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6 THE PROTECT OUR COMMUNITIES FOUNDATION,
BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE

7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10 THE PROTECT OUR COMMUNITIES) Civ. No. TO BE ASSIGNED
11 FOUNDATION, BACKCOUNTRY)
AGAINST DUMPS, and DONNA)
12 TISDALE,)

13 Plaintiffs,

) **COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

14 vs.

15 KEN SALAZAR, in his official capacity as)
Secretary of the Interior; MIKE POOL, in his)
16 official capacity as Acting Director of the)
United States Bureau of Land Management;)
17 TOM ZALE, in his official capacity as)
Acting Manager of the El Centro Field Office)
for the United States Bureau of Land)
18 Management; UNITED STATES BUREAU)
OF LAND MANAGEMENT, a federal)
19 agency; and UNITED STATES)
DEPARTMENT OF THE INTERIOR, a)
20 federal agency,)

21 Defendants.
22

23 **INTRODUCTION**

24 1. On December 19, 2011, the United States Department of the Interior (“DOI”)
25 and the Bureau of Land Management (“BLM”) published their Record of Decision
26 (“ROD”) approving the issuance of a right-of-way (“ROW”) to Tule Wind, LLC (“Tule”),
27 a subsidiary of Iberdrola Renewables, Inc., to construct, operate and maintain the Tule
28 Wind Project (“Project”) on BLM-managed public land. BLM subsequently issued the

1 ROW grant, serial number CACA-049698, to Tule on April 10, 2012. And on September
2 17, 2012, BLM issued to Tule a Notice to Proceed (“NTP”) allowing prec-construction
3 geotechnical studies. Most recently, on March 8, 2013, BLM announced an amendment
4 to the ROD and the ROW grant due to San Diego County’s approval of a new location for
5 the Project’s collector substation. The amendment alters the route and design of the
6 generation tie-line connecting the collector substation to the planned rebuilt Boulevard
7 Substation. Among other things, according to BLM’s March 8, 2013, press release
8 announcing the amendment, the “amended ROD . . . allows construction of an overhead
9 gen-tie line whereas the previously approved Gen-Tie Route 2 was underground.”

10 2. The Project includes the installation of a wind energy facility with 62 wind
11 turbines and a total generating capacity of up to 186 megawatts (“MW”) of electricity.
12 The Project would connect to the Boulevard Substation that is proposed to be rebuilt as a
13 component of San Diego Gas and Electric’s (“SDG&E’s”) East County Substation
14 Project (“ECO Substation”). From there, the electricity produced by the Project would be
15 transmitted to SDG&E’s major load centers via the Southwest Powerlink transmission
16 line. The Project was analyzed by BLM and the California Public Utilities Commission
17 (“CPUC”) in their joint Final Environmental Impact Report/Final Environmental Impact
18 Statement (“FEIR/FEIS”).

19 3. Plaintiffs THE PROTECT OUR COMMUNITIES FOUNDATION,
20 BACKCOUNTRY AGAINST DUMPS, and DONNA TISDALE (collectively,
21 “plaintiffs”) challenge the approval of the Project by defendants KEN SALAZAR,
22 Secretary of Interior, MIKE POOL, Acting Director of BLM, TOM ZALE, Acting
23 Manager of BLM’s El Centro Field Office, DOI, and BLM (collectively, “BLM”) for
24 violations of the National Environmental Policy Act (“NEPA”), 42 U.S.C. section 4321 *et*
25 *seq.*, the Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. section 701 *et seq.*, the Bald
26 and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. 24 section 668, the
27 Administrative Procedure Act (“APA”), 5 U.S.C. sections 701-706, and regulations
28 promulgated thereunder.

1 4. The Project is an unnecessary industrialization of pristine wilderness areas
2 that poses grave threats to birds, bats and other wildlife, and creates needless risks of
3 catastrophic wildfires. Far less harmful and more efficient energy development solutions
4 exist, such as photovoltaic and other non-fossil fuel distributed (*i.e.* small scale and
5 localized) generation projects near energy demand centers in already-disturbed areas.

6 5. BLM’s Project approvals, including its ROD (as amended), its ROW grant
7 and its NTP, violate NEPA in several significant respects. In its FEIR/FEIS, BLM (1)
8 failed to conduct a robust analysis of distributed generation and other alternatives (42
9 U.S.C. §4332; 40 C.F.R. §1502.14); (2) failed to take a “hard look” at, provide a “full and
10 fair discussion” of, and provide sufficient evidentiary support for its conclusions
11 regarding the environmental impacts of the Project (40 C.F.R. §1502.1); (3) failed to
12 demonstrate the “underlying purpose and need to which the agency is responding in
13 proposing the alternatives including the proposed action” (40 C.F.R. §1502.13); and (4)
14 impermissibly deferred specification and analysis of the myriad mitigation measures on
15 which the FEIR/FEIS relies until after the completion of environmental review.

16 6. BLM violated the MBTA by failing to secure a permit for the take of the
17 many protected bird species that will be harmed by the Project.

18 7. BLM violated the Eagle Act by allowing the unpermitted taking of protected
19 golden eagles that will be harmed by the Project.

20 8. BLM violated the APA by approving the Project without complying with the
21 foregoing environmental laws.

22 9. Accordingly, plaintiffs seek orders from this Court: (1) granting preliminary
23 injunctive relief restraining defendants from taking any action that would result in any
24 change to the physical environment in connection with the Project pending a full hearing
25 on the merits; (2) declaring that defendants violated the APA by failing to comply with
26 NEPA; (3) declaring that defendants violated the APA by failing to comply with the
27 MBTA; (4) declaring that defendants violated the APA by failing to comply with the
28 Eagle Act; and (5) granting permanent injunctive relief overturning BLM’s Project

1 approvals pending defendants' compliance with NEPA, the MBTA, the Eagle Act, and
2 the APA.

3 **JURISDICTION AND VENUE**

4 10. The Court has jurisdiction over this action under 28 U.S.C. sections 1331
5 (federal question), 1337 (regulation of commerce), 1346 (United States as defendant),
6 1361 (mandamus against an officer of the United States), 2201 (declaratory judgment)
7 and 2202 (injunctive relief), and under the APA, 5 U.S.C. sections 701-706 (review of
8 final agency action), because (1) the action arises under the APA, NEPA, MBTA, and the
9 Eagle Act; (2) BLM is an agency of the United States government and the individual
10 defendants are sued in their official capacities as officers of the United States; (3) the
11 action seeks a declaratory judgment voiding BLM's Project approvals; and (4) the action
12 also seeks further injunctive and mandamus relief until BLM complies with applicable
13 law.

14 11. Venue is proper in this judicial district pursuant to 28 U.S.C. section
15 1391(e)(2) because BLM and one or more individual defendants officially reside in this
16 judicial district, one or more of plaintiffs' causes of action arose in this judicial district,
17 and all of the lands and waters involved in the action are located in this judicial district.

18 12. There exists now between the parties an actual, justiciable controversy in
19 which plaintiffs are entitled to have a declaration of their rights, a declaration of BLM's
20 obligations under NEPA, the MBTA, and the Eagle Act, and further relief because of the
21 facts and circumstances hereinafter set forth.

22 13. This Complaint is timely filed within the applicable six-year statute of
23 limitations set forth in 28 U.S.C. section 2401(a).

24 14. Plaintiffs have standing to assert their claims because they use the public
25 lands on which the Project would be built, and would be harmed by the impacts of the
26 Project's construction and operation on plaintiffs' recreational, wildlife, cultural,
27 scientific, spiritual, aesthetic and safety interests. Plaintiffs have exhausted all applicable
28 remedies by commenting on and objecting to the Project before its approval.

1 **PARTIES**

2 15. Plaintiff THE PROTECT OUR COMMUNITIES FOUNDATION (“POC”)
3 is a community organization formed in 2009 as the successor to the Protect Our
4 Communities Fund, which was formed in 2006. POC is composed of numerous
5 individuals and families residing in eastern San Diego County and western Imperial
6 County who are directly affected by BLM’s approval of the Project. POC’s purpose is the
7 promotion of a safe, reliable, economical, renewable, and environmentally responsible
8 energy future. POC’s members currently use and intend to continue to use the areas
9 affected by the Project for aesthetic, scientific, historic, cultural, recreational, and
10 spiritual enjoyment. Construction and operation of the Project threatens to harm the use
11 and enjoyment of these public resources by POC’s members as well as the public at large.
12 The Project also threatens to cause physical and psychological harm to POC’s members
13 and other nearby residents through its emission of substantial audible noise, low-
14 frequency noise and infrasound (“ILFN”), and electric and magnetic fields (“EMF”).
15 POC therefore seeks this Court’s review and invalidation of BLM’s Project approvals.

16 16. Plaintiff BACKCOUNTRY AGAINST DUMPS (“Backcountry”) is a
17 community organization comprising numerous individuals and families residing in
18 eastern San Diego County and western Imperial County who will be directly affected by
19 the Project and its connected actions. Backcountry and its members are vitally interested
20 in proper land use planning and management in order to maintain and enhance the area’s
21 ecological integrity, scenic beauty, wildlife, recreational amenities, and natural resources.
22 Backcountry’s members use the area affected by the Project for aesthetic, scientific,
23 historic, cultural, recreational, and spiritual enjoyment. Construction and operation of the
24 Project threatens to harm the use and enjoyment of these public resources by
25 Backcountry’s members as well as the public at large. The Project also threatens to cause
26 physical and psychological harm to Backcountry’s members and other nearby residents
27 through its emission of substantial audible noise, ILFN and EMF. Backcountry therefore
28 seeks this Court’s review and invalidation of BLM’s Project approvals.

1 17. Plaintiff DONNA TISDALE lives on Morningstar Ranch, located two miles
2 west of Tierra Del Sol Road in Boulevard, California. She is a member of Backcountry
3 and POC. She is also the Chairwoman of the San Diego County’s Boulevard Planning
4 Group. Ms. Tisdale currently uses and intends to continue to use the area that will be
5 harmed by the Tule Wind Project for activities such as hiking, family outings, recreation,
6 wildlife and wildflower viewing, sightseeing, photography, star gazing and quiet
7 meditation. Construction and operation of the Project will harm Ms. Tisdale’s use and
8 enjoyment of these public resources. Ms. Tisdale therefore seeks this Court’s review and
9 invalidation of BLM’s Project approvals.

10 18. Plaintiffs’ injuries are fairly tracable to BLM’s actions. Construction and
11 operation of the Project and connected actions will harm plaintiffs’ use of the Project area
12 for recreational activities including natural and cultural study, wildlife and wildflower
13 viewing, scenic enjoyment, photography, hiking, family outings, star gazing and
14 meditation. These injuries are actual, concrete, and imminent. Plaintiffs have no plain,
15 speedy, or adequate remedy at law. Accordingly, plaintiffs seek injunctive, mandamus,
16 and declaratory relief from this Court to rectify BLM’s unlawful acts and redress
17 plaintiffs’ injuries.

18 19. Defendant KENNETH SALAZAR is the Secretary of the United States
19 Department of the Interior and, in that capacity, is responsible for BLM’s Project
20 approvals. He is sued in his official capacity.

21 20. Defendant MIKE POOL is the Acting Director of BLM and is sued in his
22 official capacity. In that capacity, he is generally responsible for the activities of BLM
23 nationwide. Defendant POOL is responsible for BLM’s Project approvals.

24 21. Defendant TOM ZALE is the Acting Manager of BLM’s El Centro Field
25 Office Manager. In that capacity, he is responsible for BLM’s ROW grant and its
26 September 17, 2012, NTP.

27 22. Defendant UNITED STATES DEPARTMENT OF INTERIOR (“DOI”) is
28 the federal agency charged with managing most of the nation’s federally owned lands,

1 including the Project site at issue here. DOI is also charged with ensuring compliance
2 with applicable laws, including but not limited to NEPA, MBTA and the Eagle Act, in its
3 management of those lands.

4 23. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT
5 (“BLM”) is an agency within DOI. Under federal law, BLM is charged with the
6 management of federal lands including the Project site for the benefit of the public and
7 consistent with all applicable laws.

8 **BACKGROUND**

9 24. As approved by the BLM in its ROD and ROW grant, the Project is slated to
10 be constructed on 12,360 acres of public land near the Jacumba and Boulevard
11 communities in eastern San Diego, approximately 70 miles east of the City of San Diego.
12 ROD 1. The proposed wind energy generation facility includes up to 62 turbines, 18.81
13 miles of new access roads, modifications to 11.08 miles of existing roadways, a five-acre
14 collector substation, an extensive system of overhead and underground 34.5 kV lines to
15 connect the turbines to the collector substation, a 138 kV generator-tie (“gen-tie”) line to
16 connect the on-site collector substation to SDG&E’s rebuilt Boulevard Substation, a
17 5-acre operations and maintenance building, three permanent meteorological towers, and
18 either a sonic detecting and ranging (“SODAR”) unit or a light detecting and ranging
19 (“LIDAR”) unit. ROD 31; ROW Grant 2. The Project would have an electrical
20 generation capacity of up to 186 MW. ROD 1.¹

21
22 ¹ Up to 27 additional wind turbines are proposed to be constructed and operated on
23 the Ewiiapaayp Reservation and adjacent California State Lands Commission-
24 managed land as part of the Tule Wind Reduced Ridgeline Project, which would
25 be connected to and operated in conjunction with the overarching Tule Wind
26 Project approved by BLM. The portion of the Tule Wind Project proposed for
27 California-owned and Ewiiapaayp Reservation lands is analyzed along with the
28 rest of the Project in the EIR/EIS. “Through [the] ROD, [however,] BLM ma[de]
no decision regarding those portions of the Tule Wind Project that are not located
on BLM-managed lands.” ROD 1. The Tule Wind Reduced Ridgeline Project
requires approval from the federal Bureau of Indian Affairs and the California

1 25. Also included in the Project, among other components, are “temporary
2 construction facilities: a 10-acre parking and staging area and 12 two-acre construction
3 laydown areas.” ROW Grant 2. In addition, groundwater wells would have to be drilled
4 in order to supply the Project with water during both construction and operation. In total,
5 Project construction is expected to take 12 months to complete. ROD 4.

6 26. BLM and the CPUC jointly prepared the Project EIR/EIS to evaluate several
7 connected projects, including the Tule Wind Project, the ECO Substation Project, the
8 connecting Energia Sierra Juarez U.S. Generator-Tie Project (“ESJ Gen-Tie”), and the
9 Campo, Manzanita, and Jordan wind energy projects. They issued the Draft EIR/EIS
10 (“DEIR/DEIS”) in December 2010. The agencies then published the FEIR/FEIS in
11 October 2011, and BLM relied on it in issuing the ROD, the ROW grant and the initial
12 NTP for the Project.

13 27. Plaintiffs submitted extensive comments on the DEIR/DEIS, and also
14 submitted comments during BLM’s public scoping process. Additionally, Plaintiffs
15 submitted comments to the San Diego County Planning Commission on a proposed use
16 permit, a general plan amendment, and a zoning reclassification for the Project.

17 28. In this lawsuit, plaintiffs challenge BLM’s Project approvals and associated
18 environmental review under NEPA, the MBTA, the Eagle Act, and the APA.

19 **FIRST CLAIM FOR RELIEF**

20 (Violation of the National Environmental Policy Act)

21 (Against All Defendants)

22 29. The paragraphs set forth above are realleged and incorporated herein by
23 reference.

24 30. By approving the Tule Wind Project based on an inadequate EIS, BLM
25 violated NEPA, 42 U.S.C. section 4321 *et seq.*, and its implementing regulations, 40
26 C.F.R. section 1500 *et seq.* And by approving the Project without complying with NEPA,
27

28 _____
State Lands Commission.

1 BLM failed to proceed in accordance with law in violation of the APA, 5 U.S.C. sections
2 706(2)(A) and (D).

3 **The FEIR/FEIS Fails to Analyze and Improperly Dismisses**

4 **Feasible Project Alternatives.**

5 31. The alternatives analysis “is the heart of the environmental impact
6 statement.” 40 C.F.R. §1502.14. NEPA requires that an EIS “[r]igorously explore and
7 objectively evaluate all reasonable alternatives” so that “reviewers may evaluate their
8 comparative merits.” 40 C.F.R. §1502.14; 42 U.S.C. §4332; *City of Carmel-by-the-Sea v.*
9 *United States Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997); *Alaska Wilderness*
10 *Recreation & Tourism Association v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).
11 Analyzed alternatives should be wide-ranging and include options that may require
12 additional approvals or participation by others. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th
13 Cir. 1974); *see also Alaska Wilderness*, 67 F.3d at 729; 40 C.F.R. §1502.14(c). “The
14 existence of a viable but unexamined alternative renders an environmental impact
15 statement inadequate.” *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038
16 (9th Cir. 2008).

17 32. Here, BLM unacceptably eliminated from detailed review feasible – and less
18 environmentally damaging – alternatives that would meet the general Project objective of
19 increasing renewable energy development pursuant to state and federal renewable energy
20 policies. FEIR/FEIS A-8 to 9. Among others, BLM perfunctorily dismissed the
21 distributed generation alternative.

22 33. The FEIR/FEIS describes the distributed generation alternative as follows:
23 “Under this alternative, the ECO Substation, Tule Wind and ESJ Gen-Tie projects would
24 not be built. Instead, distributed generation including but not limited to residential and
25 commercial rooftop solar panels, biofuels, hydrogen fuel cells, and other renewable
26 distributed energy sources would be installed in the place of the Proposed PROJECT.”
27 FEIR/FEIS C.5.4.1.

28 34. The FEIR/FEIS acknowledges that “this alternative, including rooftop solar,

1 would result in a significant net reduction in project impacts as compared with the
2 Proposed PROJECT and would contribute directly to meeting state and federal renewable
3 energy resource goals.” *Id.* Nevertheless, the FEIR/FEIS dismisses the distributed
4 generation alternative on the grounds that it would (1) not meet renewable energy goals
5 within the 2010-2020 time horizon; (2) only partially solve reliability issues to Boulevard
6 and Jacumba communities; and (3) would be infeasible from a technical and commercial
7 standpoint within the 2010-2020 time horizon. FEIR/FEIS C-56-58. The FEIR/FEIS
8 misstates the record. Distributed generation is feasible, cost-effective and would meet
9 state and federal renewable energy goals.

10 35. Distributed generation will provide ample renewable energy. If current rates
11 of installation continue in SDG&E’s service area, between 800 and 1,000 megawatts of
12 distributed photovoltaic (“PV”) solar generation will be installed by 2020. And there is
13 significantly more distributed generation potential with non-photovoltaic solar sources,
14 such as combined heat and power plants. These plants have the potential to provide
15 almost 400 megawatts of cost-effective energy generation. Combined, these and other
16 distributed generation sources could easily meet renewable energy goals within the
17 2010-2020 time horizon. This would be even more readily achievable if a portion of the
18 considerable funds, expertise and efforts going into developing remote industrial-scale
19 renewable energy projects like the Tule Wind Project were redirected to distributed
20 generation projects and research.

21 36. Distributed generation, such as PV solar and combined heat and power, is
22 also commercially viable now and becoming increasingly cost-effective. Indeed,
23 distributed PV systems are already cheaper than some remote industrial-scale renewable
24 energy projects, and they are predicted to soon become cheaper than most land-based
25 wind energy systems on both a per-kW-installed and levelized-cost-of-electricity basis.
26 They also *already* create nearly *three times* more permanent jobs than wind energy
27 projects for every peak MW added. In likely recognition of this trend, many utility-scale
28 renewable energy project developers themselves agree that distributed generation is the

1 future of renewable energy power.

2 37. Furthermore, distributed generation would increase the power supply
3 reliability in the Boulevard and Jacumba areas, while also reducing the vulnerability of
4 SDG&E's entire electrical grid to fires and other natural disasters.

5 38. BLM's failure to fully analyze a distributed generation alternative violated
6 NEPA.

7 **The FEIR/FEIS Fails to Take a "Hard Look" at Significant Environmental Impacts.**

8 39. Under NEPA, an EIS must take a "hard look" at the environmental impacts
9 of proposed major federal actions and provide a "full and fair discussion" of those
10 impacts, one that is "reasonably thorough" and "foster[s] both informed decision-making
11 and informed public participation." *NPCA v. BLM*, 606 F.3d at 1072 (internal quotations
12 and citations omitted); *NPCA v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001); *State of*
13 *California v. Block*, 690 F.2d 753, 761; 40 C.F.R. §1502.1.

14 40. Here, the FEIR/FEIS' discussion of many environmental impacts is absent or
15 inadequate, as explained below.

16 ***Noise impacts – Inadequate Modeling***

17 41. "[A]lmost every time an EIS is ruled inadequate by a court it is because more
18 data or research is needed." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir.
19 1984). That same deficiency plagues the FEIR/FEIS' noise impact analysis here.

20 42. "[T]he very purpose of NEPA's requirement that an EIS be prepared for all
21 actions that may significantly affect the environment is to obviate the need for
22 . . . speculation by insuring that the available data is gathered and analyzed prior to the
23 implementation of the proposed action." *Foundation for North American Wild Sheep v.*
24 *U.S. Department of Agriculture*, 681 F.2d 1172, 1179 (9th Cir. 1982). Yet here, BLM
25 *entirely failed* to model the noise generation and impacts from wind turbines with an
26 electrical generating capacity greater than 2 MW. Both the ROD and the FEIR/FEIS state
27 that the Project would use wind turbines "in the 1.5 to 3.0 MW generating capacity
28 range." ROD 1; FEIR/FEIS B-2, 4, 49. Despite the great disparity in resulting noise

1 impacts from using 3.0-MW turbines versus 2.0-MW turbines, in “the assessment of wind
2 turbine-generated sound, [only] 2.0 MW turbines were modeled” in the FEIR/FEIS.
3 FEIR/FEIS 2.7-9. This violates NEPA. By not calculating noise emission estimates for a
4 3.0-MW turbine Project, BLM failed to take the requisite “hard look” at the Project’s
5 noise impacts, which impermissibly left decisionmakers and the public to speculate about
6 them. *Foundation for North American Wild Sheep*, 681 F.2d at 1179; *Oregon Natural*
7 *Desert Association v. Singleton*, 47 F.Supp.2d 1182, 1194 (D.Or. 1998) (“NEPA requires
8 that the agency develop the data first, and then make a decision, not make a decision and
9 then develop the data” (internal quotations and citation omitted)); 40 C.F.R. §1502.22
10 (when “there is incomplete or unavailable information” that is “essential to a reasoned
11 choice among alternatives and the overall costs of obtaining it are not exorbitant, the
12 agency shall include the information in the [EIS]”).

13 ***Noise Impacts – Infrasound and Low-Frequency Noise***

14 43. Despite the fact that Project operation is likely to produce substantial
15 infrasound and low-frequency noise (“ILFN”), the FEIR/FEIS fails to calculate, disclose,
16 or otherwise adequately assess the Project’s ILFN impacts. By failing to do the required
17 ILFN impact study, and by offering excuses for its failure that are “contrary to the
18 evidence,” BLM violated NEPA and the APA. *Oregon Natural Resources Council Fund*
19 *v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007) (internal quotations and citation omitted).

20 44. During the public review process for the Project and its EIS, plaintiffs and
21 others submitted extensive evidence demonstrating that noise levels do not have to be
22 audible to cause substantial health impacts. For example, in one article submitted by
23 plaintiffs with their March 4, 2011, DEIR/DEIS comments, a group of researchers
24 reviewed the literature on impacts of wind turbine-generated ILFN and concluded that
25 “what you *can’t* hear can *also* hurt you.” FEIR/FEIS Volume 4, Comment Letter D33-31,
26 p. 24 (emphasis added). More specifically, they affirmed that “there is increasingly clear
27 evidence that” both audible noise *and* ILFN produced by wind turbines “is sufficiently
28 intense to cause extreme annoyance and inability to sleep, or disturbed sleep, in

1 individuals living near them,” as well as other health impacts like visceral vibratory
2 vestibular disturbance, vertigo, headaches, dizziness, unsteadiness, tinnitus, ear pressure
3 or pain, fatigue, irritability, memory and concentration effects, loss of motion, cardiac
4 arrhythmias, stress and hypertension, among others. *Id.* at 24 (quote), 20-31.

5 45. Plaintiffs and others also produced evidence showing that ILFN levels are
6 substantially underestimated – and often omitted entirely – by the A-weighted scale used
7 in the FEIR/FEIS to measure Project-generated noise. As the FEIR/FEIS itself states, the
8 “A-weighting scale attenuates low-frequency noises” (FEIR/FEIS 2.7-9) and is instead
9 “representative of human [auditory] perception of sound.” *Id.* at 2.7-10. Plaintiffs and
10 others explained that G-weighting (decibel levels expressed as dBG) rather than A-
11 weighting (decibel levels expressed as dBA) is necessary to accurately quantify ILFN
12 levels, and urged BLM to make G-weighted noise level estimates. Indeed, commenters
13 even specified a physiologic impact threshold based on peer-reviewed research of 60
14 dBG. As Dr. Alec Salt explained:

15 A review found the G-weighted noise levels generated by wind turbines with
16 upwind rotors [(like the wind turbines to be used in the Tule Project)] to be
17 approximately 70 dBG. This is substantially below the threshold for hearing
18 infrasound which is 95 [dBG] but is above the calculated level for [cochlear
19 outer hair cell (“OHC”)] stimulation of 60 [dBG]. This suggests that most
20 wind turbines will be producing an unheard stimulation of [the ear].

21 FEIR/FEIS Volume 4, Comment Letter D31, p. 18.

22 46. Contrary to the clear evidence in the record of the health impacts caused by
23 wind turbine-generated ILFN and the need to measure ILFN using a G-weighted scale,
24 BLM failed to make *any* G-weighted estimates of the ILFN levels to be generated by the
25 Project. FEIR/FEIS 2.7-10 (“the weighting scale used in the analysis [was] the A-
26 weighting scale,” though the “C-weighting scale [was also used] to simulate human
27 perception at higher sound levels, in excess of 70 dB”). By not calculating *any* ILFN
28 emissions estimates, it was simply impossible for BLM to take the requisite “hard look”
at the Project’s noise impacts, which impermissibly left decisionmakers and the public to
speculate about them.

47. Nonetheless, despite making *no Project-specific* ILFN estimates, BLM

1 speculated in its FEIR/FEIS response to comments that the ILFN “levels [to be produced
2 by the Project] are not harmful to the human body and in fact are produced by heartbeats
3 and other natural functions,” and that “no adverse health effects from low-frequency
4 noise are [therefore] anticipated.” FEIR/FEIS 2.7-22. Yet BLM’s decision to disregard
5 ILFN impacts is unsupported by – and indeed *contradicts* – the applicable science and the
6 evidence in the record, rendering its EIS certification and Project approvals based thereon
7 arbitrary and capricious. By failing to properly analyze or mitigate the Project’s ILFN
8 emission impacts, and by offering excuses for its failure that are contrary to the evidence,
9 BLM violated NEPA and the APA.

10 ***Public Health Impacts – Dirty Electricity***

11 48. The FEIR/FEIS fails to take the requisite “hard look” at the impacts of the
12 Tule Wind Project’s emission and propagation of electric and magnetic fields (“EMF”),
13 especially in the form of electricity containing frequencies harmful to human health.

14 49. As numerous recent studies cited by plaintiffs and others during the public
15 review process for the Project and its EIS show, the health impacts of exposure to EMF
16 generated by electrical equipment can be severe. Of particular concern are the
17 intermediate- and high-frequency transients that commonly pollute what should be
18 narrow-band or exclusively 60-hertz (“Hz”) electric and magnetic fields. This type of
19 EMF pollution is also called “dirty electricity.” The studies cited by plaintiffs and others
20 have linked dirty electricity to an increase in ailments such as cancer, diabetes,
21 fibromyalgia, chronic fatigue syndrome and attention deficit disorder, among others.

22 50. Here, the risk of public exposure to dirty electricity produced and propagated
23 by the Tule Project is high. As the FEIR/FEIS acknowledges, “[w]ind turbines create
24 electromagnetic fields from the power facilities that are part of the turbine makeup.”
25 FEIR/FEIS 2.8-9. And wind turbine-generated EMF is frequently accompanied by high-
26 frequency transients, *i.e.* dirty electricity. In his declaration accompanying plaintiffs’
27 March 4, 2011, comments on the DEIR/DEIS, EMF expert David Colling explains:

28 Wind turbines are one of the . . . sources of dirty electricity. To enable
variable speed operation of wind turbines, the alternating current they

1 generate is first converted to direct current and then converted back into
2 alternating current with the correct voltage and frequency. These
3 conversions create higher frequency electrical currents that “ride” the 60-Hz
4 sine wave and radiate from the collector lines that transmit the wind-
generated electricity to substations. If not adequately filtered, the dirty
electricity can be propagated through the substations and onto transmission
and distribution lines.

5 FEIR/FEIS Volume 4, Comment Letter D33-32, pp. 1-2. The dirty electricity can also be
6 transmitted directly from the wind turbines to distribution lines through the atmosphere,
7 since the height of the wind turbine nacelles usually allows longer-distance aerial
8 radiation and the distribution lines serve as convenient antennas. From the transmission
9 lines, the dirty electricity is either shorted to the ground, whence it can be conducted into
10 nearby homes that lie in the ground currents’ path, or it travels along the primary
11 distribution line directly into residences and other buildings. *See id.*

12 51. BLM belatedly admitted in the FEIR/FEIS response to comments that
13 “[s]tray voltage could occur [from the Tule Wind Project],” and that “[i]nduced current
14 or stray voltage has the potential for adverse health effects if not properly grounded.”
15 FEIR/FEIS 2.8-9 (quoting a 2011 “data request response” from Iberdrola Renewables,
16 Inc.). Yet the FEIR/FEIS implies that the Project’s production of dirty electricity and its
17 attendant health impacts need not be analyzed in depth because Iberdrola Renewables
18 will “confirm that [stray voltage will be] properly grounded.” *Id.* As plaintiffs
19 explained in their DEIR/DEIS comments, however, grounding alone does not eliminate
20 dirty electricity. To the contrary, grounding – which, as discussed above, produces
21 ground current – is a medium by which dirty electricity may be *introduced* into homes,
22 schools and other vulnerable uses. FEIR/FEIS Volume 4, Comment Letter D33-32, pp. 2-
23 5.

24 52. Without acknowledgment and analysis of grounding as a means of *exposing*
25 the public to – rather than protecting them from – dirty electricity, and without *any*
26 explanation of the grounding measures to be employed and how they would “confirm that
27 there are no stray voltage issues through the life of the project” (FEIR/FEIS 2.8-9
28 (internal quotations and citation omitted)), the FEIR/FEIS violates NEPA. *South Fork*

1 *Band Council v. U.S. Department of Interior* (“*South Fork*”), 588 F.3d 718, 727 (9th Cir.
2 2009) (EISs must “discuss mitigation measures[] with ‘sufficient detail to ensure that
3 environmental consequences have been fairly evaluated,’” and they may not defer
4 evaluation of “the effectiveness of the mitigation measures” (quoting *Robertson v.*
5 *Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)).

6 ***Biological Impacts – Avian Species***

7 53. The FEIR/FEIS fails to take the requisite “hard look” at the Tule Wind
8 Project’s noise impacts on birds.

9 54. As FEIR/FEIS section D.8 discusses, the Project’s construction and
10 operational noise levels would be very high. The Project’s “8-hour average construction
11 noise levels have been calculated to range up to 94 dBA at the property lines of nearby
12 properties.” FEIR/FEIS D.8-23. And during operation, the FEIR/FEIS estimates that the
13 turbines would emit noise levels as high as 111 dBA, with noise levels exceeding 50 dBA
14 at a distance of nearly 1,000 feet from the nearest turbine. *Id.* at D.8-34. As plaintiffs
15 discussed in their March 4, 2011, comments on the DEIR/DEIS, these noise levels are
16 *substantially greater* than the impact threshold for numerous sensitive bird species that
17 reside in or otherwise utilize the Project area.

18 55. Particularly sensitive species in – or potentially present in – the Project area
19 include the horned lark, loggerhead shrike, lease Bell’s vireo and southwestern willow
20 flycatcher. FEIR/FEIS Appendix 1, pp. 37-39, 42, 43. According to expert testimony
21 from Dr. Travis Longcore, discussed in detail in and appended as an exhibit to plaintiffs’
22 DEIR/DEIS comments, the threshold for significant negative impacts on bird species
23 similar to the birds just listed is much lower than the noise levels expected to be produced
24 in the Project vicinity. Dr. Longcore concludes that a “reasonable threshold based on
25 similar species for least Bell’s vireo and southwestern willow flycatcher would be *40*
26 *dB(A) or below.*” FEIR/FEIS Volume 4, Comment Letter D33-33, p. 12 (emphasis
27 added).

28 56. Despite the strong evidence in the record that the Project-generated noise

1 would harm sensitive birds species in the area, the FEIR/FEIS *entirely fails to discuss* the
2 impact. Instead, the FEIR/FEIS merely notes that “indirect loss of” species such as the
3 southwestern willow flycatcher “from noise and increased human presence” would “be
4 adverse under NEPA,” but would be ameliorated by various unrelated mitigation
5 measures.² Yet these vague statements provide no information *whatsoever* as to how and
6 in what ways the Project noise would impact sensitive and special-status birds, how those
7 impacts could be mitigated or avoided, or whether the proposed mitigation measures
8 would in fact reduce the impacts. The FEIR/FEIS’ *omission* of an analysis of these
9 impacts is the complete antithesis of the “full and fair *discussion*” that NEPA requires (40
10 C.F.R. section 1502.1 (emphasis added)), and it constitutes a failure to “consider an
11 important aspect of” the biological and noise impact “problem[s].” *Oregon Natural*
12 *Resources Council Fund*, 505 F.3d at 889.

13 ***Global Warming***

14 57. The FEIR/FEIS paints a rosy picture of the Project’s global warming
15 impacts, but it is based on wholly inadequate data and analysis. The FEIR/FEIS estimates
16 that the Project would produce less than 650 metric tons of CO₂-equivalent emissions
17 annually from construction, operation and decommissioning. FEIR/FEIS D.18-17 to 18.
18 The FEIR/FEIS also asserts that because “the project would create a renewable source of
19 energy [it would] potentially decreas[e] overall emissions attributable to electrical
20 generation in California.” *Id.* at D.18-18. Yet these estimates and assertions are deeply
21 flawed for two reasons.

22 58. First, the FEIR/FEIS fails to provide an estimate of how many megawatt-

24 ² The mitigation measure most closely addressed to the Project’s noise impacts on
25 birds, BIO-7j, pertains specifically to *nesting* birds, with the goal of “avoid[ing]
26 the potential for project-related nest abandonment and failure of fledging, and
27 minimiz[ing] any disturbance to nesting behavior.” FEIR D.2-150. Neither
28 measure BIO-7j nor any other mitigation measure listed in the FEIR/FEIS
addresses the impact of Project noise on *other* avian activities, such as masking
the birds’ songs and thereby reducing reproductive and foraging success.

1 hours per year the Project would produce. Without this information it is impossible to
2 determine how many tons per year of CO₂ or other greenhouse gases (“GHGs”) the
3 Project would displace and thus how much, if at all, it would “decreas[e] overall
4 emissions attributable to electrical generation in California.” FEIR/FEIS D.18-18. By
5 failing to “provide the data on which it base[d] its environmental analysis” of global
6 warming, BLM violated NEPA. *Northern Plains Resource Council, Inc. v. Surface*
7 *Transportation Board*, 668 F.3d 1067, 1083 (9th Cir. 2011).

8 59. Second, while the FEIR/FEIS estimates some of the Project’s greenhouse gas
9 emissions, it inexplicably fails to calculate the Project’s entire *life cycle* GHG emissions.
10 Instead, the DEIS focuses solely on the GHG emissions from *on-site* Project construction
11 and operation. FEIR/FEIS D.18-17 to 18. Yet it is well-established through myriad
12 published life cycle analyses that wind energy projects have many more sources of GHG
13 emissions than just on-site construction, including equipment manufacture and
14 transportation. To fully analyze the Project’s global warming impact in compliance with
15 NEPA, BLM was required yet failed to conduct a life cycle assessment of the Project’s
16 GHG emissions.

17 **The FEIR/FEIS Fails to Specify a Public Purpose and**
18 **Demonstrate an Actual Need for the Project.**

19 60. NEPA requires that EISs “specify the underlying purpose and need to which
20 the agency is responding in proposing the alternatives including the proposed action.” 40
21 C.F.R. §1502.13. Agencies have “considerable discretion” in defining their objectives,
22 but may not do so in “unreasonably narrow terms,” so that “only one alternative from
23 among the environmentally benign ones in the agency’s power would accomplish the
24 goals of the agency’s action, and the EIS would become a foreordained formality.”
25 *National Parks & Conservation Assn. v. U.S. Bureau of Land Mgmt* (“*NPCA v. BLM*”),
26 606 F.3d 1058, 1070 (9th Cir. 2010) (internal quotations and citation omitted). Thus,
27 agencies may not simply “adopt[] private interests to draft a narrow purpose and need
28 statement.” *Id.* at 1071. Indeed, BLM’s own “NEPA handbook explains that the

1 ‘purpose and need statement for an externally generated action must describe the BLM
2 purpose and need, *not an applicant’s or external proponent’s purpose and need.*’” *Id.* at
3 1071, n. 9 (emphasis in original) (quoting BLM National Environmental Policy Act
4 Handbook H-1790-1 (January 2008), p.35).

5 61. Furthermore, BLM must not only specify a public need for the Project, it
6 must show that the asserted need *actually exists*. See *Rankin v. Coleman*, 394 F.Supp.
7 647, 656-57 (E.D.N.C. 1975) (EIS held inadequate for failing to cite and discuss factual
8 studies to “show the need for the ‘ultimate’ five-lane [highway] facility”); *see also* 40
9 C.F.R. §§1500.1(b), 1502.22, 1502.24.

10 62. Here, the FEIR/FEIS’s statement of BLM’s purpose and need reads: “the
11 purpose and need for the proposed action is to respond to a [Federal Land Policy and
12 Management Act (“FLPMA”), 43 U.S.C. section 1701 *et seq.*,] right-of-way application
13 submitted by Tule Wind . . . in compliance with FLPMA, BLM right-of-way regulations,
14 and other applicable Federal laws and Policies.” FEIR/FEIS A-6. The FEIR/FEIS then
15 lists three such applicable authorities:

16 Executive Order 13212, dated May 18, 2001, which mandates that agencies
17 act expediently and in a manner consistent with applicable laws to increase
18 the production and transmission of energy in a safe and environmentally
19 sound manner.

20 Section 211 of the Energy Policy Act of 2005 (EPAAct 05 or EPAAct), which
21 established a goal for the DOI (BLM’s parent agency) to approve at least
22 10,000 megawatts of non-hydropower renewable energy power on public
23 lands by 2015.

24 Secretarial Order 3285A1, Renewable Energy Development by the DOI,
25 dated February 22, 2010. This Secretarial Order establishes the development
26 of renewable energy as a priority for the DOI and creates a Departmental
27 Task Force on Energy and Climate Change. It also announced a policy goal
28 of identifying and prioritizing specific locations (study areas) best suited for
large-scale production of solar energy.

Id. This bare recitation of broad renewable energy goals does not satisfy NEPA’s demand
for a statement and showing of public purpose and need for at least two reasons.

63. First, it is insufficient for NEPA purposes to merely reiterate BLM’s
statutory duty to review “right-of-way application[s] submitted” to it. FEIR/FEIS A-6.
Rather, BLM must explain the “*underlying* purpose and need” for the Project, the lease of

1 publicly-managed desert wildlands for an industrial-scale wind energy generation project.
2 40 C.F.R. §1502.13 (emphasis added).

3 64. Second, while the FEIR/FEIS lists three federal directives intended to
4 increase renewable energy production, nowhere does it explain whether and why the Tule
5 Wind Project is needed to satisfy those policy goals. Merely stating that those federal
6 objectives exist is insufficient to satisfy NEPA’s informational purposes, which require
7 the “inclu[sion] [in the EIS of] information” that is “essential to a reasoned choice among
8 alternatives.” 40 C.F.R. §1502.22. NEPA requires that the EIS analyze where the
9 electricity to be generated by the Project would be used and whether there is an existing
10 or projected supply shortage, a dearth of renewable energy generation, or some other
11 condition or mandate that necessitates this Project’s – as distinct from other alternative
12 projects’ – electrical generation. *Id.*; *Rankin*, 394 F.Supp. at 656-67. Only then can the
13 need for the Project, and the feasibility and reasonableness of alternatives thereto, be
14 adequately evaluated. The FEIR/FEIS fails to demonstrate such a need for this particular
15 Project and thereby precludes a fully informed analysis of Project alternatives.

16 **The FEIR/FEIS Improperly Defers Specification**
17 **and Analysis of Mitigation Measures.**

18 65. The FEIR/FEIS defers specification of numerous mitigation measures until
19 after the completion of environmental review. The deferred measures included, among
20 others, the noxious weeds and invasive species control plan, the habitat restoration plan,
21 the stormwater pollution prevention plan, the dust control plan, avian protection plans,
22 the cultural resources treatment program, the traffic control plan, the construction fire
23 prevention/protection plan, and site-specific noise mitigation plans. BLM’s deferral of all
24 of these mitigation plans violates NEPA.

25 **SECOND CLAIM FOR RELIEF**

26 (Violation of the Migratory Bird Treaty Act)

27 (Against All Defendants)

28 66. Plaintiffs incorporate by reference all preceding paragraphs.

1 67. The Migratory Bird Treaty Act (“MBTA”), 16 U.S.C. section 701 *et seq.*,
2 directs that unless otherwise permitted, “it shall be unlawful at any time, by any means or
3 in any manner, to . . . take [or] kill . . . any migratory bird . . . nest, or egg of any such
4 bird . . . included in the terms of the conventions between the United States and Great
5 Britain . . .the United Mexican States . . . the government of Japan . . . and the Union of
6 Soviet Socialist Republics for the conservation of migratory birds and their environments
7” 16 U.S.C. section 703.

8 68. The MBTA applies with equal force to federal agencies as it does to private
9 individuals. *Humane Society of the U.S. v. Glickman*, 217 F.3d 882, 884-88 (D.C.Cir.
10 2000); *American Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1032 (D.C.Cir. 2008).
11 And it may be enforced against the federal government by private citizens through the
12 APA. *Id.* “[A]nyone who is ‘adversely affected’ by an agency action alleged to have
13 violated the MBTA has standing to seek judicial review of that action.” *City of Sausalito*
14 *v. O’Neill*, 386 F.3d 1186, 1203-04 (9th Cir. 2004).

15 69. Federal agencies like BLM must ensure that their actions do not result in
16 violations of MBTA. *City of Sausalito*, 386 F.3d at 1225; *Mahler v. U.S. Forest Service*,
17 927 F. Supp. 1559, 1573 (S.D.Ind. 1996); *Humane Society*, 217 F.3d at 885 (D.C. Cir.
18 2000); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-39 (1992); Exec. Order No.
19 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg.
20 3853 (Jan. 17, 2001). Here, however, BLM has failed to comply with the MBTA.

21 70. Numerous migratory bird species inhabit or use the Project site, including
22 among others, the golden eagle, the California condor, the Cooper’s hawk, the burrowing
23 owl, the northern harrier, the turkey vulture, the California horned lark, the loggerhead
24 shrike, the gray vireo, the least Bell’s vireo, the southwestern willow flycatcher, the olive-
25 sided flycatcher, the yellow warbler, the long-eared owl, the Bell’s sage sparrow, the
26 southern California rufous-crowned sparrow, the Vaux’s swift and the tricolored
27 blackbird. FEIR/FEIS Appendix 1, pp. 32-43.

28 71. As the FEIR/FEIS recognizes, these “special-status bird species have the

1 potential to collide with towers and transmission lines and have the potential to be
2 electrocuted by the transmission towers associated with the Tule Wind Project, resulting
3 in injury or mortality.” FEIR/FEIS D.2-169; D.2-116 (“Presence of transmission lines
4 and wind turbines may result in electrocution of, and/or collisions by, listed or sensitive
5 bird or bat species”); D.2-176 (“the operation of wind turbines proposed by the project
6 would result in an adverse impact to golden eagle[s]”); D.2-177 (same impact to Vaux’s
7 swift). A rough calculation using BLM’s bird fatality estimates demonstrates that the
8 Project’s wind turbines would kill at least 37 raptors per year. FEIR/FEIS D.2-172
9 (estimated mortality rate of “0.2 birds/MW/year” multiplied by the Project’s 186 MW
10 generating capacity).

11 72. Furthermore, in addition to the direct killing of these birds, the FEIR/FEIS
12 admits that the Project’s wind turbines would create “a behavioral avoidance area, thereby
13 establishing a barrier in the aerial habitat used by birds and bats.” FEIR/FEIS D.2-167.
14 This displacement of birds from their nesting and foraging habitat – thereby directly
15 harming or killing the displaced birds – also constitutes a take under the MBTA. 16
16 U.S.C. §703.

17 73. Despite the fact that the Project is likely to kill migratory birds during both
18 the construction and operation phases, BLM has not applied for or secured any permits
19 under the MBTA. FEIR/FEIS D.2-116 (“Construction activities would result in a
20 potential loss of nesting birds (violation of the Migratory Bird Treaty Act)”); D.2-164
21 (same, listing mitigation measures); D.2-186 (violation of MBTA for maintenance
22 activities). And while BLM has listed compliance with MBTA as a potentially required
23 permit, nowhere in its FEIR/FEIS is there even a requirement that Tule, the Project
24 applicant, obtain any kind of MBTA permit. FEIR/FEIS A.16.

25 74. By failing to first obtain, or require that the Project applicant or operators
26 obtain, an MBTA permit before approving the Project and allowing the unpermitted
27 taking of migratory birds, BLM violated the MBTA (16 U.S.C. section 703) and the
28 APA’s prohibition on unlawful agency action (5 U.S.C. section 706(2)(A) and (D)).

1 **THIRD CLAIM FOR RELIEF**

2 (Violation of the Bald Eagle and Golden Eagle Protection Act)

3 (Against All Defendants)

4 75. Plaintiffs incorporate by reference all preceding paragraphs.

5 76. The Bald and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. section
6 668, contains criminal and civil prohibitions against the taking of Golden Eagles.
7 Subdivision (b) makes it a civil offense to “take . . . in any manner. . . any golden eagle.”
8 16 U.S.C. §668(b). Under the Eagle Act, “‘take’ includes also pursue, shoot, shoot at,
9 poison, wound, kill, capture, trap, collect, molest or disturb.” 16 U.S.C. §668c; 50 C.F.R.
10 §22.3 (“Take includes also pursue, shoot, shoot at, poison, wound, kill, capture, collect,
11 or molest or disturb”).

12 77. As discussed above, the FEIR/FEIS recognizes that Project operation would
13 almost assuredly kill birds, including golden eagles. It is thus a near certainty that the
14 Project will “take” golden eagles and thereby violate the Eagle Act. And while Tule has
15 developed an Avian and Bat Protection Plan (“ABPP”) in consultation with BLM and the
16 U.S. Fish and Wildlife Service (“FWS”) (ROD 20), BLM admits that neither the ABPP
17 nor FWS’ concurrence “will . . . in and of [themselves] authorize take of golden eagles or
18 determine that no take will occur.” FEIR/FEIS D.2-182.

19 78. By permitting the Project and its almost certain killing and/or other “taking”
20 of golden eagles, BLM violated the Eagle Act and failed to proceed in accordance with
21 law as required by APA sections 706(2)(A) and (D).

22 **PRAYER FOR RELIEF**

23 79. As relief for the above violations of law, plaintiffs respectfully request the
24 following:

- 25 1. Adjudge and declare that the BLM’s Project approvals – including its
26 December 19, 2011, ROD (as amended), its April 10, 2012, ROW
27 grant and its September 17, 2012, NTP – violate NEPA, the MBTA,
28 the Eagle Act and the APA;

- 1 2. Order BLM to withdraw its Project approvals and its October 2011
2 FEIR/FEIS until such time as it has complied with NEPA, the MBTA,
3 the Eagle Act, and their implementing regulations;
4 3. Preliminarily and permanently enjoin BLM from initiating or
5 permitting any activities in furtherance of the Project that could result
6 in any change or alteration of the physical environment unless and
7 until the defendants comply with the requirements of NEPA, the
8 MBTA, the Eagle Act, and their implementing regulations;
9 4. Award plaintiffs their reasonable attorneys' fees and costs and
10 expenses incurred in connection with the litigation of this action
11 pursuant to the Equal Access to Justice Act, 28 U.S.C. section 2412, or
12 as otherwise provided by law; and
13 5. Any other relief that this Court deems just and proper.

14
15 Dated: March 12, 2013

Respectfully submitted,

16
17 /s/ Stephan C. Volker
18 STEPHAN C. VOLKER
19 Attorney for Plaintiffs THE PROTECT OUR
20 COMMUNITIES FOUNDATION,
21 BACKCOUNTRY AGAINST DUMPS, and
22 DONNA TISDALE
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