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 6 WESTERN WATERSHEDS PROJECT

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

10 WESTERN WATERSHEDS PROJECT,)	Civ. No.
)	
11 Plaintiff,)	COMPLAINT FOR DECLARATORY
)	AND INJUNCTIVE RELIEF
12 vs.)	
)	
13 KEN SALAZAR, in his official capacity as)	
Secretary of the United States Department of)	
14 the Interior; BOB ABBEY, in his official)	
capacity as Director of the United States Bureau)	
15 of Land Management; MIKE POOL, in his)	
official capacity as Deputy Director of the)	
16 United States Bureau of Land Management;)	
UNITED STATES BUREAU OF LAND)	
17 MANAGEMENT, a federal agency; ROWAN)	
GOULD, in his official capacity as Director of)	
18 the United States Fish and Wildlife Service;)	
REN LOHOEFENER, in his official capacity as)	
19 Regional Director of the Pacific Southwest)	
Region of the United States Fish and Wildlife)	
20 Service; UNITED STATES FISH AND)	
WILDLIFE SERVICE, a federal agency; and)	
21 UNITED STATES DEPARTMENT OF THE)	
22 INTERIOR, a federal agency,)	
23 Defendants)	

24 **INTRODUCTION**

25 1. In 1976 Congress enacted unprecedented protection for the California Desert
 26 Conservation Area in recognition of the fact that “the California desert environment is a total
 27 ecosystem that is extremely fragile, easily scarred, and slowly healed,” and because “the
 28 California desert environment and its resources, including certain rare and endangered species of

1 wildlife, plants, and fishes, and numerous archeological and historic sites, are seriously
2 threatened by air pollution, inadequate Federal management authority, and pressures of increased
3 use” 43 U.S.C. §§ 1781(a)(2) and (3). Congress directed the Secretary of the Interior to
4 “prepare and implement a comprehensive, long-range plan for the management, use,
5 development, and protection of the public lands within the California Desert Conservation Area”
6 in part “to conserve these resources for future generations.” 43 U.S.C. §§ 1781(d), 1781(a)(4).
7 Among the “rare and endangered species of wildlife” intended to be protected are the desert
8 tortoise and the desert bighorn sheep.

9 2. But in an ill-conceived rush to accommodate massive renewable energy projects
10 vying for multi-billion dollar federal tax credits originally due to expire on December 31, 2010,
11 the federal defendants precipitously approved unnecessarily destructive energy development of
12 the California Desert Conservation Area without first conducting adequate environmental
13 reviews. Recognizing the impossibility of completing adequate environmental reviews within
14 this initial deadline, Congress wisely extended the period for energy companies to qualify for
15 these tax credits by one year, to December 31, 2011. That extension provides the federal
16 defendants with a rare and invaluable opportunity – guided by this Court’s review – to address
17 and rectify the significant errors and omissions that plagued their unduly hasty initial review of
18 the Ivanpah Solar Electric Generating System Project (“ISEGS” or the “Project”) whose approval
19 is challenged herein.

20 3. Plaintiff brings this action to rectify defendants’ failure to comply with critically
21 important environmental laws when approving the Project. In approving the Project, defendants
22 violated the National Environmental Policy Act, 42 U.S.C. section 4321 *et seq.* (“NEPA”), the
23 Endangered Species Act, 16 U.S.C. section 1531 *et seq.* (“ESA”), the Federal Land Policy
24 Management Act, 43 U.S.C. section 1701 *et seq.* (“FLPMA”), and the Administrative Procedure
25 Act, 5 U.S.C. sections 701-706 (“APA”). This Court’s review will afford the defendants the time
26 and direction they need to avoid unnecessary harm to the California Desert Conservation Area
27 and needless waste of scarce taxpayer resources.

28 4. Defendants violated NEPA by preparing a legally inadequate Environmental Impact

1 8. Venue is proper under 28 U.S.C. section 1391(e) because a substantial part of the
2 events or omissions giving rise to plaintiff's claims occurred in this district, and a substantial part
3 of the property that is the subject of this action is situated in this district.

4 9. This claim is timely filed within all applicable statutes of limitations.

5 10. Plaintiff has standing to assert its claims because its member use and enjoy the
6 federal public lands and resources that the Project would harm. In particular, the members of
7 Western Watersheds Project have hiked, picnicked, photographed plants, wildlife, wildlife
8 habitats and cultural resources, and otherwise utilized the lands of the California Desert
9 Conservation Area and the Project site within the Ivanpah Valley for recreation, cultural
10 enrichment, aesthetic enjoyment, and wildlife and scenic viewing, and have concrete plans to do
11 so in the future. Their use and enjoyment of these public lands would be directly harmed should
12 the Project be constructed and implemented as approved by defendants.

13 **PARTIES**

14 11. Plaintiff WESTERN WATERSHEDS PROJECT is a non-profit conservation group
15 founded in 1993 with approximately 1,400 members and with field offices in Idaho, Montana,
16 Utah, Wyoming, Arizona and California. WESTERN WATERSHEDS PROJECT's mission is to
17 protect and restore western watersheds and wildlife through education, scientific study, public
18 policy initiatives and litigation. WESTERN WATERSHEDS PROJECT's members have in the
19 past visited, and intend to continue in the future visiting, the Project site and vicinity, in order to
20 enjoy its wildlife and other natural resources for health, recreational, scientific, spiritual,
21 educational, aesthetic, and other purposes. The environmental, aesthetic, recreational, scenic,
22 scientific, historic, and cultural interests of WESTERN WATERSHEDS PROJECT and its
23 members will be adversely affected and injured by defendants' failure to comply with applicable
24 laws in the respects alleged herein, unless the requested relief is granted.

25 12 To the extent required, plaintiff exhausted all available administrative remedies.
26 No administrative appeals are available.

27 13. Plaintiff has no plain, speedy, or adequate remedy at law, as defendants' unlawful
28 actions are not otherwise reviewable in a manner that will ensure compliance with the laws whose

1 violation is alleged herein. Accordingly, plaintiff seeks injunctive and declaratory relief from this
2 Court to rectify defendants' unlawful acts.

3 14. Defendant UNITED STATES DEPARTMENT OF INTERIOR ("DOI") is the
4 federal agency charged with managing most of the nation's federally owned lands, including the
5 public lands managed by the Bureau of Land Management at issue here, and also charged with
6 ensuring compliance with applicable laws, including but not limited to NEPA, ESA, and FLPMA,
7 in the management of those lands.

8 15. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM";
9 collectively with defendants SALAZAR, ABBEY and POOL, "BLM Defendants") is an agency
10 within DOI. Under federal law, BLM is charged with the management of federal lands for the
11 benefit of the public and consistent with all applicable laws.

12 16. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("FWS";
13 collectively with defendants GOULD and LOHOEFENER, "FWS Defendants") is also an agency
14 within DOI. Under federal law, FWS is charged with the preservation of endangered and
15 threatened species under ESA, and was required to comply with ESA's requirements when it
16 prepared the BiOp for the Project challenged herein.

17 17. Defendant BOB ABBEY is the Director of BLM, and is sued in his official
18 capacity. In that capacity, he is generally responsible for the activities of BLM nationwide.
19 Defendant ABBEY is responsible for BLM's October 7, 2010, approval of the Record of
20 Decision ("ROD") for the Project.

21 18. Defendant MIKE POOL is the Deputy Director of Operations of BLM, and is sued
22 in his official capacity. In that capacity, he is generally responsible for the activities of BLM
23 nationwide. Defendant POOL is responsible for BLM's October 7, 2010, approval of the Record
24 of Decision ("ROD") for the Project.

25 19. Defendant KEN SALAZAR is the Secretary of DOI, and is sued in his official
26 capacity. Defendant KEN SALAZAR is the federal official charged with responsibility for the
27 proper management of BLM and FWS and is responsible for the actions of BLM and FWS
28 challenged herein. Defendant KEN SALAZAR, like defendants ABBEY and POOL, is

1 SDEIS was intended to “ analyze[] two additional alternatives” and “ clarif[y] the BLM’ s
2 purpose and need for the project.” 75 Fed.Reg. 19992, 19993. The Notice commenced a 45-
3 day public comment period. *Id.* at 19992. Plaintiff timely submitted comments prior to the
4 close of this comment period, pointing out the SDEIS’ s deficiencies.

5 27. On August 6, 2010, BLM published a Notice of Availability of the Proposed
6 California Desert Conservation Area Plan Amendment and Final Environmental Impact
7 Statement (“ FEIS”) for the Project. 75 Fed.Reg. 47619. This Notice initiated a 30-day public
8 comment and protest period. *Id.* Plaintiff timely submitted both comments regarding, and a
9 protest of, this action and document.

10 28. On October 7, 2010, defendants Pool and Salazar signed and approved both the
11 California Desert Conservation Area Plan Amendment and the Right-of-Way Authorization.
12 These approvals were contained within BLM’ s ROD for the Project. Defendant Salazar also
13 signed and approved these actions. There is no administrative appeal within DOI of decisions
14 by defendant Salazar, as he is the highest official within DOI.

15 **FACTUAL BACKGROUND**

16 29. On November 6, 2007, BLM published a notice of intent to jointly prepare with
17 CEC the DEIS for the Project and related California Desert Conservation Area Plan Amendment.
18 *See* 72 Fed.Reg. 62671. BLM published the DEIS on November 10, 2009, initiating a 90-day
19 public review period that ended on February 11, 2010. The DEIS eliminated from detailed
20 analysis all alternatives and fully examined only the originally proposed Project. Utilization of
21 locally distributed solar generation within the energy demand centers and locating the Project on
22 private land – alternatives that would protect the sensitive habitat of the Ivanpah Valley from
23 destruction – were discarded without serious consideration. The DEIS entirely failed to consider
24 the alternative of locating the proposed solar energy facilities on the Ivanpah Dry Lake bed. The
25 DEIS also did not identify or analyze any connected actions.

26 30. On April 16, 2010, BLM published the SDEIS for the Project. The SDEIS was
27 intended to “ analyze[] two additional alternatives” and “ clarif[y] the BLM’ s purpose and
28 need for the project.” 75 Fed.Reg. 19992, 19993. However, the two additional alternatives

1 would make only minor changes to the originally proposed Project, each reducing the
2 Project' s footprint by about 500 acres. Further, despite numerous DEIS comments from
3 plaintiff, Sierra Club and others suggesting such an alternative, the SDEIS still omitted any
4 discussion of the Ivanpah Dry Lake bed alternative. The publication of the SDEIS commenced
5 a 45-day public comment period that ended on June 1, 2010. *Id.* at 19992.

6 31. On August 6, 2010, BLM issued the Proposed California Desert Conservation
7 Area Plan Amendment and FEIS for the Project. 75 Fed.Reg. 47619. This Notice initiated a
8 30-day public comment and protest period, which closed on September 7, 2010. *Id.*

9 32. In the ISEGS FEIS, BLM selected the Mitigated Ivanpah 3 alternative as its
10 Agency Preferred Alternative. The selected Project site would encompass approximately 3471.36
11 acres – 5.4 square miles – in eastern San Bernardino County, near the Nevada border. The
12 Project would consist of three solar concentrating thermal power plants (Ivanpah 1, 2 and 3), each
13 relying on a field of elevated mirrors (“heliostats”) to focus solar energy on boilers atop 459-foot
14 tall centralized towers. The power plants would be developed sequentially, though they would all
15 rely on a cluster of shared facilities constructed along with the first power plant, including a
16 substation, administration and maintenance buildings, construction yards and a natural gas
17 pipeline situated within a 35-foot wide by 3,911-foot long right-of-way. Upon completion of all
18 three power plants, the Project would generate a total of 370 MW of electricity.

19 33. The FEIS, however, failed to adequately analyze the environmental impacts of the
20 selected Project, including but not limited to its impacts to bighorn sheep, desert tortoises,
21 migratory birds, and groundwater. The FEIS also contains numerous other NEPA defects. To
22 wit, among other deficiencies, the FEIS (1) fails to describe *BLM's* rather than the *applicant's*
23 purpose and need for the Project, (2) fails to analyze numerous reasonable alternatives, such as
24 locating the Project on the Ivanpah Dry Lake bed, locating the Project on private land, and using
25 locally distributed (such as roof-top) solar generation, (3) segments review of connected actions
26 like the Eldorado-Ivanpah Transmission Project, and (4) relies on yet-to-be-developed mitigation
27 measures to mitigate the Project's impacts.

28 34. Furthermore, after the FEIS was issued, significant changes were made to the

1 Project. These changes include revisions to BLM’s Desert Tortoise Translocation Plan.
2 Nonetheless, BLM failed to prepare a supplemental EIS to analyze and apprise the public of these
3 changes and their impacts.

4 35. On December 7, 2009, BLM requested formal ESA section 7 consultation with
5 FWS and transmitted to FWS its 2009 Biological Assessment (“BA”) and other documents. The
6 BA only identified one federally listed species that was likely to be adversely affected by the
7 Project – the desert tortoise, a threatened species. FWS issued a draft ISEGS BiOp on April 26,
8 2010, but ultimately changed it in response to (1) comments from BLM and the Project applicant,
9 and (2) BLM’s revisions to the tortoise translocation strategy. FWS issued its final ISEGS BiOp
10 and accompanying Incidental Take Statement (“ITS”) on October 1, 2010.

11 36. FWS’s BiOp, like the BA, fails to analyze the impacts on the desert tortoise from
12 actions related and/or connected to the Project, including the Eldorado-Ivanpah Transmission
13 Line (“EITP”). Without considering the impacts of connected actions, the BiOp concludes that
14 the Project is not likely to jeopardize the continued existence of the desert tortoise

15 37. FWS’s no jeopardy determination is conditioned on BLM’s compliance with
16 enumerated conditions including triggers set forth in the ITS for reinitiation of consultation.
17 These triggers include (1) the death or injury of three or more tortoises in any one year or nine or
18 more tortoises over the life of the Project from *any* ISEGS activity, (2) the identification of more
19 than 38 subadult or adult tortoises for translocation during clearance surveys of the Project site,
20 and (3) the inability of translocation areas to accommodate all desert tortoises relocated from the
21 Project.

22 38. On October 7, 2010, defendant Pool signed and approved both the California
23 Desert Conservation Area Plan Amendment and the Right-of-Way Authorization for the four
24 separate rights-of-way required for the Project. These approvals were contained within
25 BLM’s ROD for the Project. Defendant Salazar also signed and approved these actions. The
26 four approved right-of-way grants are conditioned on implementation of mitigation measures and
27 monitoring programs identified in the FEIS, the BiOp, the Programmatic Agreement developed
28 pursuant to the National Historic Preservation Act (“NHPA”), 16 U.S.C. section 470 *et seq.*, and

1 other federal rules and regulations. The ROD also requires the applicant to obtain certification of
2 the Project from CEC before BLM will issue any notices to proceed on the Project.

3 **FIRST CLAIM FOR RELIEF**

4 (Violation of the National Environmental Policy Act)

5 (Against the BLM Defendants)

6 39. The paragraphs set forth above are realleged and incorporated herein by
7 reference.

8 40. Defendants' actions in approving the Project and certifying its EIS constitute
9 violations of NEPA, 42 U.S.C. section 4321 *et seq.*, and its implementing regulations, 40
10 C.F.R. section 1500 *et seq.* These regulations apply to BLM by virtue of 43 C.F.R. subpart
11 1610.

12 41. Defendants' approval of the Project without complying with NEPA constitutes a
13 failure to proceed in accordance with law in violation of the APA, 5 U.S.C. section 706(2)(A)
14 and (D). Without limitation, the BLM Defendants' actions violate NEPA and are therefore
15 unlawful in the respects alleged below.

16 **BLM Unlawfully Segmented Review of Connected Actions**

17 42. NEPA requires that connected actions be considered together in the same EIS. 40
18 C.F.R. §1508.25; *Thomas v. Peterson*, 753 F.2d 754, 758-759 (9th Cir. 1985). Connected actions
19 are those that (1) “[a]utomatically trigger” other actions; (2) “cannot or will not proceed unless
20 other actions are taken previously or simultaneously;” or (3) are “interdependent parts of a larger
21 action and depend on the larger action for their justification.” 40 C.F.R. §1508.25.

22 43. The Project EIS violates NEPA because it fails to analyze connected actions, such
23 as the EITP. As BLM admits in the FEIS, “[i]n order to accommodate the . . . load generated by
24 ISEGS and five other planned renewable energy generation projects in the region,” the Eldorado-
25 Ivanpah Transmission Line “need[s] to be upgraded.” FEIS, at 1-7. The purpose of the EITP is
26 to make those needed upgrades. It is thus clear from the text of the EIS that the Project “cannot
27 or will not proceed unless” the EITP is completed. 40 C.F.R. §1508.25. Yet the EIS fails to
28 analyze the impact of the EITP. Therefore, BLM violated NEPA by failing to analyze the EITP

1 as a connected action.

2 **BLM Failed to Prepare a Programmatic EIS**

3 44. In addition to requiring analysis of connected actions in project-specific EISs,
4 such as the ISEGS EIS, NEPA requires agencies to prepare a programmatic EIS where the
5 agency is considering a group of related actions, including actions that are connected,
6 cumulative or similar. *Piedmont Environmental Council v. Federal Energy Regulatory*
7 *Commission*, 558 F.3d 304 (4th Cir. 2009) (citing 40 C.F.R. § 1508.25(a)(1)-(3)). Agencies
8 may not “unreasonably constrict[] the scope of . . . environmental evaluation” by segmenting
9 review of an overall program or group of related actions. *National Wildlife Federation v.*
10 *Appalachian Regional Commission*, 677 F.2d 883, 888 (D.C. Cir. 1981).

11 45. Here, the Project is one of the many proposed renewable energy projects in the
12 southern deserts of California that either require BLM approval or could not proceed without
13 BLM approval of a related facility. Other such projects include the Sunrise Powerlink
14 Transmission Line, the Tule Wind Project, the Imperial Valley Solar Project, the Esmeralda-
15 San Felipe Geothermal Project, the Genesis Solar Energy Project, the Chevron Energy
16 Solutions Lucerne Valley Solar Project, the Calico Solar Project, the Blythe Solar Project, the
17 Energia Sierra Juarez Generator Tie-Line, the ECO Substation Project, the Campo Wind
18 Project, the Manzanita Wind Project and the Jordan Wind Project, among others. These
19 projects are interrelated in multiple ways. For one, as mentioned, all the projects are located
20 in whole or in part in the California desert and require some form of BLM approval.
21 Additionally, all the projects would connect to the high-voltage wholesale power grid managed
22 by the California Independent System Operator. Further, they are all intended to help
23 California – and the utilities therein – meet their Renewables Portfolio Standard. The projects
24 are also intended to help fulfill the Obama Administration’s goal of harnessing renewable
25 energy resources. Indeed, most of the projects are reliant on federal funds made available for
26 renewable energy facilities by the American Recovery and Reinvestment Act.

27 46. Before conducting project-specific NEPA reviews for each of these interrelated
28 renewable energy projects, like the ISEGS Project, BLM should have, and must now, prepare

1 a programmatic EIS to study the impacts of widespread industrial-scale energy developments in
2 the southern California deserts and elsewhere in the Southwest. Among other things, the
3 programmatic EIS should inventory the California desert’ s affected environmental resources
4 as well as its renewable energy resources, and then evaluate the two together to determine
5 where best to allow renewable energy development, – locally as well as remotely – as well as
6 the scale and nature of such development. The programmatic EIS should also analyze
7 alternatives to developing renewable energy facilities in sensitive desert ecosystems far from
8 load centers, including locally distributed generation such as roof-top solar arrays. Without a
9 programmatic EIS, BLM has improperly segmented – and will continue to improperly segment
10 – its NEPA review of the unprecedented development of renewable energy facilities in the
11 deserts of southern California and the greater Southwest.

12 **BLM Failed to Define a Proper Purpose and Need for the Project**

13 47. An EIS must specify the “underlying purpose and need to which the agency is
14 responding in proposing the alternatives including the proposed action.” 40 C.F.R. §1502.13.
15 This requirement does not disappear when an applicant, rather than the agency itself, has
16 proposed the action under consideration. As BLM’s NEPA handbook explains, BLM must
17 describe *its* purpose and need, “*not [that of] an applicant or external proponent[]*,” for it “is the
18 BLM purpose and need for action that will dictate the range of alternatives.” BLM NEPA
19 Handbook, H-1790-1, at 35 (2008) (emphasis added). “‘Perhaps more importantly’ than the need
20 to take private interests into account, ‘an agency should always consider the views of Congress,
21 expressed, to the extent that the agency can determine them, in the agency’s authorization to act,
22 as well as in other congressional directives.’” *National Parks & Conservation Association v.*
23 *Bureau of Land Management*, 606 F.3d 1058, 1070 (9th Cir. 2010) (cert. pending) (quoting
24 *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)). Accordingly,
25 “the Department of Interior has promulgated no regulations emphasizing the primacy of private
26 interests.” *Id.*, 606 F.3d at 1071.

27 48. Contrary to this clear requirement, the ISEGS EIS fails to state *BLM’s* public
28 purpose and need. Instead, the EIS erroneously asserts that BLM’s purpose and need is merely to

1 “respond to the applicant’s application,” impermissibly restricting the EIS’ consideration of
2 alternatives that serve the public’s, rather than the applicant’s, interests. FEIS, at 2-6. Such not
3 only violates NEPA but also conflicts with the Energy Policy Act, and related Secretarial and
4 Executive Orders, which direct BLM to “encourage the development of environmentally
5 responsible renewable energy” while complying with existing environmental laws.

6 **BLM Unlawfully Rejected Feasible Alternatives**

7 49. NEPA requires that an EIS “[r]igorously explore and objectively evaluate all
8 reasonable alternatives” in order to provide a choice that includes environmentally preferable
9 options “so that reviewers may evaluate their comparative merits.” 40 C.F.R. §1502.14. The
10 alternatives should be wide-ranging and include options that may require additional approvals or
11 participation by others. *Sierra Club v. Lynn*, 502 F.2d 43, 62 (5th Cir. 1974). “The existence of
12 a viable but unexamined alternative renders an environmental impact statement inadequate.”
13 *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

14 50. Contrary to these NEPA requirements, the EIS fails to analyze a reasonable range
15 of alternatives. Without adequate justification, the EIS eliminates from detailed analysis
16 numerous feasible alternatives, including (1) locating the Project on the Ivanpah Dry Lake, (2)
17 locating the Project on private land, and (3) using distributed solar generation instead of remotely
18 located industrial facilities like ISEGS that require lengthy, inefficient and environmentally
19 destructive transmission lines. These alternatives were feasible and would avoid many of the
20 Project’s significant impacts, yet they were not properly analyzed in the EIS.

21 51. BLM’s justification for dismissing many of the alternatives it considered only
22 cursorily is that “alternatives that are not within BLM jurisdiction would not necessarily be
23 considered reasonable.” FEIS, at 3-2. This is the main rationale BLM used to eliminate the
24 distributed renewable generation alternative. FEIS, at 3-89. However, this justification conflicts
25 with NEPA’s direction that agencies may not refuse to analyze alternatives merely because they
26 *may require approvals or participation by others*. *Lynn, supra*, 502 F.2d at 62.

27 52. BLM also improperly eliminated numerous other alternatives on cost grounds. For
28 example, in dismissing the alternative of locating the Project on the Ivanpah Dry Lake bed, the

1 EIS fails to provide any evidence to support the claim of excess cost. FEIS, at 3-81. For another,
2 BLM’s assertion that locating the Project on private land would be too costly likewise has no
3 support in the record. The EIS fails to explain why it would be less expensive to (a) locate the
4 Project on public lands filled with desert tortoises and purchase 1:1 desert tortoise habitat
5 compensation lands, than to (b) purchase private lands in the first place that are not inhabited by
6 the tortoises. By eliminating feasible alternatives from detailed analysis, BLM violated NEPA.

7 **BLM Unlawfully Deferred the Formulation of Mitigation Measures**

8 53. Under NEPA, an agency “may not ‘act first and study later.’” *Western Land*
9 *Exchange Project v. United States Bureau of Land Management*, 315 F.Supp. 2d 1068, 1092 (D.
10 Nev. 2004) (quoting *National Parks & Conservation Association, supra*, 241 F.3d at 734).
11 NEPA requires mitigation measures to be “reasonably complete,” containing “sufficient detail to
12 ensure that environmental consequences have been fairly evaluated.” *Robertson v. Methow*
13 *Valley Citizens Council*, 490 U.S. 332, 352 (1989). Furthermore, mitigation measures are
14 inadequate unless they contain “supporting analytical data.” *Sierra Club v. Bosworth*, 510 F.3d
15 1016, 1029 (9th Cir. 2007).

16 54. Here, defendants’ EIS repeatedly relies on yet-to-be developed mitigation measures to
17 mitigate the Project’s significant impacts. For example, the applicant is required to “submit[] and
18 implement[] an Avian Protection Plan” – required because the Project “has the potential to take a
19 [golden] eagle” – between six and twelve months *after* Project approval.¹ Relying on documents
20 that have been neither developed nor described at the time of project approval to mitigate
21 potential impacts prevents meaningful public participation in the environmental review process
22 and violates NEPA.

23 55. Additional examples of unlawfully deferred mitigation measures, among others,
24 include:

- 25 • The future development of a Burrowing Owl Mitigation and Monitoring Plan,
26 intended to mitigate impacts on relocated burrowing owls;

27
28 ¹ FEIS, at 4.3-129. This mitigation measure was required because any such takings
would violate the Bald and Golden Eagle Protection Act, 16 U.S.C. section 668 *et seq.*

1 • The future development of a Special-Status Plant Protection and Monitoring Plan,
2 intended to ensure that special-status plant species “can be sustained in perpetuity” as “healthy,
3 reproductive populations.” FEIS, at 4.3-118 to 119.

4 • The future conducting of “floristic surveys” for certain special-status plants,
5 included because no suitable off-site compensation lands have yet been identified for these
6 species;

7 • The future development of a Draft Bighorn Sheep Mitigation Plan, intended to
8 mitigate the Project’s effects on bighorn sheep;

9 • The future preparation of lists of other special-status plant species that may be
10 present on-site, required because insufficient studies have been conducted to determine whether
11 these species occur on site; and

12 • The future preparation of a Migratory Bird Treaty Act Conservation Agreement,
13 which would “identify procedures to minimize or eliminate impacts to MTBA species.” FEIS at
14 4.3-127 to 128.

15 **BLM Unlawfully Failed to Take a “Hard Look” at the Project’ s Impacts**

16 56. NEPA requires federal agencies to take a “hard look” at the environmental impacts
17 of proposed major actions and “provide a full and fair discussion of significant environmental
18 impacts” for the public’s review. 40 C.F.R. § 1502.1. “[G]eneral statements about “possible”
19 effects and “some risk” do not constitute a “hard look” absent a justification regarding why more
20 definitive information could not be provided.” *Blue Mountains Biodiversity Project v.*
21 *Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (quoting *Neighbors of Cuddy Mountain v.*
22 *United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)). BLM failed to discharge this
23 mandate in the following respects, among others:

24 **Impacts on Desert Tortoises**

25 57. The Project will substantially effect the desert tortoise, a “threatened” species under
26 ESA. The FEIS fails to take a “hard look” at, or mitigate, the following effects of the Project on
27 desert tortoises.

28 58. First, the EIS fails to analyze the Project’s impacts on connectivity between desert

1 tortoise habitats. Specifically, the EIS fails to analyze impacts to connectivity between the
2 Northeastern Mojave and Eastern Mojave desert tortoise “Evolutionarily Significant Units”
3 (“ESUs”).

4 59. Second, the EIS fails to adequately analyze the Project’s impacts on desert tortoise
5 habitat fragmentation.

6 60. Third, the EIS fails to adequately analyze, or mitigate, the impacts of the planned
7 extensive translocation of desert tortoises on these vulnerable and imperiled creatures.

8 61. Fourth, the EIS fails to accurately describe the current tortoise population on the
9 Project site, making an accurate assessment of the Project’s impacts impossible.

10 62. Fifth, the EIS fails to analyze the effect of the planned new water source upon
11 desert tortoises. The EIS fails to address the fact that water sources attract ravens, which prey on
12 desert tortoises.

13 63. Sixth, the EIS fails to adequately analyze the cumulative impacts on desert
14 tortoises. For example, the EIS fails to even mention, let alone analyze, the Kern River Gas
15 Transmission Company Mountain Pass Lateral gas pipeline and its contribution to cumulative
16 desert tortoise impacts.

17 **Impacts on Bighorn Sheep**

18 64. The EIS fails to analyze and mitigate the Project’s effects on desert bighorn sheep
19 in several significant respects.

20 65. First, the EIS fails to analyze and mitigate the Project’s impacts on desert bighorn
21 sheep foraging habitat. Yet the Project will eliminate thousands of acres of bighorn sheep
22 foraging habitat.

23 66. Second the EIS fails to address how the Project will impact long-distance
24 movements and migration of desert bighorn sheep.

25 67. Third, the EIS fails to address how the Project will impact the ground and surface
26 water sources currently used by desert bighorn sheep. Nor does the EIS explain how the planned
27 new *water source*, at an unknown location, will mitigate for the loss of the sheep’s current water
28 sources.

1 **Impacts on Migratory Birds**

2 68. The EIS fails to adequately analyze the Project’s impacts on migratory birds,
3 including eagles, in several significant respects. Such birds are protected by the Migratory Bird
4 Treaty Act (“MBTA”), 16 U.S.C. sections 703-712, and the Bald and Golden Eagle Protection
5 Act, 16 U.S.C. section 668 *et seq.*

6 69. First, the EIS fails to provide even rudimentary information regarding migratory
7 bird impacts. It fails to identify which migratory bird species are present in the area. It fails to
8 disclose the normal flying heights for birds in the area. By failing to include such basic
9 information essential to an analysis of the Project’s impacts on migratory birds, BLM failed to
10 take the required “hard look” at those impacts.

11 70. Second, the EIS fails to adequately address the fact that migratory birds and eagles
12 may collide with taller Project structures, and could be burned if they fly into the concentrated
13 sunlight beam between the solar panels and towers. Instead of providing a reasoned analysis, the
14 FEIS dismisses these serious impacts on the grounds “there is insufficient data to make definitive
15 conclusions regarding the potential magnitude of these types of impacts at the ISEGS facility.”
16 FEIS, at 4.3-40.

17 **Impacts on Groundwater Resources**

18 71. The EIS claims that the Project will not impact groundwater resources, yet it admits
19 that the Project’s water use will *reduce* groundwater inflows to the Las Vegas Valley
20 groundwater basin, which is hydrologically connected to the aquifer under the Project site and
21 which is already in extreme overdraft. The EIS also fails to adequately analyze the cumulative
22 impacts of the Project along with other reasonably foreseeable developments upon the Las Vegas
23 Valley groundwater basin.

24 **Impacts on Rare and Special-Status Plants**

25 72. The EIS fails to adequately analyze the Project’s impacts on rare and special-status
26 plants, including Rusby’s desert-mallow (*Sphaeralcea rusbyi* var. *eremicola*). Under the 2002
27 NEMO Plan, BLM must ensure that the populations and habitats of special-status species “are
28 sufficiently distributed to prevent the need for listing.” NEMO Plan, at 2-6. Disregarding this

1 mandate, the EIS provides only cursory analysis of the impacts to special-status plants. For
2 example, BLM failed to conduct adequate surveys of special-status plants. As BLM admits,
3 “some summer blooming special-status plants may have been missed by the applicant’s surveys.”
4 FEIS, at 4.3-32. Providing for additional surveys as a mitigation measure does not cure this
5 failure because *post hoc* rationalizations do not satisfy NEPA’s foundational purpose of
6 informing the public and decisionmakers of a project’s environmental impacts *before* the decision
7 to approve or disapprove the Project is made. *See* 40 C.F.R. § 1500.1. For a second example, the
8 EIS fails to address the Project’s impacts on habitat fragmentation for the Rusby’s desert-mallow
9 and other special-status plant species.

10 **BLM Unlawfully Failed to Respond to Comments**

11 73. “NEPA’s public comment procedures are at the heart of the NEPA review
12 process.” *State of California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982). “Agencies are
13 . . . obligated to provide a ‘meaningful reference’ to all responsible opposing viewpoints
14 concerning the agency’s proposed decision. 40 C.F.R. § 1510(a). . . . Moreover, ‘there must
15 be good faith, reasoned analysis in response.’ ” *Id.* at 773 (internal brackets and citation
16 omitted). NEPA commands that agencies “must acknowledge and respond to comments by
17 outside parties that raise significant scientific uncertainties and reasonably support that such
18 uncertainties exist.” *The Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008).

19 74. Defendants’ EIS fails to provide “reasoned analysis in response” to many of the
20 comments submitted by plaintiff and others about the Project. For example, BLM failed to
21 “acknowledge and respond to comments . . . that raise[d] significant scientific uncertainties,”
22 such as the Project’s impacts on (1) desert tortoises, (2) desert bighorn sheep, (3) migratory
23 birds and (4) ground and surface waters.

24 **BLM Unlawfully Failed to Recirculate the EIS**

25 75. NEPA requires agencies to “prepare supplements to . . . environmental impact
26 statements” where “substantial changes” are made to the Project or “significant new
27 circumstances or information” were added to the environmental document. 40 C.F.R. §
28 1502.9(c)(1). This requirement exists because NEPA requires agencies to submit their actions

1 “ for public review *prior* to the issuance of the final EIS.” *Block, supra*, 690 F.2d at 771.

2 76. Contrary to this command, BLM made many “ substantial changes” to the Project
3 in the Final EIS and also added “ significant new circumstances or information” to the Final
4 EIS. For example, and for illustrative purposes only, BLM added a new Desert Tortoise
5 Translocation Plan. BLM also added and/or refined various mitigation measures in the Final
6 EIS. In so doing, BLM violated NEPA and substantially hindered the public’ s ability to
7 meaningfully comment on the Project.

8 **Allegation Regarding Preliminary and Permanent Injunctive Relief**

9 77. The threatened construction and operation of the Project, enabled by defendants’
10 approvals, would cause irreparable harm to the environment, to plaintiff, and to the public, in
11 the respects alleged hereinabove. Therefore, this Court should issue preliminary and
12 permanent injunctive relief staying and setting aside defendants’ approvals of the Project.

13 **SECOND CLAIM FOR RELIEF**

14 (Violation of the Federal Land Policy Management Act)

15 (Against the BLM Defendants)

16 78. The paragraphs set forth above are hereby realleged and incorporated herein by
17 reference.

18 79. FLPMA establishes minimum standards for resource management plans. 43 U.S.C.
19 § 1712(c); 43 C.F.R. § 1610.4-6. When developing and revising land use plans, BLM must:
20 employ “the principles of multiple use and sustainable yield”; use a “systematic interdisciplinary
21 approach to achieve integrated consideration of physical, biological and other sciences”; give
22 “priority to protection of areas of critical environmental concern”; consider “present and potential
23 uses of public lands” and “the relative scarcity of [their] values”; and weigh “long-term benefits
24 to the public against short-term benefits.” *Id.* BLM’s implementing regulations also require it to
25 “estimate and display the . . . effects of implementing each alternative considered in detail,”
26 guided by NEPA. 43 C.F.R. § 1610.4-6. Yet BLM failed to comply with these, and other related,
27 requirements, in the respects detailed below, thereby violating FLPMA.

28 80. FLPMA mandates that the “ Secretary shall manage the public lands under

1 principles of multiple use and sustained yield, *in accordance with the land use plans . . .*
2 developed under [43 U.S.C. section] 1712 . . . when they are available,” subject to an
3 exception not relevant here. 43 U.S.C. § 1732(a) (emphasis added). Here, the governing land
4 use plan is the CDCA Plan as amended by the more specific 2002 NEMO Plan. The Project, a
5 high-intensity, single use of resources that will displace all other uses and that will destroy over
6 5.4 square miles of high-quality occupied desert tortoise habitat among other impacts, is plainly
7 inconsistent with both of these plans:

8 a. The CDCA Plan as amended provides for four distinct multiple use classes
9 (“MUC”) based on the sensitivity of resources in each area. The proposed Project site is within
10 the Multiple-Use Class L (Limited Use) zone. That classification “protects sensitive, natural,
11 scenic, ecological, and cultural resources values. Public lands designated as Class L are managed
12 to provide for generally lower-intensity, carefully controlled multiple use of resources, while
13 ensuring that sensitive values are not significantly diminished.” CDCA Plan at 13. Here, the
14 Project is of *high*, not low, intensity and its operation will significantly diminish an
15 extraordinary number of sensitive natural resources, as detailed above. Therefore, the Project
16 conflicts with the CDCA Plan.

17 b. The Project is inconsistent with the NEMO Plan in that, among other
18 contradictions: the Project will disturb more than *thirty times* the 100-acre allowable maximum
19 amount of desert tortoise habitat; and the Project violates the NEMO Plan’s goals for the
20 recovery of special status species, including but not limited to the desert tortoise.

21 81. FLPMA requires the Secretary to “prepare and maintain on a continuing basis an
22 inventory of all public lands and their resource and other values . . . , giving priority to areas
23 of critical environmental concern.” 43 U.S.C. § 1711(a). Here, no such inventory exists:
24 BLM does not even know, for example, how many special-status species are present on the
25 Project site.

26 82. Hand-in-hand with the inventory requirement is FLPMA’s direction that “[i]n
27 managing the public lands the Secretary shall . . . take any action necessary to prevent
28 unnecessary or undue degradation of the lands.” *Id.* § 1732(b). Because BLM approved the

1 Project in the absence of an adequate inventory of environmental values, it failed to ascertain
2 whether the Project unduly or unnecessarily degraded public lands, and therefore could not
3 guard against such unnecessary or undue degradation, as required.

4 83. BLM’s approval of the Project in the absence of compliance with FLPMA
5 constitutes a failure to proceed in the manner required by law in violation of the APA, 5 U.S.C.
6 section 706(2)(A) and (D).

7 **THIRD CLAIM FOR RELIEF**

8 (Violation of the Endangered Species Act)

9 (Against the FWS Defendants)

10 84. The paragraphs set forth above are hereby realleged and incorporated herein by
11 reference.

12 85. The Endangered Species Act establishes a three-step consultation procedure to
13 assure that federal agencies undertaking or approving an action (“action agencies”), such as BLM
14 here, adequately confer with the FWS regarding the potential adverse impacts of proposed
15 projects on federally-listed threatened and endangered species. 16 U.S.C. § 1536(a)(2); 50 C.F.R.
16 § 402.12; *Pacific Coast Federation of Fishermen’s Associations v. United States Bureau of*
17 *Reclamation*, 138 F.Supp.2d 1228, 1240-47 (N.D. Cal. 2001) (“*PCFFA*”). These three steps
18 require the action agency to: (1) advise FWS of the area in which the plan activities are proposed
19 (and in response, FWS must provide the federal agency with a list of the endangered and
20 threatened species in the plan area); (2) “prepare a ‘[biological assessment]’ to determine whether
21 such species ‘[are]’ likely to be affected’ by the action” (*PCFFA*, 138 F.Supp.2d at 1240 (quoting
22 *Pacific Rivers Council v. Thomas*, 753 F.2d 754, 763 (9th Cir.1985)); 50 C.F.R. § 402.12(I)); and
23 (3) not proceed with the project until FWS has prepared a formal BiOp evaluating the project’s
24 potential to adversely affect any species or potentially affected critical habitat. 16 U.S.C. §
25 1536(b); 50 C.F.R. § 402.14. Thereafter, the action agency must independently ensure that any
26 action that it takes will not jeopardize the survival of any listed species or adversely modify its
27 habitat. 16 U.S.C. § 1536(a)(2).

28 86. Here, FWS violated ESA by failing to use the best scientific and commercial data

1 available to ensure that BLM’s actions were not likely to jeopardize listed species, as detailed
2 below. FWS also violated ESA by failing to re-initiate consultation when such was required by
3 law, as also detailed below.

4 87. By failing to comply with ESA in its review of the Project, FWS failed to proceed
5 in the manner required by law, in violation of the APA, 5 U.S.C. section 706(2)(A) and (D).

6 **FWS Failed to Use the Best Scientific and Commercial Data Available**

7 88. ESA requires federal agencies to ensure that their actions are not likely to
8 jeopardize the continued existence of any endangered or threatened species. *See* 16 U.S.C.
9 section 1536(a)(2). ESA further requires that each agency shall use the best scientific and
10 commercial data available to ensure their actions are not likely to jeopardize listed species. *See*
11 16 U.S.C. § 1536(a)(2); *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988) (agency
12 violated ESA by failing to analyze best scientific and commercial data available); *Bob Marshall*
13 *Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (agency failure to gather listed species
14 and habitat data violated ESA because the agency failed to provide the best scientific and
15 commercial data available); *Greenpeace Foundation v. Mineta*, 122 F.Supp.2d 1123, 1132-
16 1133 (D. Hawaii 2000) (agency ignored relevant data regarding the project’ s effect on
17 endangered species, and the court held as a matter of law that the agency’ s decision that the
18 action was “ not likely to jeopardize” listed species was arbitrary and capricious); *Conservation*
19 *Law Foundation v. Watt*, 560 F.Supp. 561, 572-573 (D. Mass 1983) (agency violated ESA by
20 failing to incorporate into the biological opinion the best scientific and commercial data
21 available).

22 89. Here, FWS failed to use the best scientific and commercial data available in its
23 preparation of the BiOp, and thereby violated ESA. FWS’ s omissions include, but are not
24 limited to, its failure to adequately survey the Project site for desert tortoises prior to
25 approving the BiOp, its subsequent failure to properly oversee the survey that was belatedly
26 conducted, and its additional omissions alleged below.

27 **FWS Failed to Consider the Impacts of Connected Actions on Listed Species**

28 90. The BiOp does not consider the effects of connected actions, including but not

1 limited to the EITP, upon listed species, including the desert tortoise, and their designated
2 critical habitat. Without considering the effects of connected actions, FWS could not
3 adequately ensure that the Project would not jeopardize the continued existence of an
4 endangered or threatened species or adversely modify its critical habitat. The effects of such
5 connected actions upon listed species should have been considered as indirect effects, cumulative
6 effects, interconnected effects, or growth-inducing effects *of the Project* under ESA.

7 91. For example, the BiOp completely fails to address critical habitat “because the
8 [Project] will not take place within critical habitat,” yet the EITP, whose completion is necessary
9 for Project operation, will traverse critical habitat. By failing to include within its BiOp an
10 analysis of the effects of the *entire* Project, including the actions upon which it depends, on the
11 desert tortoise, FWS violated ESA.

12 92. Additionally, the BiOp fails to adequately consider the effects of the entire Project,
13 including but not limited to the EITP, on desert tortoise habitat connectivity.

14 **FWS Failed to Re-Initiate Consultation When Required**

15 93. Reinitiation of consultation is required where “discretionary Federal involvement or
16 control over the action has been retained or is authorized by law and,” among other things, if “the
17 amount or extent of taking specified in the incidental take statement is exceeded” Further,
18 the “duty to reinitiate consultation lies with both the action agency and the consultation agency.”
19 *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073, 1076 (9th
20 Cir. 2001).

21 94. Here, FWS’ s ITS provides that if “ more than 38 subadult or adult desert
22 tortoises are identified for translocation during clearance surveys of the project site, the Bureau
23 must re-initiate consultation.” BiOp, at 60. Even using the agency’ s artificially deflated
24 numbers, thirty tortoises have been encountered in the clearing of just 32 percent of the Project
25 site. The total number of tortoises on the Project site therefore plainly exceeds 38. FWS is
26 thus required pursuant to its joint duty to reinitiate consultation with BLM. Its failure to do so
27 thus far violates the ESA.

28 **PRAYER FOR RELIEF**

1 1. WHEREFORE, plaintiff respectfully requests that the Court:

2 2. Adjudge and declare that the BLM Defendants acted in an arbitrary and
3 capricious manner by certifying the Project' s EIS and approving the Project because the FEIS
4 is legally inadequate under the National Environmental Policy Act, 42 U.S.C. section 4321 *et*
5 *seq.*, and approval of the Project violates the Federal Land Policy Management Act, 43 U.S.C.
6 section 1701 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. section 701 *et seq.*;

7 3. Order the BLM Defendants to withdraw their EIS and Project approval until such
8 time as the BLM Defendants have complied with the requirements of the National
9 Environmental Policy Act, the Federal Land Policy Management Act, and their implementing
10 regulations;

11 4. Adjudge and declare that the FWS Defendants' BiOp for the Project violated the
12 Endangered Species Act, 16 U.S.C. section 1531 *et seq.*, and the Administrative Procedure Act, 5
13 U.S.C. section 701 *et seq.*;

14 5. Order the FWS Defendants to withdraw their BiOp for the Project until such time
15 as the FWS Defendants have complied with the requirements of the Endangered Species Act
16 and its implementing regulations;

17 6. Adjudge and declare that the FWS Defendants violated ESA by failing to re-
18 initiate consultation when required;

19 7. Order the FWS Defendants to re-initiate with BLM the consultation required by
20 law;

21 8. Preliminarily and permanently enjoin all defendants from initiating any activities
22 in furtherance of the Project that could result in any change or alteration of the physical
23 environment unless and until defendants comply with the requirements of NEPA, ESA,
24 FLPMA, and their implementing regulations;

25 9. Award plaintiff its reasonable attorneys' fees and costs and expenses incurred in
26 connection with the litigation of this action.

27 10. Grant plaintiff such additional relief as the Court may deem just and proper.

28 Dated: January 12, 2011

LAW OFFICES OF STEPHAN C. VOLKER

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WESTERN WATERSHEDS PROJECT

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