



Adverse Federal Court Decision to BLM Oil and Gas Leasing Program Request for Immediate Appeal and Motion for Stay Pending Appeal

Case: *WildEarth Guardians, et al. vs. Department of the Interior, et al.*, U.S. District Court for the District of Columbia, Case No. 1:16-cv-01724-RC (Judge R. Contreras).

Executive Summary:

1. The Court issued an adverse decision against the Bureau of Land Management (BLM) for five federal BLM oil and gas lease sales that occurred in Wyoming from May 2015 to August 2016. If your company's leases were not part of these lease sales, they are not impacted.
2. Plaintiffs also filed legal challenges to federal oil and gas lease sales in Colorado and Utah from May 2015 to August 2016. The decision does not cover these lease sales, which have not been briefed yet. The Judge asked the parties to provide a briefing schedule by April 19, 2019.
3. For the Wyoming lease sales, the Court remanded the leasing decisions to BLM to re-analyze the effects of drilling and downstream greenhouse gas emissions that leasing of these parcels may cause.
4. The Court **did not** vacate the lease sales or the leases. The Court, however, did leave the door open for lease cancellation or modification based upon BLM's supplemental analysis on remand.
5. The Court **did** enjoin BLM from approving new Applications for Permit to Drill (APDs) on the leases at issue until BLM completes the NEPA process. Previously approved APDs are not covered by the decision, and drilling may continue for any APDs approved before the date of the Court decision: March 19, 2019.
6. The Department of the Interior and Department of Justice are still considering whether or not to seek an appeal, and if so, whether to seek a stay of the decision pending appeal.

Decision: On March 19, 2019, Judge Contreras granted in part Plaintiffs' challenge to Federal lease sales that took place in 2015 and 2016 in Wyoming.

- Judge Contreras concluded that BLM violated NEPA by: (1) failing to provide quantified estimates of greenhouse gas emissions (GHGs) at the leasing stage; (2) failing to analyze the indirect effects of leasing, including downstream uses, and related GHG emissions, of oil and gas produced on leased parcels; and (3) failing to consider cumulative impacts of

quantified GHG emissions, and failing to compare this analysis to regional and national analyses.

- The Court remanded BLM's decisions for the Wyoming lease sales and enjoined BLM from approving permits on the subject leases until BLM conducts curative NEPA analysis.

Key Points:

- The decision requires BLM to perform speculative analysis of downstream use of oil and gas and emissions that are outside of the agency's jurisdictional authority and statutory mandate, which is contrary to established D.C. Circuit Court legal precedent.
 - o At the leasing stage, estimates of emissions are purely speculative. The pace and scope of development, productivity of individual wells, and the technology used to develop and produce oil and gas may not be fully known. The BLM will not even have evaluated whether permit applications should be granted, granted with conditions, or denied since BLM's decision to lease precedes these development decisions.
 - o BLM does not have the statutory authority to regulate greenhouse gases or climate change—this falls in the purview of the EPA, the Clean Air Act's delegated authority to the states. At the development stage, EPA, a state, or a tribe will evaluate permit applications and determine conditions to protect other resources, including air quality. Regulation of emissions falls within those agencies' purview, not BLM's.
 - o The decision misapplies the Supreme Court's holding that NEPA does not require agencies to analyze issues over which they lack the authority to act. The decision uses BLM leasing decisions as a strawman to formulate a *de facto* national climate policy via the judicial branch. Climate policy is reserved solely for Congress, and the Executive Branch, and should not be fabricated from the bottom up at the agency program level.
 - o The court's conclusion that BLM may decline to sell leases if the downstream GHG emissions "would not be in the public's long-term interest" establishes a vague standard and gives the agency a roving license to claim authority not granted to it by Congress. NEPA does not empower BLM to adopt a "keep it in the ground" policy.
- The decision creates dangerous precedent that would burden BLM's oil and gas leasing program, requiring accumulation and analysis of needless detail for downstream, regional and national GHG analyses.
 - o GHG emissions from downstream combustion are a matter of national energy policy and are outside BLM's authority.
 - o A significant purpose of NEPA at the leasing stage is to inform BLM decision making as to which lease stipulations BLM should impose to protect resources, yet BLM does not have the authority to unilaterally impose emission controls for the regulation of greenhouse gases.

- The decision allows courts to create *de facto* regulatory requirements related to climate change.
- The decision opens the door for the cancellation of valid existing federal leases, which are real property interests, and other valid existing rights; the Judge considers this option but he defers this decision until after review of BLM's supplemental NEPA analysis.
- The decision also opens the door for requiring an analysis of an alternative of not offering oil and gas lease parcels for lease, despite BLM's statutory mandates that require leasing under the Mineral Leasing Act, and under BLM's multiple use mandate under the Federal Land Policy and Management Act.

Additional Information:

- The Court concluded that BLM had adequate information to quantify GHG emissions on parcels offered for lease. This conclusion ignored BLM explanations as to why a more detailed analysis was too speculative at the leasing stage, and was thus an unproductive use of limited resources.
- The Court misapplies existing legal precedent on BLM's obligations to analyze downstream uses.
 - Downstream emissions are not interconnected to oil and gas development because no way of knowing level of production or type of downstream use, or emissions associated with those downstream uses.
 - The Court overlooked portions of the D.C. Circuit Court precedent it relied on that limited consideration of downstream effects.

Concluding Observations:

While this decision provides many significant issues that are ripe for appeal, the Department of the Interior and Department of Justice are still deliberating internally whether to pursue an appeal. Given the significant ramifications, it is important for industry to advocate to Interior and BLM senior leadership in Washington D.C. that an appeal should be pursued.

It will be important for companies to develop a litigation risk strategy for current and future development plans. While this decision is limited to certain lease sales in Wyoming from 2015–2016, the environmental plaintiff community intends to file copy-cat lawsuits in the coming weeks against leasing decisions, project approvals, and permit approvals, in an effort to obtain more mileage out of this federal lower court decision.

Please contact [Bret Sumner](#) if you have any questions or would like to discuss further.