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## Great Basin Resource Watch v. Bureau of Land Management

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***Great Basin Resource Watch v. Bureau of Land Management*, 844  
F.3d 1095 (9th Cir. 2016)**

**Jody Lowenstein**

In *Great Basin Resource Watch v. Bureau of Land Management*, the Ninth Circuit invalidated the BLM’s environmental review, finding that the agency based its approval of a mining project on unsupported reasoning, inaccurate information, and deficient analysis. In negating the action, the court held that the BLM failed to take the hard look required by the National Environmental Policy Act.

**I. INTRODUCTION**

Great Basin Resource Watch and the Western Shoshone Defense Project (collectively “Plaintiffs”) challenged the United States Bureau of Land Management’s (“BLM”) environmental review of a proposed open-pit molybdenum mine project in Eureka County, Nevada in *Great Basin Resource Watch v. Bureau of Land Management*.<sup>1</sup> In arguing that the BLM’s approval of the project violated the National Environmental Policy Act (“NEPA”), the Federal Land Policy and Management Act (“FLPMA”), and the executive order Public Water Reserve No. 107 (“PWR 107”), the Plaintiffs claimed that the agency’s environmental review was impermissibly deficient in several respects, including basing its analyses on unreasonable baseline levels and a dearth of information.<sup>2</sup> The United States District Court for the District of Nevada granted summary judgment in favor of the BLM, finding that its environmental review was sufficient.<sup>3</sup> The United States Court of Appeals for the Ninth Circuit reversed in part, holding that the BLM’s environmental review incorporated deficient air impact and cumulative impact analyses.<sup>4</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

The Mt. Hope Project (“Project”) is a proposed open-pit molybdenum mine operated by Eureka Moly, LLC (“Eureka Moly”) prospectively located twenty-three miles north of Eureka, Nevada on a tract primarily administered by the BLM.<sup>5</sup> The Project provided for “an 18- to 24-month construction phase, 44 years of mining and ore processing, 30 years of reclamation, and five years of post-closure monitoring.”<sup>6</sup> Pertinently, the Project incorporated a pumped ground

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<sup>1</sup> *Great Basin Resource Watch v. Bureau of Land Management*, 844 F.3d 1095, 1099 (9th Cir. 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1101.

<sup>4</sup> *Id.* at 1111-12.

<sup>5</sup> *Id.* at 1099.

<sup>6</sup> *Id.*

water process “to provide fresh water for various mining and ore extraction purposes.”<sup>7</sup> Furthermore, the Project proposed to fill the pit “with ground water, forming a mine-pit lake.”<sup>8</sup>

In June 2006, Eureka Moly filed the Project with the BLM.<sup>9</sup> After determining that the Project was a major Federal action, the BLM undertook its obligation under NEPA to prepare an Environmental Impact Statement (“EIS”).<sup>10</sup> The BLM released its Draft EIS in December 2011, and after a year of public comment, promulgated its Final EIS and Record of Decision approving the Project.<sup>11</sup>

After denial of their petition for review of the Record of Decision, the Plaintiffs challenged the BLM’s environmental review in the United States District Court for the District of Nevada, asserting that approval of the Project violated NEPA, FLPMA, and PWR 107.<sup>12</sup> The district court granted Eureka Moly intervenor status, and subsequently granted the defendants’ joint motion for summary judgment.<sup>13</sup> As a result, the Plaintiffs appealed the district court’s decision to the United States Court of Appeals for the Ninth Circuit.<sup>14</sup>

### III. ANALYSIS

The Ninth Circuit addressed five independent grounds upon which the Plaintiffs challenged the BLM’s environmental review under the Administrative Procedures Act’s “arbitrary or capricious” standard.<sup>15</sup> First, the Plaintiffs asserted that the BLM based its air impact analysis upon unreasonable baseline levels for certain air pollutants.<sup>16</sup> Second, the Plaintiffs argued that the BLM failed to conduct a sufficient analysis of the Project’s cumulative environmental impacts.<sup>17</sup> Lastly, the Plaintiffs contended that the BLM’s consideration of three separate mitigation measures was inadequate.<sup>18</sup>

Additionally, the Ninth Circuit refused to address the Plaintiffs’ FLPMA and PWR 107 claims on the grounds that “the BLM should be given an opportunity to fix the errors in its analysis of the Project under NEPA before challenges to the approval of the Project itself are entertained.”<sup>19</sup> The court reasoned that the problems with the Project’s approval itself “may never arise once the BLM has had a chance to see the

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<sup>7</sup> *Id.* at 1099-100.

<sup>8</sup> *Id.* at 1099.

<sup>9</sup> *Id.* at 1100.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1101.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1111.

choices before it with fresh eyes,”<sup>20</sup> and that it would be imprudent to address “legal questions that may end up being irrelevant to the disposition of the claim.”<sup>21</sup>

#### A. Air Pollution Baselines

The court first addressed the Plaintiffs' argument that the BLM incorporated unreasonable baseline levels in its air impact analysis.<sup>22</sup> The court asserted that although setting “appropriate baseline [levels] is critical to any NEPA analysis,” measuring actual baseline conditions is not required.<sup>23</sup> Rather, the court claimed, an agency may estimate baseline levels “using data from a similar area”<sup>24</sup> if the assessment is “based on accurate information and defensible reasoning.”<sup>25</sup>

The Plaintiffs first challenged the BLM’s estimation of baseline levels for four different pollutants at the Project site based on data from Great Basin National Park,<sup>26</sup> a “pristine area more than 100 miles away from the Project’s [location].”<sup>27</sup> The court found that although this data “may have caused the agency to underestimate the [actual] baselines for the Project area,”<sup>28</sup> the Plaintiffs failed to show that the BLM’s estimate “rested on inaccurate information or indefensible reasoning.”<sup>29</sup> Therefore, the court held, the BLM’s baseline levels for these four pollutants complied with NEPA despite the acknowledged shortcomings in the use of this data.<sup>30</sup>

However, the court concurred with the Plaintiffs’ contention that “the BLM’s use of a zero baseline value for the remaining pollutants” was not premised on supported reasoning.<sup>31</sup> The court reasoned that the BLM supported its use of a zero baseline value for the remaining group of pollutants solely on an “opinion from an expert *within* the BLM,” which did not explain how or why the zero value was a reasonable baseline for those pollutants.<sup>32</sup> The court found it impermissible that the BLM failed to either separately clarify why a zero-baseline estimate was appropriate, or

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1101.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting *Or. Natural Desert Ass’n v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016)).

<sup>26</sup> *Id.* at 1102 (outlining that the four pollutants measured at Great Basin National Park were 2.5-micron particulate matter, 10-micron particulate matter, and the “two longest time-averaged sulfur dioxide concentrations.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* 1103 (emphasis in original).

to independently scrutinize the expert opinion.<sup>33</sup> Additionally, the court found the BLM's argument that an existing post-EIS analysis confirming that the Project's pollution would not ultimately violate air quality standards to be unavailing.<sup>34</sup> A post-EIS analysis, the court asserted, cannot cure deficiencies in an environmental review since the public would be precluded from "play[ing] a role" in the decisionmaking process.<sup>35</sup> In sum, since the BLM failed to provide "accurate information and defensible reasoning" for its decision to establish a zero-baseline value for the remaining pollutants in its Final EIS, the court held that the BLM's air impact analysis violated NEPA.<sup>36</sup>

### B. Cumulative Effects

The court next considered the Plaintiffs' assertion that the BLM conducted a deficient analysis of the Project's cumulative impacts.<sup>37</sup> An adequate cumulative impact analysis, the court clarified, requires that an agency provide quantified or detailed information regarding an action's incremental environmental impact "when added to other past, present, and reasonably foreseeable future actions."<sup>38</sup>

Although it affirmed that the BLM provided a thoroughly sufficient discussion of the Project's "cumulative impacts to water quantity," the court found the agency's cumulative air impact analysis insufficient.<sup>39</sup> The court highlighted that the BLM failed to discuss or quantify the Project's impacts in addition to other activities potentially affecting air resources, such as a nearby mine, local vehicle emissions, and oil and gas development in the area.<sup>40</sup> The court reasoned that not only did the BLM's unreasonable zero-baseline level for certain pollutants render its cumulative air impact analysis deficient, but the modicum of information the agency provided rendered the Final EIS noncompliant with NEPA's requirements.<sup>41</sup>

### C. Mitigation Measures

The court then turned to the Plaintiffs' claim that the BLM, in contravention of NEPA's requirements, failed to consider appropriate mitigation measures "aimed at reducing the possible adverse environmental effects" of poor water quality from the Project's prospective pit-lake.<sup>42</sup> The BLM, the court described, took a "wait and

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<sup>33</sup> *Id.* at 1103.

<sup>34</sup> *Id.* at 1104.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (quoting 40 C.F.R. § 1508.7 (2017)).

<sup>39</sup> *Id.* at 1104-05.

<sup>40</sup> *Id.* at 1105.

<sup>41</sup> *Id.* at 1005-06.

<sup>42</sup> *Id.* at 1106.

see' approach," limiting its discussion of appropriate mitigation measures to certain monitoring procedures.<sup>43</sup> The court noted that "[p]utting off an analysis of possible mitigation measures until after a project has been approved, and after adverse environmental impacts have started to occur, runs counter to NEPA's goal of ensuring informed agency decisionmaking."<sup>44</sup> However, due to the "relatively low probability and temporal remoteness of adverse impacts to ground water" that could result from the pit-lake, the court found that the reliance on monitoring procedures to mitigate future environmental impacts was reasonable under the circumstances, and therefore was in accord with NEPA's requirements.<sup>45</sup>

The Plaintiffs also argued that the BLM's environmental review failed to include discussion of a long-term funding mechanism and a reclamation bond, which deprived the agency from adequately assessing appropriate mitigation measures for the Project.<sup>46</sup> In addressing this argument, the court decided not to consider the BLM's retort that "reclamation bonding need *never* be discussed in NEPA documents."<sup>47</sup> Rather, the court assumed that "long-term mitigation and reclamation funding issues must be 'discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'"<sup>48</sup> Although the court considered the BLM's discussion of the long-term funding mechanism and the reclamation bond to be relatively sparse, it determined that the agency's discussion of those issues was "not so deficient as to preclude the agency or the public" from properly evaluating the Project's adverse environmental effects.<sup>49</sup> The court highlighted that the Final EIS outlined multiple mitigation measures that would be funded by the long-term funding mechanism, the annual review of funding needs for mitigation measures, and plans to update the reclamation bond every three years to reflect the Project's reclamation guarantee.<sup>50</sup> Therefore, the court held, the BLM adequately assessed the requisite funding issues under NEPA.<sup>51</sup>

Lastly, the court declined to reach the merits of the Plaintiffs' claim that "the BLM's discussion of mitigation measures [addressing] impacts to surface and ground water quantity" was inadequate, even though the court determined those impacts were "potentially significant."<sup>52</sup> Although the court found that the BLM's analysis failed to consider the full amount of ground water "needed to replace depleted

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<sup>43</sup> *Id.* at 1107.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1107-08.

<sup>47</sup> *Id.* at 1108-09 (emphasis in original).

<sup>48</sup> *Id.* at 1109 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989)).

<sup>49</sup> *Id.* at 1109-10.

<sup>50</sup> *Id.* at 1109.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1110-11.

spring and stream water” used in the mining process, this error was quite small and potentially harmless.<sup>53</sup> Since neither party addressed the issue of harmlessness, and because of other deficiencies in the BLM’s environmental review, the court refused to rule on this issue.<sup>54</sup>

#### IV. CONCLUSION

The outcome of *Great Basin Resource Watch v. Bureau of Land Management* reinforces the notion that any impermissible deficiency in an agency’s environmental review cannot withstand even the most rote challenges under NEPA. Here, the Ninth Circuit found that the BLM’s failure to take the requisite hard look required by NEPA resulted in multiple impermissible deficiencies in its environmental review. The court concluded that the BLM’s air impact analysis was premised on an unsupportable zero baseline level, and further determined that the paucity of information the agency offered to justify its cumulative air impact analysis violated NEPA’s requirements.

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<sup>53</sup> *Id.* at 1110.

<sup>54</sup> *Id.* at 1111.