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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

PROTECT OUR COMMUNITIES FOUNDATION, DAVID HOGAN, and NICA KNITE,

Plaintiffs,

v.

MICHAEL BLACK, Director, Bureau of Indian Affairs; SALLY JEWELL, Secretary, Department of the Interior; KEVIN WASHBURN, Assistant Secretary for Indian Affairs, Department of the Interior; AMY DUTSCHKE, Regional Director, Bureau of Indian Affairs Pacific Region; JOHN RYDZIK, Chief, Bureau of Indian Affairs Pacific Region Division of Environmental, Cultural Resources Management & Safety,

Defendants.

Case No. 3:14-cv-02261-JLS-JMA

Plaintiffs' Combined Opposition To Defendants' Cross-Motions For Summary Judgment And Reply In Support of Plaintiffs' Motion For Summary Judgment

Hearing Date: Feb. 16, 2017
Time: 1:30 p.m.
Place: 4A
Judge: Hon. Janis L. Sammartino

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INTRODUCTION

In their opening brief, Plaintiffs explained in detail how the Bureau of Indian Affairs ("BIA") issued its December 2013 Record of Decision ("ROD") authorizing the construction and long-term operation of up to twenty industrial-sized turbines ("Tule Wind Phase II") without conducting *any* contemporaneous environmental review under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m, thereby failing to publicly disclose—much less analyze and solicit public comment on—recent data and opinions by the expert federal and state wildlife agencies unanimously concluding that this project presents a grave risk to federally protected golden eagles and other migratory birds. On that basis, Plaintiffs argued that, as part of its Tule Wind Phase II decisionmaking process, BIA contravened NEPA by failing to take a formal, objective "hard look" at the devastating impacts this project is anticipated to cause to avian resources, whether the measures adopted by BIA for this project are sufficient to mitigate these risks, and whether alternatives urged by agency experts (such as "macrositing" and "micrositing") should be adopted instead of the full project layout as initially contemplated before the benefit of this recent information. Alternatively, Plaintiffs argued that, at minimum, BIA was obligated to prepare supplemental NEPA review to analyze highly consequential information received by BIA from October 2011 through December 2013 raising unprecedented concerns for a wind energy project as to site-specific eagle and other avian mortality and nesting disturbances, as well as reasonable alternatives that could potentially alleviate these impacts.

In response, BIA and Intervenors have ignored many of Plaintiffs' legal arguments and failed to respond to the robust Ninth Circuit case law cited in support of Plaintiffs' position. Instead, Defendants erroneously attempt to refocus the Court's attention on a prior NEPA analysis completed by a *different* agency, the Bureau of Land Management ("BLM"), which purposefully avoided any intimation that it was approving Tule Wind Phase II precisely because of the extreme risk to

eagles and other migratory birds. *See, e.g.*, Federal Defendants' Brief ("Fed. Br.") at 12-17 (asserting that BIA's Tule Wind Phase II decision should be sustained because the Ninth Circuit upheld BLM's Tule Wind Phase I EIS). Although Plaintiffs will address each of Defendants' specific arguments below, it is necessary to first dispel any notion that Plaintiffs are challenging BLM's Tule Wind Phase I EIS in this case or that BLM's EIS even has any bearing on the legal question in *this* case—i.e., whether BIA acted arbitrarily and capriciously *in December 2013* by authorizing what the expert federal agency, the U.S. Fish and Wildlife Service ("FWS"), has formally determined to be a "high-risk" site for golden eagles and other birds, without conducting *any* NEPA review whatsoever examining site-specific impacts to affected species or considering alternatives to lessen the detrimental effects of BIA's action.

I. BLM'S OCTOBER 2011 EIS HAS LITTLE, IF ANY, BEARING ON THIS CASE, AND PLAINTIFFS HAVE NOT WAIVED THEIR ABILITY TO CHALLENGE BIA'S FAILURES IN 2013 TO COMPLY WITH NEPA AND ITS REGULATIONS.

As a threshold matter, no matter how many times BIA and Intervenors attempt to characterize this case as merely a repackaging of challenges to BLM's October 2011 EIS, *see, e.g.*, Fed. Br. at 2 (asserting that Plaintiffs allege "that these same statutes were violated in the same manner" as in the earlier challenge to BLM's EIS), that could not be farther from reality. Nowhere in Plaintiffs' Complaint do they seek any relief from BLM which is not even a party to the case, nor do Plaintiffs' NEPA claims challenge any aspect of BLM's EIS or ROD associated with Tule Wind Phase I. Indeed, if anything, BLM's EIS and ROD provide a blueprint for what BIA *should* have done with respect to Tule Wind Phase II—i.e., BLM prepared an extensive EIS; reviewed various data, information, and expert recommendations during that process; and, on the basis of those materials and public input, substantially modified its own project design by ultimately

deciding *not* to construct any turbines on BLM's own ridgeline lands and *not* to have any involvement in the decision as to whether BIA, in consultation with FWS, should ultimately build any portion of Tule Wind Phase II upon further assessing risks to eagles and birds. By engaging in that transparent information gathering process, soliciting public participation and expert opinions from FWS and other agencies, and significantly modifying its decision in light of those materials, BLM—unlike BIA—at least endeavored to achieve NEPA's "action-forcing" objectives by substantially altering its conduct after an assessment of relevant impacts and alternatives. 40 C.F.R. § 1502.1.

In sharp contrast, BIA not only failed to prepare any NEPA review whatsoever in connection with its decision to authorize Tule Wind Phase II, but, instead of heeding the concerns of agency experts, BIA disregarded their conclusions and recommendations while plowing ahead with a project design that BIA was told in no uncertain term posed an excessive risk to eagles and other birds. In short, BIA's approach has turned NEPA on its head, bypassing the specific procedures prescribed by NEPA when an agency is undertaking an action—such as this one—that will decimate local and regional wildlife populations, thereby flouting the ability of federal agencies and the public to inform BIA's ultimate action and leading to a project that, if sustained by this Court, will result in disastrous and unanalyzed effects on the environment. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (NEPA "ensures that the agency, in reaching its decision, will have available, *and will carefully consider*, detailed information concerning significant environmental impacts") (emphasis added).

Hence, importantly, while Defendants repeatedly stress that NEPA is a "procedural statute," *see, e.g.*, Intervenors' Br., ECF No. 61-1, at 6, 18, Supreme Court precedents as well as NEPA's regulations emphasize that these procedures are not a make-work exercise and, rather, that Congress imposed them on BIA and other agencies precisely because they are "action-forcing" safeguards that often lead to

critical project modifications that "avoid or minimize adverse impacts or enhance the quality of the human environment," 40 C.F.R. § 1502.1, as was the case for BLM's Tule Wind Phase I. Thus, if BIA had actually conducted the required NEPA review and thus undertaken a "full and fair discussion of significant environmental impacts" and "inform[ed] decisionmakers and the public of the reasonable alternatives," *id.*—including by soliciting public comments on the new information received by BIA from October 2011 to December 2013 from FWS and other agencies indicating extremely damaging project-related impacts and urging substantial project configuration changes to minimize those risks— this may well have resulted in BIA abandoning the project altogether or at least substantially modifying it in the manner urged by FWS and its state agency counterpart. Hence, BIA has not only thwarted NEPA's procedural safeguards, but also has stripped the public, FWS, and other stakeholders of any ability to inform the final decision—contravening the fundamental purpose of the NEPA to ensure the project's impacts are not "overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson*, 490 U.S. at 349.[1]

[1] In their opening brief, *see* Pls. Br. at 37 n.12, Plaintiffs highlighted the contrasting approaches taken by BLM and BIA, emphasizing that this Court and the Ninth Circuit ultimately upheld BLM's EIS in large part because BLM, unlike BIA, addressed pertinent information from FWS raising serious concerns about eagle and bird mortality on the ridgeline both by adopting in its EIS "a comprehensive set of mitigation measures" to reduce risks to birds and by specifically "reposition[ing] turbines in valleys *rather than on top of ridgelines*, which would lessen any risk to" birds and especially golden eagles. *Protect Our Communities*, 825 F.3d 571, 582-83 (9th Cir. 2016) (emphasis added). Thus, with respect to BLM's Tule Wind Phase I, although this Court explained that it was "deeply troubled by the Project's potential to injure golden eagles and other rare and special-status birds," *Protect Our Communities Found. v. Jewell*, No. 13-cv-575, 2014 WL 1364453, at *21 (S.D. Cal. Mar. 25, 2014) (Sammartino, J.), this Court and the Court of Appeals sustained that decision because BLM analyzed, in an EIS, the relevant impacts and reasonable alternatives to that phase of the project and then adopted the "removal" of all ridgeline turbines in response to that analysis because of the risks to avian resources

Moreover, although Defendants rely on BLM's October 2011 EIS as their *defense* to why BIA did not conduct *any* contemporaneous NEPA review in connection with its own December 2013 ROD, the Court may easily reject any exhaustion or waiver arguments related to BLM's EIS process because Plaintiffs do not allege any claims with respect to the adequacy of BLM's EIS, nor could Plaintiffs' claims vis-à-vis Phase II even have been raised at that stage. BIA and Intervenors both cursorily argue that, because Plaintiffs did not raise project configuration alternatives or eagle concerns as to Tule Wind Phase II during *BLM's EIS process*, "Plaintiffs waived their claims to supplemental EIS analysis of layouts or eagle mitigation." Intervenors' Br. at 20; Fed. Br. at 17-18. Defendants' position makes no legal or logical sense for several reasons.

First, Plaintiffs' challenges in this case involve: (1) *BIA's* failure to prepare any contemporaneous NEPA review in connection with its December 2013 ROD addressing the Phase II project; and (2) even assuming BLM's EIS could in theory satisfy BIA's separate NEPA obligations in connection with BIA's authorization of a ridgeline project that was *not approved by BLM*, BIA's failure to, at the very, least prepare supplemental NEPA review on the basis of highly significant new information (including from FWS) received by BIA between October 2011 and December 2013 raising grave concern about risks to eagles and many other birds and urging consideration of various project alternatives. When BLM finalized its EIS and made its decision in October 2011, Plaintiffs obviously had no idea what *BIA* might, or might not, decide to do in the future with respect to constructing Tule Wind Phase II, let alone whether or how that agency would, at the appropriate juncture, subject that decision to NEPA review. Indeed, during the EIS process, BLM and BIA made clear that BIA might *never* construct any Phase II turbines, *see* TULE624 (explaining that "all, none, or part of the second portion" might be

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on lands administered by both BLM and BIA on the ridgeline, *see id.* at *6-7. No such analysis ever took place with respect to Tule Wind Phase II.

authorized depending on further studies and consultation with expert agencies), so it is especially disingenuous that Defendants now assert that Plaintiffs were somehow required in 2011 to peer into the proverbial crystal ball to discern whether BIA would ultimately decide to construct Tule Wind Phase II, which project configuration BIA would select and thus what reasonable alternatives should be examined, and what post-EIS information might elucidate the project's harm to birds and inform the need for project modifications or other measures to mitigate these risks and to ensure compliance with the Bald and Golden Eagle Protection Act ("BGEPA") and the Migratory Bird Treaty Act ("MBTA"). Simply put, under these circumstances, any such challenge to BLM's or BIA's then non-existent decisionmaking regarding Phase II would plainly have been conjectural and premature and undoubtedly the subject of a motion to dismiss by defendants on both ripeness and non-final agency action grounds. *Cf. Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-37 (1998) (finding challenge to programmatic land use plan and accompanying NEPA review unripe and premature because they "do[] not give anyone a legal right to [undertake any ground-disturbing activities], nor does it abolish anyone's legal authority to object" to such activities in the future at the site-specific stage).

Second, because Plaintiffs' challenges relate solely to actions that Plaintiffs assert NEPA required BIA to take *in December 2013*, there is simply no basis for Defendants' argument that "[i]t is far too late for their concerns to inform agency decision-making." Fed. Br. at 18. To the contrary, because BLM's decisionmaking in 2011 left it entirely unclear whether Tule Wind Phase II would *ever* be constructed—or, if so, in what configuration given that the public was told that the layout was subject to change based on studies and FWS recommendations—it was incumbent on BIA, in authorizing this project, to conduct some NEPA review subject to public scrutiny on its site-specific decision. Indeed, although Defendants expressly rely on the August 2012 Tule Wind Phase II Avian and Bat Protection

Plan ("Phase II ABPP") in support of their position—a document that even Defendants do not contend is a substitute for NEPA review as to BIA's action—that document was not made publicly available until *one year after* BLM issued its October 2011 EIS. In other words, it would have been *impossible* for Plaintiffs (or anyone else) to provide comments during BLM's decisionmaking process as to the adequacy of mitigation measures and project configuration alternatives with respect to Tule Wind Phase II in view of the fact that the document identifying the selected project layout and mitigation measures did not come into existence until more than a year after BLM's public comment period had expired. On this record, there is simply no basis for finding that Plaintiffs forfeited their ability to challenge BIA's actions that occurred *after* the completion of BLM's decisionmaking process.

Third, in any event, not only did Plaintiffs and others in fact raise grave concerns about the impacts of *both* phases of the project on golden eagles and other birds during BLM's comment period, *see, e.g.*, TULE20640 (Plaintiff POC commenting that BLM and BIA "must also evaluate the effects of the project on avian injury and mortality, including impacts on both special status birds (such as the California condor) and others (such as the golden eagle, which is protected by the Bald and Golden Eagle Protection Act)," including by "address[ing] risks associated with wind turbines"); TULE20840-42 (Defenders of Wildlife and Natural Resources Defense Council commenting that "recent research has established that species such as Golden Eagles tend to hunt or migrate at or below ridgelines, *potentially putting these species at risk if turbines are deployed in these ridge areas*," and thus that BLM and BIA need to "reconsider[]" the project in order "to fully evaluate the site and whether it *should be abandoned due to unacceptable, unmitigable risk to Golden Eagle[s]*") (emphases added)—which were sufficient to convince BLM *not* to approve any ridgeline construction—but it is indisputable that FWS and the California Department of Fish and Game ("CDFG"), among others,

raised these site-specific concerns with respect to Phase II in the course of urging BIA to consider project changes before BIA issued the December 2013 ROD.

Where, as here, BIA disregarded the expert views of the federal and state wildlife agencies, the notion that POC—which was never even afforded the opportunity to comment on *BIA's* decision to approve the Phase II configuration—has somehow waived its right to comment on BIA's failure to comply with NEPA makes no legal or logical sense. *Cf. Conservation Congress v. U.S. Forest Serv.*, 555 F. Supp. 2d 1093, 1106-07 (E.D. Cal. 2008) (explaining that "[t]here is no need for a litigant to have personally raised the issue, so long as the issue was raised by another party and the agency had the opportunity to consider the objection"); *Sierra Club v. EPA*, 353 F.3d 976, 982 (D.C. Cir. 2004) (rejecting waiver where "Sierra Club did not comment on the proposed [rule], and none of the entities that did have challenged the Final Rule" because others notified EPA of those issues). Thus, because BIA had "the opportunity to consider" "the very argument pressed" in this lawsuit, but failed to capitalize on that opportunity by ignoring those concerns and recommendations, there is no bar to judicial review. *Office of Comm'n of the United Church of Christ v. FCC*, 465 F.2d 519, 523 (D.C. Cir. 1972).

In short, Plaintiffs are challenging *BIA's* failures to comply with NEPA in connection with *BIA's* 2013 ROD—either because BIA failed to conduct any NEPA review in connection with *that* decision and/or because BIA at the very least failed to supplement BLM's prior EIS based on the highly probative new information from the federal and state wildlife experts. There is no legal barrier to Plaintiffs' pursuit of those challenges and hence the Court should resolve them on the merits.

II. BIA'S FAILURE TO PREPARE ANY CONTEMPORANEOUS NEPA REVIEW IN CONNECTION WITH AUTHORIZING TULE WIND PHASE II CANNOT WITHSTAND SCRUTINY.

In their opening brief, Plaintiffs provided two independent grounds upon which this Court may—and should—find that BIA violated NEPA and its

regulations by failing to prepare a contemporaneous EIS, or even an Environmental Assessment ("EA"), before authorizing the construction and operation of Tule Wind Phase II. *See* Pls. Br. at 18-29. First, Plaintiffs explained that BIA could not escape NEPA's requirements in authorizing this project because the sole NEPA document on which BIA purported to rely—i.e., BLM's EIS—set forth binding mitigation measures that BIA either subsequently abandoned or rendered pointless as a practical matter. *Id.* at 18-24. Second, Plaintiffs explained that because no agency had ever considered under NEPA any reasonable site-specific alternatives to the configuration of Tule Wind Phase II—an assessment that was never addressed by BLM, because it opted to avoid entirely any ridgeline turbine placement—at minimum, BIA had to examine a reasonable range of site-specific project alternatives (including those repeatedly urged by the expert wildlife agencies) in a formal NEPA process subject to meaningful public participation. *Id.* at 24-29. In response, Defendants have not offered any coherent responses to these contentions, much less any persuasive arguments for why BIA should be allowed to bypass the Congressionally mandated procedures that apply to all federal agencies authorizing environmentally destructive projects of this kind. As explained below, BIA's failure to conduct any contemporaneous NEPA review in connection with the decision to authorize Tule Wind Phase II cannot pass muster.

A. Because BLM Deferred Authorizing Tule Wind Phase II Due to Potential Risks to Eagles and Other Birds—and Relied on that Deferral to Mitigate the Impacts of Its Own Project—BIA's Subsequent Decision to Revive Tule Wind Phase II at Minimum Required Site-Specific NEPA Review.

As Plaintiffs previously explained, BLM's December 2013 decision to authorize construction and operation of Tule Wind Phase II without formal NEPA consideration of any significant project layout modifications or other measures that, according to FWS, CDFG, and other experts could at least reduce the grave threats posed to eagles and birds by this project, violates NEPA in several ways. In

particular, Plaintiffs explained that BIA's refusal to conduct any NEPA review whatsoever in connection with its action could not be excused by the existence of BLM's October 2011 EIS because BIA ultimately acted in a manner *entirely inconsistent* both with BLM's decision *not* to authorize any wind turbines on BLM's own ridgeline lands and with the mitigation measure adopted regarding Tule Wind Phase II, *see* Pls. Br. at 18-24—i.e., the EIS's express mitigation measure stating that Tule Wind Phase II "[t]urbine locations exceeding the *acceptable risk levels to golden eagles* . . . will *not* be authorized for construction," with the level of risk determined based on BIA's post-EIS "consultation with the required resource agencies" such as FWS and CDFG. TULE624-25 (emphasis added).

In response, Defendants offer practically no rebuttal. Rather, Federal Defendants downplay this major conflict between the rationale and conclusion set forth in BLM's EIS and BIA's subsequent action, asserting that "[t]his Court and the Ninth Circuit have already upheld the FEIS's consideration of potential measures to mitigate the Project's environmental impacts" and thus Plaintiffs are purportedly "attempting to impose an additional round of NEPA review where none is required." Fed. Br. at 19-20. In even more conclusory terms, Intervenors assert that "[t]he EIS outlined numerous mitigation measures in considerable detail." Intervenors' Br. at 15. These cursory responses do not hold water.

First, whether BLM adopted appropriate measures to minimize the impacts of the project that *BLM* ultimately authorized in its ROD—i.e., Tule Wind Phase I *in the McCain Valley*, along with a substation and a transmission line necessary to support that phase—has absolutely *nothing* to do with whether BIA's subsequent action, and the measures necessary to sufficiently reduce the environmental impacts of that *separate* action, have been appropriately examined and addressed in any NEPA review process. As a matter of logic, because BLM made no decision in its EIS and ROD concerning Tule Wind Phase II—and thus did not, and could not, develop any mitigation measures specific to Tule Wind Phase II, which BLM knew

may *never* be built (or may one day be built in a very different layout)—BIA had an independent duty to engage in NEPA review when *subsequently* determining: (1) whether to construct the project; (2) the project's layout; and (3) site-specific mitigation measures necessary to lessen the impacts posed by that particular project layout. Hence, the mitigation measures contained in BLM's EIS that were specific to the action authorized by BLM—which did *not* include Tule Wind Phase II—do not provide a basis for BIA to circumvent its own legal obligations to assess various project configurations and the mitigation measures that should apply to each configuration.[2]

Second, paradoxically, Defendants repeatedly cite to BLM's adopted mitigation measures—which, again, were designed to *only* apply to BLM's action and not to any subsequent action by BIA which might or might not come to pass—despite the fact that BIA's subsequent Tule Wind Phase II decision is in direct conflict with BLM's mitigation measures in several ways.

As a threshold matter, all parties agree that BLM deliberately decided in its EIS and ROD *not* to authorize any ridgeline turbines on BLM or BIA lands, *see* Fed. Br. at 29 (BLM "did not approve *any* of the ridgeline turbines over which it had jurisdiction"), and on the basis of that decision BLM sought credit for mitigating the impacts of BLM's own action because of the resulting reduction in eagle and bird mortality. *See* TULE624-25. Yet, notwithstanding that the Ninth Circuit, in upholding BLM's EIS, expressly relied on the fact that BLM "reposition[ed] turbines in valleys *rather than on top of ridgelines*, which would lessen any risk to"

[2] As explained, BIA did not even finalize—much less make publicly available—the selected Tule Wind Phase II project layout or any mitigation measures specific to that project layout until August 2012 in its Phase II ABPP. Thus, it is inconceivable that BLM's EIS, which was issued a year before BIA finalized these key project details, somehow supplanted the need for BIA to take its own "hard look" at these concededly new issues that were never before BLM during its decisionmaking process.

birds, *Protect Our Communities*, 825 F.3d at 582-83, BIA has now taken action that, in large part, negates BLM's key impact reduction measure by authorizing the construction and operation of twenty ridgeline turbines that are "high-risk" according to FWS, without ever subjecting this fundamental shift in position to any NEPA review. In short, BIA cannot on the one hand be permitted to insulate itself from legal challenge based on BLM's mitigation measures, including BLM's refusal to construct *any* ridgeline turbines in order to lessen risks to wildlife, while at the same time proceeding with construction and operation of twenty high-risk turbines *on the ridgeline* in a manner that directly undercuts the very measure on which BIA relies and that this Court and the Ninth Circuit singled out as establishing that BLM adequately addressed the eagle and other avian impacts of BLM's portion of the project. *Id.*; *see also Protect Our Communities*, 2014 WL 1364453, at *6-7 (noting "the removal of 63 turbines from the proposed Project" and explaining that "removing the selected wind turbines would substantially reduce adverse impacts to golden eagles and other rare and special-status birds").

Moreover, aside from BLM's overarching decision not to authorize any ridgeline turbines, BLM specifically contemplated that Tule Wind Phase II might never be built (or might be substantially modified), and expressly adopted a mitigation measure to this effect that was binding on BIA as a cooperating agency. Mitigation Measure BIO-f10 stated that, due to concerns about eagle and bird mortality on the ridgeline, "all, *none, or part* of the second portion" might ultimately be authorized by BIA in a separate decisionmaking process, but that any decision to proceed with any part of Tule Wind Phase II would only occur on the basis of "consultation with the required resource agencies" such as FWS and CDFG. TULE624-25 (emphasis added). That consultation process was a crucial feature of the mitigation measure because BIA agreed that "[c]onstruction of the second portion of the project would occur at *those turbine locations that show reduced risk to the eagle population*," as determined by BIA "in consultation with the required

resource agencies," which meant that "[t]urbine locations *exceeding the acceptable risk levels* to golden eagles based on [consultation with FWS and CDFG] *will* ***not*** *be authorized for construction*." *Id.* (emphases added).

Notwithstanding this requirement, BIA ultimately authorized a project configuration for Tule Wind Phase II that FWS formally determined, in the consultation process, "represents a ***high risk*** *for golden eagle mortality*," TULE106446-47 (emphasis added), and in the process BIA ignored FWS's repeated recommendations resulting from the consultation process to "consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take." TULE106446. Indeed, in response to BIA's August 2012 Phase II ABPP and the site-specific mitigation measures contained therein, FWS determined that the selected project layout poses "a high potential for ongoing take of eagles and the loss of a productive golden eagle breeding territory" and emphasized its concerns that "there is a potential for this territory to become an ecological trap by attracting eagles into a desirable nest site that possess high risk for both breeding eagles and any young they produce." TULE106453; *see also* TULE111549 (CDFG recommending, through the consultation process, that "[d]ue to their proximity to the nest site, the relative nest density, overall productivity of the Cane Brake nests, and the overlap of the estimated home range with the Reduced Ridgeline Project, the Department . . . BIA [should at minimum] remove turbines H-1 and H-2 as part of the Reduced Ridgeline Project").

Accordingly, even if BLM's mitigation measures could have extended to cover BIA's subsequent action and avoid separate NEPA review for that decision, that cannot possibly be the case here, where BIA *failed to comply with, and instead flouted, the very safeguards that BLM adopted* in Mitigation Measure BIO-f10 for minimizing risks to eagles and other migratory birds. Because it is well-established that an agency cannot rely on mitigation to avoid or short-circuit NEPA review unless the agency is actually *implementing* the mitigation, BIA's failure to abide by

an essential mitigation measure on which it is relying renders BIA's refusal to prepare any contemporaneous NEPA review for Tule Wind Phase II a flagrant NEPA violation and arbitrary and capricious. *See, e.g.*, *Tyler v. Cisneros*, 136 F.3d 603, 308 (9th Cir. 1998) (finding that an agency must comply with mitigation measures agreed to by agency in the NEPA review process); *Lee v. U.S. Air Force*, 220 F. Supp. 2d 1229, 1236 (D.N.M. 2002), *aff'd*, 354 F.3d 1229 (10th Cir. 2004) (explaining that agencies are "legally bound" by environmental reviews and are "obligated" to act as promised under 40 C.F.R. § 1505.3).[3]

B. BIA Violated NEPA by Failing to Consider a Reasonable Range of Tule Wind Phase II Project Layout Alternatives and the Relative Site-Specific Impacts of Each Alternative.

In their opening brief, Plaintiffs explained that neither BIA nor BLM has ever analyzed in a formal NEPA document any site-specific project layout alternatives to Tule Wind Phase II—as urged by FWS and CDFG throughout the consultation process contemplated by BLM's EIS—or the relative impacts of each alternative and the necessary mitigation measures to reduce such impacts to a legally sufficient level. *See* Pls. Br. at 24-29. Rather, in authorizing various activities in its EIS and ROD (i.e., Tule Wind Phase I, a substation, and a transmission line), BLM merely presumed either that BIA would ultimately build Tule Wind Phase II or not build it; no other options were considered because BLM determined that BIA (rather than BLM) would subsequently address Tule Wind Phase II on the basis of further eagle

[3] Anomalously, Federal Defendants state that BIA's ROD "did not whitewash the issue of impacts to eagles and did not assert that those impacts would be eliminated, *or reduced below a level of significance for NEPA purposes*." Fed. Br. at 9 (emphasis added). This admission compels the conclusion that BIA was required to analyze the site-specific impacts to eagles, and reasonable alternatives to the proposed project layout, in a full-blown EIS since BIA concedes that this action will result in *significant* environmental impacts, as that term is defined for purposes of NEPA. But instead BIA engaged in no NEPA review whatsoever.

research and consultation with FWS and CDFG that would elucidate the scope of reasonable Phase II project alternatives should the project move forward. *Id.* (citing TULE624-25).

In response, Defendants make three arguments. First, Defendants again rely on the fact that the Ninth Circuit "already upheld the sufficiency of the range of alternatives considered in the EIS" in asserting that BIA had no duty to consider reasonable alternatives for its separate, subsequent action that was completely speculative and amorphous when BLM issued its EIS. Fed. Br. at 13. Second, Defendants assert that BIA's decision to defer authorizing Tule Wind Phase II so that BIA would instead "authorize all, none, or part" of that project at a later date means that the "action alternatives considered in the EIS . . . fully encompass the construction of 'all, none or part' of the 20 turbines on the ridgeline." Fed. Br. at 13-14. Third, while conceding that "these action alternatives are identical for purposes of Phase II," Federal Defendants contend that the EIS "examined five very distinct action alternatives for the overarching project." Fed. Br. at 15-16. These arguments are groundless.

As to Defendants' reference to the Ninth Circuit's affirmance of BLM's EIS for Tule Wind Phase I, once again there is simply nothing in that document which Defendants can point to indicating that BLM *ever* considered, or even purported to consider, any alternative project configurations (or associated impacts) for Tule Wind Phase II. To the contrary, evidently because BLM ultimately decided *not* to authorize any turbines on the ridgeline and recognized that *BIA* would have to make a separate decision on whether and in what configuration to approve Phase II, BLM merely assumed in its EIS that Tule Wind Phase II might be constructed in full or might not be constructed at all. *See* TULE74-76. Because the ultimate parameters of Tule Wind Phase II were not even known to BLM at that time—indeed, BLM recognized that it might *never* be built—BLM addressed Tule Wind Phase II very differently in its alternatives analysis from the other components under review, with

BLM candidly admitting in the EIS that the action alternatives, with respect to Tule Wind Phase II, "would essentially be the same." *Id.* Federal Defendants admit as much in their brief, stating that "these action alternatives *are identical for purposes of Phase II*." Fed. Br. at 16 (emphasis added). Thus, under binding precedent from the Court of Appeals, it is beyond legitimate dispute that BIA had to consider reasonable project alternatives for Tule Wind Phase II since, at the time of BIA's decision to proceed with placing turbines on ridgelines, no agency had ever examined alternatives other than constructing the project in full or not constructing it at all.

The Ninth Circuit has routinely rejected comparable claims that an agency can avoid ever considering site-specific project alternatives. *See* Pls. Br. at 26-29. For example, in an analogous case, the Ninth Circuit addressed a situation in which the Court had previously upheld a programmatic decision and accompanying EIS, but nevertheless rejected BLM's subsequent site-specific NEPA review for failing to consider reasonable alternatives. The Court explained:

> We are troubled by BLM's decision not to consider a reduced- or no-grazing alternative at the site-specific level, having chosen not to perform that review at the programmatic level. Although we have held above that the decision not to consider these alternatives in the Breaks Resource Plan did not violate NEPA, this decision has deprived BLM of information on the environmental impacts of the unconsidered alternatives. . . . It is at this stage, when the agency makes a critical decision to act, that the agency is obligated fully to evaluate the impacts of the proposed action. The analysis in the Breaks EIS was sufficient for the proposed programmatic action, but the proposed permit renewal at the site-specific level demands more. *Where modification of grazing practices is not considered at a programmatic level . . . , it is all the more important that agency actions on site-specific areas give a hard and careful look at [alternatives and] impacts*.

W. Watersheds Project v. Abbey, 719 F.3d 1035, 1050-51 (9th Cir. 2013) (emphasis added). In turn, the Ninth Circuit rejected BLM's site-specific NEPA review

because the action alternatives all "reauthorized grazing at the exact same level" and stated that "we do question how an agency can make an informed decision on a project's environmental impacts when each alternative considered would authorize the same underlying action." *Id.*; *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812-13 (9th Cir. 1999) (rejecting EIS where "[t]he EIS considered only a no action alternative along with two virtually identical alternatives"); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (finding that an SEIS "lacked a reasonable range of action alternatives" where all of the action alternatives "are virtually indistinguishable from each other").

This Court, too, should reject BIA's attempt to avoid *ever* analyzing any alternatives (including those stressed by FWS and CDFG) that would result in a reduced-turbine project and thus lessen risks to eagles and other birds, which BLM's prior EIS indisputably did not consider. *See, e.g.*, *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1097 (9th Cir. 2006) (explaining that if an agency does not consider reasonable alternatives at the programmatic stage, then it has an "obligation" to consider such alternatives at the site-specific stage).[4]

[4] As Plaintiffs previously highlighted, the D.C. Circuit recently applied these NEPA principles to another wind project authorized by a federal agency. *See* Pls. Br. at 28. In that case, the agency only considered two action alternatives to the proposed action—"a minimally restricted operations alternative" and a "maximally restricted operations alternative," despite comments specifically requesting that the agency consider mid-range alternatives between the maximum and the minimum operational restrictions. *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 572 (D.C. Cir. 2016). The court concluded that the agency "failed to consider a reasonable range of alternatives because it did not consider any reasonable alternative that would be economically feasible while taking fewer bats than Buckeye's proposal," and the court therefore remanded the decision for "[a]n analysis of a realistic mid-range alternative with a cut-in speed that would take materially fewer bats than Buckeye's proposal while allowing the project to go forward." *Id.* at 576-77. The same result is required here to look at project configuration alternatives between all or nothing, as advised by FWS and CDFG.

As to Defendants' argument that BLM's alternatives analysis somehow encompassed a full range of action alternatives with respect to Tule Wind Phase II because elsewhere in the EIS BLM deferred authorizing this project and stated that BIA might ultimately construct "all, none, or part of the second portion" based upon the results of new wildlife studies and consultation with FWS and CDFG, this contention borders on the nonsensical. Although Federal Defendants are correct that BLM's EIS "afforded the flexibility to authorize some, all, or none of the proposed ridgeline turbines based on the outcome of monitoring efforts," Fed. Br. at 14, they have conflated BIA's ongoing *discretion* to authorize construction of the project with BIA's *obligation* to adequately analyze various project alternatives should BIA opt to exercise its discretion to proceed with the project. Simply put, the mere acknowledgement that BIA retained the ability, upon assessing further studies and obtaining the views of expert agencies, to authorize the construction and operation of at least some turbines on the ridgeline, does not remotely constitute an in-depth exploration of site-specific Tule Wind Phase II alternatives and their relative environmental impacts. If anything, such an acknowledgement suggests that if BIA were to determine that it is appropriate to proceed with Phase II, *BIA* would consider, on the basis of the new evidence obtained, whether in fact to build all, none, or part of the project predicated upon a rigorous comparison of those alternatives. In any event, Defendants' suggestion that the mere recognition that BIA could ultimately "authorize some, or, or none of the proposed ridgeline turbines" is somehow sufficient for a "hard look" at alternatives for a ridgeline project cannot pass muster under Circuit precedent.

Next, as to Defendants assertion that the Court should overlook the fact that no agency has ever examined reasonable *reduced-project alternatives* specific to Tule Wind Phase II (as urged by FWS and CDFG among others) due to the fact that BLM did analyze alternatives for *other* components of a much larger suite of agency actions, *see* Fed. Br. at 15-16, that argument is also foreclosed by Ninth Circuit case

law. As explained above, where there exists a programmatic decision authorizing many different actions and a subsequent agency decision authorizing a separate site-specific action, the Court of Appeals has consistently held that the agency must consider a reasonable range of action alternatives for the site-specific action *either* at the programmatic stage *or* at the site-specific stage. *See, e.g.*, *Rumsfeld*, 464 F.3d at 1097 (explaining that if an agency does not consider reasonable alternatives at the programmatic stage, then it has an "obligation" to consider such alternatives at the site-specific stage); *Abbey*, 719 F.3d at 1050-51 ("Where [alternatives are] not considered at a programmatic level . . . it is all the more important that agency actions on site-specific areas give a hard and careful look at" reasonable alternatives.); *see also* 40 C.F.R. § 1508.28 (setting forth the process of "tiering" in NEPA documentation, in which agencies address "general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses (such as regional or baseline program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared); *id*. at § 1508.28(b) (explaining that "tiering" is "appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided *or not yet ripe*") (emphasis added).

Here, regardless of the varying alternatives BLM analyzed with respect to the transmission line, substation, or other components, all parties agree that the "action alternatives are identical for purposes of Phase II," Fed. Br. at 15-16, which is fatal to Defendants' position. Because Defendants admit that, in contrast to the other agency actions before BLM in its programmatic EIS, BLM did not undertake any site-specific analysis with respect to Tule Wind Phase II and reasonable alternatives to *that* project because that action was "not yet ripe," 40 C.F.R. § 1508.28(b), and hence was expressly deferred for subsequent decisionmaking by BIA, it was

incumbent on BIA to prepare site-specific NEPA review in connection with its December 2013 decision to authorize this project in order to analyze reasonable project alternatives including those long recommended by the expert wildlife agencies to reduce the dangers posed to eagles and other birds.

Finally, Federal Defendants make the puzzling assertion that "it is not entirely clear what hypothetical additional alternative Plaintiffs claim BIA should have examined." Fed. Br. at 16. As Plaintiffs have stressed in both their opening brief and this brief, at minimum BIA should have looked at alternative project configurations that would have reduced the size of the project—especially by removing the turbines identified by FWS and CDFG as presenting the highest level of risk to eagles, eagle nests, and other migratory birds—in order to assess the relative environmental impacts of each alternative configuration and the mitigation measures needed to reduce risk to a sufficient threshold at these varying levels of project magnitude.

There is nothing novel about this approach to analyzing alternatives under NEPA; agencies frequently analyze alternative project configurations to reduce wildlife and other environmental harms for actions ranging from renewable energy projects, hydroelectric dams, military training facilities, pipelines, highways, mining operations, timber sales, shopping malls, and residential developments. *See, e.g.*, *Coal. for Canyon Preservation v. Bowers*, 632 F.2d 774, 784 (9th Cir. 1980) (rejecting EIS that "discussed several alternatives," because of agency's failure to consider the "reasonable and obvious . . . alternative of an improved and widened two-lane road for any portion of the project," instead of a four-lane highway); *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588, F.3d 718, 722 (9th Cir. 2009) (noting that agency's EIS included "a fourth action alternative" involving "smaller expansions . . . [to] mining pits" and "smaller heap-leach facilities"); *Tillamook Cnty. v. U.S. Army Corps of Eng'rs*, 288 F.3d 1140, 1145 (9th Cir. 2002) (noting that EA's alternatives analysis included "differing reservoir levels" for dam

heightening project); *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 887 (9th Cir. 2007) (explaining that EIS for ski area expansion considered several alternatives limiting the size of the expansion and the ensuing impacts); *League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1067 (9th Cir. 2012) (representing that the EIS considered an alternative that would "leave undisturbed 372 acres of spotted owl habitat . . . . reduc[ing] the total logged area in the Project by about 15%); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1051, 1068 (D. Ariz. 2001) (holding that agency failed to consider a number of reasonable alternatives including "a modified land exchange on a smaller scale").

Accordingly, NEPA required that BIA consider reduced-project alternatives for Tule Wind Phase II on the ridgeline lands administered by BIA (and the consequent reduction in impacts to avian resources), consistent with the legal requirements imposed on all other federal agencies undertaking environmentally damaging activities, in order to, at minimum, analyze in depth the specific reduced-project configuration alternatives long urged by the expert wildlife agencies based on the best available scientific evidence concerning eagles and migratory birds.

III. EVEN IF BIA WERE NOT REQUIRED TO PREPARE CONTEMPORANEOUS NEPA REVIEW IN CONNECTION WITH ITS DECEMBER 2013 ROD, BIA WAS REQUIRED TO AT LEAST SUPPLEMENT BLM'S EIS BEFORE AUTHORIZING TULE WIND PHASE II BASED ON HIGHLY SIGNIFICANT NEW INFORMATION AND MAJOR PROJECT CHANGES.

Although the Court need not reach Plaintiffs' supplemental NEPA claims if it determines that BIA violated NEPA by failing to prepare any contemporaneous NEPA review in connection with its December 2013 ROD, these claims provide additional, independent legal grounds for vacating BIA's ROD and remanding for additional NEPA analysis.

A. BIA Violated NEPA by Failing to Prepare Supplemental NEPA Review to Assess Highly Significant Information Received by the Agency between October 2011 and December 2013 Indicating that Tule Wind Phase II is a "High-Risk" Project and Should be Abandoned or Substantially Modified as a Result.

In their opening brief, Plaintiffs explained that, as contemplated in BLM's October 2011 EIS, BIA received copious amounts of evidence, expert opinions and recommendations, and other highly probative materials between October 2011 and December 2013 clearly indicating that Tule Wind Phase II, as planned, constitutes a "high-risk" project for golden eagles and other birds and therefore should be abandoned altogether or at least substantially redesigned to remove the highest-risk turbines. *See* Pls. Br. at 30-37. Plaintiffs further explained that despite NEPA's requirement that agencies "[s]hall prepare supplements to . . . final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(1)(ii), BIA disregarded these crucially important materials bearing on the site-specific impacts of this project and alternatives to it, failing to heed the warnings and recommendations contained therein and never subjecting these materials and their underlying evidence to any NEPA review whatsoever. *Id.* Plaintiffs pointed out that while turning a blind eye to such materials would be unlawful in the ordinary case, it is especially egregious in this case because BIA had previously committed (through BLM's EIS) to base its Tule Wind Phase II decision on precisely the materials that BIA ultimately neglected in making its final decision. *Id.*

In response, Defendants first argue that the information received after October 2011 is not "new" because it is "simply cumulative of the analysis in the EIS" and merely "confirms the EIS's finding that the Project will likely impact golden eagles." Fed. Br. at 20, 23. Next, Defendants argue that Plaintiffs have not "explain[ed] *why* this information is purportedly significant." *Id.* at 21. Finally,

Defendants argue that, even though the agency did not prepare any supplemental NEPA review formally analyzing this information, "BIA did consider and address these concerns in its ROD." *Id.* at 25. None of these arguments is convincing.

Defendants' novel argument that site-specific materials BIA irrefutably received *after* BLM completed its October 2011 EIS do not constitute "new" information for supplemental NEPA review purposes lacks merit. Not only have Defendants failed to cite any pertinent precedent supporting this counter-intuitive proposition, but it cannot be sustained under the particular facts of this case. Once again, commenters identified *generalized* concerns about eagle and bird mortality in response to BLM's Draft EIS, resulting in a decision by BLM to *defer* authorizing construction of Tule Wind Phase II *until and unless* BIA obtained further eagle data and expert agency opinions and recommendations through a mandatory consultation process to ensure that "[t]urbine locations exceeding the acceptable risk levels to golden eagles . . . will *not* be authorized for construction," TULE624-25 (emphasis added). Thus, the clear indication in the EIS was that BIA would, in fact, obtain critically important information concerning wildlife mortality risks that would have to inform the agency's final decision as to whether to construct all, none, or part of Tule Wind Phase II. Thus, for BIA to now assert that it had no obligation to even analyze under NEPA crucial information that the EIS required it to obtain *before* making any decision concerning Tule Wind Phase II—i.e., information which made crystal clear that the proposed project is, in fact, a "high-risk" site in need of major macrositing and micrositing changes, TULE106446-47—makes no legal or logical sense.

Moreover, Defendants' assertion that BIA need not supplement BLM's NEPA review because the EIS "acknowledges that eagles are likely to be taken, and nothing in the FWS's comments is inconsistent with the analysis in the EIS," Fed. Br. at 25, must also be rejected under pertinent precedent. In addition to the fact that BLM's generalized statements in the EIS about eagle impacts on the ridgeline

were not informed by any site-specific information for Tule Wind Phase II—the details of which did not come to fruition until at least the August 2012 Phase II ABPP, one year after BLM issued its EIS—it would completely turn NEPA on its head if an agency could admit the existence of an impact in general terms in an EIS and on that basis defer the underlying decision for a later time, and then, after obtaining highly significant new materials bearing on the actual nature and extent of the impact, simply proceed with the project without ever considering under NEPA whether and how the project should proceed *in light of the new information that the agency said was necessary to make an informed decision*.

This is why the Ninth Circuit and other courts have expressly rejected the argument that supplemental NEPA review is not required where new information may reinforce earlier prior concerns but adds significant new data bearing on those concerns. *See, e.g.*, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558-559 (9th Cir. 2000) (rejecting federal government's argument that supplemental NEPA review was not required because new information merely "reconfirmed" the conclusions of a prior EIS); *Sierra Club v. Bosworth*, No. 05-cv-00397, 2005 WL 2204986, at* 3 (N.D. Cal. Sept. 9, 2005) (finding that an FWS report required supplemental NEPA review by the Forest Service where it "appears to confirm . . . a suspicion" of the agency in a prior decision); *cf. Sierra Club v. U.S. Army Corps of Eng'rs*, 701 F.2d 1011, 1032 (2d Cir. 1983) ("Where the Corps may rely on an EIS previously issued by a sister agency, the determination of whether a Corps permitting decision was arbitrary and capricious depends not only on the information disclosed by that EIS, *but also on information disclosed by later studies and information conveyed to the Corps*.") (emphasis added). Thus, there is no basis for concluding that this information—conveyed to BIA after October 2011—was not "new" merely because this post-EIS, site-specific information regarding the final layout of Tule Wind Phase II reinforced and supplemented some of the generalized

projections and concerns in the EIS that a ridgeline project would pose a far higher risk to eagles and other birds than the approved project in the valley.[5]

As to Defendants' next argument—that Plaintiffs have not "explain[ed] *why* this information is purportedly significant," Fed. Br. at 21—Defendants are simply wrong. Plaintiffs devoted many pages of their opening brief explaining the unprecedented, and extremely significant, nature of the materials that came to light between October 2011 and December 2013 demonstrating that: (1) BIA's proposed project layout poses a high risk to eagles and specific eagle breeding territories, *see* TULE106446-47 ("Phase II of this project represents a *high risk for golden eagle mortality*" and has "great potential to *cause the loss of a territory* and would likely cause ongoing mortality of breeding eagles and their offspring") (emphases added); (2) the mitigation measures proposed by BIA in its Phase II ABPP are entirely insufficient to reduce the wildlife risks to a legally acceptable level, *see id.* (determining that the ABPP's measures "to curtail up to 4 turbines near this nest site, *would not alleviate the potential loss of this territory*") (emphasis added); and (3) the consensus view of the expert wildlife agencies is that this project layout should be abandoned entirely or at least substantially redesigned, *see* TULE106446 (FWS urging BIA to "consider a different turbine siting design or moving the

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[5] Relatedly, the Ninth Circuit has explained that even where environmental impacts are certain but there remains uncertainty as to the magnitude and intensity of those effects, that nevertheless requires an EIS to examine the site-specific impacts to affected resources. *See Nat'l Parks Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732-33 (9th Cir. 2001) (explaining that the "scientific evidence presented in the [agency's] own studies revealed very definite environmental effects," that "[t]he uncertainty was over the intensity of those effects," and "[t]hat is precisely the 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"). Thus, because BLM's EIS recognized, at minimum, grave uncertainty as to the magnitude and intensity of impacts in the event that BIA ultimately decided to authorize this project, BIA needed to supplemental the EIS to address these issues in a frank and objective manner.

project to another location to minimize and avoid eagle take" and take of other birds); TULE111549 (CDFG recommending that, at minimum, "BIA remove turbines H-1 and H-2 as part of the Reduced Ridgeline Project" "[d]ue to their proximity to the nest site, the relative nest density, overall productivity of the Cane Brake nests, and the overlap of the estimated home range").[6]

Under these extraordinary circumstances—in which the post-EIS materials include the formal opinions, recommendations, and determinations of *the* expert agencies delegated the responsibility for protecting and managing the avian species at issue—it is impossible to conclude that BIA complied with NEPA by sweeping aside this crucially significant information from its sister agencies without even considering whether these materials warrant at least a formal, public assessment of the proposed project layout, various layout alternatives, and the relative risks associated with such alternatives. In a functionally identical case, the Ninth Circuit admonished BLM precisely because it "failed to address concerns raised by its own experts, FWS, the EPA, and state agencies." *W. Watersheds Proj. v. Kraayenbrink*,

[6] Although NEPA is a procedural statute, its "action-forcing" mechanisms are designed to ensure that the action agency must consider the impacts of its proposed action and whether those impacts will violate other substantive environmental laws, as informed by information provided by the relevant agencies that enforce those laws. *See* 40 C.F.R. § 1508.27(b)(10) (requiring an EIS where an "action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment"). Here, FWS—as the expert agency that enforces BGEPA and the MBTA—did not recommend that BIA consider reasonable alternatives (such as abandoning the project or substantially redesigning it) merely for the sake of stating the obvious, but also because everyone agrees that this project *will* inevitably kill *many golden eagles and other migratory birds*, which, in the absence of both BGEPA and MBTA permits (which neither BIA nor Tule Wind LLC have obtained), constitute patent violations of federal law each time a bird is killed. Thus, FWS's post-EIS determinations are especially important because it found that "[t]he conditions outlined in the [Phase II] ABPP, as presented, would *not likely meet the conservation standard of [BGEPA]*," TULE106453 (emphasis added), which makes all the more glaring BIA's failure even to consider these inevitable violations of federal law in a NEPA document.

632 F.3d 472, 492 (9th Cir. 2011). The Court noted that BLM's conclusion as to the environmental impacts of the proposed action were "in direct conflict with the conclusion of its . . . sister agency, FWS," and that BLM "never seriously considered the concerns raised by FWS and the California Department of Fish and Game among others." *Id.* On that basis, the Court held that "[w]hile diplomacy with permittees or lessees . . . is certainly a worthy goal, it is no substitute for the BLM's obligations to comply with NEPA and to conduct a studied review and response to concerns about the environmental implications of major agency action." *Id.* In turn, the Court invalidated the underlying decision because "BLM gave short shrift to a deluge of concerns from its own experts, FWS, the EPA, and state agencies" and did not "ma[k]e responsive changes to the proposed" action. *Id.* at 493. The same is plainly true in this case, where diplomacy with the Ewiiaapaayp Band of Kumeyaay Indians is a worthy goal but does not and cannot supplant BIA's NEPA duties.

Finally, evidently recognizing the weakness of their position given BIA's failure to supplement BLM's EIS despite receiving many highly probative materials from sister expert agencies after the EIS was issued, Federal Defendants hedge by asserting that "BIA did consider and address these concerns in its ROD." *Id.* at 25. Thus, Defendants argue both that these materials did not require any consideration (which, according to Federal Defendants, was why BIA deliberately opted *not* to prepare a supplemental EIS or even an EA) and that BIA *did*, in fact, "consider" these materials albeit outside of any public NEPA process. Pertinent rulings, as well as common sense, make clear that BIA cannot have it both ways.

BIA's ROD (or any other document contained in the record besides an EIS or EA) is not, and does not purport to be, equivalent to the formal NEPA procedures required by federal law. The NEPA implementing regulations make crystal-clear that a ROD is adopted *after* an agency has engaged in the requisite NEPA review; it is not a *substitute* for such review. *See, e.g.*, 40 C.F.R. § 1502.1 (explaining that an

EIS "is more than a disclosure document. *It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions*.") (emphasis added); *id*. at 1502.2(f) (EIS's "shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"). Further, here, BIA's ROD was never even circulated for public comment and thus lacked the ability to change the ultimate outcome in response to comments, thereby running afoul of the statutory objectives underlying Congress's enactment of NEPA. Consequently, Defendants' effort to conflate the ROD with the NEPA analysis (including public input on the draft NEPA analysis) that must *precede* the ROD, fails. *See, e.g.*, *Village of False Pass v. Watt*, 565 F. Supp. 1123, 1141 (D. Alaska 1983) ("Documents not incorporated in the [EIS] by reference or contained in a supplemental [EIS] cannot be used to bolster an inadequate discussion in the [EIS]."), *aff'd sub nom Village of False Pass v. Clark*, 735 F.2d 605 (9th Cir. 1984); *Dubois v. U.S. Dept. of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996) ("Even the existence of supportive studies and memoranda contained in the administrative record but not incorporated in the EIS cannot bring into compliance with NEPA an EIS that by itself is inadequate. . . . Because of the importance of NEPA's procedural and informational aspects, if the agency fails to properly circulate the required issues for review by interested parties, then the EIS is insufficient even if the agency's actual decision was informed and well-reasoned."); *League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) ("A federal agency's defense of its positions must be found in its EA" rather than other documents in the record).

Accordingly, BIA's December 2013 ROD—which was *never* circulated for public comment, lacked any analysis of alternatives to the selected project layout long stressed by FWS and CDFG to reduce avian mortality, and did not provide any mechanism by which stakeholder input could shape a different outcome—does not even purport to fulfill NEPA's objectives or requirements and, in any event, as a

non-NEPA document simply "cannot serve as a substitute" for NEPA review. *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 566-67 (9th Cir. 2000); *id.* ("It is inconsistent with NEPA for an agency to use an[other document], rather than a supplemental EA or EIS, to correct this type of lapse.").

For all of these reasons, BIA violated NEPA by failing to prepare any supplemental NEPA review to examine the highly significant materials received after October 2011, including formal memoranda transmitted by agencies with "special expertise," 40 C.F.R. § 1508.26, emphasizing the serious risks of BIA's selected project layout to golden eagles and other protected bird species, the need to consider alternative layouts posing lesser risks, and the suite of mitigation measures necessary to ensure that the project satisfied a legally sufficient threshold to proceed under applicable environmental laws.

B. BIA Also Circumvented NEPA by Failing to Supplement BLM's EIS in Order to Address Substantial Project Changes Not Contemplated by the EIS.

Plaintiffs have also argued that BIA contravened NEPA by failing to prepare any supplemental NEPA review analyzing substantial changes in the project design ultimately selected by BIA in its December 2013 ROD (i.e., 20 turbines on ridgeline lands managed by BIA) and the generic layout that BLM previously contemplated in each of the EIS's action alternatives concerning Tule Wind Phase II for up to 18 turbines on the ridgeline lands managed by BIA. *See* Pls. Br. at 37-40. Plaintiffs explained not only that BIA has now adopted a project that in raw numbers constitutes an 11% increase in terms of project footprint and the overall rotor-swept area of commercial industrial-scale wind turbines obstructing eagle and other bird migratory routes on the ridgeline, but also that this expanded project has never—in BLM's EIS or otherwise—been subjected to public, agency, or stakeholder scrutiny or compared with ridgeline project alternatives such as a smaller or different project footprint that would inevitably result in reduced impacts to avian resources. *Id.*

In response, Defendants contend that: (1) these new Phase II turbines were already contemplated in the EIS and "[t]he only difference is jurisdictional: rather than being sited . . . on BLM land, they [are now] approved for construction on tribal land," and (2) an increase in two turbines "is not a substantial change in the proposed action sufficient to require NEPA supplementation." Fed. Br. at 28-29. These arguments are meritless.

Defendants' jurisdictional argument attempts to rewrite history, which is made clear by the fact that the *only* record documents cited in support of BIA's purported ability to construct more than 18 turbines on lands administered by that agency is BIA's *own* ROD with *no* reference to BLM's EIS or any documents contemporaneous to the EIS. *See* Fed. Br. at 29 (citing only to BIA's ROD at TULE105454 and TULE105459). In reality, as discussed, BLM deliberately decided in its EIS and ROD *not* to authorize *any* ridgeline turbines on BLM's own lands at that time or in the future, in order to avoid grave negative impacts to eagles and other birds, and BLM relied on that decision as a crucial part of its overall mitigation package for Tule Wind Phase I to bring that portion of the project into legal compliance. Defendants have conceded as much, stating that BLM "did not approve *any* of the ridgeline turbines *over which it had jurisdiction*." Fed. Br. at 29 (emphases added). Thus, although BLM deferred making any decision as to whether BIA might ultimately decide to construct *up to 18 ridgelines turbines* on the lands administered by BIA—indeed, no Phase II alternatives in the EIS considered *any* Phase II project layout of more than 18 turbines on BIA-administered lands, *see* TULE74-76—nothing in BLM's EIS contemplated or analyzed any Tule Wind Phase II project configuration on BIA lands with greater impacts than those inherent in an 18-turbine project, much less project layout alternatives or mitigation measures that would be necessary if BIA opted to construct more turbines than the maximum of 18 expressly contemplated in the EIS.

In any event, given that BLM *refused* to construct any turbines on its *own* lands because of the risks posed by ridgeline turbines and received mitigation credit for that decision, there is no legal basis under NEPA for BIA to subsequently commandeer BLM's abandoned turbines for its own uses and in the process undermine BLM's ongoing mitigation efforts that the Ninth Circuit already upheld. *See Protect Our Communities*, 825 F.3d at 582-83 (affirming BLM's decision to authorize Tule Wind Phase I in light of the fact that BLM "repositioned turbines in valleys *rather than on top of ridgelines*, which would lessen any risk to" birds and especially golden eagles) (emphasis added). To do so, BIA, at minimum, had to analyze the effects of significantly increasing its own project layout, including by incorporating turbines that BLM had concluded in the EIS would *never* be built.

The Court should also dismiss Federal Defendants' cursory argument that BIA's revival of two abandoned BLM turbines with massive rotor-swept areas endangering golden eagles and other migratory birds "is not a substantial change in the proposed action sufficient to require NEPA supplementation." Fed. Br. at 30. Although NEPA supplementation may not be "required in response to every design change" that has little or no environmental impact, *id.*, the increase of the Tule Wind Phase II project layout by 11% using turbines that BLM determined *must* be jettisoned from BLM's own action to satisfy applicable legal safeguards constitutes a substantially expanded project with different and greater impacts than the one considered in BLM's EIS and ROD. Put simply, the Tule Wind Phase II project configuration ultimately adopted by BIA was neither quantitatively nor qualitatively within the spectrum of alternatives or impacts examined in the EIS specific to Tule Wind Phase II, which expressly capped the number of turbines on BIA-administered lands at a maximum of 18 turbines. *See, e.g., New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) (finding that the final project design "was qualitatively different and well outside the spectrum of anything

BLM [previously] considered . . . and BLM was required to issue a supplement analyzing the impacts of that alternative under 40 C.F.R. § 1502.9(c)(1)(i)").

That BIA cannot lawfully support its expanded project in the absence of NEPA review addressing *this particular project* is even more compelling in view of the fact that FWS and CDFG have raised site-specific concerns about the *location of individual turbines on BIA-administered lands* given their proximity to eagle nests and migratory routes. *See, e.g.*, TULE111549 (CDFG recommending that, at minimum, "BIA remove turbines H-1 and H-2" "[d]ue to their proximity to the nest site, the relative nest density, overall productivity of the Cane Brake nests, and the overlap of the estimated home range"); TULE106446 (FWS urging BIA to "consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take" and take of other birds). Accordingly, especially on this record, the Court cannot sustain BIA's "unanalyzed, conclusory assertion that its modified plan would have the same type of effects as previously analyzed alternatives . . . . [b]ecause *location*, not merely total surface disturbance, affects habitat fragmentation." *Richardson*, 565 F.3d at 708.

For these reasons, as the federal and state expert wildlife agencies have concluded, adding two massive industrial-scale wind turbines to a ridgeline known to provide essential habitat for golden eagles and other migratory birds is not, as Defendants imply, a "very minor modification." Fed. Br. at 30. By deciding to place two additional mortality-inducing turbines onto an already "high-risk" ridgeline location for a wind energy project, BIA triggered its duty to prepare supplemental NEPA review to consider the import of these consequential changes.

IV. BY EXCLUDING THE PUBLIC AND ITS SISTER AGENCIES FROM A FORMAL NEPA REVIEW PROCESS IN CONNECTION WITH ITS DECEMBER 2013 ROD, BIA THWARTED NEPA'S PUBLIC DISCLOSURE AND PUBLIC INVOLVEMENT REQUIREMENTS.

In their opening brief, Plaintiffs cited the many NEPA regulations requiring that agencies meaningfully involve the public, sister agencies, and other stakeholders in the decisionmaking process, including by disclosing all relevant information bearing on the project, its impacts, and reasonable alternatives to ensure transparency and integrity in the process. *See Pls. Br.* at 40-44. In light of BIA's failure to publicly disclose highly important evidence and information it received criticizing the project and recommending needed changes, in conjunction with BIA's refusal to conduct any public NEPA review process whatsoever in connection with its Tule Wind Phase II decision, Plaintiffs argued that BIA slammed the door shut on transparency and integrity for this particular decision. *Id.*

In response, Defendants only offer two arguments: (1) NEPA's "vague" public participation and public disclosure regulations do not create a separate cause of action, and (2) BIA made two documents—the Phase II ABPP and the Fire Plan—"available for public comment." Fed. Br. at 30-32. The Court can easily dispense with both assertions.

As a threshold matter, NEPA's public participation requirements are neither "vague" nor do they deprive this Court of finding a violation due to what Defendants refer to as an "amorphous obligation." *Id.* To the contrary, these requirements are very concrete. *See, e.g.*, 40 C.F.R. § 1500.2 (requiring that agencies "shall to the fullest extent possible . . . *encourage and facilitate public involvement in decisions which affect the quality of the human environment*") (emphasis added); *id.* § 1500.1(b) ("NEPA procedures must insure that *environmental information is available to public officials and citizens before decisions are made and before actions are taken*.") (emphasis added); *id.* (explaining that "[a]ccurate scientific analysis, *expert agency comments, and public*

scrutiny are essential to implementing NEPA") (emphasis added); *id.* § 1502.1 (agencies "shall provide full and fair discussion of significant environmental impacts and *shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment*") (emphasis added).

On the basis of these specific requirements, courts routinely find that agencies circumvented the public disclosure and public participation requirements that are so crucial to the NEPA process. *See California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982) ("NEPA's public comment procedures are at the heart of the NEPA review process."); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (NEPA "provides for broad-based participation" and requires "a cross-pollinization of views."); *Bering Strait Citizens for Responsible Res. Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 953 (9th Cir. 2008) (holding that an agency "must provide the public with sufficient environmental information, considered in the totality of the circumstances, to permit the members of the public to weigh in with their views and thus inform the agency decision-making process" and explaining that "[t]he way in which the information is provided is less important than that a sufficient amount of environmental information—*as much as practicable*—be provided so that a member of the public can weigh in on the significant decision that the agency will make").

Hence, because "[t]he CEQ Guidelines therefore create qualitative standards by which public involvement must be measured," a decision "containing no substantive information on mitigation violates the CEQ Guidelines related to agency requirements for public involvement and deprives the public of its procedural right to an adequate opportunity to participate in the [decisionmaking] process." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 809-10 (S.D.W.V. 2009). That is precisely the situation before the Court, where BIA's process has completely deprived the affected public of any formal NEPA process in

which to voice their concerns and views as to reasonable alternatives, project impacts, and mitigation measures. As courts have found, the failure to disclose pertinent information and subject it to rigorous NEPA review so that "the public will be able to comment intelligently" dooms BIA's decision in this case because it "deprived Plaintiffs of an existing procedural right." *Id.* at 801-04.

BIA's failure to publicly disclose vital site-specific information about the project, its impacts, alternatives to the project, and a suite of alternative mitigation measures is exacerbated in this case because the highly germane information BIA withheld from the public did not merely involve raw data that can be difficult to digest and understand, but included formal scientific determinations by FWS and CDFG calling for an entirely different approach to this project. However, a member of the public would have had no idea of these major inter-agency disagreements and opposing viewpoints based on the Phase II ABPP and Fire Plan released for public comment, thereby further inhibiting the ability of the public to weigh in on this project in a meaningful fashion. As the Ninth Circuit has held, it is an express NEPA violation where, as here, "the concerns raised by FWS . . . . identify scientific evidence and opinions contradicting the [agency's] conclusion," but the agency then fails "to disclose and discuss [these] responsible opposing scientific viewpoints in" a formal NEPA document. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003). That alone is fatal to BIA's argument.

Defendants' argument that it did, in fact, subject two documents to public comment—the Phase II ABPP and Fire Plan—fares no better. *See* Fed. Br. at 31-32. To begin with, it is indisputable that neither of these "plans" constituted, or purported to constitute, a NEPA document. Thus, irrespective of BIA's reasons for allowing public comment on them, that has nothing to do with whether BIA complied with the public participation obligations specifically imposed by NEPA.

Further, not only did BIA fail to publish notice of this limited comment opportunity in the Federal Register as would be required for formal NEPA review,

but in any event BIA's solicitation of comment from the agency's own selection of a handful of parties concerning two documents cherry-picked from a much larger group of relevant materials bearing on the project cannot remotely satisfy NEPA's strictures. To the extent that a party even knew about the comment process, comment on those two documents was not structured even to inform the public about the fundamental inter-agency discord as to this project in a way that could foster and facilitate meaningful public participation by "present[ing] the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. As a result, "armed only with limited information," it was impossible for "members of the public . . . to comment intelligently." *Ohio Valley Envtl. Coal.*, 674 F. Supp. 2d at 801. This, too, has subverted the NEPA process and the Congressional objectives underlying it.

CONCLUSION

Plaintiffs respectfully request that the Court declare that BIA's December 2013 ROD and lease approval violated NEPA and its implementing regulations—and was arbitrary, capricious, and issued without observance of procedure required by law—and therefore set aside and remand BIA's decision for further consideration consistent with NEPA and the APA.

DATED: December 23, 2016

Respectfully submitted,

By: /s/ *William S. Eubanks II*
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CERTIFICATE OF SERVICE

I hereby state and certify that on December 23, 2016 I filed the foregoing document using the ECF system, and that such document will be served electronically on all parties of record.

Respectfully submitted,

/s/ William S. Eubanks II