

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Ninth Circuit Docket No. 11-15799

**WESTERN WATERSHEDS PROJECT and
CENTER FOR BIOLOGICAL DIVERSITY,**
Plaintiffs-Appellants

v.

BUREAU OF LAND MANAGEMENT,
Defendant-Appellee,

and

SPRING VALLEY WIND LLC,
Defendant-Intervenor-Appellee.

On appeal from the United States District Court for the District of Nevada,
3:11-cv-0053-HDM-VPC

**REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT
RULE 27-3 FOR INJUNCTION PENDING APPEAL**

Kristin F. Ruether
(ISB # 7914)
Advocates for the West
P.O. Box 1612
Boise, ID 83701
(208) 342-7024 x 208
kruether@advocateswest.org

David H. Becker
(OSB # 081507)
Law Office of David H. Becker, LLC
917 SW Oak Street, Ste. 409
Portland, OR 97205
(503) 525-0193
davebeckerlaw@gmail.com

Attorneys for Plaintiffs-Appellants

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INTRODUCTION

BLM and Spring Valley Wind LLC fail to establish that this industrial wind energy development—sited near a major bat cave and in the bats’ nightly flight path in contravention to BLM’s own siting guidance—poses less than significant impacts to sensitive bats. They do not dispute that the Project’s mortality to bats will *not* be held below 192 bats/year, as the district court erroneously assumed. Nor do they refute the certainty of irreparable harm to sage-grouse and their habitat, which will be undeniably degraded by the wind towers and 25 *miles* of roads proposed by this Project. Instead, they argue that irreparable harm cannot occur since this imperiled species is already struggling and the habitat is not pristine, a theory that lacks support in fact or law.

I. WWP COMPLIED WITH FED. R. APP. P. 8.

BLM alleges WWP failed to comply with Fed. R. App. P. 8. The Rule provides that a party “must ordinarily move first in the district court” for, as relevant here, a stay or an order granting an injunction while an appeal is pending. Fed. R. App. P. 8(a)(1). WWP did so. Ex.¹ 1 (Dkt # 66). The motion may be made to the court of appeals if, “a motion having been made, the district court denied the motion or failed to afford the relief requested.” Fed. R. App. P. 8(a)(2). Due to the imminence of irreparable harm, WWP requested the district court rule

¹ Unless otherwise noted, exhibits refer to those attached to WWP’s motion.

on its Fed. R. Civ. P. Rule 62(c) motion by April 8, 2011. The district court denied WWP's request to shorten time for responses and has never ruled on that motion. Thus, the district court has "failed to afford the relief requested." *Id.*

Waiting for the Fed. R. Civ. P. Rule 62(c) motion to be decided under the default District of Nevada timelines would take several weeks. *See* D. Nev. Local Rule 7-2 (responses due 15 days after service of motion; replies due 11 days after service of response). Site-clearing and road-blading began the week of April 4, and are ongoing. *See* Circuit Rule 27-3 Certificate. Irreparable harm to desert habitat would result from allowing these activities to continue for several weeks. Because WWP complied with the rules and BLM has not stated that it will delay construction, the Court should decide this motion under Fed. R. App. P. 8.

II. WWP IS LIKELY TO SUCCEED ON THE MERITS.

A. Impacts on Bats Will Be Significant.

BLM characterizes WWP's citations to comments by the expert wildlife agencies, BLM's own staffers, and one of the most preeminent bat biologists in the world—all raising serious concerns regarding bat mortality from this Project—as "a list of random snippets" from the record. BLM Brief (Br.) at 8. Far from random, the concerns form a consistent opinion of the scientific experts who weighed in on the project that BLM should have prepared an EIS. BLM fails to

show these concerns are not serious or how there could conceivably be *no* significant impacts from this large industrial development on public lands.

First, BLM and SVW do not refute that bat mortality will be highly uncertain. BLM defends its bat significance analysis by repeating the items cited by the district court, such as that the bats generally fly higher than the turbines. BLM Br. at 13 (citing Order). But reliance on these facts to negate significant uncertainty is clearly erroneous. Mortality remains uncertain even if the bats are only present seasonally. The fact that bats forage south of the Project area *demonstrates* uncertain and significant mortality, as this path takes them over the Project site. See Ex. 12 at 2 (map). Unsupported statements that bats “may” or “generally” avoid the site ignore that bats are *attracted* to turbines. Ex. 5 ¶ 24.

BLM and SVW fail to refute WWP’s showing that the district court’s assumption that the Project’s mitigation would “ensure the bat mortality rate would not surpass 192 bats per year,” Ex. 2 at 16, was clearly erroneous. Neither BLM nor SVW establish that this threshold serves as a mortality cap, or that the mitigation measures are anything but optional. SVW argues the mitigation is not optional, but cites only a reference to a Memorandum of Agreement, the principles of which are optional (“[t]he TAC is only an advisory committee,” will make recommendations, and can be terminated). Ex. 12 at 27 (ABPP). SVW argues WWP inaccurately stated the mitigation has strict limits. But the ABPP is clear

that “no more than two phases of curtailment will be implemented in a single year,” and each phase is defined by hourly limits of mitigation. Ex. 12 at 32 (ABPP). If mortality continues to exceed thresholds, no consequences occur other than a meeting to “discuss other appropriate mitigation measures.” *Id.* FWS agreed “it is not clear what actions would occur if this mortality estimate is grossly incorrect.” Ex. 19 at 2. SVW argues the date limits (criticized by NDOW as too narrow) only apply for an initial study period, but this is the only period for which the dates are given: the ABPP is silent on what will occur after this. *See* Ex. 12 at 30. NDOW and Dr. Tuttle confirmed these criticisms. *E.g.*, Ex. 18. at 6 (mitigation fails to show mortality will be low), Ex. 17 at 4 (substantial bat activity occurs outside of allowed mitigation dates; curtailment should occur where and when mortality occurs), Ex. 5 ¶ 37.

BLM’s defense of its radar system, BLM Br. at 15, only cites to the EA stating an *incorrect* assumption that the system is working at the sole other location at which it is deployed. BLM Ex. 1 at 96. NDOW criticized this assumption, noting the proponent did not provide its data for review, Ex. 17 at 3, and Dr. Tuttle confirmed the system has not prevented high bat mortality at that location. Ex. 5 ¶¶ 31–34.

BLM defends the mortality threshold as being based upon a comparison of 11 other wind facilities. BLM Br. at 13 (citing EA at 105). In addition to being

unenforceable, the threshold was strongly criticized by NDOW as being “an inappropriate use of data.” Ex. 18 at 3. It explained that many of the comparison sites were inappropriate since they were on ridges, not in a valley, *id*, and that BLM failed to address whether the comparison sites were actually located in the range of the relevant bat species. *Id.* at 5. In fact, almost all of BLM’s comparison sites are *outside the range* of Brazilian free-tailed bats. See Ex. 14 (map of range). See also Ex. 5 ¶ 20 (BLM’s extrapolation is “an unfounded guess.”). BLM failed to refute NDOW’s criticisms or explain how this is reasonable.

Finally, BLM complains that the expert comments WWP cites came either too late or too early. BLM Br. at 10–11. As WWP will brief in more detail on the merits of this appeal, Dr. Tuttle’s declaration comes within several exceptions to record review, notably because it was “necessary to determine whether the agency has considered all relevant factors and has explained its decision.” *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quotation omitted). As highlighted above, Dr. Tuttle identified numerous missing factors in BLM’s analysis, including bat attraction and effectiveness of the radar system.

BLM argues that the critical comments from sister agencies come from invalid “older documents,” that all concerns were addressed and all agencies ultimately endorsed the Project. BLM Br. at 11. This is not accurate. The National Park Service never rescinded its comments stating that impacts are

significant and an EIS is required. Ex. 16. The cited NDOW comments are both from 2010, the same year as BLM's decision. Exs 17, 18. NDOW's final comments, issued just two months before BLM's decision, raise numerous substantive concerns that remained unaddressed in the final EA, including: BLM's failure to avoid major bat caves and migration routes; the inadequacy of wildlife surveys; that "there could be a high magnitude of mortality on the Brazilian free-tailed bat"; SVW's refusal to share its data on the radar system; and inappropriate limits on timing of curtailment. Ex. 17. FWS's final comment letter, BLM Ex. 3, neither state that effects will be insignificant nor rescinds its prior comments, many of which BLM never resolved—such as that bat deaths could be easily ten times BLM's estimate and thresholds "could be reached in a single night." Ex. 19 at 2-3.

B. BLM Cannot Tier to the Wind PEIS to Avoid an EIS.

BLM (and the district court) defend the Project's violation of the PEIS's prohibition of locating wind facilities near major bat caves, in bat migration paths, or in feeding paths with the idea that it would not be possible to implement all "mitigation measures" in the PEIS. BLM Br. at 18, Ex. 2 at 20 (Order). Even if this were true, BLM cannot lawfully tier lawfully to the PIES unless BLM requires SVW to implement the Best Management Practices ("BMPs")—including the bat siting BMP. This is because the BMPs are a limited, mandatory subset of the many "mitigation measures." See BLM Ex. 8 at 14 (PEIS Record of Decision

stating “BMPs *will be adopted* as required elements of project-specific [plans of development] and or [rights-of-way] authorization stipulations,” as they identify “*required elements*” of the plans (emphasis added). BLM cannot rely on the PEIS for its site-specific analysis of impacts to bats because the agency, in the EA, disregarded the bat siting BMP on which the PEIS’s analysis depends.

II. SITE-CLEARING AND CONSTRUCTION WILL CAUSE IRREPARABLE HARM TO WILDLIFE.

BLM and SVW fail to refute WWP’s showing that Project construction will cause irreparable harm to sage-grouse. They do not deny that sage-grouse will be disturbed and driven away by construction, that this the birds’ mating season, or that they are a declining BLM sensitive species with a low reproductive rate. Nor do BLM and SVW refute that it would take decades for this high desert site to recover from native vegetation removal through site-clearing and road-blading.

Rather, their primary argument is a theory that there is no harm to sage-grouse since the birds are present in low numbers and the Project area is not pristine. But BLM and SVW never provide any legal or factual ground as to why this negates irreparable harm. *See* BLM Br. at 5–6. In fact, as explained in WWP’s motion, the low numbers and lack of pristine habitat only serve to increase the likelihood of irreparable harm. This is because birds in disturbed areas already have reduced likelihood of reproductive success, 75 Fed. Reg. 13,910, 13,915, and thus a small additional population decrease can cause complete abandonment of

nearby leks and the loss of their unique genetic resources forever. Agency experts admitted this significant risk. Ex. 15 at 4 (SNWA noting “the development is likely to cause the abandonment” of the closest lek and noting “possible permanent abandonment of the SVW Project area and adjacent habitats”); Ex. 12 at 17 (BLM admitting increased risk of lek abandonment).

BLM cites data collected by SNWA to imply that sage-grouse do not use the area. But SNWA itself objected to such use of its data, complaining that BLM’s assumptions that “sagebrush habitat is of poor quality and has very low use levels in this area . . . are unsupported by any survey data in the record” and explaining that its data, in fact, “suggest[]sage-grouse move across the SVW Project area.” WWP Ex. 15 at 4.² Other biologists criticized BLM’s surveys as inadequate. Ex. 22 (BLM state wildlife biologist noting “[t]he proponent did not survey for sage grouse and noted that none were observed, although none were looked for.”); Ex. 19 at 3 (FWS questioning survey adequacy). The assertion that birds do not use the habitat is simply not credible, with multiple leks nearby. Ex. 12 at 9.

BLM discounts habitat impacts by asserting that direct disturbance will only occur in small percentages of the Project area. BLM Br. at 5. This assertion blatantly contradicts BLM’s acknowledgment that the area of direct disturbance

² BLM cites a post hoc compromise agreement by SNWA and SVW, whereby SNWA agrees not to challenge the Project if SVW agrees not to oppose a SNWA groundwater development project. BLM Br. at 11 n. 17. However, SNWA did not retract the sage-grouse science described in its earlier comments.

has little to do with the severity of an action's harm to sage-grouse and their habitat. Ex. 12 at 17 (describing 38,289-acre "avoidance area" due to sage-grouse behavioral avoidance of tall structures). And this avoidance area is based on an unreasonably optimistic prediction that sage-grouse only avoid habitat within two miles of turbines. *Id.* The distance is likely greater. Ex. 15 at 4 (recent FWS science finds development within three to five miles of leks "may have significant adverse impacts"). In addition to birds using nearby leks, the Project will adversely impact birds farther away by preventing them from crossing the valley and interbreeding. Such loss of connectivity between habitats will isolate populations, increasing the probability of "loss of genetic diversity and extirpation from stochastic events." 75 Fed. Reg. at 13,923. *See also* Ex. 19 at 3 (FWS expressing concerns regarding how Project will affect connectivity).

Finally, BLM half-heartedly suggests that Nevada sage-grouse may not be "in jeopardy," since Nevada permitted a 2010 hunting season. BLM Br. at 6 (citing district court). FWS's 2010 "warranted but precluded" finding noted that effects from hunting are not significant. 75 Fed. Reg. at 13,966. Rather, it based its finding on the threat of habitat fragmentation from impacts *exactly like those this Project will cause*. *Id.* at 13,962. In sum, BLM's implication that a handful of existing roads is no different from the construction of a wind energy facility, with

some 75 415-foot tall turbines and 25 miles of new roads, is not supported by the government's own science and fails to refute the certainty of irreparable harm.

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST REQUIRES AN INJUNCTION

SVW restates its concerns that the project "could" stop the project and that liquidated damages "may" begin to accrue on its power purchase agreement. SVW Br. at 14–15. It is inconceivable that the power sale contract (which is not in the record) does not include a clause excusing performance if SVW experiences a delay in the permitting process. If the contract does not, then SVW assumed that risk, and it should not be foisted onto sage-grouse and bats. SVW's private losses also do not necessarily implicate the public interest, *id.* at 18, particularly when SVW lobbied BLM from preventing a lawful EIS. *E.g.* Ex. 21. And, although BLM and SVW state general national interests in renewable energy, these interests do not override or alter BLM's obligations under NEPA. None of the arguments advanced defeat the paramount public interest in an injunction to protect sensitive wildlife and their habitat until this Court can decide WWP's appeal.

DATED this 19th day of April, 2011.

Respectfully Submitted,

s/ Kristin F. Ruether

Kristin F. Ruether
Attorneys for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 19, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

David Negri
OFFICE OF THE U.S. ATTORNEY
MK Plaza, Plaza IV
Suite 600
800 Park Boulevard
Boise, ID 83712-9903

Respectfully submitted this 19th day of April, 2011.

s/ Kristin F. Ruether

Kristin F. Ruether
Advocates for the West
Attorney for Plaintiff-Appellants