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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATIONAL PARKS CONSERVATION ASSOCIATION,

Plaintiff,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; TRACY STONE-MANNING, Director of United States Bureau of Land Management; and KAREN MOURITSEN, Bureau of Land Management California State Director,

Defendants,

and

EAGLE CREST ENERGY COMPANY, INC.,

Intervenor Defendant.

Case No. 2:24-cv-01434-DJC-CKD

PLAINTIFF'S COMBINED REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' AND INTERVENOR DEFENDANT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT

Hearing Date:	May 1, 2025
Time:	1:30 p.m.
Courtroom:	10 – 13th Floor
Judge:	Hon. Daniel J. Calabretta
Action Filed:	May 21, 2024

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INTRODUCTION

In 2018, Defendant U.S. Bureau of Land Management ("BLM") granted Intervenor-Defendant Eagle Crest Energy Company ("Eagle Crest") the approvals to build a 15.3-mile water pipeline and 16.4-mile gen-tie across federal lands that historically were part of Joshua Tree National Park. The pipeline would allow Eagle Crest to withdraw 35 billion gallons of groundwater from an ancient aquifer for a pumped storage project—in the middle of the California desert. The gen-tie would connect the electric grid to the project, which still has no buyer for its energy despite a decade of intense lobbying by Eagle Crest and its Florida-based parent company.

To grant Eagle Crest a right-of-way ("ROW") and land use plan amendment ("LUPA"), BLM relied on a 2012 final environmental impact statement ("FEIS") prepared by the Federal Energy Regulatory Commission ("FERC"). Other federal agencies had roundly criticized the 2012 FERC FEIS, which was itself based on a prior environmental review for a landfill project that the Ninth Circuit found unlawful. Despite these problems, BLM used the 2012 FERC FEIS as the backbone for its environmental assessment ("EA").

BLM and Eagle Crest now defend the EA's perfunctory analysis of impacts on groundwater and imperiled species on many grounds, from invoking judicial deference to agency expertise, to quibbling over the minutiae of scientific studies, to asserting that NPCA's claims are "derivative" of each other.

These are efforts at distraction. BLM knew that the 2012 FERC FEIS was deficient, said so during FERC's environmental review, and yet tiered its EA to that FEIS. BLM commissioned new studies on groundwater impacts, yet inexplicably omitted them from its own analysis. And BLM either failed to gather or dismissed new data on wildlife impacts. With each of these missteps, BLM violated the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA").

Ultimately, this case is about ensuring the sound process that NEPA, and the results that FLPMA, require, especially as we look toward a future in which these and other federal environmental laws and regulations are in jeopardy. Here, NPCA makes clear the problems

underlying BLM's decision-making, which the Desert Protection Society failed to articulate in its case. The Court should grant NPCA's cross-motion for summary judgment.[1]

ARGUMENT

I. BLM violated NEPA.

A. BLM failed to take a hard look at the ROW's impacts.

Under NEPA, agencies must take a "hard look" at the environmental impacts of their proposed actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotation marks omitted). In the Ninth Circuit, "general statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (citation omitted). An agency must engage with "'reasonable opposing viewpoints'" and discuss adverse impacts without "improperly minimiz[ing] negative side effects." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159-60 (9th Cir. 2006) (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003)), *abrogated on other grounds by Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7 (2008). BLM's analyses of the ROW's impacts on groundwater and wildlife fall short of this standard.

1. BLM failed to take a hard look at the ROW's groundwater impacts.

As a threshold matter, BLM and Eagle Crest claim that BLM could not have violated NEPA's hard look requirement because the ROW itself would not result in any groundwater usage. Federal Defendants' Cross-Motion for Summary Judgment (ECF No. 56) ("BLM Cross-MSJ") at 10; Intervenor-Defendant's Cross-Motion for Summary Judgment (ECF No. 57) ("EC Cross-MSJ") at 13-14. BLM specifically argues that, in *Desert Protection Society ("DPS")*, 2023 WL 6386901 at *6, this Court "declined to assign legal significance" to the "'but-for' causal relationship" between the ROW and the pumped storage project's groundwater usage. BLM

[1] Eagle Crest asserts that NPCA first became aware of *Desert Protection Society v. Haaland*, 2023 WL 6386901 (E.D. Cal. Sept. 29, 2023), on January 31, 2019. *See* EC Cross-MSJ at 6 n.1 (citing NPCA Cross-MSJ at 14). This was a typographical error. NPCA became aware on February 15, 2023. *See* NPCA First Am. Compl. ¶ 140 (ECF No. 19). Eagle Crest also faults NPCA for "waiting nearly five years" to file this case. EC Cross-MSJ at 1. But NPCA was simply exhausting its administrative remedies before proceeding to federal court.

Cross-MSJ at 10. In fact, the Court made no sweeping statements against the but-for casual connections the Supreme Court has long held are sufficient to require NEPA review; rather, the Court criticized the Desert Protection Society's ("DPS") failure to connect its discussion of groundwater impacts to the ROW. *DPS*, 2023 WL 6386901 at *6. *See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774-75 (1983) (holding that "but for" causation between a "change in the physical environment" and its "direct effects on the environment" triggers NEPA review).

a. BLM failed to take a hard look at direct groundwater impacts.

BLM and Eagle Crest argue that BLM took a hard look at the ROW's groundwater impacts when it "properly relied on" the FERC FEIS's groundwater impacts analysis, EC Cross-MSJ at 9, and then updated FERC's analysis with a "revised water balance calculation," BLM Cross-MSJ at 11. The facts show otherwise.

First, BLM knew FERC's FEIS was inadequate. In a 2012 letter, BLM asked FERC to reconsider licensing the pumped storage project, citing "insufficient, or misleading, information presented in the FEIS." AR 9766.[2] In disregarding its own concerns and relying on FERC's incorrect data, BLM failed to ensure the "scientific integrity[ ] of the discussion and analysis in [its] environmental document." 42 U.S.C. § 4332(D); 40 C.F.R. § 1502.24.

Second, BLM made no effort to update FERC's outdated groundwater recharge estimate. BLM and Eagle Crest argue that, in its EA, BLM "updated" FERC's groundwater quantity impacts analysis, EC Cross-MSJ at 9, to reach a "revised water balance calculation," BLM Cross-MSJ at 11. In reality, however, BLM simply "lowered" its "projections of [aquifer] drawdown" by excluding or modifying the water usage of other projects, including solar projects, in the Chuckwalla Valley. AR 16392. BLM did nothing to *verify* the underlying recharge rate, thus failing NEPA's hard look requirement. *See Native Ecosystems Council v.*

[2] As part of this same letter, BLM's sister agency, the National Park Service, explained that it had "solid evidence" that the aquifer's total annual recharge was "on the order of 3,000 acre feet per year," 75 percent lower than FERC's 12,700 acre-feet-per-year estimate. AR 9762. The Park Service also pointed out that it was "likely" the Chuckwalla Valley had been "in a condition of over-draft for several decades." AR 9762.

U.S. Forest Serv., 418 F.3d 953, 964 (9th Cir. 2005) (finding that the Forest Service failed the hard look requirement when it relied on an incorrect measurement in an EIS).[3]

Third, BLM disregarded three studies—which BLM itself funded[4]—that could have addressed FERC's faulty recharge estimate. NPCA Cross-MSJ at 18. BLM now argues that it did "consider" these studies by referring to them in its responses to comments on the EA and finding they were "consistent with" FERC's FEIS. BLM Cross-MSJ at 11. But simply citing the studies in comment responses without meaningfully addressing their findings does not satisfy BLM's duty to ensure the EA's scientific integrity. *See* 42 U.S.C. § 4332(D); 40 C.F.R. § 1502.24.

Additionally, contrary to what Eagle Crest argues, EC Cross-MSJ at 12, these studies are scientifically sound and undermine FERC's—and BLM's—findings:

- The **2012 Godfrey Report** (AR Doc. 103), published by one of BLM's own geologists in partnership with Lawrence Berkeley National Lab, concluded that FERC's recharge estimate of 12,700 acre-feet-per-year ("AFY") was outside the range of reasonable estimates that spanned **3,000 to 6,000 AFY**. AR 16216. Eagle Crest dismisses these findings as a "summary of academic disagreements." EC Cross-MSJ at 12. But BLM must engage with "reasonably opposing viewpoints" and cannot "minimize negative side effects." *Earth Island*, 442 F.3d at 1159-60.
- The **2013 Argonne Study** (AR Doc. 131) estimated a recharge rate of **3,200 AFY**, AR 2708, and affirmed the Godfrey Report as consistent with "BLM's most current understanding" of groundwater recharge, AR 2725. Eagle Crest argues that BLM reasonably excluded the study from its analysis because it was not as "site-specific" and "detailed" as the groundwater assessments on which FERC and the State Water Board relied. EC Cross-MSJ at 12. But the Argonne study focused on the same aquifer system in the in the Chuckwalla Valley, AR 2706, and it used more sophisticated numerical groundwater modeling as required by BLM's 2016 Desert Renewable Energy Conservation Plan ("DRECP"). AR 16272. This modeling was a vast improvement over the two-decades-old simplistic analytical modeling that FERC used and that BLM subsequently relied on in its EA. *Id.*; AR 2712.
- The **2017 Shen Study** (AR Doc. 307), which also used numerical modeling, estimated a recharge rate between **7,100 and 11,500 AFY**. AR 23763. Eagle Crest,

[3] Eagle Crest also argues that BLM properly relied on information in the State Water Board's Final Environmental Impact Report for the pumped storage project. EC Cross-MSJ at 9. But the State Water Board relied on the same incorrect recharge rate that FERC used. *See* AR 12242; *infra* 14.

[4] Eagle Crest argues that BLM did not "commission" these studies to address the scientific uncertainty around groundwater recharge in the Chuckwalla Valley. EC Cross-MSJ at 11 n.4. But BLM helped fund each one, warning of the "serious omissions and deficiencies" in FERC's groundwater analysis. AR 2700, 23764, 9773.

> citing BLM, argues that the study "makes assumptions" regarding groundwater use for solar projects that "have not been and may not be built" or "will now use much less water." EC Cross-MSJ at 12 (citing AR 4471). But the Shen study considered the same "current list of four planned or operating solar projects"—and the same average annual water use for each project—that BLM considered in its EA. *Compare* AR 15609, 15611 *with* AR 23760, 23778.[5]

BLM had every chance to include these findings in its EA. And in fact, it had a duty to do so. *See Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 873 (9th Cir. 2022) (EA did not take a hard look where it relied on incorrect assumptions and there was "record evidence attacking the historical data used by the agencies.").

b. BLM failed to take a hard look at indirect and cumulative groundwater impacts.

BLM violated NEPA's hard look requirement when it failed to sufficiently consider the ROW's reasonably foreseeable indirect and cumulative impacts. 40 C.F.R. §§ 1508.7-.8; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1136, 1141 (9th Cir. 2011).

First, BLM disregarded the project's impacts on surface flows in the Colorado River. BLM argues that "there is no potential" for the energy project's groundwater pumping to "have any effects on surface flow in the Colorado River." BLM Cross-MSJ at 13; *see also* EC Cross-MSJ at 14. But BLM could not have known this, given the wide range of estimates for groundwater recharge. As the Godfrey Report explains, the Chuckwalla Aquifer is hydrologically connected to the Colorado River. AR 16214. Any groundwater in the aquifer above 238 feet above mean sea level ("AMSL") flows into the Colorado River, and when the aquifer dips below 238 feet AMSL, Colorado River water flows in. AR 16215. Thus, a large-enough reduction in groundwater outflow from the aquifer "could be expected to have some degree of impact on the Colorado River." AR 16215. BLM raised this very possibility in its comments to California's State Water Board, expressing "concern" about the pumped storage project's "potential down-gradient and downstream impacts to the Colorado River."

[5] Eagle Crest notes the Shen Report was published after the EA, EC Cross-MSJ at 12, but the Report was "virtually complete" such that BLM could and should have included its results in the EA, AR 16196.

AR 4418-19. BLM's assertion that the ROW would have "no potential" effect on the Colorado River therefore "runs counter to the evidence before [it]." BLM Cross-MSJ at 13; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Eagle Crest alternatively argues that, even if the ROW has "down-gradient and downstream impacts," BLM's previously expressed concerns stemmed from "the absence of a monitoring or tracking tool" now required by FERC License Article 403. EC Cross-MSJ at 14 (noting that, under the license, "if water levels decline by more than the maximum threshold, ECEC must reduce pumping"). But future monitoring does not relieve an agency of its "obligation" to assess impacts "*before* approval." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084-85 (9th Cir. 2011).

Second, BLM failed to properly assess the impacts of the ROW's water usage on local springs. BLM disregarded concerns raised in comments that it relied solely on Google Earth imagery and topographic maps, rather than on-the-ground surveys, to conclude that the springs will remain unaffected. AR 16206; *see N. Plains*, 668 F.3d at 1085-86 (concluding that "aerial surveys and photography" in lieu of "on-the-ground surveys" violated NEPA).

To defend BLM's analysis, BLM and Eagle Crest rely on a 2016 National Park Service Finding of No Significant Impact ("FONSI"). BLM Cross-MSJ at 13; EC Cross-MSJ at 14-15. In the FONSI, the Park Service "concurs that springs in Joshua Tree National Park are fed by local groundwater sources." AR 20047. But in the very next sentences, the Park Service rejects the idea that these sources would be "unaffected by withdrawals," since they are "hydraulically connected" to the Chuckwalla aquifer. *Id.* In fact, the Park Service goes on to explain that it "has concerns about the potential cumulative effect of both existing and future energy development in the broader region on water resources." *Id.*

Third, that "future energy development" included at least six solar energy projects that BLM failed to consider. *See* NPCA Cross-MSJ at 19-20. BLM and Eagle Crest argue that BLM did not need to consider the cumulative groundwater impacts of these projects because the projects were not "reasonably foreseeable." BLM Cross-MSJ at 12; EC Cross-MSJ at 15. But by the time BLM finalized its EA, at least five of the solar projects had applied to BLM for approval.

AR 20918 (AR Doc. 287 at 20).[6] In the Ninth Circuit, "projects need not be finalized before they are reasonably foreseeable." *N. Plains*, 668 F.3d at 1078 (in assessing the cumulative impacts of a railroad line, the agency erred in excluding from consideration "wells that [were] not already approved"). BLM thus knew at the time it prepared its EA that the Chuckwalla Valley was on its way to water-intensive industrialization—indeed, Eagle Crest now describes the landscape surrounding the ROW area as a "patchwork of existing solar farms." EC Cross-MSJ at 2. BLM's failure to consider the water usage of the six solar projects therefore violated NEPA. *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 606 (9th Cir. 2010) (holding an EA deficient for failing to take a "hard look at the cumulative impacts" of "other projects within the cumulative effects area").

2. BLM failed to take a hard look at the ROW's biological impacts.

As a threshold matter, Eagle Crest and BLM argue that the Court's conclusions in *DPS* control here because NPCA's wildlife arguments are "analogous" to those raised in *DPS*. EC Cross-MSJ at 16-17; BLM Cross-MSJ at 15-16. Not so; DPS focused on the impacts of the pumped storage project rather than the ROW and did not make any bighorn sheep arguments. *See* NPCA Cross-MSJ at 26.

a. BLM failed to take a hard look at desert tortoise impacts.

As Eagle Crest concedes, BLM understood the vulnerability of the federally threatened desert tortoise and its habitat when evaluating the ROW. *See* EC Cross-MSJ at 19. BLM established the Chuckwalla Area of Critical Environmental Concern ("ACEC") to protect the species, citing the area's "exceptional desert tortoise densities." AR 639. In 2016, BLM expanded that ACEC to include much of the proposed ROW area. AR 20054. BLM explained that the expansion would "provide critical desert tortoise habitat connectivity" and serve as "the designated desert tortoise translocation site from surrounding solar projects." *Id.*

[6] Eagle Crest argues in a footnote that "there is no factual support" for NPCA's claim that the six additional projects would double the estimate for groundwater usage from solar projects. EC Cross-MSJ n.6. But BLM explained that four projects would use 55,502 AFY of groundwater. AR 15651. It is reasonable to assume that six new projects would at least double this value. Moreover, NPCA is calculating these projects' water usage because BLM failed to make such calculations itself.

Given BLM's own recognition of the area's value to desert tortoise, it had a duty to take a hard look at all foreseeable direct, indirect, and cumulative impacts on the species. *See* 40 C.F.R. §§ 1508.7-.8. BLM and Eagle Crest argue that BLM did so because it considered "all the factors relevant to" the ROW's impacts on desert tortoise. BLM Cross-MSJ at 14; EC Cross-MSJ at 17. They are incorrect. BLM failed to consider relevant factors in its discussion of (1) construction and operation disturbances, (2) tortoise connectivity, and (3) raven predation.

Construction and operation disturbances: BLM's assessment of the direct impacts of the ROW's construction and operation rested on flawed tortoise-density estimates. BLM and Eagle Crest cite BLM's 2016 desert tortoise survey as confirmation of the 2012 FERC FEIS's density findings. BLM Cross-MSJ at 15; EC Cross-MSJ at 19. But it is not clear that the 2016 survey *did* confirm FERC's view that the pumped storage project area supported low desert tortoise densities. AR 15760. That survey estimated there were 2.5 tortoises in the 127-acre "combined brine pond/ transmission line" segment of the previously inaccessible Central Project Area. AR 15800. This estimate converts to a density of 12.6 tortoises per square mile, which far exceeds FERC's estimate of 1.2 tortoises per square mile along the ROW, AR 18240, and even Joshua Tree National Park's density of 7.25 tortoises per square mile, AR 17679.[7]

BLM also failed to account for the ROW's proximity to desert tortoise translocation sites for neighboring solar projects. The Desert Sunlight and Desert Harvest solar projects planned to translocate tortoises from their sites to two habitat areas near the ROW: the Chuckwalla and Sunlight Recipient Sites. *See* AR 4871. The central portion of the gen-tie and water pipeline would approach the northeast corner of the Chuckwalla Recipient Site. Another portion of the water pipeline would directly track the southwest edge of the Sunlight Recipient Site, which occupies the vital tortoise corridor between the Central Project Area and Desert Sunlight. *Compare* AR 4901-03 (recipient site maps) *with* AR 15483 (ROW map). BLM knew

[7] Even if the 2016 survey suggested low densities, how it did so is not apparent; BLM failed to provide the underlying data in a form that "the public [could] readily understand." *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 996 (9th Cir. 2004) (applying 40 C.F.R. § 1502.8 to an EA); *see* AR 15773-80 (survey maps, which make it nearly impossible to understand location of tortoise sign relative to ROW elements).

that these sites existed and that translocation would increase desert tortoise densities around the ROW, placing more animals at risk.[8] BLM was also aware that translocated tortoises would be particularly vulnerable to further disturbance. *See* AR 16153. Yet BLM excluded the translocation plans from its EA without "explain[ing] why it [could not] or should not incorporate [them]." *N. Plains*, 668 F.3d at 1079. This omission precluded BLM from fully evaluating how many tortoises would be killed or injured during the ROW's construction and operation. *See Earth Island*, 351 F.3d at 1291 (NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed action" (quoting *Kern v. Bureau of Land Mgmt.*, 284 F. 3d 1062, 1066 (9th Cir. 2002))).

Tortoise connectivity: BLM and Eagle Crest defend BLM's conclusion that, even though the ROW would "cross the Chemehuevi to Chuckwalla Linkage zone," AR 15566, it would not preclude tortoise movement because the water pipeline would be buried, the gen-tie would not be fenced, and both would largely be built along existing roads, BLM Cross-MSJ at 14-15; EC Cross-MSJ at 17. However, new roads would be constructed to access the ROW. AR 15527 (map). Roads disrupt tortoise movement, which limits genetic diversity, increasing species vulnerability. AR 21740. While the EA avers that "no new roads are planned in [tortoise conservation areas]," the new water pipeline access road is in a critical "pinch point" in the Chemehuevi to Chuckwalla desert tortoise Linkage zone. AR 16366; *see* AR 15527 (map). This road would also likely intersect the Sunlight Recipient Site for translocated tortoises. *See* AR 4901-02 (maps). The new gen-tie access road would pose similar risks; it is in the "combined brine pond/ transmission line" area where BLM's 2016 survey found the most tortoise sign. *Compare* AR 15527 (map) *with* AR 15767, 15775 (maps). Yet, in the EA, BLM barely discussed either new access road as a potential barrier to tortoise movement and made no mention of the Sunlight Recipient Site. *See* AR 15565-73. By "improperly minimiz[ing]

[8] BLM's EA appended comments to FERC noting the ROW's proximity to Desert Sunlight recipient sites. *See* AR 16153 ("Translocated tortoises will increase the density of tortoises in the project area, yet the DEIS fails to address this issue."). The Golden Eagle Survey Report cited in the EA also discussed the ROW as a risk to tortoises translocated from Desert Harvest. AR 4871-75. BLM chose to include these solar projects in its groundwater analysis, AR 15611, yet inexplicably excluded them from its desert tortoise analysis.

negative side effects" of these new roads, BLM violated NEPA. *Earth Island*, 442 F.3d at 1159.[9]

Raven predation: Eagle Crest and BLM defend BLM's conclusion that raven predation was "not anticipated to increase," AR 15566, as well-founded, *see* EC Cross-MSJ at 19; BLM Cross-MSJ at 15-16. But BLM's analysis overlooked key factors. Multiple commenters aired concerns that the pumped storage project's reservoirs would attract ravens. *See, e.g.*, AR 5345, 16355. But BLM failed to address this cumulative-impacts issue beyond its conclusory statement that reservoir-associated raven predation would not increase. *See* AR 15566, 15613-15. BLM also ignored the risk of raven predation to tortoises beyond the surveyed ROW area. *See* AR 17187 ("Ravens have been known to forage up to 30 miles from their roosts."). Commenters criticized BLM for disregarding raven predation on desert tortoises in Joshua Tree National Park. *See, e.g.*, AR 16020. BLM similarly ignored the risk to tortoises translocated to the neighboring Sunlight and Chuckwalla Recipient Sites. *See* AR 4875. These omissions precluded BLM from taking a hard look at raven predation. *See Kern*, 284 F.3d at 1078 (holding EIS inadequate for failing to consider potential effects on wildlife beyond the project area).

Furthermore, Eagle Crest and BLM misleadingly claim that "existing similar features in the Project vicinity" would keep raven predation from increasing. EC Cross-MSJ at 19; BLM Cross-MSJ at 15-16. To avoid creating new nesting sites, FERC planned to co-locate the gen-tie with existing transmission lines along Kaiser Road since ravens "aggressively defend their nesting area . . . within a 2-mile radius." AR 15613. But, as BLM admitted, construction of the Desert Sunlight gen-tie made co-location impossible, *id.*, so the Eagle Crest gen-tie would "increase perching and nesting structures" for ravens. AR 15576; *see also* AR 17974 (FERC noting that even co-located lines would "still add potential perching and nesting habitat"). And Eagle Crest's plan for mitigating this likely increase in ravens is impotent. *See infra* 20. Therefore, BLM's conclusion that raven predation would not increase "[ran] counter to the

[9] That BLM required Eagle Crest to install tortoise exclusion fencing and culverts as mitigation, AR 15595, does not satisfy BLM's obligation to fully assess adverse impacts. *See N. Plains*, 668 F.3d at 1084-85. Moreover, as BLM itself stated, "even though a project structure (e.g., transmission line) may not present an impediment to occupation (connectivity), risks to survival, reproduction, and recruitment are also critical factors that should be evaluated." AR 16366.

evidence before [it].” *Motor Vehicle*, 463 U.S. at 43.

b. BLM failed to take a hard look at bighorn sheep impacts.

BLM’s analysis of the ROW’s bighorn sheep impacts did not satisfy NEPA’s hard look standard because it (a) rested on “stale” data and (b) ignored the latest science. *See Seattle Audubon Soc’y v. Espy,* 998 F.2d 699, 704-05 (9th Cir. 1993) (finding NEPA violation where agency relied on “stale scientific evidence” despite new information). Eagle Crest and BLM counter that BLM did take a hard look because it “drew reasonable conclusions based on the record evidence.” EC Cross-MSJ at 21; *see* BLM Cross-MSJ at 16. They are incorrect.

BLM’s EA, like the 2012 FERC FEIS, relies heavily on the 1996 Divine and Douglas study. *See* AR 15573-75. When FERC published its draft EIS, BLM was one of many commenters that criticized FERC’s reliance on “decades-old sources.” AR 9931. And yet, four years later, BLM relied on the same 1996 study in its own bighorn sheep analysis. In *Lands Council v. Powell*, the Ninth Circuit held that the agency’s reliance on thirteen-year-old habitat surveys rendered its assessment of impacts to local trout inadequate. 395 F.3d 1019, 1031 (9th Cir. 2005). Here, the primary evidence is even more outdated—16 years old at the time of the FERC FEIS and 20 years old by the time BLM issued its FONSI. BLM’s reliance on “stale” bighorn sheep data was thus arbitrary and capricious. *N. Plains,* 668 F.3d at 1086-87 (reliance on “several-years-old aerial photographs” without new surveys did not constitute a hard look).

To compensate for the EA’s sole reliance on the FERC FEIS and its underlying sources, Eagle Crest points to BLM’s brief mention of the 2010 Wildlife Research Institute Study in BLM’s response to comments. EC Cross-MSJ at 27. But this cursory acknowledgement is not the “reasonably thorough discussion” NEPA demands. *Ctr. for Biological Diversity v. Nat. Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008). Moreover, there were several other sources of newer data on bighorn sheep that BLM ignored in its EA, including a 2012 study that BLM itself funded. *See* AR 20496 (Penrod 2012). BLM also relied on the Park Service’s 2016 Boundary Study and associated NEPA documents in its EA, *see e.g.*, AR 15548, 15608, which cited the following studies: Wehausen 2006, Epps 2007, Bleich 2009, Epps 2010, Creech 2014, Longshore 2013, and Wiedmann & Bleich 2014, AR 20131-32, 20239,

20072-75. While these studies did not focus on just the ROW area, they still offered relevant information. For instance, Bleich 2009 and Penrod 2012 found that bighorn sheep avoid roads and human activity. AR 20281, 20543. And maps in Creech 2014 and Epps 2007 "indicate[d] the importance of the connection between the Eagle Mountain and Coxcomb Mountain herds through [the pumped storage project area]." AR 20073. By failing to explain why it omitted these studies from its analysis, BLM did not take a hard look. *See Seattle Audubon Soc'y*, 998 F.2d at 703-04; 42 U.S.C. § 4332(D).

Given such thin evidentiary support, BLM's conclusions that (a) construction impacts on sheep would be "minor and temporary" and (b) operational impacts "were not significant," AR 15574, were not "fully informed and well-considered." EC Cross-MSJ at 22-23. BLM could not offer even wide-ranging estimates for the number of sheep in the area, *see* AR 15539-40, 15573-74, thereby violating its duty under NEPA to provide "actual baseline conditions" for impacted species, *Ore. Natural Desert Ass. v. Jewell*, 840 F.3d 562, 569 (9th Cir. 2016); *see also Neighbors of Cuddy Mountain*, 137 F.3d at 1379-80 (finding no hard look where agency failed to quantify number of impacted old growth trees).

BLM relied on flawed reasoning to make up for its lack of current data. BLM understood the area's importance as a migratory corridor, *see* AR 19692-93 (Boundary Study EA), and noted in the EA that construction and "artificial lighting" could "disrupt migratory paths," AR 15574. Yet, BLM still adopted FERC's simplistic conclusion that these disturbances would not create a migratory barrier because sheep were "most likely to use undisturbed habitat between the upper and lower reservoir," rather than the ROW area. *Id.* The EA "contains virtually no references" to back up this conclusion. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998). The finding also ran counter to BLM's own statement that bighorn sheep "are known to enter the [mine] pits to access water following rains." AR 15574. On this record, BLM's assumptions about sheep impacts were arbitrary and capricious. *See Jewell*, 840 F.3d at 569-70 (finding NEPA violation where agency's conclusion that sage grouse were less likely to use project site than other areas was unfounded).

B. BLM impermissibly tiered its EA to the 2012 FERC FEIS.

It is true that tiering to prior NEPA documents is allowed and encouraged where appropriate. EC Cross-MSJ at 24; BLM Cross-MSJ at 8. But here, BLM's decision to tier its EA to the 2012 FERC FEIS was impermissible. First, the 2012 FERC FEIS was deficient and outdated by the time BLM tiered to it. *See Kern*, 284 F. 3d at 1074 (holding EA inadequate where it tiered to a "deficient EIS"). Second, BLM neither "explain[ed]" the deficiencies in the 2012 FERC FEIS nor "provid[ed] [the] necessary analysis" to address and correct them. 43 C.F.R. § 46.140(b).

1. FERC's groundwater and wildlife impact analyses were inadequate.

The 2012 FERC FEIS was inadequate when it was issued and even more so by the time BLM tiered to it. NPCA Cross-MSJ at 26. Eagle Crest accuses NPCA of cherry-picking to make this argument, but the record is replete with evidence. EC Cross-MSJ at 28.

In response to FERC's draft EIS, BLM expressed concern that "data utilized for this EIS analysis are not current . . . [r]ather, [FERC's] data come from decades-old sources" prepared in the 1990s. AR 9931. Then, in its comments on FERC's FEIS, BLM lamented that the NEPA document still contained "huge information gaps and broad assumptions." AR 9769. Sister agencies were similarly critical. The U.S. Environmental Protection Agency ("EPA"), which rates EIS quality, gave both FERC's draft and final EISs an "EO-2-Environmental Objections—Insufficient Information" rating. AR 9725. The Park Service noted "serious omissions or deficiencies in the [FEIS's] water resources impact analysis." AR 9762. And the U.S. Fish and Wildlife Service criticized FERC's reliance on the outdated 1996 bighorn sheep study. AR 18226. BLM thus knew that FERC's FEIS was "not sufficiently comprehensive or adequate to support further decisions" when BLM tiered to it. 43 C.F.R. § 46.140(b).[10]

2. While BLM provided some additional analyses and mitigations beyond the FERC FEIS, it nevertheless failed to address key gaps.

Groundwater: BLM makes a high-level defense of tiering that depends on its hard look

[10] This case is unlike *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 987 (9th Cir. 2022). *See* EC Cross-MSJ at 10. There, a "substantial body of scientific evidence" overcame the gaps in studies. *Id.* Here, the scientific evidence for FERC's findings was far from substantial, as its sister agencies, including BLM, warned.

claim, arguing that, because it prepared a tiered EA, it was "not required" to reevaluate the groundwater analysis included in FERC's FEIS. BLM Cross-MSJ at 8. But, as BLM itself had said, the FERC FEIS's groundwater analysis was both inadequate and outdated. *See supra* 3.

For its part, Eagle Crest argues that, even if FERC's FEIS was insufficient, BLM "supplement[ed]" FERC's groundwater analysis with "a revised water balance, findings from the NPS FONSI in 2016 and findings from the 2013 State Water Board analysis." EC Cross-MSJ at 25. None of these "supplements," however, filled the gaps in the FERC FEIS, as each relied on the outdated, simplistic modeling underlying the FEIS. *See supra* 3-4. In fact, while Eagle Crest endorses BLM's decision to rely on the State Water Board as the "experts," EC Cross-MSJ at 10, the State Water Board determined in 2013 that it "lacked jurisdiction" over the ROW and was no longer "in a position to consider" whether newer groundwater data, including the three studies discussed above, were necessary. AR 21347. Ultimately, BLM's cursory efforts to "supplement" the FEIS fell flat under NEPA. *See* 43 C.F.R. § 46.140(b).

Wildlife: BLM and Eagle Crest cite the 2016 desert tortoise survey to assert that BLM adequately supplemented FERC's incomplete tortoise data. BLM Cross-MSJ at 15; EC Cross-MSJ at 19. But, at most, the 2016 survey offered limited new data on tortoise presence; it did nothing to fill other gaps in FERC's desert tortoise analysis. For example, BLM criticized FERC for failing to account for the reservoirs' likely attraction of ravens, AR 9769, and yet similarly overlooked the reservoirs in its own discussion of raven predation, *see supra* 10. BLM also fully omitted new solar projects from its analysis, despite being on notice that their tortoise translocation sites were in the ROW's immediate vicinity, *see supra* 8-9.

The gaps in BLM's bighorn sheep analysis are even more damning. The already-outdated 1996 Divine and Douglas study that FERC relied on in 2012 was even more outdated by the time BLM tiered to it six years later. *See supra* 11. As commenters warned BLM: "Much has changed in 17 years including the cumulative impacts from large-scale renewable energy projects," rendering 1990s wildlife surveys inadequate. AR 15829. Despite these warnings, BLM failed to "do the necessary work" to obtain more current information. *Nat'l Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 733 (9th Cir. 2001), *abrogated on other grounds*

by Monsanto Co. v. Geertson Seeds Farms, 561 U.S. 139 (2010); *see supra* 11-12.[11]

C. BLM was required to prepare an EIS.

To demonstrate the need for an EIS, "plaintiffs need not prove that significant environmental effects *will* occur; they need only raise a substantial question that they might." *Env't Def. Ctr.*, 36 F.4th at 878-79 (internal quotation marks omitted). As we have explained, the ROW's "highly uncertain" and "highly controversial" effects satisfy this threshold. NPCA Cross-MSJ at 28-31; *see also* 40 C.F.R. § 1508.27(b)(4)-(5); *Blue Mountains*, 161 F.3d at 1212.

In response, BLM ignores the NEPA regulations' uncertainty and controversy factors, treating its hard look argument as dispositive. BLM Cross-MSJ at 19. Eagle Crest, meanwhile, discounts NPCA's focus on "a narrow portion of the NEPA regulations," EC Cross-MSJ at 30, even though the Ninth Circuit has found that just one factor "may be sufficient to require preparation of an EIS," *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). Eagle Crest then argues that NPCA fails to show the ROW will have "highly" uncertain or controversial effects. EC Cross-MSJ at 30. These arguments fall flat.

1. The ROW's effects were highly uncertain.

Eagle Crest argues that, even if there was "*some* uncertainty" about the ROW's effects, the effects were not "highly uncertain." EC Cross-MSJ at 30-32.[12] But under Ninth Circuit precedent, "[p]reparation of an EIS is mandated where uncertainty may be resolved by further collection of data," which is true here. *Babbitt*, 241 F.3d at 732 (citation omitted).

BLM's analysis of desert tortoise impacts suffered from "significant data gaps" that required an EIS. *Env't Def. Ctr.*, 36 F.4th at 882. BLM admitted that, due to "imprecise" estimates, the "actual number" of tortoises in "harm's way along the [ROW]" was "unknown." AR 15565. BLM's 2016 desert tortoise survey did not eliminate this uncertainty

[11] None of these gaps in FERC's analysis of biological impacts were addressed in BLM's May 8, 2013, meeting with FERC that Eagle Crest cites in its cross-motion. EC Cross-MSJ at 29 (citing AR 17084-86).

[12] Eagle Crest also claims that NPCA must identify evidence that "cast[s] *serious* doubt upon the reasonableness of the agency's conclusions." EC Cross-MSJ at 30, 32. But this is the standard for controversy, not uncertainty. *See Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1011 (9th Cir. 2020).

because its findings were similarly imprecise. *See* EC Cross-MSJ at 32. The 2016 survey was conducted under drought conditions, AR 15537, and its sole calculation of 2.5 tortoises had a confidence interval of anywhere from 0.43 to 14.13 tortoises (a 33-fold range), AR 15800. The 2016 survey results also cast doubt on earlier findings rather than confirming them, *see supra* 8, which distinguishes this case from *Environmental Protection Information Center v. U.S. Forest Service*, 451 F.3d 1005, 1011 (9th Cir. 2006). *See* EC Cross-MSJ at 32. An EIS was necessity to resolve this uncertainty. *See W. Watersheds Project v. U.S. Dept. of Agric. APHIS Wildlife Servs.*, 320 F. Supp. 3d 1137, 1148 (D. Idaho 2018) (requiring EIS where agency's data on coyote takings spanned only a four-fold range).

BLM's analysis of the risks to bighorn sheep was also rife with uncertainty because it lacked any recent data on local sheep herds. *See supra* 11-12. Unable to quantify impacts, BLM merely concluded that "increased noise and human presence *could* have minor and temporary effects on bighorn sheep."[13] AR 15575 (emphasis added); *see Babbitt*, 241 F.3d at 732-33 (requiring EIS where agency described effects of increased traffic on wildlife as "unknown" because it lacked data). Further data collection could have resolved this uncertainty. The Park Service stated that, "[o]nce additional surveys are completed, we will gain a better understanding of the precise movement patterns of the area's bighorn sheep." AR 20046. But BLM never performed these surveys and provided no "convincing explanation as to why." *Babbitt*, 241 F.3d at 733. This uncertainty required an EIS.

Finally, the gaps in BLM's analyses related to the Colorado River and local springs, *see supra* 5-6, made the ROW's groundwater effects highly uncertain. This uncertainty could and should have been "resolved by further [data] collection" in an EIS. *Babbitt*, 241 F.3d at 732.

2. The ROW's effects were highly controversial.

Eagle Crest argues that the ROW's impacts are not highly controversial because, in its view, NPCA fails to "identify specific evidence that 'cast[s] serious doubt upon the

[13] The Park Service's 2016 Boundary Study reiterates this uncertainty: "It is *unknown* how bighorn sheep would adapt to new roads, operations, construction or mining in the area; they could acclimate to the noise, alter foraging and/or breeding behavior, or abandon the area altogether." AR 20281 (emphasis added).

reasonableness of the agency's conclusions.'" EC Cross-MSJ at 30 (citation omitted).

This is not true. The three studies on groundwater recharge, which BLM omitted from serious analysis, *see supra* 4-5, present a case study in scientific controversy. As the Godfrey Report explains, the discrepancy between its and BLM's recharge estimates "represents a difference between plentiful water resources or damaging overdraft conditions and is too large to dismiss without further consideration." AR 16216; *see supra* 4 (discussing variation in recharge estimates). Five years later, in a letter to the BLM, the Park Service expressed concern that BLM's EA did not include the Godfrey Report, despite the continued "substantial controversy regarding the groundwater recharge rate." AR 638. Because the recharge rate was in "hot dispute" among scientific experts, it was highly controversial and required "the full EIS protocol." *Anderson v. Evans*, 371 F.3d 475, 489-490 (9th Cir. 2004).

NPCA also directs the Court to multiple pieces of "specific evidence" that cast doubt on BLM's conclusions regarding wildlife impacts. These include surveys of local tortoise densities from neighboring solar projects, AR 4902-03, and multiple bighorn sheep studies that BLM omitted from its analysis, *see supra* 11-12.

D. BLM failed to consider a reasonable range of alternatives.[14]

BLM argues that it had no duty to consider reintegrating the ROW area into Joshua Tree National Park because reintegration is "just another way of thinking about the 'no action' alternative." BLM Cross-MSJ at 17. Eagle Crest similarly argues that "reintegration" and "no action" would "achieve the same purpose." EC Cross-MSJ at 36. They are incorrect.

Under the "no-action" alternative, BLM lands would remain in their "existing management," meaning that BLM would consider "a multitude of other potential uses authorized by FLPMA," including "mining, off-highway vehicle use, [and] energy development." EC Cross-MSJ at 36. By contrast, the reintegration alternative would prevent BLM from considering any of these potential uses. Under that alternative, BLM would need to

[14] Eagle Crest argues that NPCA did not raise the reintegration alternative to BLM, and thus may not raise it now. EC Cross-MSJ at 35. This is not true. *See* AR 16236 (NPCA EA comments: BLM should have "meaningfully reevaluate[d]" the "alternative of including the public lands in the project area in the adjacent park").

study the effects of closing off the area to future large-scale water consumption, renewable energy development, and mining, along with the effects of greater protection, such as improved biological landscape connectivity. AR 16352. The reintegration and no action alternatives represent two distinct options with two distinct sets of possible effects. Under NEPA, BLM was required to give each "full and meaningful consideration." *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988).

BLM also argues that it had no duty to consider a "reintegration" alternative because it would not further "the purpose and need for the proposed action." BLM Cross-MSJ at 18. Eagle Crest claims that BLM's authority was "limited" to determining whether the specific ROW was placed in a suitable location. EC Cross-MSJ at 34. But, while an agency's purpose and need statement may be "reasonably circumscribe[d]" where circumstances call for a "limited purpose," BLM Cross-MSJ at 18, the statement cannot be tailored to prioritize only the goals of a private entity, *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010). Here, although BLM could consider Eagle Crest's goals, *see* BLM Cross-MSJ at 18, BLM acted and argues as if it was required to consider *only* Eagle Crest's interests. "Requiring agencies to consider private objectives . . . is a far cry from mandating that those private interests define the scope of the proposed project." *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1070.

II. BLM violated FLPMA.[15]

BLM and Eagle Crest make the preliminary argument that "FLMPA does not create quantitative management standards or thresholds," but instead establishes only "guiding

[15] Eagle Crest and BLM argue that Eagle Crest's 2014 FERC License constituted a "valid existing right." BLM Cross-MSJ at 22; EC Cross-MSJ at 37-38. It is important to be clear about the scope of any such right. Under the Federal Power Act, federal lands "included in an application for power development" are reserved from other uses. 43 C.F.R. § 2320.0-3 (2025); *see also* 16 U.S.C. § 818. Here, FERC withdrew public lands for the Eagle Crest project and the then-proposed ROW. *See* AR 10434. At most, this withdrawal exempted the ROW from the 2016 DRECP's requirements to the extent they "unreasonably conflict[ed]" with Eagle Crest's interest in the lands. AR 15469. It did not grant Eagle Crest a right to the ROW itself, which only BLM, not FERC, had the authority to approve. Thus, even if the DRECP's requirements did not apply to the ROW to the extent those two things conflicted, all remaining provisions of NEPA, FLPMA, their implementing regulations, and the CDCA Plan, which predated the FERC licensing process, applied to the ROW and LUPA.

principles" for BLM decisions. BLM Cross-MSJ at 21; EC Cross-MSJ at 39 (additionally arguing that FLPMA gives BLM "considerable discretion"). But FLMPA's mandates are not so toothless. Among other things, they require BLM "to take any action necessary to prevent unnecessary or undue degradation" of the lands it manages. 43 U.S.C. § 1732(b).

BLM and Eagle Crest next argue that BLM "fully complied" with FLMPA's undue degradation standard because BLM "reasonably determined" that the ROW would not cause significant environmental impacts. BLM Cross-MSJ at 21; *see* EC Cross-MSJ at 40. This argument conflates NEPA's procedural requirements with FLMPA's substantive ones. NPCA's FLPMA claims are not "derivative" of its NEPA claims. BLM Cross-MSJ at 20. Rather, NPCA invokes the same underlying facts—evidence of risks to desert tortoise, bighorn sheep, and their habitats—to show that, even if BLM complied with NEPA, it still violated FLMPA. *Cf. Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 645 (9th Cir. 2010) ("A finding that there will not be significant impact [under NEPA] does not mean . . . unnecessary or undue degradation will not occur.").

For the reasons discussed above, the ROW will cause undue degradation to wildlife and their habitat. By way of example, *first*, industrial development in the Chuckwalla Valley has already contributed to the "steep decline" of local desert tortoise populations. AR 16152 (noting 37 percent decline over two years); *see* AR 19579, 21679-80. In 2016, BLM committed to protecting "all remaining desert tortoise habitat within the severely compromised" Chemehuevi to Chuckwalla Linkage, AR 23139, which was "one of the only [habitat] connections" in the area, AR 15536. But just two years later, BLM issued the ROW and LUPA in this very corridor. *Id. Second*, the ROW would create new perches for ravens—the predators responsible for up to 75 percent of all juvenile tortoise deaths, AR 21810—at a time when even "moderate" dips in adult survival rates could jeopardize the species' recovery, AR 21656. *Third*, data on the ROW's impacts on bighorn sheep are sorely lacking. However, we know that local herds face threats from habitat fragmentation and loss of genetic diversity. AR 20131. The disturbances to both species in a critical habitat corridor thus constitute undue degradation. *See* 43 C.F.R. § 6101.4 (2025) ("[A]pproving a proposed access road

causing damage to the only remaining critical habitat for a plant listed as endangered . . ., even if there is not another location for the road, may result in undue degradation.").

The ROW's "protective terms and conditions," BLM Cross-MSJ at 21, do not sufficiently mitigate the ROW's harms to desert tortoise and bighorn sheep. For instance, as we have explained, the Predator Monitoring and Control Plan requires Eagle Crest to act only after three or more years of increased raven presence, and, even then, the plan does not mandate removal or deterrence. NPCA Cross-MSJ at 37 (citing AR 21137); *cf.* AR 21695 (U.S. Fish and Wildlife Service provides for immediate identification and removal of ravens that attempt to prey on desert tortoises). Three years of unmitigated raven predation could decimate local tortoise populations. *See* NPCA Cross-MSJ at 37. For all these reasons, BLM failed to "take any action necessary" to prevent undue degradation, as FLPMA requires. 43 U.S.C. § 1732(b).

Finally, BLM and Eagle Crest repeatedly cite the ROW area's "disturbance" from past and ongoing development to justify further disturbance. BLM Cross-MSJ at 5-6, 14, 21; EC Cross-MSJ at 2-3, 18, 21-22. But this reasoning would consign the entire Chuckwalla Valley to effectively permanent industrial use, no matter the area's profound importance to wildlife. When is enough, enough? If anything, more disturbance makes it even more important to protect what is left.

CONCLUSION

The Court should grant NPCA's cross-motion for summary judgment and deny Federal Defendants' and Eagle Crest's cross-motions for summary judgment.

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Respectfully submitted,

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