

**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

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INTRODUCTION

BLM has not demonstrated that this industrial wind energy development—sited near a major bat cave and in the bats’ nightly flight path in contravention to BLM’s own siting guidance—poses less than significant impacts to sensitive bats. The agency cannot establish that the Project’s mortality to bats will be held below 192 bats/year, as the district court erroneously assumed. Nor does BLM refute the certainty of irreparable harm to sage-grouse and their habitat, which will be undeniably degraded by the wind towers and 25 miles of roads proposed for this Project. Instead, BLM and Spring Valley Wind LLC argue that irreparable harm cannot occur since the habitat is not pristine, a theory that has no bearing on the further harm the Project will cause. And the harm to bats is irreparable, because the district court will not be able to rule on the merits of the case before the wind facility is virtually complete, making a subsequent “hard look” unlikely.

REPLY STATEMENT OF FACTS

All parties agree that Spring Valley and the Rose Guano Cave are unique areas for bats. When describing bat characteristics, BLM states that the altitude at which Brazilian free-tailed bats fly “will place them well above the turbines.” BLM Brief (Br.) at 10. This is inaccurate, as BLM acknowledged in a meeting that “[w]e know 20–40% of Brazilian free-tailed bats drop into project area.” ER 369. SVW’s statement that bats travel to agricultural fields south of the Project area

does not contradict this fact, as to get to points south, the bats must pass by the Project area. SVW Br. at 13 n. 5; *see* ER 72 (map). Furthermore, recent research, not considered in the EA, shows that bats are attracted to wind turbines, meaning they will likely *change* their flight habits after the facility is built. *See* ER 259 (Dr. Tuttle declaration explaining this omission); ER 369 (BLM admitting “we don’t know if they’re attracted or not.”).

Contrary to SVW’s contention, SVW Br. at 29 n.13, Brazilian free-tailed bats are in decline. A study in the record confirms that “fatalities [from wind turbines] raise concerns about potential impacts on bat populations at a time when many species of bats are known or suspected to be in decline [], and extensive planning and development of both onshore and offshore wind energy development is increasing worldwide [].” ER 250 (citing literature). Dr. Tuttle specifically summarized the scientific literature on Brazilian free-tailed bat population size and their decline. ER 44–46. Neither BLM nor SVW cite any contrary evidence.

BLM states that the radar system proposed here is currently in place at a facility in Texas, where it has “helped to keep mortalities at or below projected levels.” BLM Br. at 12, citing ER 164. However, BLM’s citation is to the EA simply asserting this. The Nevada Department of Wildlife (“NDOW”) noted there was no data to support this. ER 237, 365. Dr. Tuttle explained it is, in fact, not true. ER 262–63.

A schedule submitted by SVW confirms that construction is proceeding rapidly. The March 2011 “Notice to Proceed” authorized SWV to commence “clearing and grading” 30 acres and almost six miles of roads and develop a switchyard. ER 38–40. SVW’s schedule explains that the switchyard includes concrete foundations, underground conduits, a buried ground grid, steel structures, breakers, a reactor, and a control house. ISER 60.

Construction of the remaining roads (approximately 19 more miles) will begin “in June or July and continue until mid-October” of 2011. *Id.* Construction of the wind turbine foundations “will begin in early August and continue through the end of the year” and will consist of “excavation, steel placement, forming and pouring of concrete.” ISER 60–61. Construction of the underground power system will begin in September and will consist of “trenching, laying in conductor/fiber, [] backfill and compaction,” and installing above-ground transformers and junction boxes. *Id.* Finally, erecting turbines will begin in March 2012. *Id.*

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ARGUMENT

I. DEFERENCE IS NOT DUE WHERE BLM IGNORED CONTRADICTIONARY EXPERT OPINIONS, AND THOSE OPINIONS WERE NOT ALL RESOLVED.

BLM first argues that it deserves deference. BLM Br. at 34. This demand fails because BLM repeatedly fails to explain why it disregarded expert agency concerns regarding many issues, including the ultimate conclusion of “no significant impact.” Unsupported conclusions that are contrary to the advice of agency experts do not receive deference. *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 763–64 (9th Cir. 2007) (deference not due when agency does not follow its own methodology or its result is not rationally connected to the best available scientific evidence); *see also Northern Spotted Owl v. Hodel*, 716 F.Supp. 479, 483 (W.D. Wash. 1988) (“The Court will reject conclusory assertions of agency ‘expertise’ where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation.”). Rather, the agency “must explain the conclusions it has drawn from its chosen methodology, and the reasons it considers the underlying evidence to be reliable.” *Lands Council v. McNair*, 537 F.3d 981, 994 (9th Cir. 2008) (en banc).

This Court recently confirmed this principle where BLM issued new livestock grazing regulations that weakened environmental protections. *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011). BLM

concluded the regulations would have little impact, with little to no discussion of contrary comments from sister agencies and its own experts. *Id.* at 488–91. In remanding the EIS, the Court explained “BLM gave short shrift to a deluge of concerns from its own experts, FWS, the EPA, and state agencies; the BLM neither responded to their considered comments ‘objectively and in good faith’ nor made responsive changes to the proposed regulations.” *Id.* at 493, citing *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

Here, BLM similarly ignored a “deluge” of concerns from its own experts and those of NDOW, the U.S. Fish and Wildlife Service (“FWS”), and the National Park Service (“NPS”). As explained in more detail below in conjunction with discussion of individual issues, BLM does not cite any BLM experts to explain why other expert agency comments are incorrect. Thus, BLM has not applied its expertise through reasoned analysis and its conclusions are not due deference.

BLM next argues that reference to concerns from dissenting experts is somehow “irrelevant or misleading,” because their concerns only applied to the project as “initially conceived” and were resolved. BLM Br. at 35, 8. The record belies this argument.

BLM and SVW imply all NDOW comments were incorporated into BLM’s decision. BLM Br. at 8, SVW Br. at 18–20. BLM quotes a sentence from

NDOW's final comment letter stating some concerns were addressed. SER 32 (ER 235). BLM does not mention that those comments go on to raise numerous substantive concerns that remained unaddressed in the final EA and FONSI, including: BLM's failure to avoid major bat caves and migration routes; misplaced reliance on the Wind PEIS; inadequacy of wildlife surveys; that "there could be a high magnitude of mortality on the Brazilian free-tailed bat"; SVW's refusal to share its data on the radar system; and inappropriate limits on timing of wind turbine curtailment. ER 235–38.

SVW asserts that no comments prior to April or July 2010 should be considered because that is when the ABPP was drafted. SVW Br. at 14–15, 18–20. This argument fails because many concerns raised in those comments either did not relate to or were not cured by the ABPP. For example, NDOW stated BLM needed to prepare an EIS due to significant impacts on bats and failure to adhere to the PEIS's siting guidance—and that was when BLM's mortality threshold was 179 bat deaths/year (later revised upwards to 192). ER 323–25. This was not cured by the ABPP.

NDOW also explained that BLM's mortality thresholds (created by averaging mortality from 11 other wind facilities) were inaccurate and "an inappropriate use of data" because the sites were not analogous and BLM did not even address whether the sites were in the range of the relevant bat species. ER

325, 327. NDOW suggested other, more scientific models. ER 325. BLM made one minor change, incorporating an additional wind facility, but otherwise failed to address the comments or change the model, and kept the results in the final ABPP. ER 173. NDOW objected to “resetting” the mortality threshold to zero every time it is met, ER 366 (unchanged in the final ABPP, ER 172), and to the discretionary language regarding whether TAC recommendations must be followed. ER 332. Discretionary language remains throughout the ABPP. *E.g.*, ER 179 (“if species-specific thresholds are exceeded, the TAC will determine what mitigation, if any, should be recommended for implementation, and the BLM Authorized Officer would approve the measure if determined appropriate.”).

As to FWS, BLM quotes a sentence from that agency’s final comment letter stating the Project was “appropriate in its adaptive management approach.” BLM Br. at 8, citing SER 38. Whether an ABPP is “appropriate” is a term of art under BLM’s ABPP guidance pursuant to the Bald and Golden Eagle Protection Act,¹ and distinct from finding that impacts are insignificant under NEPA. FWS conditions its conclusion on the adoption of (unspecified) substantive comments, and does not address significance or rescind its prior comments. SER 38. Many of those were never resolved—such as that, given “significant unknowns,” the risk to

¹ See BLM Instructional Memo. No. 2010-156, at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-156.html (visited June 23, 2011).

bats “could be substantial,” ER 392, and that the mortality thresholds “could be reached in a single night.” ER 335–36. In addition, the National Park Service, another agency of the Department of the Interior, never conditioned its comments explaining that impacts to wildlife are significant and an EIS is required. ER 317–21.

Next, in an attempt to neutralize the comments from Southern Nevada Water Authority (“SNWA”), which excoriate BLM’s sage-grouse analysis and conclusion of no significant impacts, ER 312, BLM cites a post hoc letter memorializing an agreement between SNWA and SVW, whereby SNWA agreed not to challenge the Project because SVW agreed not to oppose a SNWA groundwater development project. SER 250. A compromise agreement on its face, the letter does not invalidate the flaws identified in BLM’s sage-grouse analysis.

Even if the final agency comments purported to retract earlier comments, “retraction letters” unsupported by reasoned scientific explanation should carry little weight where the record contains evidence of political pressure, as it does here. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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II. WWP IS LIKELY TO SUCCEED ON ITS CLAIM THAT THE PROJECT REQUIRES AN EIS.

A. Impacts on Bats Will Be Significant.

In its opening brief, WWP explained that the Project triggers the “uncertainty” and “controversy” significance factors requiring preparation of an EIS. 40 C.F.R. § 1508.27(b)(4)–(5). In response, BLM first argues that WWP does not “provide any indication” that bats “face[] any significant risk from the project.” BLM Br. at 36. To prevail on its claim that BLM violated NEPA by refusing to prepare a site-specific EIS for the Project, WWP must show “that there are *substantial questions* whether a project may have a significant effect on the environment.” *Anderson v. Evans*, 314 F.3d 1006, 1017 (9th Cir. 2002) (quotation omitted) (emphasis in original). WWP met this standard through the numerous, unrebutted statements from agency experts noting significant risk to bats, as well as Dr. Tuttle’s statements to the same. WWP Br. at 34–39.

BLM disputes this showing by making the puzzling claim that “any given Brazilian free-tailed bat has only a small risk of being killed by a wind turbine.” BLM Br. at 36. But any given bat’s odds on life has no pertinence for the standard for significance, which asks whether there are “substantial questions” as to the effects on wildlife in the local area. *Anderson*, 314 F.3d at 1019.

BLM’s handful of citations to the EA are contradicted by expert comments, without evidence of BLM expertise. As noted, the fact that bats fly above the

height of the wind turbines ignores research not considered by BLM that bats are attracted to wind turbines. BLM does not deny that prevailing science is that bats are attracted to wind turbines, but asserts that the EA's statement that bats "simply fly around" turbines shows that BLM considered and rejected it in its "expert judgment." BLM Br. at 26. But BLM provides no evidence that it actually considered and rejected the science due to some sort of site-specific factor. In fact, the EA quote in question is itself a quote from the 2005 Wind PEIS. ER 130. As Dr. Tuttle explains, the phenomenon of bat attraction was only discovered in 2007. ER 259. Thus, it is apparent that BLM simply quoted the PEIS without considering more recent science, and the argument that it was some sort of sophisticated rejection of current science is nothing but a post-hoc justification.

BLM and SVW fail to refute WWP's showing that the district court's assumption that the Project's mitigation would "ensure the bat mortality rate would not surpass 192 bats per year," ER 16, was clearly erroneous. BLM and SVW describe the escalating mitigation phases, and SVW emphasizes the number of hours of mitigation permitted in mitigation Phase V. SVW Br. at 19. However, even if bat kills are far higher than expected, the ABPP provides that "no more than two phases of curtailment will be implemented in a single year." ER 174. This means that unsustainable bat deaths could continue for months or years until Phase V was eventually deployed.

BLM does not refute that the discretionary nature of the ABPP further vitiates any insurance of meeting thresholds. *See* ER 17 (district court order expressly relying on the condition that “*if these mitigation measures are implemented,*” impacts to bats will not be significant) (emphasis added). BLM suggests “‘discretionary’ is not the same as ‘optional’”—a distinction without a difference. BLM Br. at 39. The recent CEQ guidelines on mitigation invoked by BLM emphasize that agencies must ensure that mitigation commitments are implemented, enforced, and effective—components lacking here. 76 Fed. Reg. 3843, 3847 (Jan. 21, 2011).

SVW implies WWP is cynical for not trusting BLM to fully enforce the ABPP. SVW Br. at 38. But BLM’s *own* Associate District Manager “expressed concerns about how effectively BLM could enforce stipulations during the operation phase, particularly in light of political concerns.” ER 394. And even SVW admits key ABPP provisions are optional, such as if bat mortality exceeds thresholds, “the BLM Authorized Officer *can* require increased curtailment.” SVW Br. at 17, citing ER 119 (emphasis added). *See also* ER 172 (if mortality continues to exceed thresholds, TAC will meet to “discuss other appropriate mitigation measures.”). And the TAC itself “is only an advisory committee” and can be terminated. ER 163–64.

BLM effectively concedes that it never explained why the amount of bat mortality permitted in the thresholds (much less the higher level of mortality likely) is not biologically significant. BLM's response on this issue, which lacks a single citation, amounts to an assertion that BLM's counsel does not believe a certain percentage could be significant. BLM Br. at 40. This is no rebuttal to actual expert agencies' opinions that this level is in fact significant. ER 319 (NPS stating the thresholds "constitute[] a significant direct impact to wildlife resources" in Spring Valley over the life of the project); ER 323 (NDOW stating that 302 bird mortalities and 179 bat mortalities justifies EIS); ER 369 (NDOW stating "No question that impacts are significant"); ER 362, 381 (BLM State Office stating ability to support a FONSI is "seriously questioned," and 179 bats/year seems significant); *see also* ER 44 (Dr. Tuttle explaining that free-tailed bats require large populations for reproductive success). Nor does BLM provide any evidence it considered the declining baseline status of bats, a significant omission in its analysis.

For these reasons, the available evidence casts serious doubt upon the reasonableness of BLM's conclusion with respect to the significance of the Project's impacts on bats, as it was counter to the evidence before the agency.

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

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

BLM responds to WWP's showing that the PEIS is so general and outdated that it contains no useful analysis to which to tier by claiming that programmatic EISs need not address site-specific concerns. BLM Br. at 43. This argument is inconsistent with this Court's precedent holding that, for tiering to be successful, the programmatic document must have "*specific* information" about effects of the project. *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 997–98 (9th Cir. 2004) (rejecting tiering where programmatic EIS contained "general statements about the cumulative effects of logging across the [BLM] District," but no information on the timber sales at issue). *See also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810–11 (9th Cir. 1999) (tiering ineffective where programmatic EIS "provide[d] very broad and general statements devoid of specific, reasoned conclusions," contained "no detail," and did not "account for the specific impacts" of land exchange). The same is true here, as the PEIS only analyzes very general impacts on wildlife from potential wind facilities across the entire American west. *E.g.*, ER 231–32 (PEIS's two page cumulative impacts analysis for Ecological Resources).

BLM argues that it should be permitted, in effect, to plug the holes in the PEIS through the EA. BLM Br. at 43. Even if the EA adequately addressed impacts to bats, this argument still fails because an EA cannot take the place of an

EIS where impacts are significant—as the documents serve different purposes.

“An EA simply assesses whether there will be a significant impact on the environment.” *Anderson*, 314 F.3d at 1023. But “[a]n EIS weights any significant negative impacts of the proposed action against the positive objectives of the project. Preparation of an EIS thus ensures that decision-makers know that there is a risk of significant environmental impact and take that impact into consideration.” *Id.*

BLM does not contest that the Project does not comply with the PEIS’s bat avoidance Best Management Practice (“BMP”), on which the PEIS’s analysis and conclusions are contingent. Rather, BLM argues obliquely that it would not be possible to implement all “mitigation measures” in the PEIS. BLM Br. at 43–44. However, the plain language of the PEIS obligates compliance with the BMPs (a subset of the mitigation measures) because the PEIS’s analysis and conclusions on wildlife are based upon compliance with the BMPs. ER 202, 216, 225.

BLM’s attempt to show that the BMPs are optional backfires, as its selected quote only implies that “mitigation measures discussed in Chapter 5 of the PEIS” are optional. BLM Br. at 44. But the BMPs are not among the measures described in that chapter, ER 202; they are described separately in an Attachment to the Record of Decision. ER 195 (stating they are “required” and “would need to be

incorporated” into project-specific plans). BLM was free to deviate from the bat avoidance BMP mandated in the PEIS only if it prepared an EIS to do so.

III. WWP IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM THAT BLM FAILED TO ANALYZE CUMULATIVE IMPACTS.

A. WWP Raised This Issue Below.

As a general rule, this Court “will not consider issues raised for the first time on appeal.” *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). Here, WWP properly raised the issue that BLM failed to consider the cumulative impacts of the Project. ISER 3, 5 (WWP PI brief stating EA’s cumulative impacts analysis “barely mentions bats” and “fails to recognize the ‘extreme potential for harm’ if additional wind facilities are built”; and explaining why sage-grouse cumulative impacts analysis is inadequate). The district court recognized as much in its opinion. ER 8 (“plaintiffs claim . . . (3) the BLM failed to take a ‘hard look’ at the environmental impacts without adequate scientific data, including impacts to bats and sage-grouse, and the cumulative environmental impacts of the project”); ER 21 (defense of EA’s cumulative impacts analysis).

B. The Cumulative Impacts Analysis on Bats is Inadequate.

BLM and SVW make no serious argument that the EA’s vague, perfunctory analysis of cumulative impacts on bats is adequate. To illustrate the point that BLM failed to even estimate bat deaths from additional proposed wind facilities in

the area,² much less how that would affect bat populations, WWP estimated how many bat deaths might be caused if bat deaths per turbine on the additional facilities were the same as this Project. WWP Br. at 26. SVW's complaint that this estimate of mortality is not accurate underscores that there is no way to know the accuracy of *any* estimate of cumulative mortality since BLM never attempted one. SVW Br. at 30–31. It is not WWP's duty to perform the cumulative effects analysis; "Plaintiffs must show only the potential for cumulative impact." *Te-Moak Tribe v. U.S. Dep't of the Interior*, 608 F.3d 592, 605 (9th Cir. 2010). BLM provides no explanation of why it did not and could not have done so. As the BLM State Office put it, the cumulative impact analysis's prediction of "somewhat larger percent increase in mortality" to bats is inadequate, as there is "no basis to understand what a 'somewhat larger percent' means." ER 386.

BLM implies that WWP's calculation shows that BLM's failure to analyze cumulative impacts to bats can be cured with a calculator. BLM Br. at 46–47. This is not accurate because, while a tally of numbers (such as bat mortality) is "a necessary component of a cumulative effects analysis," "it is not a sufficient description of the actual environmental effects" expected. *Klamath-Siskiyou*, 387

² SVW is correct that only some of the projected one thousand wind turbines identified by BLM, ER 138, will be in Spring Valley proper. SVW Br. at 30. However, the remaining turbines will be in areas adjacent to Spring Valley, well within flight range for foraging or migrating Brazilian free-tailed bats from Rose Guano Cave. See ER 99–100, ER 135 (map).

F. 3d at 995. Thus, the agency must assess what the numbers mean for the resource at stake—i.e., how mortality levels would actually affect bat populations. A calculator cannot do so.

BLM and SVW dispute that Brazilian free-tailed bats are in decline or that “wind energy is or will become a significant factor in the species’ population size,” but the record indicates otherwise, as noted above. BLM Br. at 47, SVW Br. at 29 n.13, ER 250. BLM does not cite any evidence to the contrary— only speculation that the bats are common. BLM Br. at 47. This argument only highlights BLM’s failure to consider any data on bat population status in the EA.³

C. The Cumulative Impacts Analysis on Sage-Grouse is Inadequate.

BLM and SVW likewise fail to refute that the EA’s brief analysis of cumulative impacts on sage-grouse is inadequate. Again, to illustrate the point that BLM failed to even tally the estimated area that the other planned wind facilities could render uninhabitable for sage-grouse, and to show “the potential for cumulative impact,” *Te-Moak Tribe*, 608 F.3d at 605, WWP estimated how many acres that might be, considering the other wind project areas were eight times

³ SVW’s other objections on cumulative impacts are inaccurate. SVW Br. at 29 n. 13. SVW apparently objects to WWP’s statement that “the number of wind energy applications in the BLM district is much higher” than the three planned wind facilities, WWP Br. at 25, but that is precisely what the record document indicates. ER 395 (“Renewable Energy Application Status,” showing 16 wind energy applications in the Ely BLM district). And WWP labeled the vast majority of its citations to Dr. Tuttle as such, allowing this Court to consider them as it sees fit.

larger than the Project area here. WWP Br. at 30. SVW complains the analysis is inaccurate.⁴ It may or may not be, but there is no way to know since BLM never attempted it.

The point is, there is a potential for significant cumulative impacts due to the overlapping sage-grouse “exclusion zones” that BLM ignored when it only considered the far smaller area of direct habitat disturbance. ER 138. The 2010 Finding’s exhaustive explanation that habitat fragmentation is the single greatest threat to the species’ persistence makes it hard to fathom SVW’s argument that it somehow is “speculative” that additional wind facilities will cause habitat fragmentation leading to population decline. SVW Br. at 34. 75 Fed. Reg. 13,910, 13,923–24, 13,927, 13,935–37, 13,951, 13,962 (Mar. 23, 2010).

IV. THE DISTRICT COURT ERRED IN STRIKING DR. TUTTLE’S DECLARATION.

A. This Court has jurisdiction to review the order to strike.

BLM briefly contends that this Court lacks pendent jurisdiction to review the district court’s order to strike the Tuttle declaration. BLM Br. at 1, 24 n.5. It argues that resolution of that order is not essential to resolving the preliminary injunction because the latter “would not constitute an abuse of discretion even if

⁴ SVW points out that one of the projects is south of Spring Valley. SVW Br. at 34. This is true, but that project may also be in sage-grouse habitat, the eradication of which could affect the regional sage-grouse population. SVW claims that one of the projects is not in sage-grouse habitat, citing an EA map at ER 135, but that map does not show sage-grouse habitat.

the Tuttle declaration were in evidence.” *Id.* This elides the relevant question, which is whether review is “necessary to ensure meaningful review” of the PI order. *al-Kidd v. Ashcroft*, 580 F.3d 949, 957 (9th Cir. 2009). Here, it is necessary. First, the declaration identifies factors BLM failed to consider in its decision. This is central to WWP’s NEPA claim on the merits. Second, the declaration explains how the harm to bats caused by the Project will be irreparable. This supports the irreparable harm prong of the preliminary injunction inquiry for bats. The Tuttle declaration is one of WWP’s primary pieces of evidence to support these two points at this stage of the litigation. An appeal of the order to strike would be moot and meaningless if separated from the preliminary injunction order.

BLM does not address the other way this Court may exercise pendent jurisdiction: if an otherwise nonappealable order is “inextricably intertwined” with the appealable one. *al-Kidd*, 580 F.3d at 957. This factor is met as well. WWP Br. at 44–45.

B. The district court abused its discretion by striking Dr. Tuttle’s Declaration.

WWP’s opening brief explained that the district court clearly erred in assessing whether Dr. Tuttle’s declaration fit into established exceptions to record review and is appropriate evidence on a motion for preliminary injunction. WWP Br. at 46–50. Dr. Tuttle’s declarations provide background and information on key

factors BLM failed to consider with respect to impacts on bats, illustrated how BLM failed to explain its conclusion on impacts to bats, and explained complex subject matter concerning the impacts of wind turbines on bats and the population status of bats. *Id.*

BLM first argues that “this Court has consistently rejected” arguments to admit extra-record materials to determine whether an agency has considered all relevant factors and explained its decision. BLM Br. at 24. To the contrary, this Court has endorsed the use of extra-record materials in similar circumstances. *National Audubon Society v. U.S. Forest Serv.*, 46 F.3d 1437, 1447–48 (9th Cir. 1993) (approving review of biologist testimony regarding roadless areas and logging impacts missing from agency analysis, as exceptions to record review “permit the introduction of new evidence in NEPA cases where the plaintiff alleges ‘that an EIS has neglected to mention a serious environmental consequence . . . or otherwise swept stubborn problems or serious criticism under the rug.’”) (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir.1988)).

BLM argues that “BLM did consider the factors raised in the declaration, [but] it simply reached a different conclusion than does Tuttle.” BLM Br. at 25. The record and BLM’s own examples contradict this. For example, BLM argues that “its experts examined” whether the other wind facilities used to predict bat mortality here were in similar bat habitats. BLM Br. at 25. But its only defense is

an assertion from the EA that those projects had “the most similar habitats or environmental factors available.” SER 145. Dr. Tuttle refuted that (as did NDOW), noting there was no indication the sites were in similar bat habitat (i.e., near a major bat cave and within a major bat migration corridor). ER 257–58. BLM’s assertion provides no indication that any expert analysis actually occurred. Dr. Tuttle thus identified a relevant factor that BLM failed to consider.

BLM next argues that it did not ignore bat attraction. BLM Br. at 26. As explained above, its argument that BLM considered and rejected recent science fails, since the EA simply quotes the 2005 PEIS. ER 130. BLM cannot explain why the prevailing science would not apply here, and cites to no BLM expert analysis of the issue, leaving Dr. Tuttle’s declaration the only evidence of a factor BLM failed to consider.

BLM also argues it considered whether its mitigation measures would work, citing generally to the ABPP and to the FONSI’s conclusion. BLM Br. at 27. Dr. Tuttle’s declaration described that the ABPP failed to consider several specific relevant factors regarding the mitigation’s efficacy, including whether the limits on hours for curtailment and shutdowns would allow the benefits of those strategies to occur, and the fact that the only known operational version of the proposed radar system has not effectively mitigated bat deaths. ER 261–66. BLM cites to no evidence where a BLM bat or wildlife expert analyzes and rejects these concerns.

BLM argues that the Tuttle declaration cannot be admitted under the exception relating to the scope of relief because “[n]othing in Tuttle’s declaration purports to inform the Court on the appropriate scope of injunctive relief.” BLM Br. at 28 n.7. Declarants need not spell out the precise wording of an injunction; they need only inform it. *See, e.g., Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833–34 (9th Cir. 2002), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 130 S.Ct. 2743 (2010) (BLM declarant informing district court on effects of injunction). Dr. Tuttle’s declaration meets this test because by identifying the flaws in BLM’s analysis and mitigation and the risks posed by the Project, he necessarily informs the scope of any relief the Court might grant.

V. SITE-CLEARING AND CONSTRUCTION WILL CAUSE IRREPARABLE HARM TO WWP’S INTERESTS IN WILDLIFE.

A. Irreparable harm to sage-grouse

BLM argues sage-grouse face no short-term risk of harm because “there is no evidence that sage-grouse occupy the project area.” BLM Br. at 31. This argument fails because BLM’s conclusion that sage-grouse do not occupy the Project area is poorly supported, and because the Project will harm sage-grouse living outside the Project area by blocking habitat connectivity and isolating them.

There is no dispute that sage-grouse is a declining BLM sensitive species with a low reproductive rate, or that roads, powerlines, fences, and wind turbines drive the birds away and render their habitat unsuitable. 75 Fed. Reg. at 13,927–

930. U.S. Fish and Wildlife Service’s 2010 Finding explains this that type of fragmentation of the bird’s native sagebrush habitat is the cause of its rangewide decline. *Id.* at 13,962.

BLM’s argument that sage-grouse are not present in the Project area is poorly supported even by its own EA. BLM’s EA unambiguously states there is at least 3,643 acres of sage-grouse habitat in the Project area, ER 96, and that *five leks* are within five miles of the Project area, at least three of which are active. ER 97. Sage-grouse hens are known to establish nests up to 12.5 miles from the lek, 75 Fed. Reg. at 13,915, and since leks are only mating grounds, the birds use habitat miles away for other life activities. *Id.* at 13,916–23. “Large seasonal and annual movements emphasize the landscape nature of the greater sage-grouse.” *Id.* at 13,917.

The EA noted area birds spend the most time on the benches on the sides of the Project’s valley floor. ER 97. But it indicates that birds cross the valley floor to travel between those benches. *Id.* (“[b]oth birds showed cross-valley movements . . . in the general region of the [Project]” . . . “the cross-valley movements suggest that individuals may pass through the area.”). BLM now cites to the data collected by SNWA to imply sage-grouse do not use the area, but SNWA itself strongly objected to that characterization, stating BLM’s assessment that “sagebrush habitat is of poor quality and has very low use levels in this area . .

. are unsupported by any survey data in the record” and that the data “suggest[] sage-grouse move across the SVW Project area.” ER 315. BLM’s new position that sage-grouse do not use the Project area is contradicted by its own EA and is not credible considering the proximity of three active leks.

Further, the record shows that BLM’s surveys for sage-grouse were inadequate to establish birds do not use the habitat. The BLM State Office’s “Program Lead” wildlife biologist stated “[t]he proponent did not survey for sage grouse and noted that none were observed, although none were looked for. Therefore, any forecasting as to the impact of sage grouse needs careful evaluation.” ER 342. SNWA criticized the lack of surveys in the Project area and to determine whether the area provides habitat connectivity between other sage-grouse habitat areas. ER 314. For these reasons, BLM’s lack of evidence of sage-grouse in the Project area does not equate to evidence of absence.

BLM’s argument is also flawed because it myopically focuses on the “project area” (i.e., the 7,500-acre area containing the wind turbines), but the Project will degrade sage-grouse habitat in a far larger area. BLM admits that the Project will create a 38,289 “avoidance area”—far larger than the project area and equating to 9% of sage-grouse habitat in Spring Valley. ER 127. Thus, in addition to birds using nearby leks, the Project will harm birds farther away by preventing them from crossing the valley and interbreeding. Such loss of connectivity

between habitats will isolate populations, increasing the probability of loss of genetic diversity and extirpation. 75 Fed. Reg. at 13,923.

Finally, BLM provides no legal or factual ground as to why a non-pristine baseline habitat negates irreparable harm. As explained in WWP’s opening brief, the lack of pristine habitat and the low number of birds only serve to increase the likelihood of irreparable harm. Birds in disturbed areas already have reduced likelihood of reproductive success, 75 Fed. Reg. 13,910, 13,915, and thus a small additional population decrease can cause complete abandonment of nearby leks and the loss of their unique genetic resources. ER 315 (SNWA noting “the development is likely to cause the abandonment” of the closest lek and “expected sage grouse avoidance or possible permanent abandonment of the SVW Project area and adjacent habitats”).

This type of harm is irreparable to a species in precipitous overall decline, including specifically in the zone that includes this portion of Nevada, where the species has suffered a 24% decrease in males per lek, and 16% decrease in active leks over the past 35–45 years. 75 Fed. Reg. at 13,923 (“Management Zone III”).⁵ The loss of almost one-tenth of remaining local habitat for this imperiled species

⁵ BLM’s argument that a hunting season suggests Nevada’s sage-grouse are not “in jeopardy” is a red herring. Federal activities can cause irreparable harm to species that are hunted or fished. *E.g.*, *Nat’l Wildlife Fed’n v. NMFS*, 422 F.3d 782, 793, 795 (9th Cir. 2005) (irreparable harm to salmon from Columbia River dams). The 2010 Finding explains that effects on sage-grouse from hunting are not significant. 75 Fed. Reg. at 13,962–66.

believes BLM's assertion that Project construction will not harm sage-grouse. BLM's implication that a handful of existing roads is no different from the construction of a wind energy facility, with its 25 miles of new roads and 66 wind turbines, is not supported by the government's own science and fails to refute the certainty of irreparable harm.

B. Irreparable harm to bats.

To establish irreparable harm to its interest in bats, WWP must establish it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. NRDC*, 555 U.S. 7,--, 129 S.Ct. 365, 374 (2008). Although it is apparent from the record that the Project will harm bats, BLM argues the harm is not irreparable because it will not occur before the district court rules on the parties' motions for summary judgment. BLM Br. at 30–31. This is mistaken. BLM has not yet filed the administrative record in the district court. No summary judgment schedule has yet been set, but a tentative draft schedule proposed by WWP and BLM has BLM filing the record in late July and summary judgment briefing concluding in late December. If the parties argue the case in January and the district court were to rule for WWP in February, WWP would then move for injunctive relief. Briefing and argument on the appropriate remedy might take two months, until April. According to SVW's schedule, by then the wind energy facility will be all but complete. As detailed above, turbines will go up beginning in March 2012. ISER

60–61. It is absurd to suggest that a ruling favorable to WWP at that time would allow BLM to take a meaningful hard look—through an EIS—at whether to site, array, and build this Project *without* BLM drawing the foregone conclusion to utilize the fully constructed wind energy facility.

Again, in this type of case, successive “events represent[] a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues,” and “[o]nce large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to ‘redecide.’” *Mass. v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (Breyer, J.). Committing huge amounts of private and government resources would inevitably prejudice a subsequent NEPA process, contrary to the purpose of NEPA—to require “consideration of environmental factors before project momentum is irresistible, before options are closed, and before agency commitments are set in concrete.” *Id.* (quotation omitted).

The Ninth Circuit and its district courts have cited with approval the First Circuit’s reasoning that bureaucratic inertia can cause irreparable harm. *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (“Bureaucratic rationalization and bureaucratic momentum are real dangers, to be anticipated and avoided”); *Montana Wilderness Ass’n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) (enjoining ongoing natural gas development pending BLM’s revision

of unlawful NEPA analysis, citing this Court’s warning against bureaucratic momentum in *Northern Cheyenne Tribe*); *Friends of the Earth v. Hall*, 693 F. Supp. 904, 913 (W.D. Wash. 1988) (“the risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation”). In the absence of preliminary relief from this Court, the facility will be constructed by the time the district court rules, after which there is very little chance of a true “hard look,” and bats are thus “likely to suffer irreparable harm.” *Winter*, 129 S.Ct. at 374. The only opportunity for meaningful review of impacts to bats is before the Project is built.

VI. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST REQUIRE AN INJUNCTION.

SVW states its concerns that the project could stop the project and that liquidated damages may begin to accrue on its power purchase agreement. SVW Br. at 48. The power purchase agreement is not in the record, but it is inconceivable that the agreement does not include a clause excusing performance based on delays in the permitting process. If the agreement does not, then SVW assumed that risk, and the harm should not be shifted onto sage-grouse and bats. SVW’s private “equity capital” losses, *id.*, do not necessarily implicate the public interest, particularly when SVW lobbied BLM from preventing a lawful EIS. ER 341. And, although BLM and SVW state general national interests in renewable

energy, these interests do not override or alter BLM's obligations under NEPA. None of the arguments advanced defeat the paramount public interest in an injunction to maintain the status quo and protect sensitive wildlife and their habitat until the district court's decision on the merits.

CONCLUSION

For the foregoing reasons, WWP respectfully requests that this Court reverse and remand the district court's orders with instructions to enter a preliminary injunction.

DATED this 23rd day of June, 2011.

Respectfully Submitted,

s/ Kristin F. Ruether

Kristin F. Ruether
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,856 words (according to Microsoft Word).

Respectfully submitted this 23rd day of June, 2011.

s/ Kristin F. Ruether

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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 June 23rd, 2011.

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

Respectfully submitted this 23rd day of June, 2011.

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