Nos. 14-55666. 14-55842

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BACKCOUNTRY AGAINST DUMPS and
PROTECT OUR COMMUNITIES FOUNDATION, *et al.*,

Plaintiffs-Appellants,

v.

SALLY JEWELL, *et al.*,

Defendants-Appellees,

and

TULE WIND, LLC,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
Civil Case No. 13-575

ANSWERING BRIEF FOR THE FEDERAL DEFENDANTS

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JURISDICTIONAL STATEMENT

The federal defendants do not dispute the Court's jurisdiction.

QUESTIONS PRESENTED

This is an Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, challenge to the Bureau of Land Management's (BLM) decision to grant a right-of-way on federal lands in southeastern San Diego County, California to Tule Wind, LLC, for the construction, operation, maintenance, and eventual decommissioning of the Tule Wind Energy Project (the Project). The questions presented on appeal are:

I. Whether BLM complied with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, in granting a right-of-way for the Project?

II. Whether BLM's decision to grant a right-of-way for the Project violates the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712, or the Bald and Golden Eagle Protection Act (Eagle Act), 16 U.S.C. §§ 668-668d?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Federal Land Policy and Management Act (FLPMA) directs BLM, acting on behalf of the Secretary of the Interior, generally to manage the public lands of the United States under the principles of multiple use and sustained yield, in accordance with a land-use plan developed for each administrative unit of public land. 43 U.S.C. § 1732(a). Under such principles, BLM must manage public lands in a manner that, among other considerations, "takes into account the long-term needs of future

generations for renewable and non-renewable resources." *Id.* § 1702(c). Consistent with this consideration, FLPMA authorizes BLM to grant rights-of-way on public lands for, among other things, "systems of generation, transmission, and distribution of electric energy." *Id.* § 1761(a)(4). In conjunction with FLPMA's direction, various authorities make the development of renewable energy sources on public lands a national priority. ER 788 (citing Energy Policy Act of 2005 ("EPAct"), Pub. L. 109–58, 119 Stat. 594 § 211 (Aug. 8, 2005); Executive Order 13212 (May 18, 2001); Dep't of the Interior Secretarial Order 3285A1 (Feb. 22, 2010)); ER 697.

This case concerns a decision by BLM to approve a right-of-way proposed by Tule Wind for a wind energy-generating facility on federal, state, and tribally managed lands in southeastern San Diego County, about 70 miles east of downtown San Diego, near the unincorporated communities of Jacumba and Boulevard, California. *See* Federal Defendants' Supplemental Excerpts of Record (SER) 54. As originally proposed, the Project included 128 wind turbines and associated facilities and infrastructure, with a capacity of 200 megawatts of electricity. SER 55. Because 96 of the proposed 128 turbines and other facilities and infrastructure were to be located on BLM-managed lands, Tule Wind applied to the BLM for a right-of-way under Title V of FLPMA, 43 U.S.C. §§ 1761-1771.

Before taking action on the application, BLM and other federal and state agencies held public meetings and took public comment on the proposed action to help define issues, alternatives, and data needs for the NEPA process. ER 726-28,

740-42. BLM also extensively studied the proposed Project's potential environmental impacts and the impacts of alternatives to the proposal and prepared and released for public comment a draft environmental impact statement (EIS) under NEPA. ER 728. After considering public comment on the draft EIS, BLM issued an over-5,000-page final EIS responding to public comment on the draft EIS and analyzing the potential environmental impacts of the proposed action, five action alternatives, and two no-action alternatives.[1] For each alternative, the EIS analyzed the alternative's impacts on, among many other things, avian species, noise, electro-magnetic field emissions, and climate change. SER 140-254. The document also functioned as an environmental impact report under the California Environmental Quality Act (CEQA) to satisfy the California Public Utilities Commission's obligations under that statute. ER 735.

In addition to the eight alternatives analyzed in detail, the EIS considered seven additional Project configurations and three alternative generation technologies including energy efficiency, distributed generation (*e.g.*, rooftop solar panels), and nuclear generation. SER 122. BLM considered these configuration and technology alternatives, but eliminated them from detailed analysis because they either did not

[1] Because of the EIS's length, only portions are included in the Supplemental Excerpts of Record (SER). Similarly, because the administrative record is over 115,000 pages, not all documents (and not even all relevant documents) are included in the SER, to make the submission more manageable for the Court.

meet the action's purpose and need or the agency's objectives, or were otherwise infeasible or impracticable. SER 115-19, 129-38, 392, 411, 415-16.

After completing its extensive environmental analysis of the various action and no-action alternatives, BLM authorized Tule Wind's right-of-way with modifications. While Tule Wind sought a right-of-way for up to 96 wind turbines on federal lands, BLM approved a right-of-way for only up to 62 "valley" turbines in Phase I of the proposed Project. BLM decided not to approve the proposed "ridgeline" turbines in the northwest portion of the Project area to reduce visual resource impacts and the risk of golden eagle collisions with operating turbines. ER 694.

As approved, the right-of-way authorizes Tule Wind to construct, operate, maintain, and decommission a wind energy-generating facility with up to 62 wind turbines generating up to 186 megawatts of electricity. ER 695. The right-of-way has a 30-year term with an option to renew. *Id.* On federal lands, in addition to 62 wind turbines, the right-of-way authorizes the construction of the infrastructure needed to operate the facility, including the construction or improvement of access roads, the construction of two meteorological towers, and the installation of about three-quarters of a mile of generator tie line (138 kV gen-tie). ER 696. Additional facilities and infrastructure will be constructed and operated on state and tribal lands, but their approval falls outside of BLM's decision. SER 32-35, 383. Once completed, the Project will power up to 65,000 homes and businesses with clean electricity, while

providing "climate, employment, and energy security benefits to California and the nation." ER 704.

BLM conditioned the right-of-way on Tule Wind's compliance with all applicable laws and regulations, including the MBTA and Eagle Act. ER 695. The MBTA and Eagle Act prohibit, depending on the statute, the unpermitted take of either migratory birds or eagles. *See* 16 U.S.C. § 668 (Eagle Act); 16 U.S.C. § 703(a) (MBTA). BLM also conditioned the right-of-way on Tule Wind's implementation of mitigation measures and monitoring programs, including the Project-Specific Avian and Bat Protection Plan intended to reduce or eliminate the likelihood of avian take. ER 695, 704; SER 503-04, 423a-27.

The Avian and Bat Protection Plan followed years of research by Tule Wind, in coordination with the U.S. Fish and Wildlife Service (FWS) and BLM, studying the presence of, and potential for impacts to, avian and bat species in the Project area. SER 283-338, 434-43. These efforts included reviewing the scientific literature and conducting a variety of project-specific field studies and surveys to assess the Project's potential impacts on bats and eagles and other avian species. SER 435-47*; see also e.g.*, SER 577-667, 730-804, 927, 929-970, 973-1015, 1058-65.

The Protection Plan describes how Tule Wind conducted the studies and gathered the data it used to develop the Plan's comprehensive suite of mitigation measures. SER 455-83. The Protection Plan includes design elements that are intended to avoid and minimize harm by siting and configuring the Project to reduce

avian and bat mortality from above-ground power lines, among other things. It also defines the best management practices to govern Project construction. SER 455-64. Once Tule Wind completes construction, the Protection Plan requires the Project to follow certain operational avoidance and mitigation measures such as requirements to minimize lighting that attracts migratory birds and to provide environmental training to employees. SER 471-73. The Plan further requires Tule Wind to compensate for any permanently lost vegetative communities or habitats. SER 475-76.

The Protection Plan also requires Project operators and a specially-trained Environmental Coordinator to follow numerous monitoring and inspection protocols to enable the timely discovery and reporting of any avian fatalities, should any occur. SER 465-70, SER 473-75, 483. The data obtained from the monitoring and inspection reports will be supplied to the FWS and others to refine mitigation measures as necessary to ensure that Project operations comply with the law. Additional measures that may be imposed by the FWS, if deemed necessary by monitoring results, include seasonal curtailment of turbines during the fledgling period or even the complete shutdown of turbines near active nests. SER 474-75, 479-81.

Based on the accumulated research and data, the Protection Plan predicts that no golden eagle fatalities will occur from the approved Project (Phase I), but the Plan also recognizes the inherent uncertainty of such predictions. SER 479. The Plan thus requires Tule Wind to follow a state-of-the-art adaptive management program and advanced conservation practices. Under such practices, each golden eagle fatality that

is discovered within the timeframe specified in the Plan would trigger additional steps of scrutiny and mitigation. SER 480-81. Significantly, the discovery of a single eagle fatality triggers the responsible and adjacent turbines to be shut down while the existing mitigation measures are assessed for their validity and modified to the satisfaction of the resource agencies such as the FWS. SER 475, 479-81, 487. Any further eagle fatality would require stricter conservation practices to be followed. *Id.* The goal of the adaptive management program is to ensure that the Project is "implemented in a manner that assures net-zero loss of golden eagles on a population level basis." SER 414; *see also* SER 424-27, 475, 503-05.

Although the Protection Plan's adaptive management provisions focus on golden eagles, the Plan commits to apply these methods and processes to other species of concern. SER 432. For this purpose, the Plan creates an expert Technical Advisory Committee to analyze and respond to the monitoring data. *Id.* If avian or bat fatalities become a concern, the Protection Plan calls for additional monitoring or other species-specific mitigation measures, as recommended by the Technical Advisory Committee. SER 432, 482-83.

The FWS evaluated the Protection Plan and issued a letter of concurrence addressing the Plan's adequacy and endorsing the Plan as appropriate in its adaptive management approach. SER 376. Notably, the FWS also retains the discretion to impose further mitigation measures in the future should the FWS find them necessary. SER 474-75, 479-83.

II. PROCEDURAL BACKGROUND

Plaintiffs filed suit seeking a declaration that BLM's decision to grant the right-of-way violated NEPA, the MBTA, and the Eagle Act; an order requiring BLM to withdraw the decision; and an injunction preventing BLM from implementing the decision pending further action or analysis under those statutes. ER 521-36. Tule Wind intervened in the suit as a defendant. ER 1764. The parties moved for summary judgment and the district court entered judgment for the federal defendants and Tule Wind on all claims. ER 1-35.

The district court concluded that BLM satisfied NEPA by taking a hard look at the Project's potential contributions to noise and electro-magnetic field emissions, and to potential impacts on avian species and climate change, among other things. ER 13-29. The district court also determined that BLM had articulated a legally sufficient purpose and need for its decision (ER 5-9), had analyzed a range of reasonable alternatives (ER 9-13), and had sufficiently evaluated mitigation (ER 29-32). The district court further rejected Plaintiffs' arguments that the MBTA and Eagle Act required BLM to obtain permits before issuing the right-of-way. ER 32-35.

Despite the fact that Plaintiffs filed a single complaint (ER 514) and litigated the case below jointly, and the district court issued one judgment, Plaintiffs filed two notices of appeal and authored two separate appellate briefs. (Note: the two briefs together do comply with the word-count limit for a joint brief where the parties are separately represented, Ninth Circuit Rule 28-4.) On Appellants' motion, the Court

consolidated the appeals. Plaintiff Protect Our Communities Foundation (POCF) addresses only the MBTA. Plaintiff Backcountry Against Dumps addresses NEPA, the MBTA, and the Eagle Act. This brief responds to both opening briefs.

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed. BLM's right-of-way grant complied with all applicable laws, including NEPA, the MBTA, and the Eagle Act.

BLM complied with NEPA by closely examining the Project's noise and electro-magnetic field emissions, and its potential impacts on avian species and climate change, among other things. BLM articulated a legally sufficient purpose and need for its decision, analyzed a range of reasonable alternatives, and explained why it did not consider additional alternatives. BLM also sufficiently discussed the extensive mitigation measures Tule Wind will implement to reduce potential impacts.

BLM's right-of-way approval also complied with the MBTA and the Eagle Act. BLM did not authorize Tule Wind to take migratory birds or eagles in violation of the MBTA or Eagle Act, but instead required Tule Wind to comply with those statutes as a condition of the right-of-way. While the MBTA and Eagle Act allow Tule Wind and others seeking to avoid potential liability under those statutes to obtain a permit, neither statute *requires* anyone to obtain a permit before taking an action that may take birds or eagles. And certainly, neither statute requires an agency like BLM, acting in its regulatory capacity, to obtain a permit before authorizing a third party to take an action that falls within the agency's regulatory control. Plaintiffs' contention that the

MBTA and Eagle Act make regulatory agencies vicariously liable for the future acts of the community they regulate is unsupported by the statutes' plain text.

ARGUMENT

I. BLM COMPLIED WITH NEPA.

BLM's decision to grant the right-of-way was done in full compliance the NEPA. NEPA ensures that federal agencies consider the environmental consequences of their proposed actions in advance of a final decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978). NEPA imposes only procedural requirements and does not dictate a substantive environmental result. *See Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355-56 (9th Cir. 1994). If an agency proposes an action that may significantly affect "the quality of the human environment," NEPA generally requires the agency to prepare a "detailed statement" known as an environmental impact statement ("EIS") before authorizing the proposed action. 42 U.S.C. § 4332(2)(C); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 372, 375-76, 377 n.23, 378 (1989) (EIS required if proposed action "would be environmentally 'significant'"). An EIS describes, among other items, the purpose and need for the proposed action, the alternatives to the action, the affected environment, and the environmental consequences of alternatives. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.10.

Judicial review of the sufficiency of a NEPA document under the APA is narrow and deferential. Judicial review looks at whether the analysis includes a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citation omitted). The standard of review "requires a reviewing court to make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Id.* (citations omitted). The reviewing court "may not 'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987) (citations omitted).

A. The EIS took a hard look at impacts on avian species.

BLM reviewed surveys and other data to determine which avian species are likely to be in the Project area and analyzed potential impacts to those species, including impacts from the construction and operation of the facility. SER 143, 154-66. The EIS discusses the likelihood of collision and other risks for individual species, and describes the mitigation measures that will be required to reduce or avoid such impacts. *See, e.g.*, SER 184-85 (discussing risk to golden eagles and special-status bird and bat species); SER 363 (burrowing owl mitigation measures); SER 151 (long-eared owl mitigation measures). The EIS's discussion of impacts to avian species, as augmented by the mitigation measures discussed in the EIS and those required under the Protection Plan, was reasonable and should be upheld. *See City of Sausalito v.*

O'Neill, 386 F.3d 1186, 1212-13 (9th Cir. 2004) (finding that agency took "hard look" at wildlife impacts, particularly given the inclusion of mitigation).

As the district court noted, Plaintiffs' argument that the EIS "entirely fails to discuss" noise impacts on avian species is "misleading." ER 25. As BLM states in the EIS in response to a public comment regarding noise impacts:

> The [EIS] does include noise impacts to bird species under Impact BIO-7. For example, under southwestern willow flycatcher, the document states: "Direct loss of any subspecies of willow flycatcher or indirect loss of these species from noise and increased human presence, or removal of suitable habitat would be adverse ... "Based on the established significance criteria used for this [EIS], effects of noise were considered only for special-status wildlife. Mitigation Measure BIO-7j (related to the effects of noise on wildlife) has been revised in the [FEIS] to incorporate additional actions to avoid indirect noise impacts to bird species. Additionally, the avian and bat protection plans being prepared for each project under Mitigation Measure BIO-l0b will incorporate measures to protect bird species from noise associated with project construction and operations.

SER 365-66. Thus, BLM recognized that potential indirect impacts from noise may occur and revised its mitigation measures to account for all the types of activities that contribute to noise-levels that may disturb birds. These measures reduce the noise-related impacts of those activities to insignificant levels, demonstrating that the EIS's level of detail on noise impacts was entirely appropriate. *See* 40 C.F.R. § 1500.1(b) ("NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."); 40 C.F.R. § 1502.2(b) ("Impacts shall be discussed in proportion to their significance. There shall only be brief discussion of other than significant issues.").

Backcountry's statement (at 14) that "noise will greatly exceed the threshold for significant negative impacts" is hyperbole derived from a worst case scenario that assumes no mitigation and the use of the loudest possible turbine model. ER 861. As noted, noise impacts on avian species will be mitigated to reduce their impacts to insignificant levels during the Project's construction and operational phases, so the level of detail that Plaintiffs demand in the NEPA document is unwarranted.[2]

The Protection Plan also discusses the likelihood for displacing or disturbing birds due to noise, concluding that the likelihood is low. ER 1165. And the Plan discusses the mitigation that will avoid or minimize such impacts should they occur. *Id.* For example, Mitigation Measure BIO-7j requires pre-construction surveys to identify nesting birds and implementation of appropriate avoidance measures for any birds so identified. ER 1182. The measure also requires, among other things, regular, ongoing reporting to California's wildlife agencies. ER 1182; *see also* ER 1165 (listing measures to address noise impacts on birds). Mitigation Measure BIO-11a requires that vegetation maintenance activities occur outside the nesting season and that nesting bird surveys be conducted before any "maintenance" activities with "potential to result in direct or indirect habitat disturbance." ER 1183. Furthermore, Mitigation

[2] It should be further noted that Backcountry improperly derive its "threshold" for significance from testimony regarding a different project. ER 1487. Moreover, the testimony's conclusions were based on traffic noise studies in Europe and one study involving a dam in California. ER 1498-99. Backcountry does not explain why traffic or dam-related impacts are analogous to those created by a wind-energy facility.

Measure BIO-10h requires "curtailing operation of all or selected turbines during the fledging period of the active nests or potential permanent shutdown of turbines that are closest to active nests until the nest location changes to a farther location." SER 426. The record thus demonstrates that noise and noise-related impacts were fully considered by BLM and appropriately mitigated.

Backcountry criticizes (at 15) these mitigation measures because the measures focus on minimizing impacts on nesting and fledgling rather than other activities. But BLM considered nesting and fledging to be the most critical life-stage that may be affected by noise, so it made sense to focus on those activities. Backcountry focuses its concerns on the feeding activities of owls, which "have not been located within the Project area and are not believed to reside there." ER 26.[3] Ultimately, BLM's decision to focus primarily on nesting and fledgling is a judgment within the agency's scientific expertise, warranting deference. *See Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*) (APA requires "particularly deferential review" of judgments within an "agency's field of discretion and expertise").

Backcountry faults BLM for not conducting a nighttime migratory bird survey. BLM determined that such a survey was unnecessary because the studies and data that

[3] The incidental observation of one long-eared owl (ER 835) is not inconsistent with this conclusion. As the EIS explains, "[t]his species has low potential to occur based on lack of suitable habitat in the project area." SER 148. Indeed, the long-eared owl "was not observed during the 2008 surveys" and the California Natural Diversity Database (CNDDB) similarly has no record of the owl in the area. *Id.*

BLM examined showed that migratory birds are unlikely to fly through the Project area at night. As the EIS explains, the Project area is not a major route for migratory birds in the Pacific Flyway. SER 146; ER 968. In addition, based on a study of night migration patterns, "nocturnal bird use is thought to be low in the project area and night-migrating birds are thought to be migrating at higher altitudes than the proposed turbine heights." ER 968. "[N]octurnal migrants, even when flying over or along a ridge that results in them flying at a lower elevation, are at an elevation ranging from 702 to 2,523 feet. In comparison, the proposed turbines of the Tule Wind Project are a total of 492 feet tall." SER 146-47 (citing "Mabee et al. 2006"). Accordingly, BLM determined that conducting nighttime surveys was unnecessary.

Backcountry grasps onto the Mabee study's finding that a small percentage of migratory birds fly at lower elevations. SER 146. Backcountry ignores, however, that the lower flying birds would still be about 200 feet above the turbines and would be those birds flying over a ridgeline. ER 1114. BLM did not authorize any turbines on ridges, further explaining why BLM concluded that the type of study that Backcountry demands was unnecessary. This, too, is a scientific judgment that warrants deference.

BLM further determined that any potential significant impacts on nocturnal migratory birds would be minimized by mitigation. SER 371 (noting that impacts from collision risk "would be mitigated by Mitigation Measures BIO-10a through BIO-10i"); SER 373-74. These measures include preparing the Protection Plan; post-construction monitoring and reporting of bird and bat mortality; deferring the

Project's second phase pending the results of additional telemetry and nest studies; minimizing night lighting to avoid attracting night migrants; and implementing an adaptive management program. *Id.* The adaptive management plan must "provide[] triggers for required operational modifications (seasonality, radar, turbine-specific modifications, cut-in speed)." SER 187. Taken as a whole, BLM's discussion of impacts to night migrants, and mitigation to address those impacts, satisfies NEPA, particularly where the Project's mitigation renders those impacts insignificant. *See City of Sausalito*, 386 F.3d at 1212-13 (finding that agency took "hard look" at wildlife impacts, particularly given the inclusion of mitigation). NEPA simply does not require the more detailed discussion of impacts on night migrants that Backcountry demands.

B. The EIS took a hard look at inaudible infrasound and low-frequency noise impacts.

Equally flawed is Backcountry's argument (at 17-18) that the BLM failed to consider the impacts of infrasound and low-frequency noise (*i.e.*, "ILFN" or "inaudible" noise). In its responses to comments, the EIS discusses "inaudible" noise and the conclusions of the Salt and Hullar (2010)[4] study relied on by Backcountry. SER 342-54. After canvassing the available literature (SER 342-52), BLM concluded

[4] Backcountry maintains that Salt and Hullar (2010) demonstrates that externally generated "inaudible" noise causes adverse health impacts, but the BLM reasonably concluded otherwise based on evidence in the record showing no such impacts. SER 351. BLM treated Salt and Hullar as one comment at D33-30. SER 668-79. BLM's response to comment D33-30 is at SER 369. *See also Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1037 n.5 (9th Cir. 2012) (noting that courts must consider an agency's responses to comments when analyzing an agency's NEPA analysis).

that "inaudible" noise is not expected to have any adverse health effects. *See, e.g.,* SER 728 (noise analysis report concluding that "there is a consensus among acoustic experts that the infrasound from wind turbines is of no consequence to health … [and that] the scientific evidence available to date does not demonstrate a direct causal link between wind turbine noise and adverse health effects"); SER 345, 364 ("Low-frequency sound and infrasound from current generation … turbines are well below the pressure sound levels at which known health effects occur."). Under the APA, a court's deference is at its peak when reviewing "technical analyses and judgments involving the evaluation of complex scientific data within the agency's technical expertise." *League of Wilderness Defenders v. Allen,* 615 F.3d 1122, 1130 (9th Cir. 2010); *see also W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1048 (9th Cir. 2013).

C. BLM took hard looks at both stray voltage from "dirty electricity" and the separate phenomena of electromagnetic-field pollution.

Backcountry argues (at 18-19) that BLM failed to consider potential impacts related to electromagnetic-field pollution, which Backcountry wrongly characterizes as "dirty electricity" producing "stray voltage." As the district court concluded, Backcountry's arguments are once again "misleading." ER 23. Backcountry conflates two different phenomena by describing electromagnetic-field pollution as "dirty electricity." As the EIS explained, "electromagnetic energy and 'dirty electricity' refer to different phenomena…. [An electromagnetic field] is a physical field produced by

electrically charged objects…. Dirty electricity, on the other hand, is poor power quality …, which in turn might cause stray voltage." ER 936.

The EIS discusses dirty electricity and stray voltage in appropriate detail. *Id.*; SER 237-38 (mitigation). As the EIS recognizes, turbines may produce stray voltage if their electrical equipment is not maintained properly. ER 936. Stray voltage risks causing induced currents and shock hazards and effects on cardiac pacemakers if the turbines are not properly grounded. *Id.*; SER 223. But the Project's turbines will be inspected to confirm that they are properly grounded as part of their commissioning, and regular maintenance and inspections also will be done to confirm that there are no stray voltage issues over the Project's life. ER 936. BLM will do this through, among other methods, Mitigation Measure PS-2, which requires Tule Wind to provide notice to affected property owners, identify objects such as fences, conductors, and pipelines that have the potential for induced voltages, and install all necessary grounding measures prior to energizing the line. SER 231. Thus, BLM considered and discussed the potential for induced currents and shock hazards from stray voltage.

Backcountry contends that BLM's analysis "entirely ignores" that grounding is the medium that introduces what they call "dirty electrical current" into homes and that BLM fails to detail how it will ensure proper grounding. Backcountry again confuses dirty electricity with electromagnetic energy. Backcountry bases its contentions on the declaration of their hired consultant, David Colling. ER 1471-72. However, Mr. Colling defines "dirty electricity" differently than BLM does, defining it

as "electromagnetic energy that flows along a conductor and deviates from a pure 60-Hz sine wave." ER 1470. Thus, Backcountry's consultant is discussing electromagnetic energy, not the kind of stray voltage from poor power quality discussed by BLM.

At any rate, because of public interest in the subject, BLM discussed electromagnetic-field pollution in the EIS (SER 199-236, 242-43), despite the fact that BLM found potential impacts from electromagnetic-field pollution did not rise to a level of significance for NEPA purposes (SER 199-200). Backcountry's statement that electromagnetic fields cause cancer is contrary to the prevailing science. SER 199-200, 211. BLM could not quantify the potential significance of the electromagnetic exposure where there is no scientific consensus that electromagnetic-field exposure has any impact on human health, and there are no standards about electromagnetic-field exposure levels to apply. SER 202. Moreover, there are no residences in close proximity to electromagnetic-field-generating facilities and the area is sparsely used by recreationalists. *Id.* By nonetheless thoroughly discussing electromagnetic fields and developing mitigation measures to effectively address them, BLM plainly complied with any obligations NEPA may have imposed on it.

D. The EIS took a hard look at global warming impacts.

BLM thoroughly examined the potential climate change impacts of the Project throughout its expected operational life. ER 873-76. Specifically, BLM evaluated the Project's impacts on climate change, compiled an estimate of potential emissions

arising from the Project's operation and upkeep, and concluded that the Project's aggregate emissions, amortized over the Project's 30-year life, fell below both the applicable state standards for significance and the CEQ "indicator" that greenhouse gas emissions may require further NEPA analysis. ER 875-76 ("[W]hen combined with the amortized annual construction emissions, the Tule Wind Project's GHG emissions would be 646 [metric tons of carbon dioxide equivalent per year]."). NEPA thus does not require the level of detailed analysis that Backcountry demands.

BLM's conclusion that a clean wind-energy generating facility's greenhouse gas emissions are insignificant for NEPA purposes and do not require more detailed analysis is unsurprising. Not only will the Project not be a significant source of greenhouse emissions, the Project might "potentially [decrease] overall emissions attributable to electrical generation in California." ER 876. Backcountry contends (at 20) that the EIS fails to provide data to support this claim. However, the projections in the EIS stated only that the Project *could* potentially displace electricity generated from fossil fuels; it did not guarantee such results. ER 876 (project "would . . . utiliz[e] a renewable source of energy that could displace electricity generated by fossil-fuel-fired power plants") (emphasis added); ER 1283 (noting lack of certainty that Project would displace fossil-fuel power). The EIS "does not definitively state that there [will] be any resulting fossil fuel shut-down and [greenhouse gas] emission reduction as a result of the project." ER 940. Greater detail regarding the commonsense notion that

the Project has the potential to displace demand for, and thus reduce the impacts from, plants that produce energy from non-renewable sources was unnecessary.

Backcountry also suggests (at 20) that BLM miscalculated greenhouse gas emissions by failing to consider as part of a "life-cycle" analysis emissions from the offsite fabrication of the equipment—*e.g.*, wind turbines—to be used in the Project. However, emissions from the manufacture of the equipment that will be used in the Project are beyond BLM's control where manufacturers of the Project's equipment and materials fabricate products for a national or global market. ER 937. NEPA does not require agencies to consider an impact that they have "no ability to prevent," particularly where the agency "cannot be considered a legally relevant 'cause' of the effect." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

It is also speculative whether the Project is the cause of such emissions, since those materials likely would be produced for other purposes even if the Project did not exist. ER 937 ("The full life-cycle of greenhouse gas emissions from construction activities is not accounted [f]or in the modeling tools available, and the information needed to characterize greenhouse gas emissions from manufacture, transport, and end-of-life of construction materials would be speculative."); *see also* ER 873 (agency should consider all phases of proposed action over its expected life "subject to reasonable limits based on feasibility and practicality"). This Project is unlikely to have a measurable impact on the global or national market for products such as steel or concrete. *Id.* Moreover, Backcountry identifies no authority requiring the inclusion or

quantification of such speculative and attenuated environmental impacts and BLM's decision to exclude them is within its expertise and entitled to deference, especially in an area such as greenhouse gas accounting where standardized models and protocols do not exist. *See Earth Island Inst. v. Gibson*, 834 F. Supp. 2d 979, 990 (E.D. Cal. 2011), (agency's "decision as to which sources of greenhouse gas emissions to consider . . . is entitled to deference"), *aff'd*, 697 F.3d 1010 (9th Cir. 2012).

In sum, BLM's evaluation of the climate change impacts associated with the Project's construction was comprehensive and complete. NEPA only requires BLM to focus on the issues "that are truly significant to the action in question." 40 C.F.R. § 1500.1(b). Moreover, NEPA requires that impacts be discussed only "in proportion to their significance." 40 C.F.R. § 1502.2(b). Considering the Project's lack of a significant contribution to greenhouse gas emissions, NEPA does not require the more detailed analysis of potential climate change impacts that Backcountry demands.

E. BLM specified a legally sufficient purpose and need.

Under NEPA, an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. An agency retains "considerable discretion to define the purpose and need of a project," and its purpose-and-need statement is reviewed under a highly deferential standard. *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998). Here, BLM articulated a purpose-and-need statement that incorporated a myriad of federal objectives relating to the promotion of renewable

energy projects, including Congress's direction to seek to approve at least 10,000 megawatts of renewable energy on BLM-managed public lands by 2015. *See* EPAct, Pub. L. 109–58, § 211. BLM properly incorporated these federal objectives into its consideration about whether to approve, approve with modifications, or deny Tule Wind's right-of-way application. BLM's purpose-and-need statement is reasonable and satisfies NEPA.

As the district court observed, "Plaintiffs' argument that BLM's statement of purpose merely parrots Tule Wind's private objectives is simply unsupported by the record." ER 7. BLM's purpose-and-need statement "reflects the influence not only of Tule Wind's goals, but also of statutory, executive, and administrative directives regarding the promotion of renewable energy on federal lands." *Id.*; ER 697. Thus, BLM's stated basis for approving the Project incorporates federal policy objectives to increase renewable energy production on public lands.[5] ER 715. "BLM is not only permitted, but required, to consider this statutory and regulatory framework before taking action on a right-of-way application." ER 7; *see also Westlands Water Dist. v. Dep't*

[5] These policy objectives are clearly delineated in the Congressional and Secretarial mandates that direct the Department of the Interior to encourage the development of renewable energy sources on public lands. ER 697 (enumerating authorities); EPAct, § 211 ("[T]he Secretary of the Interior should … seek to have approved non-hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 [MW] of electricity."); Executive Order 13212, § 1 (establishing policy to expedite energy production projects); Secretarial Order 3285A1 (establishing renewable energy as Department priority).

of Interior, 376 F.3d 853, 866 (9th Cir. 2004); *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). "Although BLM's statement of purpose may overlap with Tule Wind's objectives in certain respects, such overlap is unremarkable in light of BLM's obligation to consider a private applicant's goals in responding to a right-of-way application." ER 7-8 (citing *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1085 (9th Cir. 2013)). Because BLM's need for taking action arises from the agency's FLPMA authority and is being done in response to, and is consistent with, federal renewable-energy objectives, BLM's purpose-and-need statement satisfies NEPA.

Backcountry also suggests (at 21) that BLM's purpose-and-need statement was inadequate under NEPA because the agency purportedly did not "identify any energy demand" or explain the manner in which the Project will achieve the agency's renewable-energy objectives "better than other renewable options" such as solar power. However, those criticisms misstate the purpose-and-need statement's role in an EIS and a court's review of that statement. As the district court correctly observed, the Court "need not second-guess BLM's judgment that there is an actual need for the Project, as Plaintiffs demand." ER 8. Instead, the Court's task is to determine "whether BLM's purpose and need statement properly states . . . BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives." *Nat'l Parks & Conservation Ass'n v. Bureau Land Mgmt.*, 606 F.3d 1058, 1071 (9th Cir. 2010). Here, BLM's purpose-and-need statement was sufficiently explained and broadly defined to allow consideration

of a reasonable range of alternatives, as explained in greater detail in the succeeding section. The statement thus satisfies NEPA.

F. BLM considered a range of reasonable alternatives and properly assessed the distributed-generation alternative.

The appropriate range of alternatives in an EIS is determined in conjunction with the document's purpose-and-need statement. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1522 (9th Cir. 1992). NEPA does not obligate an agency to consider an alternative that does not respond to the stated purpose and need. *See Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973); *City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 (9th Cir. 1986). Moreover, "the choice of alternatives is 'bounded by some notion of feasibility' and an agency is not required to consider 'remote and speculative' alternatives." *Westlands Water Dist. v. U.S. Dept. of Interior*, 376 F.3d 853, 868 (9th Cir. 2004) (quoting *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978)). For alternatives not considered in depth, the EIS need only "briefly discuss the reasons for their [elimination]." 40 C.F.R. § 1502.14(a).

Backcountry contends (at 8-13) that BLM evaluated an insufficiently broad range of alternatives, including by failing to analyze in detail an alternative that relies on distributed solar-energy generation, mostly on private lands. BLM, however, fully analyzed five action alternatives for the Project, as well as multiple no-action/no project alternatives under which BLM would have denied the requested right-of-way. ER 701-02. In addition to the alternatives that BLM analyzed in detail, BLM

considered several other alternatives in lesser detail, including the distributed solar-energy alternative, and explained why these other alternatives did not warrant detailed analysis. SER 115-20, 134-36. BLM determined that the distributed-generation alternative did not merit in-depth study because it was inconsistent with BLM's purpose and need, was remote and speculative since BLM is a land management agency with no authority over renewable-energy development on private lands, and was otherwise infeasible from a regulatory, technical, and commercial perspective. ER 796-97. As BLM's documented determinations as to the technical and commercial inefficacy of the alternative-generation measure is a matter within its area of expertise, BLM's decision in this regard is entitled to deference, and should be upheld. *See Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 378 (1989); *McNair*, 537 F.3d at 993.

1. The distributed-generation alternative is inconsistent with BLM's objectives.

Backcountry argues (at 10-12) that the distributed-generation alternative is consistent with BLM's objectives. However, BLM specifically found that the use of rooftop solar panels on private lands would not contribute to BLM's goal of increased "utility-scale renewable energy development on public lands." ER 725; *cf. Ctr. for Envtl. Law & Policy v. Bureau of Reclamation*, 655 F.3d 1000, 1012 (9th Cir. 2011) (upholding agency's decision not to analyze an all-conservation alternative "because most potential conservation projects would have benefits that were too limited in time and geographic area" to meet need for water management in the area); *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 74-75 (D.C. Cir. 2011) ("The Bureau selected

a reasonable range of alternatives in light of its purpose; it was under no obligation to include a scaled-back-development alternative that would not 'bring about the ends of the federal action.'"). BLM's conclusion that distributed generation is inconsistent with the agency's documented objectives is fully supported by the record. BLM determined that utility-scale projects are necessary to achieve the at-least-10,000 megawatt generative capacity that Congress established as a goal for public lands. ER 725. The distributed-generation alternative also fails because it would theoretically harness domestic systems that produce on average only 4.5 kilowatts, which would not produce the capacity required to satisfy "the state-mandated. . . target of obtaining 33% of electricity from renewable energy sources by 2020," based on statistics showing the rate of previous installations. SER 134-37. As the distributed-generation alternative fails to respond to BLM's purpose and need, the agency properly eliminated it from further consideration. *See Idaho Conservation League*, 956 F.2d at 1522 (agency is not required to consider "alternatives known to be unacceptable at the outset"); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1995) (an EIS "need not consider an infinite range of alternatives, only reasonable or feasible ones.").

Backcountry seeks to undermine (at 10-11) BLM's pursuit of increased utility-scale renewable-energy development on public lands by arguing that the statutory, executive, and administrative directives cited by BLM do not explicitly obligate BLM to pursue utility-scale development. However, as the district court observed, the

directives are not "merely precatory, as Plaintiffs suggest," but rather "articulate specific policies that BLM must consider in managing resources within its jurisdiction." ER 13. Taken together, these pronouncements establish that approving utility-scale renewable-energy projects on public lands – where appropriate, and after performing the required environmental analysis – is a high priority for BLM. ER 725 ("purpose and need for agency action . . . is focused on the siting and management of utility-scale renewable energy development on public lands"); *see also Protect Our Communities Found. v. Salazar*, No. 12-2211, 2013 WL 5947137, at *3 (S.D. Cal. Nov. 5, 2013) ("the purpose and need statement represents the goals of Congress, the President and the Secretary of the Interior to promote renewable energy projects on federal lands to which the Project is a partial response"). Backcountry's proposed alternative fails to contribute to BLM's goal for increased utility-scale renewable-energy development on public lands, and BLM was not required to further analyze it.

2. Backcountry's distributed-generation alternative depends upon private activity over which BLM has no authority or influence.

In its assessment of Backcountry's suggested alternative, BLM found that it "has no authority or influence over the installation of distributed-generation systems other than its own facilities." ER 725-26. Backcountry (at 10) attacks BLM's statement, arguing that a NEPA regulation and cases interpreting it require consideration of "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. § 1502.14(c). But BLM did not reject the alternative because a

different agency has regulatory jurisdiction over the installation of distributed generation systems. Rather, BLM rejected the alternative because it deemed its implementation to be too remote and speculative, where the agency has no ability to influence the installation of distributed-generation systems other than at its own facilities. Because NEPA does not require the consideration of alternatives "whose implementation is deemed remote and speculative," *Headwaters v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1180 (9th Cir. 1990), BLM reasonably declined to study the distributed-generation alternative in greater detail.

3. The distributed-generation alternative is infeasible from a technical, regulatory, and commercial standpoint.

BLM found the distributed-generation alternative infeasible in several respects. First, because applicable state regulations do not provide sufficient incentives to support markets for solar power, the alternative would be infeasible as a technical and regulatory matter. *Id.* Second, rooftop solar photovoltaic systems are less efficient than the Project's turbines; BLM found that to generate an equivalent amount of electricity under the distributed-generation scenario, between 100,000 and 163,000 homeowners or businesses would need to install such systems, whereas data suggest that the current number of domestic systems in San Diego is less than 5,000. ER 797. An alternative requiring collective action among tens of thousands of homeowners on a scale that exponentially expands upon past usage would be "highly speculative and infeasible from a commercial and technical perspective." *Id.* Finally, the consolidation

of capacity at the scale that would be necessary under the distributed-generation alternative, to protect against "rapid localized voltage drops" that are a likely consequence of its "intermittent performance," could require "extensive upgrading to local substations," which in turn could have "environmental impacts that cannot clearly be defined." *Id.* BLM's determination that distributed-energy generation is infeasible from a technical and commercial perspective merits deference, as the agency's conclusion is based on its expertise and on thorough discussion and consideration of the available evidence. *See, e.g., McNair*, 537 F.3d at 1003 ("[The agency] must explain the methodology it used for its … analysis, … [but] NEPA does not require [this Court] to decide whether an [EIS] is based on the best scientific methodology available") (quotations omitted)).

Backcountry (at 13) latches onto ambiguity in the phrase "undefined technical hurdles" and misleadingly imply that these hurdles are the sole reason for BLM rejecting the distributed-generation alternative.[6] Those hurdles are one aspect of one justification in BLM's detailed explanation for rejecting the alternative. ER 796-97.

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[6] Backcountry also takes issue (at 12) with BLM's correct and relatively inconsequential observation that rooftop solar's eligibility for renewable-energy credit was speculative because BLM could not predict when, if ever, legislation would be enacted. ER 796. That such legislation was enacted two months *after* the EIS had been completed does not undermine the speculative nature of the legislation *before* it was enacted. Even if this were a material point, that BLM could not predict the future does not render its conclusions arbitrary or capricious. *See City of Angoon*, 803 F.2d at 1022 (upholding agency's decision to reject alternative as unduly speculative where necessary conditions were not "clearly . . . met when the EIS was prepared").

BLM's explanation, when appropriately considered as a whole, satisfied the agency's obligations to "briefly discuss" its reasons. *See* 40 C.F.R. § 1502.14(a).

Moreover, BLM explained the nature of those "undefined technical hurdles." BLM explained that the consolidation of capacity at the scale that would be necessary under the distributed-generation alternative could require "extensive upgrading to local substations" to protect against "rapid localized voltage drops" that are a likely consequence of its "intermittent performance." ER 796. This, in turn, could have "environmental impacts that cannot clearly be defined." *Id.* As a result of these uncertainties, BLM would have been unable to evaluate such an alternative in any meaningful fashion. *See City of Angoon*, 803 F.2d at 1022 (agency could not assess impacts of land-exchange alternative "until an exchange becomes ascertainable" because "[u]ntil then, the consequences of an exchange are remote and speculative").

In the end, Plaintiffs simply ask this Court to accept their consultant's opinions that this alternative is technically feasible and somehow more cost effective. However, it is not this Court's "role to weigh competing scientific analyses" on the potential commercial and technical feasibility of the distributed-generation alternative. *See Ecology Center v. Castaneda*, 574 F.3d 652, 659 (9th Cir. 2009). This Court should defer to BLM on this technical issue. *See Marsh*, 490 U.S. at 378.

* * *

Because the distributed-generation alternative would be inconsistent with BLM's purpose and need, and BLM determined that it was remote, speculative, and

otherwise infeasible, BLM's evaluation of the alternative and its discussion of the reasons for eliminating it from detailed analysis easily satisfy NEPA. *See* 40 C.F.R. § 1502.14(a); *Native Ecosystems Council v. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) ("So long as … an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied."). BLM's consideration of the distributed-generation alternative was reasonable, and should be upheld.

G. The EIS adequately specifies and discusses mitigation.

NEPA requires that an EIS "discuss measures to mitigate adverse environmental" impacts. *City of Carmel-by-the-Sea v.*, 123 F.3d at 1153. Although this "entails a responsibility to discuss measures to mitigate adverse environmental" impacts, NEPA does not impose a substantive duty to mitigate environmental impacts and "there is a fundamental distinction between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated and a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-33. Accordingly, an agency need not have a "fully developed [and enforceable mitigation] plan" before it acts. *Id.* at 352; *see also Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000); *Laguna Greenbelt, Inc. v. U.S Dept. of Transp.*, 42 F.3d 517, 528 (9th Cir. 1994). Rather, if an EIS discusses mitigation measures in "sufficient detail to ensure that environmental

consequences have been fairly evaluated," an agency's obligations under NEPA are met. *Carmel*, 123 F.3d at 1154 (quoting *Robertson*, 490 U.S. at 353).

As examples of their erroneous claim that the BLM "improperly deferred" its mitigation plans Backcountry cites (at 22) the EIS's discussion of the habitat restoration plan and site-specific noise mitigation plan. However, with respect to habitat restoration, the EIS requires plans for vegetation, wetlands, and wildlife, and discusses the key components of those plans (e.g., requiring re-vegetation with native species, listing potential restoration techniques). *See, e.g.,* ER 810. Similarly, regarding the site-specific noise mitigation plan, BLM requires the plan to ensure "that operations of the turbines will comply with County General Plan Policy 4b and County Noise Ordinance Section 36.404," and identifies measures that could be used to do so. ER 862. The EIS states that "[m]itigation of . . . turbine noise may include revising the turbine layout, curtailment of nighttime use of selected turbines, utilization of an alternate turbine manufacturer (or combination of manufacturers), and implementation of noise reduction technology." *Id.* In short, Plaintiffs' claim that the EIS defers formulation of and analysis of the Project's proposed habitat restoration plan and site-specific noise mitigation plan is unsupported by the record.

Plaintiffs also fail to take into account the fact that the habitat restoration plan and site-specific noise mitigation plan are not the Project's sole mitigation strategy. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 515 (D.C. Cir. 2010) (declining to consider only part of a project's overall mitigation strategy). BLM's EIS

requires that "[a]n Avian Protection Plan . . . be developed jointly with the U.S. Fish and Wildlife Service and California Department of Fish and Game and . . . provide the framework necessary for implementing a program to reduce bird mortalities." ER 613. The EIS also provides that the "Avian Protection Plan shall include the following: corporate policy, training, permit compliance, construction design standards, nest management, avian reporting system, risk assessment methodology, mortality reduction measures, avian enhancement options, quality control, public awareness, and key resources." *Id.* Plaintiffs' flyspecking of the EIS fails to consider the full range of mitigation measures identified and examined in the document.

In sum, BLM did not improperly defer specification and analysis of mitigation measures. BLM examined several mitigation measures in substantial detail. Moreover, as indicated, NEPA contains no substantive requirement that environmental impacts be mitigated or avoided. *See Nat'l Parks*, 222 F.3d at 681. Rather, the mitigation discussion contained in an EIS must provide only "sufficient detail" to indicate that environmental impacts have been fairly evaluated. *See S. Fork Band Council of Western Shoshone of Nev. v. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009). The discussion in the EIS more than satisfies that standard.

II. BLM DID NOT VIOLATE THE MBTA OR THE EAGLE ACT.

BLM's right-of-way approval also complies with the MBTA and the Eagle Act. Plaintiffs' assertions that BLM, acting in its regulatory capacity, needed to obtain permits under those statutes before granting a right-of-way for the Project or violated

those statutes because Project operations may take migratory birds and eagles at some unknown time in the future are inconsistent with the plain text of those statutes.

A. BLM did not violate the MBTA.

Plaintiffs' contentions that BLM's right-of-way decision violates the MBTA lacks merit. Plaintiffs argue that it is foreseeable that BLM's decision to grant Tule Wind a right-of-way may, at some future time, lead to the injury or death of migratory birds from Tule Wind's wind turbines. Plaintiffs theorize that BLM's decision violates the strict-liability criminal provisions of the MBTA and thus that the APA allows this Court to set aside the decision because it is "not in accordance with law." *See* 5 U.S.C. § 706(2)(A). Plaintiffs' novel theory has several glaring holes.

First, the statute's plain language refutes Plaintiffs' arguments. As the text of the MBTA makes clear, the MBTA cannot be violated until a bird is actually taken:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof . . . .

16 U.S.C. § 703(a). This language does not prohibit activity that *may lead* to the take of migratory birds in the future. Absent actual take, it can never be an MBTA violation to issue a right-of-way or to construct and operate a wind turbine. *See Pub. Employees*

for Envtl. Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 117 (D. D.C. 2014) ("[O]n its face, the [MBTA] does not appear to extend to agency action that only potentially and indirectly could result in the taking of migratory birds.").

Second, as the district court concluded, Plaintiffs' arguments are foreclosed by this Court's precedent. ER 34. At most, the right-of-way would be indirectly responsible for any bird injuries or deaths that directly result from Tule Wind's future operations. This Court has held that federal agencies are not liable under the MBTA for decisions or activities that are indirectly responsible for bird injury or death such as the mere allowance of habitat modification. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991); *City of Sausalito*, 386 F.3d at 1225; *see also Native Songbird Care & Conserv. v. LaHood*, 2013 WL 3355657, at *4 (N.D. Cal. July 2, 2013). These holdings are founded on the MBTA's regulatory definition of "take" not including "harm" within its meaning. *See Seattle Audubon*, 952 F.2d at 302-03. By excluding harm from the definition of take, MBTA regulations express an intent to exclude from the MBTA's reach activities or decisions that may indirectly take birds.[7]

[7] Some courts have misread *Seattle Audubon*'s dicta that the MBTA proscribes "physical conduct of the sort engaged in by hunters and poachers," 952 F.2d at 302, as suggesting that the MBTA applies only to "intentional" acts directed at migratory birds such as hunting or poaching. *See, e.g., Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil & Gas*, 840 F. Supp. 2d 1202, 1209-12 (D. N.D. 2012); *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1574 (S.D. Ind. 1996). The MBTA is a strict-liability criminal statute that applies broadly to prohibit the take of "any migratory bird" "at any time, by any means or in any manner." 16 U.S.C. § 703(a). MBTA liability plainly extends to non-hunting activities that incidentally but directly take migratory birds such as wind-turbine

Accordingly, even if Tule Wind takes a migratory bird in the future without authorization, BLM would not be responsible for that take—not when it occurs, and particularly not *before* it occurs. BLM does not condone, and it certainly did not authorize, bird take. BLM conditioned the right-of-way on Tule Wind complying with all applicable laws, including the MBTA and Eagle Act. BLM's decision to grant the right-of-way to Tule Wind would at most be linked indirectly to any future bird take by Tule Wind, and this Court's precedent does not make BLM liable for such a link.

Plaintiffs note (POCF Br. at 6) that the FWS has estimated that wind turbines kill an estimated 444,000 birds every year. But mere foreseeability of a third-party act alone is not a route to vicarious criminal liability under the MBTA. The FWS also has estimated that cats kill hundreds of millions of birds each year and building-window strikes account for another 100 million to l billion more deaths. SER 971-72. Under Plaintiffs' theory, a city planning commission would be strictly liable for authorizing the construction of a tall building and the city council would be strictly liable for

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operation, electricity transmission, hazardous chemical manufacturing, pesticide application, or oil-drilling operations, even if the take is unintentional. *See United States v. Apollo Energies*, 611 F.3d 679, 684-86 (10th Cir. 2010); *United States v. CITGO Petroleum*, 893 F. Supp. 2d 841, 843-48 (S.D. Tex. 2012); *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d. Cir. 1978); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 532 (E.D. Cal. 1978); *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1074-76 (D. Colo. 1999).

stopping a health department program euthanizing feral cats.[8] Bird deaths are a foreseeable consequence of those acts too, but the MBTA's strict liability provisions do not extend so far as to prohibit the actions of regulatory agencies that, at some point in the future, indirectly may allow a regulated entity or person to take an otherwise lawful action that incidentally causes a migratory bird injury or death.

Third, no provision of the MBTA requires any person to obtain a permit, let alone a regulatory agency exercising authority delegated by Congress. The Act *allows* a person to seek a permit to avoid potential criminal liability, but the Act does not require one. In seeming recognition of the lack of any statutory requirement to obtain a permit, Plaintiffs argue that BLM instead had to require Tule Wind to obtain a permit. The MBTA also does not require BLM to include such a provision in a right-of-way grant, but BLM essentially did exactly what Plaintiffs demand. BLM required Tule Wind to comply with all applicable laws, including the MBTA. SER 390, 492. If Tule Wind takes a migratory bird at some future time without authorization, the

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[8] POCF argues (at 29 n.10) that its unbounded theory of strict and vicarious criminal liability under the MBTA is reasonable because the APA applies only to federal agencies. POCF fails to acknowledge that most, if not all, states have versions of the APA. *See, e.g., Ctr. Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349, 1372 (2008) (noting that plaintiffs eventually would have recourse against state and local agencies for future approvals of wind projects under state administrative law statute). More troubling, POCF's arguments contradict the MBTA's plain text. POCF also fails to appreciate that the MBTA's text does not change simply because it has brought a civil APA claim. The MBTA does not have one provision that applies to federal agencies and a different provision that applies to individuals. The same provision applies to all persons.

MBTA will have been violated. However, the MBTA does not prohibit persons or entities from engaging in otherwise lawful activities that are inherently dangerous to migratory birds. The Act only establishes criminal liability if, while engaging in those activities, a bird is actually taken without first obtaining a permit or operating under some other regulatory authorization.[9]

Not surprisingly, Plaintiffs' novel interpretation of the MBTA is not supported by any of the legal authorities they cite. Plaintiffs chiefly rely on *Humane Society v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000). In *Glickman*, the D.C. Circuit held that Department of Agriculture's (USDA) implementation of its Canada goose plan, calling for the agency to kill resident geese, violated the MBTA.[10] *Id.* at 883-86.

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[9] Pursuant to its authority under 16 U.S.C. § 704, the FWS has promulgated regulations that authorize permits for a wide variety of specific types of intentional take. 50 C.F.R. Part 21. Although the FWS has the authority to issue permits covering incidental take under 50 C.F.R. § 21.27, the FWS thus far has issued few such permits and has declined to promulgate additional regulations more comprehensively addressing incidental take. Instead, the FWS has relied, as a practical matter, on enforcement discretion to address incidental take. Consistent with the statute itself, none of the permitting regulations require any individual or entity to obtain a permit. In particular, the regulations do not require federal agencies to seek a permit prior to authorizing the activities of third parties, even where those third-party activities may incidentally take migratory birds. *See* 50 C.F.R. Part 21.

[10] Below, Plaintiffs misstated *Glickman*'s posture by implying that non-federal third parties implemented the USDA's program. The opinion makes clear that the D.C. Circuit understood that USDA was "rounding up resident Canada geese and killing them." *Glickman*, 217 F.3d at 884 n.2; *Humane Soc'y v. Glickman*, No. 98-1510-CKK, Memo Op. & Order (D. D.C. July 6, 1999) (Exhibit F at 2); *Glickman*, 2000 WL 35585241 (Brief for Federal Appellants); 2000 WL 35585242 (Brief for Appellees) (both stating that USDA would conduct the challenged activities).

Plaintiffs' reliance on *Glickman* is misplaced because, in that case, the federal agency was the entity actually conducting the activities found to violate the MBTA. Here, by contrast, the BLM, acting in its regulatory capacity, approved a right-of-way for a private party to construct and operate a wind-energy project and is not itself conducting any bird-taking activities. *Glickman* thus does not support Plaintiffs' argument that BLM is criminally liable for the foreseeable actions of third parties in reliance on a right-of-way grant authorizing the use of federal land. Nor does this theory have any basis in the MBTA, which states that "it is unlawful" to engage in prohibited acts, but does not obligate BLM to ensure that actions by third parties using federal lands do not result in future violations.

Plaintiffs' non-MBTA cases (POCF Br. at 26-27) are similarly inapposite.[11] In *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), this Court held that an agency acted unlawfully in authorizing an Indian tribe to take whales, an act directly prohibited by

[11] Backcountry (but not POCF) relies on authorities such as *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), and Executive Order 13186. *Robertson* addresses the constitutionality of an appropriations statute amending the MBTA. Nothing in that decision can be read as holding that the MBTA imposes any obligation on BLM to secure a permit, or that its action here in granting a right of way violates the MBTA. Likewise, Executive Order 13186 directs executive departments and agencies to take actions to protect and conserve migratory birds. *See* 66 Fed. Reg. 3,853 (Jan. 10, 2001). BLM has complied with the terms of the Executive Order by entering into a Memorandum of Understanding ("MOU") with the FWS outlining how it will promote the conservation of migratory birds. Neither the Executive Order nor the MOU creates any enforceable rights or benefits. Plaintiffs may not rely on either the Executive Order or the resulting MOU as support for their argument.

the Marine Mammal Protection Act, on the agency's mistaken belief that a treaty exempted the tribe from the statute's provisions. 371 F.3d at 501. So too in *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003), the federal agency explicitly had authorized the third party to engage in commercial activities in a wilderness area, in direct contravention of the Wilderness Act, based on the agency's belief that the statute allowed commercial activities in wilderness areas if the commercial activities were benign and minimally intrusive. 353 F.3d at 1062, 1065. Thus, these cases would be analogous only if BLM directly had authorized unpermitted bird take in its decision. BLM, of course, did no such thing. BLM granted a right-of-way for a wind-energy-generating facility on the condition that the facility comply with all applicable laws, including all laws prohibiting unauthorized bird take. BLM fully expects Tule Wind to continue to work with the FWS on Tule Wind's ongoing compliance efforts with the MBTA and all other applicable wildlife laws.

Plaintiffs similarly misplace their reliance on *Center. for Biological Diversity v. Bureau of Land Management.*, 698 F.3d 1101 (9th Cir. 2012). If anything, that case demonstrates the fatal flaw in Plaintiffs' arguments. The court concluded, among other things, that BLM had violated the Endangered Species Act (ESA) in failing to ensure that its pipeline authorization would not jeopardize listed species or adversely modify their critical habitat, where BLM's authorization had unlawfully relied on a private party's unenforceable conservation measures. *See CBD*, 698 F.3d at 1112-17, 1127-28. This holding touches a key difference between the ESA and the MBTA.

Unlike the MBTA, the ESA imposes an affirmative duty on federal agencies to ensure that third-party actions they "authorize" do not result in ESA violations. Section 7 of the ESA requires federal agencies to consult with the expert federal wildlife agency to "*insure* that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (emphasis added). That Congress imposed such an affirmative duty on agencies in the ESA demonstrates that Congress knows how to create such a duty where it intends for agencies to have one. The fact that Congress did not impose such a duty in the MBTA demonstrates that Congress did not intend for agencies to ensure against possible future violations of the MBTA by others.

Absent support within the statutory text, Plaintiffs' arguments (POCF Br. at 27-28) for expanding the MBTA's reach to include the regulatory conduct of federal agencies rely on the recent permit issued to the National Marine Fisheries Service (NMFS) authorizing incidental bycatch of seabirds by the Hawaii longline fishery, which is managed by NMFS. The fact that the FWS may issue, or an agency may apply for, such a permit does not mean that the MBTA requires such permits. NMFS chose to engage in the process voluntarily as a means of settling litigation and improving its longline fishing program. That NMFS chose this route in this one instance does not obligate every federal agency to do the same. In fact, the FWS explicitly stated that its issuance of a permit for Hawaiian longline fishing should not

be viewed as precedential, stating that "[a]ny decision to grant the NMFS permit application should not have any bearing on the future application or enforcement of the MBTA." Final Environmental Assessment for Hawaii Longline Fishery at 7.[12]

In sum, the MBTA does not forbid BLM's decision to grant a right-of-way across federal lands, even if it were foreseeable that migratory bird take by the grantee may occur at some future time. Plaintiffs improperly seek to restructure the statutory text of the MBTA and to interfere in the FWS's administration of that statute. Because the MBTA does not explicitly require BLM to apply for an MBTA permit prior to exercising its regulatory authority or to require Tule Wind to obtain one as a condition of the right-of-way, Plaintiffs' arguments must fail.

B. BLM Did Not Violate The Eagle Act.

Backcountry's contention that BLM's right-of-way decision violates the Eagle Act also lacks merit. Like the MBTA, the Eagle Act cannot be violated until a bird is actually taken, as the text of that statute makes clear:

> [W]ithout being permitted to do so as provided in this subchapter, [it] shall [be unlawful to] take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof . . . .

16 U.S.C. § 668(b).[13] The Act is not violated until an eagle is taken without a permit.

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[12] http://www.fws.gov/pacific/migratorybirds/pdf/NMFS%20Permit%20Final%20EA.pdf (last visited Jan. 2, 2015).

[13] The Eagle Act is both criminally and civilly enforceable. *See* 16 U.S.C. § 668(a)-(b).

Moreover, like the MBTA, the Eagle Act does not require anyone to obtain a permit before engaging in an otherwise lawful activity that may take eagles. Backcountry identifies no provision of the Eagle Act that *requires* a permit before taking an action that might result in eagle take. The Eagle Act *allows* persons to avoid penalties for taking an eagle by obtaining a permit.[14] The fact that a permitting program is "available" to shield persons from potential Eagle Act penalties does not mean that a person must take advantage of that program.[15] As with their MBTA arguments, Backcountry's arguments are inconsistent with the Eagle Act's plain text.

Even if a permit were required for the Project, the FWS interprets the Act not to require an agency acting in its regulatory capacity to obtain a permit. In 2009, the FWS promulgated a regulation, pursuant to the Eagle Act, allowing it to authorize, by permit, the incidental take of eagles. *See* 50 C.F.R. § 22.26; 74 Fed. Reg. 46,836 (Sept. 11, 2009) (SER 680); SER 150. In that rule, the FWS explained that an agency like

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[14] Under the Eagle Act, the FWS issues permits to take, possess, and transport bald and golden eagles for a variety of purposes, provided such permits are "compatible with the preservation of the bald eagle or the golden eagle." 16 U.S.C. § 668a; 50 C.F.R. §§ 22.21-22.29. In September 2009, the FWS promulgated a new regulation, 50 C.F.R. § 22.26, that provides for permits to take eagles where the taking is associated with, but not the purpose of, otherwise lawful activities, *i.e.*, incidental take. *See* 74 Fed. Reg. 46,836 (Sept. 11, 2009) (SER 680).

[15] Backcountry does not explain (at 30-31) why it is relevant that the United States, in a plea agreement, required a defendant to obtain an Eagle Act permit. When unpermitted eagle take occurs, the United States has an interest in preventing additional violations by requiring the defendant to seek a permit. Such a provision in a plea agreement does not mean that the Eagle Act itself requires someone to obtain a permit before taking an action.

BLM that issues a license or permit for an activity that may result in takes is not obligated to secure an Eagle Act permit. Rather:

> Persons and organizations that obtain licenses, permits, grants, or other such services from government agencies are responsible for their own compliance with the [Eagle Act] and should individually seek permits for their actions that may take eagles. Government agencies must obtain permits for take that would result from agency actions that are implemented by the agency itself.

SER 688. Thus, even if the Eagle Act were ambiguous as to whether a permit is required here, the FWS's formal interpretation of the Act is permissible and owed substantial deference. *See Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). Any take of eagles that may occur in the future from this Project would not result from "agency actions that are implemented by the agency itself" and accordingly BLM need not obtain an Eagle Act permit. SER 688. Backcountry's contrary interpretation of the Eagle Act is inconsistent with the Eagle Act and the FWS's controlling interpretation of the Act and thus must be rejected.

Even for those persons directly engaging in the activities that may result in the incidental take of eagles, the FWS has explained that incidental-take permits are not necessary when the possibility of taking an eagle is remote. For activities with some limited risk of incidental take "the Service may be able to recommend measures to reduce the likelihood of take, negating the need for a permit." SER 688. Thus, Eagle Act regulations direct applicants to "coordinate with the Service as early as possible for advice on whether a permit is needed." 50 C.F.R. § 22.26(d)(1). As the FWS has

explained, an incidental take permit under the Eagle Act is, in most cases, unnecessary "for activities that (1) are unlikely to take eagles, or (2) can practicably be modified to avoid the take." SER 688; *id.* ("An initial consideration is whether take is likely to occur. Ideally, most potential applicants whose activities will not likely result in take will be dissuaded from applying for a permit."); SER 701, 703; 50 C.F.R. § 22.26(e)(1).

Here, BLM and Tule Wind engaged the FWS on eagle and other avian issues early in the application process, working closely with the FWS to evaluate eagle use of the Project area and the potential for incidental take and, ultimately, to minimize the possibility of eagle take in connection with Project construction and operation. SER 376. For its part, as a result of the data gathered during the evaluation and consultation process, BLM developed and selected an alternate version of the Project proposal that reduced by 33 the number of turbines on federal lands, specifically to exclude any turbines on the ridgeline that posed an unacceptable risk to golden eagles. SER 128. Moreover, Tule Wind coordinated with the FWS and BLM to develop the mandatory Avian and Bat Protection Plan to further avoid and minimize the possibility of eagle take in connection with the approved Project. SER 376, 432.

The agencies used all available data about eagle occurrence and behavior to determine whether the mitigation and other conditions of approval sufficiently reduced the likelihood of eagle take. As the Protection Plan concluded, "[b]ased on model results and [the] weight of evidence from field data, fatalities are not predicted at the Phase I –Valley turbines portion of the project." SER 479; *see also* SER 447-48,

452-54. Consistent with its view that actions that effectively eliminate the likelihood of take do not need an incidental-take permit, the FWS concurred in the Protection Plan, stating that "the [Protection Plan] for the Tule Wind Energy Project is appropriate in its adaptive management approach to avoid and minimize take of migratory birds, bats and eagles within the Phase 1 project area." SER 928. Notably, the Protection Plan does not call for Tule Wind to apply for an incidental-take permit under the Eagle Act unless there is an eagle mortality and, hence, a demonstrated need for additional operational modifications or mitigation. SER 480.

Finally, Backcountry misstates (at 29) the record when it asserts that "[i]t is undisputed that Project operation is likely to kill and injure golden eagles." As mentioned, the right-of-way approved only those turbines on BLM managed lands within the valley, or what is known as Phase I of the Project. The survey data show eagles make very minor, if any, use of the Phase I area. SER 140-41, 151, 158, 438, 442-45. Eagle fatalities thus are unlikely to occur from the approved Project. SER 448.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the Federal Defendants is unaware of any currently pending cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief is proportionately spaced, has a typeface of 14 points or more and contains 12,514 words. I used Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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