MARTEN LAW PLLC
Svend A. Brandt-Erichsen (*pro hac vice*)
WA Bar No. 23923
svendbe@martenlaw.com
1191 Second Avenue, Suite 2200
Seattle, Washington 98101
(206) 292-2600
Kevin T. Haroff, CA Bar No. 123126
kharoff@martenlaw.com
455 Market Street, Suite 2200
San Francisco, CA 94105
(415) 442-5900

SNR DENTON LLP
Nicholas C. Yost, CA Bar No. 35297
nicholas.yost@snrdenton.com
Matthew Adams, CA Bar No. 229021
matthew.adams@snrdenton.com
525 Market Street, 26th Floor
San Francisco, California 94105-2708
(415) 882-5000

COX, CASTLE & NICHOLSON LLP
Michael H. Zischke, CA Bar No. 105053
mzischke@coxcastle.com
555 California Street, 10th Floor
San Francisco, California 94104-1513
(415) 262-5100

Attorneys for Defendants Pattern Energy Group LP and Ocotillo Express LLC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

* * * *

DESERT PROTECTIVE COUNCIL, et al.,

Plaintiffs,

v.

UNITED STATE DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

CASE NO.: 3:12-cv-01281-GPC-PCL

OCOTILLO EXPRESS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Date: February 22, 2013
Time: 1:30 p.m.
Courtroom: 9

Hon. Gonzalo P. Curiel

TABLE OF CONTENTS

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

TABLE OF AUTHORITIES

Cases

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

Statutes

Rules

Regulations

Guidance

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

I. INTRODUCTION

Plaintiffs ask this Court to adopt the novel proposition that California state law prohibits ***any*** human structure – any building, cell tower, or wind turbine – from incidentally killing ***any*** raptors or owls. Plaintiffs then ask the Court to rule that the only way to comply with this supposed requirement would be for Ocotillo Wind Energy Facility ("OWEF") to stop its turbines whenever any raptor or owl is present, and that BLM is legally required to mandate that practice. Plaintiffs are unbothered by the fact that this has never been required of any other wind project, in California or elsewhere, or that the California Department of Fish and Game ("CDFG"), which implements the relevant statutes, has never called for this requirement, or that their reading of California law would make the construction of not just wind turbines, but also cell towers, bridges, and most office buildings illegal. The State of California does not share Plaintiffs' views. The "California Guidelines For ***Reducing*** Impacts To Bats and Birds From Wind Energy Development" (emphasis added) recognize that impacts to raptors and other birds will occur, and the Guidelines were developed to promote wind energy development in the state while minimizing – not eliminating – impacts to birds and bats. OWEF 50724.

Plaintiffs also allege that BLM did not adequately disclose the basis for its conclusion that OWEF is a low-use site for raptors. Contrary to Plaintiffs' claims, the data supporting this conclusion is presented in the FEIS (OWEF 1138-144, 1584-599) and in the Avian and Bat Protection Plan ("ABPP") (OWEF 2936-945, 2958-966). Plaintiffs' also quibble with the comparative data presented in the ABPP, Pls. Reply (Dkt. 88) at 20-24, based on an alleged ambiguity as to whether turkey vulture numbers were treated consistently in comparing wind projects. *See* OWEF 2958. This claim perfectly illustrates the wisdom of the exhaustion doctrine, requiring that a claim cannot be raised with the court that was not first presented to the agency during the administrative process.[1] Despite collectively submitting hundreds of pages of comments to the agency, none of the Plaintiffs ever suggested that BLM had wrongly interpreted

[1] *See Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). "The purpose of the exhaustion doctrine is to permit administrative agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention in the process." *Id*. (citing *Buckingham v. U.S. Dep't of Agric.,* 603 F.3d 1073, 1080 (9th Cir. 2010)).

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

the data presented in the FEIS and ABPP, or that its explanation of the data was ambiguous. If they had, then the alleged ambiguity literally could have been resolved with one sentence. Moreover, Plaintiffs studiously ignore the fact that BLM concluded OWEF is a low-use site for raptors regardless of whether turkey vultures are included or excluded from the comparison. *See* OWEF 2939 (including turkey vultures); OWEF 2958 (raptors only, turkey vultures excluded).

The record in this case amply demonstrates that BLM gave full consideration to OWEF's potential impacts on birds, as it did all other Project impacts, and required robust mitigation to avoid, minimize and mitigate for those impacts. Plaintiffs have ignored the avoidance and mitigation measures incorporated in the Eagle Conservation Plan and the ABPP, and how well those plans measure up against California's Guidelines (OWEF 50710-846) and similar guidelines provided by U.S. Fish & Wildlife Service (POSTROD 11561-583). The balance of their complaints are simply nitpicking regarding details of BLM's analysis. The conditions BLM attached to its approval exceed all legal requirements, as well as the recognized best practices in the wind industry. Defendants are entitled to summary judgment on all claims in this action.[2]

II. ARGUMENT

A. BLM Satisfied All Relevant NEPA Requirements

In its cross-motion for summary judgment, Ocotillo clearly explained three aspects of Ninth Circuit case law governing judicial review of an EIS under NEPA. Ocotillo Mem. at 14-15. First, an EIS must be upheld unless it is "arbitrary and capricious," a standard that is "highly deferential, presuming the agency action to be valid and affirming the [] action if a reasonable basis exists." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012) (citation omitted). Second, in applying the arbitrary and capricious standard, courts "may not impose themselves as a panel of scientists that instructs the agency, chooses among scientific

[2] Ocotillo Express LLC and Pattern Energy Group LP (collectively, "Ocotillo Express") pointed out in their opening brief that Plaintiffs have abandoned their second and fourth claims for relief (Bald and Golden Eagle Protection Act and California Business Professionals Code claims), and as a result Defendants should be granted summary judgment on those claims. Dkt. 84-1 at 13-14. Plaintiffs did not respond to this point in their response/reply brief, and thus have conceded that summary judgment for Defendants on those claims is appropriate. Dkt. 88.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

studies, and orders the agency to explain every possible scientific uncertainty"; on the contrary, a court "generally must be at its most deferential when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (citation and internal quotation marks omitted).[3] Third, a reviewing court "may not flyspeck an EIS or substitute its judgment for that of the agency." *Half Moon Bay Fisherman's Mktg Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (citation and internal quotation marks omitted).

Plaintiffs have not disputed — or even provided specific responses to — any of these three points. Pl. Reply at 14-30. But they nonetheless press four narrow, hyper-technical arguments disputing scientific information and/or methodological choices in the EIS. *Id.* In so doing, Plaintiffs have asked the Court to do precisely what is forbidden under controlling Ninth Circuit case law — namely, to assume that a federal agency's scientific judgments lack basis, to intervene in a methodological dispute between scientists, to second-guess a federal agency on technical matters within its expertise, and, most fundamentally, to "flyspeck" an EIS by seizing on any conceivable ambiguity or discrepancy, no matter how minor.

1. BLM Properly Made Information About Raptors Available To The Public

Plaintiffs' first NEPA claim alleges that BLM failed to make information about raptors available to the public. *See* Pl. MSJ at 12-15; Pl. Reply at 15-19. Specifically, they claim that the agency's conclusions about raptors lacked basis because certain information about raptor migration was withheld from the Draft ABPP, a mitigation plan appended to the Draft EIS. *Id.*

This argument, like several of Plaintiffs' arguments to this Court, was not made to BLM, and so was not preserved for judicial review. *See* Dkt. 84-1 at 11-13; *Lands Council*, 629 F.3d at 1076 ("A party forfeits arguments that are not raised during the administrative process."). Plaintiffs argue that they did not have the opportunity to raise this issue because they did not

[3] Indeed, the Supreme Court has been quite clear that federal agencies "must have discretion to rely on the opinions of [their] own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

have the opportunity to comment on the Final ABPP, or that they were not required to do so. Pls. Reply at 10-12. Plaintiffs filed 48 pages of comments on the FEIS from their expert Mr. Cashen alone, including comments on the Final ABPP, OWEF 56,746-794, let alone comments from other plaintiffs. Mr. Cashen commented on several aspects of the Final ABPP, but did not question the accuracy of its comparison between raptor use at different wind projects, nor complain that he could not comment on the accuracy of the information provided regarding *other projects* (not OWEF) because he did not have access to the literature cited as the source of the data presented for public review in the ABPP. Plaintiffs argue that the exhaustion standard is lenient, but they cannot deny that it still requires that the agency be given enough information to have a chance of responding. "[A] claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised." *Lands Council*, 629 F.3d at 1076. None of the comments made to BLM even remotely resemble the complaints that Plaintiffs have brought before this Court regarding the adequacy of BLM's disclosure of raptor data. This claim has not been preserved for judicial review.

Moreover, as explained in detail in Ocotillo's cross-motion for summary judgment, Plaintiffs' claim is both factually inaccurate[4] and legally flawed.[5] In reply, Plaintiffs claim that

---

[4] BLM prepared and made available to the public an extremely thorough analysis of the Project's potential impacts on raptors. Dkt. 84-1 at 3-11, 16. BLM's Draft EIS (specifically, Draft EIS Appendix D) contains detailed information about raptor migration and was available for 90 days of public comment, more than twice the required time period. *See* OWEF 32,629-31, 32,680-86, 32,716-27 (portions of DEIS addressing raptors); OWEF 149-50, 1676 (90-day comment period for Project); 40 C.F.R. § 1506.10(c) (45-day comment period required). BLM's Final EIS responded to all public comments on the Draft EIS, updated BLM's analyses, and was then made available for public comment. *See* OWEF 1584-87, 1591-1600, 1614-34 (impact analysis); OWEF 3248-3631 (response to comments); 151, 802-03 (FEIS available for 60 days). In short, (i) nothing was withheld and (ii) Plaintiffs had multiple opportunities to submit comments (which, in fact, they did). *See* OWEF 56,746-94 (50 pages of comments from Plaintiffs' "expert," Mr. Cashen).

[5] Plaintiffs' suggestion that BLM failed to evaluate the information in the EIS is without legal (or factual) basis. *See* Dkt. 84-1 at 17; OWEF 1740. Plaintiffs' arguments regarding "incorporation by reference" are likewise baseless. *See* Dkt. 84-1 at 17-18; 40 C.F.R. §§ 1502.15, 1502.18(a), 1502.24, CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18,026, 18,034 (Mar. 23, 1981). And Plaintiffs' arguments about the "completeness" of the Draft ABPP are directly contrary to controlling Supreme Court and Ninth Circuit case law. Dkt. 84-1 at 18-19; *Robertson v. Methow Valley Citizens' Council*, 490 U.S. 332, 352-53 (1989);

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

Ocotillo's cross-motion failed to address relevant law. Pl. Reply at 14-16. That is simply untrue. Ocotillo's cross-motion addresses each of the legal arguments in Plaintiffs' Motion for Summary Judgment. *Compare* Pls. MSJ (Dkt. 80) at 12-15 *with* Ocotillo Mem. (Dkt 84-1) at 15-19. And each of Ocotillo's arguments is properly supported by citations to relevant case law, regulations, and the administrative record. Dkt. 84-1 at 15-19.[6]

Plaintiffs also allege that Ocotillo failed to address their arguments about "incorporation by reference." Pls. Reply at 15 ("Ocotillo does not even acknowledge. . . ."). This, too, is inaccurate. Pages 17 and 18 of Ocotillo's cross-motion for summary judgment explicitly address the issue of incorporation by reference, explaining that (i) BLM included relevant technical analyses as appendices to the EIS, (ii) the appendices properly cited the data and literature on which they were based, and (iii) the agency was not required to follow any additional requirements for incorporation by reference. Dkt. 84-1 at 17-18 citing 40 C.F.R. §§ 1502.15 (directing agencies to summarize, consolidate, or "simply reference" background material), 1502.18(a) (distinguishing appendices from material incorporated by reference); 1502.24 (discussion of methodology can be placed in appendices); CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18,026, 18,034 (Mar. 23, 1981) (appropriate citation is sufficient to render scientific literature "available").[7]

Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp., 222 F.3d 677, 681 n.4 (9th Cir. 2000).

[6] At one point, Plaintiffs suggest that Ocotillo and BLM failed to address "relevant Ninth Circuit decisions." Pls. Reply at 14. But they never identify the decisions in question. To the extent that Plaintiffs are referring to the cases in the lengthy string citations on pages 12-13 of Plaintiff's Motion for Summary Judgment, Ocotillo notes that (i) those cases are cited as general statements of law rather than decisions of specific relevance to the facts of OWEF and (ii) as noted above, Ocotillo's cross-motion for summary judgment responds to each and every one of Plaintiffs' arguments with accurate citations to case law, regulations, and relevant portions of the administrative record. Dkt. 84-1 at 15-19. Ocotillo has not waived any argument or objection.

[7] Ocotillo also noted that NEPA affirmatively ***requires*** that an EIS focus on analysis rather than encyclopedic background information. *See, e.g.,* 40 C.F.R. §§ 1502.1 (when preparing an EIS, agencies "shall reduce paperwork and the accumulation of extraneous background data"), 1502.2(a) ("[EISs] shall be analytic rather than encyclopedic"); *see also* 40 C.F.R. § 1502.7 (text of EIS should normally be less than 150 pages).

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

Indeed, it is Plaintiffs — and not Ocotillo — who have failed to address relevant arguments. In its cross-motion for summary judgment, Ocotillo explained that Plaintiffs' claims about the contents of the ***Draft*** EIS and ***Draft*** ABPP should be denied because judicial review under NEPA must focus on ***Final*** EISs. Dkt. 84-1 at 16 (lines 18-25) (citing 5 U.S.C. § 704 (judicial review based on final agency action); 40 C.F.R. § 1500.3 (no judicial review prior to final EIS)). Ocotillo also explained that Plaintiffs' allegation that the Draft ABPP was incomplete must be rejected because, as a matter of law, mitigation plans "need not be legally enforceable, funded, or even in final form to comply with NEPA's procedural requirements." Dkt. 84-1 at 18-19 (citing *Robertson*, 490 U.S. at 352-53; *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4). Plaintiffs have not disputed — or even addressed — either argument. Pls. Reply at 14-20. For that reason alone, Ocotillo's cross-motion for summary judgment must be granted. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Finally, Plaintiffs argues that Ocotillo has improperly distorted its arguments. Specifically, it complains that

> Ocotillo goes so far in its effort to distort Plaintiffs argument by claiming that Plaintiffs are asking for BLM to republish the referenced studies and recirculate them. Plaintiffs make no such request and do not ask that the studies be reprinted in the EIS. Nor is such an action required by NEPA.

Pls. Reply at 19 (citation omitted). But if Plaintiffs are not claiming that the studies should have been published in the EIS, what, exactly, is their claim? Plaintiffs do not dispute that BLM provided in the ABPP the data regarding raptor use at other wind projects that it relied upon in concluding OWEF is a low use site and cited the literature from which it obtained that data. Plaintiffs do not dispute that citations to the general literature are sufficient to render those studies "available." *See* Dkt. 84-1 at 17-18 (citing 40 C.F.R. § 1502.24; CEQ, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, 46 Fed. Reg. 18,026, 18,034 (Mar. 23, 1981)). And, apparently, Plaintiffs do not contend that the studies should have been published in the EIS. Pls. Reply at 19. Thus, they have no claim for relief.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

2. BLM Took A Hard Look At Turkey Vultures

Plaintiffs' second NEPA claim focuses on BLM's consideration of data on turkey vultures. *See* Pl. MSJ at 15-18; Pls. Reply at 20-24. But Plaintiffs do not claim that BLM failed to evaluate the Project's direct impacts on turkey vultures. *See, e.g.,* Pls. Reply at 21 (disclaiming any argument regarding turkey vulture impact). Nor do they claim that BLM failed to consider the potential for the Project to combine with other reasonably foreseeable actions to create a cumulatively significant impact on turkey vultures. *Id*.; *see also* Pl. MSJ at 15-18; Pls. Reply at 20-24. In fact, Plaintiffs haven't alleged any interest whatsoever in the protection of turkey vultures. *See id*. Instead, they have seized on turkey vultures as a means of impermissibly "flyspecking" BLM's scientific methodology and calculations.

As with their complaint about access to literature cited in the ABPP, Plaintiffs failed to note in their comments on the Final ABPP this alleged ambiguity regarding exclusion of turkey vultures from raptor observation data for other projects. *See* OWEF 56,746-794. Since BLM was never given the opportunity to clarify this alleged ambiguity, then for the reasons discussed above Plaintiffs cannot pursue this issue with the Court.

Even if Plaintiffs' second NEPA claim were properly before the Court, it should be denied as impermissible "flyspecking" of an agency's scientific judgments. Reduced to its essence, Plaintiffs' "claim" amounts to an alternative methodology for calculating and comparing turkey vultures' role in raptor use of the Site with turkey vultures' role in raptor use of other areas. This is precisely the sort of issue on which courts must be most deferential to federal agencies. *Marsh*, 490 U.S. at 378 (federal agencies "must have discretion to rely on the opinions of [their] own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); *Native Ecosystems Council*, 697 F.3d at 1051 (courts "may not impose themselves as a panel of scientists that instructs the agency, chooses among scientific studies, and orders the agency to explain every possible scientific uncertainty"); *see also Lands Council v. McNair,* 537 F.3d 981, 993-94 (9th Cir. 2008) (en banc) (overruling previous Ninth Circuit authority purporting to require agencies to adopt specific scientific procedures), *overruled in part on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

Here, BLM relied on relevant guidance to develop a reasonable process for determining the extent to which turkey vultures and other raptors use the site. *See, e.g.*, OWEF 1138 (methods consistent with Guidelines from the California Department of Fish & Game and the California Energy Commission). That methodology included (i) thousands of hours of on-site observations, (ii) the agency's scientific judgments about the topography of the site, and (iii) data comparing the site to other sites. *See, e.g.*, OWEF 1138-44, 1593-98, 2932-69 (describing analysis and results); OWEF 2935 (more than 2,000 person-hours of on-site observation); OWEF 3024-3156 (radar survey); OWEF 21,797 (topography of site). At most, Plaintiffs have identified an ambiguity in BLM's presentation of data in part (iii) of that methodology.[8] *Compare, e.g.*, Federal Defendants' Cross-Motion for Summary Judgment at 17-18 *with* Pls. Reply at 21-24 (conflicting interpretations of data). But that sort of flyspecking cannot overcome the significant deference to which BLM is entitled. *See Native Ecosystems Council*, 697 F.3d at 1051 (deference); *Carlucci*, 857 F.2d at 508 (flyspecking not allowed); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) ("We have consistently declined to flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor" (citation and internal quotation marks omitted). The agency took a "hard look" at turkey vultures and other raptors, and its EIS must therefore be upheld. *See League of Wilderness Defenders - Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010).

[8] Plaintiffs' attempted critique of the ABPP's incorporation of data from other wind projects, Pls. Reply at 21-24, amply demonstrates why courts do not substitute their judgment for that of the agency on scientific questions. As but one example, Plaintiffs assume that all raptors belong to the genus *Buteo* in their critique of data from Altamont Pass. Pls. Reply at 23. Actually, raptor numbers reported in the Erickson paper include eagles, large and small falcons, harriers and accipiters, as well as *Buteos*. OWEF 60,356, 60,420-431; *see also* OWEF 1129-132, 2357-360 (EIS identifies both *Buteo* and non-*Buteo* raptor species). But regardless, Plaintiffs are wrong to ask the Court to parse through the raptor data on projects other than OWEF, particularly when there are no objections to the data reported in the ABPP that appear anywhere in the administrative record for this case.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

3. BLM's Raptor Surveys Provided An Appropriate Method Of Determining The "Baseline" For Swainson's Hawks

Plaintiffs' third NEPA claim, a further effort to flyspeck BLM's scientific judgment, second-guesses the methodology by which the EIS determined the "baseline" (or existing) use of the OWEF site by Swainson's hawks. Plaintiffs' argument boils down to a single complaint about timing — namely, that migration surveys for Swainson's hawks started too late and continued too long. Specifically, Plaintiffs argue that the migration surveys should have focused on (and been limited to) the period between the second week of March and the first week of April. Pl. MSJ at 19.

Again, this is an issue on which "[a] court generally must be at its most deferential" to agency judgment. *Native Ecosystems Council*, 697 F.3d at 1051. BLM's survey methodology called for migration surveys to be conducted from March through May. The survey methodology was determined pursuant to applicable guidance from the California Department of Fish & Game and the California Energy Commission. OWEF 1138. It was also consistent with the results of regular avian point count surveys, none of which observed a Swainson's hawk near the OWEF site until March 21, 2010. OWEF 49,945. Moreover, Plaintiffs fail to recognize that the purpose of the migration survey is to provide a "picture of risk to diurnal migrating birds," and the surveys are designed to capture a representative sample, not fully document every migrating raptor. *See* OWEF 50,772-73. Under these circumstances, BLM's decision to conduct migration surveys from March through May was perfectly reasonable. Plaintiff may have preferred that the surveys start earlier or end sooner, but that preference does not render the EIS arbitrary and capricious. *Native Ecosystems Council*, 697 F.3d at 1051.

Perhaps recognizing that their claim represents an impermissible effort to flyspeck BLM's scientific methodology, Plaintiffs seek to recast their position as one involving "missing analysis" rather than "methodological differences." Pl. Reply at 24. That explanation is simply not credible. By any reasonable measure, a dispute about the conduct of a wildlife survey is, in

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

fact, a dispute about methodological and scientific issues.[9] And such disputes must be resolved in favor of reasonable agency decisionmaking. *Native Ecosystems Council*, 697 F.3d at 1051.

4. BLM's EIS Provides A Reasonable Discussion Of Measures To Mitigate Impacts To Raptors

Plaintiffs' fourth NEPA claim alleges that BLM failed properly to mitigate potential impacts to raptor species. Pl. MSJ at 22-24; Pls. Reply at 29-30. But, as explained in Ocotillo's cross-motion for summary judgment, the Supreme Court and the Ninth Circuit have made it quite clear that NEPA does not impose any sort of substantive duty to mitigate potential environmental impacts. *Robertson*, 490 U.S. at 352-53; *Laguna Greenbelt Inc. v. U.S. Dep't of Transp*., 42 F.3d 517, 528 (9th Cir. 1994). Indeed, an agency's mitigation plans "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4.

BLM complied with NEPA's procedural requirements by preparing the ABPP, a detailed mitigation plan applicable to all avian and bat species. *See* OWEF 2922-3008. Recognizing that Golden Eagles are subject to special protections under the Bald and Golden Eagle Protection Act BLM also prepared a special Eagle Conservation Plan. OWEF 2931-32 (special regulatory framework), 3157-3232 (eagle conservation plan). This Court has already recognized that these are "significant mitigation measures" that "meet or exceed industry standards." *See* Sept. 28, 2012 Order (ECF No. 54) at 8. Indeed, Plaintiffs appear to concede as much. *See* Pl. MSJ at 23.

Plaintiffs' Opposition/Reply brief fails specifically to address any of the arguments in Ocotillo's cross-motion for summary judgment. Pls. Reply at 29-30 (failing even to mention Ocotillo's cross-motion). Accordingly, Ocotillo respectfully requests that its motion be granted.

B. BLM Fully Complied with FLPMA

[9] *Hells Canyon Alliance v. United States Forest Service*, 227 F.3d 1170 (9th Cir. 2000), on which Plaintiffs rely, does not provide otherwise. In fact, *Hells Canyon* appears to contradict Plaintiffs' position. The case involved a challenge to an agency decision to schedule a period of time for non-motorized boating on the Snake River. The *Hells Canyon* court ***upheld*** the schedule selected by the agency, noting that the agency's methodology passed the "rule of reason" and was within the realm of agency expertise. *Id.* at 1184. Likewise, BLM's decisionmaking with respect to Swainson's hawks was both reasonable and within the realm of agency expertise. Accordingly, it too must be upheld.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

1. The OWEF ROW and Plan Amendment Are Consistent with the CDCA Plan

According to Plaintiffs, the only criterion for determining whether a ROW or Plan Amendment complies with the CDCA Plan is the applicable land class definition found at OWEF 5920. Pls. Opening Br. at 32-36; Pls. Reply at 46-51. But this is an incorrect reading of the CDCA Plan that would wrongly replace the Plan's detailed decision-making structure with an *ad hoc* process that relies exclusively on broadly-worded and undefined standards, rendering the bulk of the Plan meaningless. That is not the way the CDCA Plan is intended to work, and Plaintiffs' argument is refuted by the language of the CDCA Plan itself.

Contrary to Plaintiffs' theory, the CDCA Plan does not determine authorized land uses by directly applying the land class descriptions to specific projects. Instead, the CDCA Plan begins by translating the broad direction provided by the class descriptions into 19 sets of authorized land uses through the Plan's Guidelines. OWEF 5922-27. The Guidelines specify the types of land uses are allowed for each land class: "All land-use actions and resource-management activities on public lands within a multiple-use class delineation must meet the guidelines . . . given for that class." OWEF 5921. The Guidelines also specify limits or conditions on uses within particular land use classes. *See* OWEF 5922-27. Thus, the Guidelines embody BLM's judgment as to the types of uses that are consistent with the management objectives for Class L lands – and those authorized uses include wind energy projects. OWEF 5922. The CDCA Plan does not contemplate supplanting the Guidelines with case-by-case application of standards derived from the land use class descriptions.

Nor does the refinement of the land use classes stop with the Guidelines. In drafting the CDCA Plan, BLM recognized that there would likely be conflicts between different land uses authorized by the Guidelines for the same locations, and that land managers would need a mechanism to resolve those conflicts in their day-to-day land management decisions. Accordingly to Plaintiffs, BLM should resolve any conflicts among authorized uses by deriving standards from the land class definitions. Pls. Reply at 47-51. But contrary to Plaintiffs' argument, the CDCA Plan ***does not*** direct BLM to use the land class descriptions to resolve these conflicts. Instead, the CDCA Plan provides the Plan Elements to guide those decisions:

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

> After a geographic areas [sic] has been assigned a multiple-use class use designation, a number of types and levels of use consistent with the guidelines may be allowed within that area. However, uses may conflict and such conflicts, as the major issues of this Plan, are addressed in 12 Plan Elements: [listing the Plan Elements]

OWEF 5928. The CDCA Plan further explains:

> Many uses in a given area will be mutually exclusive and require selective decisions to be made for that area. The resolution of these conflicts and tradeoffs between and within varying uses are fundamental to multiple-use management. The task of the Plan element, therefore, is to identify existing or possible conflicts and to assist the manager in resolution.

Id.

Plaintiffs repeatedly and wrongly claim that BLM, by using the CDCA Plan's Guidelines and Plan Elements to evaluate the adequacy of steps taken to avoid, minimize and mitigate the Project's impacts on other resources, acted as if wind projects must be allowed on Class L lands without regard to their impact on other uses. Pls. Reply at 48, 49, 50. This claim is demonstrably false. *See* OWEF 140-47. Furthermore, nowhere does the CDCA Plan state that some standard derived from the text of the land use class descriptions should be used in place of the Guidelines and the detailed decisional criteria set out in the Plan Elements.

Plaintiffs also argue that BLM's use of the CDCA Plan Elements to evaluate OWEF was an error because the Plan Elements do not differentiate between land classifications. Pls. Reply at 51-53. But quite to the contrary, the CDCA Plan states: "The [Plan] element provides more specific application of the multiple-use guidelines for a specific resource . . . ," *id*., reiterates that "[e]ach element also provides more specific application, or interpretation, of multiple-use class guidelines for a given resource and its associated activities," *id*., and adds that Plan Elements "must try to resolve residual conflicts under broader guidelines . . . ." *Id*.

For the wildlife resources of particular concern to Plaintiffs, the Guidelines specify that threatened and endangered species will be fully protected in all four land use classes, and that sensitive species receive more protection on Class C lands than in other land classes. OWEF 5927. BLM found that these requirements had been satisfied through reductions in the Project's footprint and mitigation. OWEF 144. The Wildlife Plan Element explains that several active

management tools are available under the Plan to advance the objectives of that Element, and that eighty-nine areas within the CDCA have been identified in the Plan to receive active habitat management or special attention. OWEF 5936. The OWEF site is not among them. The Plan Element notes that BLM also can protect fish and wildlife resources on Class L lands by limiting the number and location of approved routes. *Id*. That was done here by avoiding bighorn sheep habitat and by reducing the number of turbines. OWEF 144. Thus, contrary to Plaintiffs' allegation, the Plan Elements, working with the Guidelines, **do** reflect the values of the separate land use classes and they – not the vaguely worded land class descriptions – are the CDCA Plan's intended mechanism for sorting out conflicts between competing uses that are authorized for a particular land class by the CDCA Plan's Guidelines.

Plaintiffs also fail in their efforts to analogize this case to *Oregon Natural Resources Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007). In *Brong*, the land use plan in question prohibited logging in late-successional reserve ("LSR") timber stands, which were deemed particularly important to land management objectives fostering species that are dependent on old-growth and late-successional timber. *Id.* at 1126-27. An exception allowed limited logging when there was a major stand-disturbing event, such as a fire, so long as development of late-successional conditions was accelerated, or at least not impeded. *Id*. This contrasts sharply with the CDCA Plan, under which wind development is a fully authorized use of Class L lands. OWEF 5922.

Moreover, in *Brong*, the Ninth Circuit evaluated BLM's action against the detailed timber stand management objectives of the applicable plan. *See* 492 F.3d at 1127-1132. The analogous portion of the CDCA Plan is the Plan Elements, not the land class descriptions. As a result, and contrary to Plaintiffs' reading of the case, *Brong* suggests that BLM was obliged to use the Plan Elements to guide its OWEF decision – and that is exactly what it did in its ROD in determining that the substantial efforts to avoid, minimize and mitigate the Project's impacts on other resources satisfied CDCA Plan requirements. OWEF 140-47.

2. Plaintiffs' Arguments That FLPMA Requires Turbine Curtailment To Avoid Taking Raptors Were Not Presented To BLM And So Were Not Preserved For Review By This Court

Plaintiffs struggle mightily, but ultimately unsuccessfully, in trying to identify some scrap of commentary on this Project suggesting to BLM that curtailment should be required to avoid impacts on raptors. Pls. Reply at 6-9. The best they can do is point to a request that BLM clarify whether the curtailment adopted for eagles also would be used for raptors, which BLM answered. *See* Pls. Reply at 9 n.10. Plaintiffs do not even attempt to suggest that any comment called for curtailment to protect owls. *Id*. Nor do they point to any comment that they or any other commenter made suggesting that California law flatly prohibits the incidental killing of all raptors and owls, or that curtailment should be required because taking raptors is prohibited. *Id*.

"The purpose of the exhaustion doctrine is to permit administrative agencies to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention in the process." *Lands Council*, 629 F.3d at 1076. Plaintiffs' comments listing "sensitive species that would be adversely impacted by the project," OWEF 57370-71, gave BLM no notice of the claims they seek to advance in this litigation – namely, that California law flatly prohibits the take of all raptors and curtailment must be required to implement that prohibition. The same is true for their comment that golden eagles are "fully protected" under Fish and Game Code § 3511 and assurances should be required that eagles will not be taken. OWEF 57,371. Indeed, by calling out eagles as requiring special protection under California law, they implied the opposite of the claims they now advance in this Court. Having failed to give BLM "a chance to bring its expertise to bear to resolve [the] claim," *Lands Council*, 629 F.3d 1076 (quoting *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 900 (9th Cir.2002)), Plaintiffs are barred from pursuing these claims in this Court.

3. BLM Imposed Terms and Conditions That "Minimize Damage To … Fish and Wildlife Habitat and Otherwise Protect the Environment," As Required by 43 U.S.C. § 1765(a)(ii).

BLM adopted more than 30 pages of mitigation conditions as part of its ROD for this Project, OWEF 341-375, including a series of requirements specific to burrowing owls, golden eagles, and other birds. OWEF 369-370, 372-74 (Mitigation conditions Wild-1l – Wild-1p, Wild-1bb - Wild-1ff, Wild-2a and Wild-2b). These measures include mandating implementation

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

of the very robust ECP and ABPP. OWEF 369-370. The ROD concludes that these measures constitute "all practicable means to avoid or minimize" environmental harm from the Project. OWEF 128. By imposing these requirements, BLM satisfied its obligation under 43 U.S.C. § 1765(a)(ii) to incorporate conditions in the ROW to minimize damage to habitat and to protect the environment.

Plaintiffs' only critique is that these mitigation measures do not include a requirement that they have advocated for in this litigation, even though they never mentioned it during the administrative process: to curtail turbine operations when raptors or burrowing owls are present on the Project site. Pls. Reply at 43-46. Despite being challenged to do so, Plaintiffs point to no other wind project that has been required to adopt this practice. Nor did any commenter advocate for use of curtailment to avoid all raptors, let alone owls, during BLM's administrative process.[10] This stands in sharp contrast to *Trout Unlimited v. United States Department of Agriculture*, 320 F. Supp. 2d 1090 (D. Colo. 2004), the only legal authority Plaintiffs cite in support of their proposition that section 1765(a)(ii) requires BLM to impose curtailment. In that case, EPA and others commented that allowing water to bypass a dam (bypass flows) would address environmental concerns better than the alternative measures adopted, the agency's own ROD concluded that the adopted measures would not adequately address environmental concerns and were not as good as bypass flows, and the agency had required bypass flows for another dam project approved at the same time. *Trout Unlimited*, 320 F. Supp. 2d at 1107-1110. That all is in sharp contrast to OWEF, where no one advocated for curtailment for all raptors and owls, no other projects are practicing curtailment to avoid all raptors and owls, and the ABPP commits the Project to implementing all of the best management and advanced conservation practices that the CDFG Guidelines recommend for avoiding and minimizing impacts on raptors and other birds. *See* OWEF 50-785-793 (Guidelines), OWEF 2970-72 (ABPP); Dkt. 84-1 at 9-

[10] Comments simply asked BLM to clarify whether the curtailment implemented for golden eagles also would be implemented for all raptors. *E.g.*, OWEF 54,612. BLM did so, clarifying that curtailment was being adopted only for golden eagles. OWEF 3254-55, 3467.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

10. Moreover, these mitigation measures are not voluntary, as Plaintiffs imply, Pls. Reply at 44; compliance is a condition of BLM's approval of the Project. OWEF 369-370, 372-74

4. BLM Complied with Requirements Of 43 U.S.C. § 1765(a)(iv) Regarding State Law

Plaintiffs continue to argue that California state law prohibits ***any*** incidental killing of all raptors and owls, even though neither CDFG nor any commenter suggested to BLM that this is the case, and they further contend that the only way BLM can enforce this purported requirement in compliance with 43 U.S.C. § 1765(a)(iv) is to require turbine curtailment, even though once again neither CDFG nor any commenter ever suggested that curtailment be required to avoid all collisions with raptors or owls. Pls. Reply at 30-43. As discussed in Ocotillo Express' opening brief (Dkt. 84-1 at 35-41) and below in Sections II.B.5 – 6, Plaintiffs are wrong regarding the requirements of California law. But as is particularly important for this proceeding, they also are wrong about what BLM was required to do to satisfy its obligations under section 1765(a)(iv), and they fail to recognize that BLM fulfilled those obligations.

FLPMA requires that each ROW "contain (a) terms and conditions which will . . . (iv) require compliance with State standards for public health and safety, environmental protection, and siting . . . if those standards are more stringent than applicable Federal standards." 43 U.S.C. § 1765(a)(iv). Plaintiffs argue that three state statutes impose such requirements: Fish and Game Code §§ 2080, *et seq*. (state-listed species – applicable to Swainson's hawks), § 3511 (State "fully protected" species – applicable to golden eagles), and § 3503.5 (regulating falconry by prohibiting unpermitted take of raptors and owls). But contrary to Plaintiffs' claims, BLM met its obligations under section 1765(a)(iv) as to each of these state statutes.

As to §§ 2080, *et seq*. and state-listed Swainson's hawks, the FEIS notes that information was provided to CDFG so that it could determine whether a state take permit would be required for any state-listed species, OWEF 1641, and the ROW requires Ocotillo Express to obtain a take permit from the State, if the State requires one. OWEF 470 (¶ 24). In line with that requirement, the ABPP requires consultation with a technical advisory committee (including a CDFG representative) should one Swainson's hawk (or other listed species) be taken. OWEF 2983.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

As to section 3511 and golden eagles, BLM required development of the ECP, which was reviewed by CDFG as well as USFWS. OWEF 470 (¶ 26), OWEF 449 (condition Wild-1o), OWEF 452 (Wild-1cc to -1ff); *see* OWEF 1595 (draft ECP provided to CDFG and USFWS to review in March 2011).

And as to section 3503.5 – even if it is given the expansive reading offered by Plaintiffs – BLM fulfilled its obligations by requiring submittal of the ABPP, which includes measures to avoid, minimize and mitigate for impacts on birds, including raptors and owls, as recommended by the CDFG Guidelines, to CDFG for its review and required implementation of the ABPP. OWEF 470 (¶ 26), OWEF 449-450 (Wild-1p), OWEF 452 (Wild-1bb to -1dd). Thus, even without CDFG or any commenter having mentioned section 3503.5 during the permitting process, BLM satisfied section 1765(a)(iv) as to this statute by including CDFG in development of the ABPP and requiring Ocotillo Express to implement the ABPP.

Plaintiffs assert that section 1765(a)(iv) does not allow BLM to rely on CDFG to determine what conditions are needed to comply with the state laws that CDFG is charged with implementing, but rather requires BLM to independently develop and impose conditions to implement state law. Pls. Reply at 34-37. Plaintiffs do not cite to any provision of FLPMA or any case law that supports that proposition. Ocotillo Express pointed out in its opening brief that, to the contrary, the case law interpreting section 1765(a)(iv) does not put this burden on BLM. Dkt. 84-1 at 32-33 (discussing *Columbia Basin Land Prot. Ass'n v. Schlessinger*, 643 F.2d 585 (9th Cir. 1981) and *Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984)). In *Columbia Basin*, the Ninth Circuit required the federal agency receiving the ROW, not BLM, to submit information to the relevant state agency for a determination of the applicable substantive state standards.[11] 643 F.2d at 605. In *Montana*, the state – not BLM – adopted specific substantive requirements through a project-specific application of a general standard. 738 F.2d at 1077-78.

[11] The ROW condition BLM imposed in *Columbia Basin* was simply to make the approval "subject to the provisions, limitations, and conditions of Title V" of FLPMA. 643 F.2d at 602. The Ninth Circuit found this to be "in conformity with the applicable provisions" of FLPMA. *Id.* at 608. Thus, *Columbia Basin* also refutes Plaintiffs' further argument that the ROW's general requirement to comply with all applicable laws, OWEF 458 (¶ 5(a)), cannot satisfy s 1765(a)(iv).

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

The state requirements in both cases would have been set through state permitting processes, but for the fact that the ROWs were issued to federal agencies that were exempt from state permitting procedures. *See Columbia Basin*, 643 F.2d at 605; *Montana*, 738 F.2d at 1077 (rejecting state claims that federal agencies should have been required to obtain state permits, in addition to meeting state substantive standards).

Plaintiffs misinterpret this last point as an argument that 43 U.S.C. § 1765(a)(iv) only applies to federal agencies. Pls. Reply at 34. Actually, the point was that Ocotillo Express, unlike the federal entities in those cases, *is* subject to state permitting procedures. *See* Dkt. 84-1 at 32. Thus, Plaintiffs cannot even make the argument, unsuccessful in both *Columbia Basin* and *Montana*, that BLM needed to determine applicable state requirements because there was no avenue for the state to do so independently. Here, unlike the cases relied upon by Plaintiffs, CDFG fully participated in the OWEF permitting process and had every opportunity to identify the need for any additional state permits or ROW conditions needed to implement applicable state statutes. And by consulting with CDFG and incorporating the ROW conditions discussed above, BLM fully satisfied its obligations under 43 U.S.C. § 1765(a)(iv).

5. Plaintiffs' Arguments Regarding CDFG's Actions Ignore Important Tenets of California Law.

Reduced to its essential components, Plaintiffs' argument regarding Fish and Game Code §§ 3503.5, 3511, and 2080 is simple: CDFG was silent and inactive regarding project compliance with California law, and in the face of that silence, BLM must interpret and apply state law in a way that it has never been interpreted or applied by CDFG, California's trustee agency for wildlife protection. Pls. Reply at 35-37. In making this argument, Plaintiffs ignore the fact that CDFG did comment on the project (although not as Plaintiffs wish), and CDFG also approved the project by issuing a Streambed Alteration Agreement pursuant to Fish and Game Code section 1600, *et seq.* OWEF 56,263-276, 59,180-191. In addition, Plaintiffs ignore California law requiring CDFG to identify significant environmental effects and mitigation measures when participating in the environmental review process. Plaintiffs also inappropriately

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

minimize the importance of CDFG's enforcement discretion in balancing the state's need for renewable energy against protection of the state's wildlife resources.

(1) CDFG's failure to raise raptor and owl mortality in comments on the Project carries weight under California law.

Plaintiffs characterize CDFG's failure to suggest the need for all-species curtailment as mere silence on the issue. *See* Pls. Reply at 35-36. As explained below, this characterization ignores California law governing CDFG's role as a responsible and trustee agency under the California Environmental Quality Act ("CEQA"). That law equates the failure to comment on an issue with not having a comment to make. As a result, contrary to Plaintiffs' assertions, the fact that CDFG did not raise the need for all-species curtailment does have meaning, and supports BLM's conclusion that further curtailment was not required by California law.

CDFG's participation in the Project's environmental review process was mandatory because the Project's EIS/EIR is a joint document designed to comply with both NEPA and CEQA environmental review requirements.[12] Under CEQA, public agencies like CDFG have a duty to comment at the earliest possible time in the environmental review process, and lead agencies are required to consult with responsible agencies. Cal. Pub. Res. Code § 21003.1(a) and (b) (creating duty in public agencies to comment "as soon as possible in the review of environmental documents" so that lead agencies can identify potential significant effects and mitigation measures to reduce those effects). CEQA's implementing regulations also require lead agencies to consult with trustee agencies, such as CDFG, with jurisdiction over natural resources affected by a project. 14 Cal. Code Regs. §§ 15086(a), 15386 (defining trustee agency). Consistent with this requirement, Fish and Game Code § 1802 requires CDFG to consult with lead agencies during the environmental review process.

Further, CDFG also approved a Streambed Alteration Agreement for the Project, and because CDFG exercised that approval authority, it had a further duty to consult on the Project as a "responsible agency" under CEQA. Pub. Res. Code § 21153, 14 Cal. Code Regs. §§ 15086(c) and (d), 15096(d) (requiring consultation with permitting agencies), 15227 (requiring comments

[12] For CEQA purposes, Imperial County was the lead agency.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

on proposed federal projects). Under CEQA's implementing regulations, CDFG's failure to comment that further curtailment is needed creates a presumption that it had no comment to make on the issue. 14 Cal. Code Regs. § 15207 ("If any public agency . . . who is consulted with regard to an EIR . . . fails to comment within a reasonable time . . . it shall be assumed . . . that such agency . . . has no comment to make.")

In light of these requirements of California law, CDFG's failure to suggest the need for all-species curtailment is not mere "inaction and silence." Pls. Reply at 35. BLM could properly rely on the fact that CDFG did not advocate for such further curtailment in crafting the ROW's terms and conditions.

(2) Plaintiffs Misinterpret *Center for Biological Diversity v. FPL Group, Inc.* and ignore the importance of respecting CDFG's enforcement discretion.

Not only do plaintiffs inappropriately downplay the importance of CDFG's failure to suggest the need for all-species curtailment, they also mischaracterize *Center for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (Cal. App. 2008) ("*FPL*"). Pls. Reply at 36-37. This mischaracterization stands as another example of Plaintiff's refusal to recognize CDFG's role in enforcing California's wildlife protection laws. This court should reject Plaintiffs' interpretation of the case and Plaintiffs' concomitant attempt to minimize CDFG's role in determining how California's wildlife protection laws should be enforced.

First, Plaintiffs incorrectly suggest that they have brought claims consistent with the *FPL* court's direction. Pls. Reply at 37. In *FPL*, the court expressly disapproved of plaintiffs' failure to name CDFG as a defendant as an agency with statutory responsibility to protect natural resources. *FPL*, 166 Cal. App. 4th at 1367. Plaintiffs here suggest that by suing BLM, they have proceeded against the correct agency, but that conclusion ignores the essence of their claim, which is that, to ensure compliance with state law, BLM was required to include requirements in the ROW's terms and conditions that CDFG itself has never required or suggested for any wind energy project in the state. In reality, this claim is nothing more than a challenge to CDFG's interpretation of California's wildlife protection laws and the way in which it enforces those laws, and such claims must be brought against CDFG, either for failure to carry its duties as a

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

responsible and trustee agency under CEQA, or for failure to protect the public trust's wildlife resources.

Further, because CDFG's public trust duty to protect wildlife "is derived from statute" and courts "look to the statutes protecting wildlife to determine if [C]DFG . . . has breached its duties," the concerns underlying the *FPL* decision are the very same concerns raised by Plaintiffs' attempt to use the federal courts to force an outcome predicated on state statutory law that was not pursued, or even suggested by CDFG. *Envtl. Prot. & Info. Ctr. v. Cal. Dep't of Forestry & Fire Prot,*. 44 Cal. 4th 459, 515 (Cal. 2008). As in *FPL*, here in exercising its duty to comment on the EIS/EIR, CDFG was required to engage in a "delicate balancing of the conflicting demands for energy and for the protection of other environmental values." 166 Cal. App. 4th at 1369. Indeed, passages of the CDFG Guidelines cited by Plaintiffs underscore the importance of enforcement discretion in CDFG's balancing of these two interests. *See* Pls. Reply at 36. As these passages show, and as recognized by Plaintiffs, CDFG has determined that compliance with the Guidelines demonstrates "a good faith effort to develop and operate projects in a fashion that is consistent with the intent of [] state and federal wildlife protection laws." OWEF 50,755. Here, in commenting on the EIS/EIR, CDFG balanced the interests cited by the *FPL* court, and Plaintiffs should not be allowed to use BLM's decision as a conduit to indirectly challenge CDFG's actions.

6. Plaintiffs' Interpretation of Fish and Game Code § 3503.5 Violates Basic Principles of Statutory Interpretation.

The fact that BLM required compliance with state law, and CDFG required no more should be dispositive. However, Plaintiffs' interpretation of section 3503.5 reveals an additional weakness in their argument. The gist of Plaintiffs' interpretation is that section 3503.5 must be read as a blanket prohibition to avoid being duplicative of Fish and Game Code section 395(b). *See* Pls. Reply at 39-42. In making this argument, Plaintiffs ignore basic rules of statutory interpretation and cite to a smattering of documents in SB 330's legislative history, taken out of context to support their argument. This argument fails.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

Plaintiffs' interpretation of sections 3503.5 and 395(b) violates the well-settled principle of statutory construction that a statute must be interpreted in light "of the entire scheme of law of which it is a part so that the whole may be harmonized and retain effectiveness." *Upland Police Officers Ass'n. v. City of Upland*, 111 Cal. App. 4th 1294, 1304 (Cal. App. 2003). When sections 395(b) and 3503.5 are read within the context of the Fish and Game Code and other provisions of SB 330, it is clear that section 395(b) vests power in the Fish and Game commission to issue licenses authorizing certain activities that would otherwise violate section 3503.5. As such, section 3503.5 may be read, consistent with the legislative history, as creating prohibitions relating to falconry, without being duplicative of section 395(b), which vests regulatory power in the Fish and Game Commission.

Section 395(b) is found in Chapter 3 of Division 1 of the Fish and Game Code, entitled "Other Regulatory Titles," in Article 6, which concerns falconry regulation. Section 395(b) makes clear that licenses may be granted for a certain subset of activities that would otherwise violate section 3503.5. In contrast, section 3503.5 is located in Division 4, Part 2, Chapter 1 of the Fish and Game Code, which includes several provisions that are protective of various bird species. Consistent with the location of these provisions in the Fish and Game Code, rather than creating a prohibition, section 395(b) grants to the Fish and Game Commission the authority to issue falconry licenses that permit licensees to engage in a limited set of activities involving raptors and owls that would otherwise violate section 3503.5's prohibition. That set of activities is not coextensive with the activities prohibited by section 3503.5, which also prohibits the destruction of raptors and owls, or the take, possession, or destruction of raptor or owl nests or eggs. *See* Fish and Game Code §§ 395(b), 3503.5.

That section 395(b) provides regulatory authority to CDFG, while section 3503.5 creates a prohibition, is further supported by section 12010, as added by SB 330. *See* Dkt. 38-10 at p. 25. Rather than tying heightened penalties to a violation of section 395(b), section 12010 creates heightened penalties for certain violations of section 3503.5. *Id.* For example, section 12010(b) allows for greater penalties for violations of section 3503.5 that lead to subsequent breeding of a bird of prey. *Id.* Had the Legislature considered section 395(b) to create a prohibition on take

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

related to falconry, it would have linked section 12010(b)'s heightened penalties for taking and subsequently breeding a bird-of-prey to section 395(b), not section 3503.5. For the same reasons, section 12010(a)'s heightened penalties for violations related to threatened, endangered, or fully protected raptors would have been linked to section 395(b), rather than to section 3503.5.

When read together and in light of SB 330's provisions, sections 395(b) and 3503.5 show that, while falconers generally may not take from wild, possess, or destroy birds of prey or their nests or eggs, CDFG may grant licenses for a limited subset of activities that would otherwise violate that prohibition. As such, these sections are not duplicative when read together with the suite of provisions included in SB 330, all of which, according to the Legislative Counsel's Digest were "relating to falconry." *See* Dkt. 38-10, p. 23; *Jones v. Lodge at Torrey Pines P'ship,* 42 Cal. 4th 1158, 1169 (Cal. 2008) (California Supreme Court noting that the Legislative Counsel's Digest is "entitled great weight" and carries with it presumption that the "Legislature amended [prior law] with the intent and meaning expressed" therein). Nothing in SB 330's legislative history suggests otherwise.

Contrary to Plaintiff's argument, nor do subsequent CDFG actions show that it has interpreted section 3503.5 in a way that makes it applicable to wind energy projects. Plaintiffs cite to a few CDFG reports in support of this argument, but reports are not official regulations. At best, reports reflect the views of certain CDFG staff members. Neither through enforcement action nor regulatory action has CDFG officially taken the position that section 3503.5 prohibits any killing of raptors and owls by a wind energy project. In fact, the CDFG Guidelines expressly anticipate that wind projects will minimize rather than entirely avoid the take of all raptors. OWEF 50,755. Plaintiffs cannot rely on comments in a few reports to supplant the actions CDFG has actually taken regarding wind projects.

III. CONCLUSION

For the reasons set forth above, Ocotillo Express respectfully urges the Court to grant Defendants' motions for summary judgment on all claims presented in this action, and to deny Plaintiffs' motion for summary judgment.

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601

Dated: February 1, 2013

Respectfully submitted,

/s/ S. Brandt-Erichsen

MARTEN LAW PLLC
Svend A. Brandt-Erichsen (*pro hac vice*)
WA Bar No. 23923
svendbe@martenlaw.com
1191 Second Avenue, Suite 2200
Seattle, Washington 98101
206- 292-2600
Kevin T. Haroff, CA Bar No. 123126
kharoff@martenlaw.com
455 Market Street, Suite 2200
San Francisco, CA 94105
(415) 442-5900

SNR DENTON LLP
Nicholas C. Yost, CA Bar No. 35297
nicholas.yost@snrdenton.com
Matthew Adams, CA Bar No. 229021
matthew.adams@snrdenton.com
525 Market Street, 26th Floor
San Francisco, California 94105-2708
(415) 882-5000

COX, CASTLE & NICHOLSON LLP
Michael H. Zischke, CA Bar No. 105053
mzischke@coxcastle.com
555 California Street, 10th Floor
San Francisco, California 94104-1513
(415) 262-5100

Attorneys for Defendants
Pattern Energy Group LP and Ocotillo Express LLC

CERTIFICATE OF SERVICE

Pursuant to Local Rule 5-4, I certify that on February 1, 2013, true and correct copies of the foregoing OCOTILLO EXPRESS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT was served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Southern District of California.

/s/ Erin Herlihy
Erin Herlihy

MARTEN LAW PLLC
1191 SECOND AVENUE, SUITE 2200
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 292-2600
FACSIMILE: (206) 292-2601