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

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellees Western Watersheds Project and Center for Biological Diversity state that they are non-profit entities that have not issued shares to the public and have no affiliates, parent companies, or subsidiaries that have issued shares to the public.

Dated this 29th day of April, 2011.

s/ Kristin F. Ruether

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STATEMENT OF JURISDICTION

The claims in this action arise from the Bureau of Land Management's ("BLM") violations of the National Environmental Policy Act ("NEPA") in planning and implementing the Spring Valley Wind Energy Facility ("Project") on federal public lands. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question) & 1346 (United States as defendant), and because the action sought judicial review of a final agency action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706.

Western Watersheds Project and Center for Biological Diversity (collectively, "WWP") are conservation organizations whose members use and enjoy the public lands and wildlife within the area affected by the challenged Project and who participated in the planning process. The record demonstrates that they have standing, which BLM has not challenged. Excerpts of Record ("ER") 282, 303 (member-staffer declarations).

WWP filed a motion for temporary restraining order and/or preliminary injunction, which the district court denied on March 28, 2011. ER 1. This Court has jurisdiction to review the district court's denial of injunctive relief under 28 U.S.C. § 1292(a)(1).

The district court also granted a motion made by Defendant-Intervenor-Appellee Spring Valley Wind LLC ("SVW") to strike a declaration of WWP's bat

expert. ER 32. This Court has pendent jurisdiction to review that order, as it is inextricably intertwined with the ruling denying injunctive relief and evaluation of the stricken declaration is necessary to ensure meaningful review of the interlocutory appeal over which this Court has jurisdiction. *Hendricks v. Bank of America*, 408 F.3d 1127, 1134 (9th Cir. 2005).

WWP timely filed its notice of appeal on April 1, 2011. ER 41; Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether BLM violated NEPA by issuing the Decision Record for the Spring Valley Wind Energy Facility, four miles from a major bat cave and in greater sage-grouse habitat, without first (1) analyzing the cumulative impacts of the facility on bats or sage-grouse, or (2) preparing an Environmental Impact Statement.

II. Whether the district court abused its discretion in denying WWP's motion for preliminary injunctive relief in light of these NEPA violations and irreparable harm to sage-grouse and bats if the project proceeds.

III. Whether the district court abused its discretion in granting a motion to strike a declaration of a bat expert in support of the motion for preliminary injunction, where the declaration explained several relevant factors omitted from BLM's analysis and presented evidence of irreparable harm to bats.

STATEMENT OF THE CASE

This action raises the important issue of whether renewable energy projects are exempted from, or can otherwise circumvent, federal environmental laws without the express consent of Congress, for no other reason than the industry's self-serving claims that such energy is "green" and "renewable." Plaintiffs-Appellants in this case are conservation organizations that support and encourage appropriately sited renewable energy projects that adopt proper mitigation measures to reduce harm to wildlife and the environment, but vigorously dispute any notion that BLM has legislative or regulatory authority to relax environmental standards in the manner they did for this industrial-scale renewable energy project.

Specifically, this action challenges BLM's "fast-track" approval of the first industrial-scale wind energy facility on public lands in Nevada. The Project would dominate a sagebrush valley near one of the largest bat caves in the Great Basin region, in contravention of BLM's own siting guidance. The Project as approved by BLM authorizes 75 wind turbines, each over 400 feet tall, as well as construction of 25 miles of roads, two gravel pits, nine miles of new fencing, and other associated facilities sprawled over more than 7,500 acres of public land. ER 73–77.

Unfortunately, renewable energy development is not always as green as it seems. Poorly-sited wind energy facilities pose grave risks of harm to native bats,

which are highly vulnerable to death from wind turbines. Annual bat mortalities in the thousands at wind facilities only began to receive attention in the past ten years. ER 250. "Bat fatalities outnumber bird fatalities in some regions by as much as 10 to 1." ER 241. "The fatalities raise concerns about potential impacts on bat populations at a time when many species of bats are known or suspected to be in decline [] and extensive planning and development of both onshore and offshore wind energy development is increasing worldwide." ER 250. Bats are killed both by being struck by moving blades and by a phenomenon known as "barotrauma," only discovered in 2008, which occurs when the change in pressure near spinning blades causes the lungs of nearby bats to suddenly expand and burst. ER 239.

These concerns are particularly acute for this Project because it is located within a major bat migration corridor and only four miles from a regionally significant migratory bat roost known as Rose Guano Cave. ER 99. This cave is seasonally home to least four species of bats – including over one million Brazilian (also called Mexican) free-tailed bats, a declining, BLM-designated "sensitive" species. ER 99, 94. The Project sits directly in the bats' nightly flight path. ER 72 (map showing cave to northeast of Project area); ER 99–100 (EA noting bats leave cave, gain altitude, and fly south to feed).

The Project's large footprint also poses harm to native wildlife living on or around the high desert site, such as the greater sage-grouse, another declining,

BLM-designated "sensitive" species recently found "warranted" for protection under the Endangered Species Act.[1] A primary cause of its decline is habitat fragmentation caused by the precise types of construction activities proposed by this Project, such as roads and powerlines. *Id*. at 13,927–928. It is also well documented that the species behaviorally avoids tall structures such as wind turbines, and accordingly the Project's 75 towering turbines will cause sage-grouse to avoid over 38,000 acres of habitat, an area much larger than the Project area itself. ER 127. This huge avoidance area will serve to isolate the already-declining populations living on the edges of the valley on both sides of the Project, reducing genetic exchange and leading to more precipitous declines.

During the planning of the Project, experts within BLM and from four other agencies urged BLM to prepare a full Environmental Impact Statement ("EIS") to assess these kinds of potentially significant environmental impacts to wildlife. *E.g.* ER 317 (National Park Service explaining why EIS needed). No EIS was prepared for the Project, however, after SVW and BLM upper management pressured the local BLM office to avoid the "additional work and delays" associated with an EIS. ER 418–19 (referencing pressure from BLM Washington Office), ER 341 (SVW representative telling BLM "we DO NOT need to go to an EIS" despite

[1] 12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocerus urophasianus*) as Threatened or Endangered, 75 Fed. Reg. 13,910 (Mar. 23, 2010) (sage-grouse warranted for protection under ESA, but "precluded" by other priorities).

BLM's concerns), ER 369 (biologists noting process was "politically streamlined" and that "Ex-BLM employee helped the proponent advocate for it to be an EA"). *See also* ER 233 (Senator Harry Reid advising local BLM to "keep in mind [SVW's] critical deadline" to receive federal subsidies).

On October 15, 2010, BLM's Schell Field Office Manager Mary D'Aversa approved the Spring Valley project through a Decision Record ("DR"), Finding of No Significant Impact ("FONSI"), and final Environmental Assessment ("EA"). ER 49, 58, 63.

WWP exercised its optional right to file an administrative appeal and petition for stay before the Interior Board of Land Appeals, and dismissed the appeal after IBLA failed to rule within 45 days, at which point the stay was deemed denied. *See* ER 6 (district court order noting this); 43 C.F.R. § 4.21(a)(3), (b)(4).

WWP filed suit in the district court on January 25, 2011, ER 439, and filed a motion for temporary restraining order and/or preliminary injunction on February 28, 2011. ER 477 (D.Ct. Dkt. No. 24). In support of its motion, it submitted a declaration from one of the world's preeminent bat biologists, Dr. Merlin D. Tuttle, identifying numerous gaps in BLM's analysis, explaining why BLM's mitigation measures are inadequate to protect against significant bat mortality, and concluding that the risks to bats are far more significant than BLM acknowledged.

ER 253. The district court held a hearing on March 24, 2011 and issued orders denying WWP's motion and striking Dr. Tuttle's declaration on March 28, 2011. ER 1, 32.

On March 25, 2011, BLM issued a "Notice to Proceed," ER 38, authorizing SVW to commence ground clearing, grading, and road construction for the Project – activities that will make it difficult, if not impossible, to return to the *status quo ante* if a legal violation is later discerned without first enjoining the Project while the district court considers the merits of WWP's claims. Counsel for BLM informed WWP that such ground-disturbing work began the week of April 4, 2011.

On April 4, 2011, WWP filed a motion in the district court for an injunction pending appeal and sought a shortened briefing schedule, which the district court denied. *See* ER 481 (D.Ct. Dkt. Nos. 66–68).

On April 12, 2011, WWP filed an emergency motion for injunction pending appeal with this Court, pursuant to Circuit Rule 27-3. Dkt. No. 8-1. On April 20, 2011, this Court issued an order declining to rule upon that motion until the district court had further opportunity to rule on the motion for injunction pending appeal filed below. Dkt. No. 14. On April 29, 2011, the district court denied the motion, D.Ct. Dkt. No. 78, and WWP renewed its motion for injunction pending appeal before this Court. Dkt. No. 16.

STATEMENT OF THE RELEVANT FACTS

I. SETTING AND WILDLIFE OF SPRING VALLEY

Spring Valley is located in eastern central Nevada. *See* ER 72 (map). The narrow high desert valley runs north-south, surrounded by high mountain ranges on either side. ER 135 (map). Great Basin National Park lies at the southern end of the Snake Range, a few miles east of the project area. *See* ER 2.

Spring Valley is an important flyway for bats: the Nevada Department of Wildlife ("NDOW") noted the Project area is "within the largest known bat migration route in the Great Basin ecosystem" and is suspected to serve as a migratory stopover for bats from at least *8 western states*. ER 325. Additionally, the Project site is located only four miles from the Rose Guano Cave, a BLM-designated Area of Critical Environmental Concern and a regionally significant migratory bat roost for at least four species of bats, including for over one million Brazilian free-tailed bats during their fall migration. ER 99.

Brazilian free-tailed bats are migratory. ER 129. To replenish energy for traveling, they can travel 50–60 miles one-way per night to forage on flying insects. ER 256. Their enormous amount of insect consumption has a significant effect on controlling agricultural pests. ER 311. The bats roosting in Rose Guano Cave exit the cave at sundown nightly and gain altitude "before turning south through the valley" towards agricultural fields south of the Project site. ER 99–

100. This pattern takes them directly over the Project site. *See* ER 72 (map). The species is designated as "sensitive" by BLM and protected by the state of Nevada, ER 94, and appears likely to be in substantial decline. ER 45.

Bats are uniquely vulnerable to mortality from wind turbines, as they are killed both by being struck by moving blades, and by barotrauma. ER 239. Exacerbating the problem, recent research has shown that bats are actually *attracted* to wind turbines, ER 259, meaning even if bats are believed to avoid or fly above a project site, this may change after a wind facility is built. "The reasons are not fully understood, but may include that bats perceive them as potential roost sites or rest stops when migrating, or that the light-colored turbines attract insects, which bats feed on." *Id*. These factors "may explain why bat fatality at wind turbines is far higher than for birds." *Id*. Migratory bats in general, and Brazilian free-tailed bats in particular, are particularly vulnerable to mortality from wind turbines, possibly because they may pass several wind facilities on their migration. ER 241, 256.

Bat mortality is troubling because bats reproduce (and thus recover from declines) very slowly. ER 241. They only have one or two "pups" per year, and not every year, a far lower rate than other mammals. ER 241, 260.

The Project's site-clearing and road-blading will also destroy and degrade desert vegetation. This desert vegetation is valuable in its own right, and also as

habitat for native wildlife such as the greater sage-grouse and pygmy rabbits, another BLM special-status species dependent on sagebrush. ER 92–94.

Sage-grouse are "sagebrush obligates" that depend on sagebrush habitats year-round. ER 96. Over 3,600 acres of the Project site are identified as sage-grouse habitat. *Id*. In spring, the birds congregate in "leks," ancestral breeding areas, to mate. 75 Fed. Reg. at 13,915. Sage-grouse hens typically establish nests between two and five miles from leks, but sometimes travel more than 12.5 miles to do so. *Id*. Leks are only mating grounds; the birds use habitat miles away for other life activities. *Id.* at 13916-23. Sage-grouse exhibit strong site fidelity to their leks as well as their breeding, nesting, brood-rearing, and wintering areas—meaning their ability to adapt to change by moving is limited. *Id*. at 13,915.

Here, three leks are within a mile of the Project area boundary. ER 97. Additionally, telemetry data collected by sister agency Southern Nevada Water Authority ("SNWA") suggest that sage-grouse cross through the valley bottom Project area to move between different sides of the valley. *Id*. *See also* ER 312 (SNWA comments explaining same).

The U.S. Fish and Wildlife Service ("FWS") found in 2010 that sage-grouse (rangewide) are "warranted" for protection as threatened or endangered species under the Endangered Species Act, 75 Fed. Reg. 13,910, meaning they are "in danger of extinction throughout all or a significant portion of its range" or likely to

so become. 16 U.S.C. § 1532(6), (20). The primary reason for the finding was habitat fragmentation and loss (the other reason being inadequate regulatory mechanisms by agencies such as BLM to prevent this). 75 Fed. Reg. at 13,962, 13,979–982.

Habitat fragmentation and loss is caused by the precise activities proposed by this Project. Wind energy development has similar impacts as oil and gas development, which is to say quite negative. *Id.* at 13,951. Sage-grouse are programmed to instinctively *avoid* habitat around tall structures, presumably to minimize risk of predation from predators (such a raptors) potentially perching on the structures. *Id*. at 13,927–929. Thus, structures such as wind turbines, powerlines, and fencing effectively result in habitat loss even if the actual habitat is not removed. *Id*. Fencing is additionally harmful because the low-flying birds collide with the barbed wires and die. *Id.* at 13,929. Roads are harmful by facilitating spread of invasive weeds (which thrive in disturbed areas, and outcompete native species); allowing predators to move into previously unoccupied areas; and increasing human access, traffic, and noise, which the species avoid. *Id*. at 13,929–30.

BLM admits this Project will create a 38,289-acre "avoidance area" for sage-grouse. ER 127. This avoidance area is far larger than the Project area itself, and will eliminate 9% of sage-grouse habitat in Spring Valley. *Id*. Having this

large "avoidance area" on the valley floor will thus isolate the populations living on either side of Spring Valley. When populations become isolated from each other, they become at "greater risk of extinction due to genetic and demographic concerns such as inbreeding depression, loss of genetic diversity, and Allee effect (the difficulty of individuals finding one another), particularly where populations are small." 75 Fed. Reg. at 14,005.

Three other wind energy facilities, all larger than this one, are currently proposed in or adjacent to Spring Valley. ER 137 (EA). *See also* ER 395 (over a dozen additional applications for wind power or testing are pending in Ely BLM district).

II. BLM's 2005 WIND PROGRAMMATIC EIS.

In 2005, BLM issued a Final Programmatic EIS on Wind Energy Development on BLM-Administered Lands in the Western United States ("Wind PEIS"), which purported to evaluate the consequences of establishing a "Wind Energy Development Program" across BLM lands. ER 185 (Record of Decision). The Wind PEIS admits "site-specific and species-specific issues associated with individual wind energy development projects are not assessed in detail." ER 202. Rather, it merely "identifies the range of possible impacts on resources present in the 11-state study area." *Id.*

The Wind PEIS did identify Best Management Practices ("BMPs"), which "identify required mitigation measures that would need to be incorporated into project-specific Plans of Development [] and right-of-way [] authorization stipulations." ER 195. *See also* ER 198 (BMPs "will be adopted as required elements" of projects). BMPs include avoiding placement of turbines near known bat colonies, "in known migration corridors," or "in known flight paths between colonies and feeding areas." ER 201. The Wind PEIS's brief analysis of impacts on bats does not discuss barotrauma, bats' attraction to wind turbines, or Brazilian free-tailed bats. *See* ER 204–213.

III. APPROVAL OF SPRING VALLEY WIND ENERGY FACILITY

BLM placed the Project on an artificial "fast-track" to assist project proponent SVW in obtaining tens of millions of dollars of federal financing under the American Recovery and Reinvestment Act. *See* ER 3, 5. That Act originally required project approval prior to the end of 2010, but the deadline was extended by Congress. H.R. 4853 § 707. This internal "fast-track" has no basis in law, as Congress has *not* exempted such projects from full compliance with environmental laws; rather, BLM admits they must receive "the full environmental reviews required" by NEPA. ER 308. However, BLM unlawfully rushed the NEPA process in order to reach that arbitrary approval deadline. *E.g.*, ER 322 (NDOW

biologist noting that "[w]e just need for this process to slow down a bit to give us adequate time").

In December 2009 and July 2010, BLM issued preliminary versions of an EA for the Project, through which BLM asserted that the project would pose no significant environmental impacts whatsoever, such that BLM could approve it based on an EA and a FONSI. Both Plaintiff-Appellant groups submitted written comments to BLM detailing their concerns about impacts to bats, birds, and other resources and the need for an EIS. *See* ER 282, 303 (member-staffer declarations describing involvement).

Four sister agencies—as well as BLM's own experts—repeatedly urged BLM to prepare a full EIS due to the significant environmental impacts and sensitive location of the site. FWS warned BLM that its then-predicted bat mortality threshold of 179 bats per year (later revised upwards) "could be reached in a single night" and "could easily be tenfold this estimate," and that "there is a definite possibility that a very large number of bats could be killed by this action." ER 335–336, 338. NDOW warned BLM that impacts to wildlife warranted elevation to an EIS, particularly with respect to bats. ER 323. *See also* ER 369 (NDOW biologists informing BLM, with respect to bats, "[n]o question that impacts are significant and you need to do an EIS."). The National Park Service informed BLM that an EIS should be prepared due to significant impacts on

wildlife, including cumulative impacts of the other projects planned in Spring Valley. ER 317–321. SNWA urged preparation of an EIS due primarily to impacts to sage-grouse. ER 312–315.

Likewise, BLM's own experts advised an EIS was needed. The Nevada BLM State Office's planning and environmental staff concluded a detailed review with"[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. The ability of this analysis to lead to and support a FONSI is seriously questioned." ER 362. It noted that for bats and other wildlife, the EA failed to explain or demonstrate why the impacts on wildlife were not significant. ER 357. But as noted above, no EIS was prepared, after SVW and higher levels of BLM pressured the local BLM office to avoid the "additional work and delays" associated with an EIS. *E.g.*, ER 418–19, ER 341.

Thus, on the basis of industry and political pressure rather than on the basis of the best available science on the impacts to wildlife and the environment, BLM approved the Project based on a Decision Record, Finding of No Significant Impact, and EA "tiered" to BLM's 2005 Wind PEIS. As explained below, the Wind PEIS did *not* address key risks posed by the Project, particularly to bats; and BLM did not follow the Wind PEIS's bat avoidance BMP in approving the Project. The FONSI includes a very brief review of the NEPA "intensity factors" found at

40 C.F.R. § 1508.27(b), summarily asserting that all significant impacts have been avoided. ER 60–62.

The EA admits it is "impossible to provide an accurate quantitative assessment" of predicted mortality to bats. ER 118. However, it predicts what it calls a "bat mortality threshold" of 2.56 bat deaths per turbine per year, or 192 bat deaths per year for the Project, *id*.—and ultimately bases its FONSI on an assurance that bat mortality from the Project will stay below that level. ER 61 (FONSI).

BLM created the threshold by averaging mortality from 11 other wind facilities in so-called "similar habitats." ER 118, 173. However, sister agencies and internal BLM personnel strongly criticized it as inaccurate. NDOW explained that many of the comparison sites were inappropriate since they were on ridges, not in a valley. ER 325. BLM State Office staff noted that most of the comparison sites were in the Columbia River Gorge or agricultural lands, and that none of them are "even in the same ecoregion or vegetative communities." ER 388. NDOW noted that BLM failed to address whether the other sites were actually located in the range of the relevant bat species. ER 327. In fact, almost all of BLM's comparison sites are *outside the range* of Brazilian free-tailed bats. *See* ER 311 (map of range).

The EA states if mortality levels exceed the threshold, "adaptive management measures would be implemented to reduce mortality levels below the designated threshold." EA 118. These measures are set forth in an Avian and Bat Protection Plan ("ABPP"), an appendix to the EA. ER 146. The primary measures consist of: creation of a Technical Advisory Committee to provide mitigation recommendations, ER 163–64; escalating levels of mitigation "phases," each providing for fixed numbers of hours of wind turbine curtailment (stopping the turbines during periods of low wind) and shutdowns, ER 174; and an experimental radar system intended to "trigger turbine shutdowns during high-risk periods for bats." ER 118, ER 164–65.

Although finding the concept of adaptive management promising in theory, the expert agencies criticized these measures as inadequate due to their lack of enforceability, limited nature, and overall lack of guarantee to keep bat mortality below the stated thresholds. *E.g.*, ER 235, 363 (NDOW comments).

The EA admits direct impacts on sage-grouse habitat. The Project will directly disturb about 140 acres of sage-grouse habitat. ER 126. More troubling is that sage-grouse will avoid the entire Project area and surrounding habitats as a result of construction activities during the 9–12 month construction phase; and "are expected to avoid" permanently a "38,289-acre avoidance area," due to their behavioral avoidance of tall structures such as wind turbines and associated

transmission lines. ER 127.

On March 25, 2011, BLM issued a "Notice to Proceed" authorizing SVW to commence site preparation and construction, including "clearing and grading" two sites totaling 30 acres and almost six miles of roads crossing the Project site. ER 38–40. This clearing will be done "using bulldozers, road graders, or other standard earth-moving equipment." ER 73 (EA).

LEGAL BACKGROUND

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It requires federal agencies to "take seriously the potential environmental consequences of a proposed action" by taking a "hard look" at the action's consequences in an Environmental Assessment or Environmental Impact Statement. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (citation omitted). The statute's twin objectives are (1) to ensure that BLM "consider[s] every significant aspect of the environmental impact of a proposed action" and (2) 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) (citing *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir.2002)); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

"NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s].'" *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1120 (9th Cir. 2010) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). This emphasis on "the importance of coherent and comprehensive up-front environmental analysis [] ensure[s] informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998).

SUMMARY OF THE ARGUMENT

BLM failed to consider cumulative impacts on bats and sage-grouse. BLM acknowledges that three additional wind energy facilities in or near Spring Valley, all much larger than this one, are proposed and foreseeable. However, despite quantifying expected bat mortality for this Project, it never attempts to do in its cumulative impacts analysis, simply predicting a "somewhat larger percent increase in mortality." ER 139. Nor does BLM make any attempt to predict the actual *impacts* of such mortality on local or regional populations of bats. As to sage-grouse, BLM similarly fails to even tally the expected "avoidance areas" from

the other developments proposed in Spring Valley; nor does it attempt to assess the implications for sage-grouse persistence from this large amount of habitat loss. Thus, BLM's analysis consists of the type of vague, conclusory statements repeatedly found inadequate by this Court, and its conclusion of no significant cumulative impacts is unsupported.

BLM failed to prepare an EIS despite significant impacts to bats and sage-grouse. This Project implicates several of NEPA's significance factors, including highly uncertain, unknown, and controversial risks; unique characteristics of the geographic area such as proximity to ecologically critical areas; and cumulative impacts. 40 C.F.R. § 1508.27(b). Impacts to bats are highly uncertain and controversial because BLM admitted it had little idea what degree the impacts will be, BLM relied on an unfounded assurance that mortality would be kept below the threshold levels, and the mitigation measures are discretionary and uncertain. The Project's proximity to the Rose Guano Cave triggers the factor regarding ecologically critical areas. And BLM's failure to adequately analyze cumulative impacts indicates that those impacts are likely to be significant.

The district court erred in striking the declaration of bat expert Dr. Tuttle. Dr. Tuttle's declaration was properly admitted because it identified numerous gaps and missing relevant factors with respect to bats in BLM's analysis, technical materials, and irreparable harm to bats.

The recently-commenced ground-disturbing activities, including site-clearing and road-blading, will cause irreparable harm to WWP's interests in native wildlife by destroying and degrading sage-grouse habitat and driving the birds away. BLM's EA admits that construction activities are likely to drive away sage-grouse, perhaps permanently, due to their sensitivity to human activity, ER 127, which FWS's warranted finding confirms. 75 Fed. Reg. at 13,930 (describing sensitivity to noise and traffic). The harm is irreparable because of the already-imperiled and declining status of sage-grouse and because the species has a low reproductive rate and recovers slowly. *Id.* at 14,005. The ground-disturbing activity will also cause irreversible ecological impacts to this desert habitat. This harm is irreparable due to the indisputed slow nature of vegetative recovery in this high desert environment. The Project will also cause uncertain, significant mortality to Brazilian free-tailed bats. This harm is similarly irreparable because of their already-imperiled status and low reproductive and recovery rate.

Finally, the balance of hardships and the public interest favor an injunction. Where sensitive species face irreparable habitat losses, issuance of injunctive relief to prevent such harm is appropriate despite private financial losses, which here are likely to be temporary, as the Project may very well proceed after BLM has completed a lawful EIS. Accordingly, the public interest is furthered by

suspending construction during the relatively brief period of time until the district court can rule on the merits of WWP's claims.

ARGUMENT

I. STANDARDS OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, --, 129 S. Ct. 365, 374 (2008). An injunction "is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," if the plaintiff "also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion, which occurs if the district court relied on "an erroneous legal standard or clearly erroneous finding of fact." *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). Conclusions of law are reviewed *de novo*, and findings of fact are reviewed for clear error. *Id*. at 986–87. This Court reviews *de novo* whether an agency has complied with NEPA, pursuant to the judicial review

provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–06. *Westland Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 865 (9th Cir. 2005). Under the arbitrary and capricious standard, the Court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). An agency must articulate a rational connection between the facts found and the conclusions made. *Marsh*, 490 U.S. at 378. This Court also reviews a district court's exclusion of evidence for abuse of discretion. *S.W. Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996).

II. WWP IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT BLM FAILED TO ANALYZE CUMULATIVE IMPACTS.

BLM failed to consider cumulative impacts upon bats or sage-grouse in any legally adequate way. The district court's conclusion that BLM adequately did so was an error of law reviewable by this court *de novo*. *See Lands Council*, 537 F.3d at 986.

A. NEPA and Cumulative Impacts.

NEPA's required "hard look" includes studying cumulative impacts, "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Put another way,

"[s]ometimes the total impact from a set of actions may be greater than the sum of the parts . . . . the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004).

"A proper consideration of the cumulative impacts of a project requires some quantified or detailed information; . . . [g]eneral statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Id*. at 993 (quotations omitted). The analysis must be "more than perfunctory" and "provide a useful analysis." *Id*. "[V]ague and conclusory statements," without supporting data, are not adequate. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 972–73 (9th Cir. 2006).

Lists or tables of other projects are not sufficient, even if they include a tally of affected areas. For example, "[a] calculation of the total number of acres to be harvested in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the *actual environmental effects* that can be expected from logging those acres." *Klamath-Siskiyou*, 387 F.3d at 995 (emphasis added). The same is true for a tally of miles of road construction, *id*., or in the mining context, a tally of acreage of surface disturbance. *Great Basin Mine Watch*, 456 F.3d at 973. Rather, the analysis must explain "how [] individual

impacts might combine or synergistically interact with each other to affect the [] environment." *Klamath-Siskiyou*, 387 F.3d at 994. This requirement extends with equal force to both EAs and EISs. *Te-Moak Tribe v. U.S. Dep't of the Interior*, 608 F.3d 592, 603 (9th Cir. 2010).

B. The EA's Analysis of Cumulative Impacts on Bats is Inadequate.

BLM failed to consider cumulative impacts upon bats in any legally adequate way. Cumulative impacts on bats, including Brazilian free-tailed bats, pose a grave threat, in light of their already-declining status, their vulnerability to wind development, and the numerous other wind facilities proposed in the area.

BLM states in a table that three additional wind energy facilities are planned in or adjacent to Spring Valley. ER 137. All three facilities as described are much larger than this Project in terms of project area and number of turbines, and together would add an estimated 995 additional wind turbines. *Id*. As noted, the number of wind energy applications in the BLM district is much higher. ER 395.

This Project poses significant risks of mortality to bats. As noted, BLM set a "mortality threshold" for bats at 192 bats per year, based on an estimate that bat deaths at other facilities in "similar habitats" average 2.56 bat deaths per turbine per year. ER 118. The expert agencies believed this was likely a substantial underestimate, for reasons including that many of the comparison sites were not comparable bat habitat. ER 325, 327. But even assuming that it is correct, the

additional 995 turbines planned for the valley would conservatively cause at least 2,547 additional bat deaths per year, for the decades that these facilities will operate.

BLM never even makes this simple calculation in its extraordinarily brief discussion of cumulative impacts on bats. ER 137–39. In a one-page discussion of cumulative impacts on wildlife in general, BLM notes that the foreseeable actions "would result in further mortality" from collisions and barotraumas and that "[c]umulative impacts to bats are anticipated to be similar to those described for birds; however, because of the proximity to Rose Guano Cave, there is the potential for a somewhat larger percent increase in mortality for Brazilian free-tailed bats." ER 138. In a further one-page discussion on "special-status species," it adds a single additional sentence specific to bats, noting "[b]ecause of the great distances Brazilian free-tailed bats are known to migrate and the addition of multiple wind energy facilities to the north and south of the SVWEF, there is the potential for a somewhat larger percent increase in mortality for Brazilian free-tailed bats throughout eastern Nevada." ER 153. This is the entirety of the cumulative impacts analysis on bats.

This discussion fails to provide any quantified information or useful analysis. BLM's language of "further mortality" and "somewhat larger" percent mortality is precisely the type of vague, "[g]eneral statements about possible

effects and some risk" that this Court has rejected as inadequate. *Klamath-Siskiyou*, 387 F.3d at 993.

The only attempt at quantifying information comes with tallying the numbers of turbines expected. ER 137. But just as with acres of disturbance or miles of roads, this type of tally, while a necessary start to an analysis, is no analysis in itself without a description of the actual effects on the species. Again, BLM fails to even tally the projected numbers of bats that would die from this number of turbines using its optimistic projected bat mortality thresholds. Perhaps more importantly, BLM also fails to actually analyze what such additive mortality would mean for Brazilian free-tailed bats or others at any scale, be it the population known to inhabit the Rose Guano Cave, or the species west-wide. This is a significant omission, considering Brazilian free-tail bats and others are known to be in significant decline, a fact never acknowledged in either the baseline discussion on bats or the cumulative impacts analysis. ER 90–91, 99–101 (baseline); 137–39 (cumulative impacts).

BLM's own expert staff recognized this omission of any population data in comments on BLM's draft EA, asking "[w]hat is the status of bats in the area?" and "[w]hat's the relevant population?" since "[w]e need a sense of population size and mortality rate [] to determine whether the impacts are significant." ER 354, 358, 357. But BLM chose not to address this in the final EA, or explain why it did

not. BLM's lone reference to "somewhat higher" mortality to bats in "eastern Nevada" is not only acceptably vague, but makes little sense for a migratory species that passes through eastern Nevada from 8 different states. ER 325.

Nor does BLM acknowledge that bats reproduce and thus recover from declines very slowly, an important factor in assessing cumulative impacts. ER 241 (study), 260 (Dr. Tuttle). Rather, BLM's statement that bats have "similar impacts to birds" is incorrect and ignores the key differences (such as reproductive rate and attraction) that cause bats to be far more vulnerable. ER 239–40 (study explaining why bats are more susceptible to barotrauma than birds), ER 259 (Dr. Tuttle explaining behavioral and biological differences). In sum, BLM fails to recognize the "extreme potential for harm" to bats from additional wind facilities. ER 260.

The district court erred by cobbling together a cumulative impacts analysis that the agency itself did not provide, citing the table listing the three other facilities, the Wind PEIS, and the EA's discussions of *direct* impacts to bats. ER 21. But the table contains little more than the number of turbines, which as described above, is legally inadequate. ER 137. The Wind PEIS cannot substitute for a site-specific cumulative impacts analysis, where its "analysis" consisted of literally two sentences covering both bats and birds, ER 232, and in any case assumed implementation of bat avoidance BMPs that BLM ignored and contradicted in siting this project. ER 216. Nor could the EA's analysis of direct

impacts save the analysis, as it nowhere purports to consider the collective impacts of the other facilities, *see* ER 117–19, 129–30, and direct and cumulative impacts are distinct. *See Te-Moak Tribe*, 608 F.3d at 604 (finding EA's discussion of direct impacts, in lieu of cumulative impacts, inadequate).

For these reasons, BLM's handful of vague statements on bats fails to constitute a hard look at the significant cumulative impacts present.

C. The Cumulative Impacts Analysis on Sage-Grouse is Inadequate.

The cumulative impacts analysis for sage-grouse is similarly flawed. Again, BLM acknowledges in a table that three additional wind facilities are planned in or adjacent to Spring Valley; and in addition to the numbers of turbines, lists the acreage of each project area. ER 137. Additionally, a project by SNWA to pump Spring Valley groundwater for the Las Vegas area would add 71 miles of new powerlines, ER 138, and almost certainly dry up springs. *See* ER 136.

BLM's analysis of cumulative impacts specific to sage-grouse consists of two sentences stating that "past and present actions have contributed to the direct loss of habitat" and "habitat fragmentation" for sage-grouse; and that the foreseeable future actions "would contribute up to 5,810 acres of short- and long-term habitat loss and even greater habitat fragmentation," which when combined with this Project, "represents approximately 3.3% of available greater sage-grouse habitat . . . in Spring Valley." ER 138–39. These two sentences fail to provide any

useful analysis of impacts on the species. BLM's statement noting "greater fragmentation" is again the type of vague, perfunctory statement this Court has found inadequate. *Klamath-Siskiyou*, 387 F.3d at 993.

BLM's only attempt at quantification of impacts is to tally the areas of *direct* habitat disturbance from other proposed projects and calculate its proportion of habitat in Spring Valley. ER 138–39. But the area of direct disturbance is beside the point for a species that behaviorally avoids tall structures. Again, BLM admitted in its discussion of direct impacts that the Project will create a 38,289 "avoidance area"—far larger than the Project area and equating to 9% of habitat in Spring Valley. ER 127. As the other wind facilities are all much larger than this Project, the total avoidance areas could conceivably add up to more than 50% of the available sage-grouse habitat in the valley. *See* ER 137 (project areas of other projects total over eight times the 7,500 Project area here). BLM never performs this simple calculation. Nor does BLM assess the actual effects on sage-grouse (for example, how it would affect the species' rate of decline), or implications on sage-grouse's ability to persist in this area, from such a stunning amount of habitat loss. *Klamath-Siskiyou*, 387 F.3d at 995.

This Court has found inadequate similar analyses that similarly failed to assess the role of foreseeable projects on remaining suitable habitat for the spotted owl even though owls resided outside of the project area, *Earth Island Institute v.*

U.S. Forest Service, 351 F.3d 1291, 1306–07 (9th Cir. 2003), and that found no cumulative impacts from a development in the sensitive fisher's habitat, where the agency's defense was that the area disturbed was "modest." *ONRC v. Goodman*, 505 F.3d 884, 892–93 (9th Cir. 2007). SNWA rightly explained that BLM's cumulative effects analysis here, which essentially "amounts to a single sentence," is inadequate. ER 316.

III. WWP IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT BLM FAILED TO PREPARE THE REQUIRED ENVIRONMENTAL IMPACT STATEMENT.

BLM failed to prepare an EIS despite evidence that impacts from this Project to both bats and sage-grouse would be significant. The district court's conclusion that BLM was excused from doing so was an error of law reviewable by this court *de novo*. *See Lands Council*, 537 F.3d at 986.

A. NEPA's EIS Requirement.

NEPA requires federal agencies to prepare an EIS for "major Federal actions significantly affecting" the environment. 42 U.S.C. § 4332(2)(C). To prevail on its claim that BLM violated NEPA by refusing to prepare a site-specific EIS for the Project, WWP must show only "that there are *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). "If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a

project's impacts are insignificant." *Ctr. for Biol. Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008) (quotations omitted). Assessing likely adverse impacts to sensitive species often requires an EIS given the potential for significant effects. *See Anderson*, 314 F.3d at 1010 (EIS needed for proposed hunt of gray whales, formerly protected under the Endangered Species Act), *ONRC v. Goodman*, 505 F.3d 884 (9th Cir. 2007) (agency prepared EIS for ski expansion, and still violated NEPA in not analyzing impacts on sensitive fisher habitat).

Ten "intensity" factors help determine whether an agency action "may" cause significant impacts. 40 C.F.R. § 1508.27(b). The presence of even just "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846,865 (9th Cir. 2005). Factors triggered here include: effects that are "highly uncertain or involve unique or unknown risks" or "likely to be highly controversial," 40 C.F.R. § 1508.27(b)(5), (4); "[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas," *id*. § 1508.27(b)(3); and cumulative impacts, *id*. § 1508.27(b)(7).

B. Impacts on Bats Will Be Significant.

1. Uncertain, controversial, and unknown risks.

The Project's impacts to bats are highly uncertain and controversial and involve unknown risks, two related factors requiring an EIS. 40 C.F.R. §

1508.27(b)(4), (5). An EIS is required when there is uncertainty regarding the intensity of effects, and where that uncertainty would be reduced by further collection of data. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731–32 (9th Cir. 2001) ("*NPCA*"), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2757 (2010) (citations omitted). An EIS is required due to controversy when "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor" or there is "a substantial dispute [about] the size, nature, or effect" of the major federal action. *NPCA*, 241 F.3d at 736 (quotations omitted). A substantial dispute exists when evidence "casts serious doubt upon the reasonableness of an agency's conclusions." *Id*. This Court has found these factors triggered where an increase in cruise ships would cause an unknown intensity of disturbances to whales and other sea creatures, *id*. at 732, and where it was "difficult to predict" how a whale hunt would affect a local whale population, as the number of whales recruited to the area was uncertain. *Anderson*, 314 F.3d at 1020–1021.

It is BLM's burden to produce a "well-reasoned explanation" demonstrating why information contrary to the EA's conclusions "do[es] not suffice to create a public controversy based on potential environmental consequences." *NPCA*, 241 F.3d at 736 (quoting *Laflamme v. FERC*, 852 F.2d 389, 401 (9th Cir. 1988)). Here, a barrage of evidence from both internal and external experts conclude that impacts

to bats will be significant, contrary to the EA and FONSI's conclusions. BLM's conclusion is flawed for several reasons.

First, the level of bat mortality is highly uncertain and controversial given the difficulty of predicting bat deaths caused by the Project. BLM's EA admitted that it is "impossible to provide an accurate quantitative assessment of mortality to these species." ER 118. Many expert comments and memos confirm this uncertainty. FWS warned BLM that its predicted bat mortality thresholds "could be reached in a single night" and could "easily be tenfold this estimate," and that "there is a definite possibility that a very large number of bats could be killed by this action." ER 335–36, 338. It further stated in a meeting that "there are significant unknowns and given the available data the risk could be substantial." ER 392. BLM agreed that because it did not know what percentage of bats forage in the Project area, "operation phase mortality could very considerably and cannot be predicted with reliability," making "a determination of significance difficult." *Id*. At another meeting, BLM noted "[w]e really don't know what the impacts will be at this point. We know 20–40% of Brazilian free-tailed bats drop into project area. Also we don't know if they're attracted or not." ER 369. NDOW warned BLM that it "is concerned there could be a high magnitude of mortality on the Brazilian free-tailed bat . . . given the numbers . . . using the project area." ER 237.

These are precisely the types of "difficult to predict" impacts, with uncertain

intensity, that trigger an EIS. *Anderson*, 314 F.3d at 1020–1021; *NPCA*, 241 F.3d at 732. BLM's brief rejection of these intensity factors in its FONSI, including an assertion that it has "address[ed] any uncertainty regarding impacts," ER 60–61, is unsupported and not a "well-reasoned explanation." *NPCA*, 241 F.3d at 736.

Second, BLM's FONSI—and the district court—relied upon an unfounded assurance that the Avian and Bat Protection Plan would prevent significant effects to bats by "ensur[ing]" mortality would remain below "designated mortality thresholds." ER 61–62, ER 16. The ABPP, however, is based on discretionary measures that cannot provide such assurance, which is apparent from its provisions.

The ABPP's primary mitigation measures are escalating phases of turbine curtailment during periods of low wind and turbine shutdowns, ER 174, the results of which will be monitored as a "study." ER 166. These methods indeed hold promise for reducing bat mortality. ER 241, 246 (studies). However, they are not implemented here in a way so as to ensure results. *See* ER 46 (concern is "not that curtailment cannot be done, but that it will not be done," since plan is full of loopholes). For example, in contrast to the two studies showing promise from curtailment (where the curtailment occurred either 24 hours a day, or all night, ER 243, 252), here curtailment is only allowed for strict hourly limits in each mitigation phase. ER 174. If mortality thresholds are exceeded, the next

mitigation phase is triggered; however, "no more than two phases of curtailment will be implemented in a single year," regardless of bat mortality. ER 174. If mortality continues to exceed thresholds, no consequences occur other than a meeting to "discuss other appropriate mitigation measures." ER 174. FWS worried that "it is not clear what actions would occur if [BLM's] mortality estimate is grossly incorrect." ER 335.

Another limitation is that curtailment will only occur between August 1 through September 31. ER 166. NDOW objected to these date limits, noting that bats are often present before and after these dates, and advising that curtailment "should occur where and when the mortality data demonstrates wildlife mortality." ER 238. Another problem is that the mortality thresholds "start[] over at zero" each time they are exceeded. ER 172. *See* ER 366 (NDOW objection to same). And BLM admitted it may not even be able to enforce the measures—which cause the power producer to lose money—due to "political concerns." ER 394. BLM admitted it had no data regarding whether another measure, the radar system designed to detect bats and trigger shutdowns, actually worked. ER 118, 184. Dr. Tuttle explains that system is "highly experimental" and its only known deployment failed to prevent much higher bat mortality than predicted here, even with *no* nearby bat cave. ER 261–63.

Thus, the ABPP is riddled with a series of discretionary responses which,

taken together, vitiate any "insurance" that it will keep bat mortality below the mortality thresholds—which BLM (and the district court) relied on in concluding that effects on bats will be mitigated to insignificance. ER 61, 16. Because the mitigation is either discretionary or unproven, it fails to "constitute an adequate buffer against the negative impacts that may result from the authorized activity," or "render such impacts so minor as to not warrant an EIS." *NPCA*, 241 F.3d at 734. Discretionary measures and advisory committees of this kind to be undertaken by an industrial-scale wind project developer after construction have been soundly rejected by another district court as inappropriate to mitigate risks to bats. *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540, 579–80 (D. Md. 2009) (explaining the flaws with such measures and finding that "[b]ecause entirely discretionary adaptive management will not eliminate the risk to [wildlife], the Court has no choice but to award injunctive relief").

Indeed, the ABPP's proposal to "increase the risk of harm to the environment and then perform its studies" on bat mortality has the NEPA process "entirely backwards." *NPCA*, 241 F.3d at 733. The proposed research is the type of "information and understanding that is required *before* a decision that may have a significant adverse impact on the environment is made, and precisely why an EIS must be prepared in this case." *Id.* Thus, the district court committed clear error in assuming, contrary to the evidence, that BLM would "*ensure* that the bat mortality

rate would not surpass 192 bats per year" to conclude impacts upon bats are not significant. ER 16 (emphasis added).

Third, even if, against the odds, bat mortality stays below the 192 bats/year threshold, BLM nowhere explains why this level of mortality is non-significant to this declining species, at the regional, local, or Rose Guano Cave level. *See* ER 129–30 (EA), 60–61 (FONSI). BLM's Field Office Manager admitted as much, wondering "[d]o we have a tie between these thresholds and what is considered significant??? I suspect not . . . ." ER 339–40. This is related to BLM's failure to analyze the declining status of bats, including Brazilian free-tailed bats, in its baseline analysis. *See* ER 99–101 (Affected Environment section on special-status species bats).

If one does not analyze the status of a species, it is impossible to analyze whether impacts upon it will be significant. As a BLM state office official explained, "[w]e need a sense of population size *and* mortality rate [] to determine whether impacts are significant." ER 357 (emphasis added). The closest BLM comes to this, asserting that Brazilian free-tails are "common," ER 129, is unsupported by the scientific literature and its own designation of the species as "sensitive." ER 44–46 (summarizing literature on population). "The argument that the Brazilian free-tailed bat population is so large that we need not be concerned about its decline is reminiscent of what was once believed to be true for

the now-extinct passenger pigeon. As with free-tailed bats, it required large populations for reproductive success." ER 44. The National Park Service agreed that the thresholds in fact "constitute[] a significant direct impact to wildlife resources" in Spring Valley over the life of the project. ER 319.

Finally, BLM could have taken steps to reduce this uncertainty. For example, it could have made the mitigation measures less discretionary. It also could have gathered information about the current status of Mexican free-tailed bats in the Project area, the Rose Guano Cave, and in the Great Basin and western region. The only recent study on Rose Guano Cave explains that "there is simply not enough information available to ascertain the biological significance of this site, nor to construct a robust, data driven conservation plan for the site." ER 398. It specifically identifies five missing pieces of data, such as "standardized and repeatable estimates of colony size," "determination of colony demography," and "patterns of use and habitat associations." *Id*. BLM also could have compiled mortality data on wind energy facilities actually within the range of Brazilian free-tailed bats. NDOW noted that in pre-project testing, BLM only deployed a single bat detection microphone that was raised (in the so-called "rotor sweep area"), and that it was prone to malfunction, implying that additional ones may have been helpful. ER 330, 328, 235.

2. Proximity to ecologically critical areas.

Similarly, an EIS is required because the Project's location so close to Rose Guano Cave and "within the largest known bat migration route in the Great Basin ecosystem," ER 325, puts it in close "proximity" to "ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). For this reason, FWS expressed "serious reservations over the selection of the Spring Valley project site." ER 335. BLM's statement that this factor is not triggered because "[t]here are no impacts that exceed the thresholds disclosed in the PEIS" is unsupported in light of BLM not following its bat avoidance BMP. ER 60.

3. Cumulative impacts.

Finally, as described in the cumulative impacts argument above, there are substantial questions as to whether the Project involves the presence of cumulative impacts on bats, 40 C.F.R. § 1508.27(b)(7), in light of at least three other proposed wind energy facilities in Spring Valley, ER 137, and BLM's failure to attempt to quantify cumulative bat mortality or analyze the actual impacts on local or regional populations of bats. Where an agency fails to adequately analyze cumulative impacts, this can raise substantial questions about whether the project will cause cumulatively significant environmental impacts. *Ocean Advocates*, 402 F.3d at 870 (finding substantial question as to significance due to perfunctory, conclusory cumulative impacts analysis). Here, the National Park Service confirmed the

"obvious potential to significantly impact" bat populations due to cumulative impacts. ER 319. Thus, these cumulative impacts, too, trigger an EIS.

C. Impacts on Sage-Grouse Will Be Significant.

As with bats, as described in the cumulative impacts argument above, there are at least significant questions as to whether the Project involves the presence of cumulative impacts to sage-grouse. This is due to the impacts of the foreseeable three other proposed wind energy facilities, groundwater development project, and other ongoing activities such as livestock grazing. ER 137. Again, BLM only considered areas of "direct" disturbance, but not the larger "avoidance areas" from the foreseeable projects, and failed to analyze the actual impacts of this on already-declining sage-grouse populations.

The avoidance areas will likely cause significant impacts because of how much habitat they will eliminate. BLM admits that the species avoid habitat up to two miles from tall structures. ER 127. In fact, the distance is likely greater. ER 315 (SNWA citing to recent FWS science finding that development within three to five miles of leks "may have significant adverse impacts," and explaining that this renders impacts to sage-grouse significant). Therefore, WWP has raised substantial questions about whether the project will cause cumulatively significant environmental impacts to sage-grouse. *See Ocean Advocates*, 402 F.3d at 870.

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

BLM cannot rely on its 2005 Wind PEIS to avoid a site-specific EIS for the Project. For tiering to be permissible, "[t]he previous document must *actually discuss the impacts of the project at issue*." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (emphasis added). A programmatic EIS cannot save an EA where it only contains broad, general statements and lacks any specific information about the project at issue. *Klamath-Siskiyou*, 387 F.3d at 997–998. This problem is exacerbated if the programmatic EIS is outdated or no longer valid in light of changed conditions. *Id.* at n. 3.

Here, the Wind PEIS contains absolutely no specific information about the Project at issue; and is so general that it contains virtually no useful analysis on bats or sage-grouse to which to tier. For example, the cumulative impacts section mentions bats in literally two sentences, lumped together with birds. ER 232. Nor does the Wind PEIS even mention Brazilian free-tailed bats in its analysis of direct impacts on bats. *See* ER 204–13. Further, the PEIS is now woefully outdated, failing to even acknowledge barotrauma or the fact that bats are attracted to wind turbines, both obviously important factors to consider. *See id.* NDOW informed BLM that the PEIS "has not kept pace with developments in technology, nor does it draw on the experience gained from five years of wind energy operations." ER

235.[2]

Finally, even the thin analysis present in the PEIS is explicitly limited to evaluating the impacts of wind facilities that follow its BMPs, including 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." ER 201. BLM does not deny it failed to follow this BMP. ER 140. Because the PEIS's bat analysis *is contingent upon compliance with this BMP*, BLM cannot tier to the PEIS's analysis of impacts on bats to avoid a site-specific EIS. *E.g.*, ER 202 (BMPs apply to all projects), 216 (similar), 225 (scope of cumulative impacts analysis limited to "projects that are consistent with the policies and BMPs contained in the proposed action"). Agency experts repeatedly raised this same concern to BLM. *E.g.*, ER 335 (FWS telling BLM that it failed to incorporate practices from the PEIS in way to "bring potential impacts to anything below significant"); ER 369 (NDOW raising similar concerns); ER 362 (BLM state office raising similar concerns).

[2] It is thus unsurprising that every other wind facility listed on BLM's fast-track webpage for which a level of analysis is given shows that a site-specific EIS is being prepared. ER 309 (where "NOI" indicates a "Notice of Intent" to prepare EIS).

IV. THE DISTRICT COURT ERRED IN STRIKING DR. TUTTLE'S DECLARATION AND ITS BEING STRICKEN WAS PREJUDICIAL.

A. The Court of Appeals has jurisdiction to review the order striking the Tuttle Declaration.

Under 28 U.S.C. § 1292(a)(1), the Court of Appeals "may exercise . . . pendent jurisdiction over any otherwise nonappealable ruling that is 'inextricably intertwined' with or 'necessary to ensure meaningful review of' the order properly before us on interlocutory appeal." *al-Kidd v. Ashcroft*, 580 F.3d 949, 957 (9th Cir. 2009) (quoting *Hendricks v. Bank of America, N.A.*, 408 F.3d 1127, 1134 (9th Cir.2005), *Swint v. Chambers County Comm'n,* 514 U.S. 35, 51 (1995)).

> District court rulings are "inextricably intertwined" with a preliminary injunction when the legal theories on which the issues advance are so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.

Id.

Here, the legal theories are so intertwined that the Court must decide the appeal of the order striking Dr. Tuttle's declaration in order to review the claims properly raised on the appeal of the preliminary injunction. This is because Dr. Tuttle's declaration identifies relevant factors BLM failed to consider in its NEPA analysis and explains the significance and irreparability of the harm to bats. A plaintiff challenging an administrative agency action bears an unusual burden of persuasion in demonstrating that the agency failed to consider relevant factors. *See*

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In effect, a plaintiff must demonstrate the presence of absence.

Thus, a review of the order striking the declaration, and substantive content of the declaration itself, is needed in order to properly review WWP's claims that NEPA analysis was unlawful and that irreparable harm will result. Notably, the district court utilized the same legal reasoning in its order striking the declaration and in the portion of its order regarding significance of impacts on bats, concluding in both that BLM's mitigation will "ensure" the bat mortality threshold is not exceeded and that it must defer to BLM's expertise. ER 34–35 (strike order), ER 14–17 (PI order). *See Streit v. County of Los Angeles*, 236 F.3d 552, 559 (9th Cir. 2001) (orders inextricably intertwined where they "raise the same issues, use the same legal reasoning, and reach the same conclusions" as the orders for which the Court had jurisdiction).

Further, "resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *al-Kidd*, 580 F.3d at 957 (internal quotation and citation omitted). Here, that issue is whether the district court erred in denying preliminary injunctive relief on WWP's claim that BLM failed to consider relevant factors in derogation of its obligations under NEPA. If the appeal of the preliminary injunction order is decided without review of the order striking Dr. Tuttle's declaration, the issue of whether the declaration was properly

considered will be moot. Thus, the only time for meaningful review of the order striking the declaration is now.

Finally, resolution of the order granting the motion to strike Dr. Tuttle's declaration is necessary to ensure meaningful review of the order denying the preliminary injunction. Since the declaration addresses the factors BLM failed to consider, as well as irreparable harm to bats, review of whether it was properly before the district court on the PI motion is necessary to ensure meaningful review of WWP's claims that BLM did not evaluate the appropriate factors under NEPA and that irreparable harm is likely. The declaration and the order striking it are directly related to the issues before this Court on interlocutory appeal. *Cf. Hendricks*, 408 F.3d at 1134 ("more than a tangential relationship to the decision properly before us on interlocutory appeal" is necessary for the Court to exercise pendent jurisdiction).

B. The district court abused its discretion by striking Dr. Tuttle's Declaration.

The district court abused its discretion by striking Dr. Tuttle's declaration. WWP explained that consideration of Dr. Tuttle's declaration was appropriate under several judicially-recognized extra-record evidence exceptions. These exceptions were particularly apt here, when BLM had (and still has) only filed a summary "Partial Administrative Record," meaning WWP has never seen the full record despite construction proceeding. *See* ER 479 (D.Ct. Dkt. No. 45). In

assessing whether the declaration fit into any of the established exceptions to record review, the district court clearly erred in numerous respects.

First, Dr. Tuttle's declaration is "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). The declaration identified many relevant factors with respect to bats that were missing from BLM's EA. For example, Dr. Tuttle provided information on the relevant factor that bats most frequently killed by turbines, including Brazilian free-tailed bats, "are already believed to be in substantial decline," such that the cumulative impacts from extensive wind development "has alarming potential to become the tipping point that pushes some into endangered status or extinction." ER 261. See also ER 44–46 (reviewing literature). This was missing from BLM's baseline analysis, *see* ER 90–91, 99–101, which BLM's own staff recognized as an important omission. ER 357.

The Tuttle declaration explains that in setting its mortality thresholds, BLM failed to consider the relevant factor of whether the mortality rates at the other facilities considered were in similar *bat* habitat to Spring Valley: *i.e.*, in a major bat migration corridor, four miles from a major bat cave, and in the path between the bats' cave and feeding grounds. ER 257–58. Also, it explains that BLM failed to consider the relevant factor of bat attraction in predicting mortality. It explains

that the EA's statement that bats are "expected to simply fly around individual structures . . . and continue their migratory movement" is biologically unsound, as it "ignores the science showing that bats are attracted to wind turbines," and "thus inaccurately downplays the risk to bats." ER 259.

With respect to cumulative impacts, the declaration explains that BLM failed to consider the "relevant factor" that cumulative impacts to bats are far greater than those for birds. It explains that the EA's statement that "cumulative impacts to bats are anticipated to be similar to those described for birds" is patently inaccurate because turbines kill bats at far higher rate than birds and because of bats' lower reproductive rate. ER 259 (citing literature).

The declaration explains how BLM failed to consider the relevant factor of whether the mitigation measures would *actually be effective* in keeping mortality below the thresholds. It explains how the limits on mitigation are not consistent with keeping mortality under the thresholds. ER 263–66. It also explains that BLM failed to consider whether the radar shutdown system relied upon in the EA actually works. BLM assumed it did, despite there being no data in support. ER 164. Dr. Tuttle explained that the only data, in fact, show the opposite. ER 261–63.

The district court erred because it incorrectly assumed that BLM addressed these missing factors by virtue of including three bat studies in its Partial

Administrative Record. ER 35. Their inclusion was a good *start* by BLM in grappling with the impacts on bats; but they do not identify the gaps in BLM's analysis. Indeed, Dr. Tuttle explains why their conclusions on the success of curtailment do not necessarily apply here, because of the hourly limits and other loopholes in the ABPP. ER 261–66. *Cf.* ER 243, 252 (in the studies, curtailment occurred 24 hours a day or all night).

More importantly, the district court also relied on an erroneous legal standard in stating that BLM's placement of studies in a record—without any explanation or analysis in the actual environmental document—could satisfy NEPA. Agencies must place their data, analysis, and conclusions before the public, in the NEPA document itself. *Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003); *Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993).

Further, the district court clearly erred in excluding Dr. Tuttle's observations on the radar system because it incorrectly assumed the data was only presented in order to adjust the bat mortality threshold, failing to appreciate its role in providing the missing relevant factor of whether the radar system will actually work. ER 35. The expert agencies identified this as a missing relevant factor in BLM's analysis. *E.g.*, ER 365 (NDOW stating a review of the data on the radar was necessary to assess it), ER 238 (same).

Dr. Tuttle's declaration also was properly before the district court because it helps explain complex subject matter. *Lands Council v. Powell*, 395 F.3d at 1030. The district court incorrectly states that the declaration "does not consider any new issues or scientific evidence not already raised or addressed by BLM . . . ." ER 36. As just described above, in fact it raises numerous scientific issues that BLM either did not address, or addressed in a factually unfounded manner.

Finally, Dr. Tuttle's declaration was admissible to support WWP's motion because courts are not confined to the administrative record when addressing issues of remedy. *See, e.g.*, *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833–34 (9th Cir. 2002) (reviewing declaration testimony filed to inform permanent injunction), *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (considering extra-record information on the issue of "whether relief should be granted"). As described in more detail below, on WWP's motion for preliminary injunction, it was appropriate to admit evidence of irreparable harm to bats that would result from the Project's operation. Thus, Dr. Tuttle's declaration is also admissible since it explains irreparable harm that will result if, in the absence of a preliminary injunction, the Project is constructed.

For these reasons, the district court abused its discretion in striking Dr. Tuttle's declaration; and because the declaration provided important information to support WWP's claims, the order was prejudicial. This Court should reverse the

district court's strike order and consider the Tuttle declaration in evaluating the issues WWP raises on appeal from the district court's order denying the preliminary injunction.

V. SITE-CLEARING AND CONSTRUCTION WILL CAUSE IRREPARABLE HARM TO WWP'S INTERESTS IN WILDLIFE.

Irreparable harm to wildlife—and, in turn, to WWP, its members, and the public—will result if, in the absence of a preliminary injunction, the Project is constructed. In fact, harm to sage-grouse and its habitat is already occurring from clearing of sagebrush and road building. Spring is the species' mating season, when they congregate in leks, ancestral breeding areas, to mate. 75 Fed. Reg. at 13,915. The birds avoid traffic noise, which disturbs mating. *Id*. at 13,930. Thus, the noise from bulldozers and similar equipment, even if it does not directly crush nests, will disturb mating and drive away birds. BLM acknowledged in its EA that due to these impacts, sage-grouse may avoid "foraging, breeding behavior, or vacate sites entirely throughout the entire [] project area and adjacent habitat during the 9- to 12-month construction phase," and that "[s]ome grouse may *permanently abandon* the disturbed areas and adjacent habitats." ER 127 (emphasis added). Impairment of successful nesting is irreparable for this species, which is already declining range-wide and has a low reproductive rate. 75 Fed. Reg. at 13,985.

Site-clearing and road-blading will also irreparably harm the site's desert sagebrush habitat, which provides habitat for sage-grouse as well as other species such as pygmy rabbit. Habitat fragmentation is the main cause of the decline of sage-grouse populations. *Id*. at 13,923–24, 13,927, 13,935–37, 13,962. The miles of new roads will allow sage-grouse predators to move into previously unoccupied areas. *Id*. at 13,930. This type of desert habitat recovers very slowly from such disturbance. FWS stated that the Project site would "require extensive time to recover," and that "the areas will likely require 30 + years to recover to pre-disturbed condition." Ex. 26. *See* ER 296 (WWP biologist explaining why recovery of sagebrush could take 50 years or more).

In fact, recovery may even be impossible due to the invasion of weeds, which thrive in disturbed areas. *See* 75 Fed. Reg. at 13,917. *See also id*. at 13,932. ("It is difficult and usually ineffective to restore an area to sagebrush after annual grasses become established."). *See Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005) (irreparable harm for roading, utility, & fill project because "once the desert is disturbed, it can never be restored."); *San Luis Valley Ecosystem Council v. FWS*, 657 F. Supp. 2d 1233, 1241 (D. Colo. 2009) ("complete vegetation recovery will take up to 15-20 years; such a long recovery time may constitute irreparable damage"). The same is true for this desert site.

This harm to wildlife will harm the members of WWP. Both plaintiff groups submitted detailed declarations from member-staffers explaining their regular use and enjoyment of the area affected by the Project, and how the Project's degradation of wildlife habitat and populations would harm their interests. ER 287–302, 305–07.

The district court abused its discretion by erroneously stating that fragmentation does not pose a substantial risk here, and relying on an irrelevant factor—that the Project area is supposedly not "high-quality" habitat. ER 26. The fact that habitat is not pristine does not negate the possibility of irreparable harm; in fact, it makes permanent damage more likely, as nests in disturbed habitat have lower success, and when populations become isolated, they become at "greater risk of extinction due to genetic and demographic concerns." 75 Fed. Reg. at 13,915, 14,005. Since the local sage-grouse population is already struggling with low numbers, the additional harm from the Project "will likely lead to the complete loss of sage-grouse that are already in decline in this portion of Spring Valley." ER 279 (biologist declaration). This would cause the unique genetic resources of this population to be lost forever. The Project's irreparable harm to a small group of birds barely hanging on in already-marginal habitat may well be a death sentence for that local population.

In addition, operation of the Project will create undeniable impacts to bats, as demonstrated above. Dr. Tuttle concludes the Project has "clear potential for unsustainable cumulative impacts" and is "likely to cause harmful decline of Brazilian free-tailed bats." ER 267. Bats' low reproductive rates and ability to recover, ER 241, makes such harm irreparable.

Although this harm will not be realized until the turbines operate, it is properly considered now because allowing the Project to be constructed would create such "bureaucratic momentum" that even if BLM is ultimately required to prepare an EIS, the fact that a multi-million dollar wind facility is already constructed could blind BLM to information gained from a new analysis. *See 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."). Indeed, the district court relied upon SVW's already having spent $11 million on the Project—and this amount will climb steeply during construction. ER 29. Dilatory or ex post facto environmental review is disfavored, because "[a]fter major investment of both time and money, it is likely that more environmental harm will be tolerated." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 785–86 (9th Cir. 2006) (quotations omitted). *See also Pyramid Lake Paiute Tribe v. BLM*, No. 2:06-cv-1293-LDG, 2007 WL 1288783, at

*1 (D. Nev. Apr 30, 2007) (issuing injunction pending appeal halting pipeline construction, as "*if* the BLM is ultimately required to correct its FEIS and re-consider its decision. . . , then the fact that the pipeline has already been constructed [] will blind the BLM to the additional information provided in the corrected FEIS."). This Court should evaluate these factors now and order BLM to complete a lawful EIS before further ground-disturbing activity occurs and before the bureaucratic steam roller cannot be thrown into reverse.

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

The Ninth Circuit recognizes a "well-established public interest in preserving nature and avoiding irreparable environmental injury." *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quotation omitted). There is also a public interest in "careful consideration of environmental impacts before major federal projects go forward," such that "suspending such projects until that consideration occurs 'comports with the public interest.'" *Id.* (quoting *S. Fork Band*, 588 F.3d at 728) (finding public interest favored injunction and preservation of status quo).

As discussed above, the resources at stake here include two sensitive species: Brazilian free-tailed bats and sage-grouse. The public interest here is strong, due to the species' imperiled status. Where sensitive species face irreparable habitat losses, issuance of injunctive relief to prevent such harm is appropriate despite alleged financial losses. *See, e.g., ONRC v. Goodman*, 505

F.3d at 897–88 (injunction ordered to protect sensitive fisher species from loss of habitat, where further study was needed to establish size of local population and relationship to its habitat, as "risk of permanent ecological harm outweighs the temporary economic harm" from an injunction). This proposition is no different in the context of an energy project, including a renewable energy project. *E.g.*, *Beech Ridge Energy*, 675 F. Supp. 2d at 580-83 (enjoining wind project for failing to adequately mitigate impacts to bats, despite temporary economic harm that would result during injunction). Accordingly, the public interest is furthered by suspending construction during the relatively short period of time during which the district court can hear the merits of the case.

The district court erred in its balancing analysis of the equities, first, by assuming that a preliminary injunction would permanently "kill" the Project and all of its economic impacts. ER 28–29. However, the Project may very well proceed later (but perhaps be smaller, configured differently, or with enhanced protection for affected species), once BLM has completed the required EIS and the public has been able to weigh in on an honest and thorough exposition of the impacts from the proposed wind energy Project, as envisioned by Congress when it enacted NEPA.

SVW's assertions before the district court that the Project may not be built if a delay occurs, as it may be too late to achieve funding, were speculative. The idea that a short delay would forever impede funding is contradicted by the fact that this

Project is the *first* industrial-scale wind facility approved in Nevada and many additional wind facilities are poised to follow it. ER 137. As this Court recently concluded in enjoining a mine on NEPA grounds, economic losses asserted by the mining company and government "may for the most part be temporary." *S. Fork Band*, 588 F.3d at 728. Additionally, loss of bats would cause economic harm, since their enormous consumption of insects assists agriculture.[3] ER 311, 260.

The district court further erred in elevating the development of renewable energy above other important federal land management policies. ER 30. But the goals of renewable energy and species protection need not be mutually exclusive. Nor is renewable energy development exempt from compliance with environmental law, as BLM admits, ER 308, and several courts have held. *See Beech Ridge Energy*, 675 F. Supp. 2d at 580-83 (enjoining wind facility due to bat mortality), *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] is far outweighed by the public interest in avoiding irreparable damage to public lands"). Further, putting a

[3] Recent news articles report this benefit to agriculture in North America to be about $22.9 billion per year. *UT professor finds economic importance of bats in the billions*, ScienceNewsline (April 1, 2011), *at* http://www.sciencenewsline.com/nature/2011040113000076.html

single project on pause to comply with Congress's mandate in NEPA hardly halts nationwide renewable energy goals. *See* ER 308–10 (BLM fast-track website listing over two dozen pending renewable projects).

Additionally, claims of harm carry less weight here, where both SVW and BLM have known of the need for an EIS for years. In 2008, SVW admitted it was "proceeding with an EA fully aware that we could ultimately be dragged into an EIS." ER 417. Indeed, it proceeded, in a calculated business risk, to pressure BLM into preparing an EA. ER 341. *See N. 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."). As courts have held, this type of "self-imposed plight" cannot shield an injunction from issuing. *E.g.*, *Beech Ridge Energy*, 675 F. Supp. 2d at 583. In sum, the balance of harms and public interest tip in favor of enjoining ground-disturbing activity to protect sensitive wildlife and their habitat during the short time required for the district court to rule on the merits.

CONCLUSION

For the foregoing reasons, WWP respectfully requests that this Court reverse and vacate the district court orders denying injunctive relief to WWP and striking the Tuttle declaration, and remand to the district court with instructions to enjoin further ground-disturbing activity during the pendency of this case.

DATED this 29th day of April, 2011.

Respectfully Submitted,

s/ Kristin F. Ruether

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants are aware of no related case pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,597 words (according to Microsoft Word).

Respectfully submitted this 29th day of April, 2011.

s/ Kristin F. Ruether

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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 29, 2011.

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

I further certify that true and correct copies of WWP's Excerpts of Record were transmitted via United States Priority Mail on April 29, 2011 to the following parties:

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