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# Protect Our Communities Foundation v. Jewell

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***Protect Our Communities Foundation v. Jewell*, 825 F.3d 571 (9th Cir. 2016).**

**Benjamin Almy**

In *Protect Our Communities Foundation v. Jewell*, the Ninth Circuit upheld a right-of-way grant issued by the BLM for the development of the Tule Wind energy facility in the McCain Valley in southern California. In its decision to uphold the district court's summary judgment ruling in favor of the Defendants, the Ninth Circuit reaffirmed National Environmental Policy Act ("NEPA") standards of compliance for a satisfactory Environmental Impact Statement ("EIS"). The specific challenges raised by the Plaintiffs and addressed by the court were to the Statement of Purpose and Need, the Project Alternatives, the Mitigation Measures, and the "Hard Look" at Environmental Impacts. Additionally, the Ninth Circuit reaffirmed the limits of liability federal agencies are subject to under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act when approving of right-of-way grants for the development of wind energy facilities.

## I. INTRODUCTION

In *Protect Our Communities Foundation v. Jewell*, the Protect Our Communities Foundation, Backcountry Against Dumps, and Donna Tisdale (collectively, "Plaintiffs") challenged the U.S. Bureau of Land Management's ("BLM") right-of-way grant that would permit Defendant-Intervener Tule Wind, LLC, ("Tule") to construct and operate a wind energy facility on 12,360 acres of land in the McCain Valley, 70 miles east of San Diego ("Project").[1] The Defendants in this action were the Department of the Interior, the BLM, various officials from those agencies, and Tule (collectively, "Defendants").[2] Plaintiffs challenged the adequacy of the BLM's Environmental Impact Statement ("EIS") for the Project, which was prepared pursuant to the National Environmental Policy Act ("NEPA"). In addition, Plaintiffs asserted the BLM's issuance of a right-of-way grant to Tule would harm birds in violation of the Migratory Bird Treaty Act ("MBTA") and the Bald and Golden Eagle Protection Act ("Eagle Act").[3]

The United States District Court for the Southern District of California granted Defendants' motion for summary judgment on all claims.[4] The district court held the final EIS had sufficiently articulated a proposed goal and the need for the Project, properly reviewed a number of alternatives, and proposed reasonable mitigation measures.[5] The district

[1] Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016) (hereinafter Protect Our Cmtys. Found.).
[2] *Id*. at 576.
[3] *Id*. at 577.
[4] *Id*. at 576.
[5] *Id*. at 578.

court also held the final EIS complied with NEPA by taking a "hard look" at the environmental impacts of the Project.[6] Finally, the district court concluded the BLM was not responsible for ensuring that it or Tule obtained MBTA and Eagle Act permits from the U.S. Fish and Wildlife Service ("FWS") prior to issuing its right-of-way grant.[7] The United States Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment for the Defendants.[8]

## II. FACTUAL AND PROCEDURAL BACKGROUND

The McCain Valley is located in southeastern San Diego County. The proposed wind energy facility would be located on lands administered by the BLM, the Ewiiaapaayp Indian Tribe, and the California State Lands Commission, as well as on private lands.[9]

Following wind testing and monitoring at the proposed Project site, Tule submitted an application for a right-of-way grant to the BLM for the development of an energy generation facility.[10] This proposal contained plans for the construction of 128 wind turbines and supporting infrastructure with a generation capacity of up to 200 megawatts of electricity.[11] On December 23, 2010, the BLM released an EIS focused on environmental impacts and examined multiple alternative approaches.[12] After review of the EIS, the BLM decided to administer the right-of-way grant for the development of a scaled down wind-energy facility.[13] The more modest proposal reduced the total number of wind turbines to 95 and repositioned turbines away from the top of ridgelines to reduce the risk of avian collisions with turbine blades.[14] The modifications to the Project produced only a minor reduction in generation capacity, from 200 megawatts to 186 megawatts of electricity, while achieving a decreased risk of avian impact.[15] On October 3, 2011, the BLM released a final EIS, which included the modifications designed to reduce avian impact.[16] The agency published a Record of Decision ("ROD") on December 19, 2011, officially approving the right-of-way grant for the Project.[17]

In accordance with the ROD, the right-of-way grant would be issued for a thirty-year term and contained an option to renew.[18] The ROD also stipulated the right-of-way grant was to be conditioned on the

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6 *Id*.

7 *Id*.

8 *Id*. at 577.

9 Protect Our Cmtys. Found. v. Jewell, No. 13-cv-575-JLS, 2014 U.S. Dist. LEXIS 50698, at *3 (S.D. Cal. Mar. 25, 2014).

10 *Id*. at *5.

11 *Protect Our Cmtys. Found.*, 825 F.3d at 577.

12 *Id*.

13 *Id*.

14 *Id*.

15 *Id*.

16 *Id*.

17 *Id*.

18 *Id*.

"implementation of mitigation measures and monitoring programs," as well as "the issuance of all other necessary local, state, and Federal approvals, authorizations, and permits."[19]

Plaintiffs jointly brought an action in Federal District Court. They challenged the BLM's issuance of the right-of-way grant to Tule, and sought injunctive and declaratory relief under the Administrative Procedure Act ("APA") to address the Defendants' alleged unlawful actions under NEPA, the MBTA, and the Eagle Act.[20] Tule intervened as a defendant in the lawsuit.[21]

The parties filed cross motions for summary judgment, and the district court granted Defendants' motion for summary judgment on all claims.[22]

## III. ANALYSIS

### *A. EIS Compliance with NEPA*

The Ninth Circuit Court first reviewed the BLM's compliance with NEPA in its preparation of the EIS. The Plaintiffs challenged the BLM's EIS in four specific areas: the Statement of Purpose and Need, the Project Alternatives, the Mitigation Measures, and the "Hard Look" at Environmental Impacts.[23] The court addressed these areas accordingly.

While the Plaintiffs alleged the scope of the Project's purpose and need statement was too narrow, [24] the court affirmed the district court's opinion stating the EIS's purpose-and-need statement was "fully consistent with the Agency's duty to consider federal policies in fashioning its response to a right-of-way grant application" and constituted a reasonable formulation of project goals.[25] Additionally, the statement included a range of alternatives, one of which was adopted to reduce the impact of the Project on the surrounding environment.[26]

The Plaintiffs further alleged that the Defendants' EIS "failed to adequately examine viable alternatives including a 'distributed-generation' alternative involving the use of rooftop solar panels."[27] The court determined "the range of alternatives considered in the EIS was not impermissibly narrow, as the agency evaluated all 'reasonable and feasible alternatives in light of the ultimate purposes of the project.'"[28] The agency

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[19] *Id*.

[20] *Id*. at 578.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 579.

[24] *Id*.

[25] *Id*. at 580.

[26] *Id*.

[27] *Id*. at 579.

[28] *Id*. at 580 (quoting City of Carmel-by-the-Sea v. United States DOT, 123 F.3d 1142, 1155 (9th Cir. 2004)).

reviewed seventeen project alternatives including distributed generation.[29] The BLM dismissed the distributed-generation alternative because it failed to satisfy the agency's goal of providing for utility-scale energy generation on public lands.[30] The private installation and use of rooftop solar systems presented a number of feasibility challenges as well as being speculative based on the current status of solar technology and the regulatory and commercial landscape.[31]

Next, the Plaintiffs challenged the agency's mitigation measures as "too vague and speculative to satisfy NEPA."[32] NEPA requires that an agency must consider "appropriate mitigation measures that would reduce the environmental impact of the proposed action."[33] The court determined the agency developed a comprehensive set of mitigation measures which relied, in part, on field studies conducted by Tule over several years in the proposed Project area. Those studies, in combination with scientific research, aided in the BLM's creation of multiple mitigation measures including the lengthy Protection Plan.[34] The court ruled the mitigation measures, including the 85-page Protection Plan, provided ample detail and adequate baseline data for the agency to evaluate the overall environmental impact of the Project.[35]

Finally, the Plaintiffs challenged the legitimacy of the BLM's EIS and its adherence to the "hard look" standard in its environmental impact investigation.[36] Plaintiffs specifically cited avian impacts, inaudible noise, electromagnetic fields and stray voltage, and green-house gas emissions.[37]

Plaintiffs asserted two primary challenges regarding the EIS's analysis of avian impacts. First, Plaintiffs contended that the EIS failed to review effects of Project-related noise on birds at all stages of life.[38] The court held that the BLM outlined over a dozen noise-mitigating measures that it determined would significantly reduce environmental impacts of noise on birds to low or minimal levels.[39] Second, Plaintiffs contend the EIS failed to conduct a nighttime migratory-bird survey.[40] The court held that the agency's decision not to conduct a nighttime migratory-bird survey was within its discretion because the agency relied on existing surveys and scientific literature in its determination. Existing data indicated that nocturnal species' use of the Project area would be low and

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29 *Id*. at 581.
30 *Id*.
31 *Id*.
32 *Id*. at 579.
33 *Id*. at 581.
34 *Id*. at 582.
35 *Id*.
36 *Id*. at 582-83.
37 *Id*. at 582-85.
38 *Id*. at 583.
39 *Id*.
40 *Id*.

most nocturnal species would fly at altitudes higher than the proposed turbines.[41]

While the Plaintiffs alleged that the EIS failed to adequately address the environmental impacts of inaudible noise on humans as well as health effects of electromagnetic fields and stray voltage attributable to the Project, the court sided with the BLM's conclusion.[42] The court determined that the BLM had met the "hard look" standard by basing its decision on available literature and a reasonable exercise of technical expertise.[43]

The Plaintiffs' final challenge to the contents of the EIS's environmental impacts analysis was to the greenhouse-gas emissions of the Project.[44] The court determined the EIS met the "hard look" standard in its analysis of the Project's impact on greenhouse-gas emissions and global warming.[45] The EIS determined the projected emissions from the Project were "below the level of significance required for further analysis under NEPA."[46] Additionally, the EIS stated the creation of a renewable energy source would potentially reduce overall electrical generation emissions in California and therefore did not require analysis beyond that already provided in the EIS.[47]

### *B. Liability Under The MBTA and Eagle Act*

Plaintiffs argued that by granting the right-of-way request, the BLM was complicit in future conduct by Tule that might result in MBTA and Eagle Act violations.[48] First, Plaintiffs asserted the BLM, acting in its regulatory capacity, was directly liable for the unlawful "take" of birds under the MBTA and the Eagle Act, absent a permit from the FWS. Second, Plaintiffs asserted the agency's regulatory authorization violated the APA because the BLM did not condition its right-of-way grant on Tule securing the appropriate permits from the FWS.[49]

In dismissing this argument, the court held that "the MBTA does not contemplate attenuated secondary liability on agencies like the BLM that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the 'take' of migratory birds."[50] In reference to the Eagle Act, the court used similar reasoning to defend BLM decision-making. The court referred to an FWS regulation pertaining to permits for "incidental" take of eagles, which states "persons and organizations that obtain licenses, permits, grants, or other such services from government

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41 *Id*.
42 *Id*. at 583-84.
43 *Id*. at 584.
44 *Id*.
45 *Id*.
46 *Id*.
47 *Id*.
48 *Id*. at 585.
49 *Id*.
50 *Id*.

agencies are responsible for their own compliance with the Eagle Act and should individually seek permits."[51] The court determined the separation between a regulatory agency and a third party that is committing "the take" relieves the regulatory agency from liability under both the MBTA and the Eagle Act.[52]

The Plaintiff's second argument, that the BLM violated the APA by being complicit in the unlawful action of a third party, was rejected on similar grounds. The court held the BLM's regulatory role was "too far removed from the ultimate legal violation to be independently unlawful under the APA."[53]

## IV. CONCLUSION

In *Protect Our Communities Foundation v. Jewell*, the court addressed the Plaintiffs' challenges to the BLM's EIS right-of-way grant for Tule's wind energy facility, as well as the BLM's capacity to issue a right-of-way grant in consideration of the MBTA and the Eagle Act. The court's review of the BLM's EIS found it to be sufficiently comprehensive and in accordance with the standards established under NEPA. Furthermore, the court found that the BLM, as a regulatory agency, was not liable for potential third party violations under the MBTA or the Eagle Act. Finally, the court held the BLM's regulatory role was too far removed from the ultimate legal violation to be independently unlawful under the APA.[54]

While finding that the BLM was too far removed to be liable for future violations of the MBTA and the Eagle Act, the court's recognition of this argument as "novel" is perhaps indicative that the potential for restricting right-of-way grants for wind energy projects through MBTA and Eagle Act violations may exist and that all arguments in this realm have not yet been explored.[55]

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[51] *Id*. at 588.
[52] *Id*.
[53] *Id*. at 586.
[54] *Id*.
[55] *Id*. at 585.