

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-55666 (consolidated with No. 14-55842)

BACKCOUNTRY AGAINST DUMPS, et al.,

Plaintiffs and Appellants,

v.

SALLY JEWELL, et al.,

Defendants and Appellees,

and

TULE WIND LLC,

Intervenor-Defendant-Appellee.

**APPEAL FROM THE SOUTHERN DISTRICT OF CALIFORNIA
NO. 3:13-cv-00575-JLS-JMA**

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants BACKCOUNTRY AGAINST DUMPS and DONNA TISDALE submit the following disclosure statement.

Appellants Backcountry Against Dumps and Donna Tisdale do not have any parent corporations and do not issue stock. Therefore, no parent corporation or publicly held corporation owns any interest in appellants' stock.

Dated: October 1, 2014

Respectfully submitted,

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INTRODUCTION

This public interest lawsuit seeks to enforce environmental laws that protect our nation’s public lands and wildlife from ill-considered private development. Appellants Backcountry Against Dumps and Donna Tisdale (collectively “Backcountry”) seek reversal of the district court’s Judgment of dismissal and underlying Order denying their motion for summary judgment in their action against appellees Sally Jewell, *et al.* (collectively, the Bureau of Land Management or “BLM”). Excerpts of Record (“ER”) 1-37. As shown below, BLM violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, the Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. § 701 *et seq.*, the Bald and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. §§ 668-668d, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, when it approved the Tule Wind Energy Facility (the “Project”) by granting its Right-of-Way (“ROW”) application for use of BLM lands and approving its Environmental Impact Statement (“EIS”).

STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1294(1). The district court had jurisdiction over Backcountry’s claims under 28 U.S.C. §§ 1331 (action arising under the laws of the United States), 1346 (United States as defendant), 1361 (action to compel officers of the United States to perform their duties), 2201-2202 (power to issue declaratory judgments in cases of actual controversy); and 5 U.S.C. §§ 701-706 (APA). The district court had proper venue under 28 U.S.C. § 1391 because BLM officially resides, Backcountry’s causes of action arose, and all of the lands involved are located in that district. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this

appeal is from a final Judgment filed March 25, 2014, disposing of all claims. ER36-37. Backcountry timely filed its Notice of Appeal on April 24, 2014. ER38; FRAP 3(a).

STATEMENT OF ISSUES

1. Whether BLM violated NEPA because its EIS is inadequate as it (a) improperly dismisses the distributed generation alternative, (b) fails to take a hard look at the Project's impacts, (c) fails to specify a public purpose and actual need for the Project as opposed to less-impactful alternatives, and (d) improperly defers mitigation?

2. Whether BLM violated the MBTA by failing to secure authorization from the U.S. Fish and Wildlife Service ("FWS") before approving the Project?

3. Whether BLM violated the Eagle Act by failing to secure authorization from FWS before approving the Project?

ADDENDUM

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are included within the Addendum to this Brief.

STATEMENT OF THE CASE

On December 19, 2011, BLM issued its Record of Decision ("ROD") "approv[ing] the construction, operation, maintenance, and decommissioning" of, and granting an ROW to Tule Wind, LLC ("Tule") for, the Project. ER693 (quote), 599-732. BLM amended its ROD on March 7, 2013, and Backcountry timely filed its Complaint on March 12, 2013. ER514-583. After BLM completed its Administrative Record, Backcountry moved for summary judgment on August 23, 2013. ER1765. Tule and BLM filed cross-motions for summary judgment on October 24 and 25, 2013, respectively. ER1766. On March 3, 2014, the district

court heard oral argument on these motions. ER2. On March 25, 2014, the court denied Backcountry's motion and granted Tule's and BLM's motions, and entered Judgment thereon. ER1-37. On April 24, 2014, Backcountry timely filed its Notice of Appeal. ER38.

STATEMENT OF FACTS

Tule proposes to transform a pristine wilderness area with a high density of golden eagles and other migratory bird species into an industrial zone in which hundreds of these birds will be needlessly killed. It would construct and operate 62 enormous wind turbines¹ – up to 492 feet high – on 12,360 acres of scenic, rugged and wildlife-rich public open space managed by BLM in eastern San Diego County. ER687-732, 738. The area's mountains and broad valleys boast an abundance of wildlife including golden eagles, Cooper's hawks, California condors, burrowing owls, northern harriers, loggerhead shrikes, gray vireos, yellow warblers, Vaux's swifts, tricolored blackbirds and multiple species of owls, flycatchers and sparrows. ER891-902. Based on raptor mortalities observed at other wind projects, the turbines are expected to kill up to 37 raptors each year, or more than 1100 eagles, hawks and other birds of prey over the Project's 30-year life. ER695 (30-year life), 833 (up to 0.2 deaths per year per megawatt ("MW"))

¹ The approved Project was originally a combination of two alternatives considered in the EIS, Tule Wind Alternative 5 (reduction in turbines from 128 to 62) and Tule Wind Alternative 2 (gen-tie route 2 underground with collector substation and operations and maintenance facility on Rough Acres Ranch), but BLM later modified the Project gen-tie line's route and approved its construction above ground. ER545-546, 722-726. Tule plans to install up to 27 additional wind turbines on the adjacent ridges within the Ewiiapaayp Reservation and adjacent California State Lands Commission-managed land as Phase II of this Project. ER693, 696. BLM approved an ROW grant for Phase II ancillary facilities on January 17, 2014. BLM Project website, www.blm.gov/ca/st/en/fo/elcentro/nepa/tule.html (last updated 9-19-14); ER696.

times Project's 186 MW). And that high number of avian deaths does not even include the song birds and many other birds that the Project would likely kill. ER831-838, 848, 851-853.

The Project would severely degrade this pristine mountain and desert landscape. It would bulldoze 18.81 miles of new access roads, widen or reconfigure 11.08 miles of existing roadways, build a 5-acre collector substation, grade twelve 2-acre construction sites and a 10-acre parking and staging area, install numerous overhead and underground 34.5 kV transmission lines, string a 138 kV gen-tie line, construct a 5-acre operations and maintenance building, erect three permanent meteorological towers, and generate up to 186 MW of electricity. ER600, 696, 723. In addition to hundreds of avian strikes, long-term operational impacts include noise, electric and magnetic field ("EMF") pollution, and drawing down the area's scarce groundwater. ER848 (high risk of birds colliding with or being electrocuted by Project structures, and "potential loss of nesting birds" from construction), 829-838 (same), 851-853 (same), 857 (significant and unmitigable noise impacts), 865 (same), 936 ("potential for adverse health effects" from stray voltage), 696 (groundwater use). The Project's electricity would be routed through San Diego Gas and Electric's ("SDG&E's") East County Substation Project ("ECO Substation") and Southwest Powerlink transmission line to San Diego. ER735, 739.

In December 2009, BLM and the California Public Utilities Commission ("CPUC") began scoping for the Project's Draft Environmental Impact Report/Draft Environmental Impact Statement ("DEIS"). ER1617-1618. Backcountry objected to the Project's many adverse impacts. ER1544-1592, 1596-1616.

BLM and CPUC issued the DEIS in December 2010. ER736, 1541. Backcountry objected to the DEIS' failure to adequately address the Project's impacts. ER1086-1105 (attachments: 1319-1539), 1044-1085 (attachments: 1216-1218), 1027-1042, 1122-1129; *see also* ER883, 914.

In October 2011, BLM and CPUC issued their FEIS, and closed public comment. ER733-734. Despite the public's grave concerns – which remained largely ignored – on December 19, 2011, BLM approved the Project. ER599-732. BLM issued the ROW grant (CACA-049698) on April 10, 2012 (ER559), and Notice to Proceed (“NTP”) allowing pre-construction studies on September 17, 2012. ER586-598. No NTP allowing construction has issued.

On March 7, 2013, BLM amended its ROD to “allow[] construction of an overhead gen-tie line whereas the previously approved Gen-Tie Route 2 was underground.” ER540. Overhead lines pose far greater fire hazards and aesthetic impacts than underground lines. ER745 (“Increased fire hazards can be reduced with undergrounding”), 753 (undergrounding “would reduce visual resource and fire impacts”), 755 (undergrounding “would reduce long-term visual impacts”). The Project as thus amended would significantly degrade this mountainous area's scenery and exacerbate the already extremely high fire danger. *Id.*

SUMMARY OF ARGUMENT

In approving the Project, BLM violated NEPA, the MBTA, the Eagle Act and the APA. BLM's EIS violates NEPA in four respects. First, it fails to study the feasible and environmentally preferable distributed generation alternative. Second, it fails to take a hard look at the Project's impacts, including (a) harms to avian species, (b) harm to human health from wind turbine-generated inaudible infrasound and low-frequency noise, (c) electric and magnetic field pollution, and

(d) global warming. Third, its statement of purpose and need merely parrots Tule's *private* objectives rather than identifying *BLM's* purpose, and fails to show any actual need for the Project as opposed to less impactful alternatives. Fourth, it improperly defers formulation of mitigation measures.

BLM violated the MBTA and the Eagle Act because it approved construction *and operation* of the Project notwithstanding its *known* lethal impacts on golden eagles and other migratory birds, and despite BLM's failure to obtain – or require Tule to obtain – the take permits these statutes require before any such migratory bird takes may occur.

STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002); *Akiak Native Community v. U.S. Postal Service*, 213 F.3d 1140, 1144 (9th Cir. 2000). It “must ‘view the case from the same position as the district court’ and apply the same standards.” *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). This Court examines the record to ascertain “whether any genuine issue of material fact exists precluding summary judgment and whether the district court correctly applied the substantive laws.” *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2002).

Backcountry alleges violations of NEPA, the MBTA and Eagle Act, which are reviewed under the APA. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). Under the APA the court must “hold unlawful and set aside” agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A), (D). In applying the arbitrary and capricious standard, the court must “engage in a substantial

inquiry” and conduct a “thorough, probing, in-depth review.” *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). The court must not “rubber stamp” agency decisions, and may uphold them only if they are “fully informed and well considered.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007).

Because this Court’s review is *de novo*, it may order summary judgment to either party. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 778 (9th Cir. 2006).

STANDING

Backcountry provided ample evidence of its standing below, which the district court did not question. ER284-468. Therefore its standing is established.

ARGUMENT

I. BLM VIOLATED NEPA

Before carrying out or approving any “major . . . actions significantly affecting the quality of the human environment,” BLM must prepare an EIS that details:

(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided . . ., (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

42 U.S.C. § 4332(2)(C)(i)-(v); 40 C.F.R. §§ 1508.9, 1508.11. The EIS must identify the “purpose and need” of the proposed action to guide the agency’s selection and evaluation of a reasonable range of alternatives. 40 C.F.R. §§ 1502.13, 1502.14; *National Parks & Conservation Association v. U.S. Bureau of*

Land Management (“*NPCA v. BLM*”), 606 F.3d 1058, 1071 (9th Cir. 2010). It must also evaluate mitigation measures that would avoid or reduce the action’s environmental impacts, and assure the highest “professional” and “scientific integrity” in its analyses. 40 C.F.R. § 1502.24.

Contrary to these mandates, BLM’s EIS fails to (1) consider a reasonable range of alternatives, (2) adequately examine the Project’s impacts, (3) identify a public purpose and need for the Project, and (4) formulate and analyze all mitigation measures, as shown below.

A. The EIS Fails to Analyze and Improperly Dismisses the Distributed Generation Alternative.

An EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives” – including options “not within the jurisdiction of the lead agency” – so that “reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14 (quoted); *Alaska Wilderness Recreation & Tourism Association v. Morrison* (“*Alaska Wilderness*”), 67 F.3d 723, 729 (9th Cir. 1995) (same); *Sierra Club v. Lynn* (“*Lynn*”), 502 F.2d 43, 62 (5th Cir. 1974) (“appropriate alternatives” “may be outside [the agency’s] jurisdiction”).

BLM may not eliminate a proposed alternative from consideration on the grounds it is “similar to alternatives actually considered, or . . . ‘infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area,’” *unless* it provides a “reasoned explanation in the EIS.” *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (first quote); *Southeast Alaska Conservation Council v. Federal Highway Administration* (“*SEACC*”), 649 F.3d 1050, 1059 (9th Cir. 2011) (second quote). An alternative that is consistent with the project’s policy goals and *potentially*

feasible must not be “preliminarily eliminated” from in-depth review.

Muckleshoot Indian Tribe v. U.S. Forest Service (“*Muckleshoot*”), 177 F.3d 800, 813 (9th Cir. 1999).

Instead, an EIS must study alternatives that “may partially or completely meet the proposal’s goal and must evaluate their comparative merits.” *Natural Resources Defense Council, Inc. v. Callaway* (“*Callaway*”), 524 F.2d 79, 93 (2d Cir. 1975); *North Buckhead Civic Association v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (alternatives that “would only partly meet the goals of the project” but “have a less severe . . . environmental impact” should be studied in detail); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834–835 (D.C. Cir.1972). The existence of a single “viable but unexamined alternative renders an [EIS] inadequate.” *Friends of Yosemite Valley v. Kempthorne* (“*Friends of Yosemite*”), 520 F.3d 1024, 1038 (9th Cir. 2008).

Contrary to this settled law, BLM declined to study the feasible, less environmentally-damaging distributed generation alternative, which includes “but [is] not limited to residential and commercial rooftop solar panels, biofuels, hydrogen fuel cells, and other renewable distributed energy sources.” ER9-13, 795. BLM concedes that “this alternative . . . would result in a significant net reduction in . . . impacts . . . and would contribute directly to meeting state and federal renewable energy resource goals.” *Id.* Yet BLM rejected this alternative, claiming that (1) BLM “has no authority or influence over the installation of distributed generation systems, other than on its own facilities,” (2) the alternative “fails to meet several of the basic project objectives,” and (3) it is “infeasible from a technical and commercial perspective.” ER795-797.

Because BLM excluded this alternative without reasoned explanation and

support, it violated NEPA. 40 C.F.R. § 1502.14; *Alaska Wilderness*, 67 F.3d at 729.

1. BLM May “Not Limit Its Attention to Just Those” Alternatives “It Can Provide”

BLM relied upon its lack of “authority or influence over the installation of distributed generation systems, other than on its own facilities,” to justify its preliminary elimination of the distributed generation alternative. ER796. Whether BLM itself can singlehandedly achieve a distributed generation alternative does not define whether it is reasonable. 40 C.F.R. § 1502.14(c); *Alaska Wilderness*, 67 F.3d at 729. BLM may “not limit its attention to just those [alternatives] it can provide.” *Lynn*, 502 F.2d at 62. By rejecting this otherwise reasonable alternative, BLM violated NEPA. *Id.*

2. The Distributed Generation Alternative Is Consistent with BLM’s Objectives

The distributed generation alternative “would *contribute directly* to meeting state and federal renewable energy resource goals” – the primary Project objective. ER795 (emphasis added). Yet BLM claims that this alternative’s “fail[ure] to meet several of the basic project objectives” justifies eliminating it from further study. *Id.* Not so.

While the EIS states that “BLM is *compelled* to evaluate utility-scale renewable energy development rather than distributed generation by the applicable federal orders and mandates,” BLM was under no such obligation. ER796 (emphasis added) (citing 2005 Energy Policy Act (“EPAAct”) § 211 (P.L. 109-58) and Secretarial Order 3285A1); ER12-13. Section 211 of EPAAct merely relates that “[i]t is the sense of Congress that the Secretary . . . should [by 2015] seek to have approved non-hydropower renewable energy projects located on the public

lands with a generation capacity of at least 10,000 megawatts of electricity.” *Id.* It does not mandate that the “renewable energy projects” must be “utility-scale,” as the EIS claims. ER796. Although distributed generation could help meet section 211’s suggested 10,000-megawatt goal, the EIS dismisses it wholesale. *Id.*

Nor does section 211 *mandate* that the energy be generated on the public lands. To the contrary, it uses the softer precatory encouragement that it is the “sense of Congress . . . that the Secretary . . . *should* seek” approval of such projects. *Id.* (emphasis added). Furthermore, even had Congress mandated that all such projects be on the public lands, that would not foreclose distributed energy. BLM gave no consideration to siting distributed energy on the myriad federal lands administered by the Interior Secretary – including urban enclaves such as portions of the Presidio in San Francisco and developed areas within Yellowstone, Yosemite and other national parks and monuments – nor federal lands used as military reservations.

The EIS also incorrectly relies on Secretarial Order 3285A1, wrongly asserting that it “*requires* . . . BLM . . . to undertake multiple actions to facilitate large-scale *solar* energy production.” ER796 (emphasis added). The Order does not actually *require* development of *any* specific type of energy-generation facilities. Its *lone* mandate to BLM is to “work collaboratively [within the Interior Department], and with other Federal agencies, departments, states, *local communities, and private landowners* to encourage the timely and responsible development of renewable energy and associated transmission while protecting and enhancing the Nation’s water, wildlife, and other natural resources.” Secretarial Order 3285A1 § 4 (emphasis added). The distributed generation alternative would allow BLM to do exactly that.

Furthermore, even if BLM were hypothetically required to “facilitate large-scale *solar energy* production,” which it is not, that would not provide grounds for dismissing the distributed generation alternative. ER796 (emphasis added). Because the approved Project is a solely *wind*-based energy generation project, it is *even less* responsive to such a goal than the distributed generation alternative, which *includes solar energy generation facilities*. See *SEACC*, 649 F.3d at 1057 (holding that the agency’s rejection of an alternative on cost and other grounds violated NEPA in part because “all of the alternatives . . . considered in the EIS . . . posed the same risks”).

BLM was also wrong in claiming that rooftop solar’s eligibility for renewable energy credit (“REC”) trading was speculative. ER796. Rooftop solar was and is eligible for tradable renewable energy credits to meet California’s renewable portfolio standard. ER204-283, 1595; SB 107, Stats. 2006, ch. 464; California Public Resources Code § 25741 (December 2011).

In sum, the distributed generation alternative “would contribute directly” to – and is therefore consistent with – the primary Project objectives of meeting state and federal renewable energy goals. ER795. Furthermore, it “would result in a significant net reduction in project impacts as compared with the Proposed P[roject].” ER795. Thus, BLM was required to analyze it in detail. *Muckleshoot*, 177 F.3d at 813; *Callaway*, 524 F.2d at 93.

3. The Distributed Generation Alternative Is Technically and Commercially Feasible

BLM claims that “rooftop solar” – a component of the distributed generation alternative – is “infeasible from a technical and commercial perspective.” ER12-13, 797. But the EIS fails to provide the requisite “reasoned

explanation” to substantiate this claim, and the record rebuts BLM’s assertions. *SEACC*, 649 F.3d at 1059.

The EIS states that “undefined technical hurdles associated with high levels of [photovoltaic (“PV”)] development” justify rejecting this alternative. ER797. But a reference to “undefined technical hurdles” is not a substantive justification. *SEACC*, 649 F.3d at 1059. Furthermore, the record shows that distributed generation sources such as solar photovoltaics and combined heat and power plants are actually *more* cost effective than most other generation sources. ER1368-1372 (¶¶ 11-17). “[T]hese projects can get built quickly and without the need for expensive new transmission lines.” ER1370. Distributed generation also minimizes the vulnerability of the electrical grid to fires and other natural disasters. ER1368-1373 (¶¶ 11, 14). These factors render this alternative *preferable* rather than undesirable.

The *feasible* distributed generation alternative would thus help achieve BLM’s objectives and goals for the Project. As a result, and because the EIS fails to substantiate its contrary assertions, BLM’s failure to fully analyze this alternative violates NEPA. *SEACC*, 649 F.3d at 1056-1059; *Friends of Yosemite Valley*, 520 F.3d at 1038; *Muckleshoot*, 177 F.3d at 813; *Callaway* 524 F.2d at 93.

B. The EIS Fails to Take a “Hard Look” at Significant Environmental Impacts

An EIS must take a “hard look” at a project’s environmental impacts to “foster [] informed decision-making and . . . public participation.” *NPCA v. BLM*, 606 F.3d at 1072 (quoting *State of California v. Block* (“*Block*”), 690 F.2d 753, 761 (9th Cir. 1982)); 40 C.F.R. § 1502.1. An agency must obtain information that “is incomplete or unavailable” in the EIS, so long as the costs of doing so are

not “exorbitant.” 40 C.F.R. § 1502.22; *Oregon Environmental Council v. Kunzman*, 614 F.Supp. 657, 663 (D.Or. 1985). NEPA’s purpose is to eliminate “speculation by insuring that available data is gathered and analyzed prior to” project approval. *Foundation for North American Wild Sheep v. U.S. Department of Agriculture (“Wild Sheep”)*, 681 F.2d 1172, 1179 (9th Cir. 1982). BLM’s EIS fails the “hard look” test.

1. The EIS Fails to Take a Hard Look at Impacts to Avian Species

BLM’s EIS violates NEPA’s “hard look” requirement because it fails to (1) account for noise impacts on avian species, and (2) conduct nighttime bird surveys, thereby ignoring nocturnal species. *NPCA v. BLM*, 606 F.3d at 1072; *Block*, 690 F.2d at 761.

a. The EIS Ignores the Project’s Noise Impacts on Birds

The Project’s construction and operational noise will greatly exceed the threshold for significant negative impacts on numerous sensitive avian species thought to inhabit the Project area, including the horned lark, loggerhead shrike, least Bell’s vireo, and southwestern willow flycatcher. ER885-911, 1487, 1497-1500. For example, a “reasonable threshold based on similar species for least Bell’s vireo and southwestern willow flycatcher would be *40 dB(A) or below.*” ER1499 (emphasis added). The Project’s construction and operational noise levels (up to 94 dBA and 50 dBA, respectively) will greatly *exceed* these thresholds. ER859 (the Project’s “8-hour average construction noise levels [will] range up to 94 dBA at . . . nearby properties”), 861 (operational noise will be as high as 111 dBA, with noise levels exceeding 50 dBA at nearly 1,000 feet from the nearest turbine).

Despite evidence that Project-generated noise will harm sensitive bird species, the EIS *entirely fails to discuss* these impacts. Instead, it merely notes that “indirect loss . . . from noise” will “be adverse under NEPA,” but would be lessened by various mitigation measures. ER825-826. However, only *one* of the thirteen measures listed specifically addresses *birds*: BIO-7j attempts to “avoid the potential for project-related nest abandonment and failure of fledging, and minimize any disturbance to nesting behavior.” ER821, 825-826. And *none* addresses impacts to activities other than nesting. *Id.*; ER809-811, 816-820. Furthermore, BLM’s failure to conduct nighttime avian surveys, as discussed below, precluded meaningful analysis of the Project’s noise impacts on nocturnal species. Because the Project’s constant loud noise greatly exceeds the quieter nighttime background levels that owls and other nocturnal species require for hunting, this impact should have been studied.

The EIS’ failure to provide this essential analysis violates NEPA’s hard look standard. *NPCA v. BLM*, 606 F.3d at 1072. BLM’s separate Avian and Bat Protection Plan (“ABPP”) fails to remedy this failure. ER1130-1215. Rather, it simply confirms the presence of avian species, repeats the EIS’ vague mitigation measures, and asserts without supporting analysis that the Project will “meet the current no-net loss standard” for eagles and “reduce the level of impacts to the maximum extent practicable.” ER1134, 1140-1142, 1175-1183. Without a “full and fair discussion” of these impacts and specific mitigation measures, neither BLM nor the public can assess the Project’s impact. *Id.*

b. BLM Failed to Conduct *Any* Nighttime Bird Surveys

BLM violated NEPA by *entirely failing* to conduct *any* nighttime bird surveys, leaving the public and decisionmakers to “speculate” about the Project’s

impacts on burrowing owls, long-eared owls and other nocturnal bird species. ER968; *Wild Sheep*, 681 F.2d at 1179; *Oregon Environmental Council*, 614 F.Supp. at 663. “Recent published scientific reports indicate that greater than 10% of nocturnal migrating songbirds migrating over ridges fly at elevations putting them within the area of rotating turbines.” ER1114. Nocturnal migrants are thus at high risk of collision and death, and numerous commenters alerted BLM to this risk and the EIS’ critical omission of nocturnal surveys. ER1114 (noting that “[n]octurnal bird migration was not studied” and recommending methods to gather data), 1016. Yet contrary to NEPA, BLM simply “ignored [and] shunted aside” this critical data gap. *Wild Sheep*, 681 F.2d at 179. BLM left the public and decisionmakers in the dark as to nocturnal bird impacts.

The few incidental observations of nocturnal species² during the *daytime* avian surveys provide no data on the types, behaviors, and prevalence of nocturnal bird species, making it impossible to properly analyze the Project’s impacts on them. *NPCA v. BLM*, 606 F.3d at 1072; *Wild Sheep*, 681 F.2d at 179; *Oregon Environmental Council*, 614 F.Supp. at 663.

Rather than conduct nighttime bird surveys, BLM improperly relied on *daytime* bird surveys and studies of nocturnal bird migration in *other* regions, to speculate that “nocturnal bird use is thought to be low in the project area and night-migrating birds are thought to be migrating at higher altitudes than the proposed turbine heights.” ER968; *Wild Sheep*, 681 F.2d at 1179. BLM’s speculation violated NEPA. *Wild Sheep*, 681 F.2d at 1179.

² *E.g.*, the “[l]ong-eared owl was observed *incidentally* during the studies during the 2007-2008 [daytime] survey; however, there was no information regarding encounter rates or flight direction.” ER835 (emphasis added).

2. The EIS Fails to Take a Hard Look at the Project's Inaudible Infrasonic and Low Frequency Noise Impacts

The Project's industrial-scale wind turbines will produce substantial infrasound and low-frequency noise ("ILFN").³ Indeed, studies show that "wind turbine noise [is] dominated by infrasound components." ER1442. ILFN is "not generally assessed in analyses of environmental noise . . . because it cannot be heard." ER929. But "what you *can't* hear can *also* hurt you." ER1457 (emphasis added). "[T]here is increasingly clear evidence that" inaudible ILFN produced by wind turbines "is sufficiently intense to cause extreme annoyance and inability to sleep . . . in individuals living near them." *Id.*; ER1442 ("the [ear's cochlear outer hair cells ('OHCs')] are stimulated at levels that are not heard").

Despite this evidence, the EIS dismisses the "hypothesis that [inaudible ILFN] from wind turbines . . . [has] potential to annoy or impart adverse health effects." ER928. But it did so based on speculation that because "the body is full of sound and vibration at infrasonic and low frequencies" from *internal* sources such as "the beating heart," that "any effect from wind turbine noise" will be "lost" in the existing background noise and vibration." ER925 (quotes), 928, 935, 964.

Contrary to BLM's speculation, "there *is* . . . [a] valid mechanism by which infrasound produced by turbines could affect the human body . . . differently than other infrasound produced within the body." ER927 (emphasis added). The Salt and Hullar (2010) study, cited in Backcountry's DEIS comments, explains that

³ "Infrasound" includes frequencies less than 20 hertz ("Hz"), and "low-frequency" sound ranges between 20 Hz and 200 Hz. ER929. "[T]he human ear can most easily recognize sounds in the middle of the audible spectrum, which is ideally between [1,000 to 4,000 Hz]." *Id.* Except at very high decibel ("dB") levels, ILFN is generally below the normal range of human hearing. *Id.*

“[i]nfrasound entering the ear through the ossicular chain” – *i.e.*, *externally* generated noise – “is likely to have a greater effect on the structures of the inner ear than is sound generated *internally*.” ER1437 (emphasis added).

Because Backcountry’s “evidence and opinions directly challenge the scientific basis” of the EIS’s claim that Project-generated inaudible ILFN will be benign, BLM was required to “disclose and respond to [that evidence and] viewpoint[] in the [EIS]” using “high quality information, including accurate scientific analysis.” *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1167 (9th Cir. 2003) (quotes); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993). BLM did not do that. The EIS fails to even *mention* Salt and Hullar (2010), let alone analyze and respond to its demonstration that *externally* generated inaudible ILFN has a “greater effect on the structures of the inner ear than . . . sound generated *internally*.” ER1437 (emphasis added). Consequently, BLM violated NEPA.

3. The EIS Fails to Take a Hard Look at the Public Health Impacts of Electric and Magnetic Field Pollution

“Wind turbines” and other associated power generation and transmission facilities “create” substantial “electromagnetic fields” (“EMF”) that are propagated into the surrounding environment in many ways, including as stray voltage. ER936. There is ample evidence that exposure to such EMF pollution can cause a host of negative health impacts, including cancer. ER866-868, 870. As the EIS admits, “stray voltage [from the turbines] has the potential for adverse health effects.” ER936.

The EIS nonetheless concludes that “no health effects would be anticipated to occur from [wind turbine] stray voltage” because “[a]s part of the

commissioning of the project, turbines will be . . . properly grounded.” *Id.* But the EIS *entirely ignores* the fact that its purported mitigation measure – grounding – is actually a medium by which stray voltage may be *introduced* into homes and other vulnerable locations. As Backcountry demonstrated, “dirty electrical current produced by [wind turbines is often] propagated as a ground current” that enters the earth “through grounding rods extending from neutral conductor wires.”

ER1472 (first quote), 1471 (second quote).

BLM’s attempt to pass off a serious Project *impact* as “*mitigation*” violates NEPA’s “hard look” requirement. To “ensure that environmental consequences have been fairly evaluated,” an EIS must “discuss mitigation measures[] with ‘sufficient detail.’” *South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of Interior* (“*South Fork*”), 588 F.3d 718, 727 (9th Cir. 2009) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). BLM failed to do that here. The EIS not only fails to analyze grounding as a means of *exposing* the public to stray voltage, it also fails to specify what grounding measures would be used and how they would “confirm that there are no stray voltage issues through the life of the project.” ER936.

In sum, BLM violated NEPA by failing to take a hard look at the impacts of propagating wind turbine-generated stray voltage through the ground, and by failing to evaluate “the effectiveness of” grounding as a “mitigation measure[.]” *South Fork*, 588 F.3d at 727.

4. The EIS Fails to Take a Hard Look at Global Warming

The EIS’ discussion of global warming is wholly inadequate. It estimates the Project will produce approximately 650 metric tons of CO₂-equivalent emissions annually, yet speculates it would “potentially decreas[e] overall

emissions . . . in California,” because wind is a renewable energy source. ER875-876. BLM’s EIS fails to provide data to support this claim. Indeed, “[t]he [EIS] does not definitively state that there would be *any* resulting fossil fuel shut-down and GHG emission reduction as a result of the project.” ER940 (emphasis added). Furthermore, the EIS fails to provide a Project life cycle assessment, which is necessary to accurately estimate the Project’s greenhouse gas (“GHG”) emissions. By failing to “provide the data on which it base[d] its environmental analysis,” BLM violated NEPA. *Northern Plains Resource Council, Inc. v. Surface Transportation Board*, 668 F.3d 1067, 1083 (9th Cir. 2011).

The EIS admits that “[a]nalysis of emissions sources should take account of all phases and elements of the proposed action over its expected life,” yet here it did not. ER873, 937 (“emissions associated with manufacturing of wind turbines, concrete ingredients, and other construction materials are not assessed in the [EIS]”). It ignored “GHG emissions of manufacturing the turbines, pads, anchors, etc. including the effects of the cement mixing and use, or emissions related to the release of carbon through habitat conversion.” ER875-876, 937 (quote). It claimed that “[b]ecause manufacturers of wind turbines, cement for concrete, and other construction materials fabricate products for [other] projects . . . the emissions associated with such manufacturing would not necessarily be ‘caused’ by the” Project. ER937. This assertion defies logic. If the Project were not built, it would cause no GHG emissions. If an alternative such as rooftop solar that requires no industrial-scale turbines, no high tension lines, and no huge transmission towers, is selected instead, GHG emissions will be *less*.

BLM was required to provide data to support its analysis, and conduct a life-cycle assessment of the Project’s GHG emissions. Its failure to do so

prevented the public and decisionmakers from making an informed decision.

C. The EIS Fails to Specify a Public Purpose and Demonstrate an Actual Need for the Project.

An EIS must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13. Even when the action is “externally generated,” the purpose and need statement ““must describe the BLM purpose and need, *not an applicant’s or external proponent’s purpose and need.*”” *NPCA v. BLM*, 606 F.3d at 1071, n. 9 (9th Cir. 2010); ER585. While BLM’s statement incorporates broad renewable energy objectives, it fails to show that the Project is needed to meet them. ER790-791. Without that showing, the EIS fails to “include the information” that is “essential to a reasoned choice among alternatives.” 40 C.F.R. § 1502.22. This violates NEPA.

BLM stated it was responding to *Tule’s* application for a right-of-way grant, but failed to establish *BLM’s* purpose and need independent of *Tule’s* application. ER788. BLM never explained how *Tule’s* Project would achieve the objectives in Executive Order (“EO”) 13212, Secretarial Order 32851A, and EPAAct section 211 better than *other* renewable options, like rooftop or utility-scale solar. ER787-788. BLM also failed to identify any energy demand for *Tule’s* Project. ER787-788. BLM thus failed to “specify the underlying purpose and need” for the Project, violating NEPA. 40 C.F.R § 1502.13; *NPCA v. BLM*, 606 F.3d at 1071.

D. The EIS Improperly Defers Specification and Analysis of Mitigation Measures

NEPA mandates that the EIS include ““sufficient detail [regarding the project’s impact mitigation measures] to ensure that environmental consequences have been fairly evaluated.”” *City of Carmel-by-the-Sea v. U.S. Department of*

Transportation (“*Carmel*”), 123 F.3d 1142, 1154 (9th Cir. 1997). The EIS must also assess a mitigation measure’s likely effectiveness to “evaluat[e] whether anticipated environmental impacts can be avoided.” *South Fork*, 588 F.3d at 727. “[A] mere listing of mitigation measures is insufficient.” *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998).

NEPA prohibits deferring both formulation *and* analysis of mitigation measures. *South Fork*, 588 F.3d at 727 (deferring mitigation measure analysis because “[f]easibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan” violates NEPA).

Here, the EIS improperly defers formulation and analysis of the Project’s proposed habitat restoration plan and site-specific noise mitigation plan. ER862-863, 871. No such plans are provided. Instead, the EIS calls for *future* plans to address these impacts. ER831, 862-863, 871. But an EIS must provide “site-specific conditions” and “sufficient detail” needed to evaluate the effectiveness of proposed mitigations. *South Fork*, 588 F.3d at 727; *Carmel*, 123 F.3d at 1154; ER871 (mitigation measure FF-7 requiring future plan “to restore native habitat” provides no site-specific standards). Without *any specifics*, decision-makers and the public cannot assess the mitigation measures’ effectiveness, contrary to NEPA. *Carmel*, 123 F.3d at 1154; *South Fork*, 588 F.3d at 727.

II. BLM VIOLATED THE MBTA

The MBTA directs that

[u]nless and except as permitted by regulations [promulgated hereunder] . . . , it shall be unlawful at any time, by any means or in any manner, to . . . take [or] kill . . . any migratory bird . . . nest, or egg of any such bird . . . included in the terms of the conventions [with the signatory nations]

16 U.S.C. § 703. This mandate applies to federal agencies:

As [16 U.S.C.] § 703 is written, what matters is whether someone has killed or is attempting to kill or capture or take a protected bird, without a permit Nothing in § 703 turns on the identity of the perpetrator. *There is no exemption in § 703 for . . . federal agencies.*

Humane Society of the U.S. v. Glickman (“*Glickman*”), 217 F.3d 882, 884-888 (D.C.Cir. 2000) (emphasis added); *American Bird Conservancy, Inc. v. F.C.C.* (“*ABC*”), 516 F.3d 1027, 1031-1032 (D.C.Cir. 2008). As here, citizens can enforce the MBTA against federal agencies. *Id.*; *City of Sausalito v. O’Neill* (“*Sausalito*”), 386 F.3d 1186, 1203-1204 (9th Cir. 2004) (citing 5 U.S.C. § 702 and *Clarke v. Securities Industry Association*, 479 U.S. 388, 399 (1987)); *Hill v. Norton*, 275 F.3d 98, 103 (D.C.Cir. 2001).

The MBTA thus requires BLM to “seek authorization from the Secretary” of the Interior before approving activities – such as the Project – that directly kill migratory birds. *Sausalito*, 386 F.3d at 1225; *Mahler v. U.S. Forest Service*, 927 F. Supp. 1559, 1573 (S.D.Ind. 1996); *Glickman*, 217 F.3d at 885 (D.C.Cir. 2000); *Robertson v. Seattle Audubon Society* (“*Robertson*”), 503 U.S. 429, 438-439 (1992) (Congressional waiver of MBTA required to allow Forest Service approval of timber sales); EO 13186, “Responsibilities of Federal Agencies to Protect Migratory Birds,” 66 Fed.Reg. 3853 (Jan. 17, 2001) (federal agencies must obtain permission from the Interior Secretary before allowing take of migratory birds).

Accordingly, FWS regulations require “prior authorization from [FWS]” for any take of protected birds, and provide for “special use permits” for this purpose. 50 C.F.R. §§ 21.12, 21.27. Take permits are available, for example, for “special purpose activities related to migratory birds,” such as where the applicant demonstrates a “compelling justification” for the activity. 50 C.F.R. § 21.27.

According to FWS, this required justification might exist where “take of migratory birds could result as an *unintended consequence*” of an activity. 72

Fed.Reg. 8931, 8947 (Feb. 28, 2007) (emphasis added). Thus, FWS recognizes – as it must consistent with the MBTA’s plain language – that a permit is required for any take of migratory birds, whether intentional or “*unintended.*” *Id.* (emphasis added). Consequently, FWS has issued such “special use permits” to allow federal agencies to authorize private parties such as Tule to take migratory birds as an *incidental* consequence of otherwise lawful activities. *See, e.g.,* 77 Fed.Reg. 50153 (Aug. 20, 2012) (allowing the National Marine Fisheries Service (“NMFS”) to authorize long-line ocean fishing that results in the incidental take of seabirds).

Yet BLM failed to seek FWS authorization or to require Tule to do so (ER759, 843, 848, 978), even though it admitted that such a permit might be needed, as the MBTA clearly requires. ER792; 16 U.S.C. § 703. BLM’s ABPP does not excuse this omission. It is neither a permit nor an authorization, and does not reduce migratory bird mortality to zero. ER843 (neither the ABPP nor FWS’ concurrence “will . . . in and of [themselves] authorize take of golden eagles or determine that no take will occur”), 1130-1215 (ABPP). Hence the MBTA’s requirement for a take permit remains unfulfilled.

Involvement of a third party, such as Tule, does not excuse BLM from its duty to itself obtain, or require Tule to obtain, a take permit. In *Glickman*, the Agriculture Department approved “various measures such as harassment” of migratory birds by third party “Virginia state agencies.” 217 F.3d at 884. The court ruled the Agriculture Department’s approval unlawful because the Department “did not obtain a permit from the Department of the Interior” as required by “§ 703 of the [MBTA].” *Id.* at 888. Here, as in *Glickman*, the foreseeable actions of a third party applicant, Tule, will kill migratory birds during

the Project's construction and operation. ER833 (Project will kill up to 37 raptors annually at estimated rate of up to 0.2 deaths per MW), 848 (Project will cause "potential loss of nesting birds (violation of the [MBTA]) . . . [and] electrocution of, and/or collisions by, listed or sensitive bird or bat species"), 829 (bird loss even after mitigation), 845 (violation of MBTA for maintenance), 852 (even after mitigation "the risk of mortality due to collision with operating turbines by golden eagle remains adverse;" "the identified impact cannot be mitigated" as "the remaining turbines would continue to present [collision] risk"), 853 ("[o]perations and maintenance-related disturbance or direct mortality of special-status wildlife species would remain adverse"), 854 (transmission lines and wind turbines pose unmitigable risk to birds).

Migratory birds at risk include special-status bird species such as the golden eagle, the burrowing owl, the northern harrier, the loggerhead shrike, the gray vireo, the southwestern willow flycatcher, the long-eared owl, and the Vaux's swift. ER891-902 (species observed), 759 (project impacts), 779 ("adverse and unmitigable impacts (Class I) to golden eagles . . . from collision with operating turbines"), 829 (construction impacts may violate MBTA), 833 (up to 37 raptors killed annually at estimated rate of up to 0.2 deaths per MW), 837 (adverse golden eagle impact), 838 (adverse Vaux's swift impact), 848 (electrocution and collision), 1026 (Tule admits turbines kill birds).

This substantial loss of migratory birds even if "unintended," is nonetheless a foreseeable, indeed "inevitable," consequence of "the operation of wind energy facilities." Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 Wm. & Mary Envtl. L. & Policy Rev. 1, 33 (2013). Numerous studies confirm that wind turbines kill birds. ER1683-1696 (Drewitt

(2006)), 1664-1672 (de Lucas (2008)), 1673-1682 (Mabee (2006)), 1697-1763 (Erickson (2001)). The FWS has “estimated that wind turbines cause as many as 440,000 bird deaths per year” and “wind turbines located at Altamont Pass . . . are estimated to kill . . . 1,766 birds annually, including between 881 and 1330 raptors.” R. Kyle Evans, *Wind Turbines and Migratory Birds: Avoiding a Collision Between the Energy Sector and the Migratory Bird Treaty Act*, 15 N.C.J.L. & Tech. On. 32 (2014), 46 & n. 86 (first quote), 48 & n. 95 (second quote). At the San Geronio wind project north of the Project, “[r]esearchers estimated 6,800 birds were killed annually . . . based on 38 dead birds found while monitoring nocturnal migrants.” ER1714.

The MBTA’s plain language forbids activities that foreseeably kill migratory birds whether by intentional or incidental means. “Where the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.” *Int’l Ass’n of Machinists, Etc. v. B.F. Goodrich, Etc.*, 387 F.3d 1046, 1051 (9th Cir. 2004) quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Thus, its prohibition on killing or attempting to kill migratory birds without authorization is not dependent on defendants’ intent. *Sausalito*, 386 F.3d at 1203 (citing 16 U.S.C. §§ 701, 703, 704; 50 C.F.R. § 21.27). Thus, courts have found MBTA violations where the defendants did *not* intend to kill birds. *U.S. v. Apollo Energies, Inc.*, 611 F.3d 679, 682-696 (9th Cir. 2010) (oil drilling equipment); *U.S. v. Corbin Farm Service*, 444 F.Supp. 510 (E.D.Cal. 1978) (pesticide spraying); *U.S. v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (toxic waste ponds); *U.S. v. Moon Lake Electric Association, Inc.*, 45 F.Supp.2d 1070 (D.Colo. 1999) (transmission lines); *U.S. v. CITGO Petroleum Corporation* (“CITGO”), 893 F.Supp.2d 841 (S.D.Texas 2012) (refinery waste). Indeed, BLM conceded

below that the MBTA's prohibitions against take may apply to foreseeable, albeit "unintentional," take. ER112, n. 18.

Cases involving habitat modification are not relevant here⁴ because the Project's spinning turbine blades, towers and lines will kill birds *directly* rather than only indirectly through habitat modification. As the Ninth Circuit explained in *Seattle Audubon Society v. Evans* ("Seattle Audubon") 952 F.2d 297, 303 (9th Cir. 1991) "direct, though unintended" killing *does* constitute a take for MBTA purposes, even if habitat destruction that only *indirectly* kills birds does not. EO 13186, 66 Fed.Reg. 3,853. The MBTA bars both intentional *and* unintentional take, unless permitted.

Other cases excusing MBTA non-compliance do not avail BLM. In *Center for Biological Diversity v. Pirie* ("Pirie"), 201 F.Supp.2d 113, 120 (D.D.C. 2002), the Defense Department's duty to obtain a "valid permit from [FWS]" was excused only because an act of Congress authorized "incidental taking of migratory birds during military readiness activities." Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub.L. No. 107-314, § 315 (2002); *Center for Biological Diversity v. England*, 2003 WL 179848 (D.C.Cir. 2003) (vacating *Pirie* as moot). In *Native Songbird Care and Conservation v. LaHood*, No. 13-cv-02265-JST, 2013 WL 33555657 (N.D.Cal. July 2, 2013), the court dismissed plaintiffs' MBTA claim because it was barred by the statute of limitations. The Eighth Circuit's "tentative" conclusions about the "apparent" scope of the MBTA

⁴ BLM never claimed that the MBTA did not apply to its decision to issue the ROW, and therefore has waived that defense. ER792; *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based").

in *Newton County Wildlife Association v. U.S. Forest Service*, 113 F.3d 110, 115 (8th Cir. 1997) were reached before the D.C. Circuit decided *Glickman* and failed to acknowledge the Supreme Court’s contrary ruling in *Robertson* applying the MBTA to federal agencies. *Id.*, 490 U.S. at 438-439. *ABC*, 516 F.3d at 1031-1032, is inapposite because the agency there was developing compliance measures, rendering the lawsuit premature.

This Court may enforce BLM’s compliance with the MBTA. The APA directs that this Court “*shall . . . hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law*” or “*without observance of procedure required by law.*” 5 U.S.C. § 706(2)(A), (D) (emphasis added). The MBTA requires that a take permit be obtained *before* BLM may approve activities that will directly kill migratory birds. 16 U.S.C. § 703; *Sausalito*, 386 F.3d at 1225; *Glickman*, 217 F.3d at 885-888; EO 13186. Since (1) the Project will directly kill migratory birds, (2) approving activities that kill migratory birds without an MBTA permit is “without observance of procedure required by law,” and (3) BLM approved the Project despite its lack of a take permit for the resulting bird deaths, under the APA (4) this Court “*shall . . . set aside*” BLM’s unlawful action. *Id.*

This Circuit has enforced the APA in this manner in similar contexts. *Anderson v. Evans*, 371 F.3d 475, 502 (9th Cir. 2002) (agency’s issuance of grey whale harvest quota to tribe without compliance with statutory procedures is “not in accordance with law” and therefore must be set aside under the APA); *The Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1059-1067 (9th Cir. 2003) (FWS issuance of use permit for fish hatchery project in Wilderness Area set aside as “not in accordance with law” under the APA).

BLM's past failures to obtain or require such a permit do not excuse its duty to comply with the MBTA. Prior violation of the law never justifies continued illegal behavior. *Sierra Club v. Union Oil Company of California*, 813 F.2d 1480, 1491 (9th Cir. 1987). The MBTA should be strictly enforced because Congress determined that protection of migratory birds was "a national interest of very nearly the first magnitude." *State of Missouri v. Holland*, 252 U.S. 416, 435 (1920).

By approving the taking of migratory birds without the permit Congress has mandated, BLM has failed to "observ[e] the procedure required by law." 5 U.S.C. § 706(2)(D). BLM's game of "close enough" invades territory constitutionally reserved to Congress, and this Court. *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1111 (D.C.Cir. 1971) (judicial "duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy").

III. BLM VIOLATED THE EAGLE ACT

It is undisputed that Project operation is likely to kill and injure golden eagles. ER830, 833, 837, 852, 878. The Eagle Act makes it unlawful to "take . . . in any manner . . . any golden eagle." 16 U.S.C. § 668(b). "[T]ake" includes . . . *wound, kill, . . . molest or disturb.*" 16 U.S.C. § 668(c) (emphasis added); 50 C.F.R. § 22.3. Unlike the MBTA, Eagle Act regulations include "molest" and "disturb" as additional "take" criteria. 50 C.F.R. § 22.3; *cf. Seattle Audubon*, 952 F.2d at 302 (emphasizing exclusion of "harm" from "take" definition under MBTA). Therefore, the Eagle Act, like the Endangered Species Act, 16 U.S.C. § 1532(19), *does* apply to habitat destruction. Thus, the Project also violates the

Eagle Act because it will disturb – as well as kill and injure – golden eagles in the area. ER798-799 (habits, habitat, and location), 800-802 (admitting “adverse impacts” and likely collision risks), 852-853 (adopted mitigation insufficient to eliminate adverse impacts).

FWS has confirmed that Eagle Act “[p]ermits are available to Federal, State, municipal, or tribal governments,” and even provides a programmatic take permit *specifically for wind farm operators*. ER1626-1627 (74 Fed.Reg. at 46,842-46,843 (Sept. 11, 2009)). “Utilities that kill eagles through collisions and electrocutions from contact with power lines” are also required to obtain an Eagle Act permit. *Id.* Indeed, FWS is “currently unaware of *any* measures that would eliminate eagle mortalities when turbines are sited in golden eagle habitat (including migration corridors).” ER1626 (emphasis added). According to FWS, *if* mitigation “can be developed to significantly reduce the take [of eagles], the operator may qualify for a programmatic take permit, since the ongoing mortalities are the direct result of the operation of the turbines.” *Id.* Neither BLM nor Tule has obtained this required permit. ER759, 843, 848, 978. Without it, BLM’s approval of the Project violates the Eagle Act.

The United States’ interpretation of the Eagle Act is accorded weight if it comports with the statutory language and Congressional intent. *U.S. v. Mead Corp.*, 533 U.S. 218, 227-228 (2001). Its recent prosecution of four wind energy facilities in Wyoming alleges that bird kills from these wind turbine operations violate the MBTA and the Eagle Act. ER124-126 (U.S. Attorney’s Information charges that wind turbine bird kills violated the MBTA); 130 (Plea Agreement ¶ 6 (“Admission of Guilt”)). There, the guilty wind turbine operator was required to obtain an Eagle Act permit. ER134-136 (Plea Agreement ¶ 15(b)(i)-(ii)). In

return, the United States agreed “not to prosecute the defendant under the MBTA or [the Eagle Act] for unpermitted takings of migratory birds or other avian wildlife.” *Id.* at ¶ 16, p. 10-11. The Project likewise threatens unpermitted take.

By approving the Project despite its *unpermitted* take of golden eagles, BLM violated the Eagle Act and thus failed to proceed in accordance with law.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and judgment should be entered for Backcountry.

Dated: October 1, 2014

Respectfully submitted,

/s/ Stephan C. Volker

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Backcountry Against Dumps and Donna Tisdale

STATEMENT OF RELATED CASES

On August 28, 2014, the briefing and hearing of this case was coordinated with *Protect Our Communities Foundation v. Jewell*, No. 14-55842; there are no related cases pending in this Court.

Dated: October 1, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Appellants' Opening Brief is in at least 14-point proportional type and contains 8458 words.

Dated: October 1, 2014

Respectfully submitted,

/s/ *Stephan C. Volker*

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Backcountry Against Dumps and Donna Tisdale

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2014, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Dated: October 1, 2014

/s/ Stephan C. Volker
STEPHAN C. VOLKER