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15 **IN THE UNITED STATES DISTRICT COURT**
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

16 DESERT PROTECTIVE COUNCIL, a
17 California nonprofit corporation,
JIM PELLETTY, an individual, and PARKE
18 EWING, an individual, LABORERS'
19 INTERNATIONAL UNION OF NORTH
AMERICA LOCAL UNION NO. 1184, an
20 organized labor union; HECTOR CASILLAS,
an individual; and JOHN NORTON, an
21 individual,

22 Plaintiffs,

23 vs.
24

25 UNITED STATES DEPARTMENT OF THE
INTERIOR; KEN SALAZAR, Secretary, U.S.
26 Department of the Interior; UNITED STATES
BUREAU OF LAND MANAGEMENT;
27 ROBERT ABBEY, Director, U.S. Bureau of
Land Management; TERI RAML, District
28 Manager, BLM California Desert District;

Case No. 12-cv-1281- GPC-PCL

PLAINTIFFS' (PROPOSED REVISED)
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Special Briefing Schedule Ordered
Date: February 22, 2013
Time: 1:30 p.m.
Courtroom: 9

Plaintiffs' (Proposed Revised) Memorandum of
Points And Authorities In Support Of Motion For Summary Judgment

1 MARGARET GOODRO, Field Manager, BLM
2 El Centro Field Office; OCOTILLO EXPRESS
3 LLC, a wholly-owned subsidiary of PATTERN
4 ENERGY GROUP LP, a Delaware Limited
5 Partnership; PATTERN ENERGY GROUP
6 LP, a Delaware Limited Partnership,

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Defendants.

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I. INTRODUCTION

In order for the Bureau of Land Management (“BLM”) to approve the Ocotillo Wind Energy Facility (“Project” or “OWEF”), BLM had to grant a right-of-way on public lands pursuant to Title V of the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. §§1761 -1771. The Project area falls within the California Desert Conservation Area (“CDCA”) and also required an amendment to that California Desert Conservation Area Plan (“CDCA Plan”) pursuant to Title II of FLPMA, 43 U.S.C. §§1711-1722, designating the Project site as suitable for the construction of a wind energy generation project. Also, BLM had a duty to prepare an Environmental Impact Statement (“EIS”) for the Project pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §4321 *et seq.* Plaintiffs seek a judgment from this Court setting aside the Secretary’s grant of the right-of-way, the CDCA Plan amendment, and the EIS for the Project.

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II. FACTUAL BACKGROUND

The Ocotillo Wind Energy Facility is a large-scale wind energy development being constructed on public lands in the biologically rich Yuha Desert, surrounding on three sides the small community of Ocotillo, California. Once disturbed, the fragile desert crust and biotic communities found on these lands can take decades or more to recover. The planned life of the Project is 30 years. However, the damage to the desert resources will be permanent. AR56271-72. (U.S. Fish & Wildlife (“USF&WS”) and the California Department of Fish & Game (“DFG”) consider all ground-disturbing impacts associated with the Project to be permanent).

Prior to the start of the Project’s construction, the Yuha Desert around Ocotillo was relatively undisturbed, consisting of vacant and undeveloped desert land, containing sensitive plant communities. AR1126, AR986. An electrical transmission line runs through the middle of the proposed Project site running southwest to northeast. AR1126. Interstate Highway 8 also is located nearby. AR113. Although open to the public, BLM has managed the area as a Limited Use Area, *i.e.*, a Class L area. AR120. Designating an area as Class L lands is intended to protect sensitive natural scenic, ecological and cultural resources, while providing for low intensity multiple use. AR5920. *See American Motorcyclist Ass’n v. Watt*, 534 F. Supp. 923, 927 (C.D. Cal. 1981). Low

1 intensity use includes, for example, limiting off-road vehicle users to designated roads and trails,
2 camping, and recreational shooting. AR113. The area is traditional lands of the Quechan Tribe and
3 numerous sites of cultural and spiritual significance to the Quechan as well as other Tribes are
4 located throughout the Project site. *Id.*

5 The site is home to a robust array of flora and healthy ecosystems. The site's desert scrub
6 communities are home to a number of sensitive wildlife and plant species. Numerous sensitive bird
7 species are present at the site, including Golden eagle, Swainson's hawk, prairie falcon, Cooper's
8 hawk, Northern harrier, ferruginous hawks, and burrowing owl. AR1129-32. In addition, red-tailed
9 hawks are residents of the Project site. AR49473. The Swainson's hawk is listed as threatened under
10 the California Endangered Species Act, F&G Code §2050 *et seq.* Swainson's hawks pass through
11 the Yuha Desert as they migrate between South and North America. AR57168; AR53843. Twice
12 per year, Swainson's hawks migrate through Imperial County beginning in February and ending in
13 early to mid-April and then again in September and early October. AR51685. Hundreds of
14 Swainson's hawks gather at Borrego Springs, about 40 miles from the project site, to rest during their
15 long migrations. AR49945. A number of burrowing owl nests are located within the project site.
16 AR1145. Other sensitive species inhabiting portions of the site include the flat-tailed horned lizard
17 and the endangered Peninsula bighorn sheep. AR1129; AR1134-35. Several major washes and
18 numerous unnamed washes flow through the site generally from east to west, including Palm Canyon
19 Wash, Myer Creek Wash and Coyote Wash. AR1054.

21 Imperial County and the desert lands east of San Diego County have been the scene of a race
22 to place industrial scale renewable energy projects in the desert. No less than 18 energy projects
23 have been proposed within BLM's California Desert District, including both solar and wind projects.
24 AR1162. Although these projects represent cleaner technologies for generating electricity and
25 reducing air pollution and greenhouse gas emissions, the Secretary had a duty to protect the fragile
26 desert environment by, *inter alia*, designing and conditioning the Project to prevent mortality to
27 sensitive, legally protected species of raptors and disruption of their foraging habitat.

1 The Project includes the installation, operation and, after 30 years, the possible dismantling of
2 112 wind turbine generators. AR114. Support facilities include more than 42 miles of mostly
3 unpaved access roads, a 3.4 acre operations and management building, 23.5 acre switch yard, a
4 12-acre concrete batch plant, an electrical substation, three permanent 80-meter high meteorological
5 towers, and a 50-foot observation tower. AR114, AR867. The total desert area to be disturbed by the
6 Project during construction is approximately 450 acres. AR890-91. The Project includes the
7 restoration of a portion of the disturbed areas. *Id. But see* AR56271-72. The right-of-way granted
8 by BLM, however, draws a rough boundary around the turbine field, encompassing a total area of
9 12,436 acres. AR464. *But see* AR113 (10,151 acres in record of decision).

10 The 112 wind turbines will be spread out across the valley floor, surrounding the town of
11 Ocotillo. AR155; AR1053; AR1825. Each turbine will stand about 450 feet tall. AR1820. The
12 turbines will have three rotor blades, spinning at up to 16 revolutions per minute. AR2929; AR1820.
13 Each turbine will sweep a circle with a diameter of up to 371 feet and an area of 108,408 square feet
14 at a height of 100 to 450 feet above the ground. AR2929; AR1820. This is known as the “rotor
15 swept area” or “zone.” AR2953. Fields of wind turbines kill birds and bats. AR2961. Eagles, red-
16 tailed hawks, Swainson’s hawks, burrowing owls and other sensitive raptors at the Project site either
17 have been observed flying in the planned rotor swept area or are expected to forage at the Project
18 site. *See* AR2963-65; AR49945; AR3489; AR1594, 1596-98. When they do, the Project’s spinning
19 blades will kill raptors. AR905 (“O&M activities would result in bird and bat collisions with wind
20 turbines”); AR840 (“O&M activities would result in temporary and permanent unavoidable impacts
21 to ... special status raptor and migratory bird species (collision)...”); AR3192 (estimating golden
22 eagle fatalities); AR32330 (“Operation of the OWEF site would impact avian and bat species as a result of
23 collisions with project features”); AR1605 (“Operation of the proposed OWEF has the potential to
24 significantly impact golden eagles as a result of collision with the WTGs”)’ AR1605-06 (“Operation of the
25 proposed OWEF has the potential to significantly impact special status raptor species (Cooper’s hawk, sharp-
26 shinned hawk, ferruginous hawk, Swainson’s hawk, northern harrier, merlin, osprey, peregrine falcon, prairie
27 falcon, and burrowing owl) as a result of collision with the WTGs”); AR54365; AR56788 (expert comment
28

1 that because observed Swainson's hawks "spent 57 percent of their time within the rotor-swept area... it is
2 reasonable to expect that the Project's turbines will kill Swainson's hawks"). "The pre-construction
3 fatality predictions suggest up to 1 golden eagle fatality per year for the proposed OWEF." AR3318.
4 Although the Avian and Bat Protection Plan ("Avian Plan") does not purport to estimate take of
5 raptors and eagles, it sets a trigger for initiating discussions regarding potential mitigation measures
6 after, for example, 38 raptors per year for three years are killed by the Project. See AR2983.

7 The Project's mitigation measures purporting to minimize deaths of eagles, raptors, and
8 burrowing owls are set forth in the Avian Plan. AR2970-84. A Golden Eagle Conservation Plan
9 ("Eagle Plan") also sets forth more details regarding mitigations associated with golden eagles at the
10 site. AR3158; AR3192-94; AR3196-3206. The Eagle Plan includes a number of state-of-the-art
11 measures to avoid taking golden eagles, including the curtailment, *i.e.* shutting down, of turbines
12 when an eagle is within a mile of a turbine and at risk of collision. AR3202-04. With regard to
13 operation of the wind turbines, the Avian and Eagle Plans include some aggressive monitoring
14 capabilities but do not include a condition requiring the project to prevent the killing of raptors (other
15 than golden eagles) and burrowing owls by shutting down turbines when those birds fly into the
16 Project area. AR2972-84; AR3196-3206. The Plans include the construction of a 50-foot tall
17 Advanced Biological Observation Command and Control Center toward the middle of the project
18 site. AR3197-98, AR2974-76. For ten of the Project's 30 years, the Control Center will be staffed
19 during daylight hours by a qualified biologist monitoring movements of eagles, raptors, and other
20 wildlife. AR3197; AR2975. The Control Center will be equipped with a high-resolution camera and
21 a Merlin radar system which, together, would be designed to detect Golden eagles, raptors, other
22 avian species, bats, as well as big horn sheep. AR3197; AR2974-75. The biologist would have a
23 360-degree view of the entire Project site and would be monitoring the radar data, a video tracker,
24 and radio telemetry feeds in real time. AR882. Either the biologist on-site or Project staff off-site
25 monitoring the data would have the ability to shut down any turbines within 60 seconds. AR3197,
26 AR1595. The Avian Plan also calls for additional surveys and monitoring of raptor nests and
27
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1 carcasses at the site. AR2977-79. However, monitoring will consist of a minimum of only 3 years of
2 bird and bat mortality monitoring. AR2977. *See also* AR3199.

3 Despite the extensive monitoring and detection capabilities included in the Avian and Eagle
4 Plans and the requirement that turbines be curtailed whenever a golden eagle flies into proximity of
5 the Project and is threatened by turbines (at least for the first ten years of the project), the Plans do
6 not include any requirement that the Project temporarily shut down turbines to avoid impacts with
7 other raptors or burrowing owls flying into the site. The Plans only require curtailment of turbines to
8 avoid impacts to golden eagles and, possibly, indirect impacts to bighorn sheep. AR882; AR1595.
9 No curtailment is contemplated for raptors or burrowing owls. “The Applicant has clarified that
10 during O&M, the radar will be programmed to monitor the sky for raptor species... ; however,
11 curtailment of operating wind turbines would only occur for golden eagles that are detected in or near
12 the project site.” AR3255.

13 Although the Avian Plan relies upon a purported “adaptive management” procedure to
14 determine whether to discuss additional mitigation measures after the first three years of Project
15 operation, the Plan precludes those measures from including curtailment of turbines on behalf of any
16 bird species with the exception of golden eagles. The Plan calls for the establishment of a Technical
17 Advisory Committee (“TAC”) consisting of a Project representative and resource specialists from
18 BLM, USF&WS, and DFG. AR2972. The TAC will monitor the data produced by the project and
19 provide advice and recommendations to the BLM Authorized Officer on “developing and
20 implementing effective measures to monitor, avoid, minimize, and mitigate impacts to avian and bat
21 species and their habitats related to operations.” AR2973. However, it is up to the BLM Authorized
22 Officer whether any new measures or conditions would be added to the project. *Id.* Consultation
23 with the TAC would only occur if a golden eagle is killed or, over a three-year period, an average of
24 0.12 raptors per megawatt (“MW”) per year, 0.03 large sensitive bird species per MW per year, or
25 0.02 small sensitive bird species per MW per year are killed by the Project. AR2983. Applying the
26 315 MW expected to be generated by the Project, these trigger thresholds equate to killing 37.8
27 raptors per year, 9.45 large sensitive bird species per year, and 6.3 small sensitive bird species.
28

1 Once any of these TAC consultation triggers are exceeded, “voluntary mitigation will be
2 considered.” AR2981. The Avian Plan contemplates limiting the rounds of voluntary measures to
3 four triggering incidents. AR2984. The final voluntary measure “will be capped based on models
4 that have been completed to ensure a commercially viable project.” *Id.* The models were not
5 described or provided in the FEIS or the administrative record. The Avian Plan provides four
6 examples of potential future voluntary measures, which include “[p]ossibly cut-in speed adjustments
7 during peak migration periods to reduce impacts to bats” but limiting other mitigation to “non-
8 operational mitigation as recommended by the TAC.” *Id.*

9 According to the EIS, the Project would “result in bird and bat collisions with wind turbines”
10 and “...O & M activities would result in...permanent **unavoidable** impacts to ...special status
11 raptor...species (collision).” AR905, AR840. The EIS further concludes that “[o]peration of the
12 proposed OWEF has the potential to significantly impact special status raptor species (Cooper’s
13 hawk, sharp-shinned hawk, ferruginous hawk, Swainson’s Hawk, northern harrier, merlin, osprey,
14 peregrine falcon, and burrowing owl) as a result of collision with the WTG’s.” AR1612; AR1605-
15 06. No similar conclusions are made for golden eagles, the only raptor for which the project includes
16 a turbine curtailment requirement. *Id.* Without mitigation, the EIS acknowledges that the Project
17 “would contribute to the cumulatively substantial losses of wildlife resources within the Yuha
18 Desert” and that, specifically in regard to special status birds, this “impact would be considered
19 significant...”. AR1634; AR1620. No conclusion is drawn for red-tailed hawks or other raptors
20 protected by the F&G Code. *Id.* The EIS does not include any discussion of whether curtailment of
21 turbines would also avoid collisions by raptors (other than golden eagles) and burrowing owls with
22 the turbines. Nevertheless, the EIS concludes that the Project, either by itself or cumulatively, will
23 not have a significant impact on all raptors and burrowing owls by the implementation of monitoring
24 mitigations and voluntary mitigations that do not include curtailment. *See* AR1620.

25 The Avian Plan draws a number of critical conclusions that are relied upon extensively by
26 BLM in the agency’s EIS. Of particular importance is the base assertion that raptor use of the project
27 site is low compared to other wind turbine locations. AR2958. The final Avian Plan references 34
28

1 studies or reports on which it relies for its discussion of relative raptor use of existing wind turbine
2 facilities and the proposed Project and its assertion that raptor use of the Project site is very low.
3 AR2959. Only one of those studies was identified in the draft Avian Plan released with the draft EIS.
4 Draft Avian Plan, p. 28 (Oct. 2010) (Decl. of Michael R. Lozeau (“Lozeau Dec.”), Ex. A at 34).
5 None of those referenced studies are included in the administrative record for the Project. None of
6 those studies were made available by BLM to the public attempting to review and comment on the
7 Project.

8 On May 9, 2012, the BLM Director approved the CDCA Plan amendment and BLM’s El
9 Centro Office Manager approved the right-of way grant. *Id.* On May 11, 2012, Secretary of the
10 Interior Salazar approved the CDCA Plan amendments and the ROW grant for the Project. AR152.
11 On May 14, 2012, BLM’s Field Office Manager issued a Right-of-Way Notice to Proceed to the
12 Project. AR97. Roads have been constructed and turbine towers have been erected, and a significant
13 portion of the Project is scheduled to begin operating before December 31, 2012. AR485-86.

14 **III. Legal Background.**

15 **A. FLPMA And The California Desert Conservation Area Plan.**

16 FLPMA, 43 U.S.C. §1701 *et seq.*, mandates a comprehensive planning system for the use of
17 public lands managed by the Department of Interior, through BLM. In FLPMA, Congress expressly
18 set aside public lands of the California desert as the “California Desert Conservation Area” and
19 mandated development of a comprehensive, long-range management plan for these unique desert
20 lands. 43 U.S.C. §1781. Interior developed the CDCA Plan in 1980. AR5905. The CDCA Plan,
21 like all land use plans developed under FLPMA, has binding legal effect. Projects must be consistent
22 with the CDCA Plan. *Oregon Natural Resources Council v. Brong*, 492 F.3d 1120, 1125 (9th Cir.
23 2007); 43 U.S.C. §1732(a) (requiring Secretary to manage public lands in accordance with the land
24 use plans developed under FLPMA).
25

26 To achieve Congress’ mandates of comprehensive land use planning, multiple-use
27 management, and resource preservation, the CDCA Plan divides CDCA lands into four land-use
28 classes, known as Classes C, L, M, and I, which provide a hierarchy of permissible land uses and

1 development on CDCA lands. AR5920. The CDCA Plan provides, with respect to Class L lands:

2 “Multiple-Use Class L (Limited Use) protects sensitive, natural, scenic, ecological, and
3 cultural resource values. Public lands designated as Class L are managed to provide for
4 generally *lower-intensity, carefully controlled multiple use of resources*, while *ensuring
that sensitive values are not significantly diminished.*”

5 *Id.* (emphasis added). The CDCA Plan further states that consumptive uses on Class L lands are
6 allowed but “only up to the point that sensitive natural and cultural values might be degraded.”

7 AR5928. Class L provides “*protective resource* management which complements many identified
8 Native American values.” AR5934 (emphasis added). In contrast, Class M provides for “higher
9 intensity use” such as “mining, livestock grazing, recreation, energy, and utility development.”

10 AR5920. Class I lands allow intensive development and provide for “concentrated use of lands and
11 resources to meet human needs.” *Id.* Nearly four million acres (over 30% of BLM lands in the
12 CDCA) are Class M or I lands available for moderate to high-intensity industrial energy/utility
13 developments like the Project. *Id.*

14 The BLM (Handbook) Manual (Section 6840) applicable to Special Status Species
15 Management, provides that “[c]onservation of special status species means the use of all methods and
16 procedures which are necessary to improve the condition of special status species and their habitats
17 to a point where their special status recognition is no longer warranted.” *See* Lozeau Dec., Ex. B at
18 43. The Wildlife Element of the CDCA Plan cites the BLM manual, incorporating by reference its
19 policies and prescriptions for sensitive species management. The Wildlife Element also directs BLM
20 to “[a]void, mitigate, or compensate for impacts of conflicting uses on wildlife populations and
21 habitats.” AR5935 (emphasis added).

22 **B. California Department of Fish & Game Code**

23 Relevant to this action, the California Fish & Game Code includes three take prohibitions to
24 protect certain bird species. F&G Code §3503.5 provides that “[i]t is unlawful to take, possess, or
25 destroy *any birds* in the orders Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or
26 destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation
27 adopted pursuant thereto.” (emphasis added). The order *Falconiformes* includes hawks, eagles, and
28

1 falcons, including the red-tailed hawk, golden eagle, Swainson’s hawk and prairie falcon. *See*
2 AR21340-41. The order *Strigiformes* includes all owls, including the burrowing owl. AR21341.
3 The only exceptions to Section 3503.5’s strict take prohibition are (1) for accidental takes resulting
4 from the operation of motor vehicles, (2) if the particular raptor or owl also is a listed species under
5 California Endangered Species Act (“CESA”), F&G Code §2050 *et seq.*, takes authorized pursuant to
6 an incidental take permit issued by DFG, or (3) take in the form of capture (though not killing)
7 pursuant to a falconry license. F&G Code §§2000.5; 2080; 395.

8 The California Endangered Species Act (“CESA”), F&G Code §2050 *et seq.*, sets forth
9 specific strictures on the taking of species listed as threatened or endangered. Section 2080 of the
10 Act prohibits any person, including state agencies or the officials directing those agencies, from
11 “taking” a threatened or endangered species. F&G Code §2080. Swainson’s hawks are listed as
12 threatened under CESA. The exception to this take prohibition is take pursuant to an incidental take
13 permit issued by DFG. F&G Code §2081(b). Ocotillo Express has not obtained any incidental take
14 permit from DFG authorizing any take of Swainson’s hawks.

15 F&G Code §3511 provides that:

16 Except as provided in Section 2081.7 or 2835, fully protected birds or parts thereof
17 may not be taken or possessed at any time. No provision of this code or any other law
18 shall be construed to authorize the issuance of permits or licenses to take any fully
19 protected bird....

20 F&G Code §3511(a)(1). Fully-protected species include golden eagles. *Id.* In addition to the motor
21 vehicle exception (F&G Code §2000.5), DFG “may authorize the taking of those species for
22 necessary scientific research, including efforts to recover fully protected, threatened, or endangered
23 species, and may authorize the live capture and relocation of those species pursuant to a permit for the
24 protection of livestock.” F&G Code §3511(a)(1). *See* 14 CCR §670.7. Ocotillo Wind has not
25 obtained any take permit pursuant to 14 CCR §670.7.

26 Section 86 of the Fish & Game Code defines “take” as to “hunt, pursue, catch, capture, or kill,
27 or attempt to hunt, pursue, catch, capture, or kill.” *See Dep’t of Fish & Game v. Anderson-*
28 *Cottonwood Irrigation Dist.*, 8 Cal. App. 4th 1554, 1561 (1992) (CESA prohibits take of listed

1 salmon occurring from otherwise lawful operation of irrigation pumps).

2 **C. National Environmental Policy Act.**

3 “NEPA ... makes environmental protection a part of the mandate of every federal agency and
4 department,” *Calvert Cliffs’ Coord. Com. v. United States*, 440 F.2d 1109, 1112 (D.C. Cir. 1971) and
5 is the “basic national charter for protection of the environment.” 40 C.F.R. §1500.1(a); *Ctr. for*
6 *Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008).
7 NEPA “is a procedural statute intended to ensure environmentally informed decision-making by
8 federal agencies.” *Cal. ex rel. Lockyer v. Dep’t of Agriculture*, 575 F.3d 999, 1012 (9th Cir. 2009).
9 NEPA “does not ‘mandate particular results, but simply provides the necessary process to ensure that
10 federal agencies take a hard look at the environmental consequences of their actions.’” *Id.* “The
11 ‘hard look’ ‘must be taken objectively and in good faith, not as an exercise in form over substance,
12 and not as a subterfuge designed to rationalize a decision already made.’” *W. Watersheds Project v.*
13 *Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011). Nor can an EIS’s discussion of adverse impacts
14 “improperly minimize negative side effects.” *Id.* at 491. NEPA’s purpose is “to help public officials
15 make decisions that are based on understanding of environmental consequences, and take actions that
16 protect, restore, and enhance the environment.” 40 C.F.R. §1500.1(c).

17
18 NEPA requires that an agency pay attention to the quality of the science used in an EIS. The
19 agency must “insure the ... scientific integrity of the discussions and analyses in environmental
20 impact statements.” 40 C.F.R. §1502.24. The Court’s role is not to decide whether the FEIS is
21 based on the best scientific methodology available or otherwise resolve disagreements among
22 experts. *Friends of the Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985);
23 *Seattle Audubon Society v. Moseley (“SAS I”)*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992).
24 “Rather, the court’s task is to ensure that the procedure followed [by the agency] resulted in a
25 reasoned analysis of the evidence before it, and that [the agency] made the evidence available to all
26 concerned.” 760 F.2d at 986. A key NEPA procedure is to “insure that environmental information
27 is available to public officials and citizens before decisions are made,” 40 C.F.R. §1500.1. This
28 includes scientific data relied upon by an EIS. 40 C.F.R. §1502.24 “requires agencies to provide the

1 public with the underlying environmental data from which an agency expert derives his or her
2 opinion.” *Siskiyou Regional Education Project v. Rose*, 87 F. Supp. 2d 1074, 1096 (D. Or. 1999)
3 citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); *Earth Island Inst. v.*
4 *United States Forest Serv.*, 351 F.3d 1291, 1300-01 (9th Cir. 2003). “No material may be
5 incorporated by reference unless it is reasonably available for inspection by potentially interested
6 persons within the time allowed for comment.” 40 C.F.R. §1502.21.

7 **IV. STANDARD OF REVIEW**

8 Federal Rule 56(a) requires that summary judgment may be granted when the evidence
9 demonstrates that “there is no genuine issue as to any material fact and that the moving party is
10 entitled to a judgment as a matter of law.” Summary judgment is the usual procedure for courts to
11 decide the merits of claims under NEPA based on the review of an administrative record. *See*
12 *Northwest Motorcycle Ass’n v. United States Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994).

13 The judicial review provision of the Administrative Procedures Act (“APA”), 5 U.S.C. §706,
14 governs review of agency actions under NEPA and FLPMA. Under §706, a court must set aside
15 agency actions that are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance
16 with law.” 5 U.S.C. §706(2)(A). Actions that are approved “without observance of procedure
17 required by law” must also be set aside. 5 U.S.C. §706(2)(D).

18 To determine whether agency action was arbitrary and capricious, a court must review
19 whether the agency “considered the relevant factors and articulated a rational connection between
20 the facts found and the choice made.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462
21 U.S. 87, 105 (1983). Agency action must be reversed where the agency has “relied on factors which
22 Congress has not intended it to consider, entirely failed to consider an important aspect of the
23 problem, offered an explanation for its decision that runs counter to the evidence before the agency,
24 or is so implausible that it could not be ascribed to a difference in view or the product of agency
25 expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

26 **V. ARGUMENT**

1 **A. BLM’s Approval of the EIS Was Arbitrary and Capricious Because its Discussion of**
2 **Raptor and Owl Impacts Relies on Numerous Studies That Were Not Available to BLM**
3 **or the Public During the Public Comment Period and Fails to Explain Why Curtailing**
4 **Turbine Operations Was Rejected For All Protected Bird Species Except Golden Eagles.**

5 BLM proceeded arbitrarily in approving the Project’s EIS and adopting the ROD and ROW
6 by accepting the applicant’s raptor use reports without gathering in the underlying data or allowing
7 the public to review that data and question their accuracy. Similarly, rather than discuss and analyze
8 the need to require curtailment, *i.e.*, shutting down, of turbines at the site in order to avoid take of all
9 raptor species protected under federal and state laws, BLM randomly and without explanation
10 accepted Ocotillo Express’s offer to avoid take of only golden eagles through turbine curtailment but
11 expressly declining to avoid take of Swainson’s hawks, red-tailed hawks, Ferruginous hawks,
12 burrowing owls, or any other protected bird species, by means of curtailment. These omissions and
13 leaps of faith on behalf of the Project are fatal to the EIS and BLM’s underlying approvals.

14 **1. BLM Violated Basic NEPA Procedures by Failing to Make Available or**
15 **Independently Evaluate Critical Raptor Studies Pertaining to Raptor Use at**
16 **Other Wind Energy Projects.**

17 “The purpose of NEPA is to ‘ensure that agencies carefully consider information about
18 significant environmental impacts’ and ‘*guarantee that relevant information is available to the*
19 *public.*’” *Save the Peaks Coalition v. U.S. Forest Serv.*, 669 F.3d 1025, 1035 (9th Cir. 2012)
20 (emphasis added) (citing *Lands Council v. McNair*, 629 F.3d 1070, 1075 (9th Cir. 2010). “The very
21 purpose of public issuance of an environmental impact statement is to ‘provid[e] a springboard for
22 public comment.’” *N.C. Wildlife Fed’n v. N.C. Dep’t of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012),
23 citing *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004). “NEPA requires that ‘the public
24 receive the underlying environmental data from which [an agency] expert derived her opinion.’”
25 *Earth Island Inst.*, 351 F.3d at 1300-01, quoting *Idaho Sporting Cong.*, 137 F.3d at 1150; 40 C.F.R.
26 §1500.1(b). “An agency must also ‘identify any methodologies used’ and ‘make explicit reference
27 by footnote to the scientific and other sources relied upon for conclusions in the [EIS].” 351 F.3d at
28 1301; 40 C.F.R. §1502.24.

1 “NEPA does not permit an agency to rely on the conclusions and opinions [of experts]
2 without providing both supporting analysis and data.” *Idaho Sporting Cong.*, 137 F.3d at 1150;
3 *Sierra Nev. Forest Prot. Campaign v. Tippin*, 2006 U.S. Dist. LEXIS 99458, at *29-37 (E.D. Cal.
4 Sept. 6, 2006). The CEQ regulations emphasize that “No material may be incorporated by reference
5 unless it is ***reasonably available for inspection by potentially interested persons within the time***
6 ***allowed for comment***. Material based on proprietary data which is itself not available for review
7 and comment shall not be incorporated by reference.” 40 C.F.R. §1502.21 (emphasis added).
8 Although supporting studies need not be physically attached to an EIS, the studies must be
9 referenced in the EIS or its appendices and, most importantly, the studies must “***be available and***
10 ***accessible***” to the public. *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 782 (9th Cir.
11 1980) (emphasis added). *See also Trout Unlimited v. Morton*, 509 F.2d 1276, 1284 (9th Cir. 1974).
12 “When relevant information ‘is not available during the [impact statement] process and is not
13 available to the public for comment[,] . . . the [impact statement] process cannot serve its larger
14 informational role, and the public is deprived of [its] opportunity to play a role in the decision-
15 making process.’” *N.C. Wildlife Fed’n*, 677 F.3d at 604-05, quoting *N. Plains Resource v. Surface*
16 *Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (citing *Robertson v. Methow Valley Citizens*
17 *Council*, 490 U.S. 332, 349 (1989). “Failure to provide this information ‘either vitiates a plaintiff’s
18 ability to challenge an agency action or results in the courts second guessing an agency’s scientific
19 conclusions.’” *Earth Island Inst.*, 351 F.3d at 1301, quoting *Idaho Sporting Cong.*, 137 F.3d at
20 1150.
21

22 Where an agency references studies in support of a material conclusion in its EIS, but fails to
23 gather in the studies and independently review that referenced evidence, the agency cannot claim to
24 have reviewed the evidence. “[C]ourts must independently review the record in order to satisfy
25 themselves that the agency has made a reasoned decision ***based on its evaluation of the evidence***.”
26 *League of Wilderness Defenders-Blue Mts. Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060,
27 1073 (9th Cir. 2012), citing *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1160 (9th Cir.
28 2006), overruled on other grounds, *Winter v. NRDC*, 55 U.S. 7 (2008). “If an agency has failed to

1 make a reasoned decision based on an *evaluation of the evidence*, the Court may properly conclude
2 that an agency had acted arbitrarily and capriciously.” *Earth Island Inst. v. Morse*, 2009 U.S. Dist.
3 LEXIS 68311, at *15-23 (E.D. Cal. Aug. 5, 2009) (emphasis added), citing *Earth Island Inst.*, 351
4 F.3d at 1301.

5 BLM failed to review and make available numerous studies which the agency claims are the
6 basis of its conclusions that the Project will not have a significant impact on raptors after
7 implementation of the Project’s mitigation measures. The main reference upon which BLM relies is
8 Ocotillo Express’s Avian Plan.” According to the FEIS and BLM, the Avian Plan contains evidence
9 supporting the agency’s key conclusions that (1) the Project is located in a relatively-low use area for
10 raptors, (2) compared to other wind turbine projects, the Project would be on the lower end of raptor
11 kill projections, and (3) with the implementation of mere monitoring mitigations, avian impacts
12 would be less than significant. Without access to the underlying data referenced in the Avian Plan,
13 BLM could not have independently reviewed the data to support the FEIS’s wildlife impact analysis
14 nor could the public have had an opportunity to review and comment on that evidence.
15

16 At the time of the June 2011 DEIS and the public comment period, only an early draft of the
17 Avian Plan was available to the public. Although the DEIS notes its intent to compare raptor use
18 data for the Ocotillo site to use data for other existing wind turbine projects, no data from other sites
19 is provided in the DEIS or the draft Avian Plan. AR32331. *See also* AR32432-36, AR32680-85.
20 The DEIS contains no references to any studies involving raptors, eagles or owls and rates of
21 mortality at any wind turbine projects. *Id.* The draft Avian Plan only identifies a single study²
22 pertaining to bird collisions at another wind turbine project. Draft Avian Plan, p. 28 (Lozeau Dec.,
23 Ex. A at 34). That study is not included in the administrative record.
24

25
26
27 ² Erickson, W.P., J. Jeffrey, K. Kronner, and K. Bay. 2003. Stateline Wind Project Wildlife
28 Monitoring Annual Report, Results for the Period July 2001 – December 2002. Technical report
submitted to FPL Energy, the Oregon Office of Energy, and the Stateline Technical Advisory
Committee.

1 In terms of the importance of the use of the Project site by migrating raptors, the draft Avian
2 Plan references a Fall 2009/Spring 2010 raptor migration report prepared by Ocotillo West's
3 consultant Helix. Draft Avian Plan, p. 8 (Lozeau Dec., Ex. A at 14). However, Biologist Scott
4 Cashen pointed out, the consultant's report "was not an open-source document. Consequently, the
5 [Avian Plan] (and DEIS/DEIR) fail to disclose critical information needed to assess the validity of
6 the applicant's risk assessment." AR53848. Despite his efforts to obtain a copy of the Fall
7 2009/Spring 2010 raptor migration report relied upon in the EIS, Mr. Cashen was never provided
8 access to that document. Dec'1 of Scott Cashen ("Cashen Dec."), ¶ 4.³ Biologist Cashen prepared
9 comments on the DEIS and attempted to review the underlying bases of BLM's discussion of
10 comparative raptor use but could not know what studies or reports were being relied upon in the
11 DEIS because they were not identified in that document.

12
13 The final Avian Plan was released at the same time as the FEIS. AR2923, AR804. The final
14 Avian Plan added numerous references to **34 raptor use studies** at other wind turbine projects and
15 relied upon a number of tables and conclusions purported to be derived from those studies. AR2959.
16 No formal comment period was provided by BLM on the FEIS. AR30966-69. The Fall 2009/Spring
17 2010 raptor migration report also continued to remain unavailable. AR56767. None of the raptor
18 mortality studies newly referenced in the final Avian Plan were available to the public, or BLM,
19 none of them being included in the administrative record and most not available through the internet
20 or research libraries. See Administrative Record Index; Cashen Dec., ¶ 5.

21 Because the 34 raptor mortality studies as well as the Helix Fall 2009/Spring 2010 raptor
22 migration report were not made available and accessible to the public, BLM's NEPA process was
23 severely undermined and its conclusion that raptor use at the Project site was low compared to raptor
24 use at other wind project sites unsupported in the FEIS. BLM made no effort to make that

26 ³ The district court may consider extra-record materials "(1) if necessary to determine 'whether the
27 agency has considered all relevant factors and has explained its decision,' (2) 'when the agency has
28 relied on documents not in the record,' or (3) 'when supplementing the record is necessary to explain
technical terms or complex subject matter.'" *Southwest Ctr. for Biological Diversity v. United States
Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

1 underlying data available to the public. The draft EIS did not provide the requisite springboard for
2 public comment, attempting instead to hide the relevant data regarding the likely levels of raptor
3 mortality that will result from the Project's operation. Despite the unavailability of that data, BLM
4 nevertheless proceeded to rely upon Ocotillo Express's consultants and assumed the validity of their
5 conclusions. The public was not provided the underlying data from which those consultants and
6 presumably BLM derived their opinions. *See Idaho Sporting Cong.*, 137 F.3d at 1150. As a result,
7 the public was denied the opportunity to play an informed role in the decision-making process and
8 vitiated Plaintiffs' ability to challenge BLM's migration route and overall raptor use conclusions that
9 served as the basis for BLM's conclusion that bird mortality resulting from the Project and the
10 proposed mitigation measures would sufficiently address those impacts. *See id.*

11 **2. BLM Failed to Maintain the Scientific Integrity of the Agency's NEPA Process**
12 **by Misapplying Raptor Use Numbers.**

13 "To take the required 'hard look' at a proposed project's effects, an agency may not rely on
14 incorrect assumptions or data in an EIS." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d
15 953, 964 (9th Cir. 2005). "Accurate scientific analysis, expert agency comments, and public
16 scrutiny are essential to implementing NEPA." 40 C.F.R. §1500.1(b); 40 C.F.R. §1502.24.
17 "Agencies simply do not have the discretion to arbitrarily and capriciously alter a scientifically set
18 value ... and still comply with NEPA." *Earth Island Inst. v. Morse*, 2009 U.S. Dist. LEXIS 68311, at
19 *15-23 (E.D. Cal. 2009), quoting *Native Ecosystems Council*, 418 F.3d at 964-65; *Earth Island*,
20 442 F.3d at 1160-67 (whether the error was intentional or unintentional, the Forest Service violated
21 NEPA by misrepresenting a scientific study to justify logging more larger trees); *Sierra Club v.*
22 *United States Army Corps of Engineers*, 701 F.2d 1011, 1026 (2d Cir. 1983) (FEIS vacated where
23 fisheries data misrepresented). As one Court has explained:

24 Including inaccurate data in the FEIS hinders one of the primary reasons for producing the
25 document: to provide the public with information about federal projects that will impact
26 the environment. Interested members of the public, seeking to understand why a particular
27 project is needed, depend on the accuracy of the information in an environmental impact
28 statement. Inaccurate data might sway members of the public to support a project they
would otherwise oppose if they were given accurate information.

1 *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 688 (M.D.N.C.
2 2001).

3 In addition to omitting all of the relevant studies from public review and comment, Ocotillo
4 Express's Avian Plan – and hence BLM's FEIS – misapplied the data from the studies. Subsequent
5 to the release of the FEIS, Plaintiffs' expert obtained a few of the 34 studies referenced in the final
6 Avian Plan, including a synthesis study by Erickson, et al. Cashen Dec., ¶ 8. That one study
7 summarized data from 17 of the 43 wind energy sites referenced in the Avian Plan. *Id.* ¶ 8; *id.*,
8 Ex. 2. Reviewing that study and the Avian Plan, Ocotillo Express mistakenly omitted turkey
9 vulture counts from the raptor counts data at the project site, and then proceeded to compare those
10 revised raptor counts to other wind turbine projects' data that included turkey vulture counts. *See*
11 AR2958. Given the common presence of turkey vultures in habitats throughout California and the
12 West, Ocotillo Express's and BLM's data adjustment undercounted raptor use at Ocotillo as
13 compared to the other wind sites. *See* Cashen Dec., ¶ 7 (“Because turkey vultures accounted for
14 42% of the total raptor observations on the Project site, excluding these data from the Project dataset,
15 but from none of the other datasets, would inherently generate the false impression that raptor use at
16 the Project site is “low” compared to other sites”). Based on that incorrect data comparison, Ocotillo
17 Express and BLM concluded that the Project site ranked 41st out of 44 wind energy sites with
18 respect to raptor use. Adding back in the omitted turkey vulture counts for the Project does not
19 support the FEIS's a conclusion that the Project site is a low use site for raptors as compared to other
20 wind energy sites.
21

22 The Avian Plan applies a raptor use rate based on the average numbers of raptors observed in
23 a 20-minute period. AR2958. Including vulture counts, the average raptor use rate at the Project site
24 during spring 2011 was 0.64 raptors/20 minutes. Cashen Dec., ¶ 8. The average raptor use during
25 the spring at the other 17 wind energy sites was 0.43 raptors/20 minutes. *Id.* Looking at data for
26 each of the 17 sites, the Project site's raptor use during the spring was higher than 14 of the 17
27 (82%) other wind energy sites. *Id.* Focusing on the genus *Buteo*, which includes Swainson's and
28 red-tailed hawks, 0.22 *Buteos*/20 minutes were counted at the Project site compared to an average of

1 0.15 *Buteos*/20 minutes at the other 17 sites. *Id.* And, contrary to being on the lowest percentile of
2 sites, the Project site had higher *Buteo* use than 14 of the 17 sites (82 percent) for which data is
3 available. *Id.* Likewise, during the fall of 2010, 0.15 *Buteos*/20 minutes were observed at the
4 Project site, well above the average reported for the other 17 sites and higher than 10 of the 17 sites
5 (59 percent). *Id.* Because Ocotillo Express and BLM fundamentally erred in presenting the data by
6 omitting turkey vulture observations from the Project site counts and otherwise misrepresented
7 *Buteo* data, BLM's conclusions that raptor use of the Project site is low and not a major migratory
8 corridor were not based on a hard look at the issue and BLM has failed to maintain the scientific
9 integrity of its NEPA review. *Earth Island*, 442 F.3d at 1160-67.

10 Although, when reviewing an EIS under NEPA, the reviewing court "must defer to the
11 informed discretion of the responsible federal agencies[,]" an agency is not informed where it fails to
12 independently review data provided by an applicant, fails to timely disclose references to data relied
13 upon in the FEIS, and fails to make that data available to the public during the public comment
14 period. *Earth Island Inst.*, 351 F.3d at 1301. The reviewing court also may "not 'fly speck' an
15 [EIS] and hold it insufficient on the basis of inconsequential, technical deficiencies." *Oregon Envtl.*
16 *Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). But, where, as here, the agency omits data
17 on which it relies to conclude that the Project will not have any significant impacts on protected
18 raptors and burrowing owls, the data is the core of the evidence relied upon by the agency and very
19 consequential to the FEIS' conclusion. By omitting that fundamental data and, apparently,
20 misleading the public about raptor use at the Project site compared to other wind energy sites, BLM
21 failed to uphold the scientific integrity of the FEIS.

22
23 **3. The EIS's Baseline for Swainson's Hawks Lacks Scientific Integrity Because**
24 **Surveys Relied Upon Included Months Where Swainson's Hawks Would Not be**
25 **Migrating Through the Project Site.**

26 Where an EIS "does not reasonably compile adequate information and sets forth statements
27 that are materially false or inaccurate the Court may find that the document does not satisfy the
28 requirements of NEPA, in that it cannot provide the basis for an informed evaluation or a reasoned
decision." *W. N.C. Alliance v. N.C. Dep't of Transp.*, 312 F. Supp. 2d 765, 776-77 (E.D.N.C. 2003).

1 Accurate and complete information regarding the environmental baseline of a Project is key to
2 evaluating a proposed Project's impacts. 40 C.F.R. §1500.1(b); 40 C.F.R. §1502.24. "Without
3 establishing the baseline conditions which exist in the vicinity of [a project], there is simply no way
4 to determine what effect the proposed [project] will have on the environment and, consequently, no
5 way to comply with NEPA." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505,
6 510 (9th Cir. 1988). *See Ctr. for Biological Diversity v. Provencio*, 2012 U.S. Dist. LEXIS 50457, at
7 *60-61 (D. Ariz. Jan. 23, 2012) ("baseline conditions should be established to facilitate an accurate
8 evaluation of the intensity of impact that the agency action will cause"). NEPA also requires "up-
9 front disclosures of relevant shortcomings in the data or models." *Lands Council v. Powell*, 395 F.3d
10 1019, 1032 (9th Cir. 2005).

11 BLM's EIS fails to compile adequate information regarding the presence of migrating
12 Swainson's hawks through the Project site. A California threatened species, Swainson's hawks are
13 migratory birds travelling 12,400 miles every year on a round-trip journey between their summer
14 breeding grounds in North America and their wintering grounds in the pampas of South America and
15 Mexico. AR51685. Swainson's hawks travelling to breeding grounds in California's Central Valley
16 "arrive in late February and early March." *Id.* Hawks heading to the northeast part of California
17 arrive there in early to mid-April. *Id.*; *See also* AR50854 (meeting notes with California Parks
18 identify Swainson's in San Felipe Valley from "Feb. 1 to early April" and noting that the Valley is
19 an "important corridor between the coast and [Central] valley"). Swainson's hawks begin their fall
20 migration from the California breeding grounds in early September and most individuals have
21 departed by early October. AR51685. A major resting spot is located in Imperial County, about 40
22 miles northwest of the Project site in Borrego Springs. AR49945. Thousands of Swainson's hawks
23 stop there during their migration. AR56784, AR52146, AR52153-201. The numbers of Swainson's
24 hawks using Borrego Springs during their spring migration peaks between the second week of
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1 March and the first week of April. AR52153-52202.⁴ Very few Swainson's hawks are detected at
2 Borrego Springs before February 15th or after April 15th in any given year. *Id.* Swainson's hawks
3 observed flying through the Project site were moving northwesterly in the general direction of
4 Borrego Springs. AR49473.

5 Ocotillo Express's bird surveys only overlap with the tail end of the Swainson's hawk's
6 migration periods. Well over half of the survey periods extended into the later spring when fewer or
7 no Swainson's hawks would be expected to be migrating through Imperial County. Thus, Pattern's
8 consultants conducted surveys during the spring of 2010 from March 22 through May 28, 2010.
9 AR49901. In 2011, the spring surveys went from March 21 through May 25, 2011. AR49470. If
10 most Swainson's hawks are arriving in the Central Valley hundreds of miles north of the site in late
11 February and early March, looking for those birds that might migrate through the Project site in late
12 March through late May is not going to provide any useful baseline data regarding the hawk's use of
13 the Project site or the importance of the Project site as a migratory route. Likewise, the Pattern
14 biologists' surveys barely overlapped the Swainson's hawk's Fall migration. In 2009, the biologists
15 were present from September 24 through November 10. AR49901.⁵ Those Fall surveys missed
16 most of the September migration and included an entire month where few if any Swainson's hawks
17 would be expected to be migrating.
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19 In addition to not being present during a large period of the Swainson's hawks migration,
20 Ocotillo Express and BLM made the further arbitrary error of calculating the Swainson's hawk's use
21 rate of the Project area by averaging hawk observations throughout the entire survey period, masking
22 the higher use levels observed even by Pattern's skewed survey dates in late March and early April,
23 2011. *See* AR3014-16; AR49473. BLM and Ocotillo Express both like to emphasize the total
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25 ⁴ The DEIS did not disclose the dates on which the raptor surveys were conducted, nor did BLM
26 make available the Fall 2009/Spring 2010 raptor migration report referenced in the DEIS. *See, e.g.*
27 AR31895, AR31902-04. Hence, during the comment period, one could not be aware of the absence
28 of substantial overlap between the surveys and the Swainson's hawk migration periods.

⁵ Because the 2009-2010 Raptor Migration Report remains unaccounted for, no specific dates for the
Fall 2010 raptor surveys are provided in the record.

1 number of hours biologists were in the field surveying for raptors and other birds. However, if the
2 observers show up when a critical species like the Swainson’s hawk is not likely to be migrating
3 through – and avoid the peak migration period in the area – the total number of observer hours
4 erroneously minimizes the use of Project site by the hawks.

5 Despite the skewed survey dates, Ocotillo Express’s biologists nevertheless observed 71
6 Swainson’s hawks migrating through the Project site. AR56788; AR49475. These 71 Swainson’s
7 hawks spent 57 percent of their time within the wind turbine’s rotor-swept area. AR56788.
8 “Consequently, it is reasonable to expect that the Project’s turbines will kill Swainson’s hawks.” *Id.*
9 Had the biologists actually surveyed for the threatened Swainson’s hawks during their entire
10 migration period, the number of Swainson’s hawk’s they observed would likely have been much
11 higher. Until they gather that essential baseline data, the public’s ability to comment on and
12 understand the true impacts of the Project on Swainson’s hawks is completely vitiated and forces
13 both the public and the Court to second-guess BLM’s conclusions that the Project and its monitoring
14 measures would not have a significant impact on the hawk. *Earth Island Inst.*, 351 F.3d at 1301.
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16 The Ninth Circuit has rejected EIS’s with similar data flaws. In *North Plains Res. Council,*
17 *Inc. v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011), the Ninth Circuit vacated an EIS that did
18 not gather sufficient data to accurately identify the project’s environmental baseline for various
19 sensitive species prior to the project’s approval. “[O]nce a project begins, the ‘pre-project
20 environment’ becomes a thing of the past” and evaluation of the project’s effect becomes “simply
21 impossible.” *Id.* at 1083. By failing to gather data during the bulk of the Swainson’s hawk’s
22 migration periods, BLM’s EIS suffers a similar flaw.

23 Likewise, in *Native Ecosystems Council*, the Ninth Circuit ruled that the Forest Service failed
24 to take the requisite hard look at a proposed project’s effects where it underestimated by 5,000 acres
25 the summer range of an affected elk herd and, as a result, the logging project’s potential impact on
26 the elk’s available hiding cover. 418 F.3d at 964-65. Citing the Forest Service’s obligation under
27 NEPA to apply accurate data, ensure the scientific integrity of the EIS, and to make “up-front
28 disclosures of relevant shortcomings in the data or models,” the Court ruled the underestimate of elk

1 habitat baseline tainted the EIS’s conclusions concerning effects of the Project on elk. *Id.* The “EIS
2 did not provide a ‘full and fair’ discussion of the potential effects of the project on elk hiding cover
3 and did not ‘inform[] decisionmakers and the public of the reasonable alternatives which would
4 avoid or minimize adverse impacts’ on the Sheep Creek elk herd.” *Id.* at 965. BLM’s EIS suffers
5 from similar defects. Because the EIS relied on surveys that largely occurred outside of the
6 Swainson’s hawk’s fall and spring migration periods, and failed to identify this obvious shortcoming
7 of these critical surveys, the EIS did not take the required hard look at the Project’s impacts on
8 migrating Swainson’s hawks.

9 **4. The FEIS Contains No Information Concerning Why Turbine Curtailment Is Not**
10 **Effective to Avoid Raptor Collision Mortality for Legally Protected Raptors As**
11 **Well As Golden Eagles.**

12 In the EIS and its appendices, BLM identified robust monitoring requirements enabling an
13 on-site biologist – at least for its first 10 years of operation – to detect and identify bird species
14 flying within a mile of the Project area. *Supra*, pp. 4-6. In addition, BLM identified the Project’s
15 ability to shut down, *i.e.*, curtail one or more of the turbines, within 60 seconds when a raptor flies
16 into the Project area. AR3197. Although the EIS discusses and applies such a mitigation to golden
17 eagles, the EIS arbitrarily omits any consideration or discussion of that mitigation measure for other
18 special status and protected raptors and owls.

19 Labeled “Advanced Conservation Practices” (“ACPs”), BLM approved turbine curtailment
20 requirements for golden eagles, by requiring, as a condition of the ROW, implementation of the
21 mitigation measures set out in the Eagle Plan. Using radar, “very high powered binoculars, video
22 tracking software, the on-site biologist will “provide a curtailment command to the operations center
23 for the turbines if the target is projected to intersect a turbine...”. AR3197. *See also* AR3193.
24 Curtailment would ensue when a golden eagle was within one mile of any turbine. AR 23571. The
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1 Golden Eagle Plan *requires* curtailment for golden eagles and is to be implemented as part of the
2 Project. AR3202. *See also* AR1595.⁶

3 Any efforts to mitigate the Project’s impacts on other raptors and owls are addressed in the
4 Project’s Avian Plan. Although the Avian Plan reiterates the possible use of curtailment to prevent
5 mortality to golden eagles, it does not provide for any curtailment to avoid mortality to any other
6 raptors or owls. AR2631-32; AR639; AR1352. Indeed, responding to comments, BLM
7 emphasized that “[t]he Applicant has clarified that during O&M, the radar will be programmed to
8 monitor the sky for raptor species... ; however, curtailment of operating wind turbines would only
9 occur for golden eagles that are detected in or near the project site.” AR3255.

10 The EIS concludes that operation of the Project would “result in bird and bat collisions with
11 wind turbines” and “...O & M activities would result in...permanent *unavoidable* impacts to
12 ...special status raptor...species (collision).” AR905, AR840. The EIS further concludes that
13 “[o]peration of the proposed OWEF has the potential to significantly impact special status raptor
14 species (Cooper’s hawk, sharp-shinned hawk, ferruginous hawk, Swainson’s Hawk, northern harrier,
15 merlin, osprey, peregrine falcon, and burrowing owl) as a result of collision with the WTG’s.”
16 AR1612, 1605-06. In light of the Eagle Plan’s curtailment requirement for golden eagles, there is no
17 information in the EIS as to why turbine curtailment would not also protect other sensitive or
18 protected raptors and owls that have significant risk of mortality from collision.

19 Rather than employing turbine curtailment to avoid harm to the named special status species
20 *in addition* to avoiding golden eagle mortality through turbine curtailment to minimize collision
21 risk, the EIS contemplates only implementing the Avian Plan’s mitigation measures. AR1626-27
22 (Condition Wild-1p). The measures include “implementation of Mitigation Measure Wild-1p/Wild
23 1bb (Implement a Bird and Bat Conservation Strategy, Wild-1dd (Conduct post-construction bird
24 and bat species mortality monitoring) and Wild-1ee (implement a Wildlife Mortality Monitoring
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28 ⁶ USF&WS’s interim guidelines for wind energy facilities recognize that turning off turbines is a
feasible mitigation measure. AR52127.

1 Program).” AR1630. The FEIS has no explanation, however, as to how potential collision risks to
2 raptors would be minimized through implementation of post-mortem monitoring or adaptive
3 management discussions that preclude any consideration of stopping the cause of death – the
4 whirling turbine blades.

5 The Eagle Plan emphasizes the effectiveness the Project expects to realize from curtailing
6 turbines to protect eagles as well as monitoring their interaction with the Project: “This monitoring
7 program is unlike anything implemented to date at a wind energy facility anywhere in the world and
8 will not only provide a test of state of the art technological solutions and their ability to eliminate
9 golden eagle collisions...”. AR3194. There is no explanation in the FEIS as to why curtailment
10 would not also be an effective measure in reducing mortality to other sensitive raptor species,
11 including the state-listed Swainson’s Hawk.

12 In *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), the Court
13 found that an EIS discussion of mitigation for a Forest Service project involving aerial spraying of
14 pesticides was inadequate. In that case, “[t]he lack of any analysis of how far the pesticide might
15 drift, in what direction, or of the effect of spraying or not spraying at different wind speeds coupled
16 with the contradictory statements in the Project Guidelines, EIS, Record of Decision, and the
17 apparently unanswered concerns of a sister agency” was not the required hard look. 309 F.3d at
18 1192. In *High Sierra Hikers Ass’n v. U.S. Dep’t of Interior*, 848 F. Supp. 2d 1036, 1052-1054 (N.D.
19 Cal. 2012), the District Court explained that “[t]he agency must utilize the EIS to discuss such
20 mitigation measures “in sufficient detail to ensure there has been a fair evaluation” of the
21 consequences.” In the EIS, the agency “must perform some assessment of whether the mitigation
22 measures would be effective.” *Id.* at 1056. “[The] assessment must include “an estimate of how
23 effective mitigation measures would be if adopted” or a “reasoned explanation as to why such an
24 estimate is not possible.” *Id.* See *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep’t of*
25 *Interior*, 588 F.3d 718, 727 (9th Cir. 2009). Because BLM did not take a hard look at including
26 curtailment as a mitigation measure for all protected raptors and owls – not just golden eagles – and
27 did not assess the effectiveness of curtailment to protect those species, the EIS is arbitrary.
28

1 **B. BLM Violated its Duty to Implement More Stringent State Environmental Protections**
2 **and Avoid and Mitigate Impacts on Class L Lands Under the CDCA Plan.**

3 In addition to failing to consider available mitigations to protect raptors and owls under
4 NEPA, BLM also failed to assure that the conditions of its ROW achieve no take of Swainson’s
5 hawks, burrowing owls, red-tailed hawks, ferruginous hawks and other raptors as required by
6 California’s stringent wildlife protection laws. The absence of any meaningful measures to protect
7 raptors and owls also runs afoul of the CDCA Plan, which does not contemplate projects of this type
8 on Class L lands and on such a scale that they are guaranteed to be deadly to wildlife.

9 **1. The Secretary Violated His Duty Under 43 USC §1765(a) to Require the Project**
10 **to Comply With More Stringent State Standards for Environmental Protection.**

11 The Secretary’s ROD and the FEIS he approved pay mere lip service to his duty to require
12 any right-of-way project on BLM land to comply with all applicable substantive state environmental
13 laws. California fish & game laws strictly prohibit the take, *i.e.*, capturing or killing, of certain
14 species. Fish & Game Code §3503.5 prohibits take of “any birds in the orders Falconiformes or
15 Strigiformes...”, including red-tailed hawks, golden eagles, Swainson’s hawks, burrowing owls, and
16 prairie falcons. The Swainson’s hawk also is protected from any take pursuant to CESA, F&G Code
17 §2080, unless an incidental take permit has been issued by DFG. F&G Code §2081(b). The golden
18 eagle also is listed as a fully-protected species pursuant to F&G Code §3511, which prohibits any
19 take of such species with very limited exceptions. *See* F&G Code §3511(a)(1) & (b)(7).

20 If by its very operation, a facility or activity takes any hawk, eagle, falcon, owl or other
21 raptor, it violates Section 3503.5. Similarly, because the Project has not obtained an incidental take
22 permit for the Project to take Swainson’s hawks, any fatal collisions by Swainson hawks with a
23 Project turbine is a violation of CESA. “Take” means “hunt, pursue, catch, capture, or kill, or
24 attempt to hunt, pursue, catch, capture, or kill.” F&G Code §86. “Section 86 ... expressly provides
25 that ‘take’ means ‘kill.’” *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*,
26 8 Cal. App. 4th 1554, 1562 (1992). DFG applies Section 86’s definition of “take” to F&G Code §§
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1 3503.5, 3511, and 2080.⁷ The take prohibition language of F&G Code §§3503.5, 3511 and 2080 is
2 unambiguous. “If the statutory language is unambiguous, we presume the Legislature meant what it
3 said, and the plain meaning of the statute controls.” *See In re W.B.*, 55 Cal. 4th 30, 52 (2012).

4 The Secretary has a duty to insure that any approved right-of-way includes conditions that
5 will comply with state environmental standards. Section 505(a)(iv) of FLPMA requires that BLM
6 only issue a ROW that includes “terms and conditions which will ... require compliance with State
7 standards for ... environmental protection ... if those standards are more stringent than applicable
8 Federal standards.” 43 U.S.C. §1765(a)(iv). *See* 43 C.F.R. §2805.12(i)(6). The standards include
9 state “substantive standards” but not state procedural requirements. *Montana v. Johnson*, 738 F.2d
10 1074, 1077 (9th Cir. 1984). As the Ninth Circuit has explained, Congress adopted a version of
11 competing FLPMA bills requiring that “BLM comply with, rather than merely consider, federal and
12 state pollution standards.” *Columbia Basin Land Protection Ass’n v. Schlesinger*, 643 F.2d 585, 605
13 (9th Cir. 1981). “This clearly indicates congressional intent to require federal agencies to meet the
14 state’s substantive standards for projects under FLPMA.” 643 F.2d at 605.

15 BLM’s right-of-way for the Project is contrary to law and arbitrary and capricious because it
16 does not include conditions that will ensure that the State’s prohibition of take under F&G Code
17 §§3503.5, 3511, and 2080 will be effectuated. The Avian Plan does not impose feasible operational
18 controls for the Project that would comply with Section 3503.5’s and 3511’s prohibitions on take of
19 raptors and Swainson’s hawks. The Project, as approved by BLM, will take a number of protected
20 birds of prey and owls, including the threatened Swainson’s Hawk, red-tailed hawks and burrowing
21 owls.

22 The Project will transform the existing raptor habitat in the Ocotillo Valley from a relatively
23 undisturbed foraging area into a lethal gauntlet of spinning blades. Although the FEIS and Ocotillo
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26 ⁷ DFG has consistently interpreted Section 3503.5 consistent with its plain language, as generally
27 prohibiting any take by any person of any birds-of-prey unless pursuant to permit or license issued by
28 DFG. *See, e.g.* DFG, “Staff Report on Burrowing Owl Mitigation,” p. 23 (October 17, 1995) (Lozeau
Dec., Ex. C) (“[t]ake of individual burrowing owls and their nests is defined by FGC Section 86, and
prohibited by sections 3503, 3503.5, and 3513.”).

1 Express both steadfastly avoided quantifying the expected rate of take that will result from the
2 Project, it is obvious that take of raptors will occur. *See* AR3485 (“ The Draft EIS/EIR did not make
3 any conclusions on the number (or relative number) of birds or bats that would be killed by the
4 OWEF project.”). Indeed, “the Draft EIS/EIR concluded that the project would have a significant
5 impact on special status raptor species and avian species as a result of collision with wind
6 turbines....” *Id.* (citing AR1605). The EIS confirms that the Project and its mitigation measures
7 have not eliminated the future taking of raptors using the site:

8 Operation of the proposed OWEF has the potential to significantly impact special status
9 raptor species (Cooper’s hawk, sharp-shinned hawk, ferruginous hawk, Swainson’s hawk,
10 northern harrier, merlin, osprey, peregrine falcon, prairie falcon, and burrowing owl) as a
11 result of collision with the WTGs.

12 AR1605-06. Likewise, “Operation of the proposed OWEF has the potential to significantly impact
13 golden eagles as a result of collision with the WTGs.” AR1605. *See* AR1593 (“Operation of the
14 OWEF site would impact avian ... species as a result of collisions with project features[,] including
15 the wind turbine generators); AR3318 (“The pre-construction fatality predictions suggest up to 1
16 eagle fatality per year for the proposed OWEF”).

17 These conclusions do not even address the most prevalent raptor resident at the site – the red-
18 tailed hawk. AR2965 (“Excluding turkey vultures, red-tailed hawk was the most commonly
19 observed raptor species and was also the raptor species with the highest number of exposure minutes
20 within the RSA.”); *Id.* (“red-tailed hawk would be the most likely collision risk”); AR49918 (“[red-
21 tailed hawk] is at greater risk for collision because it was commonly observed flying in the proposed
22 RSA...”). *See also* AR2693-94. Of the 712 observations of red-tailed hawks tallied during the
23 Project’s monitoring, 46 percent of those observations were of red-tailed hawks flying at the same
24 heights as the Project’s massive whirling blades. AR2965. *See also* AR2697.⁸

25 The Avian Plan acknowledges that “[b]ased on raptor use (excluding turkey vulture) at the
26 project (approximately 0.14/20-min survey), the estimated raptor mortality rate might be expected to

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28 ⁸ Similarly, 57% of Swainson’s hawks observed in 2010-2011 were flying within the Project’s rotor swept zone. AR2963; AR2965.

1 be within the range of fatality rates observed at existing facilities where low raptor use has been
2 recorded.” AR2960. Although this prediction is unsubstantiated in the record (*see supra*, pp. 12-18),
3 applying those underestimates of use still confirms that raptors and owls will be killed by the Project.
4 According to the Avian Plan, for seven facilities identified as having low raptor use, “[t]he mean and
5 range of mortality rates ... is 0.06 raptors/megawatt/year (0 – 0.11 raptors/MW/year; Table 7).” *Id.*
6 Applying that mean mortality rate of 0.06 raptors/MW/year to the Project results in an estimate that
7 the 315 MW Project will kill 18.9 raptors every year.

8 As discussed *supra*, BLM did not include conditions in the ROW that will prevent the Project
9 from killing raptors and owls throughout the project’s 30-year term and comply with Section
10 3503.5’s, 3511’s or CESA’s prohibitions on taking raptors or owls at the site. The ROW does
11 generally proscribe the Project’s personnel from harming wildlife (AR469, ¶ 23); requires the Project
12 to obtain take permits for listed species (AR470, ¶ 24) and to prepare the Avian Plan which does not
13 itself include conditions preventing take of raptors or other species, with the exception of golden
14 eagles. (*Id.*, ¶ 26). The condition in the ROW generically requiring Pattern to comply with all
15 applicable State law is not sufficient to comply with 43 U.S.C. §1765(a)(iv) and 43 C.F.R. §2805.12.
16 AR458 (¶ 5(a)). 43 C.F.R. §2805.12 precludes the use by BLM of a generic condition to comply
17 with all state laws in order to meet its Section 505(a)(iv) duty. The regulations instead requires a
18 right-of-way permittee to “[c]omply with ***project-specific terms, conditions, and stipulations***,
19 including requirements to: ... (6) When the state standards are more stringent than Federal standards,
20 comply with state standards for public health and safety, environmental protection, and siting,
21 constructing, operating, and maintaining any facilities and improvements on the right-of-way.”
22 43 C.F.R. §2805.12(i) (emphasis added).

23
24 Nothing in the ROW is a condition that will prevent the Project from taking any raptors or
25 golden eagles and thus comply with F&G Code §3503.5, F&G Code §3511 (in the case of golden
26 eagles) and F&G Code §3511. Most importantly, and as discussed above, the turbine curtailment
27 requirement for golden eagles does not apply to any other raptor or owl species. *See, supra*, pp. 22-
28 23. Likewise, the various management measures to minimize creating new habitat for prey species,

1 removing carcasses quickly, reduced speed limits, training employees and reducing fire hazards will
2 not stop 112 spinning, 371-foot diameter turbine blades from killing raptors and owls that fly into the
3 Project area. *See* AR2972. The Avian Plan only calls for BLM to consider any kill-mitigation
4 measures for non-listed or nonsensitive raptors if, over three years, the Project kills an average of
5 37.8 raptors per year. AR2983. For species identified by BLM as sensitive or by USFWS as Birds
6 of Biological Concern,⁹ no additional measures will be considered unless the Project kills an average
7 of 9.45 such birds per year over a three-year period. *Id. See also* AR2977 (“Monitoring will consist
8 of a minimum of 3 years of post-construction bird and bat mortality monitoring”); AR2980 (“The
9 TAC, as applicable, shall review the final three-year Monitoring Report for the project to evaluate
10 whether any turbines are causing significantly bird and/or bat fatalities...”). Similarly, only after a
11 Swainson’s hawk is killed once a year for three years does the Avian Plan call for discussions of
12 possible additional measures. AR2983. A condition that allows a discussion of possible additional
13 mitigations to proceed only after the project kills 113 raptors is not a condition that Pattern will
14 comply with F&G Code §3503.5 or, in the case of Swainson’s hawks, Section 3511.
15

16 Even the turbine curtailment for golden eagles will not ensure no take of that species for the
17 life of the Project. The on-site biologist is only required for the first 10 years of the 30-year Project.
18 AR2975 (the ABOCCC “will be manned from sunup to sundown for the first ten years of operations
19 to specifically monitor movements of eagles and other wildlife”). As a result, the Project’s ability to
20 curtail turbines to avoid killing eagles or any other raptors or owls will be substantially compromised.
21 *See* AR53850 (Cashen comments). As USFWS and DFG stated that, although the wildlife agencies
22 were pleased with the availability of the Merlin radar, “the Merlin Avian Radar System is a new and
23 experimental technology. Therefore, eagle mortality may still occur and as stated previously in
24 section 3.23 the eagle is a state fully protected species (Fish and Game Code 3511) and no take is
25 permitted.” AR56272 (USFWS/DFG). The fact that BLM did not condition the Project to include
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28 ⁹ Birds of Biological Concern include peregrine falcon, prairie falcon, and burrowing owl. AR20829.

1 the biologist for 20 of its 30 years of operation means that BLM has not conditioned the ROW to
2 comply with Section 3511 for golden eagles and certainly not with 3503.5 and 2080, prohibiting take
3 for other species.

4 BLM cannot second-guess a State's more stringent environmental standards. In *Montana v.*
5 *Johnson*, 738 F.2d 1074, both BLM and the Forest Service had issued a ROW to a power consortium
6 to construct a power line across federal land. 738 F.2d at 1075. Montana had submitted site specific
7 conditions for the power line project implementing its state law's broad requirement that power lines
8 achieve "the minimum adverse environmental impact..." *Id.* at 1075-76. The State provided
9 specific conditions implementing that broad directive. BLM and the Forest Service refused to
10 include the State's specific conditions in the right-of-way issued for the project. *See id.* at 1076. The
11 Ninth Circuit held that the State's project specific conditions were "state standards" under 43 U.S.C.
12 §1765(a), despite not being promulgated as rules or being generally applicable. *Id.* at 1078-79. The
13 Court then held that BLM and the Forest Service had to include Montana's standards as conditions of
14 the right-of-way, "[t]hose specific substantive provisions are "state standards for . . . environmental
15 protection," applicable to [the Power Authority] through §505(a)(iv) of FLPMA." *Id.* at 1081. The
16 Ninth Circuit identified that "[t]he central purpose of more stringent environmental protection at the
17 option of the state is furthered by according states the discretion to impose *route-specific*
18 *requirements* on federal grantees." *Id.* at 1079 (emphasis added). Here, F&G Code §§3503.5, 3511,
19 and 2080 have been promulgated and apply throughout the State. There can be no doubt that
20 prohibiting all take of raptors and owls is a more stringent state environmental standard under
21 43 U.S.C. §1765(a). And BLM, with the exception of a few passing references F&G Code §§3503.5
22 and 3511 (*see* AR1586, AR1155 (§3511)), makes no serious effort to consider conditions in the
23 ROW to assure the Project will comply with the California standard.
24

25 **2. The Secretary Violated His Duty Under 43 USC §1765(a)(ii) to Include**
26 **Conditions in the ROW Minimizing Damage to Wildlife Habitat and Protecting**
27 **the Environment.**

28 In addition, separate from the duty to assure compliance with state environmental standards,
any BLM right-of-way must "contain . . . terms and conditions which will . . . minimize damage to . .

1 . fish and wildlife habitat and otherwise protect the environment.” 43 U.S.C. §1765(a)(ii). *See Trout*
2 *Unlimited v. U.S. Dep’t of Agric.*, 320 F. Supp. 2d 1090, 1104 (D. Colo. 2004). Such terms include
3 mandating available compliance measures that will avoid killing protected wildlife. *See id.* at 1107-
4 08. BLM’s failure to require curtailment of wind turbines to avoid or at least minimize the Project’s
5 killing of red-tailed hawks, Swainson’s hawks, burrowing owls, other raptors, and, for 20 years of the
6 Project, golden eagles fails to *minimize* damage to wildlife habitat and protect the environment. The
7 Avian Plan contains no measures that would minimize damage to birds of prey and owl habitat at the
8 site and “otherwise protect the environment.” *Supra.*, pp. 22-23. The Eagle Plan has none for the
9 final 20 years of the Project. *Supra.*, p. 4. The Project, as approved without a curtailment condition,
10 fails to minimize damage to the foraging habitat of numerous State protected raptors and the
11 burrowing owl. Pattern observed protected birds foraging within the area of the Project’s wind
12 turbine rotors. *See* AR2717; AR2965. By failing to interrupt the spinning rotor blades in identified
13 foraging habitat of protected raptors and owls, BLM has not conditioned the Project and ROW to
14 minimize damage to those birds’ habitat. *See supra*, pp. 3-7, 22-24. Indeed, the Project, as
15 approved by BLM, will take a number of birds of prey and owls of various species, including a state
16 listed threatened species. *See* AR905; AR840 (“O&M activities would result in temporary and
17 permanent unavoidable impacts to ... special status raptor and migratory bird species (collision)...”);
18 AR3192 (estimating golden eagle fatalities); AR32330; AR1605; AR1605-06; AR54365; AR56788.

19
20 In *Trout Unlimited v. U.S. Department of Agriculture*, 320 F. Supp. 2d 1090, 1095 (D. Colo.
21 2004), the Forest Service issued a right of way pursuant to FLPMA for the Long Draw dam and
22 reservoir on the La Poudre Pass Creek in Colorado. The evidence in the administrative record
23 showed that requiring bypass flows was the environmentally preferred alternative and was necessary
24 to assure sufficient water supply for downstream fish and aquatic habitat. *Id.* at 1107. Rather than
25 mandate by-pass flows in the ROW to protect fish, the Forest Supervisor opted to rely on the dam
26 operator’s voluntary measures to protect fish. *Id.* (“I desire to accept voluntary measures that
27 reasonably protect resources on public land”). By failing to adopt Colorado’s by-pass flow
28

1 requirements and minimize damage to fish habitat, the District Court found the Forest Service in
2 violation of 43 U.S.C. §1765(a). The Court held:

3 FLPMA itself does not authorize the Supervisor’s consideration of the interests of private
4 facility owners as weighed against environmental interests such as protection of fish and
5 wildlife habitat. FLPMA requires all land-use authorizations to contain terms and conditions
6 which will protect resources and the environment. In responding to public comments, the
7 Forest Service expressly acknowledged that issuing a special use authorization without terms
8 and conditions requiring by-pass flows, “depending instead on voluntary achievement of
9 Forest Plan objectives appears to be inconsistent with FLPMA.” ([citation omitted.]) “Once
10 it is determined that certain resources are at risk and require such terms and conditions to
11 protect them, then neglecting to include the terms and conditions in the authorization, as
12 proposed in Alternative B, would be inconsistent with FLPMA.” ([citation omitted.]) The
13 Act simply does not allow a forest supervisor to ignore options that would minimize
14 environmental degradation because of the costs to private parties and difficulty in
15 implementation.

16 320 F. Supp. 2d at 1108. The dam project approved by the Forest Service without by-pass flows
17 addressed in *Trout Unlimited* was destined to kill fish and damage their habitat. *Id.* at 1107. The
18 same is true with the Project – as approved by BLM, it is destined to kill raptors that California
19 strictly prohibits from being killed. And like *Trout Unlimited*, BLM cannot rely on future voluntary
20 measures to address those illegal takes after the fact, when a feasible condition exists – the shutting
21 down of turbines when any raptor or other no-take bird species enters the Project area.

22 The Avian Plan is clear that it does not mandate any curtailment or shut down of the turbines
23 for any raptors or owls, except golden eagles. *See supra*. It merely states that Pattern has the ability
24 to do so and will consider doing so only when a golden eagle approaches the Project’s turbines. *Id.*
25 It is clear that Pattern will not curtail or shutdown any turbines when other raptors are killed. And,
26 even for golden eagles, curtailment will only occur for the Project’s first ten years. AR2975. Like
27 *Trout*, there is an absence of any non-voluntary measures that would prevent and minimize the death
28 of numerous raptors strictly protected by California law. The ROW’s generic provision to comply
with all State laws is not a condition minimizing damage to wildlife habitat and otherwise protect the
environment. 43 U.S.C. §1765(a)(ii). ”Once it is determined that certain resources are at risk and
require such terms and conditions to protect them, then neglecting to include the terms and conditions
in the authorization ... would be inconsistent with FLPMA.” 320 F. Supp. 2d at 1108. “The Act

1 simply does not allow a forest supervisor to ignore options that would minimize environmental
2 degradation because of the costs to private parties and difficulty in implementation.” *Id.*

3 **3. BLM Violated FLPMA By Approving a ROW That Is Inconsistent With**
4 **the CDCA Plan’s Class L Land Use Designation and Duty to Avoid and**
5 **Mitigate Environmental Impacts to Sensitive Species.**

6 Compliance with a land use plan is a substantive obligation. *Oregon Natural Res. Council*
7 *Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). *See* AR4435 (“Implementation is more than a
8 promise. It is a contract with the public...”). “Once a land use plan is developed, [a]ll future
9 resource management authorizations and actions ... shall conform to the approved plan.” *Id.*;
10 43 C.F.R. §1601.0-2.

11 The governing land use plan here, the CDCA Plan, does not permit projects that will
12 significantly diminish or degrade sensitive natural, scenic, and cultural values. Unlike the millions of
13 acres of Class M and Class I lands within the CDCA, Class L lands permit only “lower-intensity”
14 uses “while ensuring that sensitive values are not significantly diminished.” AR4341. *See American*
15 *Motorcyclist Ass’n v. Watt*, 534 F. Supp. 923, 927 (C.D. Cal. 1981) (“Limited (Class L) ... protects
16 sensitive natural scenic, ecological and cultural resources, but provides for low intensity multiple
17 use”). BLM’s discretion is limited on Class L lands to “allowing consumptive uses only up to the
18 point that sensitive natural and cultural values might be degraded.” AR5928. If a proposed use on
19 Class L lands may degrade any sensitive natural or cultural values, it is beyond the point established
20 by the CDCA Plan authorizing BLM to approve such project. *See* AR5921 (“All land use actions
21 and resource management activities on public lands *within* an MUC designation *must meet the*
22 *guidelines for that class*”) (emphasis added); *American Motorcyclist*, 534 F. Supp. at 927. In
23 addition, the CDCA’s Wildlife Element directs BLM to “*Avoid, mitigate*, or compensate for impacts
24 of conflicting uses on wildlife populations and habitats.” AR5935 (emphasis added). By failing to
25 apply a curtailment condition as mitigation for impacts to raptors and owls for the life of the Project,
26 BLM has not avoided or mitigated impacts to raptors and their habitat on the sensitive Yuha Desert
27 lands that are the site of the Project.

28 Interior’s FEIS confirms that the lands proposed for development have sensitive natural,

1 scenic, and cultural values. The lands are relatively undisturbed by human activities. *See* AR175
2 (“Most of the project site is relatively undisturbed”). The FEIS also confirms that the Project will
3 significantly diminish and degrade these sensitive resource values with its development of 112
4 massive wind turbines, 42 miles of new roads, and infrastructure spread out over 10,151 acres of
5 public lands. AR898 (“Alternatives 1-3 would impact special status species and/or their habitat”);
6 *Id.* (“if there is any development on the project site, there is likely to be some degree of impact to
7 wildlife resources”); AR840 (conceding direct impacts to wildlife resources); AR838-39 (conceding
8 significant impact on visual resources, including the viewshed from Anzo Borrego State Park).
9 These findings go beyond the point where sensitive natural resources “might be degraded.” AR5928.

10 “All raptors were observed within the proposed RSA.” AR49912.¹⁰ The EIS states that six of
11 these species were either observed foraging in the RSA or are expected to forage in the RSA.
12 AR1594 (“the proposed OWEF site is occasionally used by eagles for foraging”); AR1595 (“four of
13 the nine observations [of Cooper’s hawks] included flight heights in the proposed RSA [rotor swept
14 area] ... it is expected that the species [Cooper’s hawks] could use the site for foraging during
15 migration periods, which would put it at risk for collision”); *Id.* (same for ferruginous hawks);
16 AR1596 (same for Swainson’s hawks);¹¹ *Id.* (“In spring 2011, a larger number (51) of Swainson’s
17 hawks were observed”); *Id.* (“4 of the 12 observations [of Northern harrier] included flight heights in
18 the proposed RSA [and] [t]he species was observed foraging on site, which would put it at risk of
19 collision”); AR1597 (“it is expected that the [burrowing] owls would fly within the RSA during
20 migratory periods. Therefore, burrowing owl is at risk of collision with the turbines”).¹² There is no
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22

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24 ¹⁰ The Project’s “rotor swept area” is about “150 feet to 450 feet above ground level.” AR49912.

25 ¹¹ The relative exposure index for Swainson’s hawks at the Project site (duration within the RSA) was
26 293 minutes. AR2965. *See also* AR2963 (“Although foraging behaviour was not observed, it is
27 expected that the species could use the site for foraging during migration periods, which would put it
28 at risk for collision”).

¹² *See* AR49473 (“The Swainson’s hawks were occasionally seen flying straight through the site, but
were more often observed circling while moving through the site, and several were observed
hunting”). In addition, “[Swainson’s hawks] were observed perched or flying at variable heights
ranging from 75 to 1000 feet above the ground, which is within the Rotor Swept Zone.” AR49945.

1 doubt that the Project proposes to transform currently safe, available foraging habitat for these
2 species into a lethal area for these birds. *See* AR1594.¹³

3 Thus, in terms of the foraging habitat of the golden eagle, prairie falcon, Swainson’s and
4 other sensitive species of hawks, and burrowing owl, their habitat at the Project site will actually be
5 degraded by the Project. The Project seriously diminishes all of these birds foraging habitat at the
6 site by the addition of 112 deadly turbines. *See, e.g.* AR53854 (“Due to their foraging behavior,
7 golden eagles are frequently killed by wind turbines”). Even if BLM were to have concluded that
8 the Project miraculously would never kill any of the sensitive or listed species expected to forage in
9 the area, there can be no reasonable dispute that the habitat for those species in the Project area not
10 only will be severely curtailed by the mere presence of 112 turbines, but it is expected to be
11 potentially lethal to any listed or sensitive raptor species passing through the Project area. Likewise,
12 even if the Project manages to avoid burrowing owl nests, the currently intact habitat for the owl
13 found at the site will be significantly diminished by the edition of 112 wind turbines, any one of
14 which will obliterate any burrowing owl when it flies into its blades while migrating or foraging.
15 With respect specifically to Swainson’s hawk, Swainson’s hawks are absent from much of their
16 historic breeding range in the Central and Southern parts of California, and may have declined in
17 population by as much as 90%. AR51691. The study estimates the size of the Central Valley
18 Population as between 280-420. AR51684. Thus, under the policies and criteria for the use of Class
19 L lands in the CDCA, the Project clearly is not an appropriate use in Class L land, especially absent
20 measures that would avoid or mitigate take of protected raptors and owls.
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23
24 ¹³ In the EIS, BLM made no effort to discuss how many prairie falcons were observed foraging or in
25 the RSA. AR1132. However, numerous prairie falcons were observed at the Project site. *Id.*
26 (90 prairie falcons observed at site during migration and avian surveys). And, although the EIS
27 mentions in passing that the prairie falcon is one of “several raptor species that are resident to the
28 project site vicinity and use the site regularly for foraging, perching, and nesting,” the EIS says
“prairie falcon[] would be at a higher risk of collision because their foraging heights are within the
proposed RSA.” AR49925; 49923. AR49910 (prairie falcon third highest use of site by raptors and
vultures); AR49912 (suspected prairie falcon nest on Project site).

1 BLM's ROD, although acknowledging that Class L lands must ensure that sensitive values
2 are not significantly diminished, does not apply that standard but instead replaces it with the sole
3 condition that BLM comply with NEPA. AR63. *See also* AR854. BLM never discusses how the
4 Project may be allowed "only up to the point that sensitive natural and cultural values might be
5 degraded," and how the Project has not crossed that point. *See* AR146-47; AR5928. Instead, the
6 ROD goes as far as claiming that "the CDCA Plan contemplates industrial uses, such as the OWEF,
7 on MUC Class L lands so long as 'NEPA requirements are met.'" AR120. No such general
8 encouragement of industrial uses on Class L lands is found either at the CDCA Plan page cited by
9 the ROD (AR5922) nor anywhere else in the Plan.

10 Interior will contend that it has complied with the law, because the CDCA Plan conditionally
11 allows development of wind and solar energy on Class L lands. However, Interior wholly ignores
12 the CDCA Plan's substantive limitations that are placed on the use of Class L lands and fails to
13 recognize that not all renewable energy development is acceptable on Class L lands in terms of size,
14 scale, and scope of impact. The fact that some wind energy generation may be appropriate on some
15 Class L lands does not mean that all renewable energy projects, no matter how large, intensive, or
16 destructive are permissible on all Class L lands. The language of the CDCA Plan is clear: on
17 Class L lands, Interior must ensure that sensitive values are not "significantly diminished," and
18 consumptive uses are allowed "only up to the point that sensitive natural and cultural values might
19 be degraded." AR5920, AR5926. Here, it is undisputed that sensitive natural and cultural values, as
20 well as sensitive species habitat will be significantly diminished and degraded by this project and its
21 112 450-foot tall wind turbines. And given the availability of a curtailment requirement to avoid or
22 at least mitigate the Project's expected take of raptors, BLM's failure to include that condition in the
23 ROW fails to avoid or mitigate impacts to raptor habitat as required by the CDCA Plan. AR5935.

24 In *Brong*, 492 F.3d at 1126, the court applied the Northwest Forest Plan ("NFP") that, like
25 the CDCA Plan, divided the managed land into different classes or hierarchies of protection. BLM
26 proposed to authorize the logging of 1,000 acres of land after a forest fire – a "salvage" project.
27 However, the proposed action was within an area that the NFP designated "to be managed to protect
28

1 and enhance conditions of late-successional [LSR] and old-growth forest ecosystems, which serve as
2 habitat for ... the northern spotted owl.” *Id.* Although the NFP permitted salvage logging in this
3 area in “limited circumstances,” the Court found “the NFP clearly prioritizes the preservation of
4 LSR ecosystems over commercial benefits.” *Id.* at 1127. The Court found BLM’s authorization of
5 the salvage project as “inconsistent with the NFP’s clear direction.” At a minimum, BLM was
6 required to further explain its view of how the salvage project “is compatible with the NFP’s
7 direction to protect and enhance late-successional ecosystems.” *Id.* Similarly here, Interior has
8 authorized a land use action that is inconsistent with the substantive limitations of the CDCA Plan
9 for Class L lands – BLM is not authorized to approve a project that passes the point where it may
10 degrade significant natural values and BLM must ensure that those values are not significantly
11 diminished. Interior’s unlawful interpretation of the CDCA Plan is not entitled to deference. *Id.*

12 **C. Plaintiffs Have Standing to Pursue Their Claims.**

13
14 Plaintiffs have standing to bring this action. To establish Article III standing, Plaintiffs must
15 demonstrate that at least one of its members (1) has “suffered an ‘injury in fact’—an invasion of a
16 legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not
17 ‘conjectural’ or ‘hypothetical’”; (2) that the injury is “fairly traceable to the challenged action of the
18 defendant, and not the result of the independent action of some third party not before the court”; and
19 (3) that it is “‘likely,’ as opposed to merely ‘speculative’ that the injury will be ‘redressed by a
20 favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). For claims
21 involving a procedural injury, “the creation of a risk that serious environmental impacts will be
22 overlooked – is itself a sufficient ‘injury in fact’ to support standing, provided this injury is alleged
23 by a plaintiff having a sufficient geographical nexus to the site of the challenged project that he may
24 be expected to suffer whatever environmental consequences the project may have.” *City of Davis v.*
25 *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975). *See also Cantrell v. City of Long Beach*, 241 F.3d 674,
26 681-82 (9th Cir. 2001); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011).
27 “An individual bringing a substantive claim related to environmental harms may establish an injury
28 in fact by showing ‘a connection to the area of concern sufficient to make credible the connection

1 that the person’s life will be less enjoyable—that he or she really has or will suffer in his or her
2 degree of aesthetic or recreational satisfaction—if the area in question remains or becomes
3 environmentally degraded.” *W. Watersheds Project*, 632 F.3d at 484, citing *Ecological Rights Found*
4 *v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000). Only one party need have standing for
5 claims alleged by several plaintiffs to be justiciable. *W. Watersheds Project*, 632 F.3d at 484 n. 7.
6 *See also Brown v. City of Los Angeles*, 521 F.3d 1238, 1240 n. 1 (9th Cir. 2008).

7 The declarations submitted by Terry Weiner, Jim Pelley, Parke Ewing, and John Smith
8 (Docket Nos. 27-2, 27-3, 27-4, and 27-6) in support of their August 3rd motion for preliminary
9 injunction clearly demonstrate Plaintiffs’ connection to the Ocotillo area and the Project site. Several
10 plaintiffs live within several hundred feet of some of the Project’s turbines and regularly hike in the
11 Project area. The imminent threat that the Project will begin killing raptors and other majestic birds
12 in the area adversely affects Plaintiffs’ members’ recreational interests in bird watching and the
13 enjoyment of desert wild life. And recreating in the Project area, whether on foot or via all-terrain
14 vehicle, will forever be changed from trekking and camping in the desert to trekking and camping
15 through an industrial-scale facility that occupies a 12,500 acre right of way. The sheer magnitude of
16 the proposed Project will adversely affect the aesthetic interests of people driving through the area on
17 Highway 8 and State Route 2, who have heretofore enjoyed unimpaired views of Anzo Borrego State
18 Desert Park.
19

1 **D. Objections to the Project’s Taking of Raptors and Burrowing Owls Were Fully**
2 **Exhausted During BLM’s Administrative Proceedings.**

3 Petitioners or others raised the concern that the Project will illegally take eagles, raptors and
4 burrowing owls. “[A]lerting the agency in general terms to a particular issue will be sufficient for
5 exhaustion if the agency is given the opportunity to ‘bring its expertise to bear to solve the claim.’”
6 *Lands Council*, 629 F.3d at 1076. Where the agency has independent knowledge, “there is no need
7 for a commentator to point them out specifically in order to preserve its ability to challenge a
8 proposed action.” *Ilio ‘Ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006).
9 “[P]laintiffs need not cite the relevant statute or regulation to exhaust a legal issue.” *Or. Natural*
10 *Desert Ass’n v. McDaniel*, 751 F. Supp. 2d 1151, 1161 (D. Or. 2011); *Idaho Sporting Cong. v.*
11 *Rittenhouse*, 305 F.3d 957 (9th Cir. 2002). “Nor does a plaintiff have to invoke the exact legal terms
12 of art drawn from those statutory authorities.” *McDaniel*, 751 F. Supp. 2d at 1161; *Idaho Sporting*
13 *Cong.*, 305 F.3d at 966 (“it would be unreasonable to require that the Conservation Groups incant the
14 magic words ‘monitor’ and ‘population trends’ in order to leave the courtroom door open to a
15 challenge”). An issue may be raised by any person during the administrative process and need not be
16 raised by the person ultimately filing a legal challenge. *Ctr. for Biological Diversity v. Lubchenco*,
17 758 F. Supp. 2d 945, 961 (N.D. Cal. 2010).

18 Plaintiffs and others plainly raised the issue of the Project’s take of raptors. Plaintiffs
19 specifically raised the issue that California law prohibits the take of Golden eagles and other fully
20 protected species. AR57371-72. LIUNA specifically listed burrowing owls, Golden eagles,
21 Swainson’s hawks, prairie falcons and other raptors as specifically protected by the State no-take
22 requirements and had no obligation to specify the particular take prohibition section. AR57371.¹⁴

23 Commenters also specifically questioned the effectiveness of the mitigation measures
24 proposed to address eagle and other raptor impacts. AR54612. Likewise, the Center For Biological
25

26 ¹⁴ Numerous other commenters also raised the same issue of the project’s unacceptable killing or
27 take of raptors. AR54797 (Brendan Hughes); AR54797 (Conrad Kramer); AR54617 (Nick Ervin);
28 AR54779 (Lee Oler); AR54738 (Lisa Spoon); AR54740 (Lynn Teel); AR54750 (Sandy Zelasko);
AR54568 (Gene Trapp); AR54535 (Callie Mack); AR54863 (Dick Troy); AR54802 (James Smith).
See also AR54653 (Nuri Pierce); AR54851 (Mark Jorgensen).

1 Diversity commented that if the turbines were not shutdown or curtailed when raptors were detected,
2 they would be killed. AR53891. Likewise, the Center noted that “[r]aptors are highly vulnerable to
3 collision with wind turbines” and specifically raised the issue that red-tailed hawks, as well as other
4 raptors, are “vulnerable to turbine collision” and how the project would minimize impacts to the local
5 red-tailed hawks. *Id.* Save The Eagles International and Audubon California also raised the issue of
6 raptor deaths, focusing particularly on golden eagles and burrowing owls, and questioned the
7 effectiveness of the Project’s avian mitigation measures to prevent killings of those birds. *See also*
8 AR54730-31; AR53757-60. *See* AR53757 (“if the [Avian Plan] does not contain avoidance
9 measures, it does not reduce the impacts of the project on migratory birds to less than significant.
10 The preparation of an ABPP and a monitoring program do not in and of themselves reduce mortality
11 to less than significant, and monitoring is not mitigation”). *See also* AR53747 (EPA Comments)
12 (“Discuss whether there will be a curtailment of the operating turbines when other raptors species
13 such as red-tailed hawks fly in the OWEF site”).¹⁵

14
15 All of these comments, and BLM’s responses, confirm that the issue of raptor mortality by
16 the Project and the absence from the Project’s mandated mitigations of a requirement to shutdown or
17 curtail the turbines when a protected raptor flies into the Project area were issues that were squarely
18 raised during BLM’s administrative proceeding.

19 **E. The Court Should Vacate the Project’s Approvals and Operations Should Be Suspended**
20 **Pending Compliance with NEPA and FLPMA.**

21 At a minimum, BLM’s faulty FEIS, the CDCA Plan amendment, and the ROW must be
22 vacated and the agency ordered to prepare a new EIS that complies with the NEPA violations
23 described above. *See, e.g. Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 815
24 (9th Cir. 1999). Because an order vacating the EIS and the ROW would preclude the operation of the

25 ¹⁵ BLM acknowledged the numerous comments raising the issue of raptor deaths and the need for
26 curtailment in its responses to comments. *See, e.g.* AR3303; AR3254 (comment requests
27 “discussion of whether there will be curtailment of the operating turbines when other raptor species
28 such as red-tailed hawks fly in the OWEF site”); AR3300; AR3345; AR3466-67 (“comment asks
whether other raptor species will be monitored with the radar and surveillance system and whether
the turbines will be shut down for other raptor species besides golden eagles”); AR3468.

1 Project pending BLM's reissuance of a valid EIS and ROW, Plaintiffs do not believe there is any
2 need for the Court to order additional injunctive relief. "If a less drastic remedy (such as partial or
3 complete vacatur of [an agency's] decision) was sufficient to redress respondents' injury, no recourse
4 to the additional and extraordinary relief of an injunction was warranted." *Monsanto Co. v. Geertson*
5 *Seed Farms*, ___ U.S. ___, 130 S. Ct. 2743, 2761 (2010). *See also Animal Welfare Institute v. Beech*
6 *Ridge Energy LLC*, 675 F. Supp. 2d 540, 559 (D. Md. 2009) (even though no listed bats yet taken
7 and no turbines had yet to spin, Court enjoins operation of turbines during certain seasons to prevent
8 reasonably certain future take of listed species pursuant to federal Endangered Species Act, 16 U.S.C.
9 §1538). *See Watershed Enforcers v. Department of Water Resources*, 185 Cal. App. 4th 969, 985
10 (2010) ("CESA was in large part modeled upon FESA, which was enacted in 1973").

11 **VII. CONCLUSION.**

12 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for
13 summary judgment declaring that the Secretary acted arbitrarily and capriciously and not in accord
14 with law, when he approved the EIS for the Project, amended the CDCA Plan to provide for this
15 industrial scale project, and issued the ROW. The Court should vacate these decisions.

16 December 13, 2012

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17
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