

Kristin F. Ruether (ISB # 7914)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
kruether@advocateswest.org

Attorney for Appellants

**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS**

Basin and Range Watch,)	NV-2011-29; 2011-30; 2011-31
Center for Biological Diversity,)	
National Parks Conservation)	
Association, Nevada Wilderness)	Appeal of October 15, 2010 Decisions By
Project, Sierra Club, and)	Schell Field Office Manager Mary D'Aversa to
Western Watersheds Project,)	Approve Decision Record, FONSI, & EA for
)	Spring Valley Wind Energy Facility; and two
Appellants)	associated October 22, 2010 Rights of Way
)	
v.)	REPLY BRIEF IN SUPPORT OF
)	PETITION FOR STAY
Bureau of Land Management,)	
)	
<u>Respondent</u>)	

Respondent BLM and the industry proponent, Spring Valley Wind LLC¹ (“industry”), vehemently argue against a stay. However, their many statements that this project is critical and tremendously expensive ironically support Appellants’ key legal claim that the sheer “significance” of this project requires the preparation of an EIS. If this project is indeed such a critical venture worth so much money and with such high stakes, BLM should prepare an EIS rather rushing through a fast-track EA.

¹ Spring Valley Wind LLC refers to itself as a “Respondent.” This is a misnomer, as Appellants have not challenged any actions by the company, nor could they before this body. Rather, Appellants only challenge the actions of BLM.

BLM and the industry cite various laws and policies to support the general concept of renewable energy development. However, none of these statutes or policies state that such development should be allowed to skirt or override mandatory requirements of federal environmental law. In fact, such policies did not prevent the National Park Service and the Fish and Wildlife Service, both sister agencies within the Department of the Interior, from stating that an EIS was necessary here. BLM and the industry claim that the project is needed to meet Nevada's Renewable Portfolio Standard, but this assertion is disproved by documents filed before the Public Utilities Commission of Nevada. *See Exhibits A & B.*

BLM argues that the initial impacts of this project's construction—ground clearing and road-building—are not likely to be irreparable, as the area could be reclaimed through “reseeding.” This is simply wrong, according to the federal government's own science, as explained in attached memoranda from FWS and accompanying declarations of Dr. John Tull and Katie Fite. Rather, high desert sagebrush-steppe is notoriously slow to recover from this type of disturbance, and the impacts would be irreparable.

Further, many emails and memos from the U.S. Fish and Wildlife Service (FWS) and the Nevada Division of Wildlife (NDOW) express great concerns with this project and how it was rushed through. Exhibit C (compilation of wildlife agency documents). In particular, these memos focus on how the impacts of this project upon birds and bats, and the efficacy of the industry's mitigation measures, are *highly uncertain*, one of the factors that triggers an EIS. Many of the agency concerns were not addressed in the final EA and Avian and Bat Protection Plan. Many more such documents are likely to appear in the full record, so a full review of the record will be critical in deciding the merits of this matter.

I. LIKELIHOOD OF IRREPARABLE HARM.

Construction of this large industrial-scale project would irreparably alter the wildlife values and undeveloped character of the site. Appellants made their initial showing through a declaration of biologist Katie Fite, who has visited the site many times. With this Reply, they further document the irreparable harm in a declaration of John Tull, Ph.D. and a second declaration of Fite, who describes site conditions in more detail and summarizes recent federal sage-grouse science on the slow recovery period of disturbed sagebrush. *See* attached declarations. Further, attached documents from NDOW and FWS strongly confirm that the project would cause irreparable harm.

A. The Project Site is Valuable Wildlife Habitat.

The crux of BLM's response regarding wildlife habitat is that the agency can write-off the project site because it is not pristine and there have been few documented sage-grouse in the area. Such an approach sadly illustrates why species such as sage-grouse continue to decline and now warrant protection under the ESA. *See, e.g.,* 75 Fed. Reg. 13,910 (March 23, 2010).

Although the site is not pristine, that does not render it worthless for wildlife. In fact, NDOW and FWS state repeatedly in internal memos that the site is in fact a poor site for a wind project due to its importance for wildlife. For example, FWS stated that:

while the Service supports the development of alternative energy sources, we consider proper siting paramount in reaching a balance between conservation of wildlife resources and the development of energy sources. . . . *[T]he Service has serious reservations over the selection of the Spring Valley project site.* It is our opinion that the conclusions reached as to the degree of impact to wildlife species is not supported by the available data and reasonable deference was not afforded the significant wildlife resources in the area.

Exh. C at 120 (emphasis added). NDOW described the site as within the “largest known bat migration route in the Great Basin ecosystem” and Spring Valley as “one [of] the most heavily used Fall migration routes for *T. brasiliensis* in the Southwestern U.S.” Exh. C at 49, 54.

Likewise, biologist Fite describes how there are significant amounts of mature and old-growth Wyoming Big Sagebrush and Basin Big Sagebrush in portions of the project site. 2d Fite Decl. at ¶ 4. She also notes that much of the project site contains well-developed microbiotic crusts, which stabilize soils, prevent erosion, and help to prevent weed expansion in sagebrush habitats. *Id.* at ¶ 9. The project is important habitat for both sage-grouse, pygmy rabbit, and ungulates. *Id.* at ¶¶ 5-7. She explains that more leks are found on the surrounding benches because the benches contain short-statured sagebrush and other shrubs; while lowlands and valley floor, including much of the land area where the project site is located, provides nesting habitat, brood rearing habitat, and potentially winter habitat. *Id.* at ¶ 5. Thus, both the benches and valley are important habitat for sage-grouse. *Id.*

B. Clearing the Project Site and Constructing the Wind Project Would Cause Irreparable Harm.

BLM glibly asserts that the initial construction phase would not cause irreparable harm because “[a]ny disturbance during site preparation could be reclaimed through reseeding and other similar activities” BLM Opp. at 33. BLM does not, and cannot, support this statement. In fact, the statement is directly contradicted by FWS documents prepared for this project, a large body of the federal government’s own best available science on sagebrush habitat, and biologists Dr. Tull and Fite.

FWS stated, with respect to this project, that “[t]hese habitats require extensive time to recover,” and that “the areas will likely require 30 + years to recover to pre-disturbed condition. Additionally, there is likely further loss of use of this site aside from vegetation disturbance that

needs to be accounted for.” Exh. C at 70. In another document, the agency noted that **“arguments presented as to the ‘negligible impact’ (EA, p. 37), caused by long-term habitat removal are, at best, disingenuous.”** Exh. C at 122 (emphasis in original).

Dr. Tull explains in his declaration that the project “would greatly increase the prevalence of cheatgrass colonization, promote risk of fire and overall threaten the intact sagebrush steppe community that currently is found in Spring Valley.” Tull Decl. at ¶ 19. For example, “[a]ctivities related to the wind development project will severely compact and break-down existing biological crusts, thus threatening soil stability and ecological integrity of the site,” *id.* at ¶ 20, and “[t]his project would serve to increase habitat fragmentation in the region.” *Id.* at ¶ 21. He explains why “[f]ragmentation of the [pygmy rabbit] population in Spring Valley will result from this project.” *Id.* at ¶ 23. Further, he explains that the project “will likely lead to the complete loss of sage-grouse that are already in decline in this portion of Spring Valley,” *id.* at ¶ 24, in part because it “would split leks on both sides of Spring Valley that likely are shared by a single population of sage-grouse.” *Id.* at ¶ 26.

Fite explains that microbiotic soil crusts require “many years to recover from mechanical disturbance.” 2d Fite Decl. at ¶ 9. She also excerpts relevant excerpts from the March 2010 Finding and Monograph regarding recovery from disturbance. *Id.* at ¶¶ 15–16. This best available federal science explains that restoration of sagebrush habitat is “very difficult” and the processes are “relatively unknown.” *Id.* at ¶ 15. In fact, it notes that “[i]t is difficult and usually ineffective to restore an area to sagebrush after annual grasses become established.” *Id.* This is a serious threat on the Spring Valley site since cheatgrass and halogeton are already present. *Id.* at ¶¶ 4, 13. The 25 miles of new roads will also pose irreparable harm, including by providing

corridors for sage-grouse predators to move into previously unoccupied areas and contributing to exotic plant invasions. *Id.* at ¶ 15.

In addition to the harm from site clearing, documents from NDOW and FWS indicate that the wind towers will create irreparable harm to bats and birds. In addition to the obvious, “allowed” kill thresholds of 192 bats and 203 birds per year, EA 97, 95, NDOW expressed concerns that the impacts could be much greater. The agency strongly asserted that the mitigation measures are inadequate for many reasons, including lack of published research on the radar technology, “caps” (i.e. limits) on turbine curtailment regardless of impacts on wildlife, and lack of willingness to implement turbine shutdowns if needed for wildlife. Exh. C at 49-54.

In sum, as the FWS put it, BLM’s idea that this long-term habitat removal in the sagebrush-steppe ecosystem causes a “negligible impact” is disingenuous at best, meaning a stay is needed to prevent irreparable harm.

II. THE RELATIVE HARM TO THE PARTIES AND THE PUBLIC INTEREST SUPPORT A STAY.

A. **BLM’s selectively-cited statutes and policy statements do not exempt compliance with federal environmental law and did not prevent the National Park Service and FWS from expressing concerns with this project, and ignore countervailing statutes and policies.**

For these two overlapping factors, BLM describes various statutes and policy statements supporting the concept and construction of renewable energy facilities. Appellants do not argue with this concept; in fact, they favor well-sited renewable energy projects as well.²

² The industry predictably attempts to tar Appellants as obstructionists. This is inaccurate. For example, Appellant Nevada Wilderness Project supports many renewable energy projects in Nevada under its “Smart from the Start” program. *See* <http://www.wildnevada.org/fast-track.html>. Appellants oppose the Spring Valley Wind project because it is in a poor location for wildlife and because BLM conducted a rushed, short-cut analysis.

However, none of the statutes or policies cited contain any sort of exemption allowing renewable energy projects on public lands to avoid compliance with federal environmental law. To the contrary, BLM touts on its website that “[a]ll renewable energy projects proposed for BLM-managed lands will receive the full environmental reviews required by the National Environmental Protection [sic] Act and will include the same opportunities for public involvement as are required for all other land-use decision making by the BLM.”³ Likewise, BLM states that the February 22, 2010 Secretary Order supports “*environmentally responsible* renewable energy development.” BLM Opp. at 38 (emphasis added). This project is not such a development.

Of note, BLM’s sister agency in the Department of the Interior, the National Park Service (NPS), expressed strong reservations with this project, advising that an EIS was required, a FONSI was not justified, the issuance of a FONSI prior to allowing public comments on the EA predisposed the final outcome, the cumulative impacts were not adequately analyzed nor disclosed, and impacts to park resources were not adequately disclosed. EA at H-40. *See also* EA at H-45 (more NPS critical comments). A review of the full text of NPS’s several sets of comments, when the record is filed, will likely reveal even more critical comments than those briefly summarized in BLM’s summary of comments chart.

The FWS was similarly critical of the EA. In comments on the draft EA, FWS stated: “Because of the significant wildlife resources in the area, insufficient data by which to formulate an opinion and the inadequacy of existing regulatory mechanisms in the form of Best Management Practices and the Mitigation and Monitoring Plan, we would discourage the

³ See http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/fast-track_renewable.html

adoption of this document and the signing of a Finding of No Significant Impact.” Exh. C at 120. A review of the full record will likely reveal other similar comments.

Thus, BLM cannot very well argue that Appellants’ assertion that BLM must complete the required EIS contradicts law and Interior policy, when two sister Interior agencies—*subject to those same laws and policies*—came to the same conclusion as Appellants.

It is no doubt an awkward situation for BLM to have the ARRA deadline bearing down upon it. However, the BLM only has itself to blame. As the record will reflect, Appellants—as well as the NPS and FWS—were all very candid with BLM in their comments on this project in explaining the conflicts with wildlife and park values and the necessity of an EIS. BLM chose to ignore these comments at its own risk. Had it taken the time to do the job right, rather than rushing the project through on a fast-track, it would not be in this position.

Further, the industry admits that the ARRA funding can be ensured through one of two methods—construction *or* financing. Industry’s Hardie Decl. at ¶ 9. A stay would only prevent the former. The industry only speculates that a stay “may” threaten that funding—but funding is surely dependent on many other factors beyond the control of Appellants or the Board. This is not even the only appeal filed on this project (several Tribes also appealed). Further, Congress is currently debating an extension of the ARRA deadline.⁴ The argument that this project must proceed full steam ahead because of ARRA deadlines is based upon speculation.

Furthermore, there are a host of other statutes and policy statements which establish that careful siting of renewable energy to allow for the recovery of imperiled species—not rush-job NEPA analysis and construction before challenges are heard—is in the public interest. Of course, NEPA’s twin objectives are to ensure that the BLM “consider[s] every significant aspect

⁴ See <http://www.businessweek.com/ap/financialnews/D9K0KN003.htm>

of the environmental impact of a proposed action” and to “inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citation omitted); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

BLM’s 2010 guidance on sage-grouse advises caution in energy development in priority sage-grouse habitat, which includes habitat of “populations that are vulnerable to localized extirpation but necessary to maintain range-wide connectivity and genetic diversity.” IM 2010-071 (March 5, 2010). If a site contains priority habitat, the IM directs BLM to “alert the applicant as early as possible that the application may be denied or that terms and conditions may be imposed on the right-of-way grant to protect priority habitat as supported by NEPA analysis.” *Id.* BLM’s 2010 guidance on golden eagles likewise advises caution. IM 2010-156 (July 9, 2010). These policies show that a stay, in order to allow further consideration of serious claims against BLM’s rushed environmental analysis, is in the public interest.

2. Power from this project is not needed to achieve Nevada’s Renewable Energy Portfolio standard, as BLM and the industry allege.

BLM and the industry imply that this project is needed to achieve Nevada’s Renewable Energy Portfolio Standard (RPS). BLM Opp. at 39; Industry Opp. at 14; Industry’s Fair Decl. Also, they imply Nevada desperately needs the electricity, by repeatedly invoking how many “homes” the project would power. BLM Opp. at 41. These implications are contradicted by filings before the Public Utilities Commission of Nevada (PUCN), which explain that the company has more than enough renewable power to meet the RPS requirement. Appellants attach excerpts of Volume 10 of the 2010–2029 Triennial Integrated Resource Plan (IRP) filed before the PUCN by Sierra Pacific Power Company (d/b/a NV Energy), Exh. A, and the resulting July 30, 2010 Order issued by the PUCN. Exh. B.

In the IRP, NV Energy states with respect to renewable energy that it “forecasts an overall surplus of portfolio credits [], and hence RPS compliance, through the year 2024.” Exh. A at 5 (original pagination retained). The only exception is that it “forecasts a slight deficit of solar credits.” *Id.* at 5. *See also id.* at 31. A figure demonstrates that NV Energy will exceed its state law requirement by 431,362 Megawatt hours (also known as credits) in 2012. *Id.* at 36.

The Spring Valley Wind project is projected to begin delivering credits in the fourth quarter of 2011 and produce a maximum of 315,000 credits each year. Exh. B at 94 (original pagination retained). If this project is delayed and its credits are subtracted from 2012 numbers, NV Energy will still exceed its RPS targets by over 116,000 credits in 2012. Thus, while Spring Valley Wind is a component of the utility’s portfolio, the utility is exceeding its renewable requirements, demonstrating that a stay will not prevent compliance with the RPS.

Moreover, the Order reveals that the project may produce even less than 315,000 credits. The PUCN expressed “concerns related to SVW’s integration” into the system, because “adding the SVW project would cause high levels of curtailments to become necessary in 2011 when [the] system can no longer absorb all of the generation.” *Id.* at 96–97. In other words, Nevada’s transmission system may not be able to handle the output of the project at all times.

Thus, it is far from clear whether the project is even needed, and it clearly is not urgent. With respect to total energy production, the utility states that it has sufficient generation to meet most of its customers’ current needs, it “has not identified a need to add incremental generating resources during the Action Plan period,” and in fact, it seeks to retire several energy sites. Exh. A at 5. Thus, a stay in order to allow further consideration of claims against BLM will not prevent the utility from meeting the Nevada RPS or from powering homes in Nevada.

3. Many of the remaining considerations raised by BLM and the industry are speculative and inconsistent.

BLM's financial arguments are confused, as BLM advocates wildly inconsistent positions regarding its interest in the health of the federal treasury. BLM first argues that it is critical to disperse the \$66–69 million to the project applicant. BLM Opp. at 40. In the very same paragraph, it expresses concern about the state of the federal treasury due to the potential loss of the \$169,325 annual rent if the project is not built. *Id.* at 41. *See also id.* at 8. BLM does not explain why it is pleased to lose \$66–69 million from the treasury but concerned with a much smaller \$169,325 annual loss for the relatively short amount of time it will take to prepare a full EIS. These inconsistencies suggest that BLM needs to consider this issue of cost and benefit to the federal government more carefully when it prepares the EIS.

BLM touts that the project will create “approximately 225 construction jobs.” BLM Opp. at 41. It overstates the benefits by failing to note that these are temporary jobs only, which the industry admits. Industry Opp. at 11. The industry touts a local hiring preference, *id.* at 11–12, but fails to state whether there are in fact qualified workers in the Ely area. If not, which is likely since this is apparently the first wind project on BLM land in Nevada, then the workers will be imported from elsewhere.

BLM argues that if a stay is granted, BLM will not be able to carry out “important research and enhancement projects within the sagebrush habitat that will be funded by the project.” BLM Opp. at 9. The industry likewise asserts that wildlife would “lose out” from a stay. Industry Opp. at 3. This argument borders on frivolous, because the research would consist of “wind/wildlife interaction studies.” EA at F-18 (ABPP). Where research is designed to chronicle the damage to wildlife that will occur, a delay in such research would not harm wildlife. If the project is delayed, the wildlife will not be harmed, and *there is thus no need for*

the research. Further, the wildlife agencies expressed doubts regarding the effectiveness of the mitigation fund. In response to the industry consultant's idea to develop off-site mitigation including expanding riparian habitat in south Spring Valley, NDOW responded: "Is this true or even realistic? I doubt it!" Exh. C at 43. Likewise, as to the consultant's suggestion to "Improve habitat at other known lek sites within Spring Valley by planting herbaceous forb and grass species," NDOW responded "Don't think the consultant has a grasp of the issue!" *Id.* at 45. FWS further recommended that the industry's funding commitment be extended from 3 years to the life of the project. Exh. C at 67. This did not occur. EA at F-18 (3 years). NDOW noted that "contributions to the fund should not be an arbitrary amount." Rather, it argued funding must be tied to results. Exh. C at 51. This did not occur. *Id.* (listing fixed amount). The delay of mitigation funding from a stay will not cause harm to wildlife.

III. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

A. An EIS is Needed to Comply with NEPA: Mitigation is not Sufficient to Ensure No Significant Environmental Effects, and Analysis of Effects was Inadequate.

In their statement of reasons, Appellants explained that an EIS was required for this project because BLM failed to meet its burden of producing "a convincing statement of reasons" showing why the impacts are insignificant, *NPCA v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001), given that numerous significance factors are present. 40 C.F.R. § 1508.27(b). BLM responds that the project's mitigation measures reduced effects to less than significant levels. BLM Opp. at 15–17. BLM's argument fails because BLM never explained or provided support to show *how* the project's mitigation measures actually do so. In contrast, numerous memoranda from FWS and NDOW indicate that the mitigation measures are flawed, ineffective, and highly uncertain to have the results summarily assumed in the EA. BLM cannot rely on such mitigation to avoid preparation of an EIS unless these measures ensure that no significant environmental impacts

will occur, and it has not met that burden here. Furthermore, BLM ignores NPS's express disagreement with the use of an EA/FONSI instead of an EIS for this project. EA at H-40. BLM's failure to disclose the vigorous concerns expressed by the wildlife agencies about this project's significant effects to wildlife violates its duty to disclose opposing views, and further renders its analysis of effects inadequate.

Bats and Birds. The primary measures intended to mitigate the significant harm to birds and bats relied upon in the ABPP are a radar monitoring system and wind tower cut-in speed curtailment applied through adaptive management. EA at F-15–F-28 (ABPP). Unfortunately, FWS and NDOW documents reveal strong concerns with both, which were not adequately addressed in the EA or the ABPP.

FWS and NDOW documents reveal that those agencies were stymied from learning about the industry's touted radar system for preventing bat and bird mortality, because the industry refused to share data from its projects in Texas that used the same system. Attempting to gather the data, NDOW found that "everyone states the same exact thing . . . that the operator says it's working wonderfully, but also that the operator is unwilling to provide any actual data/methods used for public examination." Exh. C at 58. NDOW's "bottom line" was that "unless new information comes to light, we have to assume that this radar technology . . . so that mortalities are reduced *doesn't work*." Exh. C at 55–56 (emphasis added). FWS similarly noted that it "did not trust the data, and was far from convinced that the technology worked. In general, what ever is happening on the site is unknown to us and Pattern has been stonewalling sharing the data." Exh. C at 56–57. Spring Valley Wind, LLC is a subsidiary of the same company—Pattern Energy—that appears to have stonewalled the wildlife agencies' attempts to gather data about this new radar technology.

NDOW explained its concerns in more detail to BLM in April 2010 comments, including that until more data was produced, “we have no method of determining the technology’s validity and therefore can’t support such an approach at this time”; for bats, “[t]his fact cannot be stressed enough, that their baseline data set is not particularly robust”; and the question “[w]here has research validating this technology on the proponent’s properties been published in the peer-reviewed scientific literature?” Exh. C at 49–51. NDOW also had grave concerns about the adequacy and arbitrary limitations of the adaptive management plan:

- “Rather than put an hour limit on the curtailment efforts, the degree of curtailment should be as much as is needed to reduce impacts to below threshold levels.” “There cannot be [time] limitations such as these.” *Id.* at 2, 5.
- Regarding industry’s plan to have the threshold mortality count of wildlife start at zero each time a new mitigation measure is implemented: “Under no circumstances shall this be the case.” *Id.* at 4.
- Regarding cut-in time limits: “There can not be a limitation such as this. . . . The degree of curtailment and limit of effort required by the proponent shall only be tied to keeping mortality events below the accepted thresholds.” *Id.* at 5.

None of these suggestions were adopted by BLM. *See* EA at F-23, F-25–F-28 (ABPP).

In addition to these unproven mitigation measures, the BLM relies upon the industry’s pledge to create a “wildlife fund.” EA at F-18. But the fund does not mitigate harmful effects below significance. Again, much of the money is for research, which does not directly mitigate effects. *Id.* For habitat improvement expenditures, it is impossible to know where it will be spent or what degree of success it will achieve, as few details are given. As NDOW unsuccessfully requested, contributions to the fund “should not be an arbitrary amount.” Exh. C at 51. Rather, they “should be tied to providing compensation for an impact that is realized or anticipated based upon experience or data.” *Id.* FWS unsuccessfully recommended that funding be extended to the life of the project, and not merely for 3 years as approved in the EA. Exh. C at 67; *see also* EA at F-18 (3 years). No explanation is offered as to how 3 years of funding

could conceivably off-set impacts from a project that would cause harm for several decades. Industry's assertion that the fund will "more than offset any direct impact to sage brush [sic] habitat" is not supported by information about where the money will be used, what restoration projects are planned, and how that will offset the harm to the resources at the Spring Valley site. Industry Answ. at 20.

The wildlife agencies repeatedly emphasized that the degree of impacts on birds and bats is highly uncertain. FWS stated:

[W]e have been unable to precisely quantify the percentage of bats that nightly forage within the range of turbine blades, nor can we account for the potential for bats to be attracted to the turbines. As a result, operation phase mortality could vary significantly and cannot be predicted with reliability. This makes a determination of significance difficult.

Exh. C at 2. The agency struggled with "how to handle this uncertainty." Exh. C at 65. It suggested incorporating a "catastrophe clause" into the ABPP, which BLM did not do. *Id.*

When FWS estimated mortality at 5.7 golden eagles per year, it found that number "alarming as there is no clear understanding of the local and/or regional population of golden eagles." *Id.* at 68. In another memo, FWS again insisted on "some kind of catastrophe clause. *In our opinion there is the real possibility that you could reach your bat threshold of 179 individuals on a single night.* What happens in the event that a very large number of bats are being killed by this action?" Exh. C at 124 (emphasis added). In another FWS memo, a wildlife biologist states, regarding bats, that "[t]here are significant unknowns and my thoughts on the risk to bat resources, given the available data, is that the risk could be substantial." Exh. C at 5. *See also* Tull Decl. ¶¶ 28–33 (explaining why project will create unknown risks to native wildlife).

FWS also concluded that "the reported raptor passage rates may underestimate the actual use of this area and assessing the significance of this passage rate is hampered by the lack of a

comparable data set,” due to problems with the protocols used. Exh. C at 122–123. Of note, FWS’s Bald and Golden Eagle Protection Act/Migratory Bird Treaty Act concurrence letter, as quoted by BLM, contains the contingent phrase “if our substantive comments are incorporated.” BLM Opp. at 21. It is far from clear this was done. For these reasons, BLM cannot rely on industry’s unproven and uncertain radar and adaptive mitigation measures to eliminate significant effects on bats and birds.

Finally, BLM failed to summarize this vigorous scientific debate in its EA, a violation of NEPA’s requirement to disclose responsible opposing scientific viewpoints. *See Ctr. for Biol. Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1167-69 (9th Cir. 2003). BLM’s assertion in its brief that it consulted with the wildlife agencies falls flat in light of the internal memoranda showing that it largely disregarded the agencies’ concerns. BLM Opp. at 18–19. Because BLM did not discuss these opinions of the expert wildlife agencies in its EA, it failed to take a hard look at the impacts of the project and disclose that information to the public, thereby violating NEPA. *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005); *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1153-54 (9th Cir. 2006).

Sage-grouse. BLM fails to respond to the argument that it did not consider the new science on sage-grouse, including the Monograph and the FWS “warranted” finding, instead simply reiterating basic project statistics and asserting that the habitat is not pristine. The industry finds one citation to the March 2010 listing rule in the EA and alleges that this shows that “BLM considered these resources throughout its preparation of the EA, DR and FONSI.” Industry Answ. at 29. A mere citation to a sister agency’s major finding, with no discussion of the same, fails the “hard look” required by NEPA. BLM’s failure to thoroughly incorporate and discuss this critical new science on sage-grouse shows that it did not provide a full and fair

discussion of significant environmental impacts to this species, as required by NEPA. *Ore. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1130 (9th Cir. 2008).

In fact, FWS and NDOW documents also reveal even more concerns about uncertainty of impacts to sage-grouse. Again, the FWS stated in a memo that: “the discussion surrounding the environmental consequences to this species from this action does not adequately address our concerns,” including failure to address “to what degree this action would affect connectivity between northern and southern Spring Valley.” Exh. C at 121–122. It continued: “From the data presented in the EA, reaching a conclusion as to the risk presented to greater sage-grouse from this action appears premature. **Additional arguments presented as to the “negligible impact” (EA, p. 37), caused by long-term habitat removal are, at best, disingenuous.**” Exh. C at 122 (emphasis in original). FWS noted that its “recommended lek buffer is 5 mi.,” far larger than the 2 mile buffer (or less) used by BLM here. Exh. C at 3.

To illustrate how the FWS recommended buffer is being ignored by BLM, Appellants attach a series of maps illustrating sage-grouse habitat overlap with the project area. *See* Declaration of Kenneth Cole, Attachments A–F (filed herewith). These maps illustrate that the Spring Valley Wind project could significantly impact sage-grouse, and BLM has not shown why or how its mitigation fund will ensure that those impacts are insignificant.

Where the expert agencies inform BLM they do not know how effective the key mitigation measures are, and many of their suggestions are not adopted, BLM’s conclusion that impacts will be reduced to insignificance is unsupported. The expert agencies’ comments on the mitigation measures show that the effects of this project are uncertain and scientifically controversial, requiring the preparation of an EIS.

B. BLM Fails to Prop Up its Cumulative Effects Analysis.

Appellants explained in their statement of reasons that the EA's cumulative impacts analysis was inadequate, particularly in light of the 16 other wind facilities planned in the Ely BLM district. BLM does not address this claim head-on anywhere in its brief. Industry asserts that the Ely BLM district's 16 proposed wind projects is irrelevant, and that only the ones within or adjacent to Spring Valley itself needed to be considered. Industry Answ. at 26. This argument is irrational when dealing with wildlife species that do not respect such watershed boundaries, such as bats and birds. The scope of the cumulative effects analysis must be reasonable in light of the resources at issue. *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. NMFS*, 265 F.3d 1028, 1037–38 (9th Cir. 2001) (agency choice of analysis scale must represent a reasoned decision). BLM has provided no reasoned explanation for drawing the scope of analysis so narrowly, particularly in view of population-wide dangers to sage-grouse documented in this year's FWS listing decision. BLM's cumulative impacts analysis must include the proposed wind projects that fall within the range of the bird and bat populations at issue here to adequately assess impacts on these species.

Appellants also attach a map illustrating the overlap between the Spring Valley Wind project area and a proposed right of way for a Southern Nevada Water Authority pipeline—another project that BLM failed to consider adequately in the EA, a concern raised by the NPS. Cole Decl., Attachment G; EA at H-45.

Industry further asserts that cumulative impacts on sage-grouse, bats, birds, and pygmy rabbits “have been examined in great detail in the PEIS and RMP/FEIS and elsewhere in the EA,” which is unfortunately not the case. *See* EA at 58-59, 106, 110 (EA's brief analysis of sage-grouse). Simply asserting that BLM took the requisite “hard look” at cumulative impacts does not make it so.

A cumulative impacts analysis must do more than simply list other past, present, and future activities in the project area; it must provide detail about those activities and contain an *analysis* of the impacts of them, combined with the proposed action, on the resources at issue. *The Lands Council v. Powell*, 379 F.3d 738, 744–45 (9th Cir. 2004). *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993-97 (9th Cir. 2004). The Spring Valley EA contains no such analysis. Furthermore, tiering to the PEIS and RMP/FEIS does not cure the deficiency because those documents do not contain the necessary site-specific information required to assess the cumulative impacts of this particular project. *Klamath-Siskiyou Wildlands Center*, 387 F.3d at 997-98. And without the required hard look, the agency cannot determine that any cumulative impacts will not be significant, raising the need for an EIS. *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1129 (9th Cir. 2004).

C. The PEIS Fails to Rescue the EA, as the PEIS Fails to Consider this Project’s Significant Effects.

Appellants explained in their statement of reasons that BLM cannot tier to the Wind PEIS for this project, because the PEIS did not analyze most impacts of the Spring Valley Wind project, it is out-of-date on several resources including sage-grouse, and the EA failed to follow several important mitigation measures prescribed by the PEIS. FWS and NDOW echoed this latter concern. An FWS memo to BLM advises that the “PEIS states not to develop in migratory paths.” Exh. C at 121. NDOW advised BLM that “[w]ith a few million protected *T. brasiliensis* [Mexican free-tailed bats] using this project site as a migration route each Fall, the EA does not demonstrate that the PEIS has been followed with respect to this issue.” Exh. C at 49.

BLM’s primary response is that it would be “ludicrous” for it to follow all mitigation measures in the PEIS, BLM Opp. at 18; and that tiering is acceptable for a project with significant effects if “tiered to a broader EIS which fully analyzed those significant effects.”

BLM Opp. at 15 (citing BLM handbook). But the Wind PEIS did not analyze this project's significant effects. Thus it cannot substitute for an adequate site-specific analysis. *See Klamath-Siskiyou Wildlands Center*, 387 F.3d at 997-98 (holding that tiering to generalized discussion of cumulative impacts in RMP EIS did not save inadequate analysis in site-specific EAs). Furthermore, the PEIS and RMP/FEIS did not incorporate the plethora of new science on sage-grouse, and therefore their analyses are out-dated and again cannot substitute for an in-depth analysis in an EIS.

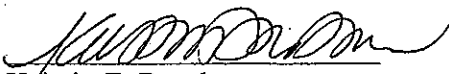
Industry concedes that the PEIS and RMP/FEIS do not examine site-specific information, leaving site-specific analysis to future NEPA processes, Industry Answ. at 17–18, and separately argues that the EA is adequate. Thus, Industry admits that the PEIS and RMP/FEIS are of little, if any, value in evaluating the validity of the EA and whether the EA complies with NEPA. Instead, Industry falls back upon the argument that the project “as mitigated” would have no significant environmental impact—indeed, that the mitigation measures “will create an effective buffer against *all possible impacts*.” Industry Answ. at 21–22 (emphasis added). As described at length above, the expert wildlife agencies disagree.

CONCLUSION

For these reasons, Appellants respectfully pray that the IBLA grant a stay of the challenged BLM DR, FONSI, EA, and ROWs approving the Spring Valley Wind facility; and following a review of the full record, reverse and set aside such decisions.

Dated this 10th day of December, 2010.

Respectfully submitted,


Kristin F. Ruether
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify I caused a true and correct copy of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR STAY and supporting documents to be served upon the following, by the method indicated:

Interior Board of Land Appeals [VIA FEDEX]
Office of Hearings and Appeals
801 N. Quincy Street, Suite 300
Arlington, VA 22203


Clementine Josephson [VIA EMAIL]
Deputy Regional Solicitor
U.S. Dept of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825
Clementine.Josephson@sol.doi.gov

Stephanie A. Balzarini [VIA EMAIL]
U.S. Department of the Interior
Office of the Solicitor, Boise Field Office
960 Broadway Ave., Ste. 400
Boise, ID 83706
Stephanie.Balzarini@sol.doi.gov

Svend A. Brandt-Erichsen [VIA EMAIL]
Marten Law PLLC
1191 Second Ave., Ste. 2200
Seattle, WA 98101
svendbe@martenlaw.com

Sylvia Harrison [VIA EMAIL]
McDonald Carano Wilson LLP
100 West Liberty St., 10th Floor
PO Box 2670
Reno, NV 89505
sharrison@mcdonaldcarano.com

DATED this 10th day of December, 2010.


Kristin F. Ruether
Attorney for Appellants