IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Ninth Circuit Docket No. 11-15799

WESTERN WATERSHEDS PROJECT and
CENTER FOR BIOLOGICAL DIVERSITY,
Plaintiffs-Appellants

v.

BUREAU OF LAND MANAGEMENT,
Defendant-Appellee,

and

SPRING VALLEY WIND LLC,
Defendant-Intervenor-Appellee.

On appeal from the United States District Court for the District of Nevada,
3:11-cv-0053-HDM-VPC

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL (ACTION REQUESTED BY APRIL 20, 2011)

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CIRCUIT RULE 27-3 CERTIFICATE

I, Kristin F. Ruether, certify the following facts to be true, pursuant to Circuit Rule 27-3(a)(3):

1. I am lead counsel for Plaintiffs-Appellants Western Watersheds Project and Center for Biological Diversity (collectively "WWP").

2. The parties' attorneys are as follows:

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3. An emergency injunction pending appeal is required under Fed. R. App. P. 8(a)(2) and Ninth Circuit Rule 27-3 to prevent ground-disturbing activities

associated with a major wind energy development on public lands, which have just begun and are causing irreparable ecological harm to sensitive species habitat in violation of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA").

Specifically, Defendant-Appellee Bureau of Land Management ("BLM") issued a Notice to Proceed on March 25, 2011, authorizing Defendant-Intervenor-Appellee Spring Valley Wind LLC ("SVW") to commence ground clearing, grading, and road construction for the Spring Valley Wind Project ("Project") in eastern Nevada. Ex. 4 (Notice to Proceed).

These ground-disturbing activities have commenced and are to continue through spring and summer 2011, as SVW proceeds with the work associated with preparing the site and installing wind turbines for the Project. *See* Ex. 27 (construction schedule submitted by SVW indicating continuous ground-disturbing work between April 2011 and June 2012).

The ground-disturbing activities will destroy and degrade native sagebrush-steppe habitat of the greater sage-grouse (*Centrocerus urophasianus*), a BLM-designated "sensitive" species, which the U.S. Fish and Wildlife Service recently found to "warrant" listing as an endangered or threatened species due to habitat and population declines. *See* 75 Fed. Reg. 13,910 (Mar. 23, 2010). Spring is sage-grouse breeding season, during which the birds mate and set up nests. *Id*. at

13,915. The site-clearing and road-blading will likely disrupt mating and cause nest abandonment, since noise interferes with mating, and the species avoids noise. *Id*. at 13,930. The ground-disturbing activity will also promote weed invasions, fragment habitat, destroy microbiotic soil crusts, and cause other irreversible ecological impacts that degrade sage-grouse habitat. *See* Declarations of Dr. John Tull and Katie Fite (Exs 7 & 8). The harm is irreparable because of the already-imperiled status of sage-grouse, the fact that the species has a low reproductive rate and recovers slowly, and the slow nature of vegetative recovery in this high desert environment. *See id*.

4. On April 4, 2011, WWP filed a motion in the district court for an injunction pending appeal pursuant to Fed. R. Civ. P. 62(c) and consistent with Fed. R. App. P. Rule 8(a)(1), and sought a shortened briefing schedule in view of the imminent irreparable harm and urgency of the relief sought. *See* Ex. 1 (Docket Sheet), Dkt. Nos. 66, 67. WWP requested that the court rule by April 8, 2011, or the motion would be deemed denied. *Id.* On April 5, 2011, the district court denied WWP's request to expedite briefing. *Id.,* Dkt. No. 68. No reason was stated. As of this date, the district court has not ruled upon the motion for injunction pending appeal, and accordingly it is deemed denied. All grounds advanced here for an injunction pending appeal were presented to the district court.

5. WWP respectfully moves this Court to issue an injunction pending appeal under Fed. R. App. P. 8, enjoining all Project ground-disturbing site preparation and construction activities from occurring until the Court can rule on this appeal of the district court's denial of WWP's motion for preliminary injunction. Because the ground-clearing activities are already authorized by BLM and have commenced, a ruling from this Court is respectfully requested by April 20, 2011 to prevent further irreparable harm to the environment.

6. I notified all counsel of record on April 4, 2011 (through the motion for injunction pending appeal) and by email on April 7, 2011, of WWP's intent to file this motion; and understand that BLM and SVW both oppose this motion. I spoke to BLM counsel on April 11, 2011, and learned that road-grading and site-clearing began on the Project site last week.

7. All exhibits to this motion were cited in the district court and are already in possession of counsel.

Executed this 12th day of April, 2011.

/s/ Kristin F. Ruether
Kristin F. Ruether
Attorney for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellees Western Watersheds Project and Center for Biological Diversity state that they are non-profit entities that have not issued shares to the public and have no affiliates, parent companies, or subsidiaries that have issued shares to the public.

Dated this 12th day of April, 2011.

s/ Kristin F. Ruether

_____

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Attorney for Plaintiff-Appellants

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question) because WWP challenged BLM's approval of the Project, a final agency action pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, as violating NEPA and implementing regulations.

WWP filed a motion for temporary restraining order and/or preliminary injunction on February 28, 2011 (Ex. 1, Dkt. No. 24), which the district court denied on March 28, 2011 (Ex. 2). This Court has jurisdiction to review the district court's denial of injunctive relief under 28 U.S.C. § 1292.

The Court also has jurisdiction to review the district court's related order (Ex. 3) striking the declaration of WWP's bat expert (Ex. 5), as that order is inextricably intertwined with the ruling denying injunctive relief and evaluation of the stricken declaration is necessary to ensure meaningful review of the interlocutory appeal over which this Court has jurisdiction. *Hendricks v. Bank of America*, 408 F.3d 1127, 1134 (9th Cir. 2005).

EXHIBIT LIST

EXHIBIT	DESCRIPTION	D. CT. DKT #
1	District Court Docket Sheet	n/a
2	District Court order denying WWP's motion for TRO/PI	62
3	District Court order granting SVW's motion to strike	61
4	Notice to Proceed (March 25, 2011)	69-1
5	Declaration of Merlin D. Tuttle	30
6	Second Declaration of Merlin D. Tuttle	58
7	Declaration of John C. Tull	31
8	Declaration of Katie Fite	32
9	BLM preliminary injunction response brief (excerpt)	52
10	Decision Record	45[1] (PAR 918)
11	FONSI	45 (PAR 927)
12	Environmental Assessment (excerpts)	45 (PAR 932)
13	BLM fast track energy projects webpage	29-3
14	Species Profile on Brazilian free-tailed bats	25-1
15	Southern Nevada Water Authority comments (Aug. 18, 2010) (excerpt)	29
16	National Park Service comments (Aug. 17, 2010)	28-8

[1] Docket No. 45 indicates BLM lodged its Partial Administrative Record ("PAR"), although the record itself was not electronically filed.

17	Nevada Department of Wildlife comments (Aug. 17, 2010) (excerpts)	45 (PAR 771)
18	Nevada Department of Wildlife comments (Jan. 25, 2010) (excerpts)	27
19	USFWS Comments (Jan. 20, 2010)	26-5
20	Email from BLM Field Office Manager Mary D'Aversa (July 8, 2010)	28-5
21	Email from SVW to BLM (June 24, 2009) re: not preparing EIS	29-5
22	Comments from BLM Nevada State Office Wildlife Biologist (June, 2010) (excerpt)	28-4
23	Meeting Minutes between BLM and FWS (Feb. 26, 2010)	27-1
24	Email from SVW to BLM (May 23, 2008) re: risk of EIS (excerpts)	25-6
25	Email from Ely BLM Dist. Manager John Ruhs (April 13, 2008) (excerpts)	25-5
26	USFWS comments (Fall, 2010) (excerpt)	29-2
27	Proposed Construction Schedule (March 15, 2011)	53-2
28	BLM Wind Programmatic Environmental Impact Statement Record of Decision (excerpt)	45 (PAR 53)

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INTRODUCTION

This Court should issue an injunction pending a ruling on WWP's interlocutory appeal. BLM unlawfully approved the first large-scale wind energy development on public lands in Nevada without preparing an environmental impact statement ("EIS") under NEPA. Construction and operation of the energy facility based on the faulty environmental analysis would cause significant harm to wildlife, including bats and sage-grouse. An injunction pending appeal is necessary because site construction and irreparable harm to wildlife have already begun.

BACKGROUND

This action challenges BLM's "fast track" approval of the industrial-scale Spring Valley Wind Energy Facility ("Project") on public lands in Nevada, near one of the largest bat caves in the Great Basin and within sage-grouse habitat. The Project as approved by BLM calls for some 75 wind turbines, each over 400 feet tall, as well as construction of 25 miles of roads, two gravel pits, nine miles of new fencing, and other assorted facilities sprawled over more than 7,500 acres of public land. *See* Ex. 12 at 3–7 (environmental assessment, or "EA").

The Project is located only four miles from the Rose Guano Cave, a regionally significant migratory bat roost for at least four species of bats – including over one million Brazilian (also called Mexican) free-tailed bats, a BLM-designated "sensitive" species. *Id*. at 10. Bats roosting in the cave exit nightly at

sundown and gain altitude "before turning south through the valley" towards agricultural fields south of the Project site. *Id.* at 10–11. This flight pattern takes them directly over the Project site. *See id*. at 2 (map).

Bats are uniquely vulnerable to mortality from wind turbines. Bats are killed both by being struck by moving blades and by barotrauma, which occurs when the change in pressure near spinning turbine blades causes the lungs of bats to suddenly expand and burst. *See* Ex. 5 ¶ 17 (Declaration of Dr. Merlin Tuttle). Recent research has shown that bats are actually *attracted* to wind turbines, which "may explain why bat fatality at wind turbines is far higher than for birds." *Id*. ¶ 24. "The reasons are not fully understood, but may include that bats perceive them as potential roost sites or rest stops when migrating, or that the light-colored turbines attract insects, which bats feed on." *Id*. Brazilian-free tailed bats are one of the most vulnerable bat species to mortality from wind turbines. *Id.* ¶¶ 14, 15.

The Project's site-clearing and road-blading will also destroy and degrade habitat for native wildlife, notably the greater sage-grouse—another BLM-designated "sensitive" species. The U.S. Fish and Wildlife Service ("FWS") recently determined that listing of sage-grouse under the Endangered Species Act is "warranted" (but "precluded" by other priorities), due to being threatened across their range by habitat fragmentation and loss, including from energy developments such as this one. *See* 75 Fed. Reg. 13,910 (Mar. 23, 2010).

The Project occurs within sage-grouse habitat and near several sage-grouse leks (mating areas). Ex. 12 at 8–9. Spring is sage-grouse breeding season, during which the birds mate and set up nests. 75 Fed. Reg. at 13,915. The site-clearing and road-blading will disrupt mating and cause nest abandonment because the birds avoids noise, which also interferes with mating. *Id*. at 13,930. Sage-grouse avoid tall structures, such that BLM admits the Project will create a 38,289-acre "avoidance area" for sage-grouse—far larger than the Project area itself—constituting 9% of sage-grouse habitat in Spring Valley. Ex. 12 at 17. These impacts mean that the species, already in decline, likely will be extirpated from the area. Ex. 7 ¶¶ 24–27 (Declaration of Dr. John Tull).

During the planning of the Project, experts from BLM and four other agencies urged that a full EIS be prepared, to assess these kinds of potentially significant environmental impacts. Biologists from FWS and Nevada Department of Wildlife ("NDOW") expressed concerns with the adequacy of the baseline data, environmental analysis, and mitigation. Exs. 17–19. The National Park Service ("NPS") informed BLM that an EIS should be prepared due to significant impacts on wildlife. Ex. 16. The Southern Nevada Water Authority ("SNWA") urged preparation of an EIS due to impacts to sage-grouse. Ex. 15.

No EIS was prepared for the Project, however, after SVW and higher levels of BLM pressured the local BLM office to avoid the "additional work and delays"

associated with an EIS. Exs 25, 21. BLM thus approved the Project based on an EA "tiered" to BLM's 2005 Programmatic Wind EIS ("PEIS"). As explained below, this PEIS did *not* address key risks posed by the Project, particularly to bats; and BLM did not adopt required mitigation measures from the PEIS in approving the Project.

On October 15, 2010, BLM issued a Decision Record approving the Project, a Finding of No Significant Impact ("FONSI"), and final EA. Exs 10–12. On March 25, 2011, BLM issued a "Notice to Proceed" authorizing SVW to commence site preparation and construction, including "clearing and grading" two sites totaling 30 acres and almost six miles of roads crossing the Project site. Ex. 4. This will be done "using bulldozers, road graders, or other standard earth-moving equipment." Ex. 12 at 3 (EA).

STANDARDS OF REVIEW

"The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, --, 129 S. Ct. 365, 374 (2008). An

injunction "is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," if the plaintiff "also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion, which occurs if the district court relied on "an erroneous legal standard or clearly erroneous finding of fact." *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc). Conclusions of law are reviewed *de novo*, and findings of fact are reviewed for clear error. *Id*. at 986-987. This Court reviews *de novo* whether an agency has complied with NEPA, pursuant to the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–06. *Westland Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 865 (9th Cir. 2005).

ARGUMENT

This court should issue an emergency injunction against further construction of the Project to preserve the environmental status quo and prevent irreparable harm to populations of sensitive bats and sage-grouse that are already in serious decline, until this Court can rule on WWP's interlocutory appeal. BLM unreasonably dismissed the significant impacts from the Project to these imperiled species by completing an EA rather than an EIS, in violation of NEPA.

I. WWP IS LIKELY TO SUCCEED ON THE MERITS.

A. BLM Violated NEPA By Not Preparing An EIS.

To prevail on their claim that BLM violated NEPA by refusing to prepare a site-specific EIS for the Project, "[a] showing that there are *substantial questions* whether a project may have a significant effect on the environment is sufficient." *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002). "If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant." *Ctr. for Biol. Diversity v. NHTSA*, 538 F.3d 1172, 1220 (9th Cir. 2008) (quotations omitted). Assessing likely adverse impacts to sensitive species often requires an EIS given the potential for significant effects. *See Native Ecosystems Council v. Tidwell,* 599 F.3d 926, 936-38 (9th Cir. 2010) (agency violated NEPA in failing to address adverse impacts on sage-grouse habitat); *ONRC v. Goodman,* 505 F.3d 884 (9th Cir. 2007) (agency violated NEPA in not analyzing logging impacts on sensitive species habitat); *Anderson*, 314 F.3d at 1021–22 (agency violated NEPA by relying on EA to authorize whaling).

Ten "intensity" factors help determine whether an agency action "may" cause significant impacts. 40 C.F.R. § 1508.27(b). The presence of even just "one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846,865 (9th Cir. 2005). Factors triggered here include: effects that are "highly uncertain or

involve unique or unknown risks" or "likely to be highly controversial," 40 C.F.R. § 1508.27(b)(5), (4); "[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas," *id*. § 1508.27(b)(3); and cumulative impacts, *id*. § 1508.27(b)(7).

B. Impacts on Bats Will Be Significant.

The Project's impacts to bats are highly uncertain and controversial and involve unknown risks, requiring an EIS. BLM claims there will be no significant impacts to bats by asserting that predicted bat mortality will not cause significant effects to this population. This assertion is flawed for several reasons.

First, the level of bat mortality is unknown and highly uncertain given the difficulty of predicting and monitoring bat deaths caused by the Project. *See* Ex. 5 ¶¶ 18–19, 22, 24 (Dr. Tuttle noting difficulties of predicting bat mortality from wind facilities). BLM itself admitted that it is "impossible to provide an accurate quantitative assessment of mortality to these species." Ex. 12 at 13. BLM further admitted that bat deaths caused by the operation of the Project "could vary significantly and cannot be predicted with reliability"—invalidating BLM's subsequent conclusion that impacts to bats would *not* be significant. Ex. 23 at 2.

FWS warned BLM that its predicted bat mortality thresholds "could be reached in a single night" and could "easily be tenfold this estimate," and that "there is a definite possibility that a very large number of bats could be killed by

this action." Ex. 19 at 2–3, 5. NDOW warned BLM that it "is concerned there could be a high magnitude of mortality on the Brazilian free-tailed bat . . . given the numbers . . . using the project area." Ex. 17 at 3. It explained that impacts to wildlife required an EIS, particularly with respect to bats. Ex. 18 at 1. BLM's EA does not refute these concerns. These comments underscore that effects to bats are unknown, highly uncertain and highly controversial, triggering an EIS. *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) ("controversial" means a substantial dispute exists about the size, nature, or effect of action).

Second, BLM's FONSI (and the district court) relied upon an unfounded assurance that the Avian and Bat Protection Plan ("ABPP"), an appendix to the EA, would not cause significant effects to bats by "ensur[ing]" mortality would remain below "designated mortality thresholds." Ex. 11 at 3–4, Ex. 2 at 16. The ABPP, however, is based on discretionary measures that cannot provide such assurance, as evidenced by its provisions, expert opinion demonstrating that the ABPP fails to consider several important factors, and other BLM statements.

The ABPP's primary mitigation measures—escalating phases of curtailment of turbines during periods of low wind and turbine shutdowns—include strict, arbitrary date and time limitations, regardless of how many bats have died. Ex. 12 at 30, 32. *See also* Ex. 17 at 4 (NDOW noting the date limits are inappropriate since are bats often present before and after allowed mitigation dates). The

mortality thresholds irrationally "start[] over at zero" each time they are exceeded. Ex. 12 at 31. The ABPP is riddled with discretion: if mortality thresholds are continually exceeded, it provides only for "recommendations" that would be approved "if appropriate." *Id*. at 33, *see also id*. at 27, 31. BLM admitted it may not be able to enforce the mitigation—which causes the power producer to lose money—due to "political concerns." Ex. 23 at 4. Dr. Tuttle describes that for these reasons and others, the measures are not implemented so as to keep mortality below the thresholds. Ex. 5 ¶¶ 36–42. BLM admitted in briefing below that the thresholds are not mortality caps, but mere triggers to *start* mitigation. Ex. 9 at 15.

BLM admitted it had no data regarding whether another measure, a proposed radar system purported to detect bats and "trigger turbine shutdowns," Ex. 12 at 13, actually worked. *Id*. at 35. Dr. Tuttle explains that system is "highly experimental" and its only known deployment failed to prevent much higher bat mortality than predicted here, even with *no* nearby bat cave. Ex. 5, ¶¶ 31–35.

Thus, the district court committed clear error in assuming that BLM would "ensure that the bat mortality rate would not surpass 192 bats per year" to find that the impacts upon bats are not significant. Ex. 2 at 16. Because the mitigation is discretionary and/or unproven, it fails to "constitute an adequate buffer against the negative impacts that may result from the authorized activity," or "render such impacts so minor as to not warrant an EIS." *Nat'l Parks and Conservation Ass'n v.*

Babbitt, 241 F.3d 722, 734 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743, 2757 (2010).

Third, even if, against the odds, bat mortality stays below the 192 bats/year thresholds, BLM nowhere explains why this level of mortality is non-significant to this declining species, at the regional, local, or Rose Guano Cave level. *See* Ex. 12 at 12–14, Ex. 11 at 3–4 (FONSI). BLM's Field Office Manager admitted as much, wondering "[d]o we have a tie between these thresholds and what is considered significant??? I suspect not . . . ." Ex. 20 at 1–2. NPS confirmed that the thresholds in fact "constitute[] a significant direct impact to wildlife resources" in Spring Valley over the life of the project. Ex. 16 at 3. These highly uncertain and controversial impacts to bats trigger BLM's obligation to prepare an EIS.

Similarly, an EIS is required because the Project's location so close to Rose Guano Cave and "within the largest known bat migration route in the Great Basin ecosystem," Ex. 18 at 3, puts it in close "proximity" to "ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). For this reason, FWS expressed "serious reservations over the selection of the Spring Valley project site." Ex. 19 at 2.

Finally, there are significant questions as to whether the Project involves the presence of cumulative impacts, 40 C.F.R. § 1508.27(b)(7), in light of at least three other proposed wind energy facilities in Spring Valley. Ex. 12 at 22; *see also* Ex. 16 at 3 (NPS noting "obvious potential to significantly impact" bat populations due

to cumulative impacts). Dr. Tuttle explains that these additional facilities pose an "extreme potential for harm." Ex. 5, ¶ 27. These impacts, too, trigger an EIS.

C. BLM Cannot Tier to the Wind PEIS to Avoid an EIS.

BLM also cannot rely on its 2005 Programmatic EIS for Wind Energy Development ("PEIS")[2] to avoid a site-specific EIS for the Project. For tiering to be permissible, "[t]he previous document must *actually discuss the impacts of the project at issue.*" *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (emphasis added). Here, the PEIS is so general that it contains virtually no useful analysis to which to tier. For example, the cumulative impacts section mentions bats in literally two sentences, lumped together with birds. PEIS at 6-19. *See also* Ex. 17 at 1 (NDOW noting PEIS is outdated, and EA failed to use sufficient on-site data to fill the gaps).

Further, the PEIS contains huge gaps, failing to even acknowledge barotrauma or the fact that bats are attracted to wind turbines, both critically important factors to consider when assessing impacts to bats. PEIS at 5-63, 5-66, 5-70–5-71. If the prior EIS did not disclose *significant* impacts of the project, a subsequent NEPA evaluation must do so, using a site-specific EIS.

Finally, the PEIS's analysis was explicitly limited to evaluating the impacts of wind facilities that followed a discrete set of Best Management Practices

[2] The district court and parties referenced the PEIS from BLM's website at: http://windeis.anl.gov/documents/fpeis/index.cfm

("BMPs"), including that "Operators shall determine the presence of bat colonies and avoid placing turbines near known bat hibernation, breeding, and maternity/nursery colonies; in known migration corridors; or in known flight paths between colonies and feeding areas." Ex. 28 at 2. BLM admits it failed to follow this BMP. Ex. 12 at 25. Because the PEIS's bat analysis is contingent upon this BMP, BLM cannot tier to the PEIS's analysis of impacts on bats to avoid a site-specific EIS. *E.g.*, PEIS at 6-3 (cumulative impacts analysis assumes compliance with BMPs); PEIS at 2-32, 5-1 (similar). FWS agreed that BLM failed to incorporate practices from the PEIS in such a way to "bring potential impacts to anything below significant." Ex. 19 at 2.

D. The EA's Analysis of Direct Impacts to Wildlife is Inadequate.

NEPA documents must "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Agencies must "consider every significant aspect of the environmental impact of a proposed action." *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1110 (9th Cir. 2010) (quotation omitted). This includes both short- and long-term effects. *Id.* § 1508.27(a).

As noted above, the EA failed to assess the direct impacts on bats by underestimating or misstating significant risks. For example, no discussion of bat attraction to wind turbines appears in the EA, despite BLM's knowledge of this threat. Ex. 23 at 2. Instead, BLM inaccurately states that bats are expected to

simply fly around or over the facility site and continue their migratory movement. Ex. 12 at 19. "This statement ignores the science showing that bats are attracted to wind turbines and thus inaccurately downplays the risk to bats." Ex. 5 ¶ 24. Other gaps include assuming bat deaths would be kept below mortality thresholds despite no assurances of this, *id*. ¶¶ 35–42, and failure to acknowledge the limited recovery potential of bats due to their slow reproductive rate, *id*. ¶ 25.

The EA also fails to adequately evaluate direct impacts to sage-grouse. FWS's March 2010 Finding shows that sage-grouse are deeply imperiled on a range-wide basis, and that agencies must exercise particular care in evaluating impacts from actions on public lands. *See* 75 Feg. Reg. at 13,921–923. Yet the EA's analysis of sage-grouse is stunningly brief, soft-pedaling the Project's impacts. Ex. 12 at 16–17. BLM admits that the Project will wipe out 9% of the local habitat from a 38,289-acre "avoidance area," *id*. at 17, but fails to explain what this means for the local population, in light of its declining status. The EA fails to mention direct impacts from the Project's nine miles of new fencing, which would increase predation by serving as raptor perches and pose a collision hazard for the low-flying birds. Ex. 12 at 17, 75 Fed. Reg. at 13,929. By ignoring these key impacts, BLM did not take a "hard look" at the direct impacts to wildlife.

E. The EA's Analysis of Cumulative Impacts is Inadequate.

The EA also failed to adequately consider cumulative impacts to bats and

sage-grouse. An agency must do more than just catalogue "relevant past projects in the area": it must also include a "useful analysis," *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1160 (9th Cir. 1997) (citation omitted), and explain "how [] individual impacts might combine or synergistically interact with each other to affect the [] environment." *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 994 (9th Cir. 2004). There was no such "useful analysis" here.

The district court erred by cobbling together a cumulative impacts analysis that the agency itself did not provide, citing a table in the EA, the Wind PEIS, and the EA's discussions of *direct* impacts to bats. Ex. 2 at 21. The table lists three additional wind facilities which would add almost 1,000 additional turbines to this valley within the largest bat migration corridor in the Great Basin. Ex. 12 at 22. But the EA fails to actually analyze what those turbines would mean for Brazilian free-tailed bats at any scale, despite its already-imperiled status, simply noting a "potential for a somewhat larger percent increase in mortality for Brazilian free-tailed bats throughout eastern Nevada." *Id*. at 24. This understatement fails to include any quantified or detailed information, or recognize the "extreme potential for harm." Ex. 5, ¶ 27. BLM also inaccurately asserts that cumulative impacts to bats "are anticipated to be similar to those described for birds," Ex. 12 at 23, ignoring key differences that cause bats to be far more vulnerable. Ex. 5, ¶ 25.

The PEIS cannot substitute for a site-specific cumulative impacts analysis,

where its "analysis" consisted of two sentences covering both bats and birds, PEIS at 6-19, and relied upon bat avoidance BMPs that BLM left out in siting this project. *Id*. at 6-3. Nor can the EA's analysis of *direct* impacts save the analysis, as direct and cumulative impacts are distinct. *Te-Moak Tribe v. U.S. Dep't of the Interior*, 608 F.3d 592, 604 (9th Cir. 2010) (finding EA's discussion of direct effects, in lieu of a discussion of cumulative impacts, inadequate).

The cumulative impacts analysis for sage-grouse is equally flawed. It does not analyze impacts beyond tallying the areas of *direct* habitat disturbance from other proposed projects and noting, without detail and in another understatement, "greater habitat fragmentation." Ex. 12 at 23–24. But the area of direct disturbance is beside the point for a species that avoids tall structures; indeed, BLM admitted that the avoidance area for this Project will be far greater than the Project area, equating to 9% of habitat in Spring Valley. *Id*. at 17. As the other wind facilities are all much larger than this Project, the total avoidance areas could conservatively add up to more than 40% of the habitat in the valley. *See id*. at 22. The EA never performs this simple calculation, or assesses the implications for sage-grouse persistence from such a stunning amount of habitat loss. SNWA rightly noted that its analysis, which "amounts to a single sentence," is inadequate. Ex. 15 at 5.

II. SITE-CLEARING AND CONSTRUCTION WILL CAUSE IRREPARABLE HARM TO WILDLIFE.

Irreparable harm to sage-grouse is already occurring from clearing of sagebrush and road building. Spring is the species' mating season, when they congregate in leks, ancestral breeding areas, to mate. 75 Fed. Reg. at 13,915. Sage-grouse exhibit strong site fidelity in returning over the years to their leks, even when the areas have been degraded. *Id*. Sage-grouse hens typically establish nests between two and five miles from leks, but sometimes travel more than 12.5 miles to do so. *Id*. The birds avoid traffic noise, which disturbs mating. *Id*. at 13,930. Thus, the noise from bulldozers and similar equipment, even if it does not directly crush nests, will disturb mating and drive away birds. Successful nesting is critical because sage-grouse has a low reproductive rate. *Id*. at 13,985. Further, the miles of new roads will allow sage-grouse predators to move into previously unoccupied areas. *Id*. at 13,930.

Site-clearing and road-blading will also irreparably harm the sage-grouse's desert sagebrush habitat. Habitat fragmentation is the main cause of the decline of sage-grouse populations. *Id*. at 13,923–24, 13,927, 13,935–37, 13,962. This type of desert habitat recovers very slowly from such disturbance. FWS stated that the Project site would "require extensive time to recover," and that "the areas will likely require 30 + years to recover to pre-disturbed condition." Ex. 26. *See* Ex. 8, ¶ 34 (recovery of sagebrush could take 50 years or more).

In fact, recovery may even be impossible due to the invasion of weeds, which thrive in disturbed areas. *See* 75 Fed. Reg. at 13,917. *See also id*. at 13,932. (It is difficult and usually ineffective to restore an area to sagebrush after annual grasses become established."). *See Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005) (irreparable harm for roading, utility, & fill project because "once the desert is disturbed, it can never be restored."); *San Luis Valley Ecosystem Council v. FWS*, 657 F. Supp. 2d 1233, 1241 (D. Colo. 2009) ("complete vegetation recovery will take up to 15-20 years; such a long recovery time may constitute irreparable damage"). The same is true for this desert site.

The district court erred by stating that fragmentation does not pose a substantial risk here, as the Project area is supposedly not "high-quality." Ex. 2 at 26. The fact that habitat is not pristine does not negate the possibility of irreparable harm; in fact, it makes irreparability more likely. Nests in disturbed habitat have lower success. 75 Fed. Reg. at 13,915. Since the local sage-grouse population is already struggling with low numbers, the additional harm from the Project "will likely lead to the complete loss of sage-grouse that are already in decline in this portion of Spring Valley." Ex. 7, ¶ 24. This would cause the unique genetic resources of this population to be lost forever.

In addition, operation of the Project will create undeniable impacts to bats, as discussed above. Dr. Tuttle concludes the Project has "clear potential for

unsustainable cumulative impacts" and is "likely to cause harmful decline of Brazilian free-tailed bats." Ex. 5 at 15. Bats have low reproductive rates, *id*. at ¶ 25, making such harm irreparable. Harm to bats must be evaluated now, before this multi-million dollar Project is partially constructed, because "[t]he difficulty of stopping a bureaucratic steam roller, once started, [is] a perfectly proper factor to take into account in assessing that risk [of irreparable harm], on a motion for a preliminary injunction." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989).

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST REQUIRES AN INJUNCTION

The Ninth Circuit recognizes a "well-established public interest in preserving nature and avoiding irreparable environmental injury." *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quotation omitted). There is also a public interest in "careful consideration of environmental impacts before major federal projects go forward," such that "suspending such projects until that consideration occurs 'comports with the public interest.'" *Id*. (quoting *S. Fork Band*, 588 F.3d at 728) (finding public interest favored injunction and preservation of status quo).

As discussed above, the resources at stake here include two sensitive species: Brazilian free-tailed bats and sage-grouse. The public interest here is strong, due to the species' imperiled status. Where sensitive species face irreparable habitat losses, issuance of injunctive relief to prevent such harm is appropriate despite alleged financial losses. *See, e.g., ONRC v. Goodman,* 505

F.3d at 897-88 (injunction ordered to protect sensitive species from loss of habitat; and holding that the "risk of permanent ecological harm outweighs the temporary economic harm" from an injunction). Accordingly, the public interest is furthered by suspending construction during the relatively short period of time until this Court rules on WWP's interlocutory appeal.

The district court erred in its balancing analysis of the equities, first, by assuming that a preliminary injunction would permanently "kill" the Project and all of its economic impacts. Ex. 2 at 28–29. However, the Project may very well proceed later (but perhaps be smaller, configured differently, or with enhanced protection for affected species), once BLM has completed the required EIS.

SVW's assertions before the district court that the Project may not be built if a delay occurs were purely speculative. This Project is the *first* industrial-scale wind facility approved in Nevada; many other proposed wind projects are lined up behind it. Ex. 12 at 22. As this Court recently concluded in enjoining a mine on NEPA grounds, economic losses asserted by the mining company and government "may for the most part be temporary." *S. Fork Band*, 588 F.3d at 728.

The district court further erred in elevating the development of renewable energy above other important policies. Ex. 2 at 30. The goals of renewable energy and species protection need not be mutually exclusive. Nor is renewable energy development exempt from compliance with NEPA, as BLM admits. Ex. 13; *see*

also Animal Welfare Inst. v. Beech Ridge Energy, LLC, 675 F. Supp. 2d 540, 542 (D. Md. 2009) (enjoining wind facility due to bat mortality), *Quechan Tribe v. U.S. Dep't of Interior*, No. 10cv2241-LAB, 2010 WL 5113197, at *17–18 (S.D. Cal. Dec. 15, 2010) (enjoining solar project on cultural and environmental grounds); *S. Utah Wilderness Alliance v. Allred*, Civ. No. 08-2187, 2009 WL 765882, at *2 (D.D.C. Jan. 17, 2009) ("'development of domestic energy resources[]' is an important public interest [but] is far outweighed by the public interest in avoiding irreparable damage to public lands"). Further, putting one project on pause hardly halts renewable energy goals. *See* Ex. 13 (BLM fast track website listing 27 projects).

Additionally, claims of harm carry less weight here, where both SVW and BLM have known of the need for an EIS for years. In 2008, SVW admitted it was "proceeding with an EA fully aware that we could ultimately be dragged into an EIS." Ex. 24. Indeed, it proceeded, in a calculated business risk, to pressure BLM into preparing an EA. *E.g.*, Ex. 21. *See Northern Cheyenne Tribe v. Hodel*, 851 F. 2d 1152, 1157 (9th Cir. 1988) (giving no weight to intervenors' financial interests where they bid on leases "with full awareness of [a] suit and chose to gamble on the EIS being adequate."). In sum, the balance of harms and public interest tip in favor of enjoining ground-disturbing activity during the short time required for this Court to hear and rule on WWP's interlocutory appeal.

CONCLUSION

For the foregoing reasons, WWP respectfully requests that this Court issue an injunction halting construction pending a decision on WWP's appeal.

DATED this 12th day of April, 2011.

Respectfully Submitted,

s/ Kristin F. Ruether

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Kristin F. Ruether
Attorneys for Plaintiff-Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Appellants certifies that to her knowledge, no related case is pending in this Court.

Respectfully submitted this 12th day of April, 2011.

s/ Kristin F. Ruether

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Kristin F. Ruether
Advocates for the West
Attorney for Plaintiff-Appellants

TRANSCRIPT ORDER NOTICE

Pursuant to Fed. R. App. P. 10(b)(1)(B) and in accordance with Circuit Rule 10-3.1(a), Appellants hereby provide this initial notice that they do not intend to order any transcripts in this matter.

Respectfully submitted this 12th day of April, 2011.

s/ Kristin F. Ruether

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Kristin F. Ruether
Advocates for the West
Attorney for Plaintiff-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 12, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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Respectfully submitted this 12th day of April, 2011.

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