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MINING ON 10 MILLION ACRES IN SIX STATES IMPACTED BY BLM'S PROPOSED WITHDRAWAL TO PROTECT SAGE-GROUSE HABITAT

Sarah Stauffer Curtiss, Eric Martin, and Shannon Morrissey

On September 24, 2015, the federal Bureau of Land Management ("BLM") published notice of the proposed withdrawal of roughly 10 million acres of "sagebrush focal areas" from mineral location and entry under the General Mining Law of 1872. 80 Fed. Reg. 57,635 (Sept. 24, 2015), corrected, 80 Fed. Reg. 63,583 (Oct. 20, 2015). The BLM notice commenced a temporary segregation period of up to two years during which the location and entry of new mining claims is prohibited within these areas in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming. The Secretary of the Interior ("Secretary") could decide to withdraw these areas on BLM and U.S. Forest Service ("USFS") lands from mineral location and entry for up to 20 years, with the opportunity to extend the withdrawal in the future.

The Decision Not to List the Greater Sage-Grouse

The BLM's proposal to withdraw sagebrush focal areas from mineral location and entry aims to protect the greater sage-grouse and its habitat from the adverse effects of locatable mineral exploration and mining. In March 2010, the U.S. Fish and Wildlife Service ("FWS") determined that the greater sage-grouse was warranted for protection under the Endangered Species Act ("ESA") due to the loss and fragmentation of its habitat but opted not to list the species due to the need to address higher-priority listing decisions. Several conservation groups challenged the "warranted, but precluded" decision, and, as part of a settlement agreement, the court required the FWS to make a listing decision by September 30, 2015.

Eight days before the deadline, Interior Secretary Sally Jewell announced that the FWS would not list the greater sage-grouse under the ESA. In support of its determination, the FWS noted that a listing is no longer warranted because the greater sage-grouse's primary threats have been reduced by federal, state, and local conservation efforts. 80 Fed. Reg. 59,858 (Oct. 2, 2015). The FWS's decision was based, in part, on amendments to 98 federal land management plans affecting the six states impacted by the temporary segregation plus California, Colorado, North Dakota, and South Dakota. Finalized in September 2015, the plan amendments adopt a tiered land use allocation system that provides the greatest protection for habitat that is most important to the greater sage-grouse (i.e., sagebrush focal areas). Sagebrush focal areas are characterized by large, contiguous blocks of federal land, high population connectivity, and high densities of breeding birds. In the plan amendments, the BLM and USFS recommended that the Secretary withdraw sagebrush focal areas from mineral location and entry because the FWS identified habitat fragmentation caused by

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October 26, 2016
Environmental and Workplace Safety Criminal Enforcement Conference
Westin City Center
Washington, DC

March 28-29, 2017
35th Water Law Conference
Loews Hollywood Hotel
Los Angeles, CA

March 29-31, 2017
46th Spring Conference
Loews Hollywood Hotel
Los Angeles, CA

October 18-21, 2017
25th Fall Conference
Baltimore Waterfront Marriott
Baltimore, MD

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hardrock mining operations as a primary threat to the greater sage-grouse and its habitat.[1]

Segregation and Withdrawal – Not Good for Mining Claims

The Federal Land Policy and Management Act of 1976 ("FLPMA") authorizes the Secretary to withdraw federal lands from "settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program." 43 U.S.C. §§ 1702(j), 1714. This withdrawal authority includes the authority to remove federal lands, subject to valid existing rights, from the General Mining Law of 1872.

If the Secretary receives an application for withdrawal or proposes a withdrawal, the Secretary is to publish notice that specifies the extent to which the subject land is to be "segregated from the operation of the public land laws" for up to two years while the proposed withdrawal is considered. The Secretary must submit a report to Congress if a withdrawal of more than 5,000 acres is approved. The report is to address 12 statutory issues, including known mineral deposits, past and present production, mining claims and leases, and future opportunities for mineral development. (The U.S. Geological Survey released its sagebrush mineral-resource assessment data in August 2016.) There are no specific standards or criteria that a proposed withdrawal must satisfy. Instead, FLPMA gave Congress the opportunity to veto withdrawals of more than 5,000 acres. However, that legislative veto has been held to be unconstitutional and severable from the remainder of FLPMA's withdrawal authority. *Yount v. Salazar*, 933 F. Supp. 2d 1215 (D. Ariz. 2013). An appeal of this decision is currently pending before the Ninth Circuit.

Here, the BLM's notice of proposed withdrawal specified that the sagebrush focal areas were, subject to valid existing rights, "segregated from location and entry under the United States mining laws." The BLM will prepare an Environmental Impact Statement under the National Environmental Policy Act (NEPA) to study the long-term impacts of the proposed withdrawal. It conducted eight public meetings on the proposed withdrawal and scope of the Environmental Impact Statement this past winter and issued the scoping report in April 2016.

The segregation period functions as a moratorium on locating new mining claims. In addition, development of preexisting mining claims within the proposed withdrawal area will be impacted. *See* 43 C.F.R. § 3809.100. Prior to approving a plan of operations (or modification to a plan approved before the segregation) for a preexisting claim during the segregation period, BLM policy calls for the submission of evidence showing a physical exposure of a locatable mineral deposit as of the segregation date. If that cannot be shown, a validity determination must first be conducted to assess whether the claim constitutes a "valid existing right." If a physical exposure can be shown, BLM policy gives its managers discretion to approve a plan of operations (or modification) without a validity determination, but only if the purpose of the segregation supports such a decision. In the context of the sagebrush focal area segregation, it seems unlikely that BLM managers will exercise discretion to avoid validity determinations. After the Secretary approves a withdrawal, the moratorium on new mining claims is extended and a validity determination is a prerequisite to approval of a plan of operations (and a modification).

A mining claim is a "valid existing right" if a valuable mineral deposit has been discovered within the boundaries of the claim as of the segregation date and the date of the validity determination. Exposure of the deposit by the segregation date is a necessary precondition. The evidence must show a reasonable prospect that the deposit can be mined, removed, and marketed at a profit, considering historic price and cost factors. *United States v. McKown*, 181 IBLA 183 (2011). If these requirements are not satisfied, the BLM will move to terminate the mining claim.

Litigation Commences

The BLM and USFS plan amendments and the proposed withdrawal are highly controversial and have spurred lawsuits in Idaho, Nevada, Utah, Wyoming, the District of Columbia, and North Dakota.[2] In late September 2015, Elko and Eureka Counties in Nevada and two exploration companies filed suit against the BLM and USFS alleging that the plan amendments violate a host of federal laws, including the General Mining Law of 1872 and that the proposed withdrawal violates FLPMA. The court in early December 2015 denied a motion for a preliminary injunction to halt implementation of the amendments. Idaho Governor C.L. "Butch" Otter also filed suit in late September 2015 challenging the plan amendments, alleging violations under FLPMA, NEPA, the National Forest Management Act, and the Administrative Procedure Act. In addition, the Wyoming Stock Growers Association filed suit in October 2015, and Utah Governor Gary Herbert filed suit in February 2016, both alleging similar violations of FLPMA and NEPA. The Utah suit requests that the federal court discard the federal plan amendments and proposed withdrawal in deference to the State of Utah's plan for sage-grouse management. In April 2016, the American Exploration & Mining Association filed suit alleging, among other claims, that the federal agencies failed to provide for adequate public participation during the NEPA environmental review process, exceeded their statutory authority by adopting a net conservation gain mitigation standard, and failed to comply with multiple use management requirements. The following month, the Western Energy Alliance and North Dakota Petroleum Council filed suit alleging, among other things, that the federal agencies violated the Mineral Leasing Act and FLPMA by improperly ceding authority over oil and gas operations to state and federal wildlife agencies.

On the other side of the debate, the Center for Biological Diversity and several other conservation groups filed a complaint in late February 2016. This lawsuit against the BLM and the USFS alleges that the land use plan amendments "fail to ensure that sage-grouse populations and habitats will be protected and restored in accordance with the best available science and legal mandates" of NEPA and other federal laws.

These legal challenges are emblematic of the controversy surrounding the measures upon which the FWS based its decision not to list the greater sage-grouse. In many respects, the FWS's decision not to list may ultimately have greater adverse impacts on mining than a decision to list the greater sage-grouse, because there are mechanisms under the ESA under which development can occur (e.g., habitat conservation plans). In contrast, segregation and withdrawal under FLPMA are much more restrictive. Although the Secretary is poised to approve the proposed withdrawal, the sage-grouse saga is far from over.

Sarah Stauffer Curtiss *is an attorney in Stoel Rives' Portland, Oregon, office and focuses her practice on permitting and compliance issues involving federal environmental laws, with an emphasis on protected species.* **Eric Martin** *is a natural resources attorney in Stoel Rives' Portland, Oregon, office, whose practice focuses on oil, gas, and mining on private and public lands.* **Shannon Morrissey** *is an environmental and natural resources attorney in Stoel Rives' Sacramento, California, office.*

Endnotes

1 The plan amendments have other impacts on mining. For example, they identify 35 million acres of "priority habitat management areas," within which new operations to mine common variety materials (*e.g.*, aggregate) are prohibited. In September 2016 the BLM issued seven Instruction Memoranda providing guidance on plan amendment implementation, including implementation of their habitat disturbance cap and energy production and mining facility density cap.

2 *Western Exploration LLC v. U.S. Dep't of the Interior*, Case No. 3:15-CV-00491 (D. Nev. Sept. 23, 2015); *Otter v. Jewell*, Case No. 1:15-CV-01566 (D.D.C. Sept. 25, 2015); *Wyoming Stock Growers Ass'n v. U.S. Dep't of the Interior*, Case No. 2:15-CV-181 (D. Wyo. Oct. 14, 2015) with which *Wyoming Coalition of Local Gov'ts v. U.S. Dep't of the Interior*, Case No. 2:16-CV-041 (D. Wyo. March 1, 2016) has been consolidated; *Herbert v. Jewell*, Case No. 2:16-CV-00101 (D. Utah Feb. 4, 2016); *Western Watersheds Project v. Schneider*, Case No. 1:16-CV-00083 (D. Idaho Feb. 25, 2016); *Am. Exploration & Mining Ass'n v. U.S. Dep't of the Interior*, Case No. 1:16-CV-00737 (D.D.C. Apr. 19, 2016); *Western Energy Alliance v. U.S. Dep't of the Interior*, Case No. 1:16-CV-00112 (D. N.D. May 12, 2016).