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' REPLY BRIEF

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The opening brief filed by Appellants Protect Our Communities Foundation, David Hogan, and Nica Knite ("Plaintiffs") explained that the Bureau of Indian Affairs' ("BIA") authorization of a lease for Phase II of the Tule Wind Project violated the National Environmental Policy Act ("NEPA"), the Administrative Procedure Act ("APA"), and the Bald and Golden Eagle Protection Act ("BGEPA") in four ways: by relying on an Environmental Impact Statement ("EIS") without fulfilling its assurances; by failing to consider a reasonable range of alternatives; by failing to prepare a Supplemental EIS ("SEIS") to consider significant new information; and through an arbitrary and capricious approach to BGEPA permitting.

Undergirding each claim, Plaintiffs explained that the U.S. Fish & Wildlife Service ("FWS")—the agency with statutory responsibility for protecting, and undisputed "special expertise" regarding, golden eagles, 40 C.F.R. § 1508.26—provided extensive reasons why BIA should not authorize the full Phase II project, but should instead consider alternatives to reduce threats to eagles and at least require the developer to obtain a BGEPA permit before construction. However, BIA, without reasonable explanation in the record, rejected FWS's expert input despite BIA's conceded "lack of BIA biological expertise" regarding "impacts to golden eagles," ER176. This arbitrary disregard for FWS's "special expertise" violated NEPA, BGEPA, and the APA.

In response, Federal Defendants and Intervenor-Defendants Tule Wind, LLC ("Tule") and the Ewiaapaayp Band of Kumeyaay Indians ("the Tribe") downplay and misrepresent FWS's input, asserting that BIA had discretion to authorize this lease but never explaining how BIA could rationally reach decisions diametrically opposed to FWS's expert input when BIA candidly acknowledged its own "lack of BIA biological expertise." ER176. Accordingly, Defendants fail to show that BIA's use of its discretion was anything other than arbitrary and capricious.

I. BIA VIOLATED NEPA BY RELYING ON BLM'S FEIS WITHOUT COMPLYING WITH THE FEIS'S PROCEDURES FOR AUTHORIZING TULE PHASE II.

As Plaintiffs explained, BIA purports to comply with NEPA by relying exclusively on a Final EIS that the U.S. Bureau of Land Management ("BLM") prepared over two years before BIA authorized Tule Phase II, and that expressly stated certain analysis must occur before any of Phase II could be authorized. Specifically, the FEIS stated that "all, none, or part" of Phase II could be authorized only after BIA established "final criteria determining the risk each [turbine] location presents to eagles . . . in consultation with the required resource agencies" and further determined that "turbine locations [] show reduced risk to the eagle population following analysis of detailed behavior studies" of golden eagles. ER146-47. The FEIS further assured the public that "[t]urbine locations exceeding the acceptable risk levels to golden eagles based on these final criteria will not be

authorized for construction." *Id*. Nevertheless, BIA authorized all of Phase II without either completing this analysis or preparing its own NEPA document. In doing so, BIA violated NEPA. Defendants have no persuasive response.[1]

A. BIA Did Not Carry Out the Analysis that the FEIS Assured the Public Would Occur Before Tule Phase II Could Be Authorized.

As explained, BIA did not fulfill the analytical process the FEIS stated was necessary before Tule Phase II could be approved: BIA never considered authorizing "part" of Phase II; never considered the risk "each [turbine] location" causes for eagles; never formulated objective criteria for determining risks to eagles; and never meaningfully consulted with FWS, instead proffering arbitrary reasons for disregarding the expert agency's input in order to reach BIA's preordained outcome of authorizing all of Phase II. *See* Plaintiffs' Opening Brief ("Br.") 24-29.

Evidently concerned they cannot show that BIA fulfilled the FEIS's public assurances, Defendants instead focus on the seriously defective argument that BIA was not legally obligated to do so. First, Defendants waived this argument by not advancing it below. *Raich v. Gonzalez*, 500 F.3d 850, 868 (9th Cir. 2007) (noting

[1] Overstating BIA's role in preparing the FEIS, the government quibbles with Plaintiffs calling it "BLM's FEIS" instead of "BIA's FEIS," Govt.14, but *BIA's own Record of Decision* ("ROD") describes it as "BLM's FEIR/EIS." ER49; *see also* ER176 (explaining BIA's limited role in preparing the FEIS).

"a long-standing rule in the Ninth Circuit" against new arguments on appeal). Second, this argument is an impermissible post hoc justification that never appears in the record. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (post hoc rationalizations are "an inadequate basis for review"). Moreover, the argument actually contradicts BIA's own ROD, which "relie[d] on the [FEIS]" and "adopt[ed] the FEIS" without reservation, ER49, as well as BIA's description of the promised analysis as an "ongoing *requirement* of the decision-making process based on the [FEIS]," SER1407 (emphasis added).[2] Accordingly, the government's new position that BIA was not obligated to fulfill the FEIS's public assurances is groundless.

Most important, the government's new argument is not relevant. Regardless of whether the Court construes the FEIS's language as binding BIA, the agency acted arbitrarily and capriciously by *adopting* BLM's FEIS—which assured the public that BIA could approve ridgeline turbines only after certain analysis—but approving the turbines *without* performing that promised analysis.

The record flatly contradicts the government's attempt to argue that BIA performed this analysis. Government Brief ("Govt.") 20. First, BIA never considered authorizing "part" of Tule Phase II, despite the FEIS stating that BIA

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[2] Plaintiffs use "ER" to cite Plaintiffs' Excerpts of Record and "SER" for the Government's.

would consult experts and consider new studies to determine whether to authorize "all, none, *or part*" of Phase II. Br.25-26. Tellingly, Defendants never attempt to demonstrate that BIA performed this analysis. Instead, they assert the FEIS merely committed to BIA's discretion the decision to authorize "all, none or part" of Phase II, but fail to explain how BIA's exercise of discretion could be anything other than arbitrary and capricious when BIA did not consider implementing "part" of the project. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency decision that "entirely failed to consider an important aspect of the problem" is arbitrary and capricious).

Similarly, contrary to the government's arguments, Govt.20, BIA did not establish any objective criteria in consultation with FWS, nor "borrowed" criteria from FWS, to determine the risk each turbine location poses for golden eagles. As explained, Br.26, the record contains no such criteria nor consultation with FWS on this subject. Defendants' brief refers to "criteria borrowed from FWS," but cites only the Project Specific Avian and Bat Protection Plan ("Plan") and portions of the ROD incorporating *that* document. However, BLM's FEIS, on which BIA relied, expressly *rejected* the notion that these criteria would appear in such a Plan. *See* ER146 (striking out language that would have located criteria in the Plan). And in any event, neither document contains "criteria" for determining acceptable risks to eagles; indeed, the Plan states that such "criteria . . . *will be determined*" by

BIA separately, ER90 (emphasis added), and BIA's ROD circularly references the Plan, ER50.

Moreover, no record document reflects consultation with FWS on such criteria. Belying the government's reliance on the Plan, FWS severely criticized that document as deficient in methodology, far off-target in estimating eagle fatalities, and insufficient to address FWS's grave concerns about *unacceptable* risks to eagle populations. ER101-02, 112–17. Indeed, FWS provided BIA with an updated model that would more accurately reflect risk to eagles, but BIA *refused to use it*. ER91. FWS further provided its expert opinion that the ridgeline turbines pose unacceptable risks to eagles. ER102 (Phase II would not meet BGEPA's "conservation standard"). Accordingly, this record makes it impossible to find that BIA established objective criteria determining acceptable risks from each turbine location in consultation with FWS.

Further, and with grave consequences for eagles, BIA did not meaningfully consult with FWS regarding risks to the Canebrake nest—located less than 500 feet from the nearest Phase II turbine. ER70. The government wrongly asserts that "BIA also addressed FWS's concern with the Canebrake territory" by requiring curtailment of a few turbines under limited circumstances. Govt.18. As explained, FWS told BIA that such curtailment "would not alleviate the potential loss of this territory," ER114; that BIA's "minimal changes" to its Plan following

FWS's criticisms did not "sufficiently address [FWS's] concerns," ER102; and that even with curtailment, Phase II would likely cause "loss of productive golden eagle breeding territory," rendering the area an "ecological trap" for eagles attempting to nest there. *Id.* Hence, the record refutes the assertion that BIA addressed FWS's concerns, and makes clear that BIA never meaningfully consulted with FWS, as the EIS said *must* occur before any Phase II authorization.

Accordingly, the record refutes Defendants' assertion that BIA fulfilled the FEIS's promised analysis. Because BIA did not complete the FEIS's promised analysis, its authorization of Tule Phase II in exclusive reliance on that FEIS was arbitrary and capricious.

B. BIA Failed to Prepare any Independent NEPA Analysis.

Because BIA's reliance on BLM's FEIS was arbitrary and capricious, BIA's remaining option for NEPA compliance was to prepare some independent analysis, such as a new or supplemental EIS—but BIA did not do so. Instead, as Plaintiffs explained, BIA simply elected to rely on BLM's FEIS, without either fulfilling its promised analysis or even explaining how BIA could arrive at conclusions diametrically opposed to those in the FEIS. Br.29-32. The government's assertion that "there is no tension" between BLM's FEIS and BIA's ROD that would necessitate BIA preparing its own EIS, at 19, is wrong. Most fundamentally, the government fails to counter Plaintiffs' argument that BIA's preparation of an

independent EIS was necessary—but never undertaken—because BIA's reliance on BLM's FEIS was arbitrary and capricious.

Additionally, Plaintiffs explained that BIA disagreed with crucial aspects of BLM's FEIS, including its preferred alternative and its assessment of risks to eagles, Br.11-12, providing *another* compelling reason for BIA to prepare independent NEPA analysis. The starkest disagreement regards mitigation: BLM's FEIS determined that impacts to eagles would be "unmitigable"—even without *any* ridgeline turbines—ER138, while BIA's ROD (purportedly based on the same EIS) found that mitigation would reduce any impacts *from the higher-risk ridgeline turbines* below the level of significance, ER45. The government's explanation that the ROD required mitigation the FEIS did not analyze, Govt.19, conveniently ignores FWS's expert analysis, which revealed that this mitigation *would not be effective*. *See supra* at 6; ER102, 114. Reliance on mitigation that the expert agency found ineffective is not a rational basis for BIA to reach a fundamentally opposite conclusion from the FEIS it relied on. Accordingly, BIA's exclusive reliance on BLM's FEIS, instead of preparing any independent NEPA analysis, was arbitrary and capricious.

II. BIA NEVER CONSIDERED A REASONABLE RANGE OF ALTERNATIVES.

Plaintiffs explained that BIA violated NEPA by authorizing Tule Phase II without ever considering a reasonable range of alternatives for this major federal action. Br.32-37. Instead, BIA relied solely on BLM's FEIS, which in relevant part analyzed only taking no action or alternatives including *all* Phase II turbines—alternatives that, in BIA's words, "would essentially be the same" regarding eagle impacts. ER55-6. BIA's all-or-nothing approach flouts this Court's numerous precedents requiring analysis of a reasonable range of alternatives.

In response, Defendants fail to establish that BIA considered any alternative between all or none of Phase II, conspicuously failing to cite any record document in which BIA considered authorizing some, but not all, Phase II turbines. Instead, the government wrongly contends Plaintiffs are foreclosed from litigating BIA's flagrant analytical defect.

A. *Tule I* did not consider BIA's reliance on BLM's FEIS.

The government's first erroneous argument is that this Court's ruling in *Protect Our Cmtys. Found. v. Jewell* ("*Tule I*"), 825 F.3d 571 (9th Cir. 2016), forecloses Plaintiffs from challenging BIA's deficient alternatives analysis because that case upheld *BLM's* reliance on BLM's FEIS for Tule *Phase I*. However, as explained, *Tule I* considered only the adequacy of BLM's 2011 FEIS *for the purposes of BLM's decision* to authorize Phase I turbines in the McCain Valley,

with far lesser risks to eagles than Phase II. BIA's separate authorization of the higher-risk Phase II was a new major federal action, and whether BIA could satisfy NEPA by relying on BLM's FEIS for BIA's separate action is a question this Court did not—and could not—reach in *Tule I*, especially since BIA's authorization took place *after* the record in that case was complete. The government evidently believes that an EIS, once upheld for one purpose, is valid for all purposes, but this Court's precedents squarely reject that facile view of NEPA. *See, e.g., W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (upholding an EIS for one purpose but holding that further alternatives analysis was necessary, as here, "when the agency makes a critical decision to act"). Accordingly, *Tule I*'s approval of BLM's reliance on the 2011 FEIS has no bearing on *BIA's* deficient alternatives analysis.

B. The Need to Analyze a Reasonable Range of Alternatives for Tule Phase II was Clearly Before BIA.

The government also wrongly argues that Plaintiffs' challenge to BIA's deficient alternatives analysis was waived through ostensible failure to raise the issue in comments. The government's argument that BIA was somehow unaware of the need to consider alternatives misrepresents the law and the facts.

To begin with, NEPA and its implementing regulations clarify that each agency must prepare an EIS for "every . . . major Federal action[] significantly affecting the quality of the human environment," which must include "alternatives

to the proposed action." 42 U.S.C. § 4332. This alternatives analysis, "the heart of the [EIS]," must "provid[e] a clear basis for choice among options by the decisionmaker and the public," and must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. Although "lead" and "cooperating" agencies may, under certain circumstances, collaborate on an EIS, a cooperating agency, such as BIA, may only adopt another agency's EIS if it "meets the standards for an adequate statement under these regulations." 40 C.F.R. § 1506.3(a). Thus, a cooperating agency may only adopt an EIS for an action under its jurisdiction if that EIS satisfies NEPA's standards—including, as relevant here, the requirement that the EIS analyze a reasonable range of alternatives for the cooperating agency's distinct major federal action. The contention that BIA somehow did not know it needed to consider reasonable alternatives for its authorization of Tule Phase II makes a mockery of these bedrock NEPA principles, which are "binding on all Federal agencies." 40 C.F.R. § 1500.3.

The government's assertion of waiver is also based on an extremely cramped, mistaken reading of precedents regarding who must raise an issue in comments. For example, the government cites only out-of-circuit precedent—while ignoring this Court's decisions—to argue that a particular litigant must raise an issue in comments or forfeit that issue. Govt.24. This Court has repeatedly rejected this argument, as Plaintiffs noted. Br.32; *see also Glacier Fish Co., LLC*

v. Pritzker, 832 F.3d 1113, 1120 n.6 (9th Cir. 2016) (an issue is not waived "so long as an issue was raised with sufficient clarity to allow the decisionmaker to understand and rule on the issue raised, whether the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party"); *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1023 n.13 (9th Cir. 2007) ("requir[ing] each participant . . . to raise every issue . . . would be sanctioning the unnecessary multiplication of comments," which "would serve neither the agency nor the parties").

The government's waiver argument also relies on a specious reading of *when* comments must be submitted. The government argues that BIA must consider alternatives beyond those in BLM's FEIS only if commenters raised the issue in response to BLM's Draft EIS—three years before BIA chose to rely on it, and long before BIA told the public that it intended to authorize all Phase II turbines without even considering authorizing "part" of Phase II. Govt.26. This argument misrepresents the record and the law.

Importantly, FWS, CDFG, and others unequivocally urged BIA to consider further alternatives *well before* BIA decided to rely on BLM's FEIS. *See* ER101-02 (FWS comments urging BIA to "consider a different turbine siting design or moving the project to another location to avoid eagle take"). Moreover, FWS implored BIA to consider alternative project designs or locations "*in response to*

[BIA's] request" for FWS's input. ER112-13 (emphasis added). Accordingly, the record clearly shows that BIA *invited comments* on its Phase II plans, and that those comments informed BIA of the need to consider alternatives beyond those in BLM's FEIS. The government's assertion that BIA may now ignore comments *BIA itself solicited* reinforces that BIA never meaningfully consulted expert agencies, nor considered reasonable alternatives those experts highlighted.[3]

Defendants cite no precedent supporting the proposition that an agency may ignore comments calling for scrutiny of specific alternatives *when the agency itself solicited those comments*. Rather, Defendants' cited precedents state merely that an alternatives argument is waived if the agency "was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available." *Dept. of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004); *see also Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (noting "some obligation to raise these issues during the comment process" where "views were solicited"). Indeed, the Supreme Court has held that "the concept of 'alternatives' is an evolving one, requiring the agency to explore more or fewer alternatives as they become better known and understood." *Vt. Yankee Nuclear Power Corp. v.*

[3] The government repeatedly calls into doubt the value of further NEPA review, but such process would be profoundly valuable in allowing experts and the public to comment on reasonable alternatives reducing risks to eagles.

Natural Res. Def. Council, 435 U.S. 519, 552-53 (1978). Here, BIA itself solicited comments on its plan for Phase II, and in response experts called for analysis of specific alternative configurations with less impact on eagles; no precedent supports BIA's position that it could ignore comments the agency itself requested and had an opportunity to examine.[4]

In any event, even if comments were required to request fuller alternatives analysis during the Draft EIS comment period, Plaintiffs explained that some comments did exactly that. Br.34. For example, EPA's formal comments on BLM's Draft EIS, ER181-84, urged development of alternatives to avoid taking eagles, noting that adaptive management or mitigation would only be appropriate "[i]f alternatives cannot be developed that avoid the take of eagles," ER184. EPA further urged that decisionmakers "relocate, reduce, or eliminate portions of the project" that threaten "sensitive species" such as golden eagles. *Id*. Additionally, before BLM issued its FEIS, FWS stressed the need for examination of additional alternatives in order to better analyze the risks to golden eagles from Phase II.

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[4] Nor is there merit to the government's assertion, at 26–27, that comments requesting further alternatives analysis were too vague. FWS not only expressly urged BIA to "consider[] a different turbine siting design or moving the project to another location to avoid eagle take," but also recommended at least one specific alternative, noting that "[t]he option of moving forward with only six turbines near the base of the ridgeline warrants further consideration." ER112–14; *see also* ER95 (CDFG recommending BIA consider removing especially risky turbines).

SER0632 (FWS "recommend[ing] . . . an alternative" for Phase II that could allow avoidance of eagle take). Accordingly, Draft EIS comments plainly satisfy even the government's unduly stringent waiver standard.

Furthermore, as Plaintiffs explained, Br.33-35, the need to consider lower-risk alternatives was clear to BIA because "the agency had independent knowledge of the issues." *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). The government overlooks substantial record evidence in asserting that *Rumsfeld* does not apply because "there is no [] evidence that BIA was aware of any concern regarding the Project EIS's lack of a mid-range alternative." Govt.27. However, as explained, BIA's knowledge of the need to consider mid-range alternatives arose from numerous sources, including: the Draft EIS and FEIS themselves, ER198, 146-47 (stating BIA must consider additional studies and expert consultation before deciding to approve "all, none or *part*" of Phase II) (emphasis added); the project developer's comments regarding "risk assessment . . . of the Ridge turbines in any variety of combinations we desire," ER130; the Tribe's comments calling for consideration of removal of "the last turbine from the array," ER150-52; EPA's Draft EIS comments described above, ER181-84; comments from Plaintiffs and others regarding threats to eagles, ER204, 177-80; and *BIA's own recognition* that "[s]pecific turbine(s) could be eliminated if it is determined that risks outweigh benefits," ER127.

Despite the government's attempt to sweep this evidence under the rug, the record clearly reveals BIA's "independent knowledge" of the need to consider mid-range alternatives. *Rumsfeld*, 464 F.3d at 1092. Thus, Defendants' position that BIA may lawfully ignore repeated calls for it to consider mid-range alternatives has no merit.

C. BIA Did Not Consider a Reasonable Range of Alternatives.

The government devotes most of its attention to arguing BIA was not obligated to consider mid-range alternatives, because Defendants cannot credibly show BIA ever did so. Indeed, the government's brief, like BIA's ROD, *concedes* that all action alternatives are "essentially the same." Govt.21; ER55-56.

Paradoxically, the government faults Plaintiffs for failing to cite authority, at 23, but ignores Plaintiffs' citations to this Court's precedents uniformly holding that an agency violates NEPA where, as here, all action alternatives are the same. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999); *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050-54 (9th Cir. 2013). Indeed, while the government agrees that the relevant question is whether an EIS "foster[s] informed decision-making," Govt.23, it ignores this Court's holding in *Abbey*, which found that an agency cannot "make an informed decision on a project's environmental impacts *when each alternative considered would authorize*

the same underlying action," because such an all-or-nothing analysis "does not take [the] hard and careful look" that NEPA requires. 719 F.3d at 1051 (emphasis added). Accordingly, the record and this Court's precedents make clear that BIA's admittedly all-or-nothing alternatives analysis violated NEPA.[5]

III. BIA VIOLATED NEPA BY FAILING TO PREPARE AN SEIS TO CONSIDER SIGNIFICANT NEW INFORMATION IT OBTAINED AFTER BLM ISSUED THE 2011 FEIS.

Plaintiffs explained that, at minimum, an SEIS is necessary for BIA to consider significant new information it received after BLM issued its FEIS, and in light of BIA's authorization of an alternative that BLM's FEIS emphatically rejected. Br.38-47. In response, government counsel relies on a series of post hoc justifications not advanced by BIA in the record, arguing that information obtained after BLM issued its FEIS was neither "new" nor "significant," and also proffers purported distinctions for controlling authority. These arguments are baseless.

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[5] There is also no merit to the government's assertion, at 23, that BIA's analysis of zero turbines or 20 turbines is an adequate range of alternatives. *See Kempthorne*, 520 F.3d at 1038 ("[W]e find that the range of action alternatives is unreasonably narrow because the alternatives are virtually indistinguishable from one another."); *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 572 (D.C. Cir. 2016) (agency "failed to consider a reasonable range of alternatives" for wind project where there was no "analysis of a realistic mid-range alternative").

A. This Court's Decision in *Boody* Is Controlling.

Plaintiffs explained that this Court's decision in *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561-62 (9th Cir. 2006), squarely supports the need for BIA to prepare an SEIS. Br.42. There, as here, an EIS found that risks to a protected species "require extensive additional research and protection before any conclusions regarding the impact of [a proposed action] could be reached," and rejected an alternative that would "increase the risk" to that species. *Id*. at 559; *see also* ER146-47 (BLM's FEIS stating Phase II could only be authorized if new studies and expert consultation "show reduced risk"). In *Boody*, as here, an agency decision then allowed the same risks to the protected species. 468 F.3d at 559-61; ER45 (BIA approving all Phase II turbines). Further, in *Boody*, as here, no agency prepared any new NEPA document for the latter decision authorizing the previously rejected alternative. 468 F.3d at 562. This Court held that adopting a decision "that closely resembles the rejected alternative" required an SEIS. *Id.* The same reasoning must yield the same ruling here.

Defendants do not meaningfully distinguish *Boody*. The government misrepresents the record by arguing that whereas in *Boody* no new NEPA document was prepared for the second decision, "BIA did prepare an EIS" here. Govt.35-36. But the only EIS here was BLM's 2011 FEIS, which stated Phase II could be authorized only after further study of risks to eagles, like the EIS in

Boody. And, as in *Boody*, BIA prepared neither an EIS nor an Environmental Assessment for Phase II. Accordingly, the government's purported distinction fails.

Tule fares no better by asserting (at 19) that "BIA's decision did not resemble an alternative previously rejected." BLM's FEIS rejected authorization of Tule Phase II, stating that the ridgeline turbines "will not be authorized" unless further study and expert consultation revealed that the turbine locations "show reduced risk." ER146-47. Because BIA's authorization of the same ridgeline turbines BLM's FEIS rejected thus *does* closely resemble a previously rejected alternative, Tule's attempted distinction is illusory.[6]

The Tribe also futilely argues (at 25) that "*Boody* is inapposite because BLM's decision regarding Phase I did not preclude the BIA's subsequent decision regarding Phase II." However, the EIS in *Boody* did not foreclose any subsequent decision; it merely stated—like the FEIS here—that further study was necessary before action could be taken. Accordingly, the Tribe's attempted distinction is also meritless.

Because it resolved the precise issue at stake here, *Boody* governs this case.

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[6] Tule also misrepresents Plaintiffs as claiming (at 20) that BIA *could not* lawfully authorize Phase II. Plaintiffs make no such argument. Instead, Plaintiffs argue, as in *Boody*, that BIA acted arbitrarily and capriciously by authorizing Tule Phase II *without preparing an SEIS.*

B. BIA Received Significant New Information After BLM Issued its 2011 FEIS.

The government advances the illogical position that information BIA received *after* BLM issued its 2011 FEIS, including studies of golden eagle behavior and expert analyses of the resulting data, was not "new." Govt.29-32. However, as the government conceded below, "the documents obviously post-date the EIS," ECF No. 74, at 10, satisfying the plain meaning of the word "new." *See* Webster's Third New Int'l Dictionary ("new" means "having originated or occurred lately"). This new information was clearly also significant.

1. Post-FEIS information showed greater risks than the FEIS analyzed.

The government distorts the record to assert that BIA did not need to prepare an SEIS because BLM's FEIS ostensibly disclosed all threats and risks to golden eagles that post-FEIS information documented. Govt.29-32. However, the FEIS actually found that those risks were *not* sufficiently understood to allow authorization of *any* Phase II turbines; instead, the FEIS found that Phase II could only be authorized—if at all—"[p]ending the outcome" of *new* studies of eagle behavior, development of *new* criteria "determining the risk each [turbine] location presents to eagles," and *new* consultation with expert agencies on these issues. ER146-47. In fact, the FEIS found that without such studies, the risks to golden eagles "cannot be determined." ER149. Accordingly, because the FEIS *required*

further studies and analyses of risks to eagles before *any* Phase II turbines could be authorized, the government's position that the FEIS fully disclosed and analyzed all risks to golden eagles is factually bankrupt.

The government's assertion that the FEIS fully considered all risks to eagles is also unsupportable in light of BIA's disagreement with the FEIS about the effectiveness of mitigation. The FEIS found that *even without any ridgeline turbines*, the risks of mortality to golden eagles "cannot be mitigated." ER148. Yet BIA's ROD concluded—ostensibly based on new information but directly contradicting the FEIS and FWS's subsequent expert analysis—that the ridgeline turbines "would not create significant impacts after the implementation of mitigation measures." ER45. The government thus simultaneously relies on the FEIS for putatively analyzing all risks to eagles, including a finding that such risks "cannot be mitigated," while also relying upon BIA's conclusion—based on *new information*—that such risks *can* be mitigated below the level of significance. The government cannot have it both ways. *See, e.g.*, *Humane Soc'y v. Locke*, 626 F.3d 1040, 1050 (9th Cir. 2010) ("A satisfactory explanation is [] required" for "apparent conflict" between agency findings).

Nor is there merit to the government's assertion that post-FEIS information merely "confirmed" the FEIS. For example, the government wrongly argues that FWS's position did not change based on post-FEIS information. Govt.31 (citing

SER632). However, the government's own citation flatly contradicts its argument, revealing that FWS reserved judgment on risks to eagles when BLM issued its FEIS, stating new studies were necessary to "inform the risk assessment" for Phase II. SER632. Accordingly, the record document *cited by the government* establishes that FWS explained the need for post-FEIS information to assess Phase II's risks to eagles.

Further, when FWS subsequently obtained that information, it repeatedly informed BIA that the risks were even more severe than the FEIS estimated. For example, while the government stresses that the FEIS anticipated potential loss of the Canebrake territory, Govt.31-32 (citing SER144), FWS's *post-EIS* analyses for the first time explained the *importance* of this scenario for eagle populations and FWS's trust responsibilities. Thus, FWS informed BIA that "loss of production from a golden eagle territory would be the equivalent of taking 4 individuals per year," ER112. That information is *not* in the FEIS, undercutting Defendants' claim that the FEIS fully analyzed all risks to eagles.

Similarly, FWS informed BIA for the first time that losing the Canebrake territory would seriously undermine FWS's efforts to develop a "Desert Renewable Energy Conservation Plan" with the "goal of maximizing energy production while maintaining sustainable populations of eagles." ER112-13. The

FEIS did not refer to this Plan at all. Accordingly, the FEIS did not—and could not—disclose or analyze this important risk to regional eagle conservation.

Finally, FWS's post-FEIS memoranda also advised BIA for the first time that due to the then-clearer risks to golden eagles, Tule Phase II "would not likely meet the conservation standard" necessary for a BGEPA permit. ER101-02. The FEIS never considered that prospect either. *See infra* at 26.

In sum, FWS's post-FEIS memoranda provided BIA with important risk assessments *beyond the FEIS*, including new explanations of the severity of the risks to golden eagles, of risks to ongoing eagle conservation planning efforts, and of Phase II's likely ineligibility for a BGEPA permit. Accordingly, while the FEIS raised serious concerns—sufficient for BLM to distance itself from Phase II—the FEIS certainly did not (and did not purport to) fully analyze Phase II's risks to eagles. Instead, post-FEIS information including FWS's memoranda revealed both greater and previously unanalyzed risks, thus necessitating an SEIS. *See N.M. ex rel. Richardson v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009) (requiring SEIS and rejecting argument that "because the *category* of impacts . . . were well-known after circulation of the Final EIS, any change in . . . impacts was immaterial" under NEPA).[7]

[7] The record also refutes the government's assertion that Plaintiffs offered "unscientific conclusions" regarding post-FEIS information. Govt.29. Plaintiffs

2. Post-FEIS information satisfied several significance criteria.

As Plaintiffs explained, post-FEIS information that BIA received was "significant," and thus required an SEIS, because it satisfied several significance criteria in NEPA's implementing regulations. Br.43-45; *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 n.20 (1989) (significance is evaluated on criteria in 40 C.F.R. § 1508.27). Post-FEIS information that BIA received satisfied significance criteria regarding impacts to "cultural resources . . . or ecologically critical areas," cumulative impacts, threatened violations of federal law, and controversy, 40 C.F.R. §§ 1508.27(b)(3), (4), (7), (10). In response, the government erroneously argues BLM's FEIS fully analyzed these issues.

First, regarding Phase II's unquestionable proximity to golden eagle nests—the nearest turbine being located only 492 feet from the vulnerable Canebrake nest, ER70—contradicting the government's assertion that the FEIS fully analyzed this

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merely stated what FWS—the agency with "special expertise" under NEPA—concluded. The government contends post-FEIS information did not indicate the importance of preserving eagle territories, *id.*, but FWS explained to BIA, based on post-FEIS information, that loss of a territory is equivalent to taking 4 eagles per year, would undermine ongoing planning efforts, and would likely preclude FWS from granting Tule a BGEPA permit. ER112-13. Similarly, the government contends that new information does not show young eagles face significant threats, Govt.29, but FWS's post-FEIS memoranda informed BIA that post-FEIS information would not support finding only "moderate" risks to juvenile eagles, and instead said "the potential collision risks to future fledglings . . . cannot be discounted." ER116.

issue, in fact FWS informed BIA of the Canebrake nest's critical ecological significance only *after* the FEIS issued. As discussed, FWS explained not only that losing breeding territory has devastating effects on eagle populations, but also that "the loss of a territory would be very costly" to creating a Desert Renewable Energy Conservation plan. ER112-13. Additionally, only *after* the FEIS issued, FWS advised BIA of the need for greater analysis of other nearby eagle territories. ER116. Accordingly, the record clearly shows "significant" post-FEIS information regarding Tule Phase II's "proximity" to "cultural resources" and "ecologically critical areas," 40 C.F.R. § 1508.27(b)(3), i.e., federally protected golden eagle nests.

Similarly, the record contradicts the government's argument that the FEIS fully considered cumulative impacts. As Plaintiffs explained, FWS informed BIA *after the FEIS* of the need for a "*more detailed discussion* regarding the cumulative effects to golden eagle populations." ER116 (emphasis added). Because FWS had already reviewed BLM's FEIS, there is no sensible way to read FWS's memorandum except as calling for BIA to provide *more* analysis than the FEIS.

Additionally, post-FEIS information revealed a threatened violation of BGEPA. *See* 40 C.F.R. § 1508.27(b)(10). As described above, FWS's post-FEIS memoranda informed BIA for the first time that Phase II "would not meet the conservation standard" necessary for a BGEPA permit. ER113. This information

about Phase II not only post-dated the FEIS, but also fundamentally differs from FWS's input on Phase I. Before BLM issued its FEIS, FWS found the Phase I ABPP *could* be the basis for a BGEPA permit for Phase I. SER0358. FWS's post-FEIS information to BIA indicating that Phase II would *not* be eligible for a BGEPA permit presented a threatened legal violation that did not exist and could not have been considered at the FEIS stage. The government claims confusion regarding "how a supplemental EIS would shed any new light on this subject," Govt.34, but the answer is clear: an SEIS would feature consideration of alternatives—*such as those FWS specifically suggested*—which might *avoid* violating BGEPA.

Finally, and critically, the record flatly belies the government's argument that "there is no new substantial dispute about the size, nature, or effect" of Tule Phase II—the test the parties agree applies in assessing whether Phase II is "highly controversial" under 40 C.F.R. § 1508.27(b)(4). Govt.33. In fact, as Plaintiffs explained, Br.43-44, FWS strenuously disputed BIA's methods and conclusions regarding how many eagles Phase II will kill and whether BIA's purported mitigation could be effective. Because BIA did not generate what the expert agency derided as a deficient risk assessment and ineffective mitigation until *after* BLM issued the FEIS, this *entire controversy* arose *after the FEIS issued*. Accordingly, the controversy between FWS and BIA regarding the methods for

evaluating impacts to eagles, the resulting risk assessments, and the efficacy of the proposed mitigation, was entirely new and "significant," thus necessitating an SEIS. *Anderson v. Evans*, 314 F.3d 1006, 1018–19 (9th Cir. 2002).

The common thread uniting these significance criteria is BIA arbitrarily rejecting FWS's input. As this Court has held, BIA's 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); *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492-93 (9th Cir. 2011) ("offer[ing] no meaningful response to serious and considered comments by experts . . . renders the procedural requirement meaningless and the [NEPA process] an exercise in form over substance").

C. BIA Failed To Assess The Significance of New Information.

Plaintiffs explained that BIA never even assessed whether post-FEIS information was sufficiently significant to necessitate an SEIS, abdicating its clear duty under NEPA. Br.46-47 (citing *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000)). Defendants offer no persuasive response.

Rather than point to any record document assessing post-FEIS information's significance, Defendants point to *one sentence* in BIA's ROD, which stated that BLM's FEIS "included an analysis of all environmental issues," Govt.35.

Defendants rely exclusively on *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013), to claim this stray reference suffices. However, BIA's ROD never even mentioned FWS's expert input on risks to eagles, much less assessed its significance. Moreover, unlike this case, *Kimbell* involved "no new information," instead concerning a change in project design to implement a combination of previously analyzed alternatives. *Id.* Here, in contrast, BIA received, but never evaluated, a great deal of new information. Under these circumstances, "the agency must consider [new information], evaluate it, and make a reasoned determination whether it is of such significance as to require [an SEIS]". *Dombeck*, 222 F.3d at 558. Because BIA failed to do so, this issue at least requires a remand.

IV. BIA'S DECISION TO REQUIRE TULE MERELY TO APPLY FOR A BGEPA PERMIT BEFORE OPERATION WAS ARBITRARY AND NOT IN ACCORDANCE WITH LAW.

Plaintiffs explained, Br.47-55, that BIA violated the APA and BGEPA in two distinct ways: (1) BIA's decision merely to require Tule to *apply* for a BGEPA permit before *operation* was arbitrary and capricious where FWS told BIA that, due to extremely likely eagle take, BIA should require Tule to *obtain* a permit before *construction*; and (2) BIA's decision was "not in accordance" with BGEPA because, on this record, it would predictably lead to unpermitted take in violation

of BGEPA. In response, Defendants conflate these distinct arguments and misleadingly downplay FWS's expert analysis.

A. BIA's Disregard for FWS's Input on BGEPA Permit Timing Was Arbitrary and Capricious.

Plaintiffs explained that before BIA issued its ROD, FWS informed BIA that due to Phase II's severe risks to eagles, FWS "recommend[ed] BIA condition[] the lease . . . to ensure a FWS permit is in place . . . prior to project construction." ER102. Plaintiffs also explained that *pre-construction* permitting is crucial because after construction, siting decisions that *BIA conceded* are "the best means of avoiding and minimizing take," ER88, are no longer possible. Nevertheless, contrary to FWS's urging—and undercutting FWS's ability to pursue "the best means" for avoiding BGEPA violations—BIA decided instead to require Tule merely to *apply* for a permit before *operation*. BIA's decision to require Tule to apply for a BGEPA permit in a manner that undermines the purpose of the permitting process is arbitrary and capricious. *See State Farm*, 463 U.S. at 43 (decision that "runs counter to the evidence before the agency" is arbitrary and capricious); *Forsgren*, 309 F.3d at 1192 (leaving "unanswered concerns of a sister agency" shows inadequate reasoning).

The government's response ignores basic APA principles. It first argues that BIA was not legally obligated to follow FWS's recommendation. Govt.44. However, even if BIA had discretion regarding this issue (which Plaintiffs address

below), BIA must of course exercise its discretion rationally. *See State Farm*, 463 U.S. at 43 (agency must articulate "a rational connection between the facts found and the choice made"). Instead, BIA irrationally disregarded input from FWS—the agency with statutory responsibility and expertise regarding BGEPA permitting—about the proper timing for BGEPA permit applications, eliminated FWS's ability to implement what BIA itself described as "the best means of avoiding and minimizing take," and thus undermined BGEPA's core conservation goal. This is an abuse of discretion and arbitrary and capricious.

The government's attempt to salvage BIA's incoherent approach to BGEPA compliance fundamentally misrepresents the record. The government asserts that BIA explained it would allow construction and operation before permit application because FWS had not finalized certain permitting guidelines. Govt.45. The government further states that "[b]ecause [these guidelines] were not yet final, *FWS* decided to allow Tule to proceed with construction." *Id.* (emphasis added). This assertion is patently false. In fact, FWS's position was that because the project poses tremendous risks for golden eagles, even considering BIA's ineffective mitigation, BIA should condition the lease on Tule *obtaining* a BGEPA permit *before construction*. ER102. No record document shows FWS altering this position. Thus, the government's assertion that FWS somehow "decided" to

endorse a counterproductive approach to BGEPA compliance is disingenuous and barren of any record support.[8]

Even aside from the government's flagrant misstatement of FWS's position, BIA's authorization of project construction before a BGEPA permit application, and project operation with no reason to believe the permit could ever issue, is irrational. The government claims that "BIA *expects* Tule to work with FWS to secure a permit before eagle take occurs," Govt.43 (emphasis added), yet fails to explain how that "expect[ation]" is rationally compatible with authorizing Tule to operate the turbines based merely on a pending *application*. Further, when FWS itself stressed how Tule could in fact "work with FWS to secure a permit before eagle take occurs,"—i.e. by obtaining a permit *before construction*—BIA manufactured a justification for not requiring Tule to work with FWS during the critical time frame. Accordingly, BIA's invocation of incomplete guidelines as a reason to allow construction (and operation) that would undermine the permitting process by eliminating the best means of avoiding and/or minimizing incidental take was arbitrary and capricious.[9]

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[8] The government's citations do not show FWS changing its position. SER1407 indicates that allowing construction before a permit was *BIA's* position, *not FWS's*. SER140.1 and SER 122 are unrelated.

[9] The government's assertion that "it is overwhelmingly Project *operations* (not construction) that poses an unmitigable threat to eagles," Govt.45, disregards that

B. BIA's Decision Was Not in Accordance with BGEPA.

Additionally, Plaintiffs explained that BIA's decision merely requiring Tule to *apply* for a BGEPA permit, rather than obtain one before operation, was "not in accordance with law" because, on the record here, BIA *knew* that Tule Phase II would kill golden eagles and would likely be ineligible for a BGEPA permit, and thus would predictably violate BGEPA. Br.51-55. In response, Defendants misread this Court's precedents and erroneously suggest that *Tule I* forecloses Plaintiffs' argument.

In *Tule I*, this Court found that under the "narrow circumstances" of that case, in which BLM "repositioned [Phase I] turbines in valleys rather than on top of ridgelines, which would lessen any risk to" eagles, BLM's approval of Phase I was in accordance with BGEPA because it would not "directly or proximately result in the incidental take of eagles." 825 F.3d at 588. Thus, *Tule I* found that an agency *may* be deemed to have violated the APA when authorizing an activity that "directly or proximately result[s] in the incidental take of eagles." *Id.* This holding is consistent with this Court's precedents, cited by Plaintiffs, holding that an agency may not issue a permit for an activity that it knows, or should know, will

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even BIA concedes pre-construction siting decisions are "the best means of avoiding and minimizing" such threats. ER88. Merely requiring submission of an application prior to operation of a completed project irrationally eviscerates the "best means" of conserving eagles.

violate federal law. Br.51-52 (citing *Anderson*, 371 F.3d at 501, *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1070 (9th Cir. 2003), and *Ctr. for Biological Diversity v. BLM* ("*CBD*"), 698 F.3d 1101, 1128 (9th Cir. 2012)).

The government overstates *Tule I* and understates *Anderson*, *Wilderness Society*, and *CBD*. As to *Tule I*, the government largely ignores this Court's statement about "directly or proximately caus[ing] incidental take," as well as this Court's caution that its holding was made "in the narrow circumstances of [that] case," 825 F.3d at 588, instead arguing the far broader position that "it can *never* be a violation of [BGEPA]" to authorize a wind turbine—no matter how predictably it will cause unpermitted take. Govt.37 (emphasis added). That is simply *not* what this Court held in *Tule I*, and the Court should reject the government's invitation to radically and unreasonably extend that ruling. And as to *Anderson*, *Wilderness Society*, and *CBD*, the government attempts to confine those to situations dealing with "direct" statutory violations. Govt.40-41 ("These cases would be analogous only if BIA directly had authorized unpermitted eagle take."). But *Tule I* itself rejects this notion, finding that an authorization that "directly *or proximately* results in the incidental take of eagles" may violate BGEPA. 825 F.3d at 588 (emphasis added).[10]

[10] There is also no merit to the government's attempt to distinguish BGEPA from similar laws ostensibly because BGEPA is "reactive." Govt.37. Like BGEPA, the

This record here unmistakably shows that BIA's lease approval would directly or proximately cause unpermitted incidental take of golden eagles, including because FWS repeatedly informed BIA that Phase II would kill a significant number of golden eagles (far more than BIA estimated), that BIA's proposed mitigation measures were ineffective, ER101-02, 112-17, and that Phase II, as approved by BIA, "would not likely meet the conservation standard" necessary for a BGEPA permit. ER102. Accordingly, on this record, BIA clearly knew when authorizing Phase II that it *would* kill many eagles and *would not* likely receive a BGEPA permit—and would thus predictably violate BGEPA—because FWS, the expert agency, unequivocally told it so.[11]

The government understates BIA's knowledge of Phase II's threatened violation of BGEPA by ignoring or misrepresenting FWS's input to argue that threats to eagles are "speculative." Govt.36-45. Indeed, the only portion of the government's argument regarding BGEPA permitting that describes FWS's

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Marine Mammal Protection Act ("MMPA"), at issue in *Anderson*, and the Wilderness Act, at issue in *Wilderness Society*, are not violated until, respectively, unpermitted take of a marine mammal occurs or a commercial activity occurs in a wilderness area. Yet this Court had no trouble finding that agencies acted "not in accordance with law" when issuing permits for activities that would predictably violate those laws *after the permits issued*.

[11] As Plaintiffs explained, the far greater risks to eagles from Phase II, and Phase II's likely ineligibility for a BGEPA permit, also distinguish this case from *Tule I*. Br.53-54.

position severely misrepresents it, as described above. *See supra* 30. The record actually shows there is nothing speculative about the link between BIA's authorization of Phase II and the consequent unauthorized take of nearby nesting and other golden eagles. Indeed, BIA stated that "the lease allows the construction *and operation* of [Phase II] to proceed before an eagle take permit is issued." ER50 (emphasis added). And while the government stresses BIA's statement that Tule "remains responsible for complying with all applicable federal laws, including the BGEPA," *id.*, BIA did not, in fact, simply tell Tule to comply with BGEPA, but instead *expressly and intentionally* "allow[ed] the construction and operation" of Phase II without a BGEPA permit in place. On *this* record, where FWS told BIA that Phase II operations *will* kill eagles and *will not* likely be eligible for a permit, BIA's decision to "allow[] construction and operation" of Phase II without a permit in place will directly or proximately result in incidental take of golden eagles. Therefore, BIA's authorization of Phase II construction and operation without a BGEPA permit in place was "not in accordance with law," as well as arbitrary and capricious, and an abuse of discretion.

CONCLUSION

For these reasons, and those in Plaintiffs' opening brief, this Court should reverse the district court, vacate BIA's ROD, and remand for further actions consistent with NEPA and BGEPA.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rules 32(a)(7)(B) and 32-2(b), I certify that this reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 8,004 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 March 16, 2018, I electronically filed the foregoing reply 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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