

No. 13-55561

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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DESERT PROTECTIVE COUNCIL, *et al.*,

Plaintiffs-Appellants,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants-Appellees,

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On Appeal from the U.S. District Court for the Southern District of California,  
Case No.: 3:12-cv-01281-GPC-PCL  
Hon. Gonzalo P. Curiel, District Judge

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**DEFENDANTS-APPELLEES OCOTILLO EXPRESS LLC AND  
PATTERN ENERGY GROUP LP's ANSWERING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Ocotillo Express LLC and Pattern Energy Group LP disclose as follows:

Ocotillo Express LLC is wholly-owned by Pattern Energy Group Inc., a publicly held corporation.

Pattern Energy Group LP is a limited partnership, is not publicly held, and has no parent corporation. No publicly held corporation owns 10 percent or more interest in Pattern Energy Group LP.

## TABLE OF CONTENTS

INTRODUCTION .....	1
STATEMENT OF JURISDICTION.....	4
ISSUES PRESENTED FOR REVIEW .....	4
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS .....	6
I.    The Ocotillo Project And Its Site.....	6
II.   BLM Prepared A Detailed FEIS For The Ocotillo Project, Including Thorough Bird Impact Analysis And Fully Developed Mitigation, And Made The Draft EIS And FEIS Available For Extended Public Review And Comment .....	7
III.  Ocotillo’s Assessment Of Bird Impacts And Its Avian Mitigation Plans Were Developed In Accordance With Federal And State Guidelines .....	9
A.  Ocotillo’s ABPP.....	11
B.  Ocotillo Avian Point Count Survey .....	14
C.  Ocotillo Migratory Bird Survey .....	15
SUMMARY OF ARGUMENT .....	16
ARGUMENT .....	19
I.    BLM Satisfied All Relevant NEPA Requirements In Connection With Its Approval of Ocotillo .....	19
A.  Standard of Review .....	19
B.  BLM Properly Made Information About Raptors Available To The Public .....	21
C.  BLM’s Raptor Surveys Provided An Appropriate Method For Determining The “Baseline” For Swainson’s Hawks .....	30

D.	BLM’s EIS Provides A Reasonable Discussion Of Measures To Mitigate Impacts To Raptors .....	34
II.	BLM Fully Complied with FLPMA In Approving The Ocotillo Right of Way .....	38
A.	Standard of Review .....	38
B.	BLM Satisfies 43 U.S.C. §1765(a)(iv) By Consulting With CDFG And Requiring Compliance With State Standards.....	39
C.	The ROW Complies With 43 U.S.C. § 1765(a)(ii) By Including Terms And Conditions To Minimize Damage To Fish and Wildlife.....	48
III.	LIUNA Has Not Demonstrated Its Standing, But The Court Need Not Consider This Issue.....	53
IV.	DPC’s Objections To The District Court’s Rulings Regarding The Adequacy Of DPC’s Pleading Of NEPA Claims And DPC’s Motion To Amend Are Moot.....	54
	CONCLUSION .....	56

## TABLE OF AUTHORITIES

### Cases

<i>California Rural Legal Assistance, Inc. v. Legal Serv. Corp.</i> , 917 F.2d 1171 (9th Cir. 1990) .....	54
<i>Center for Biological Diversity, Inc. v. FPL Group, Inc.</i> , 166 Cal. App. 4th 1349 (Cal. Ct. App. 2008) .....	46
<i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971) .....	39, 53
<i>Columbia Basin Land Protection Ass’n. v. Schlesinger</i> , 643 F.2d 585 (9th Cir. 1981) .....	45
<i>Earth Island Inst. v. U.S. Forest Serv.</i> , 351 F.3d 1291 (9th Cir. 2003) .....	27
<i>Gros Ventre Tribe v. United States</i> , 469 F.3d 801 (9th Cir. 2006) .....	38
<i>Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci</i> , 857 F.2d 505 (9th Cir. 1988) .....	20
<i>High Sierra Hikers Ass’n v. U.S. Dep’t of Interior</i> , 848 F.Supp. 2d 1036 (N.D. Cal. 2012) .....	36
<i>In re Pattullo</i> , 271 F.3d 898 (9th Cir. 2001) .....	55
<i>Indep. Acceptance Co. v. California</i> , 204 F.3d 1247 (9th Cir. 2000) .....	39
<i>Int’l Union, UAW v. Brock</i> , 477 U.S. 274, 106 S.Ct. 2523 (1986) .....	54
<i>Klamath Siskiyou Wildlands Ctr. v. Boody</i> , 468 F.3d 549 (9th Cir. 2006) .....	39
<i>Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp.</i> , 42 F.3d 517 (9th Cir. 1994) .....	34, 35, 38

*Lands Council v. McNair*,  
537 F.3d 981 (9th Cir. 2008) ..... 4, 20, 21, 31

*League of Wilderness Defenders v. Forsgren*,  
309 F.3d 1181 (9th Cir. 2002) .....35

*Marsh v. Or. Natural Res. Council*,  
490 U.S. 360 (1989) ..... 20, 21

*Mont. Shooting Sports Ass’n v. Holder*,  
727 F.3d 975 (9th Cir. 2013) .....53

*Montana v. Johnson*,  
738 F.2d 1074 (9th Cir. 1984) ..... 45, 47

*Nat’l Parks & Conservation Ass’n v. U.S. Dep’t of Transp.*,  
222 F.3d 677 (9th Cir. 2000) ..... 29, 34, 35, 37

*Native Ecosystems Council v. U.S. Forest Service*,  
418 F.3d 953 (9th Cir. 2005) .....33

*Native Ecosystems Council v. Weldon*,  
697 F.3d 1043 (9th Cir. 2012) ..... 21, 30

*Northern Plains Res. Council v. Surface Transp. Bd.*,  
668 F.3d 1067 (9th Cir. 2011) ..... 32, 33

*Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*,  
693 F.3d 1084 (9th Cir. 2012) .....20

*Presidio Golf Club v. Nat’l Park Serv.*,  
155 F.3d 1153 (9th Cir. 1998) .....54

*Robertson v. Methow Valley Citizens Council*,  
490 U.S. 332 (1989) ..... passim

*Russell Country Sportsmen v. U.S. Forest Serv.*,  
668 F.3d 1037 (9th Cir. 2011) .....27

*South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dep’t of Interior*,  
588 F.3d 718 (9th Cir. 2009) .....36

*Theodore Roosevelt Conservation P’ship v. Salazar*,  
661 F.3d 66 (D.C. Cir. 2011) .....20

*Trout Unlimited v. U.S. Dep’t of Agriculture*,  
320 F. Supp. 2d 1090 (D. Colo. 2004) ..... 50, 52

*Tur v. YouTube, Inc.*,  
562 F.3d 1212 (9th Cir. 2009)..... 54, 55

*United States v. Webb*,  
655 F.2d 977 (9th Cir. 1981).....56

**Statutes**

16 U.S.C. §§ 668-668d ..... 11, 37

16 U.S.C. §§ 703-712.....11

42 U.S.C. § 4332(2)(C)..... 19, 20

42 U.S.C. §§ 4321, et seq.....16

43 U.S.C. § 1765(a)(ii).....48

43 U.S.C. §§ 1701, et seq.....18

43 U.S.C. §1765 (a)(ii).....5, 18

43 U.S.C. §1765(a)(iv)..... passim

California FGC § 2080.....40

California FGC § 3503.5.....40

California FGC § 3511..... 38, 40, 41

1985 Cal. Stat. ch. 1334 .....40

**Federal Register**

46 Fed. Reg. 18026, 18034 (Mar. 23, 1981) (Forty Most Asked Questions  
Concerning CEQ's NEPA Regulations) .....27

74 Fed. Reg. 46836 (Sept. 11, 2009) ..... 37, 41

**Regulations**

40 C.F.R. § 1502.24 .....27  
40 C.F.R. § 1503.1(b) .....9  
40 C.F.R. § 1506.10(b)(2).....9  
40 C.F.R. § 1506.10(c).....9  
40 C.F.R. part 1502.....20  
43 C.F.R. § 2805.12 .....43  
43 C.F.R. § 2805.12(i)(6).....43

**Other Authorities**

California Energy Commission and California Department of Fish and Game,  
*California Guidelines for Reducing Impacts to Birds and Bats From Wind  
Energy Development* (2007) (“California Guidelines”).....10  
USFWS, *Draft Eagle Conservation Plan Guidance* (2011).....11  
USFWS, *Interim Guidelines for the Development of a Project Specific Avian  
and Bat Protection Plan for Wind Energy Facilities* (2010) .....9

## INTRODUCTION

The Ocotillo Wind Energy Facility (called OWEF in the record and referred to herein as “Ocotillo” or “Project”) is a 112-turbine wind energy project located on Bureau of Land Management (“BLM”)-administered federal lands in California’s Imperial Valley. Construction of Ocotillo is completed and the Project is operating. Ocotillo advances federal and state environmental and renewable energy objectives while also providing badly needed living-wage jobs in a region that has logged the highest unemployment rate in the nation. *See* OSER 53-55, 60, 134-35.<sup>1</sup> Ocotillo achieves these benefits while temporarily disturbing less than 460 acres and having a final footprint of about 120 acres, OSER 41, within a 10,151-acre federal right-of-way (“ROW”). ER 274-75.

Before the Department of the Interior, acting through BLM, approved Ocotillo, it first required a comprehensive environmental review, reflected in an extensive Final Environmental Impact Statement (“FEIS”), including exhaustive studies of current use of the site by birds and other wildlife. BLM also developed detailed measures to avoid, minimize and mitigate for Ocotillo’s impacts on birds and other wildlife, as well as other resources. The agency documented the results of this evaluation in a detailed Record of Decision (“ROD”), including comprehensive conditions for protecting wildlife and the environment. ER 264-

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<sup>1</sup> The Supplemental Excerpts of Record submitted by Ocotillo Express LLC and Pattern Energy Group LP have been given the prefix “OSER”.

317, OSER 2-36.

Among other things, the ROD required the Project developer, Ocotillo Express LLC (“Ocotillo Express”), to develop and implement: (i) an Eagle Conservation Plan (“ECP”) to protect golden eagles and (ii) an Avian and Bat Protection Plan (“ABPP”) to protect hawks and other raptors, owls, bats, and resident and migratory birds. OSER 30-31. While the permitting process was occurring, Ocotillo Express developed these mitigation plans in consultation with U.S. Fish & Wildlife Service (“USFWS”) and the California Department of Fish & Game (“CDFG”), the federal and state wildlife agencies with jurisdiction over the affected birds and bats. OSER 85; *see* OSER 30-31 (requiring wildlife agency review and approval of ECP and ABPP). The final versions of the ECP and the ABPP were completed before the FEIS was published and so were included as appendices to the FEIS. ER 724-810 (ABPP), ER 960-1034 (ECP). USFWS also formally concurred in the adequacy of both plans. OSER 48.

The Appellants in this case, Desert Protective Council, Laborers’ International Union of North America Local Union No. 1184 (“LIUNA”), Hector Casillas, John Norton, Jim Pelley, and Park Ewing (collectively, “DPC”), advance a very narrow challenge to the comprehensive environmental review and mitigation conditions developed for Ocotillo:

- (1) DPC complains that they did not have an opportunity to comment on the

- final version of the bird mitigation plan – the ABPP – even though LIUNA’s consultant provided extensive comments on that document, and the information they say was withheld (relative volume of bird activity at different wind projects) is publicly available both in the scientific literature and in CDFG’s guidance document for wind energy projects;
- (2) DPC believes that, in developing baseline data on existing conditions at the Project site, a different protocol should have been used to monitor the migration of one bird species – Swainson’s hawks – even though the protocol that was used for Ocotillo was consistent with the relevant agency guidelines and produced a representative sample of Swainson’s hawk migration over the site; and
  - (3) DPC believes that a possible measure for mitigating turbine impacts – turning off turbines when certain birds are present, called “curtailment” – should have been adopted whenever any raptors or owls are present, even though this practice is not required for any other U.S. wind energy projects, Ocotillo’s introduction of this practice to protect golden eagles is groundbreaking, and the ABPP includes the practices recommended by USFWS and CDFG for minimizing impacts on raptors and owls.

None of DPC’s objections rise above the level of flyspecking a few of the details of the comprehensive evaluation the agencies completed for Ocotillo. And

contrary to DPC's entreaty, this Court has made clear that it will not substitute its judgment for that of an agency, particularly on the sort of technical details at issue in this appeal. *See Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled in other part as recognized by Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir.2009). Accordingly, DPC's appeal must fail.

### **STATEMENT OF JURISDICTION**

Ocotillo agrees with DPC's Statement of Jurisdiction.

### **ISSUES PRESENTED FOR REVIEW**

Ocotillo offers the following alternative descriptions of the Questions Presented in DPC's opening brief:

1. Whether the opportunities that BLM provided for public comment on the Draft EIS and FEIS developed for the Ocotillo Project complied with regulatory requirements;
2. Whether the FEIS took the requisite "hard look" at Ocotillo's potential impacts on Swainson's hawks;
3. Whether the consideration of mitigation measures included in the FEIS was arbitrary and capricious or contrary to law;
4. Whether Interior acted contrary to the requirements of 43 U.S.C.

- §1765(a)(iv), providing that federal rights of way must include conditions requiring compliance with state environmental protection standards that are more stringent than federal standards, when it issued a ROW for Ocotillo that requires development and implementation of an Eagle Conservation Plan and an Avian and Bat Protection Plan with input from CDFG and requires a take permit from the State of California for Swainson's hawks if the State decides to require such a permit;
5. Whether Interior acted contrary to the requirements of 43 U.S.C. §1765(a)(ii), providing that federal rights of way must include conditions to minimize damage to fish and wildlife habitat and otherwise protect the environment, when it issued a ROW for Ocotillo that contains 35 pages of conditions to minimize damage to fish and wildlife habitat and to protect the environment (OSER 2-36).
  6. Ocotillo accepts DPC's statement of the fourth issue, regarding LIUNA's standing.
  7. Whether DPC's fifth Question, regarding the district court's holding that Appellants had not sufficiently pleaded certain claims, is moot because the district court considered and ruled on the merits of all of DPC's claims affected by that holding.

## **STATEMENT OF THE CASE**

Ocotillo agrees with DPC's Statement of the Case, which is presented in their opening brief under the heading "Proceedings Below – Litigation History."

## **STATEMENT OF FACTS**

### **I. The Ocotillo Project And Its Site**

Ocotillo helps Interior meet its statutory mandate to approve 10,000 megawatts of renewable energy generating capacity on public lands by 2015. *See* OSER 53. It helps San Diego Gas & Electric meet the state law requirement that it provide 33 percent of its power from renewable sources by 2020. OSER 56. It has generated badly needed jobs in a county with a 27 percent unemployment rate, highest in the nation, and will generate enough electricity to power 125,000 homes while avoiding 360,000 metric tons/year of greenhouse gas emissions. OSER 134-35.

The Project site also is well suited for wind development. The Ocotillo Valley has one of the highest quality wind resources in Southern California and is one of the few such sites that have not been foreclosed to wind development. OSER 126-27. The Sunrise Powerlink, a 500-kV transmission line constructed specifically to foster the development of renewable energy projects, bisects the Ocotillo site. OSER 56. In addition to the Sunrise Powerlink, another 500-kV

transmission line, Interstate 8, the Imperial Highway, State Route 98, and the San Diego and Arizona Eastern Railway all run through the Project area. ER 552, OSER 66. The Project site also is crisscrossed by a system of 27 roads and trails and is currently open for “off-highway vehicle [] use and shooting,” among other things. OSER 67.

**II. BLM Prepared A Detailed FEIS For The Ocotillo Project, Including Thorough Bird Impact Analysis And Fully Developed Mitigation, And Made The Draft EIS And FEIS Available For Extended Public Review And Comment**

BLM prepared an exceptionally thorough evaluation of all of Ocotillo’s potential impacts on environmental resources, as reflected in an exhaustive FEIS. Among other things, that evaluation includes (1) a detailed, 245-page description of the environmental conditions at and around the Project site; (2) more than 450 pages thoroughly analyzing the potential environmental consequences of the Project; and (3) nineteen technical reports providing comprehensive data on everything from eagles and raptors to traffic and paleontology.<sup>2</sup>

The FEIS presented the results of detailed bird monitoring studies – four seasons of raptor migration surveys and a year of avian point count surveys – conducted on the Ocotillo site. ER 463-67. The FEIS concluded that the Ocotillo

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<sup>2</sup> Only the portions of the 4300-page FEIS relevant to claims at issue in this appeal have been included in the excerpts of record and Ocotillo Express’ supplemental excerpts.

site is not part of a major migration corridor for either common or special-status bird species and the site does not support large populations of resident bird species. ER 465. It also concluded that use of the Ocotillo site by raptors is low compared to other wind energy sites, averaging 0.745 observations per hour. ER 464, 496.

Based on the bird survey data, the FEIS concluded that collision risk is low for virtually every raptor species that might migrate through the project area, including golden eagles, Cooper's hawk, sharp-shinned hawk, ferruginous hawk, Swainson's hawk, northern harrier, merlin, osprey, and peregrine falcon. OSER 85-87. However, it also recognized that this low collision risk could be potentially significant for these raptor species. OSER 95-96. To minimize that risk, the FEIS called for mitigation including development of an ABPP and an ECP. OSER 1-2-03, 106 (mitigation measures Wild-1o/Wild-1ff and Wild-1p/Wild-1bb). These measures were made conditions of the ROD. OSER 30-31, 33.

Ocotillo's bird mitigation plans – the ABPP and the ECP – were developed and completed before the FEIS was published. Accordingly, the final versions of both mitigation plans were attached as appendices to the FEIS. ER 724-810 (ABPP); ER 960-1034 (ECP).

BLM made the Ocotillo Draft EIS available for public review and comment for 90 days, double the length of the comment period required by the NEPA regulations. ER 310-11, OSER 114 (90-day comment period provided for Project);

40 C.F.R. § 1506.10(c) (45-day comment period required by regulations). The agency then prepared the FEIS, which includes responses to all public comments as well as updated analyses, technical appendices, and mitigation plans. As required by law, the FEIS was publicly available for more than 30 days before BLM issued its ROD. *See* 40 C.F.R. §§ 1503.1(b) (comments on Final EISs), 1506.10(b)(2) (30-day period required); OSER 49-50 (FEIS available March 9, 2012); ER 312 (ROD executed May 11, 2012).

BLM received extensive comments on the FEIS, including from the Appellants. OSER 392-97 (Desert Protective Council comments); ER 1456-478, OSER 342, 398-422 (LIUNA comments). BLM evaluated those comments, responded to the commenters directly, OSER 338-39, 340-41, and prepared a detailed response. OSER 423-489. In its ROD, BLM also acknowledged and responded to comments it received after it had completed its response to the timely comments on the FEIS. ER 279-280.

### **III. Ocotillo's Assessment Of Bird Impacts And Its Avian Mitigation Plans Were Developed In Accordance With Federal And State Guidelines**

As noted above, the mitigation plans developed for Ocotillo include an ABPP, ER 724-810, and an ECP. ER 960-1034. The ABPP was developed in accordance with USFWS Guidelines for ABPPs for wind energy projects,<sup>3</sup> as well

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<sup>3</sup> USFWS, *Interim Guidelines for the Development of a Project Specific Avian and Bat Protection Plan for Wind Energy Facilities* (2010). ER 1332-354.

as guidelines developed by the State of California (CDFG and the California Energy Commission) for reducing wind energy project impacts to birds and bats (the “California Guidelines”).<sup>4</sup> ER 729.

An ABPP is a project-specific document describing a program for reducing the risks to birds and bats from operation of that wind energy project. ER 1333. The USFWS Guidelines for ABPPs are intended to provide wind energy project developers with tools for assessing risk to birds and bats and for designing and then operating a bird- and bat-friendly wind facility. ER 1332. They recommend that every ABPP include a site suitability assessment, a risk assessment, conservation measures, an adaptive management process, post-construction monitoring, reporting, and implementation plans. ER 1336-37. The California Guidelines describe methods for carrying out these steps. *See* OSER 269, 271-284. The Ocotillo ABPP conforms to the agencies’ guidance by summarizing baseline avian and bat surveys, identifying measures to avoid and minimize impacts to birds and bats, and describing the adaptive management, monitoring, and reporting requirements for Ocotillo. ER 724-810.

The Ocotillo ECP was developed in accordance with USFWS guidance for ECPs.<sup>5</sup> ER 967-68. The ECP was developed to meet USFWS and BLM

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<sup>4</sup>California Energy Commission and California Department of Fish and Game, *California Guidelines for Reducing Impacts to Birds and Bats From Wind Energy Development* (2007) (“California Guidelines”). OSER 266-325.

requirements for implementing the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“BGEPA”) and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (“MBTA”). ER 967.

Many of DPC’s allegations in this appeal relate to Ocotillo’s ABPP, so some additional background on the ABPP and the bird survey data used to develop that document is warranted.

#### **A. Ocotillo’s ABPP**

The Ocotillo ABPP includes a detailed discussion of the results of bird surveys and other monitoring completed at the Project site. ER 736-760 (eagles and raptors). The bird survey protocols for Ocotillo were developed using the California Guidelines and approved by BLM. ER 463, 465, 578, 582. The ABPP compares the rate of raptor observations at Ocotillo to observations made at other sites.<sup>6</sup> ER 760-61. It concludes that raptor use of the Ocotillo site is low compared to other wind projects. ER 741, 760. The ABPP also presents an assessment of the

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<sup>5</sup> USFWS, *Draft Eagle Conservation Plan Guidance* (2011). OSER 206-253.

<sup>6</sup> The ABPP cites the literature sources for the data on other projects presented in that document. ER 761, 762, 784. DPC alleges that this was inadequate public disclosure – even though the relevant data is presented in the ABPP (not just adopted by reference) and the sources of the data were identified. DPC Br. at 15-20. DPC ignores the fact that the California Guidelines, developed by CDFG, present essentially the same picture of the range of raptor impacts from existing wind projects. *Compare* OSER 319-325 (California Guidelines) *with* ER 761-62. (ABPP). Thus, the conclusion that Ocotillo is a low use site for raptors is in no sense a revelation or a departure from well understood facts.

collision risk at Ocotillo for all raptors and for specific raptor species, including Swainson's hawks. ER 760-67. It outlines the approaches that will be used to avoid and minimize the risk to raptors and other birds and bats during pre-construction, construction, and operation of the Project. ER 772-786.

The California Guidelines contain an extensive discussion of how wind energy projects can avoid and minimize impacts to raptors and other birds. OSER 310-318. They identify several elements of site selection and design to avoid and minimize impacts: (1) minimize fragmentation and habitat disturbance; (2) establish buffer zones around raptor nests and high value habitat; (3) use turbine designs that reduce impacts, such as avoiding lattice towers, guy wires, or other structures that are attractive perches; (4) use information collected on movement patterns of birds and bats to inform turbine location and alignment decisions; (5) reduce habitat for prey near turbines; (6) avoid lighting that attracts birds and bats; (7) minimize power line impacts; and (8) avoid using guy wires to support structures. OSER 310-314.

Ocotillo's ABPP reports on the use of each of these elements in the selection of the Ocotillo site and in the detailed design of the Project. ER 772. The Project is not sited near high concentrations of ponds, streams, or wetlands that could attract birds or prey; the permanent meteorological towers were designed without guy wires; the electrical collection system for the Project is buried; 500-foot

construction buffers have been maintained from raptor nests; and lighting has been minimized that would potentially attract insects or wildlife. *Id.*

The USFWS and California Guidelines also call for developing, in advance, plans for adaptive management to be used should the level of bird fatalities at a wind project site be higher than anticipated during permitting. ER 1336, OSER 317. The ABPP responds to this aspect of the Guidelines by including comprehensive post-construction monitoring and adaptive management based on monitoring results. ER 774-786. The triggers for consultation on adaptive management relevant to this case are: (a) mortality of one bird listed under either federal or state Endangered Species Acts (such as Swainson's hawk, a California threatened species); and (b) average mortality of 0.12 raptors per megawatt (MW) per year over a 3-year period. ER 785. Should one of these thresholds be exceeded, a Technical Advisory Committee will confer and recommend to BLM whether to implement additional conservation measures to reduce or mitigate impacts. ER 785-86.

USFWS reviewed the ABPP and issued its concurrence for the ABPP along with its concurrence for the ECP. OSER 48. In doing so, USFWS expressly recognized that the ABPP is designed to avoid, minimize and monitor Ocotillo's impacts on migratory birds and bats. *Id.*

## **B. Ocotillo Avian Point Count Survey**

The California Guidelines recommend bird studies be conducted for up to a year on sites with little baseline information, or sometimes more than a year if special-status species may be present.<sup>7</sup> OSER 274-75. The California Guidelines recommend bird use counts as the primary survey tool for wind energy project sites. OSER 298. “Bird use counts,” also called “point counts,” are conducted by an observer recording bird detections from a single vantage point for a specified time period; the CDFG Guidelines recommend 30 minutes once a week for one year. OSER 276, 300.

For Ocotillo, the year of avian point counts were conducted from September 1, 2009 to August 31, 2010. OSER 198. The counts were made for 30 minutes one day each week, in accordance with the California Guidelines (no data was collected during one week in November and one in January). *Id.* The avian point count results were reported in a Biological Technical Report attached to the Draft EIS. OSER 169-171. Raptors accounted for 3.6 percent of the bird observations recorded during the year of point count surveys, with the peak observations occurring in the spring and the majority of raptors being common desert species, including red-tailed hawk, turkey vulture, American kestrel and prairie falcon. OSER 170. A single Swainson’s hawk was observed on three separate occasions

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<sup>7</sup> The USFWS Guidelines are consistent with the California Guidelines, but provide more general guidance on bird survey methods. See ER 1341.

in spring 2010 during point count surveys. *Id.* The FEIS reports the same information. ER 466. The Swainson's hawk observations occurred during the weeks of March 21, April 4, and May 9, 2010.<sup>8</sup>

The avian point count survey also found that the peak of bird migration across the Ocotillo site occurred in March and April, with average detections of 4.38 migratory birds of all types per 30-minute observation during that period. *Id.* Despite greater migration abundance in the spring, the data indicated that site use by migratory species is low. *Id.* The avian point count survey concluded that, based on the year of collected data, the Ocotillo site did not appear to be part of a major migration corridor for either sensitive or non-sensitive species. OSER 263. It also concluded that the Ocotillo site does not support large populations of any resident bird species. *Id.*

### **C. Ocotillo Migratory Bird Survey**

The California Guidelines also provide that migration counts may be used to evaluate risks to migrating species. OSER 305-06. The California Guidelines note that migration counts are typically performed for eight hours, 4 days per week, for 10-13 weeks in the fall and 8-10 weeks in the spring. OSER 306.

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<sup>8</sup> The avian point count report states that the Swainson's hawks were observed during weeks 30, 32 and 37 of the avian point count survey. OSER 260. The dates when the observations occurred have been calculated by using this information and counting the number of weeks from when the survey began on September 1, 2009.

Raptor migration surveys were conducted at the Ocotillo site based on the California Guidelines, using protocols developed in coordination with BLM. OSER 194. The raptor migration surveys occurred during an eight-week period during the fall 2009 migration (September 24-November 10, 2009), a ten-week period during the spring 2010 migration (March 22-May 27, 2010), a 15-week period during fall 2010 (August 23-November 12, 2010), and a ten-week period during spring 2011 (March 21-May 27, 2011). OSER 194-95. The results of the first three seasons of raptor migration surveys were reported in the Biological Technical Report appended to the Draft EIS. OSER 194-95, 167-69. The Spring 2011 results were still being tabulated when the DEIS was issued in June, 2011. OSER 194-95. Accordingly, the Spring 2011 raptor migration results are reported in an appendix to the FEIS. ER 812-821.

### **SUMMARY OF ARGUMENT**

DPC's claims under the National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq., ("NEPA") relate to BLM's evaluation of the Project's potential impact on Swainson's hawks and other raptors and the adequacy of the mitigation plan developed for those impacts. DPC claims it did not have access to information used in the ABPP to compare raptor observations at Ocotillo to other wind projects because BLM did not make the studies on those other projects publicly available. DPC Br. at 15-20. Contrary to DPC's claims, BLM complied

with NEPA requirements by presenting the data relied upon regarding those other projects in the ABPP and citing to the literature from which the data was obtained. ER 761-63, 784, 787-797. The same information comparing raptor observations at wind energy projects also has been compiled by CDFG and published in the California Guidelines. OSER 319-325. DPC had access to the relevant information, and DPC also availed itself of the ample opportunities to comment on the final ABPP. *See* OSER 392-422, ER 1471-72.

DPC objects to the protocols used to monitor the migration of Swainson's hawks over the Ocotillo Site, claiming that the migration surveys were not conducted at the right time to accurately reflect Swainson's hawk numbers. DPC Br. at 20-23. DPC's objections are baseless, as the migration survey was designed and conducted following the California Guidelines, *see* OSER 194, and the representative nature of the migration surveys is confirmed by the avian point count surveys conducted on site, OSER 260, and by comparison to migration data collected at Borrego Springs, a major Swainson's hawk resting place. *See* ER 1410-11. DPC also ignores the deference that the courts show to agency decisions regarding methodological questions.

DPC's also claims the EIS does not satisfy NEPA because BLM did not consider additional mitigation, consisting of stopping the turbines whenever raptors are present. However, NEPA does not set any substantive mitigation

standard, nor does it require fully developed mitigation plans. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-353 (1989). The avian mitigation plan for Ocotillo – the ABPP – is exceptionally robust, is very protective of raptors and other birds, and easily satisfied NEPA’s requirements.

Turning to the Federal Land Policy Management Act, 43 U.S.C. §§ 1701, et seq., (“FLPMA”), DPC argues that three state statutes are more stringent than federal law, with requirements applicable to Swainson’s hawks, golden eagles, and all raptor and owl species, and so BLM was required by 43 U.S.C. §1765(a)(iv) to impose more stringent conditions on Ocotillo. DPC has ignored the role that the state agency charged with implementing those three statutes, CDFG, played in reviewing the avian mitigation plans from Ocotillo, as well as the ROW stipulations that require Ocotillo to obtain a permit from the state for Swainson’s hawks if the state requires it, and that required development and implementation of the ECP. ER 332. Finally, DPC has misinterpreted the state statute regarding raptors and owls, and also ignored the fact that the ABPP, which protects both raptors and owls, was developed in accordance with CDFG’s California Guidelines, and in consultation with CDFG. ER 332. 772, 774-786. BLM fully met its obligation of requiring compliance with state environmental standards.

Finally, DPC argues that under 43 U.S.C. §1765(a)(ii) BLM should have required turbine curtailment whenever owls and raptors are present to “minimize

damage to fish and wildlife.” DPC Br. at 33-36. DPC’s argument is not a challenge to the adequacy of BLM’s mitigation conditions, but rather, to the ABPP and ECP that were developed to fulfill to those conditions. BLM easily met its obligations under this statute through the right of way stipulations requiring development of the ABPP and ECP, ER 332, and the detailed mitigation requirements specific to owls, golden eagles and other birds. OSER 30-31, 33-35. DPC also has ignored the ABPP’s measures to avoid and minimize impacts on birds, ER 772-74, as well as the innovative and very robust ECP. DPC suggests that the ABPP should include turbine curtailment, but can point to no other wind energy project in the country where this practice has been required, and has failed to give this Court any reason to substitute its judgment for BLM’s regarding the mitigation appropriate to minimize bird impacts.

Finally, DPC’s arguments regarding LIUNA’s standing and the district court’s ruling on DPC’s motion to amend its NEPA claims are both ill-founded and moot, as they have no relevance to the outcome of this appeal.

## **ARGUMENT**

### **I. BLM Satisfied All Relevant NEPA Requirements In Connection With Its Approval of Ocotillo**

#### **A. Standard of Review**

NEPA applies to major federal actions that may affect the human environment. *See* 42 U.S.C. § 4332(2)(C). NEPA does not impose substantive

environmental standards or requirements. *Robertson*, 490 U.S. at 348-51; *Lands Council*, 537 F.3d at 1000. It is a procedural statute, and does not dictate the results of agency decisionmaking. *Id.* Instead, NEPA sets out a process whereby a federal agency must prepare an EIS before undertaking a major federal action that may significantly affect the human environment. *See* 42 U.S.C. § 4332(2)(C) (statutory requirement); 40 C.F.R. part 1502 (implementing regulations for EISs).

DPC challenges the adequacy of the FEIS that BLM developed to support its analysis of Ocotillo. An EIS must be upheld unless it is arbitrary and capricious. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375-76 (1989). Review under this standard is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists.” *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012) (citation and internal quotation marks omitted). A reviewing court “may not flyspeck an EIS or substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action.” *Half Moon Bay Fishermans’ Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (citations and internal quotation marks omitted); *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (“We have consistently declined to flyspeck an agency’s environmental analysis, looking for any deficiency no matter how minor.” (citation and internal quotation marks omitted)).

In applying the arbitrary and capricious standard, courts “may not impose themselves as a panel of scientists that instructs the agency, chooses among scientific studies, and orders the agency to explain every possible scientific uncertainty.” *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (citation and internal quotation marks omitted); *see also Lands Council*, 537 F.3d at 988, 999 (instructing agencies on scientific issues is “not a proper role” for the federal courts). On the contrary, “[a] court generally must be at its most deferential when reviewing scientific judgments and technical analyses within the agency’s expertise under NEPA.” *Native Ecosystems Council*, 697 F.3d at 1051 (citation and internal quotation marks omitted). Indeed, the Supreme Court has been clear that federal agencies “must have discretion to rely on the reasonable opinions of [their] own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” *Marsh*, 490 U.S. at 378.

**B. BLM Properly Made Information About Raptors Available To The Public**

DPC’s first NEPA argument does not object to the FEIS or the analysis it contains; DPC simply claims they did not have an opportunity to comment on analysis contained in the ABPP - a mitigation plan appended to the FEIS - that compares raptor observations at Ocotillo to data from other wind energy projects.

DPC's Br. at 15-20. DPC's objection fails, for several reasons. First, DPC is wrong as it had ample opportunity to comment on this question and chose not to do so, instead directing its FEIS comments to other issues. *See* OSER 392-97 (Desert Protective Council comments on FEIS); OSER 342, 398-422 (LIUNA comments on FEIS). Second, DPC is wrong in claiming that the FEIS's conclusions regarding raptor use of Ocotillo relied exclusively on the Final ABPP; to the contrary, the FEIS's raptor collision risk analysis (which DPC has ignored) relies on the objectively low raptor observation rates at Ocotillo. *See* ER 495-500. Third, DPC's claim that the BLM did not adequately disclose to the public raptor use data on other projects ignores several facts, including: (a) the data on those other projects appears in the ABPP, and is not merely referenced (ER 761-63); (b) the literature from which the data was obtained is cited in the ABPP (*id.*); and (c) CDFG presented raptor use data on essentially the same range of wind project in the California Guidelines, OSER 319-325, and the CDFG analysis is entirely in line with the ABPP. *Compare id. with* ER 761-62.

BLM prepared and made available to the public an extremely thorough analysis of the Project's potential impact on raptors. The Draft EIS presented detailed information on raptor use at the Project site, including the results of three seasons of site-specific raptor migration counts and a year of avian point count surveys. OSER 139-146, 148-152. The Draft EIS also provided a thorough

discussion of the potential risks for birds and bats, including migrating and resident raptor species.<sup>9</sup> ER 1129-1135. As to raptors, the Draft EIS concluded:

[T]hree seasons of raptor migration counts have indicated that raptor use of the site is low (an average of approximately 0.496 observations/hour). Raptor use on the [Ocotillo site] is low when compared to similar studies conducted for other wind projects (HELIX 2010c).

ER 1130. The Draft EIS added: “With the exception of turkey vultures, migratory raptor species were uncommon during the fall and spring.” *Id.*

The cited report, “Helix 2010c,” is the 2010 Raptor Migration Report, which evaluated the first two seasons of raptor migration studies at the Ocotillo site. *See* ER 1147, 1218-1257. This Report concluded that the overall collision risk to raptors and other large birds was low due to their low use of the site. ER 1247. The Report provided a detailed evaluation of collision risk for golden eagles and individual raptor species, concluding that the collision risk was low or very low for all species other than turkey vultures and red-tailed hawks. ER 1233-245. For the most common species observed, turkey vultures (48 percent of the observations in the first two seasons), the Report also provided a graphic comparison of data at

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<sup>9</sup> The Draft EIS’s analysis of the risk of raptor collisions with the Ocotillo project, ER 1129-1135, was backed up by Draft EIS Appendix D (a Biological Technical Report). *See* ER 1152-1195. In addition to the detailed results of bird surveys, Appendix D presented a species-by-species discussion of the potential collision risk for golden eagles and individual special status raptor species, concluding that the risk to those species was low because their observed use of the site was low. ER 1160-65. This analysis did not rely on a comparison of Ocotillo to data from other wind projects. *Id.*

Ocotillo to data from other wind projects, showing that even though turkey vultures had the largest percentage of observations at Ocotillo, their use of the site was relatively low compared to other wind projects. ER 1256-57.

Appellant Desert Protective Council commented on the Draft EIS and did not take issue with its conclusion that raptor use of the site was low or with the evidence supporting that conclusion, or with the related conclusion that raptors faced a low collision risk. OSER 326-335. None of the individual Appellants commented on this issue either. Appellant LIUNA did not file any comments on the Draft EIS. *See* OSER 116 (listing organizational commenters).

The discussion of raptors in the FEIS added data from the fourth raptor survey season at Ocotillo. ER 454-58, 463-67. It also incorporated that information into an update of the Draft EIS's discussion of the potential collision risks for birds and bats, including migrating and resident raptor species. ER 495-500. The FEIS reiterated the conclusion that raptor use of the Ocotillo site is low (adjusted to an average of approximately 0.745 observation/hour, reflecting the full four seasons of raptor migration counts). ER 496. It also reiterated the conclusion that the Ocotillo site's raptor observation rates are low compared to other sites. *Id.* In doing so, it cited once again to the 2010 Raptor Migration Report, which as discussed above includes a comparison of turkey vulture data from various wind projects, and added a citation to the report on the spring 2011 raptor migration

counts, which summarized all four seasons of raptor data.<sup>10</sup> ER 818. The FEIS then followed with an evaluation of the collision risk for golden eagles and specific raptor species, concluding based on the low observation rates in the Ocotillo data that collision risks were low for most individual raptor species. ER 496-500. The FEIS (like the Draft EIS) recognized that turkey vultures were at highest risk of collision because they were the most common species observed, but added that – while most common at Ocotillo – their numbers were low compared to those observed at other wind projects. ER 500; *see* ER 1130 (Draft EIS making the same point). Both documents relied on the analysis in the 2010 Raptor Migration Report discussed above. ER 1256-57.

DPC’s objection to the FEIS’s discussion of raptor risk, DBC Br. at 15-20, entirely ignores the analysis actually included in the FEIS, just described, which is based on data collected at the Ocotillo site showing objectively low rates of raptor use of the site, not just low use relative to other projects. ER 496-500. Instead, DPC incorrectly asserts that the FEIS’s conclusions regarding raptors rely entirely on a comparative analysis of raptor use relative to other projects that appears in the Final ABPP. DPC Opening Br. at 15, 18-19. To the contrary, the only specific

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<sup>10</sup> The FEIS cites to “Helix 2010c” and “Helix 2011d.” ER 496. These are, respectively, the 2010 and 2011 reports on raptor migration counts. *See* ER 540. The 2011 report includes a tabulation of the full four seasons of migration counts and concludes that the Ocotillo site is not a major migratory pathway for raptors. ER 818.

comparison to other sites in the FEIS risk analysis was made for turkey vultures, ER 500, reiterating information that was available with the Draft EIS. ER 1130, 1256-57. The analysis does not otherwise directly rely on any comparison to other wind projects. *See* ER 496-500. Thus, while the comparative analysis in the Final ABPP certainly supports the conclusions in the FEIS, the central factual predicate to DPC's objection is false.<sup>11</sup>

DPC's objections also fail because BLM met its obligation to share data with the public and DPC had an opportunity to comment on the ABPP. DPC argues that BLM did not meet its obligation to provide the public with the "underlying environmental data" upon which the Final ABPP bases its conclusion that raptor use at Ocotillo is low compared to other wind projects. DPC Br. at 15-17. But contrary to DPC's claim, the Final ABPP spells out its comparative analysis and sets out the raptor data on the other projects being compared to Ocotillo, as well as citations to the scientific literature from which the data was obtained. ER 761-63, 784, 787-797. By including the data, with source citations, in the ABPP, BLM did provide the "supporting analysis and data" relied upon to support the Final ABPP's conclusions about the relatively low raptor use of the

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<sup>11</sup> DPC clearly recognizes the flaw in their argument, as they ignore the FEIS discussion of risk to raptors, citing instead to references to the Final ABPP in BLM's ROD, responses to comments on the Draft EIS and the FEIS's description of the proposed action. DPC Br. at 18. None of these present the FEIS's analysis of risk to raptors, which appears at ER 495-500.

Ocotillo site and the resulting low risk to raptors. *See Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) (NEPA satisfied by citation to sources of data in existing literature).

Not satisfied with receiving both the data on the other projects and citations to the reports containing that data, DPC argues that BLM should have taken the additional step of collecting all of the scientific literature cited in the Final ABPP and should either have provided it to DPC or placed it in the administrative record. DPC Br. at 17-18, 19. But DPC wrongly asks for the agency to assume a burden far beyond what is legally required; BLM's approach satisfied the agency's obligation to make data available to the public. *See* 40 C.F.R. § 1502.24 (directing agencies to summarize, consolidate, or simply "reference" background material; Forty Most Asked Questions Concerning CEQ's NEPA Regulations ("*Forty Questions*"), 46 Fed. Reg. 18026, 18034 (Mar. 23, 1981) (appropriate citation is sufficient to render scientific literature "available"<sup>12</sup>).

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<sup>12</sup> Forty Questions, Question 25b: "Material that is not directly related to preparation of the EIS ... would include ... research papers in the general literature, ... [t]hese must be available either by citing the literature, furnishing copies to central locations, or sending copies directly to commenters upon request." 46 Fed. Reg. at 18034. In other words, citation to the literature is an appropriate way for the agency to inform the public of the basis for its technical conclusions. *Id.*; *see Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (relying on Forty Questions to interpret NEPA regulations).

DPC makes the further argument that some of the studies cited in the Final ABPP were not publicly available. DPC Br. at 18. But whether specific studies were available or not (DPC cites no evidence to support this claim), DPC does not – and cannot – claim that the information on raptor use presented in the ABPP is in any way inconsistent with publicly available information on raptor observations at wind energy projects. For example, raptor data for many of the same projects discussed in the Final ABPP, and others as well, is presented in the California Guidelines. OSER 319-325. Indeed, the California Guidelines’ analysis looks remarkably like that in the Final ABPP, and supports the Final ABPP’s conclusion that Ocotillo has low raptor use compared to other wind energy projects in the western United States. *Compare* ER 761-63 (Final ABPP) *with* OSER 319-325 (California Guidelines). Thus, DPC cannot claim that the Final ABPP’s comparison among wind projects is in any way novel, or that its results are in any way unexpected.

DPC also claims that they did not have a fair opportunity to comment because the Final ABPP included raptor data that had not been made available earlier in the NEPA process and BLM did not provide a comment period on the FEIS. DBC Br. at 17-19. That is incorrect; the FEIS was available for comment for more than 30 days, beginning March 9, 2012. OSER 49-50. BLM received extensive comments on the FEIS, including from the Appellants. *See* OSER 392-

97 (Desert Protective Council comments); OSER 398-422 (LIUNA comments). They did not comment on the Final ABPP's comparison of raptor data. *Id.* BLM then developed a detailed response to the FEIS comments it received during the 30-day protest period. OSER 423-489. LIUNA also submitted a second, late set of comments on April 27, 2012 more than six weeks after the FEIS was released to the public. OSER 342. These included FEIS comments from their biologist, ER 1456-478, that provided comments on the Final ABPP but did not raise the objection regarding availability of source documents that DPC now pursues on appeal. ER 1471-72. In its Record of Decision, BLM noted that it had received and reviewed late comments, which it concluded did not warrant any new or supplemental environmental analysis. ER 280. Thus, contrary to DPC's claim (DPC Br. at 17), they were afforded an opportunity to comment on the FEIS, and they availed themselves of that opportunity.

Finally, it is worth noting that Plaintiffs have directed their criticism to the Final ABPP – a mitigation plan appended to the EIS – and not to analysis in the body of the FEIS. As discussed in greater detail below, mitigation plans “need not be legally enforceable, funded, or even in final form to comply with NEPA’s procedural requirements.” *Nat’l Parks & Conservation Ass’n v. U.S. Dep’t of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000) (citation omitted); *see also Robertson*, 490 U.S. at 353 (“it would be inconsistent with [NEPA] . . . to demand

the presence of a fully developed plan that will mitigate environmental harm”). Thus, even if the Final ABPP had omitted relevant information (and, as explained above, there was no such omission) BLM would not have violated NEPA, which sets a forgiving standard for mitigation plans accompanying NEPA documents. *Id.* For this reason, too, Plaintiffs’ claims must be rejected.

**C. BLM’s Raptor Surveys Provided An Appropriate Method For Determining The “Baseline” For Swainson’s Hawks**

DPC alleges that BLM used an arbitrary and capricious method of determining “baseline” (existing) use of the Ocotillo site by Swainson’s hawks. DPC Br. at 20-23. Specifically, they claim that BLM should have timed its raptor surveys (which collected information on many species) to precisely match the migration periods of this particular hawk, *id.*, which made up less than 4 percent of the raptors observed on the Ocotillo site. ER 818. That claim, which seeks to substitute DPC’s methodological preferences for the scientific expertise of the BLM (and the agency’s qualified experts), lacks merit and must be rejected.

First, this is precisely the sort of methodological question on which “[a] court generally must be at its most deferential.” *Native Ecosystems Council*, 697 F.3d at 1051 (citation and internal quotation marks omitted). The Ninth Circuit has repeatedly cautioned that federal courts are not to act as “a panel of scientists” instructing federal agencies how to validate their hypotheses, choose among

scientific studies, or explain scientific uncertainties. *See id.*; *Lands Council*, 537 F.3d at 988. DPC may have preferred that the BLM conduct its surveys a week earlier or a week later, but, under applicable Ninth Circuit precedent, that preference does not render the BLM's surveys arbitrary and capricious.

Second, the raptor survey methodology was the result of reasoned application of established protocols. The survey design was based on the California Guidelines, developed by California's wildlife agency. ER 468. The California Guidelines provide that migration counts are typically conducted for 10 to 13 weeks during the fall and 8 to 10 weeks during spring.<sup>13</sup> OSER 306. Moreover, DPC fails to recognize that the purpose of the migration survey is to provide a "picture of risk to diurnal migrating birds," and the surveys are designed to capture a representative sample, not fully document every migrating raptor. *See* OSER 305-06.

Third, DPC's position appears to be that the number of hawks that could use the Project area "peaks between the second week of March and the first week of April," DPC Br. at 21, in which case the Ocotillo surveys did capture a

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<sup>13</sup> DPC's objection to Swainson's observations being averaged over the number of survey hours likewise conflicts with the California Guidelines, which recommend reporting survey results as the number of birds observed over the time period of observations. OSER 300. The FEIS also provided the actual number of Swainson's hawks observed, which was quite low, ER 464, so DPC cannot claim that use of an average observation rate was misleading as to actual Swainson's observation rates.

representative picture of Swainson's migration over the site. The spring raptor migration surveys extended from the third week of March through May in both 2010 and 2011. *See* ER 736-37. In fact, the Ocotillo surveys occurred when the bulk of the spring migration was passing through Borrego Springs, 40 miles to the northwest. Of the Swainson's observations at Borrego Springs, 55 percent in 2010 and 75 percent in 2011 occurred during the Ocotillo monitoring. *See* ER 1410-11. Similarly, the fall 2010 Ocotillo survey began August 23 ER 736, thus rebutting DPC's concern that the fall survey missed hawks migrating in September. DPC Br. at 22.

Fourth, DPC has ignored the avian point count survey conducted weekly for a year on the Project site. OSER 198, 255. This survey collected data from September 2009 and February 2010, two months that DPC believes were missed by the migration survey. DPC Br. at 21-22. In fact, the avian point count survey did not observe a Swainson's hawk until the week of March 21, 2010, OSER 260 (see footnote 8, above), affirming the appropriateness of the timing of the more intensive migration survey.

Finally, DPC's reliance on *Northern Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011), is entirely without basis. In that case, the Ninth Circuit held that a federal agency violated NEPA by deferring its collection of baseline data until after it had already issued a ROD. 668 F.3d at 1083-85.

Here, BLM collected considerable baseline data on raptors (including Swainson's hawks) prior to issuing the Ocotillo ROD. *See, e.g.*, ER 463-469, 734-767, 826-958; *see also* ER 737 (2,000 person-hours of observations). Therefore, *Northern Plains* does not support Plaintiffs' position.<sup>14</sup>

DPC's reliance on *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953 (9th Cir. 2005), is equally misplaced. There, the Forest Service was evaluating compliance with a fixed numeric management standard and acknowledged that it had used the wrong data in making its impact calculation. 418 F.3d at 963-64. For Ocotillo, there is no fixed standard at issue and the surveys provided a representative sample of the Swainson's migration – and in doing so, demonstrated that the Ocotillo site is not on a major migration route for this species. *Compare* ER 818 (at Ocotillo, 2 Swainson's in spring 2010 and 51 in spring 2011) *with* ER 1394, 1398 (at Borrego Springs, 3105 Swainson's in spring 2010 and 8902 in spring 2011).

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<sup>14</sup> On the contrary, *Northern Plains* appears to support the Appellees' position. The *Northern Plains* court explicitly noted that it would have come to a different conclusion if the agency had “attempted to obtain the baseline data . . . through some scientific study or methodology that its experts deemed reliable.” *N. Plains*, 668 F.3d at 1085. That is precisely what BLM did for Ocotillo. To the extent *Northern Plains* applies here, it undermines Plaintiffs' claims.

**D. BLM's EIS Provides A Reasonable Discussion Of Measures To Mitigate Impacts To Raptors**

DPC's third NEPA claim alleges that BLM should have evaluated additional measures to mitigate potential impacts to raptor species. DPC Br. at 24-27. But the Supreme Court has ruled that NEPA does not impose a substantive duty on agencies to mitigate adverse environmental effects or require that EISs contain a fully developed mitigation plan. *Robertson*, 490 U.S. at 352-53. In fact, "it would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a fully developed plan that will mitigate environmental harm." *Id.* Instead, "NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F.3d 517, 528 (9th Cir. 1994) (citing *Robertson*, 490 U.S. at 352-53). Mitigation "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4.

Here, BLM went well beyond NEPA's procedural requirements for identifying potential mitigation measures. As discussed in the sections above, the agency completed an extremely thorough evaluation of the Project's potential impacts on raptor species involving thousands of hours of observation and analysis. *See, e.g.*, ER 463-470, 495-500, 736-747, 760-771. On the basis of that

evaluation, the agency discussed the potential risks to raptors, ER 495-500, and developed mitigation measures to avoid or reduce those impacts. These included condition Wild-1p, requiring development of an ABPP describing the Project design features and advanced conservation practices for minimizing the risk of collision pre-construction, during construction, and during operation, and including post-construction monitoring, adaptive management, and reporting procedures. ER 528-29.

Rather than simply relying on condition Wild-1p, which would have been sufficient to satisfy NEPA, *see Laguna Greenbelt, Inc.*, 42 F.3d at 528, or even on a draft of the ABPP, the FEIS included the final version of the ABPP spelling out the measures that would be implemented to reduce impacts on raptors and other birds and bats. ER 724-810. This more than satisfies BLM's NEPA obligations, as mitigation plans "need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *Nat'l Parks & Conservation Ass'n*, 222 F.3d at 681 n.4.

DPC compares this case to *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), DPC Br. at 26-27, but the Ocotillo FEIS is easily distinguishable from the one at issue in that case. There, the Forest Service entirely failed to analyze the potential impacts of pesticide drift outside of wilderness areas, let alone whether those impacts could be mitigated. 309 F.3d at

1191. Here, the FEIS contains a detailed evaluation of the potential risk to raptors, ER 495-500, identifies measures to mitigate that risk, ER 528-29, and includes the ABPP, a fully developed mitigation plan. ER 724-810. Those same FEIS elements easily satisfy the expectations outlined in *High Sierra Hikers Ass'n v. U.S. Dep't of Interior*, 848 F.Supp. 2d 1036 (N.D. Cal. 2012), by providing neither a “perfunctory description” nor a “mere listing” of mitigation measures, but rather by presenting a complete ABPP that describes the mitigation with more than “enough specificity to ensure that environmental consequences have been fairly evaluated.” 848 F.Supp.2d at 1053 (citations and quotations omitted). DPC cites *High Sierra* and *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009), for the further principle that there should be some assessment of how effective the mitigation measures would be if adopted. DPC Br. at 27. The ABPP does exactly that by describing not only the measures that will be undertaken to avoid and minimize risks to avian and bat species, ER 722-24, but also post-construction monitoring and adaptive management, ER 774-786, to “ensure that potentially significant levels of mortality from operation of the OWEF are effectively mitigated.” ER 783.

DPC, ignoring the fact that NEPA imposes no substantive obligation to mitigate impacts and no requirement for fully developing the details of mitigation plans, *Robertson*, 490 U.S. at 352-53, nevertheless faults the ABPP for not

discussing the extraordinary step of stopping the turbines if a raptor is observed in the area – a measure that has never been required for any wind project in the United States.<sup>15</sup> DPC Br. at 24-27. This simply is not a NEPA requirement. *See, e.g., Nat’l Parks & Conservation Ass’n*, 222 F.3d at 681-82 (plaintiffs’ mitigation arguments “seek too much from the EIS”). Moreover, DPC has ignored the reasons Ocotillo Express agreed to adopt this unprecedented measure to protect golden eagles, which had nothing to do with NEPA.

Despite the rare observation of golden eagles at the Ocotillo site, the FEIS concluded there is a low risk of golden eagle collisions. ER 496. Federal and state law is particularly sensitive to impacts on golden eagles. USFWS, which administers the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“BGEPA”), has established a “no net loss” objective for its management of golden eagles.<sup>16</sup> *Eagle Permits*, 74 Fed. Reg. 46836 (Sept. 11, 2009). Golden eagles also

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<sup>15</sup> DPC’s assertion that curtailing turbines is feasible rests on a comment in interim federal guidelines for wind energy facilities. DPC Br. at 24 n. 5 (citing ER 1347). However, the cited provision says only that curtailment “may be appropriate” in areas with high concentrations of migrating raptors. ER 1347. No one has suggested that the Ocotillo site ever experiences a high concentration of raptors; indeed, the opposite is the case. *See* ER 464-500, 761-63. Moreover, DPC points to no evidence that curtailment has ever actually been used in the U.S. to minimize raptor impacts.

<sup>16</sup> In contrast, FWS maintains that an ABPP “can and should result in an agreement between the project proponent and the Service as a ‘good faith’ effort to conserve migratory birds and bats while still allowing for the development of wind energy projects and production of renewable electricity in the most environmentally friendly ways possible and practicable.” ER 1333-34.

are a “fully protected species” under California Fish & Game Code § 3511. Accordingly, Ocotillo Express worked with USFWS to develop an Eagle Conservation Plan (“ECP”). ER 960-1015. Ultimately, USFWS concurred in the adequacy of the ECP, as well as of the ABPP. OSER 48.

Thus, curtailment to protect golden eagles is a means of achieving USFWS’s substantive objective of “no net loss” for golden eagles and California’s “fully protected” status for this species, and was not developed to satisfy NEPA. Nor does the existence of the ECP alter the procedural nature of NEPA’s requirements, which are satisfied when mitigation is “discussed in sufficient detail to ensure that environmental consequences have been fully evaluated.” *Laguna Greenbelt, Inc.* 42 F.3d at 528. Here, there is no question that BLM’s analyses and mitigation plans provide more than enough detail to “ensure that environmental consequences have been fully evaluated.” *See id.* Accordingly, the agency’s EIS must be upheld.

## **II. BLM Fully Complied with FLPMA In Approving The Ocotillo Right of Way**

### **A. Standard of Review**

FLPMA governs BLM’s management of federal lands under its jurisdiction, including the CDCA. FLPMA is “primarily procedural in nature” and agency compliance is reviewed pursuant to the APA. *Gros Ventre Tribe v. United States*,

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469 F.3d 801, 814 (9th Cir. 2006) (APA applies to review under FLPMA). Agency decisions may be set aside only “if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 554 (9th Cir. 2006) (quoting 5 U.S.C. § 706(2)(A)). This standard is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (citation and internal quotation marks omitted). The Court must take care not to “substitute its judgment for that of the agency.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

BLM, in consultation with USFWS and CDFG, fulfilled its obligations under FLPMA as to all matters touched upon by DPC’s claims, by overseeing the design of the most advanced avian protection program ever proposed for a wind energy project. The resulting measures to avoid and minimize impacts on the birds of concern to DPC meet and exceed all of FLPMA’s requirements.

**B. BLM Satisfies 43 U.S.C. §1765(a)(iv) By Consulting With CDFG And Requiring Compliance With State Standards**

Under FLPMA, federal rights of way must contain terms and conditions that “require compliance with State standards ... if those standards are more stringent than applicable Federal standards.” 43 U.S.C. §1765(a)(iv). DPC argues that to

satisfy this statute, the Ocotillo ROW should have included terms to enforce compliance with three provisions of California's Fish and Game Code: (1) section 2080 (applicable to Swainson's hawks); (2) section 3511 (State "fully protected" species, applicable to golden eagles); and (3) section 3503.5 (regulating falconry by prohibiting unpermitted take of raptors and owls).<sup>17</sup> DPC Br. at 28-33. But contrary to DPC's claims, BLM met its obligations under section 1765(a)(iv) as to each of these state statutes.

As to section 2080 and state-listed Swainson's hawks, the FEIS notes that information was provided to CDFG so that it could determine whether a state take permit would be required for any state-listed species, OSER 112, and the ROW requires Ocotillo Express to obtain a take permit from the State if the State requires one. ER 332 (Stipulation 24). In line with that requirement, the Final ABPP requires consultation with a technical advisory committee, including a CDFG representative, should one Swainson's hawk (or other listed species) be taken. ER 785.

DPC's invocation of section 3511 and golden eagles is misplaced, since eagles are just as protected under federal law as they are under state law; BGEPA and California's section 3511 essentially parallel each other and FWS has

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<sup>17</sup> Section 3503.5 was one of several sections adopted in 1985 as part of SB 330, an act aimed directly at the regulation of *falconry*, i.e., the practice of capturing falcons for their use to hunt wildlife. The chaptered law states that SB 330 is an act "relating to falconry." 1985 Cal. Stat. ch. 1334.

established a “no net loss” objective for its management of golden eagles. *See* Eagle Permits, 74 Fed. Reg. 46836. Accordingly, section 3511 is not “more stringent” than federal law and FLPMA section 1765(a)(iv) does not come into play in dealing with golden eagles.

But even if the Court were to accept DPC’s assertion that section 3511 is more stringent than federal law, the Court also should easily conclude that BLM has met any obligation it may have to require compliance with the standards set by that law. BLM has required development and implementation of the ECP, which was reviewed by CDFG as well as USFWS. ER 332 (ROW Stipulation 26), OSER 30 (mitigation condition Wild-1o), OSER 33-34 (mitigation conditions Wild-1cc to -1ff); *see* ER 497 (draft ECP provided to CDFG and USFWS to review in March 2011).

Using data and calculations that DPC has not contested, the ECP concluded that golden eagles were rarely present on the Ocotillo site, and therefore golden eagle collision risk without curtailment was less than once per year. ER 994. To eliminate that very low risk, a suite of electronic surveillance – radar and radar-guided tracking video, combined with software that can identify whether the tracked object is moving like an eagle – will keep a lookout. ER 1025-1032. The guidance and detection software will be constantly refined during the life of the Project. ER 1028. Although currently experimental, the developer expects to

introduce and test automated curtailment algorithms at Ocotillo. ER 1029. In the meantime, solely to provide redundancy while the radar-based system is evaluated, a trained biologist will be stationed on site for a guaranteed ten years. ER 995-96. The radar and associated measures to protect golden eagles will operate for the life of the Project. ER 1045.

Finally, as to section 3503.5, no court has endorsed DPC's interpretation of that statute as prohibiting all take of any raptors or owls.<sup>18</sup> But even if 3503.5 is given the expansive reading that DPC offers, BLM fulfilled its obligations by requiring submittal of the ABPP to CDFG for its review, and by requiring implementation of the ABPP. ER 332 (ROD stipulation 26); OSER 30-31 (condition Wild-1p); OSER 33 (mitigation conditions Wild-1bb to Wild-1dd). The ABPP includes the measures to avoid, minimize and mitigate for bird impacts, including raptors and owls, recommended by the California Guidelines that CDFG authored. *Compare* OSER 310-14, 317 with ER 772, 774-786. BLM also required implementation of a burrowing owl monitoring and mitigation plan, including

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<sup>18</sup> DPC's theory that the statute can only be satisfied by prohibiting any and all take of raptors and owls is absurd on its face. Their broad reading would prohibit the permitting of glass-covered buildings, bridges, cell towers and other vertical structures in California, since birds routinely collide with those structures. DPC has pointed to no examples of the state blocking construction of any building, cell tower, bridge, or other structure – or wind energy project – because of the risk of collision for raptors or owls. Nor do they point to CDFG having ever suggested that wind energy projects should stop their turbines to avoid raptor or owl impacts in order to satisfy 3503.5.

offsetting mitigation for lost borrowing owl habitat. OSER 30, 32-33 (conditions Wild 11-1n, Wild-1x).

In light of Ocotillo's ECP, ABPP and owl monitoring and mitigation plan, each of which was developed with input from CDFG, there can be no question that BLM has easily satisfying its obligations under 1765(a)(iv) to require compliance with any state standards set by California Fish and Game Code sections 2080, 3511 and 3503.5 that may be more stringent than federal law. Those conditions not only protect Swainson's hawks, golden eagles, and more generally all raptors and owls, but also reflect CDFG's inputs, and the expectations CDFG has set for wind energy projects in its California Guidelines.

DPC argues that BLM cannot satisfy section 1765(a)(iv) with a general condition requiring Ocotillo Express to comply with all applicable state law (referencing ROW ¶5(a), ER 320). DPC Br. at 31-32. DPC ignores ROW Stipulations 24 and 26, which require Ocotillo Express to submit its ABPP and ECP to CDFG and USFWS prior to Project construction and to obtain a State take permit (for Swainson's hawks) if CDFG requires it. (ER 332). These are project-specific terms and conditions, thus nullifying DPC's objection to ROW ¶5(a).<sup>19</sup>

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<sup>19</sup> DPC's argument also rests on a misreading of 43 C.F.R. § 2805.12(i)(6). *See* DPC Br. at 32. This regulation imposes obligations on Ocotillo Express, as the ROW recipient, not on BLM. Its first sentence states: "By accepting a grant, you agree to comply with and be bound by the following terms and conditions." 43 C.F.R. § 2805.12.

DPC does not expressly acknowledge the existence of these project-specific conditions, but apparently considers them inadequate because they could allow some raptor mortality. DPC believes that any raptor or owl mortality would violate its reading of California law. DPC Br. at 28-31. Remarkably, DPC ignores CDFG's views, even though it is the relevant state agency with jurisdiction over eagles, raptors and other birds. As the district court noted, CDFG – the state agency that implements the three state statutes in question – did not object to the mitigation plans developed for eagles and for other birds (including raptors and owls), but rather cooperated with BLM. ER 30. DPC also ignores the California Guidelines, upon which Ocotillo's ABPP is based. ER 729. CDFG helped develop the California Guidelines to reduce – not eliminate – the impacts of wind energy development on birds. *See* OSER 266; OSER 267 (California Guidelines were developed “to encourage the development of wind energy in the state while minimizing and mitigating harm to birds and bats”); OSER 289 (“The CDFG is aware that wind energy projects may result in bird and bat fatalities despite avoidance and minimization measures.”).

DPC simply seeks to short-circuit CDFG's authority to determine what, if any, additional mitigation is required for Ocotillo under the laws the state agency administers. DPC would have this Court require that BLM step into CDFG's shoes and act as a sort of super-regulator to undertake, on CDFG's behalf, any and

all state permitting decisions; to interpret California wildlife law; to make complex judgments regarding the mitigation measures necessary to comply with state law; and effectively to pre-incorporate state permit standards never suggested by CDFG itself directly into the ROW. DPC Br. at 27-33. Yet DPC has failed to point to any authority suggesting that BLM can or must do so. *Id.* This is because no such authority exists.

DPC's argument relies exclusively on *Montana v. Johnson*, 738 F.2d 1074 (9th Cir. 1984). DPC Br. at 30-32. But in that case, the Ninth Circuit did not direct BLM to determine what was required by state law; rather, it required the ROW recipient (Bonneville Power Administration, a federal agency) to demonstrate its compliance with certain State standards adopted specifically for that project. 738 F.2d at 1078-79. *Montana* also relies heavily on a case not discussed by DPC, *Columbia Basin Land Protection Ass'n. v. Schlesinger*, 643 F.2d 585 (9th Cir. 1981), in which the Court directed the ROW recipient (the same federal agency) to submit information to the state so that the state – plaintiffs in that action – could determine whether its substantive standards were being met. 643 F.2d at 605. Here, CDFG participated in review of the Project and was provided with the ABPP, which includes measures implementing CDFG's own California Guidelines, and CDFG did not ask BLM to impose any additional conditions on Ocotillo. Thus, BLM has done everything that the Court in *Montana*

and *Columbia Basin* indicated was expected to assure compliance with state standards.

While DPC is not satisfied with the way that CDFG has applied California's law to avian mortality at wind energy facilities, these are determinations for CDFG, not BLM – or DPC – to make. The issue is clearly explained in *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (Cal. Ct. App. 2008). In that case, wildlife conservation groups asked a California court to intervene in efforts to reduce avian mortality at wind energy facilities in the Altamont Pass. They sued the facility operators, rather than state permitting agencies, under two theories. First, they claimed that avian mortality violated California and Federal law, including sections 3503.5 and 3511, in violation of the California Unfair Competition Law; second they claimed that the defendants' activities were a violation of the public trust. The trial court found the first of these claims was barred by Cal. Prop. 64 (2004). *See* 166 Cal. App. 4th at 1355-56. In a decision relevant here, it then addressed the public trust claims.

The Court said that state wildlife agencies such as CDFG were required to engage in “[a] delicate balancing of the conflicting demands for energy and for the protection of other environmental values.” *Id.* at 1369. The Court concluded: “We do not gainsay plaintiffs’ concern for the protection of the raptors . . . . However, it is apparent that the responsible agencies *have not ignored this concern and are*

*attempting to mitigate the harm to birdlife by imposing appropriate conditions and restrictions on the operation of the turbines.”* *Id.* at 1372 (emphasis added). Those “appropriate conditions” are embodied in the California Guidelines – which have been closely followed at Ocotillo.

*Montana* also suggests a final difficulty with DPC’s demand that BLM – and this Court – step into CDFG’s shoes and directly interpret and apply California law, rather than leaving the task to the state: section 1765(a)(iv) does not apply to discretionary standards and complex decisionmaking, but rather only to rules that “concretely regulate” how a project should be built or operated. *Montana*, 738 F.2d at 1078. In *Montana*, the court specifically rejected the argument that a ROW would have to incorporate a requirement of “minimum adverse environmental impact,” calling such a standard “incapable of offering any guidance to” BLM. *Id.* at 1077. The wildlife protection standards at issue in this case similarly require complex, discretionary determinations regarding impact minimization, necessary mitigation, population jeopardy, and enforcement. These are not the type of “standards” that must be, or can be, incorporated by BLM into a FLPMA ROW. *See id.*

BLM complied with section 1765(a)(iv) by consulting with and being responsive to CDFG. The fact that DPC is dissatisfied with CDFG’s use of its discretionary enforcement authority or the avian wildlife protections embodied in

the California Guidelines does not give rise to a claim against BLM under FLPMA.

**C. The ROW Complies With 43 U.S.C. § 1765(a)(ii) By Including Terms And Conditions To Minimize Damage To Fish and Wildlife**

BLM adopted more than 30 pages of mitigation measures for the Ocotillo Project, OSER 2-36, including a series of requirements specific to burrowing owls, golden eagles, and other birds. OSER 30-31, 33-35. The conditions include a mandate to implement the very robust ECP and ABPP. *Id.* BLM's ROD concludes that all mitigation measures identified in the FEIS have been adopted, and that these measures constitute "all practicable means to avoid or minimize" environmental harm from the Project. ER 289. BLM also made compliance with these mitigation measures a condition of the ROW. ER 328 (Stipulation 4). The ROW also reiterates conditions specific to eagles and other birds. ER 332 (Stipulations 24 and 26). By imposing these requirements, BLM satisfied its obligation under 43 U.S.C. § 1765(a)(ii) to incorporate into the ROW "terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment."

DPC incorrectly asserts that the ABPP contains no measures to minimize mortality to raptors, and that the ECP's measures are limited to the first 10 years of the Project. DPC Br. at 33. In fact, the ABPP incorporates all of the California

Guidelines' recommendations for impact avoidance and minimization. *Compare* OSER 30-31, 33-35 *with* ER 772-74. These include methods for reducing the attractiveness of the site to birds and a Nesting Bird Management, Monitoring, and Reporting Plan to avoid impacts to nesting birds. ER 772-74. Perhaps the single most important mitigation decision is one that is not directly reflected in the ABPP: the Project site experiences low bird activity. ER 496.

As to the ECP, that plan does provide that a biologist will augment the Project's radar detection system for 10 years, ER 497, 995-96, but the biologist's role is to "validate and possibly refine the radar, video and curtailment technologies being tested." ER 999. The radar system itself will remain in place for the life of the Project. ER 1004. It will continue to be used to avoid eagle collisions; the objective of these and other mitigation measures is no net loss of golden eagles over the life of the Project. ER 996.

DPC's sole objection to the extensive mitigation that has been made part of the Ocotillo Project is that BLM did not include a requirement DPC has advocated for in this litigation – turbine curtailment when any raptors or owls are present – even though they never suggested this measure during the administrative process<sup>20</sup>

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<sup>20</sup> As the district court noted, ER 11-12, comments did ask BLM to clarify whether the curtailment adopted for golden eagles also would be implemented for all raptors. *E.g.*, OSER 336. BLM responded by clarifying that curtailment was being adopted only for golden eagles. ER 1036-37, 1064-65. No comments

and they have failed to point to any wind project in the nation that engages in this practice. *See* DPC Br. 33-36.

The only legal authority DPC cites to support its theory that section 1765(a)(ii) requires turbine curtailment is *Trout Unlimited v. U.S. Dep't of Agriculture*, 320 F. Supp. 2d 1090 (D. Colo. 2004). *See* DPC Br. at 35. However, that case is in no way comparable to Ocotillo. In *Trout Unlimited*, the court found that the Forest Service's failure to require that water be allowed to bypass a dam to maintain instream fish habitat ("bypass flow") was arbitrary and capricious where: (1) The Forest Service's management plan found that the best way to minimize damage to fish habitat was to maintain instream water flows, (2) EPA and others commented that bypass flows were needed to address environmental concerns, including fish habitat needs, (3) the agency's own ROD concluded that the adopted measures would not adequately address environmental concerns and were not as good as bypass flows, and (4) the Forest Service had required bypass flows for another dam project approved at the same time. 320 F. Supp. 2d at 1106-1110. Each of these factors distinguishes *Trout Unlimited* from Ocotillo. The ABPP commits the Project to implement all of the best management and advanced conservation practices that the California Guidelines recommend for avoiding and minimizing impacts on raptors and other birds. OSER 310-18; ER 772-74.

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suggested that curtailment would be feasible whenever any raptors are present, let alone when owls – a resident species – are present.

Furthermore, no one – no agency and no commenter – suggested that to minimize impacts, curtailment should be required whenever any raptors or owls are present, and DPC has failed to point to any other U.S. wind energy projects that are practicing curtailment to avoid all raptors and owls.

DPC also attempts to make something of Ocotillo's commitment to shut down turbines when a golden eagle is at risk of collision. DPC Br. at 36. This measure is unprecedented in the wind industry; it is "unlike anything implemented to date at a wind energy facility anywhere in the world." ER 996. Curtailment for eagles is nevertheless viable for Ocotillo because of the Project's advanced radar technology and because golden eagles are so rare at the Ocotillo site. ER 464 (observation of 0.011 eagle per hour); ER 496 (most observations last 2 to 10 minutes). DPC argues curtailment should be expanded to all raptors and owls, apparently on no other grounds than that it may be physically possible. DPC Br. at 36. But while overall raptor use of the Ocotillo site is low, the raptor observation rate was 75 times higher than the rate for golden eagles. ER 464 (0.754 raptors per hour during the same surveys observing 0.011 eagles per hour). Moreover, DPC suggests curtailment should be required when burrowing owls are present, DPC Br. at 33, even though owls nest on the site (in low numbers) and so would be present throughout the nesting season. *See* ER 470, 521. Thus, DPC is suggesting that BLM should have required that Ocotillo's turbines not operate for extended

periods (such as the entire owl nesting season) merely because such constraints are possible. But no court has held that section 1765(a)(ii) requires implementation of *all possible* mitigation measures.

To the contrary, *Trout Unlimited* holds that FLPMA is satisfied by implementing those measures that the agency has itself recognized elsewhere as minimizing harm to wildlife, or that have been recommended by wildlife agencies for that purpose. *See* 320 F. Supp. 2d at 1106-1110. For Ocotillo, BLM satisfied this far more logical reading of section 1765(a)(ii) by requiring development and implementation of the ABPP with the involvement of USFWS and CDFG. Even before taking into account the ABPP's mitigation measures, the FEIS concluded that the collision risk for raptors and owls at the Ocotillo site is low. ER 495-500. BLM carefully considered this information and, in consultation with USFWS and CDFG, weighed the need for avian wildlife mitigation and formulated a suite of measures to minimize impacts. *See* OSER 30-31, 33-35 (mitigation measures for raptors, eagles and owls). As already noted, the resulting ABPP adopted all of the avoidance and minimization measures recommended by the California Guidelines. ER 772-74. In advocating for turbine curtailment, DPC is asking this Court to substitute its judgment for BLM's reasoned conclusions regarding necessary avian mitigation measures, reached after consultation with the wildlife agencies and

reflecting their guidance for avoiding minimizing impacts. This the courts will not do. *See Citizens to Pres. Overton Park*, 401 U.S. at 416.

### **III. LIUNA Has Not Demonstrated Its Standing, But The Court Need Not Consider This Issue**

The district court concluded that one of LIUNA's members, John Norton, has standing to join Desert Protective Council and the individual local residents in pursuing the claims asserted in this action. ER 7-8. However, the district court also concluded that LIUNA itself does not meet the criteria for organizational standing because the alleged environmental impacts of the Project are not germane to LIUNA's purposes. ER 8-9. The Court need not address whether the district court was correct in holding LIUNA does not have standing, since the district court found that Mr. Norton has standing and the presence "of even one party with standing suffices to make a claim justiciable." *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013) (citation and internal quotation marks omitted).

Indeed, no arguments or claims were excluded from the case as result of the district court's standing decision. LIUNA's member, Mr. Norton, was allowed to advance all of the claims asserted by LIUNA. Furthermore, no future proceedings are contemplated in this action, since the district court resolved all claims, and so no purpose would be served by this Court revisiting the district court's standing

decision. LIUNA's standing, or lack thereof, has no effect on the outcome of this case, and so is moot. *See Tur v. YouTube, Inc.*, 562 F.3d 1212, 1214 (9th Cir. 2009).

Should the Court nevertheless entertain LIUNA's standing claim, it is baseless. LIUNA objects that allegations in the First Amended Complaint and the declaration of LIUNA's manager show that advancing environmental considerations are among the union's purposes. DPC Br. at 38-40. However, this Court has looked to a union's constitution, rather than its factual allegations in a complaint, in deciding whether the interests the union seeks to protect in litigation are germane to the union's purpose. *California Rural Legal Assistance, Inc. v. Legal Serv. Corp.*, 917 F.2d 1171, 1174 (9th Cir. 1990) (citing *Int'l Union, UAW v. Brock*, 477 U.S. 274, 286, 106 S.Ct. 2523, 2530 (1986)); *see Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998) (court considered club's purpose as stated in incorporation papers). In the absence of any demonstration that the union's purposes as identified in its organizational or incorporation papers are germane to this litigation, the district court was justified in concluding that LIUNA "has not shown that the environmental effects of [Ocotillo] are germane to its purpose." ER 9.

**IV. DPC's Objections To The District Court's Rulings Regarding The Adequacy Of DPC's Pleading Of NEPA Claims And DPC's Motion To Amend Are Moot**

The district court ruled that DPC's Complaint did not plead sufficient facts to put the Defendants on notice as to the nature of several of DPC's NEPA claims, and that DPC's motion to amend the Complaint to plead the claims with more specificity was untimely, as it was not filed until after the filing of cross motions for summary judgment. ER 15. DPC asks the Court to reverse the district court's ruling as to both of these issues. DPC's Br. at 42-45. However, DPC has ignored the fact that after making the rulings in question, the district court went on to say: "However, the Court addresses the merits of all of Plaintiffs' NEPA claims as the Defendants have fully addressed all NEPA claims." ER 15-16. The district court then proceeded to rule on the merits of all of DPC's NEPA claims, despite the deficiencies in DPC's Complaint. ER 16-27.

DPC's objections to these portions of the district court's decision are moot. A claim is moot when deciding it "would have no effect within the confines of the case itself." *Tur*, 562 F.3d at 1214. In order to retain jurisdiction over a claim, this Court must be able to grant effective relief between the parties. *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001). Here, an order from this Court determining that all four NEPA claims asserted at the district court level were adequately pleaded, or allowing DPC to amend the Complaint to sufficiently plead those claims, would have no effect on this case because the district court has already considered and rejected DPC's arguments on each of those claims. ER 16-27.

Furthermore, the underlying purpose of the rule governing the amendment of complaints supports dismissal of this claim. Rule 15 is designed “to facilitate decision on the merits, rather than on the pleadings or technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Here, even though the district court did not allow DPC to amend the Complaint, it still ruled on the merits of the claims they sought to assert through the motion to amend. Thus, the purpose of Rule 15 was achieved even though DPC’s motion to amend was denied.

Since there is no way for this Court to grant effective relief within this case on this issue, DPC’s assertion on appeal that the district court erred in holding the claims were not properly pleaded and refusing to allow them to amend their complaint is moot.

### CONCLUSION

Ocotillo Express and Pattern Energy respectfully urge the Court to affirm the district court’s order granting summary judgment for the United States and denying DPC’s motion for summary judgment.

Respectfully submitted this 8th day of January, 2014.

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees state that the present case is related to *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior, et al.*, Ninth Circuit Case No. 13-55704, and *Protect Our Communities Foundation v. Jewell*, Ninth Circuit Case No. 13-57129. All three cases arise from the same agency action: the Secretary of the Interior's approval of BLM's decision to grant a federal right of way for the Ocotillo Wind Energy Facility.

## **RULE 32 CERTIFICATE**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,429 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 fourteen point Times New Roman font.

Dated this 8th day of January, 2014.

s/ Svend A. Brandt-Erichsen  
Svend A. Brandt-Erichsen

## **CERTIFICATE OF SERVICE**

I hereby certify that on January 8, 2014, 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.

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

Dated this 8th day of January, 2014.

s/ Svend A. Brandt-Erichsen  
Svend A. Brandt-Erichsen