No. 17-55647

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROTECT OUR COMMUNITIES FOUNDATION, *et al.*,

Plaintiffs-Appellants,

v.

WELDON LOUDERMILK, *et al*.,

Defendants-Appellees,

and

TULE WIND, LLC, and EWIAAPAAYP BAND OF KUMEYAAY INDIANS

Intervenor-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANTS' OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Protect Our Communities Foundation states that it has no parent corporation or any publicly held corporations that own 10% or more of its stock.

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APA	Administrative Procedure Act
BGEPA	Bald and Golden Eagle Protection Act
BIA	Bureau of Indian Affairs
BLM	Bureau of Land Management
CDFG	California Department of Fish and Game
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ER	Excerpts of Record
FEIS	Final Environmental Impact Statement
FWS	Fish and Wildlife Service
NEPA	National Environmental Policy Act
ROD	Record of Decision
SEIS	Supplemental Environmental Impact Statement

STATEMENT OF JURISDICTION

This case challenges a decision by the United States Bureau of Indian Affairs ("BIA") approving a lease for a wind energy facility. The district court, which had jurisdiction under 5 U.S.C. § 706 and 28 U.S.C. § 1331, granted summary judgment for Federal Defendants and Defendant-Intervenors Tule Wind, LLC ("Tule") and Ewiiaapaayp Band of Kumeyaay Indians ("the Tribe") on March 6, 2017. Plaintiffs Protect Our Communities Foundation, David Hogan, and Nica Knite ("Plaintiffs") filed a notice of appeal on May 4, 2016. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The issues are whether BIA acted arbitrarily and capriciously, and/or violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370m-12, by:

1. relying exclusively on an earlier Environmental Impact Statement ("EIS") to approve development of the wind energy project where that EIS specifically stated that because certain turbines likely pose great risks for golden eagles, BIA would approve only turbines that showed reduced risk based on new data and consultation with experts, and where experts subsequently indicated that new data did not show reduced risk;

2. failing to consider any alternatives between building all or no proposed turbines, although the EIS on which BIA relied obligated the agency to consider authorizing "part" of the project;

3. failing to prepare a supplemental EIS ("SEIS"), or even assess the significance of new information, when the agency received new information bearing directly on its decision's environmental impacts;

4. disregarding formal comments from the expert federal agency tasked with permitting incidental take of golden eagles regarding the necessary process for pursuing such a permit.

ADDENDUM

Pertinent statutory and regulatory provisions and excerpts appear in an Addendum.

STATEMENT OF THE CASE

Plaintiffs challenge BIA's decision to approve Phase II of the Tule Wind Project ("Tule Phase II"), an industrial-scale facility in southern California that even BIA concedes will kill federally protected golden eagles, in exclusive reliance on a prior EIS prepared by the U.S. Bureau of Land Management ("BLM"). Although BLM's EIS found that Tule Phase II would cause unacceptable risks to golden eagles and provided that BIA would approve the project only if new studies and expert agency consultation revealed reduced risks to eagles, and although

expert agencies found that new information revealed severe risks to individual eagles as well as the regional eagle population, BIA approved the project in full.

In the district court, Plaintiffs argued that BIA's decision violated NEPA and was otherwise arbitrary and capricious, including because BIA relied on BLM's EIS without implementing one of its key mitigation measures, failed to consider a reasonable range of alternatives regarding Tule Phase II, failed to prepare an SEIS to consider new information, and rejected without justification the views of the agency responsible for permitting the take of golden eagles regarding the proper timing to obtain such a permit. On motions for judgment on the pleadings and cross-motions for summary judgment, the district court sustained BIA's decision.

STATEMENT OF FACTS

I. PERTINENT STATUTES

A. NEPA

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA's "twin aims" obligate agencies "to consider every significant aspect of the environmental impact of a proposed action" and to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983).

To achieve NEPA's "core focus on improving agency decisionmaking," *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 n.2 (2004), agencies must take a "hard look" at all potential environmental impacts of an agency action and all reasonable alternatives to reduce such impacts. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989). Where significant impacts may occur, agencies must prepare an EIS. 40 C.F.R. § 1502.3. The analysis of alternatives "is the heart of the [EIS]." *Id.* § 1502.14. Failure to examine a viable alternative renders an EIS "inadequate." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999).

To serve NEPA's twin aim of "informed public participation," *Marsh*, 490 U.S. at 368, federal agencies "shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2. "NEPA's instruction that all federal agencies comply with [the statute] 'to the fullest extent possible' is neither accidental nor hyperbolic," but "is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 787 (1976).

If multiple agencies have jurisdiction over an action or distinct but related actions, one "lead agency" and other "cooperating agencies" may work

collaboratively. 40 C.F.R. §§ 1501.5–1501.6. "A cooperating agency . . . has an independent legal obligation to comply with NEPA," Forty Most Asked Questions Concerning CEQ's NEPA Regulations ("40 Questions"), 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981), and thus may only adopt a lead agency's EIS if "after an independent review of the statement, [it] concludes that its comments and suggestions have been satisfied." 40 C.F.R. § 1506.3(c). Otherwise, the cooperating agency "must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment." 40 Questions, 46 Fed. Reg. at 18,035. Similarly, if a cooperating agency encounters "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," the agency must issue an SEIS. 40 C.F.R. § 1502.9(c)(1).

Where lead and cooperating agencies take distinct actions, each agency must issue a separate Record of Decision ("ROD") for its own action and "explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their [RODs] earlier." 40 Questions, 46 Fed. Reg. at 18,035. A cooperating agency must implement mitigation measures in an EIS it adopts or supplements. 40 C.F.R. § 1505.3 (mitigation "shall be implemented by the lead agency or other appropriate consenting agency.").

B. The Bald And Golden Eagle Protection Act

Congress enacted the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. §§ 668–668c, to strictly prohibit "take" of any golden eagle "at any time or in any manner" unless permitted by the U.S. Fish & Wildlife Service ("FWS"). 16 U.S.C. § 668(a), (b). BGEPA defines "take" broadly to include "wound, kill, molest, or disturb," *id.* § 668c, and "take" includes direct incidental take, such as collisions with wind turbines, as well as indirect incidental take, such as habitat modification that adversely impacts eagles. 50 C.F.R. § 22.26.

FWS permits are the sole mechanism to authorize lawful take of golden eagles. 16 U.S.C. § 668a. FWS issues incidental take permits only if "take is compatible with the preservation of the . . . golden eagle; is necessary to protect an interest in a particular locality; is associated with, but not the purpose of, the activity; and cannot practicably be avoided." 50 C.F.R. § 22.26(a).

II. FACTUAL BACKGROUND

A. The Grave Threats To Golden Eagles

Human activities cause most golden eagle deaths, which occur too quickly for the birds to achieve replacement through reproduction. *See* Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494, 91,496 (Dec. 16, 2016). FWS has determined that "ongoing levels of human-caused mortality likely exceed [the number of eagles that can be removed

while still achieving a stable population], perhaps considerably." *Id.* "Golden eagles, in particular, are vulnerable to collisions with wind turbines," which in some areas "are a major"—and increasing—"source of mortality." ER185. Turbines also disturb eagles and lead to loss of nesting territories. ER186–87.

In southern California, threats to golden eagles are especially dire. Only 2,000 golden eagles remain in California. ER202. In San Diego County, where the project at issue is located, only 50-55 pairs of golden eagles nest, and only 20 pairs produce young in a given year. *Id.* Locally, "[t]he golden eagle population appears to be declining, primarily due to urban sprawl, but other factors affecting the eagles are human disturbance" of various types. *Id.* Human disturbance of nesting golden eagles "can be fatal to embryos and nestlings" and accounts for 85% of known nest losses. ER208. Because the loss of nests has "a much greater impact on eagle populations than the intermittent loss of individuals," FWS considers loss of a nesting territory to be "the equivalent of taking 4 individuals per year." ER112.

Tule Phase II is sited on a ridgeline "in close proximity" to occupied eagle nests and "visited regularly by eagles." ER115. At least ten golden eagle territories—i.e. areas used by a bonded eagle pair, ER173—exist within ten miles of the turbines, ER69–70; *see also* ER210 (depicting surrounding eagle territories). At least eight territories were "occupied"—i.e. contained courting or nesting

eagles, ER173—as recently as 2012, ER70. Four territories produced young in 2011, although two of five eaglets died within a year, ER79–80. The golden eagles near Tule Phase II comprise a significant portion of the golden eagle population in San Diego County and an even greater portion of the breeding population, *compare* ER69–70 (ten eagle pairs and four nests producing young nearby), *with* ER202 (50–55 eagle pairs in San Diego County and only 20 nests producing young). The significance of local eagle territories led FWS to find that these turbines could result in the loss of a breeding territory that would affect the larger eagle population. ER115.

The Canebrake eagle territory is particularly close to two Phase II turbines and thus at greatest risk. In 2010, the Canebrake eagles produced young, ER71, at a nest *only 680 feet* from the site of one turbine. ER69. In 2011, the Canebrake eagles produced young, ER71, at a nest *only 492 feet* from the site of one turbine and *1,207 feet* from another. ER70. A third nest used by the Canebrake eagles is *only 738 feet* from the site of one turbine and *1,549 feet* from another. *Id.* FWS found these turbines "would likely cause ongoing mortality of breeding eagles and their offspring," leading to elimination of this territory, equivalent to taking 4 eagles per year. ER112–14.[1]

[1] Golden eagles often use different nests within one territory. ER173.

Local golden eagles regularly traverse the site of Tule Phase II. Between 2011 and 2012, studies showed that 73 of 123 observed flight paths crossed the project's airspace. ER79. A Canebrake fledgling's home range "overlapped all turbines" at issue. ER80. The record contains maps depicting eagle use of the Tule Phase II area. ER160–65.

B. The Tule Wind Project

The Tule Wind Project ("Tule Wind") is a multi-phase wind energy facility proposed in southeastern San Diego County. ER119. Tule Wind comprises two distinct phases under separate agency jurisdiction: a 65-turbine project that BLM authorized in 2011 on BLM-managed lands in the McCain Valley ("Tule Phase I"); and Tule Phase II, consisting of 20 additional turbines that BIA separately authorized in 2013 on lands BIA manages in trust for the Tribe on a ridgeline above the McCain Valley. ER44–47.

Although BLM initially intended to authorize both phases in one ROD, *see* ER191, FWS's objections that wind turbines on the BIA-administered ridgelines would have unacceptable consequences for golden eagles led BLM to reconsider. *E.g.* ER200. BLM then decided not to authorize *any* ridgeline turbines, instead separating the Project into two phases: BLM's authorization of Phase I in 2011; and later authorization (if any) of "all, none or part" of Phase II by BIA after

further study and consultation with FWS regarding golden eagles impacts. *See* ER146–47.

1. BLM's Authorization of Phase I in the McCain Valley

BLM prepared an EIS regarding Tule Wind, releasing a Draft EIS ("DEIS") in 2010, *see* ER192, and a Final EIS ("FEIS") in October 2011, ER131. The DEIS considered five alternatives, including one without any ridgeline turbines, but did not consider any other alternatives for the ridgeline, such as eliminating or relocating *some* turbines to avoid or lessen impacts to golden eagles. *Id.*

In view of the information then available, the DEIS's preferred alternative did not include any ridgeline turbines because BLM found, with FWS input, that "[t]he proximity of active golden eagle nests to the proposed turbines [on the ridgeline] makes it probable that an adult or juvenile eagle could collide with the turbines." ER195. Accordingly, BLM found the ridgeline turbines "could become a continuing sink for golden eagles attempting to use nesting sites" near Phase II, *id.*, and that BLM's preferred alternative "would reduce impacts to golden eagles by siting turbines farther away from nesting eagles" and, in particular, would greatly reduce the risk of eliminating the Canebrake territory. ER194.

Various entities, including Plaintiffs, FWS, and the Tribe submitted comments. Although many comments described the ridgeline turbines' threats to golden eagles, *e.g.* ER179–80, the Tribe repeatedly opposed BLM's preferred

alternative of eliminating these high-risk turbines. *See* ER156. The Tribe supported separating the project into two phases, with BIA issuing a separate ROD regarding the ridgeline turbines, evidently because the Tribe believed BIA would more likely authorize these higher-risk turbines. ER156–57.[2]

FWS also supported separating Tule Wind into two phases, albeit for very different reasons. FWS believed the valley turbines could be constructed with low risk to eagles, and the second phase would be built only "if and when monitoring results and/or conservation measures indicate that take would be either avoided or offset." ER200; *see also id.* ("[M]onitoring of golden eagles to elucidate flight[] patterns of golden eagles in the vicinity will inform the risk assessment for the [ridgeline turbines]."). FWS also supported an Avian and Bat Protection Plan for Tule Phase I, but reserved judgment about Phase II, stating it would need to "review[] additional data" for any subsequent decision about the ridgeline turbines. ER153.

BLM issued its FEIS in October 2011, reiterating the risks to eagles, especially on the ridgeline. *E.g.* ER143. The FEIS's preferred alternative authorized only the lower-risk valley turbines and specifically declined to

[2] Notably, although *this* Tribe supported Tule Wind based on its economic value, other bands of the Kumeyaay Indians opposed the Project due to impacts on golden eagles. *E.g.* ER154 (Viejas Band criticizing "unmitigated impacts to . . . sacred golden eagle populations"); ER175 (Manzanita Band stating "eagles are important and that the tribe does not want any turbines destroying eagles").

authorize any ridgeline turbines. ER139; *see also* ER148 ("Turbines removed . . . present[] high risk of collision for golden eagles based on topography, landforms, and distance to known active nests."). BIA strenuously *opposed* BLM's preferred alternative, arguing that eliminating the ridgeline turbines was inconsistent with BIA's purpose of "facilitat[ing] the timely development of [the Tribe's] wind and solar energy resources." ER123. Although the FEIS found that impacts on eagles would be "unavoidable," "significant," and "unmitigable," ER138—and although BIA itself acknowledged "a lack of BIA biological expertise" regarding "[p]otential impacts to golden eagles," ER176—BIA disagreed, stating its "opinion that site specific minimization measures could be implemented" on the ridgeline "to reduce or if necessary to mitigate potential impacts to golden eagles," including the possibility that "[s]pecific turbine(s) could be eliminated if it is determined that risks outweigh benefits." ER125, 127. BIA also was "concerned" that the FEIS's preferred alternative of eliminating the ridgeline turbines was "inconsistent with BIA findings related to the[se] turbines." ER127. In short, BIA disagreed with fundamental aspects of the FEIS, including its preferred alternative and assessment of risk to golden eagles.

Like the Draft, the FEIS considered only all-or-nothing alternatives with regard to the ridgeline turbines, either allowing *no ridgeline turbines* or *all*

ridgeline turbines. The FEIS considered no alternatives that would eliminate or relocate *some* ridgeline turbines to reduce risk to eagles.

Importantly, BLM's FEIS included a key mitigation measure providing that BIA's subsequent authorization of Tule Phase II's higher-risk ridgeline turbines would proceed only if further study indicated that those turbines presented a "reduced risk" to golden eagles. ER146. Thus, BLM—and BIA as a cooperating agency—made the following binding commitment:

> Construction of the second portion of the project would occur at those turbine locations that show reduced risk to the eagle population following analysis of detailed behavior studies of known eagles in the vicinity of the Tule Wind project. Pending the outcome of eagle behavior studies, *all, none or part* of the second portion of the project would be authorized. . . . The final criteria determining the risk each location presents to eagles *will be determined* by the BLM or the appropriate land management agency, *in consultation with the required resource agencies*, tribes, and other relevant permitting agencies . . . . *Turbine locations exceeding the acceptable risk levels to golden eagles based on these final criteria* ***will not be authorized for construction***.

ER146–47 (emphases added). Thus, BLM and BIA made an unequivocal commitment that BIA would not authorize any ridgeline turbines unless ongoing study of golden eagle behavior showed that those turbines presented reduced risk.[3]

[3] After conservation organizations challenged BLM's 2011 EIS, this Court found that the EIS contained sufficient analysis to support BLM's decision to authorize the *valley* turbines, in part because this Court found that BLM had "drafted a comprehensive set of mitigation measures," including the mitigation measure that would "reposition turbines in valleys *rather than on top of ridgelines*." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 582–83 (9th Cir. 2016) (emphasis added). That case did not concern BIA's subsequent decision to

2. FWS's Ongoing Concerns with the High-Risk Ridgeline Turbines

Following BLM's ROD, the project developer drafted what it called a "Tule Wind Phase II Supplemental Avian and Bat Protection Plan" ("Plan"). The Plan was based on more "up to date information" and studies than were available when BLM issued its FEIS, including studies of golden eagles in 2011 and 2012. ER67.

Although the Plan purported to show that Tule Phase II would not harm the local breeding eagle population, *id.*—a finding rejected by FWS, the expert agency, ER113, ER102—the Plan actually relied on information demonstrating that the ridgeline turbines present a high risk to golden eagles. Thus, new surveys detected 10 golden eagle territories near Tule Phase II, including eight occupied territories, of which two were producing viable fledglings. ER70. Similarly, new studies demonstrated that golden eagles regularly traverse the Tule Phase II area. ER79 (73 of 123 flight paths crossed the Phase II area); *see also* ER168–70 (maps of flight paths crossing turbine locations). The Plan also projected that—even with all mitigation measures in place—Phase II would kill at least three golden eagles, thus violating BGEPA in the absence of a permit. ER84–86.

FWS repeatedly criticized the Plan's methodologies and conclusions as underestimating the threat to eagles, noting that BIA disregarded FWS's

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authorize the turbines BLM declined to authorize, and did not evaluate whether the 2011 EIS could support BIA's separate decision.

recommendation to use certain data and modeling techniques to assess the risk posed by the ridgeline turbines. ER114. Similarly, FWS found that the Plan neither "adequately address[es] cumulative impacts" to eagles, nor risks to non-breeding eagles, nor whether construction or operation could "cause abandonment of the Cane Brake nest site." ER115–17.

FWS's expert evaluation found that Tule Phase II "poses a high risk to eagles and the potential to avoid or mitigate impacts is low," because "the project is in close proximity [to] eagle nests" and "the project footprint is visited regularly by eagles." *Id.* FWS emphasized that Tule Phase II "has great potential to cause the loss of a territory and would likely cause ongoing mortality of breeding eagles and their offspring." ER114. FWS advised BIA that loss of "nesting territory ha[s] a much greater impact on eagle populations than the intermittent loss of individuals," which is "the equivalent of taking *4 individuals per year*." ER112 (emphasis added). Rejecting Tule Wind's position that the "risk of taking eagles from project operations of Phase II would be low to moderate," FWS instead concluded that "construction and operation of Phase II . . . *has a high potential to result in injury or mortality of golden eagles . . . and the loss of golden eagle breeding territories*." ER112–13 (emphasis added).

FWS also criticized proposed curtailment and other mitigation measures in the Plan as inadequate to actually mitigate risks to golden eagles. FWS found that

because "curtailment options presented do not span enough of the golden eagle breeding season and fledgling period to avoid loss of the Cane Brake nest territory," BIA's proposed curtailment "would not alleviate the potential loss of [golden eagle] territory." ER114.

Accordingly, FWS urged BIA to "consider[] a different turbine siting design or moving the project to another location to minimize and avoid eagle take." ER113; ER114 ("[M]oving forward with only six turbines at the base of the ridgeline warrants further consideration."). Nevertheless, despite the Plan's acknowledgment that "micrositing decisions based on eagle behavior . . . are probably the best means of avoiding and minimizing take," ER88, it did not actually consider micrositing—i.e., seemingly minor siting adjustments that could have enormous benefits for eagles—or relocation of any ridgeline turbines.

Following FWS's stark criticisms of the Plan, BIA issued a Notice of Availability of a revised Plan for a 30-day comment period, ER108–110, but did not publish the notice in the Federal Register or issue any NEPA document for public comment. In response, FWS again submitted comments reiterating serious concerns with the Plan's methodologies and conclusions, finding BIA made only "minimal changes" following FWS's earlier comments, and "disagree[ing] with the BIA's assertion that the [revised] version of the [Plan] sufficiently addressed [FWS's] concerns." ER102.

Despite its acknowledged "lack of BIA biological expertise," ER173, BIA disregarded FWS's expert input. For example, FWS provided "a superior modeling approach" to the one BIA relied on, ER101, but BIA refused to utilize this model. ER91. FWS again did "not concur with the analysis presented in the [Plan] or with the calculated estimates" of low annual take of eagles. ER101. Instead, FWS reiterated its "determin[ation] that construction and operation of [Tule Phase II] has a high potential to result in injury or mortality of golden eagles . . . and the loss of golden eagle breeding territories." *Id.* FWS further stressed "the potential for this territory to become an ecological trap by attracting eagles into a desirable nest site that possesses high risk for both breeding eagles and any young they produce." ER102.

FWS *again* advocated "a different turbine siting design or moving the project to another location to minimize and avoid eagle take." *Id.* FWS further stated that if BIA approved the turbines it should "condition[] the lease on this project to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act, prior to project construction." *Id.*[4]

[4] The California Department of Fish and Game ("CDFG") also criticized the Plan's methodology and conclusions and "recommend[ed] the BIA remove [the turbines nearest to the Canebrake nest]." ER93–100.

3. BIA's ROD Authorizing Tule Phase II.

Despite receiving highly critical comments on the Plan from FWS, CDFG, and the public, BIA never conducted any NEPA review whatsoever to analyze the ridgeline turbines' impacts to golden eagles or any alternatives to the developer's proposed design. Instead, BIA's ROD simply authorized construction of the ridgeline turbines based on a final Plan that suffered from the same flaws that FWS had criticized as greatly understating the risks to eagles. *See* ER45, ER65.

BIA's ROD, issued in December 2013, *see* ER64, differed crucially from the commitments made in BLM's 2011 EIS. For example, BLM's FEIS found that impacts to golden eagles would be "significant," "unavoidable," and "unmitigable," ER138, but BIA "determined that [Tule Phase II] would not create significant impacts after the implementation of mitigation measures." ER45. Further, although the FEIS embodied BIA's commitment *not* to authorize *any turbines* unless the agency established "final criteria determining the risk each location presents to eagles" and that the turbine locations presented an "acceptable risk" to golden eagles based on these criteria, ER146–47, BIA's ROD nonetheless authorized the ridgeline turbines without ever establishing any such criteria.

Nevertheless, in the absence of any additional NEPA compliance, BIA purported to "adopt[]" and "rel[y] on" the FEIS for the "decisions in th[e] ROD." ER49.[5]

The ROD also stated that BIA's decision was based on new information regarding risks to eagles that was not available when BLM issued its 2011 FEIS. ER52 ("BIA's decision . . . is based on . . . supplemental documents"). Nevertheless, BIA did not assess in any NEPA document the significance of this new information with respect to whether, and in what specific manner, the ridgeline turbines should be authorized. Further, despite the 2011 FEIS obligating BIA to consider whether to authorize "all, none, *or part*" of Phase II, ER146–47 (emphasis added), BIA did not even analyze any alternatives that would entail constructing a *smaller* number of turbines on the ridge than previously contemplated. *See* ER55–56 (ROD's acknowledgment that all alternatives "would essentially be the same" in authorizing all ridgeline turbines).

Despite FWS advising BIA that, because ridgeline turbines *will* predictably kill golden eagles, BIA should require Tule to *obtain* a BGEPA permit *before any construction*, ER102, BIA required only that Tule *apply* for a permit *"prior to initiating operation*," so that a mere application would "enable the applicant to

[5] In fact, BLM's FEIS considered siting only 18 turbines on Tribal land, and found that would represent an unacceptable risk. *See* ER148. In contrast, BIA authorized 20 turbines on the ridgelines, beyond what the FEIS even contemplated. ER49.

move forward with construction and operation." ER57. BIA therefore rejected the expert agency's position that a high-risk project such as this should not be built before FWS can ascertain whether, and on what terms, a BGEPA permit could be issued. ER50.

Regarding Tule Phase II's eagle impacts, BIA asserted that its evaluation "included consultation with entities that have jurisdiction or special expertise," ostensibly "to ensure that the impact assessments . . . were conducted using accepted industry standards and the most currently available data." ER57. Yet BIA's ROD did not disclose that FWS and CDFG *disagreed with BIA's methodologies* for analyzing the Phase II turbines' risks to golden eagles *and rejected BIA's conclusion* concerning the level of risk from the ridgeline turbines. *Compare, e.g.*, ER59 (BIA's ROD asserting significantly reduced risks to the Canebrake eagle nest), *with* ER102 (FWS's opposite conclusion).

III. PROCEEDINGS BELOW

The district court rejected two of Plaintiffs' claims in response to motions for judgment on the pleadings, and resolved the remainder of the issues against Plaintiffs on cross-motions for summary judgment. In response to Plaintiffs' claim that BIA violated the APA and acted contrary to BGEPA by failing to require that Tule obtain, as opposed to merely apply for, a BGEPA permit, the district court found that BIA acted lawfully because it did not directly authorize the project to

kill eagles. ER34. While the district court recognized that Plaintiffs raised "other logical arguments," ER36, it did not reach Plaintiffs' argument that BIA wrongfully ignored FWS instruction on the proper timing for obtaining a BGEPA permit.

Regarding Plaintiffs' contention that BIA's reliance on BLM's prior EIS was unlawful, the district court acknowledged that BLM's EIS obligated BIA to consult with FWS regarding Tule Phase II's risks to golden eagles. Nonetheless, the district court found that BIA was within its discretion to disregard FWS's substantive input. ER9–10.

Concerning Plaintiffs' argument that BIA failed to consider a reasonable range of alternatives for its decision to approve Tule Phase II, the district court recognized that BLM's EIS obligated BIA to consider new information when deciding to approve "all, none, or part" of Phase II, but nevertheless found that BIA's reliance on the earlier EIS's alternatives analysis—which only considered approving *all* or *none*, rather than *part*, of Phase II—was reasonable. ER10–14.

Regarding Plaintiffs' claim that significant new information regarding Phase II's risks to golden eagles required BIA to prepare an SEIS, the district court recognized that BLM's EIS obligated BIA not to authorize turbines in high-risk locations, but found that the new information was not "significant" because it confirmed or reinforced the fact that the ridgeline turbine locations entailed a high

risk to eagles. ER14–16. The district court did not address Plaintiffs' argument that BIA itself never evaluated the significance of the new information.

SUMMARY OF ARGUMENT

1. BIA's exclusive reliance on BLM's EIS was arbitrary and capricious because BIA failed to implement the EIS's most important mitigation measure regarding Tule Phase II. Although the EIS required BIA to consider new information and expert agency input in order to approve Phase II turbines only in locations that showed reduced risk to eagles, and although the expert agencies found that the new information indicated that Phase II would cause high risks to individual eagles, breeding territories, and populations with little prospect of meaningful mitigation, BIA nonetheless approved construction of *all* of Phase II. Because BIA thus relied on the EIS without complying with it, and failed to prepare any NEPA analysis of its own, its resulting decision was arbitrary and capricious.

2. BIA violated NEPA by failing to consider a reasonable range of alternatives. Although the EIS on which BIA relied required the agency to consider whether to authorize "all, none, *or part*" of Phase II, BIA considered only authorizing all or none of the wind turbines—and conceded that every action alternative considered "would essentially be the same"—and never considered any mid-range alternative to reduce risks to eagles.

3. BIA violated NEPA by relying on new information to authorize Tule Phase II without preparing an SEIS to examine the new information on the turbines' severe risks to golden eagles, or even considering whether that new information was sufficiently significant to warrant preparation of an SEIS.

4. By disregarding formal comments from the expert agency tasked with issuing BGEPA permits for take of golden eagles, which stated that Tule Phase II should be required to *obtain* a permit before *construction*, and instead requiring only that Tule *apply* for a permit before *operation*, BIA acted in a manner that was arbitrary and capricious and not in accordance with law.

ARGUMENT

I. Standard of Review

Under the Administrative Procedure Act ("APA"), a "reviewing court shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, or otherwise not in accordance with law . . . [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Although courts "are deferential to the agency's expertise . . . [j]udicial review is meaningless . . . unless [courts] carefully review the record to ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Ariz. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001). To survive APA review, an agency must "articulate[] a rational connection between the facts found

and the choices made," *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.* ("*CBD*"), 698 F.3d 1101, 1121 (9th Cir. 2012), and must "offer a satisfactory explanation for its decision in light of [] earlier findings" that conflict with the decision. *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1050–51 (9th Cir. 2010).

II. BIA Violated NEPA by Relying on BLM's EIS without Complying with The EIS.

Although cooperating agencies may, under certain circumstances, adopt and rely on a lead agency's EIS, BIA's exclusive reliance on BLM's 2011 FEIS was arbitrary and capricious because BIA failed to implement the FEIS's chief mitigation measure for reducing risk to eagles, disagreed with fundamental aspects of the FEIS, and came to opposite conclusions from the FEIS about impacts to eagles. Under these circumstances, BIA's failure to conduct any NEPA review addressing these crucial discrepancies with the FEIS cannot withstand scrutiny.

A. BIA Flouted a Critical Mitigation Measure in BLM's EIS.

Where a NEPA document "enter[s] into a mitigation measure, that measure 'shall be implemented,'" *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998) (quoting 40 C.F.R. § 1505.3), "by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3. Accordingly, BIA was obligated to implement the mitigation measures in the 2011 FEIS, which BIA adopted and relied on in its ROD. *See Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1104 n.16 (9th Cir. 2012) ("An agency must implement the measures it chooses to adopt

in its decision"); *see also Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114, 1123 (D. Mont. 2016) (collecting cases).

As discussed above, BLM's FEIS contained a key mitigation measure obligating BIA to authorize only "turbine locations that show reduced risk" to eagles based on new studies and expert input. ER146. BIA was obligated to determine "final criteria determining the risk each location presents to eagles" based on expert agency consultation, and not to authorize "[t]urbine locations exceeding the acceptable risk levels to golden eagles based on these final criteria." *Id.* In short, if BIA wanted to rely on the FEIS without conducting further NEPA review, the agency was obligated to consider whether to authorize "all, none, *or part*" of the ridgeline turbines based on further study of golden eagle behavior and consultation with FWS. *Id.* (emphasis added).

BIA neither implemented this mitigation measure nor prepared any further NEPA review. At minimum, this mitigation measure obligated BLM to consider whether to authorize "part" of Tule Phase II, which as a matter of plain language means some but not all ridgeline turbines. The mitigation measure further required BIA to consider "the risk *each location* presents to eagles," *id.* (emphasis added), which required BIA to consider the risks of authorizing *each turbine*. BIA did none of this. Although BIA did consider *temporarily curtailing operation* of some

ridgeline turbines, ER84–86, BIA never examined any alternative or mitigation measure involving construction of some but not all ridgeline turbines.

Likewise, BIA failed to establish any objective criteria to evaluate risks to golden eagles at each turbine location. The mitigation measure obligated BIA to determine "criteria determining the risk each location presents to eagles . . . in consultation with the required resource agencies," i.e. FWS. ER146–47. Although BIA's Plan acknowledged this obligation, ER90, neither the Plan nor ROD include *any criteria* for evaluating the ridgeline turbines' risks to eagles. Nor does the record reveal any effort by BIA to consult with FWS regarding such criteria.

Indeed, BIA failed to consult with FWS in *any* meaningful manner regarding Tule Phase II's risks to golden eagles. FWS repeatedly informed BIA that the Plan suffered from significant methodological deficiencies and repeatedly requested that BIA use FWS's "superior modeling approach" to assess risk. ER101; ER114; *see supra* at 13–17. Nevertheless, while conceding the Plan "could be redone" with FWS's superior model, BIA *refused to do so*, stating such modeling "would be inconsistent with the analysis conducted for the remainder of the Project." ER91. However, because the mitigation measure's basic purpose was to ensure an *enhanced* risk analysis for Phase II based on new data and expert agency input, BIA's refusal to implement FWS's repeated request for a "superior modeling approach" violated a key mitigation measure in the FEIS.

Similarly, BIA disregarded FWS's expert assessment of Tule Phase II's risks to eagles. FWS *repeatedly* informed BIA that Phase II has "a high potential to result in injury or mortality of golden eagles . . . and the loss of golden eagle breeding territories." ER101; ER112; *see supra* at 13–17. FWS expressly disputed the Plan's analysis and estimate of how many eagles Phase II would take. ER101. FWS further informed BIA that Tule Phase II's impacts on nesting territories entailed especially significant risk to eagle populations. ER112. Accordingly, FWS advised BIA that, contrary to BIA's assessment that Phase II would take only three golden eagles, FWS considered the risk *much* greater, especially because the likely "loss of golden eagle breeding territories" is "the equivalent of taking *4 individuals per year*." *Id.* (emphasis added). BIA rejected FWS's expert input. Instead, BIA merely stated that its *much lower* risk estimate was based on outdated FWS guidelines, while also acknowledging that methodology "*is not what the USFWS has recommended*." ER91 (emphasis added).

BIA also disregarded a host of other specific FWS critiques. FWS stated that BIA's proposed turbine curtailment "would not alleviate the potential loss of [golden eagle nesting] territory," ER114, and that the Plan "lacks any discussion" of the likely loss of the Canebrake nest or other nearby breeding territories and "how the overall loss of reproduction would affect the local golden eagle

population." ER115–16. FWS further stated that the Plan neither analyzed risk to non-breeding eagles nor sufficiently analyzed the project's cumulative impacts on eagle populations. *Id.* BIA did not address these criticisms or correct these deficiencies. ER102 (BIA did not "sufficiently address [FWS's] concerns" because only "minimal changes were made").

Nor did BIA's ROD *even disclose* FWS's fundamental disagreement with BIA's methodologies and conclusions. Instead, despite FWS stating that "the potential to avoid or mitigate impacts is low" and that BIA's curtailment mitigation "would not alleviate the potential loss" of nesting territory, ER114–15, BIA's ROD found that "the Proposed Action would not create significant impacts after the implementation of mitigation measures." ER45. BIA's failure to meaningfully respond to, or even disclose, FWS's serious disagreement over the project's risks to golden eagles flouted BIA's obligation under the 2011 FEIS to meaningfully evaluate the risk of each turbine location based on objective criteria created in consultation with expert agencies—a violation that is especially egregious because BIA itself acknowledged "a lack of BIA biological expertise" regarding "[p]otential impacts to golden eagles." ER176. Accordingly, BIA's failure to implement the 2011 FEIS's mitigation measure—while at the same time relying

solely on the 2011 FEIS for BIA's own NEPA compliance—was arbitrary and capricious and contrary to NEPA.[6]

B. Despite Deviating Sharply from BLM's EIS, BIA Unlawfully Failed to Prepare Any Independent NEPA Analysis.

Because BIA did not comply with *BLM's* FEIS, BIA could discharge its NEPA obligations only by preparing *its own* NEPA document that adequately explained its deviation from the EIS on which it was a cooperating agency. *See* 40 Questions, 46 Fed. Reg. at 18,035 ("A cooperating agency . . . has an independent legal obligation to comply with NEPA."). BIA failed to do so, and thus violated NEPA in numerous ways.

Most fundamentally, BIA did not prepare any NEPA document explaining its fundamental disagreement with the FEIS on which it purportedly relied to approve the ridgeline turbines. For example, BLM's FEIS acknowledged that even constructing the lower-risk valley turbines would have "unavoidable," "significant," and "unmitigable" impacts to eagles, ER138. Nevertheless, BIA's ROD, while purporting to *rely* on the FEIS, reached *precisely the opposite conclusion*, finding that "the Proposed Action would not create significant impacts

[6] Even aside from the obligation imposed by the EIS on which BIA purportedly relied, BIA's failure to disclose its disagreement with FWS violates NEPA's requirement to discuss and respond to "responsible opposing viewpoints." *See California v. Block*, 690 F.2d 753, 770–71 (9th Cir. 1982) (explaining "the paramount Congressional desire to internalize opposing viewpoints into the decision-making process").

after the implementation of mitigation measures," ER45—and did so *without ever acknowledging* or explaining the disparity between BIA's ROD and the FEIS on which it purports to rely. This failure is a violation of NEPA and basic APA principles. *See* 40 Questions, 46 Fed. Reg. at 18,035 (cooperating agency must "explain how and why its conclusions differ" from prior agency decisions); *id.* ("If the cooperating agency determines that the [lead agency's] EIS is wrong or inadequate, it must prepare a supplement."); *see also Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125–26 (2016) ("When an agency changes its existing position . . . a reasoned explanation is needed for disregarding facts and circumstances" underlying the prior position).

Moreover, the record reflects that BIA's failure to engage in any independent NEPA review stemmed from the fact that BIA had decided to approve the ridgeline turbines *even before the FEIS was issued*. BIA stated in 2011—before publication of the FEIS—that eliminating the ridgeline turbines would be inconsistent with the Tule Wind Project's purpose and need. ER127. Accordingly, BIA committed to authorizing the ridgeline turbines regardless of their risk to eagles. *Id.* BIA then reiterated this commitment even before issuing its ROD. ER130 ("BIA is willing to take the position of a positive ROD"); ER111 (BIA "supports the Tule Wind project"). BIA's foreordained approval of Tule Phase II irrespective of what any NEPA analysis might divulge violates the fundamental

purpose of NEPA review to "help public officials make decisions that are based on understanding of environmental consequences," 40 C.F.R. § 1500.1(c), rather than to "rationalize or justify decisions already made." *Id.* § 1502.5; *see also Metcalf v. Daley*, 214 F.3d 1135, 1142–45 (9th Cir. 2000) (NEPA review must not merely "rationalize a decision already made"). Especially under these circumstances, BIA's failure to prepare its own NEPA document—rather than rely on an FEIS with which it disagreed—was arbitrary, capricious, and contrary to NEPA's core function.[7]

Simply put, BIA had two options under the law: (1) rely exclusively on BLM's FEIS and adhere to all of its binding conditions and mitigation measures, or (2) conduct its own supplemental NEPA review addressing the major discrepancies between the requirements of BLM's FEIS and BIA's ultimate decision. But BIA chose a third (and unlawful) option of relying exclusively on BLM's FEIS while simultaneously abandoning binding commitments made in the

[7] In reaching the opposite conclusion, the district court misconstrued Plaintiffs' argument as asserting that the mitigation measure at issue "compels BIA to accept other agencies' high-risk classifications of Tule II as a complete bar to construction." ER9. Rather, Plaintiffs' argument is that BIA's reliance on BLM's FEIS—which required BIA to consider whether to approve "all, none, or part" of Tule Phase II in consultation with expert agencies—violated NEPA where BIA disagreed with the FEIS's analysis and conclusions yet neglected to prepare its own NEPA document regarding the ridgeline turbines.

FEIS and contradicting its key findings. This approach subverted the purpose of NEPA review and is arbitrary and capricious.

III. BIA Violated NEPA by Failing to Analyze a Reasonable Range of Alternatives With Respect to BIA's Decision.

BIA failed to authorize Tule Phase II—which is itself a "major Federal action" under NEPA—on the basis of any NEPA document analyzing a reasonable range of alternatives with regard to these turbines. Instead, BIA relied solely on BLM's FEIS, which analyzed only alternatives constructing *all* or *none* of these turbines. Especially because BIA acknowledged that all action alternatives "would essentially be the same," ER55, its failure to ever consider an alternative authorizing "part" of Phase II violates this Court's well-established precedents.

A. The Need for BIA to Analyze Alternatives for the Ridgeline Turbines Was Clearly Before BIA.

As an initial matter, the district court's suggestion that the alternatives issue was somehow inadequately preserved for judicial review is erroneous. *See* ER12. First, because BIA did not adopt BLM's FEIS until 2013—and comments, including from FWS, apprised BIA clearly of the need for an additional analysis of alternatives before BIA issued its ROD, ER102, ER113—the issue was plainly put to BIA before it chose to rely exclusively on the FEIS, and was thus not waived. *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior*, 929 F. Supp. 2d 1039, 1046 & n.4 (E.D. Cal. 2013) (collecting a "controlling line of cases"

establishing that "comments submitted by third parties may form the basis of a NEPA lawsuit, so long as the comments brought sufficient attention to the issue").

In any case, there cannot be any legitimate dispute about BIA's awareness of the issue *even before the FEIS issued*. This Court has "declined to adopt a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review" particularly where—as here—a case involves "procedural violations of NEPA." *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). An EIS's flaws are "so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action" where "the agency had independent knowledge of the issues." *Id.* (citing *Pub. Citizen*, 541 U.S. at 765).

Here, BIA undoubtedly had "independent knowledge" of the need to consider mid-range alternatives for the ridgeline turbines. BLM's Draft and Final EIS stated that BIA would need to consider additional studies before authorizing "all, none, *or part*" of Phase II, ER198 (Draft); ER146–47 (FEIS) (emphasis added), thereby compelling BIA to consider a mid-range alternative between *all* and *none* of Phase II. BIA itself acknowledged that "[s]pecific turbine(s) could be eliminated if it is determined that risks outweigh benefits," ER127, revealing independent knowledge of the need to consider constructing "part" of Phase II.

The project proponents also raised with BIA the need to consider a mid-range alternative. The developer emailed BIA about "risk assessment . . . of the Ridge turbines in any variety of combinations we desire (e.g. all but BLM turbines erected; all but northernmost turbines built, only tribal land turbines erected, etc.)." ER130. Further, the Tribe consulted with BIA regarding removal of "the last turbine from the array" to reduce the impacts to the Canebrake territory because the Tribe found that loss "of one wind turbine is better than a loss of all 17 turbines." ER150–52.

Additionally, commenters on the EIS indicated the need to examine alternatives to avoid or reduce the impacts to eagles. *E.g.* ER184 (U.S. Environmental Protection Agency stating an adaptive management plan would be appropriate only "[i]f alternatives cannot be developed that avoid the take of eagles"); ER200 (FWS recommending "an alternative . . . that allows for flexibility" about Phase II turbines to account for new data); ER204 (Plaintiff comments raising concerns about golden eagles); ER178–80 (describing ridgeline turbines' risk to golden eagles and the need to "fully evaluate the site and whether it should be abandoned due to unacceptable, unmitigable risk to Golden Eagle[s]"). Accordingly, even before issuance of BLM's FEIS, the need to consider reduced impact alternatives for the ridgeline turbines was clear based on the EIS itself, BIA's own comments, input from expert federal agencies including FWS and EPA,

and comments from the Tribe, the project developer, and environmental organizations.

As BIA moved to approve Tule Phase II, various entities then reiterated the need for a more robust alternatives analysis. ER102 (FWS urging that BIA "consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take"); ER95 (CDFG recommending removal of especially risky turbines); ER107 (independent biologist suggesting BIA "should require the Applicant to conduct a micrositing study so that proper siting decisions can be made").

Because "[t]he record in this case is replete with evidence" that BIA "had independent knowledge of the very issue" that Plaintiffs are seeking to litigate, Plaintiffs "have not waived their right to challenge the sufficiency of [BIA's] consideration of reasonable alternatives." *Ilio'ulaokalani*, 464 F.3d at 1093.

B. BIA Violated NEPA By Only Considering Action Alternatives That Authorized All Ridgeline Turbines.

Under NEPA, a "range of action alternatives is unreasonably narrow [where] the alternatives are virtually indistinguishable from each other." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *see also Muckleshoot*, 177 F.3d at 813 (an agency "failed to consider an adequate range of alternatives" where it considered "only a no action alternative along with two virtually identical alternatives"); *W. Watersheds Proj. v. Abbey*, 719 F.3d 1035,

1050–54 (9th Cir. 2013) (agency failed to "make an informed decision on a project's environmental impacts when each alternative considered would authorize the same underlying action"). Any "viable but unexamined action renders [an EIS] inadequate." *Muckleshoot*, 177 F.3d at 814.

Here, neither BLM's FEIS nor any subsequent document considered any alternatives for Tule Phase II that entailed building some but not all of the proposed ridgeline turbines. The FEIS specifically stated that BIA would use new information to authorize "all, none, *or part*" of Phase II, ER146 (emphasis added), and BIA itself stated that "[s]pecific turbines could be eliminated if it is determined that risks outweigh benefits." ER127. However, neither BIA's Plan nor its ROD actually considered eliminating "specific turbines"; instead, BIA's ROD conceded that all action alternatives "would essentially be the same" regarding the number and placement of ridgeline turbines. ER55–56.[8]

Indeed, BIA disregarded expert agencies' proposed mid-range alternatives. CDFG recommended eliminating two turbines nearest to the Canebrake nest, ER95, and FWS recommended that BIA "consider a different turbine siting design or moving the project." ER102; *see also* ER114 ("The option of moving forward with only six turbines at the base of the ridgeline warrants further consideration.").

[8] In fact, as discussed above, BIA even authorized *more* turbines than the FEIS considered on Tribal land. ER47.

Nevertheless, BIA never considered relocating or eliminating any ridgeline turbines.

Nor did BIA consider any alternative involving micrositing, despite *itself acknowledging* that "micro siting decisions based on eagle behavior . . . are probably the best means of avoiding and minimizing take," ER88; *see also* ER206 ("Wind project (macro) and wind turbine (micro) siting [is] believed to be [the] best way to minimize impacts"); ER207 ("Careful siting of wind plants as well as micrositing of turbines . . . within wind plants to avoid major bird use areas may also mitigate impacts"). BIA's failure to consider moving any ridgeline turbines to avoid impacts to eagles—which BIA itself conceded to be "probably the best means of avoiding and minimizing" golden eagle impacts—is an especially egregious violation of the agency's duty to consider a reasonable range of alternatives.[9]

[9] The district court found that the 2011 FEIS considered a sufficient range of alternatives, ER13–14, despite BIA itself *admitting* that the action alternatives are "essentially . . . the same" and that the "best means of avoiding and minimizing" eagle impacts had not been considered. ER13 n.6. The district court purported to distinguish this Court's directly relevant precedents but failed to offer any meaningful distinctions. For example, the district court asserted that *Western Watersheds* merely involved tiering to a programmatic EIS. *Id.* However, *Western Watersheds* actually stated 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." 719 F.3d at 1050–51 (emphasis added). Moreover, *Western Watersheds*' admonition that "[i]t is . . . when the agency makes a critical decision to act, that the agency is obligated fully to evaluate the impacts of the proposed action," 719 F.3d at 1050, applies directly here: when BIA

IV. BIA Violated NEPA By Failing to Prepare an SEIS to Consider Significant New Information It Obtained After BLM Issued the 2011 FEIS.

"[A]n agency that has prepared an EIS cannot simply rest on the original document," but "must be alert to new information that may alter the results of its original environmental analysis, and continue to take a hard look at the environmental effects of [its] planned action." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000). "When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [an SEIS]." *Id.* at 558. A court "should not automatically defer to the agency . . . without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information." *Marsh*, 490 U.S. at 378. Leaving "apparently unanswered concerns of a sister agency simply do[es] not measure up to the requirements in this Circuit for a 'hard look.'" *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1192 (9th Cir. 2002). BIA violated these principles by failing to supplement the 2011 FEIS.

"ma[de] the critical decision" to authorize "all, none, or part" of Phase II, it was obligated to consider a reasonable range of alternatives.

A. BIA Received Important New Information between Publication of BLM's EIS and Issuance of BIA's ROD.

Between the issuance of BLM's FEIS and BIA's ROD authorizing Tule Phase II, BIA received important new information about the ridgeline turbines' risks to golden eagles, which proved these eagles use the Tule Phase II area. New surveys revealed at least eight occupied golden eagle territories within ten miles of Tule Phase II, including two that successfully produced young, and two at which eaglets failed to fledge. ER70. Similarly, new information indicated that the Canebrake nests—those closest to Tule Phase II—continued to be active. *Id.* The new information also indicated the importance of preserving golden eagle territories, because "no territory produced young in every year." ER71. Additionally, new flight surveys showed that 73 of 123 documented flight paths traversed Tule Phase II. ER79. A new study of eaglets revealed that "[t]he home range of the Cane Brake fledgling prior to" its migration to Mexico "*overlapped all turbines*" in Tule Phase II. ER80 (emphasis added). The same study also showed young eagles face significant threats; two of five eaglets died during the study. *Id.*

According to a formal memorandum to BIA from FWS, this new information established that "construction and operation of Phase II of the Tule Wind facility has a high potential to result in injury or mortality of golden eagles . . . and the loss of golden eagle breeding territories," ER112; *see also id.* (warning that taking a breeding territory is "the equivalent of taking 4 individuals

per year"). FWS also criticized the scientific methodology of these new golden eagle studies, ER114–17, stating that BIA improperly discounted risk to fledglings from several eagle territories and lacked "robust data" to justify finding moderate or low risk to eagles, ER116.

FWS then sent BIA *another* formal memorandum explaining that BIA had failed to correct methodological deficiencies. As discussed above, FWS criticized BIA's refusal to utilize FWS's "superior modeling approach," and found BIA had not addressed its concerns. ER101–02. FWS again "d[id] not concur with the analysis" of the new information or with BIA's resulting lowball estimates of golden eagle fatality. Instead, FWS reiterated its expert opinion that the new information showed Tule Phase II's "high potential to result in injury or mortality of golden eagles . . . and the loss of golden eagle breeding territories." ER101. Similarly, CDFG submitted detailed comments criticizing the methodology used to gather and interpret the new data and recommending revisions, including eliminating two turbines nearest to the Canebrake territory, ER95–98, which BIA did not consider.

Accordingly, between BLM issuing its FEIS in 2011 and BIA issuing its ROD in 2013, BIA received critically important new information indicating that golden eagles *do use* the Tule Phase II area and *are threatened* by the ridgeline turbines. Additionally, BIA received *repeated* input from expert agencies—which

unquestionably have greater expertise regarding golden eagles, *see* ER176 (BIA explaining the "[l]ack of BIA biological expertise" regarding "[p]otential impacts to golden eagles")—highlighting important flaws in the gathering and analysis of this new information, as well as expert agency analyses unequivocally stating that Tule Phase II poses dire risks to golden eagles, including at the population level.

B. The New Information Furnished to BIA Necessitated an SEIS.

Whether new information is sufficiently significant to necessitate an SEIS "turns on the value of the new information to the still pending decisionmaking process." *Marsh*, 490 U.S. at 374. Where "new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Id.* The term "significant" in the SEIS context is defined according to the CEQ's regulations. *Id.* at 374 n.20 (quoting 40 C.F.R. § 1508.27).

"[T]he bar for whether 'significant effects' may occur," thus requiring an SEIS, "is 'a low standard.'" *League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) (quoting *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561–62 (9th Cir. 2006)). New information that "raise[s] substantial questions regarding the project's impact [is] enough to require further analysis." *Id.*

An SEIS is necessary where an EIS rejected an alternative on environmental grounds, but an agency shortly thereafter adopts a decision "that closely resembles the rejected alternative." *Boody*, 468 F.3d at 562. In *Boody*, a prior EIS found that risks to a species "require extensive additional research and protection before any conclusions regarding the impact of [the proposed action] could be reached," and for this reason rejected an action alternative that would "increase the risk" to that species. *Id.* at 559. Nevertheless, based on new information, the agency shortly thereafter adopted a decision allowing precisely the same risks to that species. *Id.* at 559–61. Finding that the subsequent decision impacted the species "in the same way" as under the "flatly *rejected*" alternative, this Court found that it was "unreasonable for [the agency] to argue that the [older] EIS supports" the subsequent decision. *Id.* This Court then found that the adoption of a decision "that closely resembles the rejected alternative" required the preparation of an SEIS. *Id.* at 562.

Boody governs this case. As in *Boody*, here BLM's FEIS found that the ridgeline turbines likely caused such grave risks to golden eagles that more study and information was necessary before they could be authorized. Then, based on new information, BIA authorized the same high-risk turbines the FEIS rejected. As in *Boody*, BIA prepared no further NEPA analysis supporting its adoption of the decision initially rejected due to severe environmental impacts. *Id.* at 562.

Accordingly, as in *Boody*, BIA's decision is "invalid for failing to satisfy NEPA." *Id.*

Moreover, the new information furnished to BIA is sufficiently significant to necessitate an SEIS for several other reasons. As discussed, the term "significant" is defined according to criteria in CEQ's regulations. *Marsh*, 490 U.S. at 374 n.20. The following significance criteria are clearly satisfied by the new information BIA received.

First, Tule Phase II is in close "[p]roximity to . . . cultural resources . . . or ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). FWS's post-EIS memoranda explained that Phase II is "in close proximity of eagle nests or cluster of nests" and "is visited regularly by eagles occupying a proximate nesting territory." ER115. Golden eagles are indisputably valuable cultural resources, which is one reason Congress afforded them robust federal protection in BGEPA. *E.g.* ER53. Moreover, FWS explained the ecological importance of the proximate eagle nests by noting that loss of nests has large impacts on eagle populations. ER112.

Second, this project's effects are "highly controversial," 40 C.F.R. § 1508.27(b)(4), because there is a "substantial dispute about the size, nature, or effect" of the action. *Blue Mountains Biodiversity Proj. v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). Here, FWS strenuously disputed BIA's projection of

the number of eagles Tule Phase II will take, *compare* ER112 (FWS stating loss of nesting territory equals "taking 4 individuals per year"), *with* ER60 (BIA asserting take of only "3.0 golden eagles over 20 years"); the efficacy of BIA's mitigation measures, *compare* ER115 (FWS stating "potential to avoid or mitigate impacts is low"), *with* ER45 (BIA asserting Phase II with mitigation measures "would not create significant impacts"); and the overall degree of risk to golden eagles, ER112–13 (FWS finding "high risk" to golden eagles and disputing BIA's low or moderate risk assessment). These major disagreements between BIA and the expert agency on eagles plainly constitute a "substantial dispute about the size, nature, or effect" of the action, indicating that the new information before BIA was significant under NEPA. *Found. for N. Am. Wild Sheep v. Dept. of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982).

Third, "the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). FWS's new information noted "numerous proposed and ongoing alternative energy projects in the vicinity" of Tule Phase II with "potential to take golden eagles," and noted that BIA failed to analyze cumulative impacts. ER116–17. Thus, FWS's new information was also significant in indicating likely cumulative impacts to golden eagles.

Fourth, "the action threatens a violation of federal . . . law . . . ." 40 C.F.R. § 1508.27(10). FWS's new information clearly stated that Tule Phase II "would not likely meet the conservation standard of" BGEPA, which is a permit precondition. ER112–13. Thus, because FWS has indicated it may not be able to issue a permit authorizing Tule Phase II to take golden eagles, the new information clearly demonstrates that Tule Phase II threatens a violation of federal law.

Finally, by leaving FWS's concerns unaddressed, BIA failed to "continue to take a hard look" at new information. *Dombeck*, 222 F.3d at 557; *see also Forsgren*, 309 F.3d at 1192 (leaving "apparently unanswered concerns of a sister agency simply do[es] not measure up to the requirements in this Circuit for a 'hard look'").

Accordingly, because BIA adopted effectively the same alternative that BLM's FEIS rejected as too risky for golden eagles, thus creating "substantial questions" sufficient to warrant an SEIS, *see Boody*, 468 F.3d at 562, because the new information that BIA obtained after BLM published its FEIS meets multiple significance criteria, *see Marsh*, 490 U.S. at 374 n.20, and because BIA left FWS's serious concerns "unanswered," *Forsgren*, 309 F.3d at 1192, BIA's failure to prepare an SEIS under these circumstances was arbitrary and capricious.[10]

[10] The district court erred by finding that the "new information is not 'significant'" because "it merely confirmed concerns that the 2011 EIS already articulated and considered." ER15–16. Because "an agency's action must be upheld, if at all, on

C. BIA Failed Even to Assess the Significance of New Information It Received.

Agencies have a clear duty to evaluate new information's significance. *Dombeck*, 222 F.3d at 558. However, the record here contains no indication that BIA ever considered the significance under NEPA of new information it received. Neither BIA's Plan nor BIA's ROD analyzes whether this new information necessitated an SEIS. Indeed, BIA's ROD *never even mentions* FWS's expert determination that Tule Phase II poses a high risk to golden eagles. Instead, without explaining how BIA could have overcome the "lack of BIA biological expertise," ER176, BIA's ROD comes to diametrically opposite conclusions from FWS. *Compare* ER114 (FWS finding that BIA's proposed curtailment mitigation "would not alleviate the potential loss of [golden eagle] territory"), *with* ER45

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the basis articulated by the agency itself," *Beno v. Shalala*, 30 F.3d 1057, 1074 (9th Cir. 1994), and because BIA itself *never articulated this reason in the record* for its failure to prepare an SEIS, the district court erred by accepting this post hoc argument. In any event, the new information did not merely "confirm" BLM's concerns that the project posed excessive threats to golden eagles. Rather, as contemplated by the FEIS, BIA received a wealth of additional information regarding the extent and nature of the threat, as well as appropriate methodologies for assessing the risk and measures for mitigating it. Refusing to prepare an SEIS to take this information into account before federally protected eagles are placed at severe risk undermined the fundamental function of NEPA review and, in particular, the SEIS requirement. *See Marsh*, 490 U.S. at 374 (the significance of new information "turns on the *value of the new information to the still pending decisionmaking process*") (emphasis added).

("BIA has determined that the Proposed Action would not create significant impacts after" mitigation).

As in *Dombeck*, "[t]here is no evidence in the record that . . . the [agency] ever considered whether the" new information was "sufficiently significant to require preparation of an SEIS." 222 F.3d at 558. Accordingly, while there are compelling reasons why an SEIS is required, BIA's "failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA," *id.* at 559, and must at least be remanded for BIA to make that determination in the first instance.[11]

V. BIA's Decision to Require Tule Merely to Apply for an Eagle Take Permit Before Beginning Operation Was Arbitrary, Capricious, and Not in Accordance With Law.

A. Requiring Only a Pre-Operation Permit, Rather than a Pre-Construction Permit, Was Arbitrary and Capricious.

In light of Tule Phase II's serious risks for golden eagles, FWS "recommend[ed] [that] BIA condition[] the lease" to require a BGEPA permit

[11] The district court erroneously assumed that Plaintiffs had the burden of demonstrating the significance of this new information. *See* ER15 ("Plaintiffs gloss over the additional regulatory command that [an SEIS] need be prepared only if the new information is also significant."). However, *Dombeck* made clear that "*the agency* must consider [new information], evaluate it, and make a reasoned determination whether it is of such significance as to require [an SEIS]." 222 F.3d at 558 (emphasis added); *see also Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1094 (D. Alaska 2014) ("[I]t is not the Plaintiffs' duty to assess the significance of the [new] information.").

"*prior to project construction*." ER102 (emphasis added). This follows FWS's general policy that applicants should "coordinate with the Service as early as possible in the project planning process." 81 Fed. Reg. 91,501. The purpose of early consultation and permitting is to implement FWS's hierarchy for mitigation measures. *See id.* at 91,504 (FWS "defines 'mitigation' to *sequentially* include: Avoidance, minimization, rectification, reduction over time, and compensation for negative impacts." (emphasis added)). Siting decisions for whole projects or individual turbines are, as BIA acknowledged, "the best means of avoiding and minimizing take" of eagles. ER88; *see also* ER102 (FWS recommending BIA "consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take").

However, *after construction*, siting decisions reflecting the "best means of avoiding and minimizing take" are no longer possible. As FWS has explained, when "project proponents build and operate without eagle take permits even in areas where they are likely to take eagles . . . the opportunity to apply avoidance, minimization, and other mitigation measures is lost." 81 Fed. Reg. at 91,500.

Nevertheless, despite FWS's admonition that consistency with BGEPA necessitates that Tule obtain a BGEPA permit *before construction* so that crucial siting issues could be taken into consideration during permitting, BIA's ROD required only that Tule *apply* for a permit before "*operation* of the project."

ER45–46. Indeed, BIA further specified that merely "[s]ubmitting a take permit application to [FWS] will satisfy this requirement and enable the applicant to move forward with construction and operation," and that "any delays due to the processing of the application will not affect this requirement." *Id.* In other words, BIA allowed Tule Phase II to be built—and thus allowed all macrositing and micrositing decisions to be made *without FWS input*—before a BGEPA permit application is even submitted, and further *authorized the Project to operate, knowing that it will kill eagles, regardless of whether FWS denies the permit*.[12]

BIA's decision is arbitrary and capricious and not in accordance with BGEPA because it fundamentally undermines the purposes of the congressionally mandated permitting scheme for incidental take of golden eagles. As explained above, in implementing that scheme, FWS prioritizes the most effective methods for avoiding and minimizing eagle take, which include siting projects and project components to reduce threats to eagles. Here, FWS specifically found that the entire Tule Phase II project is likely to take eagles, and both FWS and CDFG noted that the turbines closest to an active nest threaten particularly severe harm to

[12] BIA's ROD acknowledged that "[a]ny take of eagles caused by [Phase II], prior to the issuance of an eagle take permit, constitutes a violation of BGEPA," ER50, yet expressly allowed Phase II to be built *and operated* before FWS issues any permit, ER46—despite knowing that Phase II will kill eagles and will not likely be eligible for a permit from FWS. Accordingly, BIA acknowledged that Phase II, as authorized by BIA, would likely unlawfully take eagles.

golden eagles *at the population level*. Yet despite these indisputable risks, BIA expressly authorized the entire project—including the riskiest turbines—to be sited and built *before* the developer even submits a BGEPA permit application. Accordingly, BIA's decision deprived FWS of the opportunity to implement *any* expert input on siting decisions that even BIA has acknowledged are "the best means of avoiding and minimizing take." ER88.

As described, even after implementing curtailment measures—which FWS found will not be effective—BIA concedes that this project will kill golden eagles. FWS believes it will take many more. Moreover, FWS indicated that the project design as approved by BIA would "not likely meet the conservation standard" for golden eagles and thus would not likely *ever* receive a BGEPA permit. ER102. Thus, BIA's decision to deprive FWS of the ability to require the most effective means of avoiding and minimizing take of golden eagles is arbitrary and capricious because BIA conceded this project will take golden eagles and knew that FWS does not anticipate the project would be eligible for an eagle take permit as currently sited and approved by BIA.

Because BIA, without any explanation, disregarded FWS's expert input indicating that this project will cause dire risks to golden eagles, that macrositing or micrositing would be the best ways to avoid and minimize take of golden eagles, and that for these reasons either BIA or Tule should be required to obtain a permit

before construction of this project, rather than before *operation*, BIA's contrary decision was arbitrary and capricious. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (decision is arbitrary and capricious if it "runs counter to the evidence before the agency"); *see also Forsgren*, 309 F.3d at 1192 (leaving "unanswered concerns of a sister agency" shows inadequate reasoning).[13]

B. BIA's Decision to Require Only that Tule Apply for a Permit, Rather than Obtain a Permit, Was Not in Accordance With Law.

"The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A)—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *F.C.C. v. NextWave Personal Comm'cns Inc.*, 537 U.S. 293, 300 (2003) (emphasis added). Accordingly, an agency may not issue a permit for an activity the agency knows, or should know, will violate federal law. *See Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004) ("issuance" of permit to take whales "violate[d] federal law" where the permitting agency failed to ensure compliance

[13] As described below, Plantiffs also maintain that BIA was legally obligated under the APA to require that Tule *obtain* a BGEPA permit, rather than merely *apply* for one. However, even if this Court disagrees, and finds that BIA had no such obligation under the APA, BIA's decision regarding the *timing* of submission of a permit application was still arbitrary and capricious for failure to consider FWS's input and the undermining of FWS's permit scheme. The district court only addressed BIA's obligation to require *obtaining* a permit and did not address Plaintiffs' arguments about the *timing* of the permit application.

with Marine Mammal Protection Act); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1070 (9th Cir. 2003) (permit allowing otherwise lawful commercial activity in a wilderness area, where commercial activities are banned, "violated the Wilderness Act"); *CBD*, 698 F.3d at 1128 (vacating agency approval of gas pipeline for failure to properly consider how it would harm endangered species); *accord Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989) (finding agency approval—rather than third-party use—of pesticide was unlawful because "[t]he relationship between the registration decision and the deaths of endangered species [was] clear"). In contrast, where the relationship between a permit and unlawful activity is "speculative and indirect" because the agency does not know that the permitted activity will violate the law, the APA does not require the agency to "take affirmative measures to prevent potential unlawful action." *Protect our Communities Found. v. Jewell* ("*POC I*"), 825 F.3d 571, 586–87 (9th Cir. 2016).

This case is governed by this Court's decisions in *Anderson*, *Wilderness Society*, and *CBD*, because—unlike in *POC I*—the record here clearly shows not only that Tule Phase II *will kill eagles*, but also that BIA *knew* that eagle fatalities from Tule Phase II are inevitable. The only question on this record is *how many* eagles will die. *Compare* ER60 (BIA acknowledging that even with mitigation in place Phase II will take 3 golden eagles), *with* ER112–16 (FWS criticizing BIA's

"underestimate of predicted take levels" as lacking "robust data" and advising BIA that likely loss of nesting territory from Phase II is "the equivalent of taking 4 individuals per year"). Moreover, FWS expressly advised BIA that, as presently designed, Tule Phase II "would not likely meet the conservation standard of [BGEPA]" necessary for a permit authorizing the concededly inevitable take from these turbines. ER113; ER102. Thus, because BIA *knew* that Tule Phase II *will* kill eagles and, according to the expert agency, *will not* likely be eligible for an incidental take permit when constructed as presently designed, BIA knew that authorizing construction of the permitted activity is placing it on a collision course with federal law.

Accordingly, this case is a far cry from *POC I*, which this Court was careful to confine to "the narrow circumstances of [that] case." 825 F.3d at 588. Although *POC I* did involve Tule Phase I, it *only* considered BLM's approval of lower-risk *valley* turbines and did not reach BIA's subsequent approval of the higher-risk *ridgeline* turbines in the face of FWS's grave concerns that such turbines will inevitably kill eagles in violation of BGEPA and even threaten the local eagle population. The ridgeline turbines unquestionably pose *a far greater threat* to golden eagles—indeed so great a threat that, as discussed above, BLM refused to authorize them, which is one factor this Court relied on in *POC I* to find that BLM cooperated with FWS to avoid taking eagles. *Id.* at 588 n.3. Indeed, as

to the ridgeline turbines, FWS reviewed new information establishing that "there is low or possibly no observed eagle use in the valley but substantial use on the northern most portion of the ridge," ER159, i.e. the location of Tule Phase II. Accordingly, on this record, as opposed to *POC I*, there is nothing "speculative and indirect" about the inevitable deaths of golden eagles due to Tule Phase II.

Consequently, FWS's formal position was that BIA should have required Tule to "*obtain*"—not merely *apply for*—a permit. ER50; ER101. However, BIA merely required Tule to *apply* for a permit and even stated that its "lease *allows the construction and operation of the Proposed Action to proceed before an eagle take permit is issued*." ER50 (emphasis added). Accordingly, because BIA knew these turbines will kill eagles and has nonetheless authorized their construction *and* operation in the absence of the only mechanism in federal law for legally permitting the take of eagles, BIA's decision is arbitrary and capricious and flies in the face of Congress's determination in BGEPA to protect golden eagles from unpermitted take.

Thus, especially because "[t]he relationship between the [permitting] decision and the deaths of [protected] species is clear," *Defenders*, 882 F.2d at 1301, BIA's decision was "not in accordance with law." *Anderson*, 371 F.3d at 501–02 (invalidating an agency decision allowing unlawful taking of whales and finding that the agency must comply with the relevant permitting requirement

"before any taking" occurs); *CBD*, 698 F.3d at 1128; *Wilderness Society*, 353 F.3d at 1070.[14]

CONCLUSION

For these reasons, this Court should reverse the district court, vacate BIA's ROD, and remand to BIA for further action consistent with NEPA and BGEPA.

ORAL ARGUMENT REQUEST

Because this appeal raises important issues, and oral argument may aid the Court's consideration, Plaintiffs respectfully request that the Court schedule an oral argument.

STATEMENT OF RELATED CASE

No other cases pending in this Court or any other are related to this case.

[14] *POC I* distinguished *Anderson* and *Wilderness Society* because in those cases the permitting agencies knew or should have known that the permitted activities would violate the law, whereas in *POC I* this Court found taking of eagles from the lower-risk valley turbines "too speculative and indirect to impose liability on the BLM." 825 F.3d at 587. The district court erred by making the same distinction but failing to recognize that, as described above, all parties agree that the higher-risk ridgeline turbines *will* kill eagles and, here, the expert agency (FWS) itself implored BIA to require a BGEPA permit before construction and operation. Both the district court and *POC I* distinguished *CBD* on the basis that the Endangered Species Act ("ESA") requires agencies to "ensure" compliance with its take prohibition. *POC I*, 825 F.3d at 587; ER15 n.9. However, as in the ESA, Congress has specifically directed BIA to "ensure" that wind turbines on tribal lands "compl[y] with all applicable environmental laws," 25 U.S.C. § 3504(e)(2)(B)(iii)(VII). BIA's own regulations impose the same requirement. *See* 25 C.F.R. § 162.565(a) (BIA must "ensure compliance with all applicable environmental laws" before approving a lease).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

PROOF OF SERVICE

I hereby certify that on November 13, 2017, I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, including the following:

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ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706 – Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S.C. § 4332 – Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

BALD AND GOLDEN EAGLE PROTECTION ACT

16 U.S.C. § 668 – Bald and golden eagles

(a) Prohibited acts; criminal penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act 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 of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: Provided, That in the case of a second or subsequent conviction for a violation of this section committed after October 23, 1972, such person shall be fined not more than $10,000 or imprisoned not more than two years, or both: Provided further, That the commission of each taking or other act prohibited by

this section with respect to a bald or golden eagle shall constitute a separate violation of this section: Provided further, That one-half of any such fine, but not to exceed $2,500, shall be paid to the person or persons giving information which leads to conviction: Provided further, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle.

(b) Civil penalties

Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall 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 of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary. For good cause shown, the Secretary may remit or mitigate any such penalty. Upon any failure to pay the penalty assessed under this section, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing any such action, the court must sustain the Secretary's action if supported by substantial evidence.

(c) Cancellation of grazing agreements

The head of any Federal agency who has issued a lease, license, permit, or other agreement authorizing the grazing of domestic livestock on Federal lands to any person who is convicted of a violation of this subchapter or of any permit or regulation issued hereunder may immediately cancel each such lease, license, permit, or other agreement. The United States shall not be liable for the payment of

any compensation, reimbursement, or damages in connection with the cancellation of any lease, license, permit, or other agreement pursuant to this section.

16 U.S.C. § 668a – Taking and using of the bald and golden eagle for scientific, exhibition, and religious purposes

Whenever, after investigation, the Secretary of the Interior shall determine that it is compatible with the preservation of the bald eagle or the golden eagle to permit the taking, possession, and transportation of specimens thereof for the scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes, or that it is necessary to permit the taking of such eagles for the protection of wildlife or of agricultural or other interests in any particular locality, he may authorize the taking of such eagles pursuant to regulations which he is hereby authorized to prescribe: Provided, That on request of the Governor of any State, the Secretary of the Interior shall authorize the taking of golden eagles for the purpose of seasonally protecting domesticated flocks and herds in such State, in accordance with regulations established under the provisions of this section, in such part or parts of such State and for such periods as the Secretary determines to be necessary to protect such interests: Provided further, That bald eagles may not be taken for any purpose unless, prior to such taking, a permit to do so is procured from the Secretary of the Interior: Provided further, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking, possession, and transportation of golden eagles for the purposes of falconry, except that only golden eagles which would be taken because of depredations on livestock or wildlife may be taken for purposes of falconry: Provided further, That the Secretary of the Interior, pursuant to such regulations as he may prescribe, may permit the taking of golden eagle nests which interfere with resource development or recovery operations.

16 U.S.C. § 668c – Definitions

As used in this subchapter "whoever" includes also associations, partnerships, and corporations; "take" includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb; "transport" includes also ship, convey, carry, or transport by any means whatever, and deliver or receive or cause to be delivered or received for such shipment, conveyance, carriage, or transportation.

25 U.S.C. § 3504(e)(2)(B) – Tribal energy resource agreements

The Secretary shall approve a tribal energy resource agreement submitted under paragraph (1) if--

> **(i)** the Secretary determines that the Indian tribe has demonstrated that the Indian tribe has sufficient capacity to regulate the development of energy resources of the Indian tribe;
>
> **(ii)** the tribal energy resource agreement includes provisions required under subparagraph (D); and
>
> **(iii)** the tribal energy resource agreement includes provisions that, with respect to a lease, business agreement, or right-of-way under this section--
>
> > **(I)** ensure the acquisition of necessary information from the applicant for the lease, business agreement, or right-of-way;
> >
> > **(II)** address the term of the lease or business agreement or the term of conveyance of the right-of-way;
> >
> > **(III)** address amendments and renewals;
> >
> > **(IV)** address the economic return to the Indian tribe under leases, business agreements, and rights-of-way;
> >
> > **(V)** address technical or other relevant requirements;
> >
> > **(VI)** establish requirements for environmental review in accordance with subparagraph (C);
> >
> > **(VII)** ensure compliance with all applicable environmental laws, including a requirement that each lease, business agreement, and right-of-way state that the lessee, operator, or right-of-way grantee shall comply with all such laws;
> >
> > **(VIII)** identify final approval authority;
> >
> > **(IX)** provide for public notification of final approvals;

(X) establish a process for consultation with any affected States regarding off-reservation impacts, if any, identified under subparagraph (C)(i);

(XI) describe the remedies for breach of the lease, business agreement, or right-of-way;

(XII) require each lease, business agreement, and right-of-way to include a statement that, if any of its provisions violates an express term or requirement of the tribal energy resource agreement pursuant to which the lease, business agreement, or right-of-way was executed-

(aa) the provision shall be null and void; and

(bb) if the Secretary determines the provision to be material, the Secretary may suspend or rescind the lease, business agreement, or right-of-way or take other appropriate action that the Secretary determines to be in the best interest of the Indian tribe;

(XIII) require each lease, business agreement, and right-of-way to provide that it will become effective on the date on which a copy of the executed lease, business agreement, or right-of-way is delivered to the Secretary in accordance with regulations promulgated under paragraph (8);

(XIV) include citations to tribal laws, regulations, or procedures, if any, that set out tribal remedies that must be exhausted before a petition may be submitted to the Secretary under paragraph (7)(B);

(XV) specify the financial assistance, if any, to be provided by the Secretary to the Indian tribe to assist in implementation of the tribal energy resource agreement, including environmental review of individual projects; and

(XVI) in accordance with the regulations promulgated by the Secretary under paragraph (8), require that the Indian tribe, as soon as practicable after receipt of a notice by the Indian tribe, give written notice to the Secretary of--

> **(aa)** any breach or other violation by another party of any provision in a lease, business agreement, or right-of-way entered into under the tribal energy resource agreement; and
>
> **(bb)** any activity or occurrence under a lease, business agreement, or right-of-way that constitutes a violation of Federal or tribal environmental laws.

28 U.S.C. § 1291 – Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331 – Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

REGULATIONS

25 C.F.R. § 162.565 – What is the approval process for a WSR lease?

(a) Before we approve a WSR lease, we must determine that the lease is in the best interest of the Indian landowners. In making that determination, we will:

(1) Review the lease and supporting documents;

(2) Identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances;

(3) If the lease is being approved under 25 U.S.C. 415, assure ourselves that adequate consideration has been given to the factors in 25 U.S.C. 415(a); and

(4) Require any lease modifications or mitigation measures necessary to satisfy any requirements including any other Federal or tribal land use requirements.

(b) Upon receiving a WSR lease package, we will promptly notify the parties whether the package is or is not complete. A complete package includes all the information and supporting documents required under this subpart, including but not limited to, NEPA review documentation and valuation documentation, where applicable.

(1) If the WSR lease package is not complete, our letter will identify the missing information or documents required for a complete package. If we do not respond to the submission of a WSR lease package, the parties may take action under § 162.588.

(2) If the WSR lease package is complete, we will notify the parties of the date of receipt. Within 60 days of the receipt date, we will approve or disapprove the lease, return the package for revision, or inform the parties in writing that we need additional review time. If we inform the parties in writing that we need additional time, then:

(i) Our letter informing the parties that we need additional review time must identify our initial concerns and invite the parties to respond within 15 days of the date of the letter; and

(ii) We have 30 days from sending the letter informing the parties that we need additional time to approve or disapprove the lease.

(c) If we do not meet the deadlines in this section, then the parties may take appropriate action under § 162.588.

(d) We will provide any lease approval or disapproval and the basis for the determination, along with notification of any appeal rights under part 2 of this chapter, in writing to the parties to the lease.

(e) We will provide approved WSR leases on tribal land to the lessee and provide a copy to the tribe. We will provide approved WSR leases on individually owned Indian land to the lessee, and make copies available to the Indian landowners upon written request.

40 C.F.R. § 1500.1 – Purpose

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take

actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. § 1500.2 – Policy

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 C.F.R. § 1501.5 – Lead agencies

(a) A lead agency shall supervise the preparation of an environmental impact statement if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency.

A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which other Federal agencies shall be cooperating agencies.

40 C.F.R. § 1501.6 – Cooperating agencies

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

40 C.F.R. § 1502.3 – Statutory requirements for statements

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

40 C.F.R. § 1502.5 – Timing

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to

rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

40 C.F.R. § 1502.9 –Draft, final, and supplemental statements

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

40 C.F.R. § 1505.3 – Implementing the decision

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

40 C.F.R. § 1506.3 – Adoption

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of a judicial action which is not final, the agency shall so specify.

40 C.F.R. § 1508.27 –Significantly

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

> **(1)** Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

50 C.F.R. § 22.26 – Permits for eagle take that is associated with, but not the purpose of, an activity.

(a) Purpose and scope. This permit authorizes take of bald eagles and golden eagles where the take is compatible with the preservation of the bald eagle and the golden eagle; is necessary to protect an interest in a particular locality; is associated with, but not the purpose of, the activity; and cannot practicably be avoided.

(b) Definitions. In addition to the definitions contained in part 10 of this subchapter, and § 22.3, the following definition applies in this section:

Eagle means a live bald eagle (Haliaeetus leucocephalus), live golden eagle (Aquila chrysaetos), a bald eagle egg, or a golden eagle egg.

(c) Permit conditions. In addition to the conditions set forth in part 13 of this subchapter, which govern permit renewal, amendment, transfer, suspension, revocation, and other procedures and requirements for all permits issued by the Service, your authorization is subject to the following additional conditions:

> **(1)** You must comply with all avoidance, minimization, or other mitigation measures specified in the terms of your permit to mitigate for the detrimental effects on eagles, including indirect and cumulative effects, of the permitted take.
>
> > **(i)** Compensatory mitigation scaled to project impacts will be required for any permit authorizing take that would exceed the applicable eagle management unit take limits. Compensatory mitigation for this purpose must ensure the preservation of the affected eagle species by reducing another ongoing form of mortality by an amount equal to or greater than the unavoidable mortality, or increasing the eagle population by an equal or greater amount.
> >
> > **(ii)** Compensatory mitigation may also be required in the following circumstances:
> >
> > > **(A)** When cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population; or
> > >
> > > **(B)** When available data indicate that cumulative unauthorized mortality would exceed 10 percent of the local area population.

(iii) All required compensatory mitigation must:

(A) Be determined based on application of all practicable avoidance and minimization measures;

(B) Be sited within the same eagle management unit where the permitted take will occur unless the Service has reliable data showing that the population affected by the take includes individuals that are reasonably likely to use another eagle management unit during part of their seasonal migration;

(C) Use the best available science in formulating and monitoring the long-term effectiveness of mitigation measures and use rigorous compliance and effectiveness monitoring and evaluation to make certain that mitigation measures achieve their intended outcomes, or that necessary changes are implemented to achieve them;

(D) Be additional and improve upon the baseline conditions of the affected eagle species in a manner that is demonstrably new and would not have occurred without the compensatory mitigation (voluntary actions taken in anticipation of meeting compensatory mitigation requirements for an eagle take permit not yet granted may be credited toward compensatory mitigation requirements);

(E) Be durable and, at a minimum, maintain its intended purpose for as long as impacts of the authorized take persist; and

(F) Include mechanisms to account for and address uncertainty and risk of failure of a compensatory mitigation measure.

(iv) Compensatory mitigation may include conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements. Permittee-responsible mitigation may be approved provided the permittee submits verifiable documentation sufficient to demonstrate that the standards set forth in paragraph (c)(1)(iii) of this section have been met and the alternative means of compensatory mitigation will offset the permitted take to the degree that is compatible with the preservation of eagles.

(2) Monitoring.

(i) You may be required to monitor impacts to eagles from the permitted activity for up to 3 years after completion of the activity or as set forth in a separate management plan, as specified on your permit. For ongoing activities and enduring site features that will likely continue to cause take, periodic monitoring will be required for as long as the data are needed to assess impacts to eagles.

(ii) The frequency and duration of required monitoring will depend on the form and magnitude of the anticipated take and the objectives of associated avoidance, minimization, or other mitigation measures, not to exceed what is reasonable to meet the primary purpose of the monitoring, which is to provide data needed by the Service regarding the impacts of the activity on eagles for purposes of adaptive management. You must coordinate with the Service to develop project-specific monitoring protocols. If the Service has officially issued or endorsed, through rulemaking procedures, monitoring protocols for the activity that will take eagles, you must follow them, unless the Service waives this requirement. Your permit may require that the monitoring be conducted by qualified, independent third parties that report directly to the Service.

(3) You must submit an annual report summarizing the information you obtained through monitoring to the Service every year that your permit is valid and for up to 3 years after completion of the activity or termination of the permit, as specified in your permit. The Service will make eagle mortality information from annual reports available to the public.

(4) While the permit is valid and for up to 3 years after it expires, you must allow Service personnel, or other qualified persons designated by the Service, access to the areas where eagles are likely to be affected, at any reasonable hour, and with reasonable notice from the Service, for purposes of monitoring eagles at the site(s).

(5) The authorizations granted by permits issued under this section apply only to take that results from activities conducted in accordance with the description contained in the permit application and the terms of the permit. If the permitted activity changes after a permit is issued, you must immediately

contact the Service to determine whether a permit amendment is required in order to retain take authorization.

(6) You must contact the Service immediately upon discovery of any unanticipated take.

(7) Additional conditions for permits with durations longer than 5 years—

(i) Monitoring. Monitoring to assess project impacts to eagles and the effectiveness of avoidance and minimization measures must be conducted by qualified, independent third parties, approved by the Service. Monitors must report directly to the Service and provide a copy of the reports and materials to the permittee.

(ii) Adaptive management. The permit will specify circumstances under which modifications to avoidance, minimization, or compensatory mitigation measures or monitoring protocols will be required, which may include, but are not limited to: Take levels, location of take, and changes in eagle use of the activity area. At a minimum, the permit must specify actions to be taken if take approaches or reaches the amount authorized and anticipated within a given time frame. Adaptive management terms in a permit will include review periods of no more than 5 years and may require prompt action(s) upon reaching specified conditions at any time during the review period.

(iii) Permit reviews. At no more than 5 years from the date a permit that exceeds 5 years is issued, and at least every 5 years thereafter, the permittee will compile, and submit to the Service, eagle fatality data or other pertinent information that is site-specific for the project, as required by the permit. The Service will review this information, as well as information provided directly to the Service by independent monitors, to determine whether:

(A) The permittee is in compliance with the terms and conditions of the permit and has implemented all applicable adaptive management measures specified in the permit; and

(B) Eagle take does not exceed the amount authorized to occur within the period of review.

(iv) Actions to be taken based on the permit review.

(A) In consultation with the permittee, the Service will update fatality predictions, authorized take levels and compensatory mitigation for future years, taking into account the observed levels of take based on approved protocols for monitoring and estimating total take, and, if applicable, accounting for changes in operations or permit conditions pursuant to the adaptive management measures specified in the permit or made pursuant to paragraphs (c)(7)(iv)(B) through (D) of this section.

(B) If authorized take levels for the period of review are exceeded in a manner or to a degree not addressed in the adaptive management conditions of the permit, based on the observed levels of take using approved protocols for monitoring and estimating total take, the Service may require additional actions including but not limited to:

(1) Adding, removing, or adjusting avoidance, minimization, or compensatory mitigation measures;

(2) Modifying adaptive management conditions;

(3) Modifying monitoring requirements; and

(4) Suspending or revoking the permit in accordance with part 13 of this subchapter B.

(C) If the observed levels of take, using approved protocols for monitoring and estimating total take, are below the authorized take levels for the period of review, the Service will proportionately revise the amount of compensatory mitigation required for the next period of review, including crediting excess compensatory mitigation already provided by applying it to the next period of review.

(D) Provided the permittee implements all required actions and remains compliant with the terms and conditions of the permit, no other action is required. However, with consent of the permittee, the Service may make additional changes to a permit, including appropriate modifications to avoidance and/or

minimization measures or monitoring requirements. If measures are adopted that have been shown to be effective in reducing risk to eagles, appropriate adjustments will be made in fatality predictions, take estimates, and compensatory mitigation.

(v) Fees. For permits with terms longer than 5 years, an administration fee of $8,000 will be assessed every 5 years for permit review.

(8) The Service may amend, suspend, or revoke a permit issued under this section if new information indicates that revised permit conditions are necessary, or that suspension or revocation is necessary, to safeguard local or regional eagle populations. This provision is in addition to the general criteria for amendment, suspension, and revocation of Federal permits set forth in §§ 13.23, 13.27, and 13.28 of this chapter.

(9) Notwithstanding the provisions of § 13.26 of this chapter, you remain responsible for all outstanding monitoring requirements and mitigation measures required under the terms of the permit for take that occurs prior to cancellation, expiration, suspension, or revocation of the permit.

(10) You must promptly notify the Service of any eagle(s) found injured or dead at the activity site, regardless of whether the injury or death resulted from your activity. The Service will determine the disposition of such eagles.

(11) You are responsible for ensuring that the permitted activity is in compliance with all Federal, Tribal, State, and local laws and regulations applicable to eagles.

(d) Applying for an eagle take permit.

(1) You are advised to coordinate with the Service as early as possible for advice on whether a permit is needed and for technical assistance in assembling your permit application package. The Service may provide guidance on developing complete and adequate application materials and will determine when the application form and materials are ready for submission.

(2) Your application must consist of a completed application Form 3–200–71 and all required attachments. Send applications to the Regional Director of the Region in which the take would occur—Attention: Migratory Bird

Permit Office. You can find the current addresses for the Regional Directors in § 2.2 of subchapter A of this chapter.

(3) Except as set forth in paragraph (d)(3)(ii) of this section, an applicant must coordinate with the Service to develop project-specific monitoring and survey protocols, take probability models, and any other applicable data quality standards, and include in the application all the data thereby obtained.

(i) If the Service has officially issued or endorsed, through rulemaking procedures, survey, modeling, or other data quality standards for the activity that will take eagles, you must follow them and include in your application all the data thereby obtained, unless the Service waives this requirement for your application.

(ii) Applications for eagle incidental take permits for wind facilities must include pre-construction eagle survey information collected according to the following standards, unless exceptional circumstances apply and survey requirements can be modified to accommodate those circumstances after consultation with, and written concurrence by, the Service:

(A) Surveys must consist of point[hyphen]based recordings of bald eagle and golden eagle flight activity (minutes of flight) within a three-dimensional cylindrical plot (the sample plot). The radius of the sample plot is 2,625 feet (ft) (800 meters (m)), and the height above ground level must be either 656 ft (200 m) or 82 ft (25 m) above the maximum blade reach, whichever is greater.

(B) The duration of the survey for each visit to each sample plot must be at least 1 hour.

(C) Sampling must include at least 12 hours per sample plot per year for 2 or more years. Each sample plot must be sampled at least once per month, and the survey start time for a sampling period must be selected randomly from daylight hours,1 unless the conditions in paragraph (d)(3)(ii)(F) of this section apply.

(D) Sampling design must be spatially representative of the project footprint,2 and spatial coverage of sample plots must

include at least 30 percent of the project footprint. Sample plot locations must be determined randomly, unless the conditions in paragraph (d)(3)(ii)(F) of this section apply.

(E) The permit application package must contain the following:

(1) Coordinates of each sample point in decimal degrees (specify projection/datum).

(2) The radius and height of each sample plot.

(3) The proportion of each three-dimensional sample plot that was observable from the sample point for each survey.

(4) Dates, times, and weather conditions for each survey, to include the time surveys at each sample point began and ended.

(5) Information for each survey on the number of eagles by species observed (both in flight and perched), and the amount of flight time (minutes) that each was in the sample plot area.

(6) The number of proposed turbines and their specifications, including brand/model, rotor diameter, hub height, and maximum blade reach (height), or the range of possible options.

(7) Coordinates of the proposed turbine locations in decimal degrees (specify projection/datum), including any alternate sites.

(F) Stratified-random sampling (a sample design that accounts for variation in eagle abundance by, for example, habitat, time of day, season) will often provide more robust, efficient sampling. Random sampling with respect to time of day, month, or project footprint can be waived if stratification is determined to be a preferable sampling strategy after consultation and approval in advance with the Service.

(iii) Application of the Service-endorsed data quality standards of paragraphs (d)(3)(i) and (ii) of this section may not be needed if:

(A) The Service has data of sufficient quality to predict the likely risk to eagles;

(B) Expediting the permit process will benefit eagles; or

(C) The Service determines the risk to eagles from the activity is low enough relative to the status of the eagle population based on:

(1) Physiographic and biological factors of the project site; or

(2) The project design (i.e., use of proven technology, micrositing, etc.).

(e) Evaluation of applications. In determining whether to issue a permit, we will evaluate:

(1) Whether take is likely to occur based on the magnitude and nature of the impacts of the activity.

(i) The prior exposure and tolerance to similar activity of eagles in the vicinity;

(ii) Visibility of the activity from the eagle's nest, roost, or foraging perches; and

(iii) Whether alternative suitable eagle nesting, roosting, and/or feeding areas that would not be detrimentally affected by the activity are available to the eagles potentially affected by the activity.

(2) Whether the take is:

(i) Compatible with the preservation of the bald eagle and the golden eagle, including consideration of indirect effects and the cumulative effects of other permitted take and other additional factors affecting eagle populations;

(ii) Associated with the permanent loss of an important eagle use area;

(iii) Necessary to protect a legitimate interest in a particular locality; and

(iv) Associated with, but not the purpose of, the activity.

(3) Whether the cumulative authorized take, including the proposed take, would exceed 5 percent of the local area population.

(4) Any available data indicating that unauthorized take may exceed 10 percent of the local area population.

(5) Whether the applicant has proposed all avoidance and minimization measures to reduce the take to the maximum degree practicable relative to the magnitude of the impacts to eagles.

(6) Whether the applicant has proposed compensatory mitigation measures that comply with standards set forth under paragraph (c)(1) of this section to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

(7) Whether issuing the permit would preclude the Service from authorizing another take necessary to protect an interest of higher priority, according to the following prioritization order:

(i) Safety emergencies;

(ii) Increased need for traditionally practiced Native American tribal religious use that requires taking eagles from the wild;

(iii) Non-emergency activities necessary to ensure public health and safety; and

(iv) Other interests.

(8) For projects that are already operational and have taken eagles without a permit, whether such past unpermitted eagle take has been resolved or is in the process of resolution with the Office of Law Enforcement through settlement or other appropriate means.

(9) Any additional factors that may be relevant to our decision whether to issue the permit, including, but not limited to, the cultural significance of a local eagle population.

(f) Required determinations. Before we issue a permit, we must find that:

(1) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting the eagle populations within the eagle management unit and the local area population, are compatible with the preservation of bald eagles and golden eagles.

(2) The taking is necessary to protect an interest in a particular locality.

(3) The taking is associated with, but not the purpose of, the activity.

(4) The applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles.

(5) The applicant has applied all appropriate and practicable compensatory mitigation measures, when required, pursuant to paragraph (c) of this section, to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

(6) Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority as set forth in paragraph (e)(7) of this section.

(7) Issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle take at the project.

(g) We may deny issuance of a permit if we determine that take is not likely to occur.

(h) Permit duration. The duration of each permit issued under this section will be designated on its face and will be based on the duration of the proposed activities, the period of time for which take will occur, the level of impacts to eagles, and the nature and extent of mitigation measures incorporated into the terms and conditions of the permit. A permit for incidental take will not exceed 30 years.

(i) Applicants for eagle incidental take permits who submit a completed permit application by July 14, 2017 may elect to apply for coverage under the regulations that were in effect prior to January 17, 2017 provided that the permit application satisfies the permit application requirements of the regulations in effect prior to January 17, 2017. If the Service issues a permit to such applicants, all of the provisions and conditions of the regulations that were in effect prior to January 17, 2017 will apply.