



March 2, 2016

VIA CM/ECF

Molly C. Dwyer, Clerk of the Court  
U.S. Court of Appeals for the Ninth Circuit  
P.O. Box 193939  
San Francisco, CA 94119-3939

Re: *Oregon Natural Desert Ass'n et al. v. Jewell*, No. 13-36078  
Project Status Letter in response to 2/19/16 Order (DktEntry # 65)

Dear Ms. Dwyer:

There is little possibility that the Echanis project will go forward. As the Court notes, key regulatory preconditions have been cancelled, withdrawn, and revoked: the power purchase agreement with Southern California Edison, the interconnection agreement with Bonneville Power Administration, and the BLM Notice to Proceed. ER 34–37, 43; Opening Br. at 30–31 & n.11. The only piece that remains is the Secretary’s Record of Decision (“ROD”) granting a Right-of-Way. ER 257–62.

But that is critical: the Right-of-Way is current in effect and does not expire until December 31, 2041. Right-of-Way Grant, ¶ 2.c.<sup>1</sup> Unless and until the ROD and Right-of-Way are either withdrawn and terminated by the Secretary or vacated by this Court, the developer could—if it could find a buyer for this controversial project—still sell the Right-of-Way asset to another company.<sup>2</sup>

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<sup>1</sup> Available at [http://www.blm.gov/or/districts/burns/plans/steen\\_trans/files/row-grant.pdf](http://www.blm.gov/or/districts/burns/plans/steen_trans/files/row-grant.pdf) (last visited Mar. 1, 2016).

<sup>2</sup> There is little likelihood that the Right-of-Way holder could develop the project. Echanis, LLC appears to have been abandoned, and its parent company, Columbia Energy Partners, has never built any type of project. See [http://egov.sos.state.or.us/br/pkg\\_web\\_name\\_srch\\_inq.show\\_detl?p\\_be\\_rsn=13429](http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=13429)

As a practical matter, in the current market for renewable energy, the chances of finding a buyer are slim. Like in any other business venture, renewable energy developers look to reduce risk by selecting properly-sited, cost-effective, non-controversial projects. The Steens project fits none of those criteria. One indicator of the unusual degree of risk involved here is that the project never moved forward at any of the typical points one would expect: following issuance of the ROD and Right-of-Way, following issuance of the Notice to Proceed, or following the district court's decision in the Secretary's favor. *See, e.g., W. Watersheds Proj. v. BLM*, 443 Fed. App'x 278, 278–79 (9th Cir. 2011) (Graber, J., concurring) (discussing denial of preliminary injunction that allowed project construction to begin despite ongoing litigation on merits); *Desert Protective Council v. U.S. Dep't of Interior*, 927 F. Supp. 2d 949, 955 (S.D. Cal. 2013) (summary judgment ruling describing earlier denial of preliminary injunction that allowed project construction to proceed). Pending litigation rarely delays an economically-viable project.

Moreover, the window for full-bore renewable energy development has since been replaced by a more nuanced approach. For example, Congress recently extended the expiration date for the federal renewable electricity production tax credit, but now with a 20% phase-down per year through 2019 for wind facilities. *See* <http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc> (last visited Mar. 1, 2016). Marginal projects like Echanis are increasingly unprofitable with each passing year. Combined with the time it would take to secure new power purchase and interconnection agreements, as well as conduct required pre-construction surveys, the project is more uneconomical than ever.

Similarly, last month the Northwest Power and Conservation Council<sup>3</sup> issued its Seventh Power Plan for the Pacific Northwest. *See* <https://www.nwcouncil.org/news/blog/7th-pp-approved/> (last visited Mar. 1,

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[86&p\\_srce=BR\\_INQ&p\\_print=FALSE](http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc) (Oregon Secretary of State showing Echanis, LLC as “inactive” since 2012); <http://columbiaenergypartners.com/> (website last updated in early 2011, describing one wind project sold off in 2006 and subsequently developed by another company and a 2 MW solar project that was never built) (both last visited Mar. 2, 2016).

<sup>3</sup> Congress established the Council in 1980 in the Pacific Northwest Electric Power Planning and Conservation Act. Pub. L. 96-501.

2016). Despite expected population growth, the Council determined that Idaho, Montana, Oregon, and Washington can secure *all* of their energy needs for the next 20 years from conservation (*i.e.*, energy efficiency) alone. This means there is no need to build new electricity generation facilities.

Of the new projects that are built, the Council forecasts more emphasis on increasingly cost-effective solar photo-voltaic projects and on resources such as geothermal and wave energy, which have more consistent output compared to the sun and wind. And utilities in neighboring states like California and Nevada have for the most part filled out the generation capacity required to meet state renewable portfolio standards for the next five to ten years. *See, e.g.*, [http://www.cpuc.ca.gov/RPS\\_Homepage/](http://www.cpuc.ca.gov/RPS_Homepage/) (California renewable procurement status); <http://www.cesa.org/assets/2015-Files/NV-Energy-2014-RPS-Compliance-Report.pdf> at 14 (NV Energy's 2014 renewable portfolio standard report showing 20.2% of its power generated from renewables, already over the 18% standard) (both last visited Mar. 1, 2016).

Making the Steens project still further unpalatable to potential buyers is the near-certainty that BLM would need to prepare a supplemental EIS prior to reissuing a Notice to Proceed. Last October, BLM issued the Oregon Greater Sage-Grouse Approved Resource Management Plan Amendment ("ARMPA"). *See* <http://www.blm.gov/or/energy/opportunity/finaleis.php> (last visited Mar. 1, 2016). The ARMPA establishes objectives, land use allocations, and management actions for protecting the sage-grouse and its habitat on public lands. The decision took immediate effect and applies to "[a]ll existing operations and activities under permits, contracts, or other authorizations." ARMPA at 2-1. Pertinent to the Echanis project are, for example, new requirements to identify connectivity habitat and to verify and update habitat data. ARMPA at 2-7, -9 (MD SSS-12, MD SSS-7).

ONDA again drew the Secretary's attention to these issues in October 2015.<sup>4</sup> Under NEPA, even after an agency has prepared an EIS, so long as there is "major federal action remaining to occur," the agency must supplement its analysis if there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)); 40 C.F.R. § 1502.9(c)(1)(ii); *see also*

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<sup>4</sup> <http://onda.org/what-we-do/conservation-laws/steens-wind-petition-2015> (rulemaking petition pursuant to 5 U.S.C. § 553(e)) (last visited Mar. 1, 2016).

*Hammond v. Norton*, 370 F. Supp. 2d 226, 256 (D.D.C. 2005) (major federal action remained to occur where BLM had not yet issued Notices to Proceed for a Right-of-Way).

Despite asking the Secretary in 2013, 2014, and 2015 to withdraw the ROD her predecessor signed, she has declined to do so. Accordingly, there remains a live controversy necessitating that the Court adjudicate ONDA's claims and vacate the ROD and Right-of-Way it granted. *See Bundorf v. Jewell*, -- F. Supp. 3d --, 2015 WL 6636806, at \*3 (D. Nev. Oct. 30, 2015) (vacating ROD for a BLM wind project upon finding NEPA violations).

Sincerely,

s/ Peter M. Lacy

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Cc: Counsel of Record

**CERTIFICATE OF COMPLIANCE**

Pursuant to the Court’s order (DktEntry # 65) dated Feb. 19, 2016, I certify that the foregoing letter contains 1,000 words.

s/ Peter M. Lacy

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Peter M. (“Mac”) Lacy  
Oregon Natural Desert Association

Attorney for Plaintiffs-Appellants

**PROOF OF SERVICE**

I hereby certify that on March 2, 2016, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no unregistered users participating in this case.

s/ Peter M. Lacy

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