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## Oregon Natural Desert Association v. Jewell

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***Oregon Natural Desert Association v. Jewell*, \_\_\_ F.3d \_\_\_, 2016 U.S. App. LEXIS 9642, 2016 WL 3033674 (9th Cir. May 26, 2016)**

**Jody Lowenstein**

In *Oregon Natural Desert Association v. Jewell*, the Ninth Circuit invalidated the BLM’s environmental review, finding that the agency based its approval of a wind-energy development on inaccurate scientific analysis. In negating the BLM’s action, the court held that flawed data and indefensible reasoning were discordant with NEPA’s central tenets. Furthermore, the court did not hold the BLM responsible for addressing a distinct environmental issue that was not brought to its attention during the public comment period.

**I. INTRODUCTION**

In *Oregon Natural Desert Association v. Jewell*, the Oregon Natural Desert Association and the Audubon Society of Portland (collectively “ONDA”) challenged the United States Bureau of Land Management’s (“BLM”) environmental review of a proposed wind-energy development in southeastern Oregon.<sup>1</sup> ONDA claimed that the BLM’s failure to provide an accurate scientific assessment of the development’s impact on sage grouse habitat violated the National Environmental Policy Act (“NEPA”).<sup>2</sup> The United States District Court for the District of Oregon granted summary judgment in favor of the BLM, finding that the BLM sufficiently conducted its environmental review.<sup>3</sup> The United States Court of Appeals for the Ninth Circuit reversed in part, concluding that the BLM’s failure to adequately assess sage grouse winter habitat conditions at the proposed site violated NEPA by “imped[ing] informed decisionmaking and public participation.”<sup>4</sup> The Ninth Circuit also partially affirmed the district court’s decision, holding that the BLM sufficiently addressed all of ONDA’s concerns that were expressed during the public comment period.<sup>5</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Steens Mountain, located in southeastern Oregon, is largely comprised of BLM-administered land, where the agency is tasked with

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1. Or. Natural Desert Ass’n v. Jewell, \_\_\_ F.3d \_\_\_, 2016 WL 3033674 (9th Cir. May 26, 2016) [hereinafter *Or. Natural Desert Ass’n*].

2. *Id.* at \*1.

3. Or. Natural Desert Ass’n v. Jewell, No. 3:12—cv—00596—MO, 2013 WL 5101338, at \*1, 6 (D. Or. Sept. 11, 2013) [hereinafter *Jewell*].

4. *Or. Natural Desert Ass’n*, 2016 WL 3033674, at \*1.

5. *Id.* at \*10.

conserving the area's ecological integrity.<sup>6</sup> Amid this region sits "one of the last remaining 'strongholds of contiguous sagebrush habitat essential for the long-term persistence of sage grouse.'"<sup>7</sup> Sage grouse depend entirely on sagebrush habitat for survival, and the loss and fragmentation of this habitat has been the primary cause of the species' declining population in the western United States.<sup>8</sup>

Steens Mountain is also the proposed site of the Echanis Wind Energy Project ("Project"), a wind-energy development to be primarily located on a tract of privately-owned land ("Echanis Site").<sup>9</sup> The Project includes a transmission line, running through the BLM-administered Steens Protection Area.<sup>10</sup>

The proposed right-of-way for the transmission line subjected the entire Project to environmental review under NEPA, including the construction of the wind turbines at the Echanis Site.<sup>11</sup> According to the Ninth Circuit, the Project's impact on sage grouse habitat was "by far the most significant concern" during the environmental review process.<sup>12</sup> To address these concerns, ONDA submitted numerous comments to the BLM on issues regarding sage grouse habitat.<sup>13</sup> After the public comment period, the BLM issued a Final Environmental Impact Statement ("FEIS") and a Record of Decision ("ROD") approving the Project's development.<sup>14</sup>

Notably, although the BLM acknowledged the Project's potential impact on sage grouse habitat, specifically to the species' winter habitat, it did not conduct any surveys to determine the winter presence of sage grouse at the Echanis Site.<sup>15</sup> Instead, the BLM assumed that no sage grouse were present during winter based on data collected from two nearby sites that reported no observations of sage grouse during these months.<sup>16</sup> The BLM clarified that the Echanis Site's higher elevation and greater likelihood of extended snow accumulation compared to the two surveyed sites made it reasonable to assume that no sage grouse were present during winter.<sup>17</sup>

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6. *Id.* at \*2; The Steens Protection Area and Steens Mountain Wilderness Area were established by Congress in 2000. 16 U.S.C. § 460nnn (2015).

7. *Id.* at \*2 (quoting Endangered and Threatened Wildlife and Plants; 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13910, 13958 (March 23, 2010)).

8. *Id.* at \*2-3.

9. *Id.* at \*1.

10. *Id.* at \*1, 3.

11. *Id.* at \*2.

12. *Id.* at \*3.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

Additionally, the BLM recognized multiple connectivity concerns, including the physical division of sage grouse habitat and the displacement of sage grouse due primarily to the construction of maintenance roads and transmission lines.<sup>18</sup> Despite the Project's foreseeable habitat fragmentation, the BLM approved its development.<sup>19</sup>

After the FEIS and ROD were issued, ONDA challenged the BLM's environmental review of the Project under NEPA in the United States District Court for the District of Oregon.<sup>20</sup> The district court granted the BLM's motion for summary judgment, finding that the BLM had enough information regarding sage grouse habitat at the proposed site to make a reasonable and informed decision to approve the Project under certain mitigation measures.<sup>21</sup> Furthermore, the district court held that the BLM sufficiently addressed all of ONDA's concerns that were effectively asserted in its public comments.<sup>22</sup> ONDA appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit.<sup>23</sup>

### III. ANALYSIS

The Ninth Circuit reviewed the BLM's compliance with NEPA on two grounds to determine whether its actions were "arbitrary and capricious" under the Administrative Procedures Act ("APA").<sup>24</sup> First, the Ninth Circuit looked at the BLM's assumption that the Echanis Site provided no winter habitat for sage grouse without conducting a direct assessment of baseline conditions.<sup>25</sup> Second, the court considered the BLM's failure to address the issue of "genetic connectivity" in its FEIS.<sup>26</sup>

#### A. Baseline Winter Conditions

In response to the BLM's failure to directly assess the baseline conditions of sage grouse winter habitat at the Echanis Site, the court recognized that establishing an environmental baseline was "not an independent legal requirement."<sup>27</sup> However, assessing baseline conditions, the court claimed, was a "practical requirement" in order to effectively "identify the environmental consequences" of an action.<sup>28</sup> The court stated that identifying an action's environmental impact is

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18. *Id.* at \*4.

19. *Id.* at \*3-4.

20. *Id.* at \*4.

21. *Jewell*, 2013 WL 5101338, at \*6, 10.

22. *Or. Natural Desert Ass'n*, 2016 WL 3033674, at \*4.

23. *Id.* at \*1, 4.

24. *Id.* at \*4, 5, 8.

25. *Id.* at \*5.

26. *Id.* at \*8.

27. *Id.* at \*5 (quoting *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1195 (9th Cir. 1999)).

28. *Id.* (quoting *Am. Rivers*, 201 F.3d at 1195).

fundamental in providing “[a]ccurate scientific analysis,” which is essential to implementing NEPA.<sup>29</sup> The court further asserted that NEPA requires that accurate “information is available to public officials and citizens *before* decisions are made and *before* actions are taken.”<sup>30</sup>

The BLM's failure to assess baseline conditions at the Echanis Site, the court found, caused the agency to rely on an assumption that was based on inaccurate data, ultimately rendering its action arbitrary and capricious.<sup>31</sup> In reaching this conclusion, the court refuted the BLM's assertion that it was reasonable to assume that sage grouse were absent from the Echanis Site.<sup>32</sup> The court pointed to the BLM's flawed reasoning in its FEIS, which maintained that since no sage grouse were found at two nearby sites during winter, the higher elevation and greater likelihood of snow accumulation at the Echanis Site made it a less likely area for sage grouse winter habitat.<sup>33</sup> Yet, the court highlighted that the FEIS, in contradiction to its ultimate assumption, recognized that the Echanis Site was potentially a good winter habitat for sage grouse due to its wind-swept landscape.<sup>34</sup> The court further noted that scientists and cooperating agencies made the recommendation that the BLM either conduct surveys at the Echanis Site or assume that sage grouse were present in the area.<sup>35</sup> If the BLM had followed these recommendations, they would have discovered four birds were in fact found in February at the Echanis Site.<sup>36</sup> In light of these considerations, and in line with recent precedent, the court declared that “baseline conditions at the Echanis site . . . warranted comprehensive study” by the BLM, and that the agency had a duty to reasonably assess these conditions.<sup>37</sup> Ultimately, the court found that the BLM's failure to provide accurate scientific analysis and ensure professional integrity significantly undermined the validity and reasonableness of its assumption that the Echanis Site did not provide winter habitat for sage grouse.<sup>38</sup>

The BLM asserted three arguments against ONDA's challenge.<sup>39</sup> First, the BLM maintained that it was owed special scientific and

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29. *Id.* (quoting 40 C.F.R. § 1500.1(b) (2016)).

30. *Id.* (quoting 40 C.F.R. § 1500.1(b) (emphasis added)).

31. *Id.* at \*5-6.

32. *Id.* at \*5.

33. *Id.*

34. *Id.* at \*6.

35. *Id.*

36. *Id.*

37. In both *Northern Plains Resource Council v. Surface Transportation Board* and *Half Moon Bay v. Carlucci*, the Ninth Circuit held that an agency's failure to assess baseline conditions was arbitrary and capricious under the APA, and in violation of NEPA. *Id.* at \*5; *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011); *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505 (9th Cir. 1988).

38. *Id.* at \*6.

39. *Id.* at \*7.

technical deference.<sup>40</sup> The court agreed, but rejected the notion that deference could excuse the agency from “ensuring the accuracy and scientific integrity of its analysis,” as required by NEPA.<sup>41</sup> Second, the BLM argued that the Ninth Circuit would be imposing a “requirement not derived from NEPA” if it invalidated the FEIS on the basis that extrapolations are impermissible.<sup>42</sup> In response, the court clarified that its holding did not make all extrapolations impermissible, but rather that all extrapolations “must be based on accurate information and defensible reasoning.”<sup>43</sup> Lastly, the BLM declared that any prejudice caused by its faulty analysis was cured by the FEIS’s mitigation measures.<sup>44</sup> The court again dismantled the BLM’s reasoning, asserting that mitigation measures could not cure the effects of inadequate data.<sup>45</sup> The court reasoned that the measures would not be able to accurately address what specific impacts to mitigate, nor assess whether they could sufficiently offset the foreseeable impacts.<sup>46</sup>

In conclusion, the court declared that the BLM’s inadequate data collection could not be considered a harmless error.<sup>47</sup> The court clarified that the BLM’s use of “inaccurate information and unsupported assumption[s]” undermined the essential tenets of NEPA, most notably informed decisionmaking and public participation.<sup>48</sup> The court stated that “most importantly,” the BLM’s unsupported assumption materially affected the outcome of its environmental review.<sup>49</sup> Specifically, if the BLM would have correctly assumed the presence of sage grouse at the Echanis Site, the agency would not have allowed the Project to proceed.<sup>50</sup>

### B. Genetic Connectivity

ONDA also challenged the BLM’s environmental review on the agency’s failure to address the issue of “genetic connectivity between sage grouse populations.”<sup>51</sup> The court found that ONDA’s contention was unavailing since it failed to necessarily raise the issue of genetic

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40. *Id.* (citing 40 C.F.R. §§ 1500.1(b), 1502.24).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* (citing Tucson Herpetological Soc’y v. Salazar, 566 F.3d 870, 880 (9th Cir. 2009); WildEarth Guardians v. Mont. Snowmobile Ass’n, 790 F.3d 920, 924 (9th Cir. 2015)).

49. *Id.*

50. *Id.*

51. “‘Genetic connectivity’ means the extent to which separate populations of a species are able to share genes and thereby to maintain a healthy genetic diversity within each population.” *Id.*, at \*8.

connectivity during the public comment period.<sup>52</sup> Due to this failure, the court held that ONDA did not exhaust its administrative remedies, and therefore its NEPA challenge was not entitled to judicial review on this basis.<sup>53</sup>

The court reasoned that ONDA's comments did not address genetic connectivity directly or conceptually.<sup>54</sup> The court also noted that the BLM had responded to all of ONDA's "extremely comprehensive" comments "regarding habitat connectivity and fragmentation."<sup>55</sup> Therefore, the court held, ONDA's vaguely structured comments, even if intended to refer to genetic connectivity, did not sufficiently notify the BLM that "ONDA sought discussion of the [substantively distinct issue of] genetic connectivity."<sup>56</sup> The court did not agree with ONDA that the issue of genetic connectivity was either clearly distinct from other connectivity issues, or that that its widely-recognized importance to sage grouse conservation excused ONDA from having to raise it as an issue.<sup>57</sup> Despite ONDA's contentions, the court did not find that the BLM was obligated to address genetic connectivity without being alerted to the issue during the public comment period.<sup>58</sup>

#### IV. CONCLUSION

The Ninth Circuit addressed the dueling objectives of two critical environmental conservation efforts in *Oregon Natural Desert Association*. Ultimately, the court's ruling turned on NEPA's strict imperatives that agencies conduct informed decisionmaking and ensure scientific integrity. In holding that the BLM's reliance on inaccurate data and unsupported assumptions was arbitrary and capricious, the court reinforced that agencies have the onus to act with defensible reasoning and to protect meaningful public participation. Furthermore, the court refrained from requiring an agency to address distinct environmental issues if they are not effectively asserted during the public comment period.

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52. *Id.* at \*8, 10.

53. *Id.*

54. *Id.* at \*9.

55. *Id.* at \*8, 10.

56. *Id.* at \*8.

57. *Id.* at \*9.

58. *Id.* at \*10 (citing *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011)).