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10.654.02

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BACKCOUNTRY AGAINST DUMPS, DONNA TISDALE, and JOE E. TISDALE, Plaintiffs, vs. UNITED STATES BUREAU OF INDIAN AFFAIRS, DARRYL LACOUNTE, in his official capacity as Director of the United States Bureau of Indian Affairs, AMY DUTSCHKE, in her official capacity as Regional Director of the Pacific Region of the United States Bureau of Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, in his official capacity as Secretary of the Interior, and TARA SWEENEY, in her official capacity as Assistant Secretary of the Interior for Indian Affairs, Defendants, and TERRA-GEN DEVELOPMENT COMPANY, LLC, Intervenor-Defendant.	Civ. No. 3:20-cv-02343-JLS-DEB **FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** (Filed "as a matter of course" per FRCivP 15(a)(1)(B) within 21 days after Federal Defendants' Motion for Partial Dismissal (ECF # 40) filed January 4, 2021; see *Hylton v. Anytime Towing*, No. 11 CV1039 JLS (WMc), Order filed Mar. 26, 2012, 2012 WL 1019829 *2)

INTRODUCTION

1. On May 12, 2020, Defendant UNITED STATES BUREAU OF INDIAN AFFAIRS ("BIA") published notice of its April 7, 2020 Record of Decision ("ROD")

authorizing the issuance of a 25-year lease of land (with a possible 13-year extension) ("Land Lease") between the Campo Band of Diegueño Mission Indians ("Tribe") and TERRA-GEN DEVELOPMENT COMPANY LLC ("Terra-Gen"), allowing Terra-Gen to develop, construct, operate, and maintain renewable energy generation facilities on land within the Tribe's Reservation boundaries (the "Project"). Because Terra-Gen and the BIA have refused Plaintiffs' request for a copy of this Land Lease, Plaintiffs lack knowledge of its specific contents, depriving them and the public including Tribal members of information vitally needed to assure compliance with applicable laws and to fully assess the impacts of the Project. However, based on Defendants' disclosures in their Final Environmental Impact Statement ("FEIS") on this Project, it is clear that it will cause significant environmental harms to Tribal members (some of whom are supporters of Plaintiff BACKCOUNTRY AGAINST DUMPS ("Backcountry")) and the surrounding community (which includes many members of Backcountry), and that Defendants failed to address those harms fully and fairly as required by applicable environmental laws, harming Plaintiffs and the public.

2. The Project includes both the Campo Wind Facilities on the Reservation, and the Boulder Brush Facilities on adjacent private lands. The Campo Wind Facilities would be located within a 2,200 acre corridor on the Tribe's Reservation, and consist of sixty 586-foot to 604-foot tall turbines, three 374-foot tall meteorological towers, 15 miles of new access roads, an electrical connection and communication system, a collector substation, an operation and maintenance facility, a gen-tie line, and other components needed for construction and operation. The Boulder Brush Facilities on 320 acres of private land adjacent to the Reservation would include a substation, gen-tie line, switchyard, and access roads. The Boulder Brush Facilities are under the land use and permitting jurisdiction of the County of San Diego, and would require a Major Use Permit from the County.

3. Plaintiffs BACKCOUNTRY AGAINST DUMPS, DONNA TISDALE, and JOE E. TISDALE (collectively, "Plaintiffs") challenge the approval of the Project by

defendants UNITED STATES BUREAU OF INDIAN AFFAIRS, DARRYL LACOUNTE, in his official capacity as Director of the United States Bureau of Indian Affairs, AMY DUTSCHKE, in her official capacity as Regional Director of the Pacific Region of the United States Bureau of Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, in his official capacity as Secretary of the Interior, and TARA SWEENEY, in her official capacity as Assistant Secretary of the Interior for Indian Affairs (collectively, "Defendants") for violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. section 4321 *et seq*., the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. section 703 *et seq*., the Bald Eagle and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668, and the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701-706, and regulations promulgated thereunder.

4. The Project is a dangerous and completely unnecessary industrialization of low-density rural neighborhoods and high quality wildlife habitat in an area with an extremely high wildfire risk and frequent low-flying military, commercial and private aircraft. The Project poses grave threats to birds and other wildlife, to aviation safety, to human health and safety in adjacent and nearby residential neighborhoods both within and outside the Reservation from high-speed turbine rotor and blade breakage and ejection, from excessive noise – especially infrasound and low frequency noise ("ILFN") – and from fires sparked by overheating and malfunctioning turbine rotors, causing potentially catastrophic wildfires. Far less harmful and more efficient energy development solutions exist, such as distributed (*i.e.* small scale and localized) generation projects (such as roof-top solar arrays) near energy demand centers in already-disturbed areas, or much smaller, quieter and less visually intrusive, reduced-capacity turbines.

5. Wind power is widely perceived to be an ecologically safe and reliable renewable energy source, but in truth, it is anything but. Unlike roof-top solar power that eliminates environmental harm due to its small scale and proximity to the place where its electricity is used, wind power is unsafe, unreliable and environmentally destructive.

Much as hydroelectric dams were once thought to be environmentally benign, but are now known to block salmon migration, waste water through evaporation, harm downstream habitat by releasing warm rather than cold water of low rather than high dissolved oxygen content, fill with sediment, and pose downstream safety risks from leaks, collapse and overtopping due to poor foundation design and construction, and just as nuclear energy was initially promoted as safe and reliable but is now known to be neither, so too wind power has not withstood careful scrutiny. The Project's 230-foot long, 40-ton, 200-mph spinning blades kill birds and bats much like a giant vacuum in the sky that creates a huge, 460-foot-wide vortex. Its 50- to 75-ton nacelles (rotors) overheat and spew flaming debris, causing wildfires. Its unrelenting, pulsating whooshing noise emits infrasound and low-frequency sound waves that harm human health and disturb sleep for miles. Its ridge-top towers and power lines prevent aerial firefighting, and their unceasingly blinking red lights turn the night sky into a nightmarish spectacle. Its enormous blade sweep poses aviation hazards because tower warning lights are hundreds of feet below the blade tips, creating a 20-story-high and 40-story-wide blade sweep zone invisible to planes at night for each turbine tower. This extreme hazard has already caused airplane collisions and deaths at existing wind turbine energy projects. Each day when the sun rises and sets, its swirling blades cause blinding shadow flicker. When its blades break, they fly through the sky, pointed-end over jagged-end, posing extreme safety hazards to homes, cars and people alike. And, due to uncertain winds and frequent breakdowns, on average its wind capacity factor (the amount of energy actually produced over a year as a fraction of the turbines' rated maximum capacity) is only about 30 percent. Unlike roof-top solar, it lacks any battery storage capacity and thus requires augmentation from other, often fossil fuel, energy sources. And, unlike solar panels, which are increasingly American made, virtually all wind turbines–like the ones in this Project–are built overseas and provide no manufacturing jobs here at home.

6. Defendants' Project approvals violate NEPA in several significant respects. Their FEIS (1) unlawfully segmented the analysis of connected actions (40 C.F.R.

§1508.25(a)(1)); (2) failed to consider all cumulative projects (40 C.F.R. §1508.7); (3) failed to evaluate a reasonable range of alternatives (42 U.S.C. §4332; 40 C.F.R. §1502.14);(4) failed to take a "hard look" at, provide a "full and fair discussion" of, and provide sufficient evidentiary support for its conclusions regarding, the environmental impacts of the Project (40 C.F.R. §1502.1); and (5) impermissibly deferred specification and analysis of the myriad mitigation measures on which the FEIS relies until after the completion of environmental review.

7. Defendants violated the MBTA by approving the Project knowing that (1) the Project would foreseeably kill and otherwise take migratory birds and (2) Defendant United States Department of the Interior had unlawfully adopted and would continue to adhere to the position that it would not require Terra-Gen or the Tribe to obtain a takings permit under the MBTA for the Project as necessary to assure that the foreseeable takings of migratory birds are avoided to the extent possible.

8. Defendants violated the Eagle Act by approving the Project knowing that (1) the Project would foreseeably kill and otherwise take eagles and (2) Defendant United States Department of the Interior would not require Terra-Gen or the Tribe to obtain a takings permit under the Eagle Act for the Project as necessary to assure that the foreseeable takings of eagles are avoided to the extent possible.

9. Defendants violated the APA by approving the Project without complying with the foregoing environmental laws.

10. Accordingly, Plaintiffs seek orders from this Court: (1) granting preliminary injunctive relief restraining Defendants from taking any action that would result in any change to the physical environment in connection with the Project pending a full hearing on the merits; (2) declaring that Defendants violated NEPA in the respects alleged herein; (3) declaring that Defendants violated the MBTA by failing to secure or require a takings permit under that statute as necessary to minimize the foreseeable deaths of migratory birds; (4) declaring that Defendants violated the Eagle Act by failing to secure or require a takings permit under that statute as necessary to minimize the foreseeable deaths of

golden eagles; (5) declaring that Defendants violated the APA by failing to comply with NEPA, the MBTA and the Eagle Act; and (6) granting permanent declaratory and injunctive relief overturning Defendants' Project approvals pending Defendants' compliance with NEPA, the MBTA, the Eagle Act, and the APA.

JURISDICTION AND VENUE

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

12. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391(b)(2) because the Project whose approval is challenged in this action, and the property on which it is proposed to be constructed, are located in this judicial district.

13. There exists now between the parties an actual, justiciable controversy in which Plaintiffs are entitled to have a declaration of their rights, a declaration of Defendants' obligations under NEPA, the MBTA, the Eagle Act, and the APA, and further relief because of the facts and circumstances hereinafter set forth.

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

15. Plaintiffs have standing to assert their claims because they use or otherwise enjoy, or reside in close proximity to or adjacent to the lands on which the Project would be built, and would be harmed by the impacts of the Project's construction and operation on Plaintiffs' recreational, wildlife, cultural, scientific, spiritual, aesthetic, safety and

property interests. Plaintiffs have exhausted all applicable remedies by commenting on and objecting to the Project before its approval.

PARTIES

16. Plaintiff BACKCOUNTRY AGAINST DUMPS ("Backcountry") is a community organization comprising numerous individuals and families residing in eastern San Diego County and Imperial County who will be directly affected by the Project and its connected actions. Backcountry and its members are vitally interested in proper land use planning and management in order to maintain and enhance the area's ecological integrity, scenic beauty, wildlife, recreational amenities, and natural resources including groundwater quality and quantity. Backcountry's members use the area affected by the Project for aesthetic, scientific, historic, cultural, recreational, quiet rural residential and spiritual enjoyment. Construction and operation of the Project threatens to harm the use and enjoyment of these public resources by Backcountry's members as well as the public at large.

17. The Project threatens physical and psychological harm to Backcountry's members and other nearby residents through its emission of excessive audible noise and ILFN, its unceasing light pollution at night due to the red lights constantly blinking on the Project's 60 wind turbine towers, its excessive consumption of groundwater from the area's overtapped aquifer, its storage and risk of release of toxic substances from the periodic disposal of hundreds of gallons of waste oil from *each* turbine, and its adverse impacts to visual resources including disruptive shadow flicker each morning and evening and degradation of scenery from the Project's huge steel towers and spinning turbines, and associated industrial structures. Backcountry therefore seeks this Court's review and invalidation of Defendants' Project approvals.

18. Plaintiff DONNA TISDALE lives on Morningstar Ranch, located at 1250 Tierra Real Lane and 38236 Tierra Real Road in Boulevard, California, and adjacent to the Tribe's Reservation. She is a member of Backcountry, as well as the Chairwoman of San Diego County's Boulevard Planning Group. Ms. Tisdale's ranch shares a half-mile

border with the Reservation and is adjacent to the Project site. The ranch includes a barn/shop, and three homes. Ms. Tisdale and her husband reside in one of the homes and use the other two homes as rental properties. Ms. Tisdale currently uses and intends to continue to use her ranch for these purposes for as long as possible, as well as for activities such as hiking, family gatherings, recreation, wildlife and wildflower viewing, photography, star gazing and quiet meditation. Construction and operation of the Project will harm Ms. Tisdale's use and enjoyment of her ranch and the surrounding natural resources, diminish her health, well being and quality of life in her senior years, and jeopardize her lifetime investment in her property. Ms. Tisdale therefore seeks this Court's review and invalidation of Defendants' Project approvals.

19. Plaintiff JOE E. TISDALE lives with his wife Donna Tisdale on Morningstar Ranch, located at 1250 Tierra Real Lane and 38236 Tierra Real Road in Boulevard, California, and adjacent to the Tribe's Reservation. He is a member of Backcountry. Mr. Tisdale purchased Morningstar Ranch in 1963. Mr. Tisdale's ranch shares a half-mile border with the Reservation and is adjacent to the Project site. The ranch includes a barn/shop, and three homes. Mr. Tisdale and his wife reside in one of the homes and use the other two homes as rental properties. Mr. Tisdale currently uses and intends to continue to use his ranch for these purposes for as long as possible, as well as for activities such as hiking, family gatherings, recreation, wildlife and wildflower viewing, photography, star gazing and quiet meditation. Construction and operation of the Project will harm Mr. Tisdale's use and enjoyment of his ranch and the surrounding natural resources, diminish his health, well being and quality of life in his senior years, and jeopardize his lifetime investment in his property. Mr. Tisdale therefore seeks this Court's review and invalidation of Defendants' Project approvals.

20. Plaintiffs' injuries are fairly traceable to Defendants' actions. Construction and operation of the Project and connected actions will harm Plaintiffs' quiet enjoyment of their rural residences, recreational activities including natural and cultural study, wildlife and wildflower viewing, scenic enjoyment, photography, hiking, family outings,

and star gazing, and spiritual study and practice including religious worship and meditation. These injuries are actual, concrete, and imminent. Plaintiffs have no plain, speedy, or adequate remedy at law. Accordingly, Plaintiffs seek injunctive, mandamus, and declaratory relief from this Court to rectify Defendants' unlawful acts and redress Plaintiffs' injuries.

21. Defendant UNITED STATES BUREAU OF INDIAN AFFAIRS ("BIA") is an agency of the United States government charged by statute with responsibility for reviewing and approving the Project as it is located on Reservation lands owned and managed by BIA for the benefit of the Tribe.

22. Defendant DARRYL LACOUNTE is sued in his official capacity as Director of BIA because he exercises responsibility over management of lands owned and managed by BIA including the Reservation in which the Project is proposed to be built and operated, and in that capacity Mr. LaCounte purported to approve the Project.

23. Defendant AMY DUTSCHKE is sued in her official capacity as Regional Director of BIA because she exercises responsibility over management of lands owned and managed by BIA including the Reservation on which the Project is proposed to be built and operated, and in that capacity Ms. Dutschke purported to recommend approval of the Project.

24. Defendant UNITED STATES DEPARTMENT OF INTERIOR ("DOI") is the federal agency charged with managing most of the nation's federally owned lands, including the Project site, and with supervising BIA and the BIA officials who approved the Project to assure that in doing so, they complied with federal environmental laws. DOI is charged with ensuring the Project's compliance with applicable laws, including but not limited to NEPA, the MBTA the Eagle Act, and the APA, in its management of those lands.

25. Defendant DAVID BERNHARDT is sued in his official capacity as Secretary of the Interior because he exercises responsibility over management of lands owned and managed by BIA including the Reservation on which the Project is proposed

to be built and operated, and in that capacity Mr. Bernhardt purported to approve the Project through delegated authority exercised by the Assistant Secretary of the Interior for Indian Affairs, Tara Sweeney.

26. Defendant TARA SWEENEY is sued in her official capacity as Assistant Secretary of the Interior for Indian Affairs. In that capacity, Ms. Sweeney purported to approve the Project by signing a ROD and related authorizations including approval of the FEIS, all allowing construction and operation of the Project, on or about April 8, 2020, although the approvals were not released to the public until on or about May 12, 2020.

BACKGROUND

27. As approved by Defendants in their ROD, the Project is slated to be constructed on 2,200 acres of land located within the Tribe's 16,512-acre Reservation near the rural community of Boulevard in eastern San Diego, approximately 70 miles east of the City of San Diego. ROD 1. The proposed wind energy generation facility includes up to sixty 586-foot to 604-foot tall turbines, three 374-foot tall meteorological towers, 15 miles of new access roads, an electrical connection and communications system, a collector substation, an operation and maintenance facility, a generator-tie ("gen-tie") line, and other components needed for construction and operation of the Project. FEIS at 6-11. The Project would have an electrical generation capacity of up to 252 megawatts ("MW"). ROD 1.

28. The Project also includes the closely related Boulder Brush Facilities on 320 acres of private land adjacent to the Reservation which would include an approximately 3.5-mile Off-Reservation portion of the gen-tie line, a high-voltage substation, a 500 kilovolt ("kV") switchyard and connection, and access roads. FEIS at 11-14. The Boulder Brush Facilities are subject to the land use and permitting jurisdiction of the County of San Diego, and require a Major Use Permit from the County. FEIS at 5.

29. Also included in the Project are temporary construction facilities including: a 20-acre parking and staging area immediately adjacent to the Tisdales' ranch, sixty 1.9-

acre construction laydown areas, and a massive, noisy and dusty concrete batch plant (with cement storage silos) that would occupy 3.7 acres and measure about 400 feet on each side. FEIS at 10, 16, 19. In addition, because existing groundwater wells are problematic due to the area's declining, over-tapped aquifer, new groundwater wells would have to be drilled in order to supply the Project with water during both construction and operation. In total, Project construction is expected to take 14 months to complete. ROD 7.

30. Defendants prepared a Draft Environmental Impact Statement ("DEIS") in May 2019 and a FEIS on February 10, 2020, and purported to rely on those documents in approving the Project. Plaintiffs had submitted timely scoping comments on the Project on December 21, 2018, timely comments on the DEIS on July 8, 2019 and timely comments on the FEIS on March 11, 2020, which raised pertinent objections to the Project. Plaintiffs had also submitted other relevant comments to Defendants identifying legal deficiencies in their review of the Project prior to their approval of the ROD on or about April 7, 2020 and public notification of that approval on or about May 12, 2020.

31. Plaintiffs also submitted timely comments to San Diego County objecting to its review and approval of the Project and the related Boulder Brush Facilities.

32. In this lawsuit, Plaintiffs challenge Defendants' Project approvals and associated environmental review under NEPA, the MBTA, the Eagle Act, and the APA.

FIRST CLAIM FOR RELIEF

(Violation of the National Environmental Policy Act)

(Against All Defendants)

33. The paragraphs set forth above and below are realleged and incorporated herein by reference.

The FEIS Unlawfully Segments the Analysis of Connected Actions

34. NEPA forbids "segmented" environmental review. 40 C.F.R. §1508.25(a)(1). Connected actions must be considered together in a single EIS. *Thomas*

v. Peterson, 753 F.2d 754, 759 (9th Cir. 1985) (overruled on other grounds by *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1088-1092 (9th Cir. 2015)). Connected actions are those that (1) "[a]utomatically trigger" other actions, (2) "cannot or will not proceed unless other actions are taken previously or simultaneously," or (3) are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. §1508.25(a)(1). The second and third categories apply to the Project, since it would "share[] a high-voltage substation and switchyard . . . that would be used to connect both [the Project and the connected Torrey Wind Project] to the existing Sunrise powerlink transmission line." FEIS at RTC-9. Without this interconnection, the Project could not proceed.

35. Actions do not lose their "connected" status just because they are proposed by a different project applicant. *Alpine Lakes Protection Society v. U.S. Forest Service*, 838 F.Supp. 478, 482 (W.D. Wash. 1993).

36. Here, the FEIS improperly segments the analysis of connected actions in at least two ways.

37. First, the FEIS fails to analyze the impacts of the connected Torrey Wind Project, instead considering it to be only a cumulative action that need not be analyzed in detail. FEIS at RTC-10. The Torrey Wind Project is a proposed 30-turbine, 126-MW wind energy generation facility that is interdependent with the Boulder Brush component of the Project. The FEIS acknowledges that the Boulder Brush project and the Torrey Wind Project "do propose to share a high-voltage substation and switchyard on private lands that would be used to interconnect both projects to the existing Sunrise Powerlink transmission line." FEIS at RTC-9. However, the FEIS erroneously claims that "the Torrey Wind Project is not a connected action because it would not be triggered by the Project and because the Project is not dependent on the Torrey Wind Project to proceed." FEIS at RTC-9. But in fact, as the FEIS elsewhere acknowledges, the Boulder Brush Project's "high-voltage substation would allow for the receiving and stepping up of electric energy from 230 kV to 500 kV for the Torrey Wind Project," and, as noted above,

the Boulder Brush Project is, in turn, an integral component of the Campo Wind Project. FEIS at B-12. Because the Torrey Wind Project would not proceed as planned without the approval and construction of the Boulder Brush facilities, and the Boulder Brush Project would be dependent on a high-voltage substation and switchyard that would be shared with the Torrey Wind Project, the Torrey Wind Project is connected to the Campo Wind Project. Therefore, its impacts must be analyzed together in the same document. Contrary to this NEPA requirement, the FEIS did not analyze the impacts of the Torrey Wind Project.

38. Second, while the FEIS acknowledges that the Project "consists of both the Campo Wind Facilities on land within the Reservation and the Boulder Brush Facilities which are located on adjacent private lands within the Boulder Brush Boundary," it fails to analyze the impacts from and alternatives to the Boulder Brush transmission, substation and switchyard facilities currently being considered for approval by San Diego County (PDS2018-MPA-18-016). The FEIS admits that "the Boulder Brush Facilities include an approximately 3.5-mile Off-Reservation portion of the gen-tie line, a high-voltage substation, a 500 kV switchyard and connection," as well as other components, yet it fails to reconcile this dispositive fact with its failure to analyze the impacts of these clearly connected components. FEIS at RTC-8. The FEIS concedes that

> the term "Project Site" refers to the combined Campo Corridor and Boulder Brush Corridor, within which all Project facilities would be constructed and/or operated . . . [and] 'Project Area' is used to describe a broader area potentially affected by the Project alternatives and is generally consistent with the Reservation Boundary and Boulder Brush Boundary.

FEIS at RTC-8. However, despite the bare inclusion of these areas in the Project's definition, the FEIS fails to analyze the impacts of the Boulder Brush components. Nor does the FEIS consider specific alternatives to the Boulder Brush transmission facilities; instead, it only briefly summarizes generic alternatives to the form, capacity and location of electrical generation in general. FEIS at 24-26. Despite Plaintiffs' comments on the DEIS requesting full analysis of the Boulder Brush facilities and alternatives thereto as NEPA requires, BIA failed to provide this required analysis in the FEIS. Indeed, its

response to comments objecting to this omission from the DEIS fails to address this NEPA violation altogether. FEIS at 24-26, RTC-7 to RTC-9.

The FEIS Fails to Consider All Cumulative Projects

39. NEPA requires analysis of cumulative impacts. 40 C.F.R. §1508.7. Yet the FEIS ignores numerous reasonably foreseeable projects that would contribute to the Project's cumulative impacts, including the Energia Sierra Juarez Phase II project in Mexico (only the existing Phase I project is considered), the 90-MW Starlight Solar project near Boulevard, and the 50-MW Tecate Solar Hybrid project also in the Boulevard area. FEIS at 140-142, N-1 to N-14. Without any supporting evidence, the FEIS baldly asserts that these projects need not be considered because they are outside the unreasonably truncated area that was considered, despite their obvious cumulative impacts. FEIS at RTC-14. The FEIS ignores the fact that the artificial boundaries it drew around the small area it considered exclude numerous nearby projects whose impacts should have been analyzed. Each of these projects has broad-ranging effects that plainly add to the Project's impacts. Their impacts include widespread adverse effects on wildlife and its habitat, on wildfire risk, on groundwater levels, and on visual resources. The cumulative impacts discussion in Appendix N is likewise deficient because it does not identify these omitted projects, much less address their effects, nor include a map of the cumulative projects that were considered, let alone their impact areas. FEIS at N-1 to N-14. Although Plaintiffs' comments on the DEIS identified this deficiency, the FEIS entirely fails to address it. FEIS at RTC-13 to RTC-14, RTC-174.

The FEIS Fails to Evaluate a Reasonable Range of Project Alternatives

40. The alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. §1502.14. NEPA requires that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives" so that "reviewers may evaluate their comparative merits." 42 U.S.C. §4332; 40 C.F.R. §1502.14. Alternatives should be wide-ranging and not exclude options just because they require other agency approvals. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974). Agencies may decline to study an

alternative in detail on the grounds that it is "similar to alternatives actually considered, or . . . infeasible, ineffective, or inconsistent with the basic policy objectives for the management area," but only after providing a "reasoned explanation *in the EIS* for its rejection." *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (first quote; internal quotations and citation omitted); *Southeast Alaska Conservation Council v. Federal Highway Administration* ("*SEACC*"), 649 F.3d 1050, 1059 (9th Cir. 2011) (second quote; emphasis added). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison* ("*Alaska Wilderness*"), 67 F.3d 723, 729 (9th Cir. 1995).

41. Here, the FEIS evaluates an artificially and unduly limited range of alternatives. It only evaluates two action alternatives: (1) a 252-MW capacity wind energy facility with sixty 4.2-MW, 586-foot (ground to blade tip) tall wind turbines, and (2) a 202-MW capacity wind energy facility with forty-eight 4.2-MW turbines. FEIS at 24. Defendants refused to provide detailed analysis of a reasonable range of alternatives designed to reduce the Project's impacts, including a mixed renewable generation (wind and solar) alternative, a smaller (63-MW capacity) alternative with substantially reduced impacts, an off-Reservation alternative, an alternative with smaller, quieter turbines (each 2.5-MW), and a distributed generation alternative. FEIS at 25-26.

42. As Defendants acknowledged, they are required to "describe any alternative eliminated from further analysis *along with the rationale for elimination*." FEIS at RTC-12 (citing BIA NEPA Guidebook, §8.4.6, emphasis added). But Defendants failed to provide a "reasoned explanation *in the EIS* for [their] rejection" of those additional alternatives. *SEACC*, 649 F.3d at 1059 (emphasis added). And Defendants' response to comments on the DEIS does not provide any further explanation about why the alternatives that were eliminated from analysis were deemed infeasible. FEIS at RTC-11 to RTC-13. For example, the FEIS fails to list any "scientific [or] other sources relied upon" for its assertion that the

> distance and cost of connecting the scaled down [minimal build-out] project to the planned switchyard would be cost prohibitive and the delivered cost of energy from 15 turbines would be too expensive for a potential buyer to enter into a contract for such a scaled-down project based on current energy market conditions.

40 C.F.R. § 1502.24 (first quote); FEIS at 25 (second quote). And Defendants' reference to the DEIS' statement that "the minimal buildout alternative would be economically infeasible because . . . the costs" would outweigh the "revenue in current market conditions . . . and would not support the purpose of economic benefit to the Tribe," is likewise devoid of any scientific or other source material to support that claim. FEIS at RTC-174.

43. The FEIS did not remedy the DEIS' failures by simply referring back to statements made in the DEIS. Defendants must, under NEPA, provide facts and figures to support their conclusion before eliminating a viable, and more environmentally friendly alternative. The FEIS similarly fails to support its rationale for rejecting the reduced-capacity turbines alternative: that the "[i]mpacts to the environment would have been similar to those of the larger capacity turbines considered in Alternative 1." FEIS at 25. Rather, Defendants again made a circular argument: they refer back to the unsupported statement in the DEIS as support for that same unsupported statement in the FEIS. FEIS at RTC-175. But neither the DEIS nor the FEIS provides evidence "that the reduced capacity turbines would not appreciably reduce impacts." FEIS at RTC-175.

44. The fact that reduced-capacity turbines would also require the "same number of turbine pads," while relevant to certain types of impacts, is irrelevant to many others. For example, noise would likely be reduced with lower-capacity turbines because smaller turbines are much quieter. So too, public health and safety impacts would be less because of reduced noise, reduced aviation hazards due to shorter towers, and reduced wildfire risk due to smaller and lighter nacelles that are less likely to burn out. Similarly, avian impacts would be less because the blade sweep area would be smaller. And, visual impacts would be less because the turbines and their supporting towers would be smaller

and therefore less visually intrusive.[1]

45. NEPA requires that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives" so that "reviewers may evaluate their comparative merits." 40 C.F.R. §1502.14; 42 U.S.C. §4332; *City of Carmel-by-the-Sea v. United States Dept. of Transp.* ("*Carmel*"), 123 F.3d 1142, 1155 (9th Cir. 1997). Analyzed alternatives should be wide-ranging and include options that may require additional approvals or participation by others. *Sierra Club v. Lynn*, 502 F.2d at 62; *see also* 40 C.F.R. §1502.14(c). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Alaska Wilderness*, 67 F.3d at 729.

46. Here, BIA improperly eliminated from detailed review feasible – and environmentally less damaging – alternatives such as the distributed generation alternative even though they would meet the general Project objective of increasing renewable energy development pursuant to state and federal renewable energy policies. FEIS at 2, 26.

47. The FEIS describes the distributed generation alternative as follows: "a variety of technologies that generate electricity at or near where that electricity would be used, such as solar panels and small wind turbines." FEIS at 26.

48. The FEIS acknowledges that "[w]hen connected to the electric utility's lower-voltage distribution lines, distributed generation can help support delivery of power to additional customers and reduce electricity loss along transmission and distribution lines." *Id*. Nevertheless, the FEIS dismisses the distributed generation alternative on the grounds that it "would have to be located primarily at Off-Reservation locations to

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[1] *See*, *e.g.*, Walker, Bruce, George F. and David M. Hessler, Rob Rand & Paul Schomer, December 24, 2012, "A Cooperative Measurement Survey and Analysis of Low Frequency and Infrasound at the Shirley Wind Farm in Brown County, Wisconsin," Public Service Commission of Wisconsin Report #122412-1 (attached as Exhibit 1 to Backcountry's July 8, 2019 DEIS Comments) (noting that the "Navy's prediction of the nausogenic region . . . indicates a 6 dB decrease in the criterion level for a doubling of power such as from 1.25 MW to 2.5 MW).

generate the same approximate amount of energy that would be produced by the Project." *Id*. The FEIS therefore eliminated distributed generation from analysis because "it would not provide benefits to the Tribe and would be outside of the Tribal governance." *Id*. But the FEIS must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Distributed generation is feasible, cost-effective and would meet state and federal renewable energy goals. Therefore, it is reasonable and must be considered in detail.

49. Distributed generation will provide ample renewable energy. Currently, the City of San Diego is one of the top producers of distributed solar in the country. If current rates of installation continue in SDG&E's service area, distributed generation could "generate the same approximate amount of energy that would be produced by the Project." FEIS at 26. And there is significantly more distributed generation potential with non-photovoltaic solar sources, such as combined heat and power plants. These plants have the potential to provide almost 400 megawatts of cost-effective energy generation. Combined, these and other distributed generation sources could easily meet renewable energy goals. This would be even more readily achievable if a portion of the considerable funds, expertise and efforts going into developing remote industrial-scale renewable energy projects like the Campo Wind Project were redirected to distributed generation projects and research.

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

51. Defendants' failure to fully analyze a distributed generation alternative violated NEPA.

Defendants Failed to Take a Hard Look at the Project's Impacts in the FEIS

52. NEPA requires that agencies take a "hard look" at the environmental impacts of proposed major federal actions and provide a "full and fair discussion" of those impacts in an EIS. 40 C.F.R. §1502.1; *National Parks and Conservation Assn v. BLM*, 606 F.3d 1058, 1072-1073 (9th Cir. 2010); CEQA Guidelines §15126.2(a) ("Direct and indirect significant effects of the project on the environment shall be clearly identified and described"); *National Parks & Conservation Assn v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001). That includes "insur[ing] the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements" by "identify[ing] any methodologies used and . . . mak[ing] explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement." 40 C.F.R. §1502.24. Here, Defendants failed to take a hard look at numerous Project impacts.

A. Impacts to Biological Resources

53. The FEIS significantly downplays the Project's biological impacts on numerous species. By understating these impacts, the FEIS fails to accurately inform the public and decisionmakers of the Project's environmental harm, in violation of NEPA.

1. Golden Eagles and Other Avian Species

54. Wind turbines kill birds.[2] The Campo Wind Project's 60 turbines will be no different. A wealth of bird species has been documented inhabiting or otherwise using the Project area, including sensitive species like golden eagles. FEIS Appendix F. The risk to golden eagles is particularly concerning because they are "currently known to be at risk of *population-level* effects from [wind turbine] collisions," and must be afforded

[2] Dwyer, J.F., M.A. Landon, and E.K. Mojica, 2018, "Impact of Renewable Energy Sources on Birds of Prey," in J.H. Sarasola *et al.* (eds.), 2018, *Birds of Prey*, Springer International Publishing AG (attached as Exhibit 2 to Backcountry's July 8, 2019 DEIS Comments).

every possible protection. Plaintiffs' July 8, 2019 Comments, Exhibit 2 at 306. Yet the FEIS brushes aside the risk to golden eagles because "[e]agle use on site is infrequent and the chance for collisions is low." FEIS at 88. It also dismisses collision impacts to other migratory birds (protected under the MBTA) because the Project would implement a hypothetical "Bird and Bat Conservation Strategy ('BBCS')" to be developed by Terra-Gen to monitor, report and notify a Project biologist about dead or injured birds and bats *after* they have been killed or injured. FEIS at 88; FEIS Appendix P at 5-6.

55. But not one of the specific suggested components of the BBCS listed in FEIS Appendix P would actually reduce bird collisions or mitigate their impacts on birds. *Id*. Instead, all of them merely suggest ways to monitor and report bird collisions and deaths *after they occur*. *Id*. Yet, despite the absence of any actual proposal to reduce bird collisions and deaths, the FEIS still dismisses the Project's impact on birds as less than significant with mitigation. FEIS at RTC-21. But if the impact is significant before mitigation, and the mitigation does not lessen the impact – as here – then the impact is still significant after mitigation. FEIS at 88 (admitting that "Absent mitigation, these direct impacts would be adverse" but simultaneously claiming that with mitigation, "the Project would not result in adverse effects to migratory birds").

56. The FEIS' vague claims of effective mitigation to reduce bird collisions and deaths are unsupported and insufficient to reasonably inform decisionmakers and the public for at least four reasons. First, the FEIS fails to *quantify* the number of expected wind turbine collisions with all birds, let alone with any bird species that are particularly at risk. While Defendants did complete additional avian surveys to determine the presence of species in the area, they still failed to quantify potential impacts. In the face of the FEIS' admission that "wind turbines were considered to present a potential risk to avian species for collision" (FEIS at RTC-27), Defendants' failure to quantify this risk by disclosing the foreseeable range of bird deaths leaves the public guessing.

57. Yet despite this profound omission, the FEIS nonetheless claims that "there would be no additional impacts anticipated" to avian species. FEIS at RTC-27. But the

FEIS may not, consistent with NEPA, draw this conclusion without facts to support it. *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). And, the record shows that this conclusion does not follow from the facts that *are* available. For example, because the golden eagle *population* is at risk from wind turbines and other causes, as discussed, the loss of one golden eagle could have population-level consequences. But Defendants ignore that potentially devastating impact and flatly declare, without factual support, that "there would be no adverse effects on eagles." FEIS at 88.

58. Second, after-the-fact monitoring of bird collisions and removal of bird carcasses (as proposed as part of Mitigation Measure ("MM")-BIO-4) merely documents the harm *after* it has occurred. It does nothing to mitigate, let alone prevent, the collisions themselves or the resulting bird deaths. FEIS Appendix P at 5-6. Monitoring cannot bring birds back from the dead. Defendants' revision of MM-BIO-4 does nothing to lessen the ineffectiveness of that mitigation measure. *Id*. Adding more post-mortem monitoring and notification does not stop the impact from happening in the first place. To the contrary, it just habituates the public to the growing death toll, compounding the unfolding tragedy.

59. Third, the FEIS fails to analyze the fact that when birds are killed by wind turbines, that mortality impacts both the way birds migrate, and the relative abundance of open-habitat versus forested habitat species. The birds that are genetically best able to lead their flocks on migrations are the ones most likely to be killed, because they are in the lead when they encounter the turbines. With their passing, the flocks as a whole are less likely to migrate well, or at all, leading to population-level declines due to the flocks' collective inability to timely reach their feeding, breeding and nesting habitats. Relatedly, wind turbines disproportionately impact open-habitat birds, as opposed to birds that avoid open areas. These impacts are among those categorized by scientists as *the landscape*-scale avoidance impacts that the Project's turbines would likely cause.[3] A recent

[3] Fernández-Bellon, D., M.W. Wilson, S. Irwin, and J. O'Halloran, 2018, "Effects of Development of Wind Energy and Associated Changes in Land Use on Bird

longitudinal study of bird densities at 12 wind farms in Ireland and their paired control sites found that "densities of open-habitat species were lower at wind farms" than at the control sites "independent of distance to turbines." July 8, 2019 Comments Exhibit 3 at 7. This "suggests that for open-habitat birds, effects were operating at a landscape scale." July 8, 2019 Comments Exhibit 3 at 8. The Campo Wind Project is therefore likely to have similar effects. While some of the bird species inhabiting the Campo Wind Project site may be different than those at the study sites in Ireland, the fact remains that because most of the bird species at the Campo Wind Project site occupy "open-habitat" – since that is the prevalent habitat at the Project site – most of these birds are vulnerable to landscape-scale lethal effects as documented by the wind-farm study in Ireland.

60. Fourth, the avian surveys that were completed did not comply with Land-Based Wind and Eagle Conservation Plan Guidelines. Those Guidelines call for a minimum of two years of surveys, across all seasons, and 20 hours of survey per turbine per year–which would total 2,400 hours for this Project. But here, these protocols were not met. The FEIS admits that Terra-Gen and USFWS agreed that the Land-Based Wind Energy Guidelines and the Eagle Conservation Plan Guidance were the appropriate methods to be used, and it does not deny that the surveys that were completed failed to reach 2,400 hours, across all seasons, for two years.

61. Instead, Defendants now claim – contrary to their earlier admission – that the "guidelines referenced . . . are not required . . . under federal law or regulation" and "the methods are flexible." FEIS at RTC-81 (first quote), RTC-92 (second quote), RTC-176. But no amount of flexibility changes the fact that the surveys do not meet the requirements that Terra-Gen and USFWS originally said were the best practice and therefore necessary. Furthermore, no eagle nest searches *at all* have been performed since 2011, and the FEIS does not provide any information on the status of eagle breeding territories in the region.

Densities in Upland Areas," *Conservation Biology* 0(0):1-10 (attached as Exhibit 3 to Backcountry's July 8, 2019 DEIS Comments).

62. Finally, even if the surveys had been performed, the survey methods cannot be evaluated because survey reports are not included in the FEIS.

63. In sum, the FEIS' analysis of the Project's impacts to birds fails to reasonably inform decisionmakers and the public as NEPA requires. Its discussion of the Project's impacts on birds must accordingly be declared inadequate under NEPA.

2. Quino Checkerspot Butterfly

64. The Project area provides habitat for the endangered Quino checkerspot butterfly (*Euphydryas editha quino*; "QCB"), as it falls within the La Posta/Campo Core Occurrence Complex for this species. 74 Fed.Reg. 28776-28862 (June 17, 2009). The U.S. Fish and Wildlife Service ("FWS") warns that preservation of these core occurrence complexes is essential to QCB recovery. *Id*. Yet, the Project "would permanently remove 242.1 acres of suitable [QCB] habitat." FEIS at 87. Despite this significant impact, the FEIS devotes less than one page to the Project's effects on the QCB. FEIS at 87. It directs the reader to FEIS Appendix H, but that Appendix never evaluates how this impact affects QCB recovery and survival. FEIS Appendix H at 136, 141. And contrary to NEPA, it ignores rather than addresses FWS' warning.

65. Appendix H states that "[a]pproximately 1,216 acres were considered potential suitable habitat within the Project Site," contrary to the FEIS' textual claim that only 699 acres within the Project Area were considered suitable habitat. FEIS Appendix H at 77; FEIS at 38. It also acknowledges that "[c]onstruction activities increase the number of humans within the area, which can deter wildlife from using an area," and that operation and maintenance would cause "fugitive dust from vehicles, habitat fragmentation, accidental additional clearing of adjacent habitat, chemical pollutants if used for operation-related activities, non-native invasive species, and alteration of the natural fire regime." FEIS Appendix H at 131, 141. But it never assesses how these admitted incursions into its habitat would impact QCB survival.

66. The FEIS claims it followed FWS guidelines to identify potential habitat, but it never delineates, or cites any source for, that claimed guidance. Defendants ask the

public to take their word that "[a]ll survey methods and protocols, species modeling and impact analysis methodologies were conducted in coordination and consultation with [FWS] to ensure adequacy and accuracy." FEIS at RTC-14. But without any guidelines or correspondence with FWS to allow independent assessment of these claims, the public is left in the dark. Furthermore, the FEIS' claim that "the Project would not adversely affect *any* federally listed plants or wildlife, because *none* are present," is demonstrably incorrect, since there were five QCB identified in the 2019 off-reservation surveys of the Project area. FEIS at 87 (emphasis added). Claiming the absence of endangered species that the FEIS' own surveys show to be present is not the "hard look" that NEPA requires.

67. The FEIS also claims that "[b]ecause decommissioning would include restoration of the area to pre-Project conditions, it would ultimately not result in adverse effects on [QCB]." FEIS at 87. But the Project will operate – and deprive QCB of their essential habitat – for decades, rendering any attempted restoration thereafter too late to save the QCB from extinction.

68. The FEIS claims that any adverse impacts "would be reduced to less than adverse with implementation of recommended [Mitigation Measures] MM-BIO-1 and MM-BIO-3" (FEIS at 87), but those "measures" are nothing more than one-to-four-word headings – e.g., "revegetation" and "construction fencing and signage" – devoid of any actual text explaining what each measure entails. FEIS at 90. As the FEIS admits, "mitigation [must] be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." FEIS at RTC-177. For this reason, courts require EISs to describe mitigation measures with enough detail so the public can assess how well they "will serve to mitigate the potential harm" they target. *Foundation for North American Wild Sheep v. U.S. Department of Agriculture* ("*Wild Sheep*"), 681 F.2d 1172, 1181 (9th Cir. 1982) (quote); *South Fork Band Council v. U.S. Department of Interior* ("*South Fork*"), 588 F.3d 718, 727 (9th Cir. 2009). But contrary to this NEPA tenet, the FEIS never provided *any* detail, let alone demonstrated that these "measures" would mitigate the Project's impacts to insignificance. These discrepancies and

omissions leave the public guessing as to the Project's impacts to the QCB's survival and recovery.

69. The FEIS downplays the fact the Project would "permanently remove 242.1 acres of suitable Quino checkerspot habitat" by claiming that "[a]dverse effects on the Quino checkerspot and its habitat would be reduced to less than adverse with implementation of recommended MM [Mitigation Measure]-BIO-1 and MM-BIO-3," and that "[t]he Off-Reservation portion of the Project would not adversely affect any federally listed plants or wildlife, because none are present." FEIS at 87. Neither claim is correct.

70. As noted, these "mitigation measures" are nothing more than vague catch phrases devoid of any actual text, let alone substance. FEIS at 90. This is not surprising, since Defendants cannot possibly know how to mitigate impacts that they have not yet identified. The FEIS concedes that Defendants lack the information they need to determine the Project's impacts, and are still collecting data notwithstanding publication of the FEIS: "[a]n additional set of Quino checkerspot butterfly surveys are being conducted within the Off-Reservation portion of the Project." FEIS at 87. Without this survey information, Defendants cannot determine the Project's impacts and how those unknown impacts would affect the FEIS' analysis.

71. The FEIS' admission that Defendants rushed to publish the FEIS before they had completed collection of essential data is consistent with their pattern of claiming "mission accomplished" or "no effect" before actually collecting the data to support these claims. For example, the FEIS claims that "the Project would not adversely affect any federally listed plants or wildlife, *because none are present*." FEIS at 87 (emphasis added). But, as noted, according to Defendants' own Biological Technical Report, Appendix H, there were five Quino checkerspot butterflies identified in the 2019 surveys of the Off-Reservation portion of the Project area. FEIS Appendix H at 77. The FEIS' claim of "no adverse effect" on this species because "none are present" was at best premature, and at worst, knowingly false.

72. For a second example, the FEIS claims that "[b]ecause decommissioning

would include restoration of the area to pre-Project conditions, it would ultimately not result in adverse effects on Quino checkerspot butterfly." FEIS at 87. But eventual restoration to pre-Project conditions – which is not even possible – does not negate the adverse effects that would have occurred during the decades of Project operation. Defendants brush aside this inconvenient truth, asserting that "restoration of habitat is often an approach used to reduce the effects on species." FEIS at RTC-177. But "reduc[ing] the effects on species" is a far cry from assuring the Project would "not result in adverse effects" on this endangered butterfly during its decades of operation, as claimed.

73. The FEIS acknowledges that decommissioning activities will "result in temporary direct and indirect adverse effects on [the] Quino checkerspot butterfly," including collisions with equipment and vehicles, human disturbance, and noise impacts. FEIS at 87. Those adverse impacts are significant and cannot be ignored simply because the FEIS claims – without any supporting evidence – that the area will be restored to pre-Project conditions. Even with the best possible decommissioning plan, revegetation that takes place *after* the Project's operational impacts have already occurred cannot bring dead Quino checkerspot butterflies back to life. FEIS at RTC-177; FEIS Appendix P at 3.

74. The significance of these errors and omissions is heightened by the importance of the Project area to the Quino checkerspot butterfly. As noted, the Project falls within the La Posta/Campo Core Occurrence Complex for the Quino checkerspot butterfly, on the eastern edge of the species' range. 74 Fed.Reg. 28776-28862 (June 17, 2009). FWS has concluded that preservation of these core occurrence complexes is essential for recovery and survival of the Quino checkerspot butterfly. *Id*. This is because

> [t]he eastern edge of Quino checkerspot's range supports large and robust butterfly populations, abundant and diverse larval host plants and nectar sources, and relatively low levels of development and intensive agriculture. These areas may provide climate refugia that Quino checkerspot will require

under future predicted scenarios of climate change.[4]

Therefore, the Project area is important not only because it is a core occurrence area, but also because it provides unique habitat essential to this species' survival in the face of the rapidly worsening perils of climate change. *Id*.

75. Tacitly conceding the FEIS omits specific mitigation measures, Defendants claim that "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act." FEIS at RTC-177. But whether or not all environmental harm must be mitigated is a separate question from whether the FEIS' claim of "no adverse impacts" is supported by the supposed mitigation measures on which it bases this claim. As the FEIS acknowledges, "mitigation [must] be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." FEIS at RTC-177.

76. That informational goal cannot be met where, as here, the FEIS' claims of "no adverse impacts" are not supported by the agency's record. Contrary to the FEIS' claims, MM-BIO-1 is not a mitigation measure. Instead, it merely announces an intent to develop as yet unidentified measures by listing catch phrases. FEIS Appendix P at 1-3.

77. MM-BIO-3 is no less vague and unenforceable. It defers development of mitigation for the Project's impact on the Quino checkerspot butterfly until after Section 7 consultation with FWS is complete. FEIS Appendix P at 4. The FEIS makes vague statements such as "[r]atios for habitat-based mitigation (if any) shall be determined during the Section 7 consultation process," and "mitigation shall focus on habitat preservation and creation for long-term conservation of metapopulation dynamics." FEIS Appendix P at 4. But the FEIS does not provide any specific information on what those measures may be, to what aspects of Project construction or operation they would apply,

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[4] Preston, Kristine L., et al, 2012, "Changing distribution patterns of an endangered butterfly: Linking local extinction patterns and variable habitat relationships," *Biological Conservation* 152:280–290, 289 (attached to July 8, 2019 Comments as Exhibit 4).

or when and how they would be implemented. Indeed, the FEIS admits there may not be *any* habitat-based mitigation at all. *Id.*

78. Without any actual delineation of the substance and timing of this supposed mitigation, the FEIS cannot rationally conclude that these unknown and thus entirely hypothetical mitigation measures will reduce the Project's impacts. And the FEIS' failure to acknowledge this lack of information is just another example in a long line of insufficient analyses. NEPA requires more.

79. The FEIS' analysis of the Project's impacts to the Quino checkerspot butterfly fails to reasonably inform decisionmakers and the public of those effects. Its discussion of the Project's impacts on this species accordingly violates NEPA.

B. Noise Impacts

80. The FEIS masks and downplays the Project's severe noise impacts, including audible noise, low-frequency sound and infrasound, even as the FEIS acknowledges that these impacts will be significant and unavoidable. The FEIS uses erroneous baseline data, omits essential reviews, employs flawed assumptions, misstates and misapplies key methodologies, and ignores opposing scientific opinion.

81. First, the FEIS studies the wrong turbines. The modeled turbines that Dudek (the company that wrote the FEIS) used to predict the Project's noise levels produce substantially–up to 52.38 percent–*less* power than the Project's turbines. Because larger turbines produce louder noise, the FEIS' use of smaller turbines to predict the Project's noise substantially *understates* the noise generated by the Project's wind generators. Defendants knew that the Project's 4.2 MW turbines will produce more noise than the smaller turbines reviewed in the irrelevant study they used, yet they still used that study, knowingly understating the Project's noise impacts. FEIS at RTC-179. Defendants' use of this bogus study to downplay the Project's noise violates NEPA.

82. Second, Dudek ignored the Federal Transit Administration's Guidelines for Transit Noise and Vibration Impact Assessment ("FTA Guidelines") that measure the Project's *operational* noise, and instead used criteria that measure *construction* noise.

Consequently, the actual severity of the Project's impacts on ambient noise is understated and in some areas, ignored altogether, such as during night operation, when impacted residents are prevented from sleeping.

83. Third, the FEIS makes no effort to compare background ambient noise levels with the projected noise from the Project's operation. This is a severe shortcoming because, as modern acoustic science recognizes and the FTA Guidelines codify, humans are sensitive to increases in noise levels over ambient levels, particularly at night. It is well established that the impacts of a given noise level on humans are worse at night than they are during the day. Nighttime noise is particularly noticeable to humans for two reasons. First, ambient noise at night is usually much quieter than ambient noise during the day, so an increase at night is more noticeable. Second, it is a well-documented scientific fact that obtaining a good night's sleep is important for both physical and mental health. Because nighttime noise interferes with sleep, the impacts of the Project's elevated noise at night are therefore especially significant.

84. Fourth, the FEIS used manipulated baseline information. Its purported before-and-after noise measurements were taken at locations much farther away from the Project than the highly noise-sensitive land uses the Project would impact. It ignored homes markedly closer to the Project and thus more impacted by its turbine noise than those the FEIS counted. Consequently, the FEIS under-reports Project noise levels and understates their impacts.

85. Fifth, the FEIS inflated background noise to downplay the Project's dramatic increase in noise levels. It used noise level meters whose "noise floor" is greater than the far lower actual nighttime ambient noise in the Project area, thereby overstating the background noise levels. By exaggerating baseline noise readings, the FEIS understates the increase in ambient noise levels that the Project would cause.

86. Sixth, the FEIS fails to analyze the Project's pure tone noise impacts such as a whine, screech or hum, despite the fact that the San Diego Zoning Code recognizes the particularly pernicious effects of these types of shrill noise and therefore requires that

they be specifically evaluated to determine the significance of a wind energy project's noise impacts .

87. Seventh, despite the well-known fact that the Project area's high elevations are buffeted by strong winds, Dudek failed to use windscreens adequate to prevent wind turbulence from exaggerating the area's background noise. Because it appears that windscreens (used to prevent wind-caused air turbulence that exaggerates noise levels measured by a microphone) were too small for the relatively high wind speeds in the Project area, the resulting measurements could have overstated the actual background noise levels, and thereby understated the Project's actual noise impacts.

88. Eighth, the FEIS understates the long-range effects of the spinning turbines' ILFN on Noise Sensitive Land Uses. Peer-reviewed research shows that humans are negatively affected by ILFN even where it is below the threshold of audibility, and "that individuals living near wind turbines are made ill, with a plethora of symptoms that commonly include chronic sleep disturbance," due to prolonged exposure. FEIS Appendix T, Comment J-102 at 301.

89. Ninth, the FEIS fails to correctly measure and assess the especially harmful effects of "amplitude modulation," a rhythmic fluctuation in noise level, like the bi-tonal fluctuation of the so-called European-style emergency vehicle siren, generated by wind turbine rotor noise. Studies of amplitude modulation (fluctuation) indicate adverse sleep effects. Wind turbine noise from similar projects in the area emits excessive amplitude modulation (peak-to-trough variation of 4 dBA or more) as defined in the scientific literature. The FEIS ignores the effects of the Project's amplitude modulation on sensitive receptors by relying on inapplicable methodologies in a botched attempt to offset the FEIS' failure to predict these effects using the proper equipment and models.

90. Finally, the FEIS relies on a modeling program that cannot accurately predict wind turbine noise. The FEIS uses the computer program CadnaA to forecast noise generated by the Project's wind turbines despite the fact this program was not intended to be applied to prediction of noise generated by large wind turbines due to the CadnaA

program's inherent limitations. None of the criteria for using this program are met here, as both wind speeds and turbine heights greatly exceed those limits.

91. Because, as explained, the FEIS is plagued by serious methodological and measurement errors, and ignores the adverse health effects of ILFN, it substantially understates the Project's grave noise impacts on the community. "[A]lmost every time an EIS is ruled inadequate by a court it is because more data or research is needed." *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1249 (9th Cir. 1984). That same deficiency plagues the FEIS' noise impact analysis.

92.

> [T]he very purpose of NEPA's requirement that an EIS be prepared for all actions that may significantly affect the environment is to obviate the need for . . . speculation by insuring that the available data is gathered and analyzed prior to the implementation of the proposed action.

Wild Sheep, 681 F.2d at 1179. Contrary to this fundamental NEPA mandate, the FEIS fails to accurately and reasonably inform the public and decisionmakers of the Project's noise impacts, including the impacts from audible noise, low-frequency sound and infrasound.

93. For these reasons, the FEIS' noise impact analysis fails to reasonably inform decisionmakers and the public as NEPA requires, and must be declared inadequate.

C. Impacts to Water Resources

94. The FEIS downplays the Project's impacts on groundwater in several key respects. First, it understates the community's existing and future groundwater demand, and the Project's adverse impact on groundwater levels should it be built.

95. Second, it misapplies principles of hydrogeological analysis by overstating the groundwater available in the underlying Campo/Cottonwood Creek Aquifer, and understating the Project's likely drawdown of that basin. Understanding these effects is particularly crucial because this basin is designated as a sole source aquifer pursuant to section 1424(e) of the federal Safe Drinking Water Act, and the Environmental Protection Agency has determined that "contamination of [the] aquifer would create a significant hazard to public health." 58 Fed.Reg. 31025 (May 28, 1993).

96. Third, the FEIS ignores the impacts of past groundwater use by a recent energy project – the ECO Substation Project – thereby depriving the public of an understanding of how this Project may likewise lower groundwater.

97. Fourth, the FEIS ignores the groundwater impacts if, as is likely, the Project uses on-site wells located in the southern portion of the Reservation.

98. Fifth, the FEIS claims the Project would not harm groundwater quality during construction and decommissioning, based on a *hypothetical* stormwater pollution prevention plan ("SWPPP"). FEIS at 71. But it never specifies the SWPPP's best management practices because those practices, like the SWPPP itself, have not been formulated. FEIS at RTC-180. Instead, it merely provides a list of the stormwater control measures that "*could*" be included, without any analysis of the relative efficacy of the listed measures. FEIS at 15 (emphasis added). Indeed, the FEIS acknowledges that many of the sample BMPs "may not be appropriate" here. FEIS at RTC-180. Consequently, it violates NEPA's mandate that EISs must describe mitigation measures with sufficient detail to assess how well they "will serve to mitigate the potential harm" they target. *Wild Sheep*, 681 F.2d at 1181 (quote); *South Fork*, 588 F.3d at 727. Therefore, BIA cannot possibly "supply a convincing statement of reasons why [the] project's impacts are insignificant." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998).

99. Sixth, the FEIS fails to adequately address the Project's hazardous wastes. The FEIS claims "hazardous materials would not be allowed to enter the septic system," and that creation of a Hazardous Materials Management Plan ("HMMP") would reduce all impacts of use, storage, and disposal of hazardous materials to less than adverse. FEIS at 28, RTC 180-181. But not all the Project's hazardous materials are discharged to the septic system. The Project also involves the storage and transport of hundreds of gallons of waste oil from *each* turbine on a regular maintenance schedule, an impact ignored by the FEIS. Further, preparation of the HMMP is impermissibly deferred. Without information about how these materials will be used, stored and disposed of, the public

and decisionmakers cannot ensure protection of the area's vulnerable water resources. This is a critical omission because contamination of the underlying aquifer "would create a significant hazard to public health." 58 Fed.Reg. 31025.

100. Consequently, the FEIS' analysis of the Project's impacts to water resources fails to reasonably inform decisionmakers and the public as NEPA requires.

D. Global Warming Impacts

101. There is no question that global warming poses an existential threat that requires rapid mobilization of science, technology and both private and public resources to reduce fossil fuel consumption and increase reliance on renewable energy. But renewable energy has to be done right. Roof-top solar installation is far more efficient and poses far fewer adverse impacts than developing remote, industrial-scale wind energy projects that are prone to catastrophic failure. Such projects – like the Campo Wind Project -- typically create more problems than they solve. Their fire-prone turbines and hundreds of miles of power lines foreseeably spark months of wildfires each year that emit far more carbon through the ensuing wildfires than they ostensibly save in renewable energy production. Once an area has been scorched, it remains prone to devastating wildfires because the loss of native vegetation increases aridity and temperature, and allows the invasion of fire-prone non-native weeds.

102. The FEIS paints a rosy picture of the Project's global warming impacts, but it is based on an incomplete analysis. FEIS Appendix G at 29-44. The FEIS admits that it fails to calculate the Project's entire life cycle greenhouse gas ("GHG") emissions. FEIS at RTC-46 (modeling tools used "did not account for the full life-cycle of GHG emissions from construction activities"). Instead, the FEIS focuses on the GHG emissions from on-site Project construction and operation. FEIS at 4.5-1 to 3. Defendants claim that this failure should be overlooked because the FEIS did consider some "directly related GHG impacts." FEIS at RTC-47. But consideration of those impacts does not make up for the FEIS' failure to consider others, such as the increased risk of wildfires (and their massive GHG emissions that dwarf their ostensible GHG

reductions) due to construction of fire-prone turbines and spark-prone power lines in areas already suffering high wildfire risk.

103. Myriad published life cycle analyses demonstrate that wind energy projects have many more sources of GHG emissions than just on-site construction and operation. As one recent study states, "due to GHG emissions produced during equipment manufacture, transportation, on-site construction, maintenance, and decommissioning, wind and solar technologies are not GHG emission free."[5] July 8, 2019 DEIS Comments Exhibit 11 at SI36. That same study concluded, based on a "systematic review and harmonization of life cycle assessment (LCA) literature of utility-scale wind power systems," that industrial-scale wind turbines produce 11 g CO2-eq/kWh (median value, with a range of 3 g CO2-eq/kWh to 45 g CO2-eq/kWh). July 8, 2019 DEIS Comments Exhibit 11 at SI36, SI46. To adequately analyze the Project's global warming impact as NEPA requires, Defendants must conduct a life cycle assessment of all of the Project's GHG emissions, including those from the wildfires that are linked to construction of large-scale energy projects that depend on hundreds of miles of power lines through wildfire-prone areas that San Diego County's own recent fire history has shown are indisputably linked to massive wildfires and carbon emissions.

104. Defendants claim a life-cycle analysis would be speculative "because a turbine model has not been selected for the Project and the location of manufacturing for turbine components is unknown." FEIS at RTC-47. But uncertainty about a specific turbine model is irrelevant. NEPA requires a hard look at the Project's *potential* impacts. Therefore, the FEIS must analyze the impacts of the Project's potential turbines, while acknowledging any gaps in the available information. The FEIS' speculative claim that these impacts might have been considered in other NEPA analyses likewise fails because

[5] Dolan, Stacey L. & Garvin A. Heath, 2012, "Life Cycle Greenhouse Gas Emissions of Utility-Scale Wind Power: Systematic Review and Harmonization," *Journal of Industrial Ecology*, 16(SI) (attached to July 8, 2019 Comments as Exhibit 11).

these impacts are pertinent to and must be evaluated for this Project. Even if the impacts were analyzed in a prior NEPA document, Defendants must still disclose that analysis in this FEIS. Moreover, because production of wind turbines is often project-dependent, the components for the Project may not be built at all if the Project is rejected, rendering their manufacturing impacts unreviewed unless they are examined now, in this FEIS.

E. Shadow Flicker Impacts

105. The Project's spinning wind turbines will produce invasive and disruptive "shadow flicker" every morning and evening. The FEIS fails to fully disclose and analyze, let alone mitigate, the impacts of shadow flicker. The FEIS admits that "receptors both On- and Off-Reservations may experience nuisance-level shadow flicker effects for more than 30 hours in a given year," and on-reservation receptors may also "experience shadow flicker for more than 30 minutes in a given day." FEIS at RTC-39 (first quote), 63 (second quote). In fact, shadow flicker impacts on the closest residences including the Tisdales' would exceed 30 minutes per day and 200 hours per year, according to San Diego County's Draft Environmental Impact Report for the related Boulder Brush project at Figure C2-1, a fact not disclosed in Defendants' FEIS. These effects exceed the guidance and recommendations adopted for shadow flicker in multiple jurisdictions and for this FEIS. FEIS at 137.

106. Despite admitting that shadow flicker will exceed established thresholds, the FEIS downplays this impact by claiming that "the modern wind turbines that will be utilized for the Project will rotate well below any frequency of health concern." FEIS at RTC-38. But just as prolonged loud noise causes stress (and related harms) to those who are exposed to it even though they may not suffer hearing loss as a result, so too prolonged shadow flicker will cause stress (and related harms) to those exposed to it whether or not they will also suffer injury to their eyesight. The FEIS ignores this adverse impact.

107. Further, as for injuries to the exposed public's health, the FEIS fails to provide any facts to support its claim that they will not suffer physical harm. It does not

quantify or assess the potential frequency at which the turbines will rotate, nor reveal the frequency at which it would consider the turbines to pose a health concern. FEIS Appendix S. It provides no information about blade passage frequency or revolutions per minute. *Id*. Instead, it downplays the impact by discussing only the number of minutes per day, or hours per year, that a given receptor will be subjected to shadow flicker. But the severity of shadow flicker impacts depends on more than just duration; it also depends on the flicker's timing and frequency. The FEIS' omission of this vital information precludes informed evaluation of the Project's health and safety impacts on nearby residents.

108. The FEIS asserts that Project Design Features would be implemented to minimize the impacts of shadow flicker, including

> coordinat[ion] with the relevant tribe to assess shadow flicker complaints made within one year from the initial operations date of the Project by the resident of any existing . . . Off-Reservations receptor located within a distance of 15 x Rotor Diameter (i.e. approximately 6,750 feet) of a Project turbine to assess their shadow flicker complaints made within one year from the initial operations date of the Project.

FEIS at RTC-40 (defining "existing" as "existing as of the date of Record of Decision approval"). But this after-the-fact assessment fails to address, let alone prevent or otherwise mitigate, the impact before it happens. Merely documenting harm after it has occurred does nothing to prevent the harm in the first place. Moreover, the effects of shadow flicker extend for miles, much farther than 15 times the rotor diameter.

109. Furthermore, the FEIS impermissibly removes a mitigation measure that was promised in the DEIS, without any analysis of the resulting harm to the public, let alone a cost-benefit justification for removing this mitigation measure. The DEIS represented that "'all turbine software *would include* programming to reduce or shut off turbines during times of shadow flicker potential.'" FEIS at RTC-39 (emphasis added). But the FEIS removes that mitigation altogether because "it was determined that this design feature would significantly impact the economic benefits of the Project to the Tribe." FEIS at RTC-39. But unsupported claims about increased costs to the project proponent do not justify preemptive dismissal of an apparently effective mitigation measure.

110. NEPA requires a full discussion of the potential impacts of the Project, and possibilities for mitigation. The FEIS must include this possible mitigation so that the public and decisionmakers can at least weigh the benefits of its inclusion against the claimed economic costs of its rejection.

F. Visual Impacts

111. The Project includes sixty wind turbines that will reach up to 604 feet in height and occupy prominent positions on mountainous and high desert terrain including ridgelines that will be visible to the public for miles. These enormous, unsightly structures will mar the natural beauty of this wild and remote rural landscape. According to the Project Description in the FEIS, the turbine hub height above ground will extend up to 374 ft (114 meters) – 74 feet longer than a football field – and the rotor blade diameter will be up to 460 feet, meaning the blades would be approximately 230 feet long. FEIS Appendix B at B-2. Adding the maximum hub height to the blade radius yields a maximum height of 604 ft, not 586 ft as the FEIS claims. FEIS at 7. That 18-foot difference equates to almost two stories of additional height. And whether the turbines are 586 feet or 604 feet, they are exponentially larger than any other manmade structure in the area.

112. Seven of these wind turbines will loom over the Tisdales' adjacent ranch, substantially degrading their enjoyment of their bucolic rural property, and many other turbines would harm residents of other adjacent neighborhoods including Tribal members whose homes are likewise directly impacted. By way of comparison, the turbines are twice the 301-foot height of the Statue of Liberty, and even larger than the enormous One American Plaza building in downtown San Diego. The turbines would completely dwarf all surrounding natural landmarks, and dominate and destroy the view from surrounding viewpoints, including the Tisdales' ranch, irretrievably degrading the existing natural beauty of this rural area. Vision Scape Imagery has prepared simulations showing the impact of these gigantic turbines from both the Tisdales' property and other viewpoints, which are attached as Exhibit 3 to their March 11, 2020 FEIS comments. For example,

the views from Tribal offices, including the Tribal health clinics and education center, and from Tribal members' homes, would be degraded as documented in the visual simulations attached to the Tisdales' March 11, 2020 FEIS comments.

113. Additionally, numerous large industrial facilities will be sited along the border of the Tisdales' ranch, substantially degrading their beautiful view of the surrounding land. Two photos that depict the view of the Reservation from the Tisdales' ranch are attached as Exhibit 1 to Ms. Tisdale's March 11, 2020 FEIS comments. While the FEIS admits that the Project's visual impacts will be significant and unavoidable, it still understates those impacts. FEIS at 120-125.

114. The FEIS claims that mitigation measures will help reduce the visual impacts, but nothing can change the fact that the Project will shatter the previously dark night skies with blinking red lights visible for miles, and destroy the daytime view from the surrounding viewpoints, including the Tisdales' property where they have built their lives, and where they plan to enjoy their retirement years with their children, grandchildren, and great-grandchildren. The FEIS' failure to accurately assess the visual impacts of the Project violates NEPA's informational purposes.

G. Wildfire Impacts

115. Wildfire risk in the Project area is dangerously high due to heavy vegetation, aridity, high summer and fall temperatures, and frequent high winds, prompting its classification by CalFire as a "'High' to 'Very High' Fire Hazard Severity Zone." This risk is exacerbated by the Project and is a danger that also threatens the Project's operation. The FEIS acknowledges that the Project "would increase the potential for a wildfire and could impact the public and the environment by exposure to wildfire due to construction and decommissioning activities and ground disturbance with heavy construction equipment." FEIS at 131, 132. But the FEIS' meager, three-paragraph discussion fails to detail the increased risks of fire–and the increased risk to firefighting–posed by the Project's *operation* as NEPA requires.

116. First, the FEIS fails to address the risk of wind-turbine fires that could occur

during Project operation, despite several comments mentioning this serious risk. The FEIS acknowledges that the Project "would increase the potential for a wildfire and could impact the public and the environment by exposure to wildfire *due to construction and decommissioning activities* and ground disturbance with heavy construction equipment." FEIS at 131 (emphasis added). But the FEIS fails to disclose and discuss the far greater risks of ignition – and increased risks to firefighting – posed by the Project's *operation*. *Id.* It is well established that wind turbine motors can overheat due to mechanical wear or failure, ignite from the excessive heat, and then disperse flaming debris onto surrounding vegetation. The FEIS never addresses this known hazard. Instead of disclosing and discussing the substantial risk of ignition from operation, the FEIS speculates that a non-existent Campo Fire Protection Plan might be developed in the future to mitigate any fire risks. *E.g.* FEIS at RTC-230. But the FEIS' failure to analyze the Project's operational fire risks, and its reliance on an undeveloped mitigation plan, leave the public and decisionmakers in the dark. NEPA requires factual disclosure, not vague promises.

117. Second, the FEIS fails to address the fact that the Project's wind turbines and meteorological towers would directly interfere with both ground and aerial firefighting safety and effectiveness, due to several factors. These factors include the electrification of the 600-foot towers and power lines, which poses the risk of electrocution to firefighters; the towers' and lines' blockage of aerial application of retardant over nearby areas, particularly in smoky conditions; the fact that smoke can act as a conductor due to its high carbon content and transmit electricity from the towers and lines to the ground; and firefighters' inability to use solid-stream water applications around energized towers and lines due to the capacity of water to transmit electricity.

118. The impairment of aerial firefighting bears particular emphasis. Helicopters perform firefighting operations between 200 and 500 feet above ground level, to assure that their water drops are accurate and not dissipated by height, wind and evaporation. Similarly, air tankers and their lead planes usually fly at altitudes of 150 to 1,000 feet above ground surface during firefighting operations to minimize wind drift and maximize

accuracy and effective concentration of the retardant. But none of these operations can be performed safely and effectively where turbines and meteorological towers block those operations by jutting up to 600 feet into the airspace, particularly along ridge tops, as this Project allows. This hazard is exacerbated when smoky conditions impair visibility during firefighting.

119. The FEIS ignores these impacts on fire ignition and suppression, and therefore fails to take the required hard look at the Project's wildfire impacts.

H. Impacts on Aviation

120. The FEIS fails to adequately address the Project's impacts on military, commercial and private aviation in the area. These impacts concern both aviation safety and the wildfire hazard posed by aerial collisions with the Project's turbines. This hazard is so great, it caused the Federal Aviation Administration ("FAA") to declare some of the Project's towers to be hazards to aviation–a fact the FEIS never reveals. Indeed, in response to Plaintiffs' August 17, 2020 Petition for Review, the FAA has revoked its approval of the Project, citing "errors in the aeronautical study process." FAA Ruling on Petition for Review of Backcountry Against Dumps, Donna Tisdale, and Joe ("Ed") Tisdale regarding No Hazard to Air Navigation Determinations for 72 Turbines Associated With the Campo Wind Project, dated December 2, 2020, at p. 1.

121. The FEIS claims that the Project "would comply with any applicable FAA requirements to ensure that FAA, military, and emergency responders navigate the area safely" (FEIS at RTC-206), but never discloses, let alone analyzes, those requirements and the Project's violations of them. *Id*. It ignores the Project's impacts to the military's heavy use of the area and to the air traffic control and radar operated by the Departments of Defense and Homeland Security, as documented by the FAA. *See, e.g.,* Https://oeaaa.faa.gov/oeaaa/external/gisTools/gisAction.jsp (Coordinates 32 41 28.72 N and 116 19 19.52 W).

122. The FAA's review found the Project posed impacts "highly likely to Air Defense and Homeland Security radars," and therefore concluded that an "*Aeronautical*

study [was] required." (Emphasis added.) This "required" aeronautical study should have been disclosed and discussed in the FEIS. The FEIS' vague and baseless claims of future compliance with "any applicable" FAA requirements cannot substitute for actual analysis of those very serious impacts. Plaintiffs alerted Defendants of Plaintiffs' concerns regarding the FAA's findings, but to no avail. Defendants never took the hard look that NEPA requires.

I. Socioeconomic Impacts

123. The Project would harm use and enjoyment of their homes and ranches by residents of both the Reservation and the surrounding rural community of Boulevard. Many of those residents are retired and elderly, on fixed or limited incomes, and have lived in the area for decades. For example, Mr. Tisdale has lived and ranched at Morning Star Ranch for 55 years, and Ms. Tisdale, a fourth generation California rancher and co-owner of Morning Star Ranch, has been there with him for 43 years. The Tisdales' home, ranch, and rental property represent the hard-earned savings of their lifetimes, and would, if the Project is built, suffer a substantial diminution in value – along with many other properties in the surrounding area – should the Project proceed.

124. The FEIS concludes that "the presence of wind turbines" is not a factor in changes in property values, and that the Project's impacts "would be insignificant." FEIS at RTC-44. These claims are false. Many residents of other rural communities have left their homes – often suffering severe economic losses – after wind turbines began operating nearby. The incessant noise, vibration and flashing night lights have interfered with sleep and destroyed enjoyment of their homes. So too here, the Project will cause significant impacts on the Tisdales and their neighbors in the community. The Project will replace the currently pristine view outside the Tisdales' home and seen through their windows with a gigantic, ugly, industrial nightmare of towering and whining wind turbines. Those turbines will dramatically increase audible and inaudible sound pressures, and create shadow flicker for hundreds of hours per year, causing physical discomfort and annoyance for the Tisdales and others present on their property. It will

replace their stunning dark night sky with its brilliant blaze of stars with annoying, constantly blinking red lights and noisy, whirling 230-foot long turbine blades.

125. While admitting that "environmental and physical changes may affect property values within an immediate distance of a wind project" the FEIS declines to attribute any significance to this effect, and instead dismisses these impacts as having only a speculative impact on property value. FEIS at RTC-45. This conclusion completely ignores the overwhelming evidence of property value destruction before the agency and fails to heed NEPA's informational purpose.

The FEIS Improperly Defers Analysis of Mitigation Measures

126. NEPA mandates that mitigation measures "'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Carmel*, 123 F.3d at 1154 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)); *Laguna Greenbelt, Inc. v. U.S. Department of Transportation*, 42 F.3d 517, 528 (9th Cir. 1994)). "'[A] mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.'" *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998). An FEIS may not defer assessment of their effectiveness. Otherwise, it cannot serve its purpose of "evaluating whether anticipated environmental impacts can be avoided." *South Fork*, 588 F.3d at 727 (recognizing that "'[f]easibility and success of mitigation would depend on site-specific conditions and details of the mitigation plan'").

127. Here, the FEIS improperly defers formulation of several important mitigation plans until the Project is under construction, improperly delaying analysis of their effectiveness. The FEIS' deferred plans include, for example, mitigations for QCB (FEIS Appendix P at P-4), storm-water (FEIS at 15, RTC-180), fire risks (FEIS at 131) and a HMMP (FEIS at 128, RTC-181). Each of these deferrals omits all, let alone "sufficient," "detail to ensure that environmental consequences have been fairly evaluated." *South Fork*, 588 F.3d at 727; *Carmel*, 123 F.3d at 1154. Contrary to NEPA, these supposed mitigations present no detail whatsoever, and instead merely call for future development

and implementation of broad concepts, such as reducing avian species impacts or noise. Without site-specific performance standards, it is impossible to analyze their effectiveness. *South Fork*, 588 F.3d at 727; *Carmel*, 123 F.3d at 1154.

128. The FEIS references these plans as a means of mitigating adverse consequences of the Project, but fails to provide *any specific information* as to what these future plans might contain. This is not a situation where otherwise complete mitigation measures leave room for minor *adjustments* as the project progresses. Rather, many of these measures are left entirely undeveloped. The FEIS' failure to "ensure that environmental consequences have been fairly evaluated" violates NEPA. *Carmel*, 123 F.3d at 1154; *South Fork*, 588 F.3d at 727.

Conclusion

129. For each of the foregoing reasons, the FEIS is deficient and the Project approval must be set aside. By approving the Campo Wind Project based on an inadequate EIS, Defendants violated NEPA, 42 U.S.C. section 4321 *et seq.,* and its implementing regulations, 40 C.F.R. section 1500 *et seq*. And by approving the Project without complying with NEPA, Defendants failed to proceed in accordance with law in violation of the APA, 5 U.S.C. sections 706(2)(A) and (D).

SECOND CLAIM FOR RELIEF

(Violation of the Migratory Bird Treaty Act)

(Against All Defendants)

130. The paragraphs set forth above and below are realleged and incorporated herein by reference.

131. The Migratory Bird Treaty Act as amended ("MBTA"), 16 U.S.C. section 701 *et seq*., directs that unless otherwise permitted,

> it shall be unlawful at any time, by any means or in any manner, to . . . take [or] kill . . . any migratory bird . . . nest, or egg of any such bird . . . included in the terms of the conventions between the United States and Great Britain . . . the United Mexican States . . . the government of Japan . . . and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments . . . ."

16 U.S.C. §703.

132. The MBTA applies with equal force to federal agencies as it does to private individuals. *Humane Society of the U.S. v. Glickman* ("*Humane Society*"), 217 F.3d 882, 884-88 (D.C. Cir. 2000) ("There is no exemption in [16 U.S.C.] § 703 for . . . federal agencies."); *American Bird Conservancy, Inc. v. F.C.C.* (*"American Bird Conservancy"*), 516 F.3d 1027, 1031 (D.C. Cir. 2008) ("the MBTA applies to federal agencies"). And, it may be enforced against the federal government by private citizens through the APA. *Id*. "[A]nyone who is 'adversely affected' by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action." *City of Sausalito v. O'Neill* ("*City of Sausalito*"), 386 F.3d 1186, 1203-04 (9th Cir. 2004) (citing *Seattle Audubon Soc'y v. Evans,* 952 F.2d 297, 302-03 (9th Cir. 1991); *Humane Society*, 217 F.3d at 888.

133. Federal agencies like the United States Department of the Interior and BIA must ensure that their actions do not result in violations of the MBTA. *City of Sausalito*, 386 F.3d at 1225; *Humane Society,* 217 F.3d at 885; *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-39 (1992); Exec. Order No. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed.Reg. 3853 (Jan. 17, 2001). Here, however, Defendants violated the MBTA by approving the Project knowing that (1) the Project would foreseeably kill and otherwise take migratory birds and (2) Defendants had unlawfully adopted and would continue to adhere to the position that they would not require either the Tribe or Terra-Gen to obtain a takings permit under the MBTA for the Project as necessary to assure that the foreseeable takings of migratory birds are avoided to the extent possible.

134. An MBTA permit is required for the Project because it will foreseeably take migratory birds. The FEIS admits that some "171 avian species were detected in the [Project's] biological study area," including many raptors such as golden eagle, Cooper's hawk, red-tailed hawk, northern harrier and American kestrel, and other sensitive species such as California condor, long-eared owl, and burrowing owl. FEIS at 39 and Appendix H at 99-103. Raptors, crows and species allied with them are among those at greatest risk of being killed, because they are the birds most frequently observed in the rotor-sweep

zone, where the spinning blades collide with and kill birds. FEIS at RTC-28. Other migratory bird species inhabiting or using the Project site included the California horned lark, the loggerhead shrike, the gray vireo, the least Bell's vireo, the southwestern willow flycatcher, the olive-sided flycatcher, the yellow warbler, the Bell's sage sparrow, the southern California rufous-crowned sparrow, the Vaux's swift and the tricolored blackbird. FEIS Appendix H at 96-100.

135. As the FEIS recognizes – albeit in language that attempts to blame the victim – many "special-status bird species have the potential to collide with towers and transmission lines and have the potential to be electrocuted by the transmission towers associated with the Tule Wind Project, resulting in injury or mortality." FEIS at 88 ("Direct effects on avian species . . . may include collisions with wind turbines and Met towers, and electrocution from overhead transmission lines"); FEIS Appendix H at 119 (direct impacts of the project will "include continuing operational impacts such as avian and bat collisions with wind turbines"), 136 (the Project will potentially cause golden eagle collision with turbines), 137 ("Red-tailed hawks, turkey vultures, and common ravens . . . have the greatest risk of collision with Project turbines. . . [but] many species were observed on site and collision is possible with any of the species"), 139 ("impacts to bats could result in mortality or injury due to collisions at wind turbines). Raptors such as golden eagles are particularly at risk because they necessarily look down rather than ahead when they are hunting their ground-dwelling prey (such as squirrels), and thus can unknowingly fly directly into the path of the rotor blades, which reach speeds of up to 200 mph at their tips.

136. Furthermore, in addition to the direct killing of these birds, the FEIS admits that wind turbines create "a behavioral avoidance area, thereby establishing a barrier in the aerial habitat used by birds and bats." FEIS at 88; FEIS Appendix H at 126. This displacement of birds from their nesting and foraging habitat – thereby directly harming or killing the displaced birds – also constitutes a take under the MBTA. 16 U.S.C. §703.

137. Despite the fact that the Project is likely to kill migratory birds during both

the construction and operation phases, Defendants have not applied for or secured any permits for the Project under the MBTA. FEIS at 88 ("Direct effects on avian species protected under the Migratory Bird Treaty Act resulting from construction and operations of Alternative 1 [the approved Project] may include collisions with wind turbines and Met towers, and electrocution from overhead transmission lines"), 90-91 ("both build alternatives' construction and operations would result in adverse biological resource effects related to . . . migratory birds protected by the Migratory Bird Treaty Act"). And while Defendants have listed compliance with the MBTA as a potentially required permit, nowhere in their FEIS nor in their ROD is there any requirement that the Project applicant obtain any MBTA permit. FEIS at 2.

138. Defendants refused to obtain, or to require the Tribe or Terra-Gen to obtain, an MBTA takings permit despite their knowledge that the Defendant United States Department of the Interior has, since at least December 22, 2017, taken the unwavering position that "the Migratory Bird Treaty Act does not prohibit incidental take" of migratory birds. Interior Solicitor Opinion M-37050, adopted pursuant to Interior Secretary Order 3345 on December 22, 2017 (capitalization altered). Pursuant to this position, Defendants would never apply for, let alone issue, a taking permit under the MBTA for the foreseeable takings of migratory birds due to the construction and operation of wind turbine energy projects such as the Campo Wind Project. Defendants' adoption of Opinion M-37050 reversed the Interior Solicitor's previous position, set forth in Opinion M-37041, entitled "Incidental Take Prohibited Under the Migratory Bird Treaty Act," that held that the incidental take of migratory birds without a taking permit was prohibited by the MBTA.

139. Defendants have continued to take the position that the MBTA does not prohibit the take of migratory birds as a result of the construction and operation of wind energy projects, and thus does not require that a take permit for wind energy projects be obtained before such projects may be constructed and operated, despite the judgment and injunction entered by the Federal District Court for the Southern District of New York in

the matter *Natural Resources Defense Council v. U.S. Dep't of the Interior*, 2020 WL 4605235, on August 11, 2020 vacating M-37050 specifically on the grounds that it violated the MBTA. District Judge Valerie Caproni held that the MBTA's prohibition against the killing of migratory birds "by any means or in any manner" means exactly what it says and says exactly what it means: "Any means of killing is a violation, which plainly includes . . . building wind turbines . . . . ." 2020 WL 4605235 at *10.

140. On October 8, 2020, the Department of the Interior filed its notice of appeal from Judge Caproni's judgment, confirming its intent to continue to interpret the MBTA's prohibition against the killing of migratory birds "by any means or in any manner" not to apply to activities such as the authorization of wind turbines that foreseeably, but only incidentally, kill migratory birds.

141. On January 7, 2021, the Department of the Interior further confirmed its intent to continue to interpret the MBTA's prohibition against the killing of migratory means by authorizing wind turbines by publishing its Final Rule formally adopting its position that the MBTA does not prohibit the incidental take of migratory birds as a regulation codified in Title 50 of the Code of Federal Regulations, Part 10. 86 Federal Register 1134 (January 7, 2021).

142. Consequently, when Defendants approved the Campo Wind Project without first applying for a take permit under the MBTA, or requiring the Tribe or Terra-Gen to obtain a take permit under the MBTA, Defendants knowingly participated in the authorization and implementation of a project that would result in the foreseeable and inevitable deaths of migratory birds without any possibility that the project would ever receive a take permit under the MBTA.

143. By failing to first obtain, or require that the Tribe or Terra-Gen obtain, an MBTA taking permit before approving the Project, and thereby authorizing the unpermitted taking of migratory birds, Defendants violated the MBTA (16 U.S.C. section 703). Because Defendants violated the MBTA, they failed to proceed in accordance with law as required by the APA, thus contravening the APA's prohibition against unlawful

agency action (5 U.S.C. section 706(2)(A) and (D)).

144. Defendants' unlawful authorization of illegal, permitless taking of migratory birds here is similar to the U.S. Fish and Wildlife Service's ("FWS'") "issu[ance of] a permit allowing a third party to operate a 'commercial enterprise' in a national wilderness area, based on a legally mistaken construction of the governing federal statute, which prohibited such commercial activities" in *Wilderness Society v. U.S. Fish & Wildlife Service* ("*Wilderness Society*"), 353 F.3d 1051, 1055 (9th Cir. 2003) (en banc). *Protect Our Communities Foundation v. Jewell* (*"POC I"*), 825 F.3d 571, 587 (9th Cir. 2016). The Ninth Circuit correctly distinguished the facts, and its ruling, in *Wilderness Society* from the facts, and its ruling, in *POC I*, where the plaintiffs had failed to demonstrate that the defendant BLM had based its approval on a "legally mistaken construction of the governing federal statute." *Id.* Here, Defendants have adopted a "legally mistaken construction" of the MBTA, as Judge Caproni held in *Natural Resources Defense Council v. U.S. Dep't of the Interior*, *supra*, 2020 WL 4605235.

145. Defendants nonetheless, and incorrectly, contend that their conduct here is lawful, arguing that under the Ninth Circuit's ruling in *POC I,* "an agency acting in a regulatory capacity as BIA has done here does not violate the MBTA or [Eagle Act] when it issues a regulatory approval," as "[s]uch a theory would constitute an 'attenuated secondary liability' that 'verges on argument for unbounded agency vicarious liability' and 'is too far removed from the ultimate legal violation to be independently unlawful under the APA.'" Federal Defendants' Memorandum in Support of Motion for Partial Dismissal filed January 4, 2021 (Dkt. 40-1) at 1:12-17, quoting *POC I* at 585-586.

146. *POC I* is distinguishable for three reasons. First, the Ninth Circuit was not aware that the Federal Defendants would *not* be enforcing the MBTA and the Eagle Act when it decided *POC I* and its successor, *Protect Our Communities Foundation v. LaCounte*, 939 F.3d 1029, 1044 (9th Cir. 2019) ("*POC II*"). To the contrary, the Ninth Circuit's rulings in both cases are predicated on that Court's express and emphatic

conviction that the Defendants *would* enforce these laws. Plaintiffs did not succeed with this claim in *POC I* because there, as the Ninth Circuit explained,

> BLM's ROD indicate[d] that its approval of the Project is *expressly contingent on Tule [Wind]'s compliance with* 'all applicable laws and regulations,' *which in this case includes the MBTA and the Eagle Act,* as well as the securing of 'all necessary local, state and Federal permits, authorizations and approvals.

POC I, 825 F.3d at 587 (emphasis added). Likewise in *POC II*, the Court relied on the fact that "the ROD said that Tule [Wind, LCC, the project developer] would comply with BIA requirements for approval [of Eagle Act permits]" and "the ROD confirms that Tule *must comply* with 'any requirements for an eagle take permit under the [Eagle Act]' and spells out the consequences of noncompliance." 939 F.3d at 1043 (emphasis added). Based on these statements, it appears that the Ninth Circuit would agree with Plaintiffs here that permits under these laws *are required* for the incidental take of protected birds by the Campo Wind Project. Indeed, the *POC II* Court was emphatic in confirming that "*[o]f course, Tule must comply* with [the Eagle Act] at all times during construction and operation of the project," and that plaintiffs' legitimate concerns about protecting these birds "can be addressed through the [Eagle Act] permitting process." *Id*. at 1044 (emphasis added).

147. Here, by contrast, in direct contravention of their previous representation to the Court, and contrary to the express "compliance with law"premise that animated the Ninth Circuit's rulings in *POC I* and *POC II*, Defendants have not required, and will not require, the Tribe's and Terra-Gen's compliance with the MBTA and the Eagle Act because the Department of the Interior reversed its previous interpretation of the MBTA. It no longer takes the position that MBTA permits are required for incidental takings of migratory birds. To the contrary, as explained above, it takes just the opposite position: it insists that *no* takings permits are required for "incidental" takings by wind energy projects and the like.

148. The second reason that the *POC I* and *II* cases are distinguishable is that Defendants assume far more than a mere "regulatory role" in supervising the Tribe's

development of this energy project on its Reservation. The Ninth Circuit had understood, and so held, that in *POC I* and *II* the agency defendants and officials acted in a "purely regulatory capacity." *POC I*, 825 F.3d at 585, 586; *POC II*, 939 F.3d at 1043 ("'the APA does not target regulatory action [by an agency] that permits a third-party grantee . . . that only incidentally leads to subsequent unlawful conduct by that third party,'" quoting from *POC I*). But here, Defendants along with the Tribe and Terra-Gen are all participating in the unlawful activity. Defendants both *hold title as trustee* and *manage* the Tribe's "Indian Reservation lands held in trust by the federal government," which are "administered by the Bureau of Indian Affairs (BIA)." BIA, Campo Wind Project, Draft Environmental Impact Statement ("DEIS") , Appendix C, "Regulatory Settings," p. C-1.

149. Here, Defendants do not merely issue regulatory approvals as was the case with the Bureau of Land Management in *POC I* and was assumed without analysis to be the case with the BIA in *POC II*. Instead, by law Defendants exercise broad discretion both in their fiduciary role as the trustee for the Tribe, and under applicable statutes and regulations in selecting, developing and managing land uses on the Reservation. Under settled Supreme Court jurisprudence, the United States Government (including most directly Defendants Secretary of the Interior and BIA and their officials) bears

> the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited [Native American] people. . . . Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation v. United States (*"Seminole Nation"*), 316 U.S.286, 296, 62 S.Ct. 1049, 1054 (1942) (footnote omitted); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1101 (8th Cir. 1989) (repeating this quotation from *Seminole Nation* and affirming BIA's duty to clean up and maintain solid waste disposal sites on Reservation). When managing trust lands for Indian tribes, BIA assumes responsibility for assuring that all applicable laws are followed and bears liability if it fails to fully protect the tribes'

interests and welfare. *Id.*

150. This strict and exacting fiduciary standard is reflected and carried forward in the comprehensive, parallel statutory and regulatory framework that governs Defendants' approval of the subject Campo Wind Project lease. Under 25 U.S.C. section 415(a), Defendant Secretary of the Interior through BIA exercises broad discretion in reviewing and approving any leases of Indian trust land "for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases." "Prior to approval of any lease . . . pursuant to this section, the Secretary of the Interior shall:"

> first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; *and the effect on the environment* of the uses to which the leased lands will be subject.

Id. (emphasis added).

151. In exercising their managerial responsibility under this statutory authorization, Defendants must observe and comply with a detailed regulatory scheme codified in 25 C.F.R. Part 162. 77 Fed.Reg. 72440-72509 (November 28, 2012). The "commercial leasing regime created for trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government," and this statute and its implementing regulations thus serve to "define the contours of the United States' fiduciary responsibilities." *Brown v. U.S.*, 86 F.3d 1554, 1563 (Fed. Cir. 1996) (emphasis removed).

152. The governing regulations for wind and solar resource ("WSR") leases mandate that the lease include provisions requiring that "[t]he lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Consequently, "the lessee must agree not to use any part of the leased premises for unlawful purposes." *Rosebud Sioux Tribe v. U.S.*, 75 Fed.Cl. 15, 28 (Ct. Cl. 2007). Importantly, "[t]he obligations of the lessee and its

sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).

153. Defendants' supervisorial duties as trustee of the lands included within the Campo Reservation and the subject lease are thus akin to the managerial role in which the National Marine Fisheries Service ("NMFS") functioned in overseeing the activities of the longline fishery in *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 2013 WL 4511314 at *6(D. Haw. 2013). There, as the Ninth Circuit pointed out in *POC I*, NMFS "occup[ied] a more directly supervisorial position over a regulated third party than that of a typical agency, and certainly that of the [Bureau of Land Management] vis-a-vis Tule [Wind, LLC]," the wind energy project applicant in *POC I*. *POC I,* 825 F.3d at 586. For that reason, the Ninth Circuit distinguished *Turtle Island*, in which NMFS had properly applied to FWS for a takings permit under the analogous Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. ("MMPA"). *Id*. So too here, Defendants function in both a supervisorial as well as a regulatory capacity in overseeing the Tribe's development of its Reservation, and thus this case is, for the same reason as was *Turtle Island*, distinguishable from *POC I*.

154. Similarly, Defendants' managerial responsibilities in supervising the Tribe's development of the Reservation are more analogous to the supervisorial position that NMFS occupied with respect to management of the California gray whale and its hunting by the Makah Tribe in *Anderson v. Evans*, 371 F.3d 475, 480, 486 (9th Cir. 2004). There, the Ninth Circuit set aside NMFS's improper issuance of a five-whale take permit quota to the Makah Tribe in violation of NEPA and the MMPA, a statute much like the MBTA and the Eagle Act in that it forbade the take of marine mammals except by permit. *Id*. at 480, 486 ("explaining that the agency environmental assessment unlawfully authorized a 'quota for the "land[ing]" of the gray whales'"(*POC I*, 825 F.3d at 587)). There, as here, the agency defendants perform both managerial as well as purely regulatory duties, and thus the MBTA's take prohibition may be enforced against them directly.

155. Because here Defendants serve in both a regulatory capacity and a supervisorial or managerial role in overseeing the Tribe's development of its Reservation, the rationale for not enforcing the MBTA's and Eagle Act's take prohibitions against the defendant agency in the *POC* cases is inapplicable.

156. The third reason that the *POC I* and *II* cases are distinguishable is that unlike in those cases, here there is no suggestion that Plaintiffs seek to create "agency vicarious liability" as a substitute remedy for the wind energy operator's failure to secure required permits. *POC I*, 825 F.3d at 586. To the contrary, in this case Plaintiffs ask the Court to enforce Defendants' *own*, and *explicit,* duty to abide by the regulation that governs their conduct, pursuant to the APA's command that the courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A). It is axiomatic that agencies must abide by their own regulations, as the APA specifically requires agency compliance with the "procedure required by law." 5 U.S.C. § 706(2)(D).

157. As noted, the procedural regulations governing Defendants' approval of wind and solar resource ("WSR") leases mandate that "all WSR leases must include the following provisions : . . . (3) The lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Thus, Defendants have a duty to include in the Tribe's lease with Terra-Gen a requirement that the lessee "must comply with all applicable laws . . . ." 25 C.F.R. § 162.542(c)(3). Those "applicable laws" include the MBTA. And, to assure that Defendants have clear authority to enforce these required lease terms, the governing regulations provide further that "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).

158. Contrary to the explicit requirement of this governing regulation mandating that wind energy leases "comply with all applicable laws," Defendants have adopted a policy expressly refusing to enforce the MBTA's prohibitions against the unpermitted

taking of migratory birds "by any means or in any manner," including incidental but foreseeable takings by wind energy projects. 16 U.S.C. § 703. Defendants' unlawful policy renders compliance with the MBTA impossible, and thereby foreseeably causes the unpermitted taking of migratory birds in violation of the MBTA.

159. Accordingly, Defendants' approval of the Campo Wind Project without requiring a take permit for the foreseeable taking of migratory birds violates the MBTA. And, because Defendants violated the MBTA, they failed to proceed in accordance with law as required by the APA, 5 U.S.C. sections 706(2)(A) and (D).

THIRD CLAIM FOR RELIEF

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

(Against All Defendants)

160. The paragraphs set forth above and below are realleged and incorporated herein by reference.

161. The Bald and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668, sets forth criminal and civil prohibitions against the taking of golden eagles. Subdivision (b) makes it a civil offense to "take . . . in any manner. . . any golden eagle." 16 U.S.C. §668(b). Under the Eagle Act, "'take' includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." 16 U.S.C. §668c; 50 C.F.R. §22.3 ("Take includes also pursue, shoot, shoot at, poison, wound, kill, capture, collect, or molest or disturb"). Regulations adopted pursuant to the Eagle Act direct that no person may "take . . . any golden eagle . . . except as allowed by a valid permit issued under this part [22 of 50 C.F.R.]." 50 C.F.R. §22.11.

162. As discussed above, the FEIS recognizes that Project operation would almost assuredly kill birds, including golden eagles. The FEIS admits that some "171 avian species were detected in the [Project's] biological study area," including many raptors such as golden eagles, all of which will be exposed to potential collision with the turbines. FEIS at 39 and 136 (the Project will potentially cause golden eagle collision with turbines); DEIS Appendix H at 99-103. Raptors including golden eagles are among

those at greatest risk of being killed, because they are the birds most frequently observed in the rotor-sweep zone, where the spinning blades collide with and kill birds. FEIS at RTC-28. And, because raptors including golden eagles are typically looking down as they glide through the air hunting for prey on the ground, they do not see the spinning blades of wind turbines in front of them as they approach the turbines. It is thus a near certainty that the Project will "take" golden eagles and thereby violate the Eagle Act. And while Defendants have stated that they will require preparation of a BBCS (ROD 37-38), they also admit that even with the BBCS, avoidance of protected species including the golden eagle may not be feasible. FEIS Appendix H at 142.

163. Defendants violated the Eagle Act by approving the Project knowing that (1) the Project would foreseeably kill and otherwise take eagles and (2) Defendants would not require Terra-Gen or the Tribe to obtain a takings permit under the Eagle Act for the Project as necessary to assure that the foreseeable takings of eagles are avoided to the extent possible. Despite the fact that the Project is likely to kill eagles, Defendants have not applied for or secured any permits for the Project under the Eagle Act, nor required Terra-Gen or the Tribe to do so, nor indicated any intent to do so.

164. Consequently, when Defendants approved the Campo Wind Project, Defendants participated in the authorization and implementation of a project that would result in the foreseeable and inevitable deaths of golden eagles without first applying for a take permit under the Eagle Act, or requiring Terra-Gen or the Tribe to obtain a take permit under the Eagle Act.

165. Defendants' unlawful authorization of illegal, permitless taking of golden eagles here is similar to the FWS' "issu[ance of] a permit allowing a third party to operate a 'commercial enterprise' in a national wilderness area, based on a legally mistaken construction of the governing federal statute, which prohibited such commercial activities" in *Wilderness Society,* 353 F.3d at 1055. *POC I*, 825 F.3d at 587. As noted, the Ninth Circuit correctly distinguished the facts, and its ruling, in *Wilderness Society* from the facts, and its ruling, in *POC I*, where the plaintiffs had failed to demonstrate that

the defendant BLM had based its approval on a "legally mistaken construction of the governing federal statute." *Id.* Here, Defendants have adopted a "legally mistaken construction" of the Eagle Act, just as they had adopted a mistaken construction of the MBTA as Judge Caproni pointed out in *Natural Resources Defense Council v. U.S. Dep't of the Interior*, *supra*, 2020 WL 4605235.

166. By failing to first obtain, or require that the Tribe or Terra-Gen obtain, an Eagle Act permit before approving the Project, and thereby authorizing the unpermitted taking of golden eagles, Defendants violated the Eagle Act. Because Defendants violated the Eagle Act, they failed to proceed in accordance with law as required by the APA, thus contravening the APA's prohibition against unlawful agency action (5 U.S.C. section 706(2)(A) and (D)).

167. As noted, Defendants' conduct in this case is distinguishable from that of the agency defendants in *POC I* and *II*, for three reasons. First, the Ninth Circuit was not aware that the Federal Defendants would *not* be enforcing the MBTA and the Eagle Act when it decided *POC I* and its successor, *POC II*. To the contrary, the Ninth Circuit's rulings in both cases are predicated on that Court's express and emphatic conviction that the Defendants *would* enforce these laws. Plaintiffs did not succeed with this claim in *POC I* because there, as the Ninth Circuit explained,

> BLM's ROD indicate[d] that its approval of the Project is *expressly contingent on Tule [Wind]'s compliance with* 'all applicable laws and regulations,' *which in this case includes the MBTA and the Eagle Act,* as well as the securing of 'all necessary local, state and Federal permits, authorizations and approvals.

POC I, 825 F.3d at 587 (emphasis added). Likewise in *POC II*, the Court relied on the fact that "the ROD said that Tule [i.e., Tule Wind, LLC, the project developer] would comply with BIA requirements for approval [of Eagle Act permits]" and "the ROD confirms that Tule *must comply* with 'any requirements for an eagle take permit under the [Eagle Act]' and spells out the consequences of noncompliance." 939 F.3d at 1043 (emphasis added). Based on these statements, it appears that the Ninth Circuit would agree with Plaintiffs here that permits under these laws *are required* for the incidental

take of protected birds by the Campo Wind Project. Indeed, the *POC II* Court was emphatic in confirming that "*[o]f course, Tule must comply* with [the Eagle Act] at all times during construction and operation of the project," and that plaintiffs' legitimate concerns about protecting these birds "can be addressed through the [Eagle Act] permitting process." *Id*. at 1044 (emphasis added).

168. Here, by contrast, in direct contravention of their previous representation to the Court, and contrary to the express "compliance with law" premise that animated the Ninth Circuit's rulings in *POC I* and *POC II*, Defendants have not required, and will not require, the Tribe's and Terra-Gen's compliance with the MBTA and the Eagle Act because the Department of the Interior has reversed its previous interpretation of the MBTA. It no longer takes the position that MBTA permits are required for incidental takings of migratory birds. To the contrary, as explained above, it takes just the opposite position: it insists that *no* takings permits are required for "incidental" takings by wind energy projects and the like, and has not required such permits under either the MBTA or the Eagle Act for the Project.

169. The second reason that the *POC I* and *II* cases are distinguishable is that here, Defendants assume far more than a mere "regulatory role" in supervising the Tribe's development of this energy project on its Reservation. The Ninth Circuit had understood, and so held, that in *POC I* and *II* the agency defendants and officials acted in a "purely regulatory capacity." *POC I*, 825 F.3d at 585, 586; *POC II*, 939 F.3d at 1043 ("'the APA does not target regulatory action [by an agency] that permits a third-party grantee . . . that only incidentally leads to subsequent unlawful conduct by that third party,'" quoting from *POC I*). But here, Defendants along with the Tribe and Terra-Gen are all participating in the unlawful activity. Defendants both *hold title as the trustee,* and *manage* the Tribe's "Indian Reservation lands held in trust by the federal government," which are "administered by the Bureau of Indian Affairs (BIA)." BIA, Campo Wind Project, Draft Environmental Impact Statement ("DEIS") , Appendix C, "Regulatory Settings," p. C-1.

170. Here, Defendants do not merely issue regulatory approvals as was the case with the Bureau of Land Management in *POC I* and was assumed (without analysis) to be the case with the BIA in *POC II*. Instead, by law defendants exercise broad discretion both in their fiduciary role as the trustee for the Tribe, and under applicable statutes and regulations in selecting, developing and managing land uses on the Reservation. As noted, under settled Supreme Court jurisprudence, the United States Government (including most directly Defendants Secretary of the Interior and BIA and their officials) bears

> the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited [Native American] people. . . . Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Seminole Nation, 316 U.S. at 296, 62 S.Ct. at 1054 (footnote omitted); *Blue Legs v. U.S. Bureau of Indian Affairs*, *supra*, 867 F.2d at 1101 (repeating the above quote from *Seminole Nation* and affirming BIA's duty to clean up and maintain solid waste disposal sites on Reservation). When managing trust lands for Indian tribes, Defendants assume responsibility for assuring that all applicable laws are followed and bear liability if they fail to fully protect the tribes' interests and welfare. *Id.*

171. As noted, this strict and exacting fiduciary standard is reflected and carried forward in the comprehensive, parallel statutory and regulatory framework that governs Defendants' approval of the subject Campo Wind Project lease. Under 25 U.S.C. section 415(a), Defendant Secretary of the Interior through BIA exercises broad discretion in reviewing and approving any leases of Indian trust land "for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases." "Prior to approval of any lease . . . pursuant to this section, the Secretary of the Interior shall:"

> first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring

> lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

Id.

172. As noted, in exercising their managerial responsibility under this statutory authorization, Defendants must observe and comply with a detailed regulatory scheme codified in 25 C.F.R. Part 162. 77 Fed.Reg. 72440-72509 (November 28, 2012). The "commercial leasing regime created for trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government," and this statute and its implementing regulations thus serve to "define the contours of the United States' fiduciary responsibilities." *Brown v. U.S.*, *supra*, 86 F.3d at 1563 (emphasis removed).

173. The governing regulations for wind and solar resource ("WSR") leases mandate that the lease must include provisions requiring that "[t]he lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Consequently, "the lessee must agree not to use any part of the leased premises for unlawful purposes." *Rosebud Sioux Tribe v. U.S.*, *supra*, 75 Fed.Cl. at 28. Importantly, "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).

174. As noted, Defendants' supervisorial duties as trustee of the lands within the Campo Reservation and the subject lease are thus akin to the managerial role in which the NMFS functioned in overseeing the activities of the longline fishery in *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, *supra*, 2013 WL 4511314 at *6. There, as the Ninth Circuit pointed out in *POC I*, NMFS "occup[ied] a more directly supervisorial position over a regulated third party than that of a typical agency, and certainly that of the [Bureau of Land Management] vis-a-vis Tule [Wind, LLC]," the wind energy project applicant in *POC I*. *POC I,* 825 F.3d at 586. For that reason, the Ninth Circuit distinguished *Turtle Island*, in which NMFS had properly applied to FWS

for a takings permit under the analogous Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq. ("MMPA"). *Id*. So too here, Defendants function in both a supervisorial as well as a regulatory capacity in overseeing the Tribe's development of its Reservation, and thus this case is, for the same reason as was *Turtle Island*, distinguishable from *POC I*.

175. Similarly, Defendants' managerial responsibilities in supervising the Tribe's development of the Reservation are more analogous to the supervisorial position that NMFS occupied with respect to management of the California gray whale and its hunting by the Makah Tribe in *Anderson v. Evans*, *supra*, 371 F.3d at 480, 486. There, the Ninth Circuit set aside NMFS's improper issuance of a five-whale take permit quota to the Makah Tribe in violation of NEPA and the MMPA, a statute much like the MBTA and the Eagle Act in that it forbade the take of marine mammals except by permit. *Id*. ("explaining that the agency environmental assessment unlawfully authorized a 'quota for the "land[ing]" of the gray whales'"(*POC I*, 825 F.3d at 587)). There, as here, the agency defendants perform both managerial as well as purely regulatory duties, and thus the Eagle Act's take prohibition may be enforced against them directly.

176. Because here Defendants serve in both a regulatory capacity and a supervisorial or managerial role in overseeing the Tribe's development of its Reservation, the rationale for not enforcing the MBTA's and Eagle Act's take prohibitions against the defendant agency in the *POC* cases is inapplicable.

177. The third reason that the *POC I* and *II* cases are distinguishable is that unlike in those cases, here there is no suggestion that Plaintiffs seek to create "agency vicarious liability" as a substitute remedy for the wind energy operator's failure to secure required permits. *POC I*, 825 F.3d at 586. To the contrary, in this case Plaintiffs ask the Court to enforce Defendants' *own*, and *explicit,* duty to abide by the regulation that governs their conduct, pursuant to the APA's command that the courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A). It is axiomatic that agencies must abide by their own regulations, as

the APA specifically requires agency compliance with the "procedure required by law." 5 U.S.C. § 706(2)(D).

178. As noted, the procedural regulations governing Defendants' approval of wind and solar resource ("WSR") leases mandate that "all WSR leases must include the following provisions: . . . (3) The lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Thus, Defendants have a duty to include in the Tribe's lease with Terra-Gen a requirement that the lessee "must comply with all applicable laws . . . ." 25 C.F.R. § 162.542(c)(3). Those "applicable laws" include the Eagle Act. And, to assure that the Defendants have clear authority to enforce these required lease terms, the governing regulations provide further that "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).

179. Contrary to the explicit requirement of this governing regulation mandating that wind energy leases include provisions requiring the lessee to "comply with all applicable laws," Defendants have failed to enforce the Eagle Act's prohibition against the unpermitted incidental taking of golden eagles by wind energy projects. Defendants' unlawful refusal to enforce the Eagle Act's prohibition against the unpermitted incidental takings of golden eagles by wind energy projects renders compliance with those statutes impossible, and thereby foreseeably causes the unpermitted taking of eagles in violation of the Eagle Act.

180. Accordingly, Defendants' approval of the Campo Wind Project without requiring a take permit for the foreseeable taking of golden eagles violates the Eagle Act. And, because Defendants violated the Eagle Act, they failed to proceed in accordance with law as required by the APA, 5 U.S.C. sections 706(2)(A) and (D).

PRAYER FOR RELIEF

181. As relief for the above violations of law, Plaintiffs respectfully request the following:

1. Adjudge and declare that Defendants' Project approvals – including their April 7, 2020 ROD authorizing the Project and the Land Lease, and their March, 2020 FEIS, violate NEPA, the MBTA, the Eagle Act and the APA;
2. Order Defendants to withdraw their Project approvals and their March 2020 FEIS until such time as Defendants have complied with NEPA, the MBTA, the Eagle Act, the APA and their implementing regulations;
3. Preliminarily and permanently enjoin Defendants from initiating or permitting any activities in furtherance of the Project that could result in any change or alteration of the physical environment unless and until the Defendants comply with the requirements of NEPA, the MBTA, the Eagle Act, and their implementing regulations;
4. Award Plaintiffs their reasonable attorneys' fees and costs and expenses incurred in connection with the litigation of this action pursuant to the Equal Access to Justice Act, 28 U.S.C. section 2412, or as otherwise provided by law; and
5. Any other relief that this Court deems just and proper.

Dated: January 22, 2021

Respectfully submitted,

/s/ *Stephan C. Volker*
STEPHAN C. VOLKER
Attorney for Plaintiffs BACKCOUNTRY AGAINST DUMPS, DONNA TISDALE, and JOE E. TISDALE