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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

Basin and Range Watch, Center for Biological Diversity, National Parks Conservation Association, Nevada Wilderness Project, Sierra Club, and Western Watersheds Project, Appellants v. Bureau of Land Management, Respondent	NV-_____ Appeal of October 15, 2010 Decisions By Schell Field Office Manager Mary D'Aversa to Approve Decision Record, FONSI, & EA for Spring Valley Wind Energy Facility; and two associated October 22, 2010 Rights of Way **APPEAL, STATEMENT OF REASONS, AND PETITION FOR STAY**

NOTICE OF APPEAL

Appellants Basin and Range Watch, Center for Biological Diversity, National Parks Conservation Association, Nevada Wilderness Project, Sierra Club, and Western Watersheds Project hereby appeal the Final Decision dated October 15, 2010 by BLM's Schell Field Office Manager Mary D'Aversa to approve a Decision Record ("DR"), Finding of No Significant Impact ("FONSI"), and Environmental Assessment #DOI-BLM-NV-L020-2010-0007-EA ("EA") for the Spring Valley Wind Energy Facility. Appellants also appeal two associated BLM

Rights-of-Way ("ROWs") for the project which BLM issued October 22, 2010, based on the EA, FONSI, and DR.

STATEMENT OF STANDING

The IBLA appeal regulations provide that "[a]ny party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management . . . shall have a right to appeal to the Board." 43 C.F.R. § 4.410(a). Those regulations define "party to a case" to include "one who has . . . participated in the process leading to the decision under appeal . . . e.g., [] by commenting on an environmental document." *Id.* § 4.410(b). A party to a case is adversely affected "when that party has a legally cognizable interest, and the decision on appeal has caused or is substantially likely to cause injury to that interest." *Id.* § 4.410(d).

Appellants have standing to pursue this appeal and petition for stay, because they and their staff and members have a "legally cognizable interest" in the public lands, wildlife, and plant species affected by the Spring Valley Wind project. *Id.* § 4.410(d), (b). Appellants have submitted comments during the administrative process, regularly visit the affected areas including the project area itself, intend to continue to visit these areas in the immediate and foreseeable future, and will be adversely affected if the project is constructed, as discussed below and in the declarations submitted concurrently. Appellants also have ongoing interests in the resources that will be affected by the project, including the groundwater system that supports the Swamp Cedar ACEC, which adjoins the project area; the vistas and dark sky resources of the nearby Great Basin National Park and surrounding areas; the birds, bats, and other wildlife species that may be affected, which include but are not limited to golden eagles and other raptors, bats, sage-grouse, pygmy rabbits; and rare and imperiled plants in the project vicinity.

Appellant Basin and Range Watch is a group of volunteers who live in the deserts of Nevada and California, working to stop the destruction of deserts. Its goal is to identify the problems of energy sprawl and find solutions that will preserve our natural ecosystems and open spaces. It supports renewable energy but advocates for better national and state planning. Its members frequently use the public lands of Nevada for recreational and scientific pursuits, including the project area, and are deeply concerned about the protection of the species found there and their habitats. Basin and Range Watch members submitted comments on the project and regularly visit the affected area. They intend to continue to do so in the future and have interests in conserving and protecting these public lands as habitat for rare and imperiled species. *See* Declaration of Kevin Emmerich (filed herewith).

Appellant Center for Biological Diversity ("Center") is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 315,000 members and online activists throughout Nevada and the United States. Its staff and members frequently use the public lands of Nevada for recreational and scientific pursuits, including the proposed project area, and are deeply concerned about the protection of the species found there and their habitats. The Center submitted comments on the Project in January 2010 and August 2010. Center staff and members use the public lands at issue and intend to continue to do so in the future and have interests in conserving and protecting these public lands as habitat for rare and imperiled species including, but not limited to, golden eagles and other raptors, bats, sage grouse, pygmy rabbits, and rare and imperiled plants. *See* Declaration of Rob Mrowka (filed herewith).

Appellant National Parks Conservation Association (NPCA) is a non-profit organization whose mission is to protect and enhance America's National Parks for present and future

generations. Founded in 1919, with more than 325,000 members and with headquarters in our nation's capitol and 23 regional and field offices (including Las Vegas), NPCA plays a crucial role in protecting America's treasured national parks. NPCA staff and members regularly visit the areas affected by this project, including Great Basin National Park, and will be adversely affected if the project is constructed. NPCA supports development of wind energy as a way to help reduce air pollution that degrades national parks, but is cognizant that not all wind projects are appropriate for all places. NPCA opposes wind generating projects that have unacceptable and negative impacts on park viewsheds, projects that materially affect the natural and historic character of park areas and/or threaten park resources including wildlife. NPCA submitted comments on this project, and is deeply concerned with the proximity of federally designated and protected national park land, the views on approach and from within the park, the area's notable dark sky resources, and the cumulative impacts of several proposals that will affect natural resources in the area.

Appellant Nevada Wilderness Project (NWP) is a catalyst for wildlife habitat conservation, wilderness preservation, and smart development of renewable energy. It is NWP's position that immediate steps are required to combat global climate change, and that a transition to renewable energy production is key to meeting this critical need. Moreover, NWP recognizes that this transition needs to happen rapidly or we will be unable to reverse the catastrophic consequences of climate change. With this in mind, NWP advocates for renewable energy projects that are sited on land that has already been developed or disturbed and on land with minimal impact for wildlife and cultural resources. NWP is greatly concerned with this project's conflicts with wildlife including Mexican free-tailed bats, sage-grouse and pygmy rabbits, siting next to an Area of Critical Environmental Concern, and visual impacts to Great Basin National

Park's rare dark skies and scenic views from high elevation peaks. The Spring Valley Wind project has been poorly sited and does not meet NWP's "smart from the start" criteria for supporting renewable energy projects. NWP staff and/or members regularly visit the area affected by this project, and will be adversely affected if the project is constructed.

Appellant Sierra Club is a national non-profit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass protecting our public lands, wildlife, air and water while at the same time rapidly increasing our use of renewable energy to reduce global warming. The Club's particular interest in this case and the issues which the case concerns stem from its desire to increase Nevada's use of renewable energy without unnecessary harm to the state's wildlife, air and water quality, habitats and other resources; as well as a strong belief that large-scale renewable energy projects like the Spring Valley Wind Project are complex, have multiple and significant impacts on birds, bats, and other wildlife and public land values and resources, and require the full environmental analysis of an Environmental Impact Statement under NEPA. The Sierra Club submitted comments on this project. The Toiyabe Chapter of the Sierra Club has approximately 5,000 members in the state of Nevada. Sierra Club staff and members regularly visit the area affected by this project, and will be adversely affected if the project is constructed.

Appellant Western Watersheds Project (WWP) is a non-profit organization with over 1200 members that works to protect and restore western watersheds and wildlife through education, public policy initiatives and litigation. WWP's staff and members regularly visit and

recreate on the public lands of the Schell Field Office, including the project area, and intend to continue to do so. WWP and its members have a keen interest in protection of biodiversity, restoration of damaged public lands, and the protection of important aquatic and terrestrial habitats for native wildlife in this region. *See* Declaration of Katie Fite (filed herewith).

INTRODUCTION AND SUMMARY.

This appeal challenges BLM's approval of an industrial-scale wind facility on a so-called "fast track" to receive funding under the American Recovery and Reinvestment Act. Unfortunately, BLM's review and approval of the Spring Valley Wind project on the fast track is in violation of federal environmental laws and regulations, and threatens irreparable harm to wildlife habitats, populations, and other values.

In particular, BLM has unlawfully utilized an Environmental Assessment ("EA") to approve this large industrial project in violation of the National Environmental Policy Act ("NEPA), despite the fact that the Spring Valley Wind project will have many significant environmental impacts, as indicated by BLM's own analysis and demonstrated by well-documented science; and even though BLM concedes that there are many uncertainties about exactly how extensive or severe these impacts will be. Both the significant impacts and uncertainties associated with the Spring Valley Wind project thus require evaluation in a full, site-specific Environmental Impact Statement ("EIS") under NEPA.

The many resource values threatened by the Spring Valley Wind project include the regionally significant Rose Guano bat cave (which is used by millions of Mexican free-tail bats) and the Great Basin National Park, which are both in close proximity to the project; and the Swamp Cedar Area of Critical Environmental Concern ("ACEC"), which directly adjoins the project area. The Spring Valley Wind Project will also be located within and around – and will

cause direct, indirect, and cumulative adverse impacts to – sage-steppe habitat occupied by sagebrush-obligate species that are declining and deeply imperiled, including greater sage-grouse and pygmy rabbits, both of which BLM has designated as "sensitive species" thus requiring BLM to afford them special protections against further declines.

These and other natural resources will be directly, indirectly, and cumulatively impacted by construction and operation of the Spring Valley Wind project, which will involve construction and installation of a massive network of roads (over 25 miles), 75 huge wind turbines, over 9 miles of new fences, and other facilities within the habitat of sage-grouse and other imperiled sage-steppe species, all of which will cause direct, indirect and cumulative harms to these species and their habitats.

BLM attempts to justify its approval of the Spring Valley Wind project by "tiering" its EA to BLM's 2005 Programmatic Wind Environmental Impact Statement ("Wind PEIS"), in which BLM provided general analysis of wind projects on BLM public lands and set forth mitigation and other criteria that specific wind projects should follow. However, the Wind PEIS acknowledges that BLM should prepare site-specific EISs for wind projects on public lands that pose significant environmental impacts which are not addressed within the general scope of the PEIS, and when projects cannot satisfy all the mitigation and other criteria of the Wind PEIS. That is the situation here, as BLM concedes in its Spring Valley Wind EA, because the Spring Valley Project will affect important resources not addressed in the Wind PEIS, including the Rose Guano bat cave and its millions of bats; sage-grouse and pygmy rabbit in the area; the Great Basin National Park; and the Swamp Cedar ACEC; and BLM has <u>not</u> complied with the Wind PEIS mitigation and other criteria in approving the Spring Valley project, including criteria to protect sage-grouse and other birds and bats.

Moreover, the Wind PEIS is already outdated in light of the extensive science concerning sagebrush-steppe and sage-grouse habitats, trends, and threats that has been published since the 2005 EIS – including the *Studies in Avian Biology* "Monograph" prepared by leading sage-grouse researchers,[1] and the U.S. Fish and Wildlife Service's March 2010 determination that greater sage-grouse "warrant" listing as an endangered or threatened species under the Endangered Species Act. *See* "12-Month Findings for Petitions to List the Greater Sage-Grouse (*Centrocercus urophasianus*) As Threatened or Endangered," 75 Fed. Reg. 13,910 (Mar. 23, 2010) (hereafter, "March 2010 Finding").

Moreover, the 2005 Wind PEIS's assessment of environmental impacts from wind project on public lands is not site-specific; and by its own terms, BLM is required to conduct a full site-specific EIS for proposed wind project where the assumptions and mitigation measures of the PEIS are not met – as is the case here. As the Spring Valley Wind EA discloses, the project does not comply with the mitigation measures specified in the PEIS in several respects – particularly regarding bats and sage-grouse – and the EA further demonstrates that there will be significant direct, indirect, and cumulative harms to birds, bats, and other ecological values from the project's construction and operation. Accordingly, BLM is again required to prepare a full site-specific EIS before approving the Spring Valley Wind project; and its attempt to avoid that NEPA requirement by instead relying on the inadequate and defective EA and FONSI violates NEPA.

Because of these and other violations of law, BLM's approval of the Spring Valley Wind project -- including the EA, Decision Record, FONSI, and ROWs -- must be reversed and remanded to BLM; and because substantial construction is planned to occur in the next month, a

[1] *Available at* <http://sagemap.wr.usgs.gov/monograph.aspx>.

stay must be granted to prevent irreparable environmental harm while the merits of this appeal are decided.

STATEMENT OF FACTS.

On October 15, 2010, BLM's Schell Field Office Manager Mary D'Aversa signed the Decision Record ("DR") and Finding of No Significant Impact ("FONSI") for the Spring Valley Wind Energy Facility Project, based on a final EA for the project.[2] Based on the EA, FONSI, and DR, on October 22, 2010, BLM also issued two Rights-of-Way ("ROWs") to Spring Valley Wind LLC. One is for the wind generation facility and substation. The other is for a switchyard, overhead electrical lines, fiber-optic cable, microwave tower, and all associated facilities.

The project is a 75-turbine industrial-scale wind facility on BLM land within the Ely District's Schell Field Office. The wind turbines will be between 125–130.5 meters (410–428 feet) tall. EA 11. The turbines will be arranged in rows oriented east-west, which is directly contrary to guidance in BLM's PEIS that turbine arrays should be oriented parallel to bird movements. EA 11, 164. *See also* EA 30 (map). The project components also include over 25 miles of 28-foot-wide roads, two gravel pits, a 400-foot-long overhead transmission line, and over nine miles of new fencing to keep cows out of the project area. EA 10, 15, 18, 29; DR at 5.

The 7,673-acre project area is 20 miles east of Ely, Nevada, in Spring Valley, which lies between the Schell Creek Range to the west and the Snake Range to the east. *See* EA 74. The project area lies only five miles west of Great Basin National Park and four miles west of the Rose Guano Cave, a regionally significant bat hibernaculum for at least four species of bats, including a large population of Mexican free-tailed bats that researchers estimate may number up

[2] These documents are posted on BLM's website at: <http://www.blm.gov/nv/st/en/fo/ely_field_office/blm_programs/energy/spring_valley_wind/spring_valley_wind.html>.

to 1 million bats during fall migration. EA 61, 77–78. The project area is directly adjacent to the Swamp Cedars Area of Critical Environmental Concern (ACEC), which contains a globally unique plant community dependent on its "perched" water table. EA 3, 78. The project area is also on or adjacent to the site of an Indian massacre known as the Goshute War of 1863. EA 68, 78. Among many wildlife values, the project area contains over 3,600 acres of summer and winter sage-grouse habitat and three sage-grouse leks (mating grounds) within a mile of the project area boundary. EA 58–59.

The EA considered three alternatives: two similar alternatives proposing 75-tower wind facilities and one no-action alternative. The EA purports to tier to BLM's 2005 Programmatic Wind EIS, as well as the 2007 revised Ely RMP/FEIS (which BLM cites simply to authorize siting of the wind project on public lands in the Schell Field Office).

STANDARD OF REVIEW

To achieve success on the merits, the appellant must meet its burden to demonstrate, by a preponderance of the evidence, that the BLM's decision is unreasonable or does not substantially comply with NEPA, FLPMA, or applicable regulations. *See Eason v. BLM*, 127 IBLA 259, 262 (1993). A BLM decision is arbitrary, capricious, or inequitable if it is not supported by any rational basis. *Wayne D. Klump v. BLM*, 124 IBLA 176, 182 (1992).

STATEMENT OF REASONS

I. BLM VIOLATED NEPA BY NOT PREPARING A SITE-SPECIFIC EIS FOR THE SPRING VALLEY WIND PROJECT.

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It requires federal agencies to "take seriously the potential environmental consequences of a proposed action" by taking a "hard look" at the action's likely environmental consequences. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir.

2005) (citation omitted). The statute's twin objectives are (1) to ensure that BLM "consider[s] every significant aspect of the environmental impact of a proposed action" and (2) to "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006) (citation omitted).

NEPA requires that federal agencies must prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The NEPA document 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." *Ore. Natural Desert Ass'n v. BLM*, 531 F.3d 1114, 1130 (9th Cir. 2008) (citing *Vermont Yankee Nuclear Pwr. Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 553 (1978)). This includes studying the direct and indirect effects and cumulative impacts of the action. *See* 40 C.F.R. §§ 1508.7, 1508.8.

BLM violated NEPA by failing to prepare an EIS on a site-specific basis before approving the Spring Valley Wind project. As an industrial-scale energy development on public lands that poses significant environmental impacts, the Spring Valley Wind project must be evaluated by BLM in an EIS. 42 U.S.C. § 4332(2)(C). The project will completely transform the 7,673-acre project area, as well as the much larger area from which impacts will be seen and felt, from a natural sagebrush-steppe setting into an industrial one. The construction of over 25 miles of new 28-foot-wide roads in sage-steppe habitat alone is significant; here, it is added to the construction of 75 400-foot-tall wind turbines, gravel pits, substations, transmission lines, and over nine miles of fences.

Under NEPA, BLM must prepare an EIS if "the agency's action *may* have a significant impact upon the environment." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (emphasis in original; internal quotes omitted); *see also Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (an EIS is required if "substantial questions" exist as to whether a project may have a significant environmental effect). "This is a low standard." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). BLM bears the burden of producing "a convincing statement of reasons" showing why the impacts of its plan are insignificant. *Nat'l Parks*, 241 F.3d at 730. Because there are, at a minimum, "substantial questions" about whether the Spring Valley Wind project "may" have significant environmental effects, BLM's failure to prepare an EIS, and decision to instead rely upon an EA/FONSI, violates NEPA. 42 U.S.C. § 4332(2)(C).

Further, the NEPA regulations establish ten factors that help determine whether an agency action "may" cause significant impacts and therefore require an EIS. 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*, 402 F.3d at 865. This project implicates several of them.

A. Unique characteristics, cultural resources, and cumulative impacts.

Significance factors requiring an EIS include "[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, [] wetlands, [] or ecologically critical areas," as well as "[t]he degree to which the action . . . may cause loss or destruction of significant scientific, cultural, or historic resources." 40 C.F.R. § 1508.27(b)(3), (8). The presence of cumulative impacts is also a significance factor. *Id.* § 1508.27(b)(7). BLM's FONSI brushed these factors off, alleging that impacts were "considered," surveys were conducted, and

no impacts exceed thresholds disclosed in the PEIS or RMP/FEIS; and citing to an ethnographic study that "enhanced the understanding" of the cultural significance of the area. *See* FONSI 2–3.

However, this large industrial development is poorly sited in an area with multiple unique environmental and cultural characteristics. It is directly adjacent to the Swamp Cedars ACEC, which is also an Indian massacre site. EA 3, 68. It is a mere 4–5 miles from Great Basin National Park and the Rose Guano bat cave (also an ACEC), which is regionally significant for bat migration and reproduction. EA 61. And the project area and surrounding landscape are sage-steppe habitat for sage-grouse, pygmy rabbit, and other sagebrush-obligate species that are imperiled principally by loss and fragmentation of their habitat. More "proximity" to sensitive resources could scarcely be imagined.

All of these resources are very likely to be adversely affected by the project. The National Park will be affected, among other ways, by degradation of its dark sky and visual resources and industrialization of the area's current rural character. Significantly, the National Park Service strongly advised that an EIS be prepared due to these impacts on the Park, only to be rebuffed by BLM. EA H-40 (NPS comments and BLM response).

Moreover, the proximity of the project to the Rose Guano Cave alone demonstrates that significant impacts will occur. The most common species in the cave is the Mexican (or Brazilian) free-tailed bat, which is at high risk of mortality from the project's wind turbines. Bats are attracted to wind turbines because their lights at night draw insects; and bats are highly vulnerable to mortality from "barotraumas," due to the change in pressure that accompanies spinning turbines. EA 97. The EA estimates that at least 192 bat deaths per year may occur as a result of operation of the turbines at the Spring Valley Wind project, which BLM deems to be acceptable— without any explanation of this impact on the bat populations. EA 97. The EA

also admits the numbers of likely bat fatalities from the project are unknown, *id*., meaning this impact, at a minimum, "may" be significant to bats.

The character of the ACEC and massacre site will be irrevocably altered by the presence of an adjacent industrial development. The ACEC contains a globally unique plant community dependent on its "perched" water table. EA 78. This underlying aquifer is vulnerable to being punctured by the construction of the wind turbine foundations. BLM asserts that "[g]eotechnical investigations will be done for each turbine to ensure not to puncture and dewater the aquifer," that "[s]pecific measures will be developed as needed," and that "[i]f the perching ground water layer . . . is breached, the hole or breach point will be seal grouted to preserve the subsurface hydrology that feeds the local system." DR 2. These vague, uncertain mitigation measures fail to mitigate risk to the aquifer, meaning this impact, at a minimum, "may" be significant to the ACEC.

The project will also destroy over 3,600 acres of habitat for sage-grouse and other sagebrush obligate species such as pygmy rabbit. As the March 2010 Finding by U.S. Fish and Wildlife Service discusses – based on the *Studies in Avian Biology* Monograph and other best available science – wind turbines, powerlines, roads, fences and other man-made installations within sage-grouse habitat have documented impacts on sage-grouse, including by causing mortality (such as through collisions with fences) and abandonment of nesting, brood-rearing and other critical habitats. *See* 75 Fed. Reg. at 13,927–29.

Finally, all of these impacts are likely to be magnified many-fold by the cumulative impacts of numerous other wind power projects proposed in the Ely BLM District and Spring Valley. EA 151 (noting 3 proposed projects for almost 1,000 new wind turbines in the Spring Valley). BLM's website further indicates that there are as many as 16 wind projects proposed in

the Ely BLM District, meaning many were not mentioned in the EA.[3] For these reasons, these significance factors have been triggered.

B. Highly uncertain and controversial effects.

Significance factors are further triggered by 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). BLM's FONSI denied that these factors were triggered, citing to the Wind PEIS and the EA's Avian and Bat Protection Plan, yet at the same time admitting that "the ultimate degree of impacts that will occur from the SVWEF Project is unknown." FONSI at 2–3.

In fact, the impacts from this project are highly uncertain and controversial, particularly on bats and birds. BLM admits that "there is the potential to injure or kill numerous bats at wind energy facilities," and that it is "impossible to provide an accurate quantitative assessment of mortality to these species." EA 97. *See also* EA 95 (same statement of impossibility of determining mortality for birds of prey and vultures). These are significant uncertainties.

The project design relies heavily on adaptive management and uncertain, future mitigation measures. For example, the key mitigation measures for sage-grouse are all prefaced with the phrase "where appropriate," with no explanation of what that means. DR 3–4. If active migratory bird nests are found during construction, BLM is to determine "appropriate mitigation" on a "case-by-case basis." DR 3. The EA's strategy for birds and bats, as set out in the EA and Avian and Bat Protection Plan, is likewise based on adaptive management and therefore rife with uncertainties. For example, the EA provides that "if species-specific thresholds are exceeded, the [Technical Advisory Committee] would determine what mitigation,

[3] BLM Nevada Renewable Energy Program, *available at* <http://www.blm.gov/pgdata/etc/medialib/blm/nv/resources/racs/trirac/nov_2009.Par.20258.File.dat/Renewable_Energy_by_PGubbins.pdf>.

if any, should be recommended for implementation, and the BLM Authorized Officer would approve the measure *if determined appropriate*." EA 107 (birds of prey), 109 (bats) (emphasis added). The EA relies upon a radar system to trigger turbine shut-downs; but its implementation is uncertain and would only take effect after a period of research. EA 97, F-16 (ABPP discussing "if" radar is implemented, how it will work). As a relatively untested, experimental measure, its effectiveness is also uncertain. Similarly, the Decision Record states that the project may employ "on-demand" lighting (i.e., lighting the towers only when needed)—but this is "subject to FAA approval," with no indication as to whether or when this will occur. DR 5.

Other uncertainties include water use. The EA states usage will be between 5 and 10 million gallons. EA at 19. This is a significant difference. The water, purchased from the Mormon Church, is to be displaced from agricultural use. *Id*. Finally, the ROW for the wind facility includes a provision that allows for the plan to be changed in any fashion with simple written approval from BLM: "Any relocation, additional construction, or use that is not in accord with the right-of-way grant, shall not be initiated without prior written approval of the authorized officer." Wind facility ROW at Exh. B (7). Because of these uncertainties and controversies, these significance factors are triggered.

C. Precedential effects.

Another significance factor is "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." 40 C.F.R. § 1508.27(b)(6). This project sets an important precedent. It is one of the first wind energy projects on public land in Nevada—and despite poor project siting and even strong objections from its sister agency NPS, BLM prepared a "fast-track" EA, attempting to tier to its inadequate and outdated 2005 PEIS. With many more wind projects proposed on BLM

land in Spring Valley and the Ely BLM District, *see* EA 151, it would be foolhardy not to assume that BLM is using this project to establish the precedent that it may utilize similar EAs instead of EISs to approve other wind projects in the area.

D. Effect of Programmatic Wind PEIS and Ely RMP FEIS.

BLM attempts to tier to, and relies heavily upon, its PEIS (as well as the 2007 revised Ely RMP/FEIS) for NEPA compliance. This attempt fails for two separate reasons. First, these EISs did not analyze many important resources at issue in the Spring Valley Wind project; and the EISs are both now out-of-date, because they were prepared before the latest sage-grouse science (as set forth in the *Studies in Avian Biology* Monograph) and the Fish and Wildlife Service's March 2010 Finding that ESA listing of sage-grouse is "warranted." Second, BLM admits that it is failing to follow many mitigation requirements mandated by the Wind PEIS, meaning it cannot rely upon that EIS to avoid site-specific analysis of adverse effects posed by the Spring Valley Wind project.

Council on Environmental Quality (CEQ) regulations allow for NEPA documents to "tier" to one another. *See* 40 C.F.R. §§ 1502.20, 1508.28. However, CEQ underscores that such tiering does *not* eliminate the need to determine whether a project threatens significant effects and therefore requires an EIS:

> [W]here a Federal agency adopts a formal plan which will be executed throughout a particular region, and later proposes a specific activity to implement that plan in the same region, both actions need to be analyzed under NEPA to determine whether they are major actions which will significantly affect the environment. If the answer is yes in both cases, both actions will be subject to the EIS requirement, whether tiering is used or not.

48 Fed. Reg. 34,263, 34,267 (July 28, 1983); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) ("Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future

project-specific EIS, without regard to the nature or magnitude of a project."). Thus, where an activity threatens significant effects the agency must prepare an EIS that analyzes those effects—regardless of whether the agency previously conducted a broader programmatic review.

Further, if tiering is employed, it is only effective if the tiered-to document actually analyzed the impacts in question. *See Te-Moak Tribe v. U.S. Dep't of the Interior*, 608 F.3d 592, 605 n.13 (9th Cir. 2010) (rejecting BLM EA's attempt to tier when the tiered-to documents did not analyze the impacts in question). The Wind PEIS fails this test, as its analysis of impacts is extraordinarily general. As the PEIS itself stated: "Because this is a programmatic evaluation, site-specific and species-specific issues associated with individual wind energy development projects are not assessed in detail." PEIS at 5-1. The PEIS's chapter on environmental effects does not even identify specific terrestrial wildlife. Rather, it analyzes effects to "wildlife" as a whole. PEIS at 5-41 – 5-43. Because this type of analysis is so vague as to be meaningless, tiering to the PEIS does not satisfy BLM's requirement to prepare an EIS here before determining whether to approve the Spring Valley Wind project.

Further, the PEIS is now woefully out-of-date on several important issues, such as sage-grouse and amount of predicted wind development. In November 2009, the United States Geological Survey (USGS) – a sister federal agency to BLM within the Department of Interior – made public on its website the 1,481-page sage-grouse Monograph, which is being published in the peer-reviewed scientific journal *Studies in Avian Biology*, and is titled *Ecology and Conservation of Greater Sage-grouse: A Landscape Species and its Habitats*. [4] In its March 2010 Finding, FWS relied heavily on this Monograph in determining that greater sage-grouse

[4] This Monograph is available on the USGS website at http://sagemap.wr.usgs.gov/monograph.aspx; and the entire Monograph is incorporated here by reference.

"warrant" listing under the Endangered Species Act due to population and habitat losses and threats, thus reversing its 2005 decision that ESA listing of greater sage-grouse is "not warranted." As the March 2010 Finding explained, "understanding of the status of the species and the threats affecting it *has changed substantially since our decision in 2005*. In particular, *numerous scientific papers and reports* with *new and highly relevant information* have become available, *particularly during the past year*." Based on this new information, FWS reversed its 2005 decision and determined that the sage-grouse now warrant protection under the ESA. 75 Fed. Reg. at 13,910.

Obviously, none of this recent scientific information concerning sage-grouse populations, habitat losses, and threats was considered in either the 2005 Wind PEIS or the 2007 Ely RMP/FEIS, which the Spring Valley Wind EA supposedly tiers to; and the EA itself does not address the science from the Monograph or the March 2010 Finding. Similar to sage-grouse, significant new information on barotrauma to bats, as well as white nose syndrome which is killing bat populations across the country, has been published since 2005; and hence is not evaluated in the Wind PEIS.

The PEIS is also out-of-date on the amount of predicted wind development in Nevada. The PEIS stated that the amount of economically developable lands for wind power in Nevada is 34,700 acres. PEIS at 5-2. However, as noted above, there are 16 wind power proposals in the Ely District alone. The EA only mentions three of those projects in its cumulative effects analysis. EA 151. And even those three projects have project areas totaling 66,000 acres, far more than projected in the PEIS. *Id*.

Finally, BLM admits in the EA that the Spring Valley Wind project does not follow many important mitigation measures set forth in the Wind PEIS. These include measures directing that

wind turbine arrays should be oriented parallel to bird migrations, rather than perpendicular to them; to avoid locating turbines near known bat colonies, corridors, or flight paths, or in sage-grouse breeding habitat; and to site wind projects on already altered landscapes – all important mitigation measures from the PEIS which the EA admits will not be followed on the Spring Valley Wind project. EA 164, 165, 169.

In short, Appellants have established that *substantial questions* exist about whether the decision *may* have a significant impact, therefore requiring that BLM prepare an up-to-date, site-specific EIS. Accordingly, BLM's decision to prepare an EA/FONSI instead of a site-specific EIS is not in accordance with NEPA. 42 U.S.C. § 4332(2)(C).

II. THE EA's ENVIRONMENTAL IMPACTS ANALYSIS IS DEFICIENT.

Moreover, the Spring Valley Wind EA's discussion of likely impacts to wildlife, both birds and mammals, the Swamp Cedars ACEC, and visual and scenic resources is cursory, full of uncertainty, and fails to evaluate adequately the direct, indirect, and cumulative impacts of the action; and the EA thus violates NEPA. *See* 40 C.F.R. §§ 1508.7, 1508.8.

A. The EA Does Not Adequately Address Impacts to Greater Sage-Grouse.

The EA fails to adequately evaluate impacts to greater sage-grouse – a species recently identified by FWS to warrant protection as a threatened or endangered species under the Endangered Species Act. The March 2010 Finding shows that sage-grouse as a species is deeply imperiled on a range-wide basis and on a regional basis, including in the Great Basin; and that federal agencies must exercise particular care in evaluating potential impacts to this ESA candidate species from actions authorized on public lands. *See* 75 Feg. Reg. at 13912-88. The EA is woefully deficient in its evaluation of sage-grouse and its habitat in and near the project site.

a. Failure to address direct impacts to sage-grouse populations and habitat.

Nevada sage-grouse populations and sagebrush habitats comprise a significant percentage of the range-wide distribution of greater sage-grouse, as both the Monograph and the March 2010 Finding underscore. Management actions in Nevada thus have implications for sage-grouse on both range-wide and regional scales. Population fluctuation and decline in Nevada during the past century are similar to those documented throughout the species' range. Because Nevada contains some of the largest expanses of relatively intact sagebrush habitat in North America, and coupled with relatively minimal threats of oil, gas or coal-bed methane development, conservation and protection of sage-grouse in Nevada is extraordinarily important to the species' survival and recovery range-wide.

As the Monograph and March 2010 Finding both emphasize, sagebrush-steppe habitat fragmentation and disturbance across much of the sage-grouse's range has contributed to significant population declines over the past century. *See* 75 Feg. Reg. at 13912-88. If current trends persist, many local populations may disappear in the next several decades, with the remaining fragmented populations vulnerable to extinction. As the Monograph discusses, limiting large-scale developments, roads, and transmission lines in sage-grouse habitat is necessary for current populations to remain intact and for the very survival of this species. *See, e.g.*, J. Connelly *et al.*, "Characteristic of Greater Sage-Grouse Habitats: A Landscape Species at Micro and Macro Scales," *Studies in Avian Biology* (in press), 28 (explaining that the sage-grouse is a landscape-level species and synthesizing literature); March 2010 Finding, 75 Fed. Reg. at 13923 (explaining that sage-grouse require "large expanses of sagebrush to meet all seasonal habitat requirements"). Sage-grouse rely on different types of habitat at different seasons of the year, 75 Fed. Reg. at 13915, and the annual range of a sage-grouse can encompass

more than 2,700 km. *See* S. Knick & J. Connelly, "Greater Sage-Grouse and Sagebrush: An Introduction to the Landscape," *Studies in Avian Biology* (in press) 4. Damage to even one of its seasonal habitats can impact the sage-grouse. Connelly & Knick at 36.

Because the sage-grouse is a landscape-scale species, ensuring the species' survival requires comprehensive analysis of remaining habitats and populations on a range-wide basis, and then adopting a range-wide conservation plan to ensure that adequate regulatory mechanisms are in place to protect the species across its range. Indeed, the U.S. Fish and Wildlife Service has recognized this basic fact, explaining, "Meaningful restoration for greater sage grouse requires landscape, watershed, or eco-regional scale context rather than individual, unconnected efforts." *See* 75 Fed. Reg. at 13917.

Despite these well-publicized recent findings and scientific knowledge, the EA's analysis of sage-grouse is stunningly brief. Its baseline discussion admits that the project area contains at least 3,643 acres of sage-grouse habitat – and that in fact, NDOW treats the entire project area as habitat. EA 58–59. There are three leks within *one mile* of project boundary, one of which is active; and two other active leks within five miles. EA 59. As to analysis of impacts, the EA very briefly summarizes the general sage-grouse findings from the outdated 2005 PEIS – never addressing the extensive body of scientific literature that has been produced since then. EA 102. The EA then devotes less than a page to analyzing impacts from this project. EA 106, 110. The EA does not even note whether the local sage-grouse are migratory or non-migratory.

This cursory analysis fails to acknowledge the broad range of threats facing sage-grouse and the significance of a local or regional decline caused by this project. The threats to sage-grouse habitat across the West are numerous. *See* March 2010 Finding, 75 Fed. Reg. 13,909 (Mar. 23, 2010). Impacts to sage-grouse habitat and sagebrush systems include:

- Domestic livestock grazing, which can lead to the establishment and spread of weeds, erosion, denuded vegetation and associated lack of cover, pollution of water, and other impacts to sagebrush habitats;

- Range projects such as barbed-wire fencing, which provides predator perches and can pose a mortality threat for sage-grouse when flying grouse collide with the fencing;

- Proliferation of the non-native annual grass cheatgrass, which is spreading rapidly and replacing sagebrush;

- Periods of drought and the effects of global climate change, which may exacerbate the expansion of cheatgrass and the loss of sagebrush habitat;

- West Nile virus, which is spread through mosquito populations as they colonize wet areas on the landscape including livestock water developments;

- Altered and unnatural fire regimes, which are caused by, among factors, grazing, climate change and altered vegetative ecosystems;

- Encroachment of juniper trees on sagebrush habitats, which has been caused mainly by the impacts of livestock grazing, fire suppression and climatic influences over the last century or more;

- High road densities, which fragment sagebrush habitats; various types of energy development and utility corridors;

- Land use issues such as urban development, agriculture, and water development;

- Large-scale development, such as natural gas extraction, mining, and renewable energy development, which fragments habitat, introduces invasive vegetation, cause soil erosion, and increases wildlife collisions with vehicles.

See 75 Feg. Reg. at 13912-88.

While renewable energy might help create a less fossil fuel-dependent energy economy, climate change is already happening. Development in areas that are sensitive to climate changes undermines the benefits of renewable energy. Sagebrush-steppe is one of the ecotypes most vulnerable to the effects of climate change. Altered fire regimes, accelerated invasion by exotic

plants, woodland expansion, loss of surface waters and spread of disease have all been cited as potential outcomes of a warming climate. Sensitive species such as sage-grouse are vulnerable to regional extirpation as the effects of climate change degrade sagebrush-steppe across Nevada. The EA fails to address how development of this project will exacerbate climate change-related impacts sage-grouse and other sagebrush obligates.

The EA unacceptably downplays the impacts of the project. It states that sage-grouse "are expected to avoid areas of up to 2 miles surrounding WTGs, towers, and transmission lines." EA 106. This statement is unsupported by any data or scientific literature. By contrast, recent scientific studies show that effects from energy development projects to sage-grouse can occur six or more miles from leks.[5] The reason for this is simple: sage-grouse need to move around to forage, spend most of their lives away from leks (which are used during the breeding season in the spring of the year), and move between their nesting/foraging habitat to breed, as well as moving among leks. Any impediment to that movement, such as transmission lines or wind turbine arrays, is likely to significantly adversely affect sage-grouse in all phases of their life cycle, including breeding. All credible scientific studies indicate that wind energy development can have profound negative impacts on sage-grouse. BLM does not and cannot scientifically justify its claim that there will be no or few effects to sage-grouse from turbines two miles from leks. Nor does it even adhere to this "buffer," as it admits that three leks are within *one* mile of the project area. EA 59. And as noted above, the sage-grouse mitigation

[5] *E.g.*, Aldridge, C.L. and M.S. Boyce. 2007. Linking occurrence and fitness to persistence: habitat-based approach for endangered Greater Sage-Grouse. Ecological Applications 17: 508-526 (lek buffer of less than 6.2 miles insufficient to protect important nesting and brood-rearing habitats); Doherty, K.E., D.E. Naugle, B.L. Walker. 2010. Greater Sage-Grouse nesting habitat: the importance of managing at multiple scales. Journal of Wildlife Management 74:1544-1553.

measures identified in the EA and DR are only to be adopted "where appropriate," placing their implementation, not to mention their effectiveness, in doubt. DR 3–4.

Furthermore, the EA lacks any attempt to analyze and disclose the impacts of the project on sage-grouse from a landscape or population perspective. For example, it fails to discuss any of Nevada's sage-grouse guidance documents, such as the 2004 Greater Sage-Grouse Conservation Plan for Nevada and Eastern California, or the draft 2009 recommendations from the Nevada Governor's Sage-Grouse Conservation Team. The EA should cite and evaluate recommendations set out by the State and by FWS when considering restrictions or conditions on the ROW. The EA fails to provide or evaluate information regarding sage-grouse population management units ("PMUs") in the vicinity of the project area and other PMUs in the region to identify and evaluate potential cumulative effects on these PMUs from other potential energy development and habitat loss due to impacts from domestic livestock grazing, vegetation treatments projects, and climate change. The EA does not quantify or properly evaluate the large-scale and long-term habitat losses that have occurred from fires in the region, the long-term impact of extensive new habitat loss and fragmentation, and the very long recovery times for sagebrush habitats.

The EA fails to quantify or analyze in detail the potential impacts of increased predation from allowing the new transmission line and fencing to serve as raptor perches. Ravens and raptors will likely congregate and nest in large numbers on the line and fencing, preying on sage-grouse eggs and chicks in nests near the transmission line. BLM failed to quantify or describe in detail these potential increased predation effects.

The EA completely ignores the latest scientific information on sage-grouse from the *Studies in Avian Biology* Monograph. The Monograph, and the March 2010 Finding by US Fish

and Wildlife Service, document and underscore the precarious status of the greater sage-grouse throughout its remaining habitat and the need for excluding habitat-fragmenting activities from sage-grouse core habitat. BLM failed to evaluate the science contained in this document, as well as the conclusions of the March 2010 Finding; or to explain how they apply to the sage-grouse that would be affected by the transmission and generation which the ROWs authorize. BLM's analysis of the effects to sage-grouse from this project is woefully incomplete.

b. Failure to address cumulative impacts to sage-grouse.

The cumulative impacts analysis is also deficient. The EA does not even mention some of the most important threats to sage-grouse, including livestock grazing, fencing (over nine miles of which is proposed as part of this project), and vegetation treatments. It devotes a section to supposed impacts *on* grazing, while largely ignoring impacts *from* grazing. EA 151. As noted, livestock grazing can "seriously degrade" sage-grouse habitat and exacerbate many of the most significant threats to sage-grouse. 75 Fed. Reg. at 13,942. Likewise, fencing "can cause direct mortality to sage-grouse in addition to degrading and fragmenting habitats." *Id*. at 13,942. And yet, the cumulative impacts analysis does not discuss negative impacts from existing grazing in Spring Valley or the miles of new fencing (and roading) proposed by this project.

BLM also fails to grapple with the staggering amount of wind energy proposed within the Spring Valley. It admits that there are three foreseeable projects in the Spring Valley area alone, which would total almost 1,000 new wind turbines over 66,000 acres. EA at 151. However, the EA failed to mention the vast majority of the 16 wind projects proposed in the Ely BLM District. Further, the EA does not analyzes the impacts this would have on sage-grouse beyond admitting that such projects would lead to up to 5,810 acres of habitat loss, cause "greater habitat fragmentation" and lead to loss of 3.3% of available habitat in Spring Valley. AR 152. The

5,810 figure and 3.3% are apparently derived from "area of impact" (i.e. the area occupied by wind towers)—a nonsensical figure to use for a species affected by the sight of tall towers. The EA fails to discuss what such additional injury and mortality would mean for the species. Thus, BLM's analysis of sage-grouse is inadequate.

c. Failure to address sage-grouse conservation requirements and policies.

The EA, FONSI and DR further fail to address a suite of policies and conservation requirements that BLM has adopted to protect sage-grouse from declining toward extinction and ESA listing.

FLPMA mandates that BLM public lands "shall" be managed "for multiple use and sustained yield," and to prevent "unnecessary or undue degradation" of public lands. *See* 43 U.S.C. § 1732(a) & (b). Pursuant to these and other statutory authorities, BLM has adopted a Special Status Species Policy, Section 6840 of BLM's Manual, with which BLM must also comply in analyzing the proposed Spring Valley Wind Project and determining whether to approve rights-of-way over the public lands for it. Yet remarkably, the EA, FONSI, DR and ROWs for the Spring Valley Wind Project fail to even mention this Special Status Species Policy – even though sage-grouse as well as pygmy rabbits are designated by BLM as "sensitive" species requiring protection under this Policy. This failure to mention the Special Status Species Policy thus alone violates NEPA here.

Moreover, in 2004, BLM adopted a National Sage-grouse Habitat Conservation Strategy pursuant to its FLPMA duties and the Special Status Species Policy. BLM's National Sage-Grouse Habitat Conservation Strategy represents an official policy of BLM to help conserve and protect sage-grouse habitats and populations, thereby meeting its obligations under the Special Status Species Policy discussed above. The National Sage-Grouse Habitat Conservation

Strategy is directly applicable to the Spring Valley Wind Project, and emphasizes that existing sage-grouse habitat should be maintained and/or improved – yet again, the Spring Valley EA, FONSI, DR and ROWs wholly fail to mention this Conservation Strategy, much less follow it.

For example, the Strategy states that BLM should "[f]ocus project design and approval on avoiding or minimizing habitat degradation" and identify "mitigation measures at off-site locations to offset unavoidable sage-grouse habitat alteration and losses." *See* Strategy, § 1.4.1 at p. 15.

In March 2010, BLM supplemented the Strategy with Instruction Memorandum No. 2010-071, entitled: *Gunnison and Greater Sage-grouse Management Considerations for Energy Development (Supplement to the National Sage-Grouse Habitat Conservation Strategy*), Mar. 5, 2010. This IM establishes as BLM policy that

> Gunnison sage-grouse and greater sage-grouse are BLM sensitive species that are to be managed to promote their conservation and to minimize the need for listing under the ESA, in accordance with the BLM's special status species policy (BLM Manual 6840). Therefore, when necessary to maintain sustainable sage-grouse populations across the broader landscape within the state, field managers will implement an appropriate combination of the following actions in "priority habitat."
>
> Generally speaking, "priority habitat" is the habitat of highest conservation value relative to maintaining sustainable sage-grouse populations range-wide. Priority habitat will be areas of high quality habitat supporting important sage-grouse populations, including those populations that are vulnerable to localized extirpation but necessary to maintain range-wide connectivity and genetic diversity.

See IM 2010-071.

Despite these directives, BLM has not identified "priority" habitat for sage-grouse in Nevada nor analyzed whether or how the Spring Valley Wind Project might impact such priority habitat. Again, this failure to even analyze potential impacts to local and

regional sage-grouse populations and habitats, much less protect them from further degradation caused by the Spring Valley Wind project, violates NEPA.

B. The EA Does Not Adequately Address Impacts to Bats.

The EA does not adequately address impacts to bats from wind turbines or transmission lines. There are significant and growing concerns about impacts of wind turbines on bats. Bats have low reproduction rates and high mortality rates from collisions with turbines or transmission lines; and the installation and operation of industrial wind farms, such as the Spring Valley Wind project, threaten to cause population declines as a result of continued bat mortalities. This is particularly problematic in light of the EA's heavy reliance on adaptive management, the fact that bats in the U.S. are currently being devastated by the fungal disease known as white nose syndrome, and the many (up to 16) proposed wind projects in the Ely BLM District.

The EA fails to discuss all impacts on bats, such as research indicating that taller turbines pose a greater threat to bats than shorter turbines. The wind turbines planned for this project are over 400 feet high, presenting an unusually high risk for bat mortality. The EA downplays the impacts on bats by relying on its mitigation measures; however, as they are based on adaptive management, their implementation and effectiveness are highly uncertain. E.g. EA 108–09. While the EA implies that bat mortality will be capped at a level of 192 bat mortalities per year, a close reading of the ABPP reveals that much higher mortality levels could occur. There are strict limits on how much turbine curtailment could occur each year, meaning that even if bat mortality greatly exceeded the expected level, further curtailment would not occur. EA at F-25.

The EA fails to analyze cumulative impacts on bats from the large numbers of proposed wind projects in Spring Valley and the Ely BLM District. Instead, it devotes one sentence to

bats in the cumulative impacts analysis, noting, in quite an understatement, a "potential for a somewhat larger percent increase in mortality for Brazilian free-tailed bats throughout eastern Nevada." EA 153. No other bat species are mentioned. This analysis falls far short of assessing the impacts to the Rose Guano Cave's, Nevada's, or the west's bat populations from this project in combination with the many other proposed wind projects and other threats such as white nose syndrome.

C. The EA Does Not Adequately Address Impacts To Other Avian Species.

a. Direct, indirect, and cumulative impacts.

The EA failed to adequately evaluate impacts to raptors, passerines and waterfowl, and impacts/impediments on migratory flyways. Of all species in this area, the avian species (along with bats) have the largest range—spatially limited studies offer little assurance the impacts will be as isolated as they are described in the EA. Avian mortality through collisions with the rotor blades on wind turbines is a chief impact wind farms have on the environment. Long-term studies on the effects of industrial scale wind farms are rare and there are a number of cases in the American West of large-scale wind farms causing harm to raptor populations.

In general, the EA does not adequately address impacts of the transmission line and wind turbines on raptors and other birds. The EA failed to fully evaluate how nesting behavior of raptors might be affected by the presence of a wind facility and what new predation dynamics the facility might introduce to the area. The SWCA studies are missing adequate, quantitative study of avian migratory movements. Much of the information and assessment of impacts is based on limited observation and conjecture. For example, no science is provided to justify the legitimacy of surveying only once a month for raptors, instead of the more rigorous six-days-a-week observations recommended by literature.

The EA heavily relies upon its adaptive management strategy, the effectiveness of which is unknown. Similar to bats, the EA implies that bird mortality will be capped at a level of 203 mortalities per year. EA 93. However, the ABPP's strict limits on how much turbine curtailment can occur each year means that bird mortality could exceed this level. EA at F-25. The EA relies upon a radar system which could trigger turbine shutdowns, but it is not to come into service until "necessary data" has been collected. EA 96. Further, the EA fails to acknowledge the experimental nature of this measure. The other proposed "adaptive mitigation" is vague and relies on uncertain processes, as noted above. E.g. EA 97. Thus, the EA's adaptive management actions not quantify or explain how they will be effective in preventing bird deaths, or how many, or how exceeding – or even meeting—the "avian mortality threshold" will affect species. EA 95–96.

Similar to sage-grouse, BLM fails to grapple with the cumulative impacts of the many wind energy projects proposed within the Spring Valley and Ely BLM District. Again, it only mentions the three projects, rather than the 16 proposed projects that BLM admits elsewhere. EA 151. And the EA improperly downplays the cumulative impacts, stating "the addition of the SVWEF is expected to result in only a small percent increase in cumulative avian mortality." EA 152. The EA fails to discuss what such additional injury and mortality would mean for avian species. Thus, BLM's analysis of avian species is inadequate under NEPA.

b. The EA fails to demonstrate and insure compliance with the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668–668d.

The EA fails to ensure compliance with the federal Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. § 668–668d, despite the presence of Golden Eagles within the project site. EA 59–60. The BGEPA prohibits any person, association, partnership or corporation from

taking a bald or Golden Eagle at any time or by any manner without a permit. 16 U.S.C. § 668(a). A permit may be issued only if the taking would be compatible with the preservation of the species. *Id*. § 668a.

The EA states that it will not issue its notice to proceed "until the applicant completes its obligation under applicable requirements of the BGEA [sic], including completion of any required procedure for coordination with the USFWS or any required permit." EA 37. Thus, compliance remains unknown and undisclosed to the public. This BGEPA process should have been done prior to the Decision so the public could be informed as to whether the procedure had been finished and the results.

c. The DEIS fails to ensure compliance with the Federal Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712.

The Migratory Bird Treaty Act ("MBTA") requires that the FWS enforce the MBTA against "any person, association, partnership, or corporation" that "by any means or in any manner," pursues, hunts, takes, captures, kills or attempts to take, capture or kill a migratory bird or any part, nest or eggs of any migratory bird. 16 U.S.C. §§ 703, 707. Under the MBTA, a person may take or kill migratory birds only as permitted under FWS regulations and based on the FWS's determination that the take or kill is compatible with the migratory bird treaties. *Id.* §§ 703, 704. The FWS's determination must take into account scientific factors such as species abundance and distribution, migratory patterns, and breeding habits, as well as the economic value of birds. Id. § 704. The killing of a single migratory bird is sufficient to create criminal liability. *United States v. Corbin Farm Service*, 444 F. Supp. 510 (E.D. Cal), *aff'd*, 578 F.2d 259 (9th Cir. 1978). The killing of a migratory bird does not need to be intentional and the killing can occur "by any means or in any manner." *United States v. Moon Lake Electric Ass'n, Inc.*, 45 F.Supp. 2d 1070, 1075–79 (D. Col. 1999) (upholding the prosecution of a utility for

unintentionally electrocuting and killing seventeen birds). The EA fails to ensure compliance with the MBTA, as it anticipates many bird deaths, with only vague adaptive management to occur in response. *E.g*. EA 104–05 (songbirds), 107 (birds of prey).

D. The EA Does Not Adequately Address Impacts to Swamp Cedars ACEC.

The Swamp Cedar ACEC contains a unique plant community related to the fact that it is a "perched" watershed. The 75 wind turbines each require excavation and construction of an 8-foot deep cement foundation. EA 11. This construction has the potential to "puncture" or otherwise disrupt the delicate hydrology of the ACEC, causing localized cones of depression that could dry up parts of the ACEC. BLM fails to adequately disclose and analyze the impacts of this threat. It optimistically states in its Decision that "[i]f the perching ground water layer . . . is breached, the hole or breach point will be seal grouted to preserve the subsurface hydrology that feeds the local system." DR 2. But there is no disclosure or discussion of how "grouting" the earth is far more experimental and uncertain than grouting one's bathtub. It also unacceptably puts off site-specific geotechnical investigations until *after* project approval. *Id*.

BLM failed to adequately consider the serious cumulative impacts on the ACEC from both this project and the proposed Southern Nevada Water Authority groundwater development project. That project's pumping could irreparably change its hydrology and vegetation of the ACEC, as described in literature by Dr. David Charlet. However, BLM inexplicably does not even mention the dewatering impacts of the SNWA project in its cumulative impacts analysis of water resources, instead mentioning only the project's ground disturbance. EA 154.

E. The EA Does Not Adequately Address Impacts to Pygmy Rabbits.

The EA also fails to evaluate adequately effects on other mammals, including pygmy rabbits, which are documented in the project area. EA 54. Pygmy rabbits, like sage-grouse, are

dependent on large areas of intact sage-steppe habitat for their survival. Any activities that fragment pygmy rabbit habitat—such as the development of wind turbines and electrical transmission towers and lines through previously-undisturbed or minimally-disturbed habitat—could lead to increased pressure on the species and its continued existence. An extensive body of science shows that the pygmy rabbit is an imperiled, "extreme" sagebrush-obligate species that responds negatively to the destruction of its habitat. FWS describes the pygmy rabbit as a "habitat specialist." 70 Fed. Reg. at 29,265. The EA's very brief discussion, concluding that "regional population levels are not expected to be affected because of the small amount of habitat loss relative to the Spring Valley watershed" does not adequately evaluate likely direct or indirect effects of the project on pygmy rabbits. EA 103. Nor is the single sentence in the cumulative impacts analysis dismissing cumulative impacts from future wind projects as only affecting 3.3% of potential pygmy rabbit habitat, adequate. EA 153. As for sage-grouse, many wind projects are left out, and the figure appears to be calculated based on the minimal area of direct impact, not actual acres impacted from wind facilities.

F. The EA Does Not Adequately Address Impacts to Visual and Recreation Resources.

BLM failed to analyze the direct, indirect, and cumulative impacts on visual and recreation resources. Great Basin National Park is known for its dark skies. Its website boasts that a National Park Service Night Sky Team determined that the Park's night skies are among the darkest in the country, and highlights Park astronomy programs.[6] The Park's scenic vistas are another major draw. As the Park Service stated in its comments, "Public Law 99-565 established Great Basin National Park (GRBA) for the purpose of preserving for the benefit and

[6] *Available at* <http://www.nps.gov/grba/naturescience/lightscape.htm> (last visited Nov. 11, 2010).

inspiration of the people a representative segment of the Great Basin of the Western United States possessing outstanding resources and significant geological and scenic values. The views of and across the Snake and Spring Valley basins are important to park values." EA at H-45.

The EA fails to disclose and analyze the significant impacts that the project would have on these resources. The lit towers would be visible from a vast surrounding area at night, degrading the dark sky and stargazing opportunities. The EA attempts to tier to the Wind PEIS, which did not consider the unique characteristics of the Great Basin National Park's dark sky and visual resources. The Spring Valley EA itself considered only one viewpoint within the Park, on Wheeler Peak, and simply stated that the towers and facilities would visible, but with "low" apparent visual contrast, and that the scenic panoramic views of the surrounding ranges would dominate the view at the summit. EA 126. As the NPS stated in its comments, "The visual impairment of the Spring Valley basin as a result of pervasive industrial development could alter the basin scene that adds a critical dimension to GRBA. . . . The EA fails to disclose that the project has the potential to adversely impact park scenic values in terms of context, intensity, and duration." EA at H-45.

BLM failed to analyze cumulative impacts of the numerous proposed wind facilities on the visual and recreation resources of the Park. BLM's dismissive assertion that even with the numerous new wind facilities planned in Spring Valley, these new light sources combined with the Spring Valley Wind project "are not expected to contribute to sky glow greater than the existing night sky conditions" is inexplicable and defies logic. EA 156. Again, the Park Service stated it well: "The document does not attempt to quantify the cumulative impacts to night skies from the additional industrialization of Spring Valley due to the SNWA groundwater development project as well as the Nextera and Hamlin Valley Wind project." EA at H-45.

Finally, BLM failed to consider the important factor that the Department of the Interior (including the National Park Service) can regulate activities on private lands that harm the fundamental purposes for which a National Park was created. BLM could have imposed mandatory conditions on the project to protect Great Basin National Park, but failed to evaluate any such conditions in the EA, thus again violating NEPA. *See, e.g., United States v. Arbo*, 691 F. 2d 862 (9th Cir. 1982); *Minn. v. Block*, 660 F.2d 1240 (8th Cir. 1981); *United States v. Lindsey*, 595 F.2d 5 (9th Cir. 1979); *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977).

III. THE EA CONTAINS AN IMPROPERLY NARROW PURPOSE AND NEED STATEMENT AND FAILS TO ANALYZE AN ADEQUATE RANGE OF ALTERNATIVES.

The EA impermissibly defines the "purpose and need" for the proposed action too narrowly, precluding development of reasonable alternatives. An agency must "'rigorously explore and objectively evaluate all reasonable alternatives' to a proposed plan of action that has significant environmental effects." *NRDC v. USFS*, 421 F.3d 797, 813 (9th Cir. 2005) (citing 40 C.F.R. § 1502.14(a)). In order to do so, the agency must first reasonably and objectively define the purpose and need of a proposed action, which effectively dictates the range of alternatives evaluated. "[A]n agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F. 3d 1142, 1155 (9th Cir. 1997).

Moreover, as the U.S. Court of Appeals for the Ninth Circuit recently held – in a decision closely on point here – an agency may not allow the economic needs and goals of a private applicant to define the purpose and need, and hence the inevitable outcome, of an EIS. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010). Yet that is exactly what BLM has done here.

Federal agencies must "exercise a degree of skepticism in dealing with self serving statements from a prime beneficiary of the project and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals." *Envtl. Law & Policy Center v. U.S. Nuclear Reg. Comm.*, 470 F.3d 676, 683 (7th Cir. 2006) (quotation omitted). When the purpose and need of a project are overly narrow, the resulting range of alternatives is inadequate under NEPA. An agency cannot define the purpose of a project in such a way as to foreclose the ability of any alternatives to meet the stated purpose. *See Simmons*, 120 F.3d at 669.

Unfortunately, that is exactly the case with this EA. The EA first states that its purpose and need is to respond to Spring Valley Wind's ROW application, EA at 4; and adds that:

> NV Energy has entered into a Power Purchase Agreement (PPA) with SVW to purchase 149. MW of wind energy produced from the WVWEF if it is constructed. Therefore, an additional purpose of this project is to meet the need to fulfill the production of 149.1 MW as required under the PPA.

EA at 5. The EA thus describes the applicant's "needs," but lists no agency-defined objectives or needs other than complying with applicable laws. The EA fails to acknowledge that BLM has no obligation or responsibility to meet the applicant's needs or desires. Certainly the PPA—a private contract between two corporations—does not "require" BLM to do anything, as BLM implies. As a result, the applicant-identified needs defined and drove the characteristics of this project and the alternatives thereto. This is apparent from numerous other comments in the EA, such as stating "[e]ach alternative . . . includes 75 WTGs in order to achieve the 149.1 MW required by the PPA with NV Energy." EA at 7. Thus, BLM's two alternatives to no action are virtually identical, with 75 wind towers in slightly different configurations. This approach is an unlawful abrogation of the agencies' obligation to consider "all reasonable alternatives" and whether there is truly a need for the wind project.

Specifically, the EA failed to identify whether there truly is a need for energy generation facilities in Spring Valley or whether wind energy generation is an appropriate use for the lands at issue. BLM did not consider whether there exist potential alternative sites that would involve less ecologically sensitive areas—such as sites farther from the National Park and Rose Guano Cave. The EA contains no discussion of alternative ROW conditions BLM considered to minimize impacts and satisfy its obligation under FLPMA, the Bald and Golden Eagle Protection Act, and other statutory obligations. The EA also failed to evaluate whether relying on or expanding other renewable energy alternatives would be a practicable alternative or whether the lower efficiency and higher maintenance cost of wind energy generation and long-distance electricity transmission, compared to other renewable generation alternatives (e.g., geothermal or distributed generation) would obviate any need for this project. Because BLM failed to study a reasonable range of alternatives, its decisions are not in accordance with NEPA.

IV. THE FINAL DECISION AND RIGHTS-OF-WAY GRANTS VIOLATE FLPMA.

BLM issued two separate rights-of-way ("ROW") grants on October 22, 2010. Regarding ROW grants, FLPMA states that

> Each right-of-way **shall** contain…
>
> (a) **terms and conditions which will** (i) **carry out the purposes of this Act and rules and regulations issued thereunder**; (ii) **minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environmen**t; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and
>
> (b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way; (iii)

> protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

43 U.S.C. § 1765 (emphasis added).

Of particular note, the underscored language above emphasizes that a ROW must contain terms and conditions that will "carry out the purposes of FLPMA" and "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment. *Id*. § 1765(a). FLPMA also requires that a ROW contain terms and conditions necessary to "protect Federal property and economic interests," efficiently manage the lands that are subject to the ROW "or are adjacent thereto, and "otherwise protect the public interest" in the ROW lands or lands "adjacent thereto." *Id*. § 1765(b). Yet the EA here nowhere describes how the ROW grants would comply with these obligations under FLPMA; and indeed, the ROWs do not.

The EA and ROWs fail to include such terms and conditions that are protective of federal property and the associated public interest, or evaluate any alternatives that consider potential conditions. The EA fails to contain adequate mandatory terms and conditions to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." *Id.* § 1765(a). The ROWs contains various mitigation measures, but the EA and ROW do not disclose and evaluate how such terms and conditions will "minimize" damage. For example, as described above, many mitigation measures are based upon adaptive management and/or prefaced by phrases such as "where appropriate," making their power to "minimize" uncertain at best; and many are based upon stale science, such as with respect to sage-grouse.

The EA also failed to demonstrate that the ROWs would "prevent unnecessary or undue degradation" of the lands BLM manages on and near Spring Valley. *Id.* § 1732(b).

PETITION FOR STAY

Pursuant to 43 C.F.R. § 4.21, Appellants hereby petition for a stay of the challenged decisions. A stay of BLM's decisions and ROWs approving the Spring Valley Wind Energy Facility is necessary to prevent irreparable harm to the environment and Appellants.

I. LEGAL STANDARD FOR A STAY.

To prevail on a petition for stay, the appellant must show sufficient justification based on the relative harm to the parties if the stay is granted or denied, the likelihood of appellant's success on the merits, the likelihood of immediate and irreparable harm if the stay is not granted, and whether the public interest favors granting a stay. 43 C.F.R. § 4.21(b).

> In balancing the likelihood of movant's success against the potential consequences of a stay on the other parties it has been held that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus more deliberative investigation.

Wyo. Outdoor Council Inc., 153 IBLA 379, 388 (2000) (internal quotes omitted). Maintaining the status quo during pendency of appeal "can be of considerable importance since the effectiveness of any relief may be compromised if actions objected to are allowed to go forward during the period of adjudication." *W. Wesley Wallace*, 156 IBLA 277, 278 (2002).

II. LIKELIHOOD OF IRREPARABLE HARM.

The appealed decisions will lead to imminent, irreparable environmental harm. BLM's Decision Record states that "[i]n accordance with 43 CFR 2801.10(b), this Decision is in full force and effective immediately." DR 1. About a week following issuance of the Decision Record, BLM issued the two ROW grants. The Decision Record states that "[t]here will be no ground disturbing activities until a Notice to Proceed (NTP) is issued." DR 1. However, this NTP is likely to be issued at any moment.

This project is being "fast-tracked" by the Department of the Interior. EA 4. As such, the proposed construction schedule is extremely rapid. "Construction is expected to commence in the later part of 2010, with the final mechanical completion, commissioning, and testing expected to be completed by the third quarter of 2011." EA 11. Specifically, activities scheduled in "4th quarter 2010" include "construction mobilization" and "commence civil works (roads, underground electrical foundations). EA 8. Site preparation for construction will include vegetation mowing and vegetation clearing "using bulldozers, road graders, or other standard earth-moving equipment," as well as the planned 9+ miles of fence construction. EA 10. Construction will also include bulldozing the over 25 miles of planned new roads. Turbine deliveries commence in 2nd quarter 2011. EA 8. Three to five towers can be erected weekly. EA 11.

This imminent construction activity will cause irreparable environmental harm. It will destroy slow-growing sagebrush, other vegetation, pygmy rabbit burrows, and the like. *See* Declaration of Katie Fite, submitted herewith. The bulldozing of roads, turbine sites, and other facilities associated with the Spring Valley Wind project will irreparably alter the soils, microbiotic crusts, vegetation, and habitat conditions of the region; and will fragment and degrade sagebrush-steppe habitat in and around known sage-grouse and pygmy rabbit habitat. *Id.* Ground disturbance by construction activities will also promote weed invasions that further degrade and fragment the habitat of these and many other species. The erection of powerlines and turbines will likely cause sage-grouse to abandon or be displaced from habitats within a far greater distance than BLM has acknowledged. *Id.* Likewise, the construction of nine miles of fencing for the project threatens to cause direct mortality to sage-grouse from collisions, and indirect impacts including abandonment by sage-grouse. *Id.*

The Supreme Court has acknowledged that environmental harm, by its nature, is often permanent or irreparable, and that the "balance of harms usually favors issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Similarly, Federal courts have repeatedly recognized that noncompliance with NEPA and other environmental laws, in itself, generally causes irreparable injury, both by threatening permanent environmental harm and by injuring the rights of affected members of the public to participate and be fully informed of the agency's decision-making process under NEPA. *See, e.g., Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984); *California v. Block*, 690 F.2d 753 (9th Cir. 1982)

The Ninth Circuit has repeatedly recognized that injunctive relief is appropriate for noncompliance with environmental laws, including NEPA violations. *See Blue Mtns. Biodiversity Project v. Blackwood, 161 F.3d 1207, 1208, 1211* (9th Cir. 1998); *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800 (9th Cir. 1999); *National Parks Conservation Assoc. v. Babbitt, 241 F.3d 722, 736* (9th Cir. 2001); *Earth Island Institute v. USFS*, 351 F.3d 1291 (9th Cir. 2003); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033-34 (9th Cir. 2007).

Indeed, courts in the Ninth Circuit have underscored in recent decisions that injunctive relief is particularly appropriate to protect sensitive and declining wildlife species from irreparable harm – including greater sage-grouse. *See ONRC v. Goodman*, 505 F.3d 884, 897-99 (9th Cir. 2007) (granting injunction to protect Forest Service-designated sensitive species); *Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217 (D. Idaho 2005) (enjoining livestock grazing on nearly 1 million acres of Jarbidge Resource Area to protect sage-grouse). The fact that the U.S. Fish and Wildlife Service recently determined, in its March 2010 Finding, that sage-grouse are so imperiled as to "warrant" ESA listing further underscores the irreparable

harm that will occur if the Spring Valley Wind project proceeds to construction and implementation without adequate analysis and protection of sage-grouse, as required by NEPA, FLPMA and implementing regulations and policies, as discussed above.

III. RELATIVE HARM TO THE PARTIES.

There is little to no harm to BLM from a stay. BLM may claim that a stay would result in economic harm to the project proponent. That is not, however, the same as harm to BLM or the public. Further, economic harm is not irreparable, especially in the context of a preliminary injunction where such alleged harms are temporary. *See S. Fork Band Council*, 588 F.3d at 728 (economic injuries to mining operations temporary); *S.E. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006) ("there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation"); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) ("loss of anticipated revenues . . . does not outweigh the potential irreparable damage to the environment"). Where there is a threat of irreparable environmental harm, "more than pecuniary harm must be demonstrated" to avoid a preliminary injunction. *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (irreparable environmental harm outweighed competing harm to miners despite potential for "real financial hardship"); *Save Our Sonoran*, 408 F.3d at 1124-1125 (affirming preliminary injunction because, while developer "may suffer financial harm," without injunction "unlawful disruption to the desert is likely irreparable").

IV. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

The Appellants' likelihood of success on the merits also favors granting a stay because the appellants have shown that the challenged decisions and ROWs are unreasonable. As

explained in the foregoing Statement of Reasons, Appellants have demonstrated that they are likely to succeed on the merits of their appeal based on numerous challenges – including that BLM has violated NEPA and FLPMA. At a minimum, the Appellants have raised "fair ground for litigation and thus for more deliberative investigation," *Wyoming Outdoor Council, et al*., 153 IBLA at 388, showing that the decisions and ROWs should be stayed pending final resolution of their appeal.

V. THE PUBLIC INTEREST SUPPORTS A STAY.

Finally, the issuance of a stay would serve the public interest. The public interest favors maintaining the status quo until the merits of a serious controversy can be fully considered. *Valdez v. Applegate,* 616 F.2d 570, 572-573 (10th Cir. 1980). And there is an inherent public interest in upholding federal environmental law, as the Ninth Circuit has repeatedly held. *See Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1177 (9th Cir. 2006) (public's interest in preserving the environment favors injunctive relief); *ONRC v. Goodman*, 505 F.3d 884, 897-99 (9th Cir. 2007) (same). To allow the BLM to quickly construct the Spring Valley Wind Energy Facility before BLM has fully analyzed the project's impacts under NEPA, and before Appellants can obtain adequate review through this administrative appeal would harm the public's interest in the values protected by these regulations and statutes, and in lawful governance itself.

CONCLUSION

For these reasons, Appellants respectfully pray that the IBLA grant a stay of the challenged BLM DR, FONSI, EA, and ROWs approving the Spring Valley Wind facility; and following a review on the merits, reverse and set aside such decisions.[7]

Dated this 13th day of November, 2010.

Respectfully submitted,

/s/ Kristin F. Ruether

Kristin F. Ruether
Attorney for Appellants

[7] If the IBLA does not timely grant a stay of the BLM decisions challenged here, Appellants – or any of them – reserve the right to dismiss their appeal and seek relief from the federal courts.