Y2P2> (“a landmark victory for effective collaboration”), and state agencies, see *Sagebrush Ecosystem Conference to Build on Successful Conservation Efforts*, W. ASS’N OF FISH & WILDLIFE AGENCIES (Feb. 16, 2016), <https://perma.cc/N3ER-GHQF> (“An unprecedented collaboration of wildlife management agencies, scientists, private landowners, industry and other conservation.”).

133. See PARTNERS FOR CONSERVATION, PERSPECTIVES ON COLLABORATIVE CONSERVATION 6 (2018), <https://perma.cc/9A3J-C449> (describing the uniqueness of the effort’s “scale and scope,” “use of science,” “variety of perspectives,” and “proactive, voluntary conservation”).

134. See generally 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., 1984).

135. ALISTER E. MCGRATH, THE TERRITORIES OF HUMAN REASON: SCIENCE AND THEOLOGY IN AN AGE OF MULTIPLE RATIONALITIES 19 (2019).

136. *Id.* at 40.

137. *Id.*

138. *Id.*

139. See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

but because the “focal problem, . . . facts, explanatory goals, methods, and . . . associated vocabulary” of the agency is fundamentally defined by a combination of its own mission, the current presidential administration, and path dependence. The problem, facts, goals, methods, and vocabulary of the court, by contrast, are defined by its own jurisprudence in constitutional, statutory, administrative, and common law. These rationalities of court and agency are not separate, of course, but intersect and overlap, as they must for courts to make sense of agency decision-making and vice versa. Nonetheless, each entity applies a different set of tools to understand a given situation and generate a “rational” outcome.

Collaborative groups have a distinct rationality as well. 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.”<sup>140</sup> Processes that are collaboratively rational have the potential to produce remarkably effective and durable outcomes by bringing together a diverse group of stakeholders to generate collectively acceptable solutions through interest-based negotiation as well as other facilitative processes such as collaborative learning.<sup>141</sup> The potential benefits of these collaboratively rational processes also go beyond option generation to include changes in the stakeholders themselves, such as “individual and collective learning that will help make the [collaborative group] more adaptive and resilient” as well as institutional changes improving efficacy, adaptability, and resilience.<sup>142</sup> In response to these benefits, the use of collaborative processes, especially in land use planning and other environmental fields, has been increasing.<sup>143</sup> The success and outcomes of these processes, however, very much depend on both the design of the collaborative process, and more importantly, the manner in which the parties engage with it. For example, a positions-based negotiation process based in logrolling or tit-for-tat will not only produce a different outcome than an interests-based negotiation based on self-enforcing agreements—the latter will also typically produce trust where the former will not.<sup>144</sup>

The national collaborative Sage-Grouse conservation effort bore many hallmarks of collaborative rationality. Immense numbers of stakeholders were involved in a long-term process that involved face-to-face deliberation, reconciliation between parties, and substantive engagement with the interests of all

---

140. INNES & BOOHER, *supra* note 10, at 6.

141. *See id.* at 7. *See generally* ROGER FISHER ET AL., GETTING TO YES (3d ed. 2011) (establishing the principles of interest-based negotiation); STEVEN E. DANIELS & GREGG B. WALKER, WORKING THROUGH ENVIRONMENTAL CONFLICT: THE COLLABORATIVE LEARNING APPROACH (2001) (establishing the principles of collaborative learning).

142. INNES & BOOHER, *supra* note 10, at 9–10.

143. *See generally* TRACYLEE CLARKE & TARLA RAI PETERSON, ENVIRONMENTAL CONFLICT MANAGEMENT 11–22 (2016).

144. *Id.* at 114.

involved. It has so far produced both a fixed outcome (the 2015 plans) as well as dynamic processes and relationships, such as the Sage Grouse Initiative, that continue to shape habitat conservation. The fixed outcome, as discussed above, has been heralded by participants, observers, and the district court in this case as an exemplary process of collaborative work that also incorporated the scientific rationalities of involved experts (agencies and academics) and communicative rationalities of other stakeholders, especially private landowners and environmental groups.

The collaborative, long-term nature of this conservation effort alters the stakes of the BLM's proposed revisions to the 2015 plans. Instead of merely shifting away from science-based decision-making, as has been the trend over the last few years,<sup>145</sup> the BLM's proposed action calls into question the validity of the collaborative Sage-Grouse process as a whole. For example, many private landowners partnered with federal and state agencies to take voluntary conservation actions in part to avoid the possibility of an ESA listing and subsequent regulatory enforcement.<sup>146</sup> They did so relying to a certain extent on implied agency assurances of regulatory stability. The landowners' action becomes significantly less meaningful if subsequent BLM action invalidates the very aspects of the collaboratively-generated outcomes that prevented regulatory enforcement under the ESA, as was held in this case. This radical about-face of the BLM and deconstruction of key components of this holistic process devalues the importance and potentially jeopardizes the beneficial relational outcomes of this deeply democratic process—especially if continued habitat degradation confirms private landholders' fears of ESA listing.

Instead of treating collaborative outcomes as merely precatory, the BLM and other federal agencies should strive to give collaborative groups and their decisions greater credence.<sup>147</sup> Beyond mere separation of powers, courts defer to agency decision-making on highly technical issues as a practical matter due to the expertise required to evaluate the decision.<sup>148</sup> Like agencies, collaboratively rational groups are, collectively, experts in their field. Their expertise definitionally 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.<sup>149</sup> This suggestion is not to say that agencies can or should delegate authority to a collaborative process or rubber-stamp their proposed outcomes—especially in cases where the

---

145. See generally Lin, *supra* note 114.

146. See Katherine L. Wollstein & Emily Jane Davis, *A "Hammer Held over Their Heads": Voluntary Conservation Spurred by the Prospect of Regulatory Enforcement in Oregon*, 11 HUMAN-WILDLIFE INTERACTIONS 258, 269–70 (2017).

147. Cf. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

148. See *id.* at 865.

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

final action to be taken is an inherently federal function.<sup>150</sup> Instead, agencies could view this type of deference to collaborative groups as an expanded interpretation of NEPA's public participation requirements.<sup>151</sup> 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. (Like judicial evaluation of NEPA compliance, this would be a question of procedure, not substance.) Overall, as courts defer to agencies, agencies should seriously consider deferring to the collective cognitive capacity that a diverse set of stakeholders (including the agency itself) brings to a situation that is scientifically complex, politically controversial, and culturally conflicted. 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.

### CONCLUSION

*Western Watersheds Project* will now proceed to evaluation on its merits in the District of Idaho, since the defendants withdrew their appeals.<sup>152</sup> Since preliminary injunctions are dramatic interventions, courts avoid them unless they are fairly confident of a particular outcome on the merits. As it stands, Judge Winmill will likely rule against the BLM either at trial or at the summary judgment stage.

It is unclear why the BLM withdrew its appeal of the injunction. It may be due to lack of resources or bandwidth. At this time, the BLM is continuing its move to Grand Junction, Colorado,<sup>153</sup> the novel coronavirus is upending the U.S. economy and social fabric,<sup>154</sup> and the Department of the Interior is under

---

150. See *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (“[W]hile federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so.”); *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 955 (9th Cir. 2003) (“Even though the concept of a cooperative Conservation Agreement is attractive, and ought to be encouraged, federal agencies cannot delegate the protection of the environment to public-private accords. Even given the cooperation of private entities, the agencies must vigilantly and independently enforce environmental laws.”); *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 2004); *Forest Serv. Emps. for Env'tl. Ethics v. U.S. Forest Serv.*, 689 F. Supp. 2d 891, 903–05 (W.D. Ky. 2010); *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 21 (D.D.C. 1999).

151. See 40 C.F.R. § 1500.2(d) (2019).

152. See Niina H. Farah, *BLM Drops Appeal of Order Blocking Sage Grouse Plan*, E&E NEWS (Mar. 30, 2020), <https://perma.cc/Z24M-6S5S>.

153. See *Headquarters Move West*, BUREAU OF LAND MGMT., <https://perma.cc/8AET-R4YU>.

154. See *Coronavirus Live Updates*, N.Y. TIMES (Apr. 26, 2020), <https://perma.cc/5DDC-NXCX>.

fire for its national park policies in response to the pandemic.<sup>155</sup> Alternatively, the BLM may have reprioritized its multiple legal battles over the Sage-Grouse. Two days after the BLM dropped its appeal in this case, the agency filed a notice of intent to appeal a different decision from the same district court.<sup>156</sup> That decision, in a suit also filed by Western Watersheds Project, invalidated three lease sales from 2018, requiring a return of \$125 million to the lessees.<sup>157</sup> Earlier that same month, the BLM proposed adding a new shortcut to its NEPA regulations, which would allow it to conduct removal of piñon pine and western juniper trees in swaths of up to 10,000 acres with minimal environmental review.<sup>158</sup> The FWS also decided not to list the bi-state Sage-Grouse, a particularly vulnerable subpopulation of the Greater Sage-Grouse, under the ESA.<sup>159</sup>

As *Western Watersheds Project* proceeds to evaluation on the merits, the decision discussed here stands for the importance of agencies relying on high-quality decision-making processes. The BLM and other federal agencies should strive to give collaborative groups and their decisions greater credence, as agencies have done intermittently in the past.<sup>160</sup> Like agencies, collaboratively rational groups are, collectively, experts in their field. 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.<sup>161</sup>

Agencies could elevate the importance of outcomes from collaborative groups as an expanded interpretation of NEPA's public participation requirements.<sup>162</sup> Federal officials 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

---

155. See Rob Hotakainen, *Patchwork of Closures Draws Congressional Ire*, E&E NEWS (Mar. 30, 2020), <https://perma.cc/UU5D-BNFJ>.

156. See Defendants' Notice of Appeal, *W. Watersheds Project v. Bernhardt*, No. 1:18-cv-00187-REB (D. Idaho Mar. 31, 2020), <https://perma.cc/H6AA-EWDF>.

157. See *W. Watersheds Project v. Zinke*, No. 1:18-cv-00187-REB, 2020 WL 959242 (D. Idaho Feb. 27, 2020).

158. See NEPA Implementing Procedures for the BLM, 85 Fed. Reg. 14,700 (Mar. 13, 2020).

159. See Withdrawal of the Proposed Rules to List the Bi-State Distinct Population Segment of the Greater Sage-Grouse, 85 Fed. Reg. 18,054 (Mar. 31, 2020).

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

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

162. See 40 C.F.R. § 1500.2(d) (2019).



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 because such actions will almost inevitably face legal challenges.

