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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

WESTERN WATERSHEDS PROJECT and CENTER FOR BIOLOGICAL DIVERSITY Plaintiffs, v. BUREAU OF LAND MANAGEMENT, Defendant, and SPRING VALLEY WIND LLC, Defendant-Intervenor.	Case No. 3:11-CV-53 **REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

As the opposing papers from BLM and industry Defendant-Intervenor Spring Valley Wind LLC ("Industry") confirm, ground-clearing work is slated to start in less than ten days on the Spring Valley Wind Energy Facility ("Project"), including removing native sagebrush vegetation and bulldozing roads and construction sites for the erection of dozens of wind turbines. These activities will occur within occupied habitat of greater sage-grouse – which the U.S. Fish and Wildlife Service ("FWS") recently found "warrants" protection under the Endangered Species Act because of loss of habitat from energy development and other activities. Plaintiffs' experts Dr. John Tull and Katie Fite have shown how the disturbance of soils, microbiotic soil crusts, and native vegetation for this project will cause immediate and long-lasting, irreparable ecological harms, including to sage-grouse habitat in the project area. And Plaintiffs' expert Dr. Merlin D. Tuttle – one of the foremost bat experts in the world – has warned that the Project poses significant adverse impacts to the colony of Brazilian free-tailed bats located near the Project site.

Neither BLM nor Industry rebut these facts, which confirm that BLM violated NEPA by relying on an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI") instead of taking a "hard look" at the likely environmental consequences in a full Environmental Impact Statement ("EIS"), as NEPA requires. Because Plaintiffs are likely to prevail on the merits of their NEPA claims, and given the irreparable ecological harms that are imminently threatened, the Court must issue an injunction to preserve the environmental values at risk, including these sensitive species, and preserve the status quo until this Court resolves the merits and the agency can complete a lawful environmental review. *See Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007) ("*ONRC v. Goodman*") (injunction

ordered to protect sensitive species from loss of habitat, based on NEPA violations; and holding that the "risk of permanent ecological harm outweighs the temporary economic harm" from an injunction); *South Fork Band v. U.S. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (enjoining Nevada mine based on NEPA violations because "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward.").

REPLY ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

A. Environmental Effects Of The Project Will Be Significant.

Plaintiffs' opening brief easily satisfied NEPA's "low standard" for requiring an EIS, *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006), by raising "substantial questions whether a project may have a significant effect on the environment." *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) (quotation omitted). The sheer size of the Spring Valley Wind Project demonstrates that it will have significant environmental impacts, including construction of over 25 miles of new roads and extensive disturbance across more than 7,000 acres of sagebrush habitat. Moreover, Plaintiffs' opening brief pointed out numerous statements from BLM's own experts, as well as those from four sister agencies, stating that the impacts will be significant. And Plaintiffs have presented the Court with declarations of preeminent bat scientist Dr. Merlin D. Tuttle and two expert biologists in the sagebrush steppe ecosystem, Dr. John Tull and Katie Fite, which identified numerous adverse impacts that BLM failed to address in its EA and FONSI – and whose testimony is not rebutted.[1]

[1] Rather than respond to Plaintiffs' declarations on the merits, BLM complains that they are improper extra-record evidence. BLM Br. at 10–12. As explained in Plaintiffs' response to industry's motion to strike (filed herewith), the declarations are properly considered by the Court

BLM's primary response to this showing is to argue that this Court must simply defer to its "expert" conclusions. BLM Response Brief (BLM Br.) at 19. But that argument fails, since BLM provides little to no evidence of application of its expertise to which the Court could defer. Its remaining arguments, including that all critical agency expert comments—internal and external—were somehow resolved, are not supported and are unpersuasive, as discussed below.

In particular, BLM fails to rebut the facts shown by Plaintiffs which trigger numerous "significance" factors under the NEPA regulations for determining whether an EIS is required. For example, BLM fails to rebut that that there are significant questions as to whether the Project's location –which NDOW describes as "within the largest known bat migration route in the Great Basin ecosystem," Ex.[2] 17 at 4 – puts it in close "proximity" to "ecologically critical areas," 40 C.F.R. § 1508.27(b)(3). BLM cites nothing showing that such proximity is not a significant concern. Nor could it in light of the overwhelming series of expert agency memoranda establishing the opposite. *E.g*., Ex. 16 at 2 (FWS expressing "serious reservations over the selection of the Spring Valley project site"), Ex. 18 (FWS noting "biggest issue was potential impacts to Brazilian Free-Tailed bats using Rose Guano Cave" and asking why BLM did not follow measures regarding not building near bat hibernacula or migration corridors).

BLM also fails to rebut that there are significant questions as to whether the Project involves the presence of cumulative impacts, 40 C.F.R. § 1508.27(b)(7), in light of at least three other wind developments proposed in Spring Valley as well the nearby Southern Nevada Water Authority ("SNWA") groundwater development. EA at 150–151. *See* Tuttle Decl. ¶ 27 (noting unrecognized "extreme potential" for cumulative harm in light of bats' low reproductive rate);

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both to show environmental impacts that BLM failed to address under NEPA, and to identify irreparable ecological harms that underscore the need for injunctive relief. *See Nat'l Audubon Soc'y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 (9th Cir. 1993).

[2] Exhibits again refer to those attached to the Declaration of Kristin F. Ruether (Dkt. No. 25).

Ex. 29 at 3 (National Park Service noting "obvious potential to significantly impact shared DOI bat and bird populations in the area" due to cumulative impacts).

Perhaps most importantly, BLM fails to rebut that there are significant questions as to whether the Project may cause effects that are "highly uncertain or involve unique or unknown risks," "likely to be highly controversial," or of a significant degree. 40 C.F.R. § 1508.27(b)(5), (4), (8). In fact BLM admits that wind energy and appropriate mitigation "are evolving" and are "at the frontiers of science," BLM Br. at 13 – thus confirming that even BLM knows the Project poses at least uncertain impacts to bats, sage-grouse and other wildlife.

BLM's request that the Court simply defer to it, despite all these facts showing "significance" of the Project, fails to recognize that deference is only due when there is an expert agency opinion to which to defer. "Although the Court must defer to an agency's expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts." *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D.D.C. 1997); *Ctr. for Biol. Diversity v. Lohn*, 296 F.Supp.2d 1223, 1239 (W.D. Wash. 2003) (same). This principle governs here, where BLM's own scientific experts opined that impacts were significant, and only its managers and the industry proponent argued otherwise. As the Ninth Circuit upheld recently, where BLM managers override the contrary scientific advice of the agency's own experts, no judicial deference is due and NEPA is violated. *See WWP v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008), *aff'd* 632 F.3d 472 (9th Cir. 2011) (holding that BLM violated NEPA in promulgating revised grazing regulations that weakened ecological protections, where agency scientists repeatedly warned of negative impacts to wildlife but were overridden by agency superiors).

BLM further argues that Brazilian free-tailed bats are neither threatened nor endangered, implying this negates the possibility of significant impacts. BLM Br. at 14. But Brazilian free-tailed bats are in fact imperiled, and are a designated Nevada BLM "sensitive species" (due to inhabiting "ecological refugia, or specialized or unique habitats")[3] and a Nevada "protected mammal." NAC 503.030; EA at F-29. Dr. Tuttle confirmed that the species "appears likely to be in substantial decline." Tuttle Decl. ¶ 43. Industry's attempt to rebut this fact via its declaration of statistician Wallace Erickson is based upon a "highly misleading" reading of the literature; and does not address the many significant impacts and uncertainties raised in Dr. Tuttle's initial declaration. *See* Second Tuttle Declaration (filed herewith) ¶ 7. The Ninth Circuit and other courts have emphasized that "sensitive" species – such as sage-grouse and Brazilian free-tailed bats – deserve close protection to ensure against further losses of habitat. *See Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (agency violated NEPA in failing to address adverse impacts on sage-grouse habitat); *ONRC v. Goodman*, 505 F.3d at 898 (injunction ordered to protect sensitive fisher species from loss of habitat); *Morgan v. Walter*, 728 F.Supp. 1483 (D. Idaho 1989) (injunction granted to protect ESA "candidate" species from impacts of bulldozing and other activities that harm their habitat).

BLM also argues that Plaintiffs do not allege the Project will "impact the species" as a whole. BLM Br. at 14. But impacts at a species-wide level are not required to trigger NEPA's "hard look" requirements. *Anderson*, 314 F.3d 1006 at 1019 (local impacts to whales from hunt in one area required EIS). Local impacts here are confirmed by BLM's contradictory defense of its "mortality thresholds." BLM Br. 14–16. On one hand, it attempts to defend the accuracy of the threshold, as it must, considering the FONSI specifically bases its finding that the Project

[3] *See* http://water.nv.gov/hearings/dry_cave_delamar%20hearings/USBLM/BLM-801.pdf

does not trigger the "highly uncertain" significance factor on its claim that the ABPP "would ensure that in the long term, impacts *remain below designated mortality thresholds* (203 birds/year and 193 bats/year)." FONSI at 3, PAR 930 (emphasis added). On the other, it admits that the thresholds are not caps at all, but mere triggers for further optional mitigation, BLM Br. at 15—undercutting its own finding in the FONSI and confirming the presence of highly uncertain impacts. *See* Ex. 29 (National Park Service noting that even *meeting* thresholds has "obvious potential to significantly impact shared DOI bat and bird populations in the area).

BLM's half-hearted defense of the accuracy of the bat mortality threshold also fails under NEPA. BLM restates the EA's reliance on a simplistic chart averaging mortality from eleven wind projects scattered around the northwest and demands deference, but does not explain why it is reasonable or to what expert we must defer. BLM Br. at 15–16. During the planning of the Project, NDOW strongly criticized this calculation as "an inappropriate use of data." Ex. 17 at 4. It explained that just "because a species has not been observed as mortality at other wind energy sites, one cannot conclude that it would not likely suffer mortality" here; and that application of data from "somewhat similar site (many of which were not located in a valley but on ridge tops) is inappropriate and may not be applicable to the proposed project site." *Id*. NDOW suggested "using a more scientific means of deriving risk" and suggested several models. *Id*. *See also id*. at 6 (same), Tuttle Decl. ¶ 20 (no evidence comparison facilities were in similar bat habitat; thresholds are "unfounded guess"). BLM cites no expert rebuttal of these serious criticisms, meaning deference is not appropriate on this issue.

Finally, as described in Plaintiffs' opening brief, numerous agency scientists, including BLM's own, concluded that impacts on wildlife were likely to be significant. Plfs' Br. at 11–12. BLM argues in a footnote that all internal BLM criticisms "were addressed in a subsequent

version of the EA." BLM Br. at 22, n.9 (citing PAR 520). But in fact, many comments from BLM staffers were not resolved. *See* Exhs. 24, 25. For example, when the state office commented that "[t]here remains substantial question on the impacts of this project on natural and wildlife resources and the document fails to follow BLM policy for wind energy development," and thus the ability to use a FONSI was "seriously questioned," Ex. 24 at 20, the official response was a brush-off: "No significant impacts have been described beyond those analyzed in the PEIS and therefore, a FONSI is appropriate." PAR 520.

As to NDOW and FWS, BLM claims that they provided "early criticism," but "after the BLM further refined the ABPP and the EA, the wildlife agencies had only approving comments." BLM Br. at 17. This is not accurate. BLM quotes two statements from NDOW, generally supporting the concept of adaptive management and implies that they encompass the entirety of the comments submitted in August 2010. BLM Br. at 17. In fact, those comments additionally raised numerous substantive concerns including the inadequacy of the industry proponent's wildlife surveys; concern that "there could be a high magnitude of mortality on the Brazilian free-tailed bat"; NDOW's inability to review industry's secret data on its radar technology; and inappropriate limits on timing of curtailment. PAR 772–774. None of these concerns were resolved in the EA.

BLM quotes one sentence from FWS's one-page letter of concurrence, stating that the ABPP was "appropriate in its adaptive management approach to avoid and minimize take of bats, migratory birds, and eagles." PAR 867. Finding that an "approach" is "appropriate" is a term of art under BLM's ABPP guidance pursuant to the Bald and Golden Eagle Protection Act,[4]

[4] *See* BLM Instructional Memo. No. 2010-156, *at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-156.html

and is distinct from finding that impacts are insignificant under NEPA. In fact, FWS conditions its conclusion on the adoption of its substantive comments, and does not address significance or rescind its prior critical comments. PAR 867. Many of those were never resolved– such as that given the "significant unknowns," the risk to bats "could be substantial," that a determination of significance is "difficult," that BLM needs to verify that the plan will be enforced, Ex. 18 at 2, 4; PAR 428, 430; and that the mortality thresholds "could be reached in a single night" and mortality could be easily ten times BLM's estimate. Ex. 16 at 3.

B. The Proposed Mitigation Fails to Prevent Significant Impacts.

In their opening brief, Plaintiffs explained that the mitigation measures described in BLM's ABPP fail to ensure against significant impacts to bats and birds because the measures were unproven or contained serious loopholes, as documented by numerous internal communications as well as Dr. Tuttle. Plfs. Br. at 14–17. "An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *South Fork Band*, 588 F.3d at 727. Similarly, in that case, "BLM argue[d] that an effectiveness discussion was not required because it is impossible to predict the precise location and extent" of harm and "problems should instead be identified and addressed as they arise." *Id*. But the Ninth Circuit reversed, because "NEPA requires that a hard look be taken, if possible, *before* the environmentally harmful actions are put into effect." *Id.*, at 727 (emphasis in original) (citation omitted).

Perhaps the most overarching problem with the ABPP is that, while the FONSI relies upon mortality being kept below "mortality thresholds" for BLM's significance determination, FONSI at 3, PAR 930, the ABPP fails to provide for this. As noted above, BLM does not dispute this. BLM Br. at 15.

Additionally, Plaintiffs explained that the effectiveness of the radar system was highly uncertain considering Industry had refused to share the data from the one Texas facility using it. Plfs. Br. at 15. Dr. Tuttle noted that the Texas data in fact show high rates of mortality, and that "it is unlikely that even the few [radar-triggered] shut-downs that occurred had any impact on protecting bats." Tuttle Decl. ¶¶ 31–35. BLM responds that it "never expected" the system to prevent birds and bat deaths in real-time, but only to record data. BLM Br. at 18–19. This argument is not consistent with the ABPP, which touted that the system could detect birds or bats flying through the facility and "automatically break and feather until the group exits the project area." EA at F-16. Thus, BLM's brief confirms that the radar system is unlikely to work and should not have been relied upon to reduce impacts to insignificance.

Plaintiffs further explained that the turbine curtailment measures fail to render impacts minor because of strict limits on how much curtailment can occur, regardless of bat or bird mortality; limits on how many phases can be reached in a year; and "resetting" mortality thresholds between mitigation phases. Plfs. Br. at 16–17. BLM's response is to quote a statement from Dr. Thomas H. Kunz and demand deference. BLM Br. at 19. However, Dr. Kunz, while generally approving of the concept of the ABPP, does not address whether it will reduce mortality below significance or harmful levels. *See* PAR 433. Additionally, several features he relies upon appear to have been deleted from the ABPP. For example, he assumed that if the TAC Science Team recommends mitigation, the Management Team can modify but not deny a measure, PAR 434; however, the final ABPP gives BLM management total discretion as to whether to adopt or deny TAC-recommended mitigation. EA at F-14. Thus, BLM fails to counter the numerous agency complaints regarding the ABPP's adequacy and ability to mitigate below significance, many of which remain unresolved in the final ABPP. *E.g.*, PAR 774

(NDOW's final comments criticizing curtailment date limits, as it "should occur where and when the mortality data demonstrates wildlife mortality"). BLM fails to establish that the mitigation will be effective, and deference is not due.

C. BLM Cannot Tier To The Wind PEIS To Avoid An EIS.

Plaintiffs explained in their opening brief that BLM cannot tier to the Programmatic Wind EIS ("PEIS") to avoid preparing a site-specific EIS for the Spring Valley Project, where the EA failed to follow several critical mitigation measures prescribed by the PEIS and the PEIS is itself out-of-date on bats and sage-grouse.

BLM's primary response is that all mitigation measures in the PEIS are optional – even those identified as Best Management Practices ("BMPs") – because those BMPs were not adopted into the Ely Resource Management Plan. BLM Br. at 25–26. BLM's argument is non-responsive. Plaintiffs do not attempt to enforce the BMPs as terms of the Ely RMP. Rather, BLM is unable to tier to the PEIS to avoid an EIS for this Project because it ignores critical parameters assumed by the PEIS – most egregiously, the direction not to site projects near bat colonies or in known bat flight paths. PAR 69 (PEIS bat avoidance BMP).

For successful tiering, "[t]he previous document must actually discuss the impacts of the project at issue." *South Fork Band*, 588 F.3d at 726 (emphasis added). If a subsequent project ignores explicit parameters of the prior analysis, as here, the prior analysis cannot have analyzed the project impacts under NEPA.

The plain language of the PEIS makes clear that it assumed the BMPs, including the bat avoidance BMP, would be followed. The PEIS Record of Decision ("ROD") states that mitigation measures incorporated in project plans of development ("PODs") "will include incorporation of specific programmatic BMPs." PAR 57. The ROD's attachment regarding

BMPs confirms that "[t]he BMPs will be adopted as required elements of project-specific PODs and/or as ROW authorization stipulations. . . . The BMPs for development of the POD identify required elements of the POD needed to address potential impacts associated with subsequent phases of development." PAR 66 (emphasis added). Those BMPs include that: "Operators shall determine the presence of bat colonies and avoid placing turbines near known bat hibernation, breeding, and maternity/nursery colonies; in known migration corridors; or in known flight paths between colonies and feeding areas." PAR 69 (emphasis added). Likewise, the PEIS chapter that analyzed "Potential Impacts of Wind Energy Development and Analysis of Mitigation Measures," Chapter 5, stated that it specifically limited the programmatic BMPs to "those that would be applicable to all wind energy development projects on BLM-administered lands." PEIS at 5-1 (emphasis added). *See also id.* at 2-32 (proposed alternative "would incorporate policies and BMPs that establish mitigation requirements for all projects"). FWS similarly informed BLM that "[t]he PEIS clearly states that wind energy development will not occur in known migration corridors, and we support this recommendation." Ex. 16 at 3.

The PEIS thus assumed the BMPs would be adhered to. BLM does not deny that the Project failed to adhere to the bat avoidance BMP. BLM Br. at 26. Thus, the Project's impacts are not encompassed by the PEIS's analysis, so BLM cannot tier to the PEIS and use only an EA to evaluate this Project's impacts on bats. Essentially, because BLM is not adhering to the bat avoidance BMPs set out in the PEIS, it must "start from scratch" in evaluating the impacts on bats. All evidence shows that these impacts will be significant, such that BLM's evaluation must be in the form of a comprehensive EIS.

BLM further acknowledges that the PEIS is outdated. BLM notes it was signed "years ago," and admits the agency needs to "refine its procedures further as new information comes to

light." BLM Br. at 26.[5] Indeed it does, considering the PEIS's major omissions include failing to address barotrauma and bats' attraction to turbines, and the recent sage-grouse science and March 2010 "warranted, but precluded" ESA determination. BLM's assertion that the PEIS includes "analysis of specific effects on sage grouse and bats" is incorrect, considering these gaps. BLM Br. at 27.

BLM argues it has not exceeded the PEIS's Maximum Potential Development Scenario because only areas of direct impact (*i.e.*, covered by a turbine pad) should be counted, rather than the area of construction listed in the EA (20,000, 15,000 and 31,000-acre project areas). BLM Br. at 28 n.13, citing EA at 151. This argument fails: FWS explained to BLM that short- and long-term disturbance figures "should include a much larger portion of the project area (8,565 acres)" because wildlife outside the areas of ground disturbance is still impacted. Ex. 17 at 8. Nor does the EA fill in the PEIS's gaps, when it too brushed off the significant impacts to bats and sage-grouse, as discussed below. *See also* Plfs' Br. at 19–22.

D. The EA's Analysis of Impacts is Inadequate.

Plaintiffs explained in their opening brief that BLM failed to take the required "hard look" at impacts to bats, sage-grouse, and other wildlife. That showing remains unrebutted.

With respect to bats and birds, Plaintiffs focused on BLM's failure to acknowledge bats' attraction to turbines and impacts of barotraumas; BLM's unfounded assumption that bat and bird deaths would be kept below mortality thresholds; and the EA's extremely brief cumulative impacts discussion which failed to recognize that bats are more susceptible than birds to death from wind turbines. Plfs. Br. at 20. BLM does not refute these specific showings of

[5] Of the seven wind energy projects listed on BLM's fast-track renewable energy projects website, BLM only attempted to use a tiered EA for this Project, indicating BLM is well aware of the shortcomings of the PEIS. Ex. 33 at 2–3.

inadequacies in the EA – nor could it, since the EA plainly does not discuss the bat impacts identified by other agencies, Plaintiffs, and Dr. Tuttle, which pose significant adverse impacts that require an EIS. Since BLM has never evaluated these impacts in any NEPA documents – either the PEIS or the EA – it violated NEPA by not taking a "hard look" at such impacts.

With respect to sage-grouse, Plaintiffs focused on the failure to acknowledge the imperiled status of the species, or the significance of the likely local or regional decline caused by this Project. Plfs. Br. at 21–22. Rather than point to anywhere in the record where it discussed and resolved these concerns, BLM responds by continuing to downplay impacts to sage-grouse, in disregard of the contrary opinions of its sister agencies. BLM Br. at 20–23. BLM fails to explain why, in light of its sister agencies' criticism of its sage-grouse analysis, it could have possibly fulfilled its NEPA duties here when it ignored or downplayed sage-grouse impacts.

Particularly unfounded is BLM's argument there are no sage-grouse leks directly within in the project area, and that it found no individual sage-grouse in the Project area – almost to suggest that sage-grouse will not be affected in any way. BLM Br. at 20. *See also* Ind. Br. at 7. In truth, since leks are mating grounds, the birds use habitat miles away for nesting and brood-rearing – a well-known fact which the Service discussed in detail in its March 2010 "warranted" determination. *See* 75 Fed. Reg. 13910, 13916-23. Indeed, SNWA informed BLM that it "collected telemetry data suggesting sage-grouse move across the SVW Project area." Ex. 30 at 4 (SNWA comments).[6] Where NDOW, SNWA, and BLM's own biologists criticized BLM for failing to conduct adequate surveys, BLM cannot now stick its head in the sand and pretend that

[6] BLM submits a letter from SNWA which sets out a compromise agreement by SNWA and Industry, whereby SNWA agrees not to challenge the Project if Industry agrees not to oppose SNWA's groundwater development project. PAR 1544. SNWA does not retract the scientific conclusions that led it to conclude impacts to sage-grouse were significant. Further, the letter is dated November 8, 2010—following the signing of the Decision Record—so is a post hoc rationalization rather than information that advised BLM of its decision.

sage-grouse will not be harmed by a massive development within occupied habitat. *E.g.*, Ex. 25 (BLM state office lead wildlife biologist criticizing adequacy of sage-grouse surveys, noting impacts to sage-grouse needs "careful evaluation," and noting alternative that causes lek abandonment and loss of nesting habitat should not be selected). The Ninth Circuit recently reversed another agency for similarly failing to address impacts on sage-grouse and its habitat under NEPA. *See Native Ecosystems*, 599 F.3d at 936-38.

BLM further argues that the Project will only result in the removal of 39–140 acres of sage-grouse habitat, BLM Br. at 21, despite the agency experts' repeated comments that the entire project site would be impacted, as wildlife outside the areas of ground disturbance is impacted. Ex. 17 at 8. *See also* Ex. Ex. 25 at 2 (BLM state office lead wildlife biologist explaining that the 5,000+ acre footprint of the project, minus temporary construction for some but not all species, is the amount of lost habitat); Ex. 2 at 4 (FWS stating that arguments as to "**the negligible impact [] caused by long-term habitat removal are, at best, disingenuous.**") (emphasis in original). BLM also implies that since the habitat is not pristine, further degradation is harmless. BLM Br. at 20, 23. Again, the FWS's March 2010 determination that sage-grouse now "warrant" ESA protection underscores the folly of this approach; FWS projected that sage-grouse will decline substantially toward extinction in the foreseeable future if continued habitat degradation in existing sage-grouse areas continues, including the Great Basin. *See* 75 Fed. Reg. at 13957-61.

The fact remains that BLM received serious comments from its own biologists and other agencies, criticizing its environmental analysis and mitigation measures, yet never discussed these in the EA. To satisfy NEPA, BLM must address in a meaningful way the concerns of scientists and the public in order to fully analyze the impacts of an action – not brush them off, as

BLM has done here. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 974 (9th Cir. 2006) ("conclusory statements, without any supporting data, do not constitute a 'hard look' at the environmental consequences of the action as required by NEPA"); *Earth Island Institute v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006) (EIS must contain a "discussion of adverse impacts that does not improperly minimize negative side effects"); *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1169 (9th Cir. 2003) (reversing where "Final EIS fails to disclose responsible scientific opposition to the conclusions upon which it is based").

II. PLAINTIFFS ESTABLISHED THAT IRREPARABLE INJURY WILL OCCUR.

BLM fails to rebut Plaintiffs' showing that irreparable injury will occur. Plaintiffs established that the construction activities imminently planned, which include mowing, site-clearing, blading roads, digging foundations, and the like, will cause irreparable harm to soils, native habitat, and wildlife including sage-grouse and pygmy rabbits. Plfs. Br. at 26–27.

BLM argues that sage-grouse impacts are "minor" and the "death of a small percentage of a reasonably abundant game species" is not irreparable unless the well-being of the entire species is jeopardized. BLM Br. at 35, quoting *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975). Reliance on *Frizzell* is misplaced. Not only did the D.C. Circuit find that an EIS was not required there, meaning that there was no violation under NEPA, *id*. at 988 n.15, but it has not been followed by other Circuits, which have found irreparable injury without species-level effects. Again, the Ninth Circuit has made clear that "local effects" are a sufficient basis for a finding of significant impacts. *See Anderson*, 314 F.3d at 1019 (local impacts to whales from hunt in one area required EIS); *ONRC v. Goodman*, 505 F.3d at 892-97 (impacts to habitat for fisher required full NEPA analysis); *Native Ecosystems*, 599 F.3d at 936-38 (impacts to sage-grouse habitat required full NEPA anaylsis).

Additionally, BLM's assertion that the impacts are "minor" is contradicted by numerous statements by agency scientists, as just explained above, as well as the Declarations of Dr. John Tull and Katie Fite. Sage-grouse are "warranted" for protection under the ESA due to the long-term population declines documented across the sage-grouse range, including declines in the Great Basin – as FWS again detailed in its March 2010 determination. *See* 75 Fed. Reg. 13,957-61. The "warranted" determination underscores the need to protect remnant sage-grouse habitats and declining populations, because they are critical to ensuring that the species does not slide into extinction. *Id.* FWS emphasized that one of the largest and most important remaining "core" populations of sage-grouse is located within the Great Basin, where population declines are projected due to habitat loss and fragmentation. *Id*.

As to bats, BLM and Industry argue that the harm to them is not "irreparable," as the turbines will not operate for a year. BLM Br. at 34, Ind. Br. at 9. However, this Court has noted that a preliminary injunction is proper to prevent the "bureaucratic momentum" that would render a supplemental analysis useless. In a 2007 order enjoining a BLM pipeline project based upon NEPA failures, this Court explained that, in addition to immediate environmental harm, the Court must consider whether allowing the project to be constructed would create such "bureaucratic momentum" that even "*if* the BLM is ultimately required to correct its FEIS and re-consider its decision [] in light of that corrected FEIS, then the fact that the pipeline has already been constructed [] will blind the BLM to the additional information provided in the corrected FEIS." *Pyramid Lake Paiute Tribe v. BLM*, No. 2:06-cv-1293-LDG, 2007 WL 1288783, at *1 (D. Nev. Apr 30, 2007) (emphasis in original). The Court further explained that "a significant difference exists between a decision whether to grant a right-of-way to permit the construction" of a project and a decision whether to allow a constructed project to be utilized,

where preventing it from being utilized means that the project "(and all efforts and sums expended to construct it, and the incurred disturbance to public lands) will be wasted." *Id.; see also Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir.1989) ("[t]he difficulty of stopping a bureaucratic steam roller, once started, [is] a perfectly proper factor to take into account in assessing that risk [of irreparable harm], on a motion for a preliminary injunction").

This principle is on point here. Once ground is cleared, roads are bulldozed, and substations and foundations are built – all of which will happen very quickly here, if no injunction is granted – the bureaucratic momentum of having a partially- or fully-constructed wind energy facility on public lands would almost certainly blind BLM to any additional information gained in a corrected analysis, meaning an injunction must issue now to prevent irreparable harm to bats, as well as sage-grouse and other wildlife. For these reasons, as the Ninth Circuit recently held for a Nevada mining project, "[t]he likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high." *South Fork Band*, 588 F.3d at 728.

III. THE BALANCE OF THE HARMS AND THE PUBLIC INTEREST FAVOR ISSUANCE OF AN INJUNCTION.

BLM argues that the public's interest in renewable energy trumps all others, and that "[i]f this Court enjoins the Project, it would stand in the way of the United States's goal of facilitating renewable energy projects on public lands." BLM Br. at 35. BLM's argument ignores the fact that the Project may very well proceed (but perhaps be smaller, configured differently, or with enhanced protection for affected species) once BLM has completed its required EIS. Further, there are many other renewable energy projects in progress on public lands; putting one on pause hardly "stands in the way" of BLM's nationwide goal. *See* Ex. 33 (BLM fast-track website listing 27 BLM renewable energy projects in progress, including many in Nevada).

Neither do the various renewable energy policies cited by BLM purport to exempt BLM from having to fully comply with its statutory NEPA duty to fully analyze renewable energy projects before authorizing them on public lands. BLM agrees that they must receive "the full environmental reviews required." Ex. 33. Notably, the Interior policies cited by BLM failed to prevent two of BLM's sister agencies in the Department of the Interior, FWS and the National Park Service, from advising that an EIS was needed here. Ex. 16 at 5 (FWS noting significant impacts); Ex. 29 (NPS stating EIS is needed).

Nor have courts agreed that renewable or domestic energy concerns must trump environmental ones. In another recent case challenging a wind facility, a court enjoined the project on environmental grounds after finding "this is a case about bats, wind turbines, and two federal policies, one favoring the protection of . . . species, and the other encouraging development of renewable energy resources . . . . two vital federal policies [which] are not necessarily in conflict." *Animal Welfare Inst. v. Beech Ridge Energy, LLC*, 675 F. Supp. 2d 540, 542 (D. Md. 2009). That court noted that "the tragedy of th[e] case" was that the developer failed to follow advice from FWS. *Id*. *See also Quechan Tribe v. U.S. Dep't of Interior*, No. 10cv2241-LAB, 2010 WL 5113197, at *17–18 (S.D. Cal. Dec. 15, 2010) (enjoining solar project on cultural and environmental grounds); *S. Utah Wilderness Alliance v. Allred*, Civ. No. 08-2187, 2009 WL 765882, at *2 (D.D.C. Jan. 17, 2009) ("'development of domestic energy resources[]' is an important public interest [but] this interest is far outweighed by the public interest in avoiding irreparable damage to public lands").

BLM's financial arguments are confused, as BLM advocates inconsistent positions regarding its interest in the health of the federal treasury. BLM first argues that it is necessary to disperse the (tens of millions of dollars in) stimulus funds to Industry. BLM Br. at 36. It later

expresses concern about the minor potential losses of annual rent, which would only recover a tiny fraction of the stimulus funds. *Id*. at 37–38. These inconsistencies suggest that BLM needs to consider this issue of cost and benefit to the treasury more fully when it prepares an EIS.

For its part, Industry argues that it may lose millions of dollars, and jobs and tax revenues will be lost. Ind. Br. at 10–13. But Industry's dire predictions all hinge on the premise that the project will be permanently killed by a preliminary injunction, and thus Industry admits this potential harm is speculative. *Id*. (PI "could make it impossible" to build, "could" prevent federal loans, etc.). It similarly claims that liquidated damages "may" begin to accrue on its power purchase agreement. *Id*. at 11. If Industry's power sale contract in fact puts it at risk of paying damages, without a clause excusing Industry's performance if it was unable to obtain environmental permits after a lawful NEPA review process, Industry assumed that risk. As the Ninth Circuit recently concluded in enjoining a Nevada mining project,"[t]he resulting hardship asserted by [the mining company] and the government is cast principally in economic terms of employment loss, but that may for the most part be temporary." *South Fork Band*, 588 F.3d at 728. This was despite the District Court's finding of "substantial monetary losses" and "a great likelihood of substantial harm to both the local and state economies should the Project be delayed." *South Fork Band v. U.S. Dep't of Interior*, 643 F.Supp.2d 1192, 1213 (D.Nev. 2009) (overruled). *See also Quechan Tribe*, 2010 WL 5113197, at *17 ("The Court is mindful that Defendants face hardships as well . . . Imperial Valley Solar has already spent millions of dollars preparing this project, and faces difficulties obtaining investment and financing if the project is held up. Even so, the Court finds the balance of equities tips heavily in the Tribe's favor."). The same analysis applies here.

Additionally, Industry's claims of harm carry less weight here, where it made a calculated business risk to pressure BLM into preparing an EA despite BLM's warnings that this was risky. Exhs. 6, 8, 35. Industry has been on notice since 2008 that preparation of an EA was risky and likely unlawful. *Id*. *See Northern Cheyenne Tribe v. Hodel*, 851 F. 2d 1152, 1157 (9th Cir. 1988) (giving no weight to intervenors' financial interests where they bid on leases "with full awareness of [a] suit and chose to gamble on the EIS being adequate.").

Where sensitive species – such as sage-grouse and free-tailed bats – face irreparable habitat losses, issuance of injunctive relief to prevent such harm is appropriate despite alleged financial losses. *See, e.g., ONRC v. Goodman, supra,* 505 F.3d at 897-88 (injunction ordered to protect sensitive species from loss of habitat; and holding that the "risk of permanent ecological harm outweighs the temporary economic harm" from an injunction). As the Ninth Circuit recently held, "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest." *South Fork Band*, 588 F.3d at 728.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant their Motion for Temporary Restraining Order and/or Preliminary Injunction.

Dated this 21st day of March, 2011.

Respectfully submitted,

/s/ Kristin F. Ruether

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2011, the foregoing REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION was served via the United States District Court CM/ECF system on all parties or persons requesting notice in this matter.

Dated this 21st day of March, 2011.

Respectfully submitted,

/s/ Kristin F. Ruether

_____

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