UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

Docket No. 15-72788

FRIENDS OF THE COLUMBIA GORGE
and **SAVE OUR SCENIC AREA,**

Petitioners

v.

BONNEVILLE POWER ADMINISTRATION,

Respondent

REPLY BRIEF OF PETITIONERS

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BMP	Best Management Practice
BPA	Bonneville Power Administration
CEQ	Council on Environmental Quality
DEIS	Draft Environmental Impact Statement
EFSEC	Washington Energy Facility Site Evaluation Council
EIS	Environmental Impact Statement
FCRTS	Federal Columbia River Transmission System
FEIS	Final Environmental Impact Statement
LGIA	Large Generation Interconnection Agreement
MW	Megawatt
NEPA	National Environmental Policy Act
ROD	Record of Decision
SCA	Site Certification Agreement
SEIS	Supplemental Environmental Impact Statement
SEPA	Washington State Environmental Policy Act
TAC	Technical Advisory Committee
WTG	Wind Turbine Generator

INTRODUCTION

To try to justify its violations of NEPA (including a failure to consider any alternatives besides the Applicant's proposal and a failure to take a hard look at the Project's environmental impacts), BPA leans upon the slender reed of lacking direct siting authority over the Project's wind turbines. But the inescapable reality is that BPA evaluated the proposed wind turbines and the requested interconnection to its power grid together as components of the single action alternative in the FEIS. Moreover, BPA has conceded that if it were to deny the interconnection the turbines would not be built. Accordingly, BPA was required to comply fully with NEPA to inform its decision whether to approve or deny the interconnection.

Ultimately, BPA has authority to say "no"—to the interconnection, and thereby to the entire Project—and NEPA requires it to make an *informed* decision and thus potentially avoid or minimize harm to the environment. BPA's litigation position posits an alternative reality in which the agency did not evaluate the wind turbines and interconnection together as a single action, and did not admit that the interconnection is a necessary element of the Project without which the wind turbines cannot be built. The analyses adopted in the FEIS—not the agency's current litigation position—must be the focus of this Court's review.

BPA's arguments rely almost entirely on cases in which federal actions were completely distinct from non-federal actions—rather than intertwined, as the proposed wind turbines and interconnection are here—and on knocking down straw-man arguments that Friends does not make. The fact that BPA can cite no case where a court upheld an EIS that considered only a single action alternative involving several undefined variables underscores the unprecedented way BPA evaded NEPA's express requirements.

Although BPA may "believe[] that the Project will be implemented in an environmentally responsible manner," ER 37 (SER 48),[1] it failed to follow the procedures NEPA requires to draw an informed conclusion about likely harm from the proposed Project as compared to reasonable alternatives. BPA asks this Court to condone a NEPA analysis that in essence evaluated only a single, worst-case alternative and that lacked any evaluation whether the proposed mitigation measures could effectively reduce or eliminate harm.

[1] It is unclear why BPA submitted a 19-volume, 5,397-page Supplemental Excerpts of Record ("SER") that goes far beyond the scope of providing "portions of . . . documents not included by [petitioners]." Cir. R. 30-1.7. Few pages BPA cites in the SER—other than general citations to large ranges of pages, *e.g.*, Answ. at 9 (citing SER 720–1134), 13 (citing SER 287–5146)—do not also appear in Friends' ER. In fact, BPA's entire Argument section cites only 65 pages from the SER that are not in the ER. For the Court's convenience, this Reply cites both the ER and the SER for material that appears in both and otherwise cites only the ER or the SER for material that appears in only one or the other. The attached Addendum provides two tables cross-referencing the ER to the SER and vice-versa.

Where an agency could prevent environmental harm, as BPA could do here by denying the requested interconnection, NEPA and this Court's precedents require the agency's decision to be fully informed and to include a complete understanding of the effects of reasonable alternatives—even alternatives not within BPA's jurisdiction. An evaluation showing that changes to the number, locations, capacities, heights, or other details of the proposed wind turbines would cause significantly less harm to birds, bats, or scenic values might have led BPA to deny the requested interconnection. BPA's uninformed decision violates NEPA and its procedures for ensuring informed, democratic decisionmaking.

ARGUMENT

I. FRIENDS HAS STANDING BECAUSE THE INJURIES THAT FRIENDS' DECLARANTS ALLEGE ARE FAIRLY TRACEABLE TO THE INTERCONECTION.

A. Friends' Declarants' Substantive Injuries are Fairly Traceable to BPA's Interconnection Decision Because the Project Could Not Be Built Without the Interconnection and Because BPA Analyzed the Proposed Wind Turbines and Interconnection as a Single Action.

BPA is wrong that Friends lacks standing. BPA's decision to allow the Project to interconnect to its transmission grid is a cause of the injuries Friends' members allege because, according to the FEIS, the proposed wind turbines and the interconnection are components of a single action and the wind turbines would not be built but for the interconnection. ER 202, 210–13, 239 (SER 309, 317–20, 352). An organization has standing to assert the standing of its members if they

provide "specific allegations establishing that at least one identified member [has] suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). Such injury must be fairly traceable to the challenged action and a favorable judicial decision must be likely to redress the injury. *Id*. at 493.

BPA's only argument appears to be that the injuries alleged are not "fairly traceable" to BPA's interconnection decision. *See* Answ. at 23–26 (Dkt # 23). BPA nowhere argues that the injuries are not concrete or particularized, nor that they are not redressable. In fact, BPA acknowledges that Friends' members have alleged specifically and concretely how—if the turbines were constructed and operated—they would suffer harm. *Id*. at 22–23; *see, e.g.*, Drach Dec. ¶¶ 9–10, 12–13 (Dkt # 12-2); Rogers Dec. ¶¶ 4–5, 11 (Dkt # 12-3); Urmos Dec. ¶¶ 6, 15 (Dkt # 12-4).[2]

The injuries caused by the proposed wind turbines are fairly traceable to BPA's decision to grant the interconnection because the turbines cannot be built without the interconnection and because the FEIS defined the turbines and interconnection together as the single Proposed Action. An injury caused by the action of third parties—here, the construction and operation of the wind turbines—is fairly traceable to a federal agency's decision if the "third parties could not

[2] Friends' members specifically relate the alleged injuries to BPA's decision to authorize the interconnection. *See, e.g.*, Urmos Dec. ¶ 15 ("I was deeply disappointed to learn that the [BPA] is giving the proposal for the [Project] extra life by permitting it to connect to BPA's transmission grid. This decision harms my ability to use and enjoy the recreational opportunities . . . .").

undertake their future actions *but for* the challenged decision." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1518 (9th Cir. 1992); *see also Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1040 (9th Cir. 2006) (holding that plaintiffs had standing where defendants' alleged failures to follow proper procedures were the but-for cause of the alleged injury). So long as there is a chain of causation, even an indirect injury confers standing. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 975 (9th Cir. 2003).

In the FEIS, BPA defined the single Proposed Action as including the state's approval of proposed wind turbines *and* the federal agency's concurrent grant of the interconnection. ER 210 (SER 317). Under the no action alternative, the state "would deny the Applicant's application for a Site Certificate for the [Project], *and/or* BPA would not grant interconnection of the Project to the FCRTS." ER 213 (SER 320) (emphasis added). The "or" means there would be no action if either the state denied siting certification *or* if BPA denied the interconnection. "As a result, the [Project] would not be constructed or operated." *Id.*[3] As thus framed, the Project would not be built if BPA denied the interconnection—making the interconnection a but-for cause of the wind turbines' construction, and also making

[3] In so framing the no action alternative, BPA explicitly acknowledged that it has the power to deny the interconnection, evidently so long as it does so in a nondiscriminatory manner—a point BPA appears to concede in describing the intersection of its Tariff and NEPA. *See* Answ. at 7.

the substantive injuries to Friends' declarants traceable to BPA's decision. *Mumma*, 956 F.2d at 1518.

This causal connection is confirmed by the FEIS's analysis of the turbines and the BPA interconnection as a single action. The components of the Proposed Action include both "[u]p to 50 wind turbines" and the "interconnection with BPA's existing . . . transmission line," requiring the "construction of a new BPA substation and related electrical equipment." ER 202, 239 (SER 309, 352). And the no action alternative acknowledges that if BPA were to deny the interconnection, "the [Project] would not be constructed or operated," ER 213 (SER 320), which also makes the turbines and interconnection connected actions under NEPA. NEPA regulations direct agencies to study connected actions together in "the same impact statement." 40 C.F.R. § 1508.25(a)(1). "Actions are connected if they . . . [a]utomatically trigger other actions which may require environmental impact statements" [or c]annot or will not proceed unless other actions are taken previously or simultaneously." *Id*. § 1508.25(a)(1)(i)–(ii).[4]

[4] BPA argues that the interconnection and the turbines are not connected actions. Answ. at 37. However, in this APA case, the Court's review must focus on what BPA actually *did*—not BPA's litigating position that is merely its counsel's post hoc rationalization for BPA's actions, advanced for the first time in this Court. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988); *Anaheim Mem'l Hosp. v. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997) ("An agency's decision can be upheld only on the basis of the reasoning found in that decision.")

By contrast, only "[w]hen one of the projects might reasonably have been completed without the existence of the other" do they "have independent utility" and thus "are not 'connected' for NEPA's purposes." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 969 (9th Cir. 2006). Here, the wind turbines and interconnection are part of the single Proposed Action; the turbines cannot be built without the interconnection; and thus neither component has independent utility.[5] ER 213, 239 (SER 320, 352).

BPA's argument that it has no direct siting authority over the wind turbines thus has no bearing on the causation prong of standing, which turns on whether the federal action is the but-for cause of a third party's project, not on whether the federal agency directly controls every detail of the project. BPA's litigation position contradicts the position it took in the EIS itself. BPA now argues that further NEPA analysis is not likely to change the interconnection decision because BPA cannot change the outcome of the State of Washington's decision to approve

[5] BPA cites a single page from the ROD in speculating that the turbines "could still be built" by interconnecting to a local utility. Answ. at 37. That page merely hypothesizes in a footnote that it is "conceivable" the Project could proceed absent the BPA interconnection—while acknowledging that "for purposes of [BPA's decision] and the NEPA analysis, BPA *continues to presume that the Wind Project would not be constructed* and operated under the No Action Alternative," ER 19 n.13 (SER 30) (emphasis added). The only evidence in the record regarding any local utility discloses that the "[t]he [local Public Utility District] system is not capable of providing transmission interconnection and capacity to the [Project]." Further Excerpts of Record ("FER") 29.

a maximum of 35 wind turbines. *See* Answ. at 25. But this assertion is false: the FEIS acknowledged that BPA *can*, as a practical matter, affect the outcome—namely, by denying the interconnection. ER 213 (SER 320). Elsewhere in its brief, BPA concedes this point. Answ. at 32.

Because the wind turbines and interconnection are part of the same Proposed Action, and because the turbines cannot be built if the interconnection were denied, the injuries alleged by Friends' declarants are fairly traceable to BPA's decision to grant the interconnection, and thus Friends has standing to challenge the decision.

B. Friends' Declarants' Procedural Injuries Satisfy the Relaxed Requirements for Standing in NEPA Cases.

Friends' members have satisfied this Circuit's standard for alleging procedural injury and thus also have standing on this basis. To "satisfy the injury in fact requirement, and thereby meet the first prong for Article III standing, a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (citation and internal quotation marks omitted). The concrete interest test requires only "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Id*.

BPA concedes that Friends' declarants have adequately alleged procedural injuries caused by BPA's violations of NEPA. Answ. at 24–25. All three declarants

describe their connection to the areas and resources affected by the Project and BPA's interconnection, and also explain how NEPA's procedures are meant to protect their interests. Drach Dec. ¶¶ 3–4, 8–15; Rogers Dec. ¶¶ 3–5, 7–13; Urmos Dec. ¶¶ 3–5, 7–16. "Once a plaintiff has established an injury in fact under NEPA the causation and redressability requirements are relaxed." *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). For these two remaining prongs, Friends' "members must show only that they have a procedural right that, if exercised, *could* protect their concrete interests," which is amply alleged in their declarations. *Kraayenbrink*, 632 F.3d at 485 (citation and internal quotation marks omitted). Because "it is enough that a revised EIS may redress plaintiffs' alleged injuries," Friends' members have satisfied the causation and redressability requirements. *Id*. (citation and internal quotation marks omitted).

BPA fails to cite this Court's standard for parties asserting procedural injuries, relying instead solely on *Summers*, a case that did not involve NEPA and that did not change this Circuit's law regarding procedural injuries. *Kraayenbrink*—decided two years after *Summers*—controls this issue. BPA's suggestion that Friends must show that BPA *would* change its interconnection decision if it engaged in a further, lawful NEPA analysis, Answ. at 25, is wrong as a matter of law. *See Kraayenbrink*, 632 F.3d at 485. It is enough that a revised EIS *could* redress Friends' members' alleged injuries and that BPA—properly

informed by a lawful NEPA analysis—*could* change its decision. If a lawful NEPA analysis disclosed that a differently configured project would result in significantly fewer impacts on the environment and the public, a fully informed BPA could deny the interconnection and explain to the Applicant how it could redesign a more environmentally acceptable project and reapply for interconnection. Under the controlling standard, Friends' members have adequately alleged injuries-in-fact and procedural injuries necessary to challenge BPA's decisions.[6]

II. BPA VIOLATED NEPA BY FAILING TO EVALUATE IN DETAIL ALTERNATIVE PROJECT CONFIGURATIONS THAT COULD MINIMIZE OR AVOID ENVIRONMENTAL IMPACTS

BPA's premise is that, without direct siting authority over the proposed wind turbines, BPA is absolved from following the unambiguous requirements in NEPA and its regulations regarding alternatives. Answ. at 26–29. BPA fails to address the statutory and regulatory provisions that command it to study and develop alternatives other than what the Applicant proposed, including alternatives that are beyond BPA's jurisdiction. BPA also fails to explain how limiting the FEIS to a single, indefinite action alternative satisfies its obligation under NEPA to provide

[6] BPA's argument regarding a supposed "second bite" at the state's decision, Answ. at 25, is wrong. Friends challenges *BPA's* interconnection decision and related NEPA analysis, not the separate state process, which expressly excluded NEPA. ER 185–86 (SER 187–88). Friends' challenge to BPA's decision—involving NEPA's distinct procedural standards—is unrelated to the state adjudication and state court appeal, both of which have been completed. Thus, there is no concern that a federal suit would be an "interruption of state proceedings." *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974).

the public with a clear, full, and fair discussion of alternatives in order to foster informed public involvement in the decisionmaking process.

A. BPA's Failure to Consider Alternatives Besides the Applicant's Proposal Violates the Purpose and Express Provisions of NEPA.

BPA has lost sight of NEPA's central purpose: to "prevent or eliminate damage to the environment," 42 U.S.C. § 4321, by forcing agencies to make informed, "intelligent, optimally beneficial" decisions, *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010) ("*ONDA I*"). BPA does not explain how considering only the 50-turbine configuration initially proposed by the Applicant, ER 434 (SER 2201), squares with the command in NEPA § 102(E) that an agency "shall . . . study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E); *see also Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 407 U.S. 926, 928–29 (1972) (Douglas, J., dissenting from denial of cert.) (Section 102's purpose is "to insure that if a project is approved, an environmentally acceptable alternative will be chosen.").

Far from a paper exercise, a NEPA alternatives analysis must inform a decisionmaker about "reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment"—including "reasonable alternatives not within the jurisdiction of the lead agency." 40 C.F.R. §§ 1502.1, 1502.14(c). Indeed, the FEIS recognized that "BPA must consider the environmental consequences of its proposed actions—in this case, the proposed

interconnection of the Project to the FCRTS—under NEPA prior to making a decision on whether to proceed with the proposed action." ER 208 (SER 315).

Complying with NEPA's mandate to evaluate and compare different levels of harm from alternatives besides the Applicant's proposal would allow BPA to choose whether approving or denying the interconnection would best avoid and minimize environmental harm from the turbines, as well as what level of harm BPA would be willing to accept if it agrees to allow the interconnection. The interconnection decision must reflect "BPA's environmental and social responsibilities" and must comply with NEPA. ER 205 (SER 312). Unless BPA is claiming that it would find *any and all* environmental impacts caused by *any* potential turbine configuration "acceptable," then only by evaluating "the environmental impacts of the proposal and the alternatives in comparative form" does it have a basis to judge how much harm is acceptable and consistent with its responsibilities to society and the environment. 40 C.F.R. § 1502.14.

BPA does not dispute that, to produce the desired amount of power, the Project could have included as few as 25 wind turbines (Open. at 43, 45, 59 (Dkt # 12-1)), nor that fewer turbines means less harm to birds, bats, and scenic resources (*id.* at 18). Nor does BPA dispute that alternative turbine configurations, some involving as few as 25 turbines, are reasonable and feasible. A full evaluation of the effects of a 25-turbine configuration using the shortest possible towers, for

example, might show that all turbines could have been sited to avoid damage to the spectacular scenic views of the National Scenic Area and kill fewer birds and bats.[7]

Such outcomes would be more consistent with BPA's environmental and social responsibilities. Awareness that BPA could have, by denying the interconnection, avoided higher, unacceptable levels of harm might have led the agency to send the Applicant back to rework the Project details to develop a smaller, less harmful project. *See ONDA I*, 625 F.3d at 1124 ("NEPA is not a paper exercise, and new analyses may point in new directions."). The required alternatives analysis allows an agency to compare the effects of different alternatives to determine what levels of harm it considers acceptable. An analysis of different Project configurations would guarantee that BPA had before it "all possible approaches to a particular project (*including total abandonment of the project*) which would alter the environmental impact and the cost-benefit balance," and allow BPA to make a reasoned decision whether or not to allow the Project to be built. *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (internal quotation marks, punctuation, and citation omitted).

[7] BPA has authority to obtain the information necessary to develop and study alternative configurations: under BPA's Technical Requirements and its Large Generator Interconnection Agreement, an applicant must provide detailed technical information about its proposed facility, including the number of turbines, capacities, and coordinates of individual turbine locations. FER 4–7, 11.

Because NEPA requires an evaluation of alternatives beyond an agency's jurisdiction, it does not matter that BPA has no direct authority over siting the wind turbines. BPA's argument that its lack of siting authority over the turbines allowed it to limit its alternatives analysis solely to the Applicant's initial proposal ignores not only the fact that the FEIS analyzed the turbines and interconnection together as a single Proposed Action, but also this Court's holding in *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999). In *Muckleshoot Tribe*, this Court held that an EIS for a proposed land exchange between the agency and a timber company was invalid because it failed to consider an alternative involving the outright purchase of the company's land with federal funds that the Forest Service could request but over which it had no authority. *Id*. at 813–14. BPA does not discuss this case at all. Its principle—that a federal agency must evaluate reasonable alternatives beyond its jurisdiction to ensure it has fully informed itself of alternative courses of action—controls the instant case.

B. BPA's Remaining Arguments do not Justify the Agency Avoiding a Full Evaluation of Alternatives to the Applicant's Proposal.

As an initial matter, BPA contends that the Applicant's proposal was not vague and indeterminate by claiming it involved "specifically delineated corridors." Answ. at 30–31. But corridors do not kill birds or obliterate scenic values—turbines do. Moreover, when BPA purported to evaluate the effects of the proposal, it had no idea where within the site the turbines would actually be, nor

their number, capacities, or heights, because of the indeterminate, ever-shifting variables in the Applicant's proposal. It is undisputed that fewer turbines cause less harm. *See* Open. at 18, 43, 45, 59. Tellingly, BPA does not cite a single case where evaluating the impacts of a single, worst-case alternative developed by an applicant and defined by multiple indeterminate variables was held to meet the specificity and clarity required in an EIS.

Here, the issue is whether BPA should have considered feasible alternatives involving fewer turbines or different configurations within the project site to evaluate how to minimize environmental harm, not whether other *sites* should have been considered. Thus, BPA's reliance on *Oregon Natural Desert Ass'n v. Jewell* and how the agency in that case did not consider different sites is misplaced. 823 F.3d 1258, 1262 n.2 (9th Cir. 2016) ("*ONDA II*"). Although the FEIS claimed to have considered and rejected "alternative turbine configurations," ER 252 (SER 371), BPA now makes no attempt to defend the incomprehensible and arbitrary assertion in the EIS that a Project whose parameters could allow any number from 25 to 50 turbines of differing heights arrayed at various locations throughout the Project site is an "integrated whole" for which the number of turbines "has already been minimized," *id*.

BPA's litigation position also requires a sleight of hand, accusing Friends of not proposing any alternatives to the *interconnection*. Answ. at 29. But the FEIS

did not evaluate the interconnection as a stand-alone alternative. Rather, it defined the single alternative (the Proposed Action) as the totality of the proposed wind turbines, substation, interconnection, and all other project elements taken together. ER 202, 210–13, 239 (SER 309, 317–320, 352). Having defined the turbines and interconnection together as a single proposed action, the letter and purpose of NEPA required BPA to consider reasonable and feasible alternatives.

This Court has only allowed an agency "to limit the scope of its NEPA review to the activities specifically authorized in the federal action where the private and federal portions of the project could exist independently." *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1116 (9th Cir. 2000). BPA seems to suggest that its statutory authority gives it no choice but to approve an interconnection for whatever project an applicant proposes. Answ. at 27. But if that were so, then its FEIS truly would be nothing but the paper exercise this Court denounced in *ONDA I*. 625 F.3d at 1124. And, of course, the FEIS acknowledged that BPA could deny the interconnection. ER 213 (SER 320).

Under BPA's theory, any federal agency with a "basic" choice but no direct siting authority (such as whether to fund a local highway project with many potential configurations, or to allow it to interconnect to the federal interstate highway system) could satisfy NEPA by simply considering a single, worst-case action alternative, evaluating potential effects in the most general terms based on

some indeterminate set of variables, and later rubber-stamping whatever project the local agency decides to approve. Adopting such a cursory approach would rewrite NEPA. In *Laguna Greenbelt*, this Court upheld the agency's alternatives analysis based on a detailed evaluation of two action alternatives, each involving specific and distinct highway configurations, and the consideration but elimination of six other categories of alternatives from detailed study for lack of feasibility. *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.*, 42 F3d. 517, 524–25 (9th Cir. 1994).[8] The alternatives analysis in *Laguna Greenbelt* is a far cry from the single, undefined action alternative considered here. Approving BPA's approach would open the door to any agency to pursue shortcuts by evaluating only a single, worst-case scenario or a single action alternative so vague and indeterminate as to prevent meaningful analysis. The letter and purpose of NEPA require otherwise.

III. BECAUSE BPA CONCEDES THAT THE FEIS DID NOT EVALUATE THE EFFECTIVENESS OF PROPOSED MITIGATION MEASURES, THE DECISION TO GRANT THE INTERCONNECTION VIOLATED NEPA.

BPA attempts to divert the Court's attention away from the undisputed fact that the FEIS contains no analysis of whether proposed mitigation will be effective in reducing or eliminating the Project's harm to the environment. BPA

[8] BPA misrepresents the rationale in *Honolulutraffic.com v. FTA*, which involved a specific FTA regulation authorizing the agency to eliminate alternatives rejected through a state *alternatives analysis* process—an analysis that is absent from the instant case. 742 F.3d 1222, 1231 (9th Cir. 2014).

misrepresents Friends' argument, accusing Friends of demanding the agency "prove the effectiveness of mitigation." Answ. at 22. Rather, Friends relies on this Court's precedents obligating an agency that prepares an EIS to *evaluate* whether mitigation measures will be effective, not *prove* that they will be. Open. at 33–35, 46–50. Nor does Friends argue that "every" mitigation measure must be evaluated for effectiveness, Answ. at 47, nor that there must be a "highly detailed evaluation of individual and fully fleshed-out mitigation measures," *id.* at 48–49. Instead, Friends argues that BPA's failure to evaluate the effectiveness of *any* of the mitigation measures renders its decision arbitrary and capricious. Open. at 47–50.

BPA apparently concedes that it did not evaluate the effectiveness of any mitigation measure because it points to no page in the record that contains any such analysis. *See* Answ. at 45–51. BPA does not claim that the pages it cites evaluated whether mitigation will be effective in reducing harm from the Project. Rather, BPA asserts that the measures "are identified and described" and include a Mitigation Action Plan listing "the full text of each measure" and who is responsible for implementing what when. Answ. at 49–50. Leaving aside BPA's mischaracterizations of the mitigation measures as "thorough" and of "high . . . specificity"—unbelievable assertions, given that the details of almost all measures are left to future planning processes, *see* Open. at 11–12, 15, 21–22, 48–50—a mere "description of mitigating measures is inconsistent with the 'hard look' [the

agency] is required to render under NEPA." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

NEPA's procedures, including the evaluation of mitigation's effectiveness, are meant to force agencies to make an informed, "optimally beneficial decision." *ONDA I*, 625 F.3d at 1099–1100. Where an agency has a right to prevent an action with "unacceptable environmental consequences"—which BPA can do here by denying the interconnection and thus preventing the turbines from being built—NEPA obligates the agency to fully inform itself, and the public, of the potential consequences of a proposed project and whether mitigation could be effective in reducing or eliminating the project's harmful effects. *N. Plains Res. Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989).

A. BPA Incorrectly States the Applicable Legal Standard, Which Unambiguously Requires an Agency Preparing an EIS to Evaluate the Effectiveness of Mitigation Measures.

Contrary to BPA's novel interpretation of NEPA's requirement to evaluate proposed mitigation measures, *see* Answ. at 45–46, the Supreme Court has explained that "[t]he requirement that an EIS contain a detailed discussion of possible mitigation measures flows" directly from the statute. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). "Implicit in NEPA's demand that an agency prepare a detailed statement on 'any adverse environmental effects which cannot be avoided should the proposal be implemented,' 42 U.S.C. §

4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided." *Id*. at 351–52. "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects." *Id*. at 352. BPA's theory regarding the regulation it cites contradicts this Court's interpretation of NEPA, following *Robertson*, that "[a]n essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective." *S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

BPA also erroneously claims that the definition of mitigation in 40 C.F.R. § 1508.20 "focuses on measures an agency analyzing a proposed action could undertake." Answ. at 45. Contrary to BPA's assertions, that definition simply describes what "mitigation" is, not who performs it. In the vast majority of federal actions, including timber projects and other federally authorized private activities on public lands, it is a third party, not the agency, that is responsible for mitigation, yet the federal agency's EIS must nevertheless contain a sufficient evaluation of mitigation to evaluate "the extent to which adverse effects can be avoided." *Robertson*, 490 U.S. at 352–53 (recognizing that mitigation would be undertaken by state and local governments, not by the federal agency itself).

BPA asks this Court to ignore its unambiguous, binding precedent in *South Fork Band* in favor of BPA's interpretation of *Robertson* and its progeny. Answ. at 47–49. However, its claim that this Court has held that there is "no duty . . . to analyze the effectiveness of individual mitigation measures in an EIS" misstates the holding in the cited case. *Id*. at 47 (citing *Or. Natural Res. Council v. Marsh*, 52 F.3d 1485, 1491 (9th Cir. 1995)). In fact, in *Marsh*, this Court explained that the earlier iteration of that case had contained only a holding that a *complete* mitigation plan was required—a holding overturned by the Supreme Court—not a holding that a discussion of the effectiveness of mitigation was required. 52 F.3d at 1491. BPA then knocks down the straw-man arguments that Friends has not asserted. *See* Answ. at 47–48. BPA never tries to show where the record contains the required "assessment of whether the proposed mitigation measures can be effective," *S. Fork Band*, 588 F.3d at 727, because there is none.[9]

B. Without an Evaluation Whether Mitigation Measures Would be Effective, the Decision Approving the Interconnection Is Arbitrary and Capricious.

The "action-forcing" function of an analysis of mitigation's effectiveness is critical in this case because BPA has the power to prevent unacceptable environmental consequences by denying the interconnection and foreclosing the

[9] The fact that the Project's mitigation measures are mostly conditional and deferred to future planning further reinforces that BPA would have had no factual basis upon which to assess the measures' effectiveness.

Project's construction. BPA frames the issue incorrectly as whether it has sufficient control or responsibility to order more mitigation. Answ. at 46. But the decision BPA actually had to make was whether—based on the severity of the adverse environmental effects the turbines would cause, and whether those effects are unacceptable—it should allow the Project to be built by granting the interconnection. Without compliance with the procedures required by NEPA, BPA had no way of understanding whether the Project would cause unacceptable harm.

An obvious fallacy in BPA's contention that it would be "pointless" to evaluate mitigation, Answ. at 46, is the fact that BPA's ROD relies on mitigation. *See*, *e.g.*, ER 38 (SER 49) ("[W]ith the extensive mitigation measures that have been identified . . . BPA believes that the Project will be implemented in an environmentally responsible manner."), ER 37 (SER 48) (asserting that the FEIS contained mitigation measures "to further reduce, avoid, or compensate for Project impacts"). The fatal flaw in BPA's decision is that because it failed to conduct *any* evaluation of whether any of the mitigation measures would be effective, BPA had no basis for claiming the mitigation measures would result in an "environmentally responsible" project or "reduce, avoid, or compensate for Project impacts." Thus, its decision to approve the interconnection was arbitrary and capricious.

In all of the cases BPA cites, the federal agencies actually attempted to evaluate the effectiveness of mitigation measures and, on the facts of those cases,

satisfied NEPA. For example, in *Laguna Greenbelt*, the Court sustained an agency evaluation of whether mitigation by state and local governments would be effective. 42 F.3d at 528. That agency's statement "that mitigation measures may not be totally successful" demonstrates that an analysis of whether mitigation would be effective actually occurred—a critical distinction from the instant case, in which BPA undertook no such analysis. *Id*.

BPA's inability to directly control the mitigation of harm from the Project also is irrelevant to its obligation to analyze the effectiveness of such mitigation because "NEPA, of course, does not require that these harms be mitigated." *S. Fork Band*, 588 F.3d at 727. Industrial-scale wind turbines pose well-known, serious threats to birds, bats, and scenic resources. Open. at 18–19, 44–45, 50–51; *see ONDA II*, 823 F.3d at 1260 ("Renewable energy projects . . . can have significant adverse environmental impacts, just as other large-scale developments do."). Without some evaluation of whether the proposed mitigation measures will be effective, there is no way to adequately assess the likely impacts of the turbines proposed for this Project. BPA failed to perform the required evaluation of whether the proposed mitigation measures will be effective in avoiding harm. *See Robertson*, 490 U.S. at 352; *S. Fork Band*, 588 F.3d at 727.

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IV. THE INTERCONNECTION GRANT WAS UNLAWFUL BECAUSE THE FEIS FAILED TO TAKE A HARD LOOK AT THE PROJECT'S EFFECTS ON BIRDS AND BATS.

A. BPA is Wrong That Having No Direct Siting Authority Over the Wind Turbines Absolves it From Taking a Hard Look at the Project's Impacts.

BPA attacks Friends' demonstration that BPA failed to take a hard look at the Project's impacts to birds and bats with an exegesis of NEPA cases that allow federal agencies, in appropriate circumstances, to avoid NEPA analysis of non-federal portions of an action. Answ. at 32–37. But BPA concedes up front that the Project could not be built if BPA denied the interconnection—meaning that neither the Project nor the interconnection has independent utility. Answ. at 32 (citing SER 30 (ER 19)).

As explained above at 4–8, the proposed wind turbines are part of the same Proposed Action as the requested interconnection. When federal and non-federal actions are inextricably connected, the federal agency must meet the same standards for a full and lawful NEPA analysis of *all* project elements, including the non-federal portions; the federal action cannot be divorced from its environmental consequences. *Robertson*, 490 U.S. at 352 (an agency must take a "hard look" at the environmental effects of a federal action "*and consequences* of that action" (emphasis added)); *Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1083 (D.C. Cir. 2016) (agency may not "slice and dice proposals," rather must

"look beyond the decision to offer a lease and consider the predictable consequences of that decision"); *ONDA II* 823 F.3d at 1261, 1264–67 (holding BLM's NEPA analysis unlawful for failure to ascertain baseline conditions at the proposed wind turbine site on private lands).[10]

In both *ONDA II* and the instant case, the federal agencies themselves defined the scope of the EIS to include harm from the wind turbines. *See* 40 C.F.R. § 1508.25 (defining "scope" as "the range of actions, alternatives, and impacts to be considered in an environmental impact statement," including connected actions). Here, BPA's pure speculation that the proposed wind turbines could "conceivably" interconnect to a local utility does not amount to the reasonable probability that would give the turbines independent utility. *See supra* at 7 & n.5. In fact, the only record evidence about *any* local utility is a statement in an early draft of the EIS that the Skamania County Public Utility District #1 "is not capable of providing transmission interconnection and capacity to the [Project]"—an accurate but inconvenient statement that BPA's attorneys later struck from the draft. FER 29.

BPA's suggestion that the effects of the wind turbines need only be evaluated as cumulative or indirect impacts, Answ. at 33, again ignores that the

[10] BPA's statement that in *ONDA II* the BLM had "asserted approval authority" over the wind turbine site on private lands, Answ. at 37, is false. 823 F.3d at 1260 (explaining that Harney County issued the development permit for the turbine site).

FEIS actually evaluated the effects of the turbines and interconnection as part of a single Proposed Action, and also as connected actions. The fallacy in BPA's argument is evident from the FEIS's "cumulative impacts" section, ER 232–35 (SER 344–47), which distinguishes between the effects of the "Proposed Action"—including the turbines and the interconnection—and the effects of other existing and reasonably foreseeable developments. *See* ER 233–35 (SER 345–47). Presumably, if the impacts of the wind turbines were "cumulative" to the interconnection, BPA would have addressed that explicitly in the cumulative impacts section. Nor do the effects of the wind turbines fall within the definition of "indirect effects," which are effects "caused by the action [that] are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.08(a).

None of the cases BPA cites, Answ. at 33–37, involved actions without independent utility. Nor do any of the cited cases stand for the principle that a federal agency's responsibility under NEPA to supply the public with a hard look at a project's likely impacts is diminished when evaluating the non-federal components of a single proposed action. One of the cases, *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853 (9th Cir. 2004), does not address this

question at all.[11] Two other cases involved holdings that because federal and non-federal actions could be undertaken independently and because the federal actions were not but-for causes of the non-federal actions, the non-federal actions need not be evaluated under NEPA. *Sierra Club v. BLM*, 786 F.3d 1219, 1225 (9th Cir. 2015); *Wetlands Action Network*, 222 F.3d at 1116–17.

The last cited case, *Enos v. Marsh*, addressed a different question without relevance here. 769 F.2d 1363, 1371–72 (9th Cir. 1985). The conclusion in *Enos* that a state-funded project functionally distinct from and not interrelated to a federal project was not a "single federal action," *id*., has no bearing on the fact that the wind turbines in this case, which could not and would not be built absent BPA's interconnection, are defined as part of the Proposed Action that must be fully evaluated in the FEIS.

Ultimately, BPA defined the turbines and interconnection as having no independent utility, and *actually purported to evaluate the environmental impacts of the turbines* in the FEIS. Nowhere did the FEIS state that it was evaluating the

[11] The legal standard BPA cites from *Westlands*—that "the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS"—applies only to objectives set out in the *purpose and need statement*, not to the entire EIS. 376 F.3d at 866. Thus it is inapplicable to the issue at hand: whether the agency has taken the required "hard look" at a project's environmental impacts. In addition, BPA has identified no statutory provision that overrides its NEPA obligations, which must be given the broadest possible interpretation. *See Westlands Water Dist. v. Natural Res. Def. Council*, 43 F.3d 457, 460 (9th Cir. 1994).

turbines' effects to a lesser degree because they would not be under federal control. The Court's review must focus on the NEPA analysis BPA *actually adopted*, not its counsel's post hoc rationalization of what BPA might have done differently had it framed the scope of its NEPA analysis differently. *Bowen*, 488 U.S. at 212–13. The post hoc rationalization BPA offers erroneously interprets NEPA and cannot excuse BPA's failure to prepare a lawful NEPA analysis of the Project's effects.

B. BPA's Analysis of the Project's Impacts to Birds Violates NEPA.

1. BPA's conclusion that the proposed wind turbines are unlikely to have negative impacts to local populations is unsupported by any data regarding local populations.

What BPA characterizes as a dispute about "methodology," Answ. at 39, is actually Friends identifying important data that are necessary to BPA's analysis but that are absent from the agency record. The FEIS's conclusion—"[i]t is unlikely that the Project would have any negative impacts on population levels [of birds in] and *near the Project Area*"—unambiguously asserts that local populations *near* the Project site will not suffer negative impacts. ER 298 (SER 459) (emphasis added). BPA's argument depends on inserting into its conclusions a reference to data on "local bird use and abundance" that does not actually exist in the record. Answ. at 40. The surveys BPA cites were limited to the Project site only—not the populations in the local area near the site. *See, e.g.*, ER 282 (SER 438) (describing

that "[a]vian surveys were conducted in the Project Area"); SER 1348 (describing that the studies were to "provide site specific bird resource and use data").

BPA argues that it may reach its conclusion that negative effects on nearby populations are unlikely by relying on a study of other wind projects across the United States. Answ. at 39. But in a recent case that also involved a wind project's harm to birds, this Court rejected a similar argument that an agency could extrapolate information from other studied sites to substitute for data it failed to collect in the relevant study area and nevertheless draw a conclusion about the effects within that area. *ONDA II*, 823 F.3d at 1264–65. Here, because BPA had no accurate baseline data about the local bird populations near the Project site, BPA's conclusion that negative effects on nearby populations are unlikely is arbitrary. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864–66 (9th Cir. 2005) (conclusory assertions that an activity would have insignificant impacts, without providing any explanation, violated NEPA).

2. BPA failed to take a hard look at the Project's impacts to olive-sided flycatchers because it lacked surveys during the specific period when the birds were most likely to fly through the Project site.

BPA again mischaracterizes the failure to survey for olive-sided flycatchers between mid-July and mid-September—the only period during which these birds migrate south through the Project site—as a dispute over methodology. Ironically, BPA's argument that "the low occurrence of detections" justifies its generalized

conclusion that there will be "some" harm to flycatchers, Answ. at 42, proves Friends' point: if no surveys were conducted during the time when birds are most likely to fly through the site (and be killed by turbines), then there is no credible basis for asserting that few birds will be affected.

Contrary to BPA's arguments, a state court decision interpreting state regulations in a proceeding that did not involve NEPA cannot satisfy BPA's obligation to consider all relevant factors under NEPA. *See S. Fork Band*, 588 F.3d at 726. Nor can the Applicant's so-called "exposure index" substitute for surveys for flycatchers during their busiest period: BPA conceded in response to comments that the exposure index "is not meant to accurately predict which species will occur as fatalities and *was not used* to predict the level of bird fatalities;" instead, "[a]vian *use*, rather than the exposure index, was used to predict the level of post-construction avian mortality." SER 2184, 2128 (emphasis added). BPA's post hoc reliance on the Applicant's exposure index must be rejected because the agency never explained "why it is reliable" as a predictor of flycatcher mortality given its own admission that it cannot be used in that manner. *Lands Council v. McNair*, 629 F.3d 1070, 1078 (9th Cir. 2010).[12]

[12] The Applicant's consultants also admitted that their exposure index cannot be used to predict fatality rates and that it merely compares numbers of different species observed at the Project site with each other, rather than comparing each species' abundance at the Project site to its abundance at other regional sites or

A failure to quantify impacts and their intensities violates the "requirement under NEPA to gather information before [the agency] can make an informed decision" and evinces BPA's failure to make any effort to "first understand[] the extent of the problem." *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011). By ignoring the critical period during which flycatchers are most likely to be prevalent, BPA willfully avoided obtaining accurate information regarding the Project's threats to this sensitive bird, and thus failed to take a hard look at the Project's likely impacts.

C. The FEIS's Failures to Estimate Bat Mortality and to Evaluate the Threat of Barotrauma Violates NEPA.

In a now-familiar pattern, BPA reframes its failure to estimate the Project's bat mortality as a dispute over methodology. Answ. at 41. But the case it cites endorses qualitative evaluations only where the agency explains why it cannot provide objective quantitative data. *League of Wilderness Defenders–Blue Mtns. Biodiversity Proj. v. U.S. Forest Serv.*, 689 F.3d 1060, 1076 (9th Cir. 2012). No such explanation is found in the FEIS here. *See* ER 298–99 (SER 459–60). Instead, the FEIS's statement that "[m]ortality estimates are difficult" because there is uncertainty about why bats collide with turbines, ER 298 (SER 459), is the sort of "general statement about uncertainty" that this Court has held "does not satisfy the

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throughout its range. FER 15–18. The exposure index thus sheds no light on how many flycatchers the Project is likely to harm.

procedural requirement that an agency take a hard look at the environmental effects of an action." *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (An agency "may not rely on a statement of uncertainty to avoid even attempting the requisite analysis.").

BPA is wrong that it analyzed the effects to bats from barotrauma. Answ. at 43–44. The FEIS text that addressed the Project's impacts to bats does not even mention barotrauma, and instead on a separate page merely lists the 2008 study as a "reference," without describing or analyzing that study's finding that ninety percent of bats killed by wind projects suffered barotrauma, nor explaining how that fact relates to the Project's potential threats to bats. ER 298–99, 302 (SER 459–60, 463). BPA cannot discharge its duty to provide the public with analysis of the Project's impacts simply by incorporating documents by reference. *Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1031 (9th Cir. 2012), *vacated as moot*, 133 S. Ct. 2843 (2013). Documents analyzing environmental impacts must instead be "described and analyzed in the text" and included in an appendix. *Id.* Here, because the only study referenced in the FEIS's text shows that barotrauma poses a significant risk to bats, BPA's failure to include any analysis of that threat renders its analysis of impacts to bats arbitrary and capricious.[13]

[13] The 2011 study BPA cites is only noted in the response to public comments, and is not even mentioned in the FEIS text. *Compare* SER 2211 *with* ER 298–99 (SER 459–60). And the bat surveys in the appendices never evaluate barotrauma, but,

V. BPA's SUPPLEMENT ANALYSIS WAS ARBITRARY AND CAPRICIOUS

A. Among Other Reasonable Alternatives, BPA Must Evaluate a 35-Turbine Configuration.

BPA effectively concedes that a 35-turbine configuration, first raised by the State of Washington, was not evaluated in the FEIS when it argues that it was "reasonable" for the "EIS to consider in detail two alternatives reflecting the options of approving the Project as proposed [i.e., the worst-case 50-turbine configuration], or not approving the Project." Answ. at 21. This underscores that BPA apparently decided, in its selection of alternatives, that it would only consider the two extreme ends of the spectrum: the worst-case scenario that it actually considered, and not allowing the Project to proceed at all. This is precisely the sort of uninformed decisionmaking that careful comparison of effects of feasible alternatives is supposed to avoid.

BPA does not challenge the fact that between the issuance of the FEIS in August 2011 and the issuance of the ROD in March 2015, the details of the Project under consideration changed dramatically, including the total number of turbines and the capacities of individual turbines. BPA's threshold argument fails because it again falsely claims that the interconnection was a separate action. As explained above, the interconnection was framed in the FEIS as part of a single Proposed

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like the main text of the FEIS, only list the 2008 study as a "reference." ER 411, 421, 425 (SER 1672, 1706, 1710).

Action intertwined with the proposed turbines. *Supra at* 4–8. This fact defeats BPA's litigating theory that *it* did not change the action. In any case, the significant new information flowing from the state proceedings requires supplementation under 40 C.F.R. § 1502.9(c)(1)(ii). The case that BPA cites to support its theory actually holds only that the petitioner in that case had not preserved the issue, not that supplementation was not required. *Idaho Conservation League v. BPA*, 826 F.3d 1173, 1178 (9th Cir. 2016).

BPA simply reiterates the rationale in its SA that a 35-turbine project was within the "spectrum" of alternatives considered, without addressing the portion of this Court's controlling holding in *Russell County* that illustrates how BPA misapplied that term and how a 35-turbine configuration is not within the scope of the worst-case scenario BPA actually considered. *Russell Cnty. Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). Because the FEIS did not actually evaluate the effects of a configuration of 35 turbines, each with 2.0-MW capacity, BPA must supplement the FEIS to evaluate the *actual* Project now contemplated for interconnection, not the hypothetical set of variables alluded to in the FEIS. BPA's decision to not supplement the FEIS is arbitrary and capricious.

B. BPA Must Update the Stale Data.

By waiting nearly four years between its FEIS and ROD, BPA has only itself to blame for the staleness of its bird and bat survey data. It does not even

attempt to distinguish this Court's holdings that an agency cannot rely on data that is more than six years old—like all of the data here—to reach a rational conclusion regarding the likelihood of harm to wildlife. *N. Plains Res. Council*, 668 F.3d at 1085–87; *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005).

Although BPA argues that circumstantial changes are required for data to become stale, the agency concedes that alterations to wildlife habitat at the Project site have been ongoing and will continue—exactly the same changes to habitat conditions that led this Court to declare more-than-six-year-old data stale in the cases cited above. *See* Answ. at 9 (The Project site "has been heavily and frequently logged for many decades, and additional continuous forestry management and logging at the site is planned."). The record also discloses that northern spotted owls were detected in 2010 even though none were detected during surveys between 2003 and 2009—indicating that habitat conditions at and near the Project site may be changing. *Compare* FER 24–26 *with* ER 269–76 (SER 425–32); *see* Open. at 10 n.1. BPA violated NEPA by deciding not to update its bird and bat analysis with current data.

CONCLUSION

For these reasons, Friends respectfully requests that this Court grant their Petition, vacate the ROD, and remand for preparation of a lawful NEPA analysis.

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Dated: September 26, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 8,736 words, excluding the parts that do not count towards the limitation as provided in Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: September 26, 2016

/s/ David H. Becker
David H. Becker

Attorney for Petitioners

ADDENDUM - TABLE 1

Excerpts of Record (ER) to Supplemental Excerpts (SER) Cross-Reference

ER	SER	ER	SER	ER	SER
1	12	33	44	65	NONE
2	13	34	45	66	NONE
3	14	35	46	67	NONE
4	15	36	47	68	NONE
5	16	37	48	69	NONE
6	17	38	49	70	NONE
7	18	39	50	71	NONE
8	19	40	51	72	NONE
9	20	41	66	73	NONE
10	21	42	67	74	NONE
11	22	43	68	75	NONE
12	23	44	69	76	NONE
13	24	45	70	77	NONE
14	25	46	71	78	52
15	26	47	72	79	53
16	27	48	73	80	54
17	28	49	74	81	55
18	29	50	75	82	56
19	30	51	76	83	57
20	31	52	77	84	58
21	32	53	78	85	59
22	33	54	79	86	60
23	34	55	80	87	61
24	35	56	NONE	88	62
25	36	57	NONE	89	63
26	37	58	NONE	90	64
27	38	59	NONE	91	65
28	39	60	NONE	92	NONE
29	40	61	NONE	93	NONE
30	41	62	NONE	94	NONE
31	42	63	NONE	95	81
32	43	64	NONE	96	82

ER	SER	ER	SER	ER	SER
97	83	132	239	167	274
98	84	133	240	168	275
99	85	134	241	169	276
100	86	135	242	170	277
101	87	136	243	171	278
102	88	137	244	172	279
103	89	138	245	173	280
104	90	139	246	174	NONE
105	91	140	247	175	NONE
106	92	141	248	176	NONE
107	93	142	249	177	NONE
108	94	143	250	178	NONE
109	95	144	251	179	NONE
110	96	145	252	180	NONE
111	97	146	253	181	NONE
112	98	147	254	182	182
113	99	148	255	183	183
114	100	149	256	184	186
115	101	150	257	185	187
116	102	151	258	186	188
117	103	152	259	187	205
118	104	153	260	188	206
119	105	154	261	189	207
120	106	155	262	190	208
121	107	156	263	191	287
122	108	157	264	192	289
123	109	158	265	193	291
124	110	159	266	194	293
125	111	160	267	195	294
126	112	161	268	196	295
127	113	162	269	197	296
128	114	163	270	198	297
129	236	164	271	199	298
130	237	165	272	200	299
131	238	166	273	201	300

ER	SER	ER	SER	ER	SER
202	309	237	349	272	428
203	310	238	351	273	429
204	311	239	352	274	430
205	312	240	353	275	431
206	313	241	354	276	432
207	314	242	355	277	433
208	315	243	356	278	434
209	316	244	357	279	435
210	317	245	358	280	436
211	318	246	359	281	437
212	319	247	364	282	438
213	320	248	365	283	439
214	321	249	368	284	440
215	322	250	369	285	441
216	323	251	370	286	442
217	324	252	371	287	443
218	330	253	372	288	444
219	331	254	373	289	445
220	332	255	374	290	446
221	333	256	375	291	447
222	334	257	376	292	448
223	335	258	390	293	454
224	336	259	391	294	455
225	337	260	400	295	456
226	338	261	401	296	457
227	339	262	408	297	458
228	340	263	409	298	459
229	341	264	410	299	460
230	342	265	411	300	461
231	343	266	422	301	462
232	344	267	423	302	463
233	345	268	424	303	487
234	346	269	425	304	488
235	347	270	426	305	489
236	348	271	427	306	490

ER	SER	ER	SER	ER	SER
307	491	342	570	377	771
308	506	343	571	378	791
309	515	344	572	379	800
310	516	345	573	380	801
311	539	346	574	381	802
312	540	347	575	382	803
313	541	348	576	383	931
314	542	349	577	384	942
315	543	350	578	385	943
316	544	351	579	386	944
317	545	352	618	387	945
318	546	353	619	388	1239
319	547	354	628	389	1241
320	548	355	629	390	1340
321	549	356	717	391	1341
322	550	357	719	392	1342
323	551	358	720	393	1343
324	552	359	721	394	1344
325	553	360	722	395	1352
326	554	361	723	396	1353
327	555	362	724	397	1354
328	556	363	740	398	1355
329	557	364	741	399	1356
330	558	365	742	400	1357
331	559	366	743	401	1358
332	560	367	744	402	1359
333	561	368	762	403	1360
334	562	369	763	404	1361
335	563	370	764	405	1643
336	564	371	765	406	1644
337	565	372	766	407	1645
338	566	373	767	408	1664
339	567	374	768	409	1665
340	568	375	769	410	1666
341	569	376	770	411	1672

ER	SER	ER	SER	ER	SER
412	1673	447	NONE	482	NONE
413	1674	448	NONE	483	NONE
414	1675	449	NONE	484	NONE
415	1697	450	NONE	485	NONE
416	1698	451	NONE	486	NONE
417	1699	452	NONE	487	NONE
418	1703	453	NONE	488	NONE
419	1704	454	NONE	489	NONE
420	1705	455	NONE	490	NONE
421	1706	456	NONE	491	NONE
422	1707	457	NONE	492	NONE
423	1708	458	NONE	493	NONE
424	1709	459	NONE	494	NONE
425	1710	460	NONE	495	NONE
426	1953	461	NONE	496	NONE
427	1957	462	NONE	497	NONE
428	1978	463	NONE	498	NONE
429	1979	464	NONE	499	NONE
430	1987	465	NONE	500	NONE
431	1988	466	NONE	501	NONE
432	2056	467	NONE	502	NONE
433	2147	468	NONE	503	NONE
434	2201	469	NONE	504	NONE
435	2263	470	NONE	505	NONE
436	2288	471	NONE	506	NONE
437	2289	472	NONE	507	NONE
438	2329	473	NONE	508	NONE
439	2346	474	NONE	509	NONE
440	2363	475	NONE	510	NONE
441	2367	476	NONE	511	NONE
442	2368	477	NONE	512	NONE
443	2396	478	NONE	513	NONE
444	2397	479	NONE	514	NONE
445	NONE	480	NONE	515	NONE
446	NONE	481	NONE	516	NONE

ER	SER	ER	SER	ER	SER
517	NONE	552	NONE	587	NONE
518	NONE	553	NONE	588	NONE
519	NONE	554	NONE	589	NONE
520	NONE	555	NONE	590	NONE
521	NONE	556	NONE	591	NONE
522	NONE	557	NONE	592	NONE
523	NONE	558	NONE	593	NONE
524	NONE	559	NONE	594	NONE
525	NONE	560	NONE	595	NONE
526	NONE	561	NONE	596	NONE
527	NONE	562	NONE	597	NONE
528	NONE	563	NONE	598	NONE
529	NONE	564	NONE	599	NONE
530	NONE	565	NONE	600	NONE
531	NONE	566	NONE	601	NONE
532	NONE	567	NONE	602	NONE
533	NONE	568	NONE	603	NONE
534	NONE	569	NONE	604	NONE
535	NONE	570	NONE	605	NONE
536	NONE	571	NONE	606	NONE
537	NONE	572	NONE	607	NONE
538	NONE	573	NONE	608	NONE
539	NONE	574	NONE	609	NONE
540	NONE	575	NONE	610	NONE
541	NONE	576	NONE	611	NONE
542	NONE	577	NONE	612	NONE
543	NONE	578	NONE	613	NONE
544	NONE	579	NONE	614	NONE
545	NONE	580	NONE	615	NONE
546	NONE	581	NONE	616	NONE
547	NONE	582	NONE	617	NONE
548	NONE	583	NONE	618	NONE
549	NONE	584	NONE	619	NONE
550	NONE	585	NONE	620	NONE
551	NONE	586	NONE	621	NONE

ER	SER	ER	SER	ER	SER
622	NONE	NONE	2	NONE	203
623	NONE	NONE	3	NONE	204
624	NONE	NONE	4	NONE	209
625	NONE	NONE	5	NONE	210
626	NONE	NONE	6	NONE	211
627	NONE	NONE	7	NONE	212
628	NONE	NONE	8	NONE	213
629	NONE	NONE	9	NONE	214
630	NONE	NONE	10	NONE	215
631	NONE	NONE	11	NONE	216
632	NONE	NONE	115	NONE	217
633	NONE	NONE	116	NONE	218
634	NONE	NONE	163	NONE	219
635	NONE	NONE	168	NONE	220
636	NONE	NONE	169	NONE	221
637	NONE	NONE	174	NONE	222
638	NONE	NONE	175	NONE	223
639	NONE	NONE	177	NONE	224
640	NONE	NONE	180	NONE	225
641	NONE	NONE	184	NONE	226
642	NONE	NONE	185	NONE	227
643	NONE	NONE	189	NONE	228
644	NONE	NONE	190	NONE	229
645	NONE	NONE	191	NONE	230
646	NONE	NONE	192	NONE	231
647	NONE	NONE	193	NONE	232
648	NONE	NONE	194	NONE	233
649	5366	NONE	195	NONE	234
650	5378	NONE	196	NONE	235
651	NONE	NONE	197	NONE	282
652	NONE	NONE	198	NONE	283
653	5382	NONE	199	NONE	284
654	NONE	NONE	200	NONE	285
655	NONE	NONE	201	NONE	286
NONE	1	NONE	202	NONE	360

ER	SER	ER	SER	ER	SER
NONE	361	NONE	1383	NONE	5150
NONE	362	NONE	1384	NONE	5151
NONE	363	NONE	1385	NONE	5152
NONE	366	NONE	1386	NONE	5153
NONE	367	NONE	1387	NONE	5154
NONE	392	NONE	1388	NONE	5155
NONE	596	NONE	1389	NONE	5156
NONE	647	NONE	1390	NONE	5157
NONE	648	NONE	1391	NONE	5323
NONE	757	NONE	1392	NONE	5324
NONE	792	NONE	1393	NONE	5325
NONE	804	NONE	1394	NONE	5326
NONE	805	NONE	1395	NONE	5327
NONE	806	NONE	1396	NONE	5328
NONE	807	NONE	1397	NONE	5329
NONE	808	NONE	1398	NONE	5330
NONE	809	NONE	1399	NONE	5331
NONE	810	NONE	1400	NONE	5332
NONE	811	NONE	1401	NONE	5333
NONE	1348	NONE	1402	NONE	5334
NONE	1349	NONE	1403	NONE	5335
NONE	1350	NONE	1404	NONE	5336
NONE	1351	NONE	1405	NONE	5337
NONE	1371	NONE	1406	NONE	5338
NONE	1372	NONE	1676	NONE	5339
NONE	1373	NONE	2129	NONE	5340
NONE	1374	NONE	2133	NONE	5341
NONE	1375	NONE	2134	NONE	5342
NONE	1376	NONE	2135	NONE	5343
NONE	1377	NONE	2136	NONE	5344
NONE	1378	NONE	2192	NONE	5345
NONE	1379	NONE	2193	NONE	5346
NONE	1380	NONE	2211	NONE	5347
NONE	1381	NONE	5148	NONE	5348
NONE	1382	NONE	5149	NONE	5351

ER	SER	ER	SER
NONE	5352	NONE	5376
NONE	5353	NONE	5377
NONE	5354	NONE	5379
NONE	5357	NONE	5380
NONE	5358	NONE	5381
NONE	5359	NONE	5383
NONE	5360	NONE	5384
NONE	5361	NONE	5385
NONE	5362	NONE	5386
NONE	5363	NONE	5387
NONE	5364	NONE	5388
NONE	5365	NONE	5389
NONE	5367	NONE	5390
NONE	5368	NONE	5391
NONE	5369	NONE	5392
NONE	5370	NONE	5393
NONE	5371	NONE	5394
NONE	5372	NONE	5395
NONE	5373	NONE	5396
NONE	5374	NONE	5397
NONE	5375		

Documents in SER Cited as Large Ranges

SER
117-161
162-181
287-5146
720-1134

ADDENDUM - TABLE 2

Supplemental Excerpts (SER) to Excerpts of Record (ER) Cross-Reference

SER	ER	SER	ER	SER	ER
1	NONE	33	22	65	91
2	NONE	34	23	66	41
3	NONE	35	24	67	42
4	NONE	36	25	68	43
5	NONE	37	26	69	44
6	NONE	38	27	70	45
7	NONE	39	28	71	46
8	NONE	40	29	72	47
9	NONE	41	30	73	48
10	NONE	42	31	74	49
11	NONE	43	32	75	50
12	1	44	33	76	51
13	2	45	34	77	52
14	3	46	35	78	53
15	4	47	36	79	54
16	5	48	37	80	55
17	6	49	38	81	95
18	7	50	39	82	96
19	8	51	40	83	97
20	9	52	78	84	98
21	10	53	79	85	99
22	11	54	80	86	100
23	12	55	81	87	101
24	13	56	82	88	102
25	14	57	83	89	103
26	15	58	84	90	104
27	16	59	85	91	105
28	17	60	86	92	106
29	18	61	87	93	107
30	19	62	88	94	108
31	20	63	89	95	109
32	21	64	90	96	110

SER	ER	SER	ER	SER	ER
97	111	190	NONE	225	NONE
98	112	191	NONE	226	NONE
99	113	192	NONE	227	NONE
100	114	193	NONE	228	NONE
101	115	194	NONE	229	NONE
102	116	195	NONE	230	NONE
103	117	196	NONE	231	NONE
104	118	197	NONE	232	NONE
105	119	198	NONE	233	NONE
106	120	199	NONE	234	NONE
107	121	200	NONE	235	NONE
108	122	201	NONE	236	129
109	123	202	NONE	237	130
110	124	203	NONE	238	131
111	125	204	NONE	239	132
112	126	205	187	240	133
113	127	206	188	241	134
114	128	207	189	242	135
115	NONE	208	190	243	136
116	NONE	209	NONE	244	137
163	NONE	210	NONE	245	138
168	NONE	211	NONE	246	139
169	NONE	212	NONE	247	140
174	NONE	213	NONE	248	141
175	NONE	214	NONE	249	142
177	NONE	215	NONE	250	143
180	NONE	216	NONE	251	144
182	182	217	NONE	252	145
183	183	218	NONE	253	146
184	NONE	219	NONE	254	147
185	NONE	220	NONE	255	148
186	184	221	NONE	256	149
187	185	222	NONE	257	150
188	186	223	NONE	258	151
189	NONE	224	NONE	259	152

SER	ER	SER	ER	SER	ER
260	153	299	200	347	235
261	154	300	201	348	236
262	155	309	202	349	237
263	156	310	203	351	238
264	157	311	204	352	239
265	158	312	205	353	240
266	159	313	206	354	241
267	160	314	207	355	242
268	161	315	208	356	243
269	162	316	209	357	244
270	163	317	210	358	245
271	164	318	211	359	246
272	165	319	212	360	NONE
273	166	320	213	361	NONE
274	167	321	214	362	NONE
275	168	322	215	363	NONE
276	169	323	216	364	247
277	170	324	217	365	248
278	171	330	218	366	NONE
279	172	331	219	367	NONE
280	173	332	220	368	249
282	NONE	333	221	369	250
283	NONE	334	222	370	251
284	NONE	335	223	371	252
285	NONE	336	224	372	253
286	NONE	337	225	373	254
287	191	338	226	374	255
289	192	339	227	375	256
291	193	340	228	376	257
293	194	341	229	390	258
294	195	342	230	391	259
295	196	343	231	392	NONE
296	197	344	232	400	260
297	198	345	233	401	261
298	199	346	234	408	262

SER	ER	SER	ER	SER	ER
409	263	459	298	561	333
410	264	460	299	562	334
411	265	461	300	563	335
422	266	462	301	564	336
423	267	463	302	565	337
424	268	487	303	566	338
425	269	488	304	567	339
426	270	489	305	568	340
427	271	490	306	569	341
428	272	491	307	570	342
429	273	506	308	571	343
430	274	515	309	572	344
431	275	516	310	573	345
432	276	539	311	574	346
433	277	540	312	575	347
434	278	541	313	576	348
435	279	542	314	577	349
436	280	543	315	578	350
437	281	544	316	579	351
438	282	545	317	596	NONE
439	283	546	318	618	352
440	284	547	319	619	353
441	285	548	320	628	354
442	286	549	321	629	355
443	287	550	322	647	NONE
444	288	551	323	648	NONE
445	289	552	324	717	356
446	290	553	325	719	357
447	291	554	326	720	358
448	292	555	327	721	359
454	293	556	328	722	360
455	294	557	329	723	361
456	295	558	330	724	362
457	296	559	331	740	363
458	297	560	332	741	364

SER	ER	SER	ER	SER	ER
742	365	1340	390	1387	NONE
743	366	1341	391	1388	NONE
744	367	1342	392	1389	NONE
757	NONE	1343	393	1390	NONE
762	368	1344	394	1391	NONE
763	369	1348	NONE	1392	NONE
764	370	1349	NONE	1393	NONE
765	371	1350	NONE	1394	NONE
766	372	1351	NONE	1395	NONE
767	373	1352	395	1396	NONE
768	374	1353	396	1397	NONE
769	375	1354	397	1398	NONE
770	376	1355	398	1399	NONE
771	377	1356	399	1400	NONE
791	378	1357	400	1401	NONE
792	NONE	1358	401	1402	NONE
800	379	1359	402	1403	NONE
801	380	1360	403	1404	NONE
802	381	1361	404	1405	NONE
803	382	1371	NONE	1406	NONE
804	NONE	1372	NONE	1643	405
805	NONE	1373	NONE	1644	406
806	NONE	1374	NONE	1645	407
807	NONE	1375	NONE	1664	408
808	NONE	1376	NONE	1665	409
809	NONE	1377	NONE	1666	410
810	NONE	1378	NONE	1672	411
811	NONE	1379	NONE	1673	412
931	383	1380	NONE	1674	413
942	384	1381	NONE	1675	414
943	385	1382	NONE	1676	NONE
944	386	1383	NONE	1697	415
945	387	1384	NONE	1698	416
1239	388	1385	NONE	1699	417
1241	389	1386	NONE	1703	418

SER	ER	SER	ER	SER	ER
1704	419	5149	NONE	5351	NONE
1705	420	5150	NONE	5352	NONE
1706	421	5151	NONE	5353	NONE
1707	422	5152	NONE	5354	NONE
1708	423	5153	NONE	5357	NONE
1709	424	5154	NONE	5358	NONE
1710	425	5155	NONE	5359	NONE
1953	426	5156	NONE	5360	NONE
1957	427	5157	NONE	5361	NONE
1978	428	5323	NONE	5362	NONE
1979	429	5324	NONE	5363	NONE
1987	430	5325	NONE	5364	NONE
1988	431	5326	NONE	5365	NONE
2056	432	5327	NONE	5366	649
2129	NONE	5328	NONE	5367	NONE
2133	NONE	5329	NONE	5368	NONE
2134	NONE	5330	NONE	5369	NONE
2135	NONE	5331	NONE	5370	NONE
2136	NONE	5332	NONE	5371	NONE
2147	433	5333	NONE	5372	NONE
2192	NONE	5334	NONE	5373	NONE
2193	NONE	5335	NONE	5374	NONE
2201	434	5336	NONE	5375	NONE
2211	NONE	5337	NONE	5376	NONE
2263	435	5338	NONE	5377	NONE
2288	436	5339	NONE	5378	650
2289	437	5340	NONE	5379	NONE
2329	438	5341	NONE	5380	NONE
2346	439	5342	NONE	5381	NONE
2363	440	5343	NONE	5382	653
2367	441	5344	NONE	5383	NONE
2368	442	5345	NONE	5384	NONE
2396	443	5346	NONE	5385	NONE
2397	444	5347	NONE	5386	NONE
5148	NONE	5348	NONE	5387	NONE

SER	ER	SER	ER	SER	ER
5388	NONE	NONE	174	NONE	472
5389	NONE	NONE	175	NONE	473
5390	NONE	NONE	176	NONE	474
5391	NONE	NONE	177	NONE	475
5392	NONE	NONE	178	NONE	476
5393	NONE	NONE	179	NONE	477
5394	NONE	NONE	180	NONE	478
5395	NONE	NONE	181	NONE	479
5396	NONE	NONE	445	NONE	480
5397	NONE	NONE	446	NONE	481
NONE	56	NONE	447	NONE	482
NONE	57	NONE	448	NONE	483
NONE	58	NONE	449	NONE	484
NONE	59	NONE	450	NONE	485
NONE	60	NONE	451	NONE	486
NONE	61	NONE	452	NONE	487
NONE	62	NONE	453	NONE	488
NONE	63	NONE	454	NONE	489
NONE	64	NONE	455	NONE	490
NONE	65	NONE	456	NONE	491
NONE	66	NONE	457	NONE	492
NONE	67	NONE	458	NONE	493
NONE	68	NONE	459	NONE	494
NONE	69	NONE	460	NONE	495
NONE	70	NONE	461	NONE	496
NONE	71	NONE	462	NONE	497
NONE	72	NONE	463	NONE	498
NONE	73	NONE	464	NONE	499
NONE	74	NONE	465	NONE	500
NONE	75	NONE	466	NONE	501
NONE	76	NONE	467	NONE	502
NONE	77	NONE	468	NONE	503
NONE	92	NONE	469	NONE	504
NONE	93	NONE	470	NONE	505
NONE	94	NONE	471	NONE	506

SER	ER	SER	ER	SER	ER
NONE	507	NONE	542	NONE	577
NONE	508	NONE	543	NONE	578
NONE	509	NONE	544	NONE	579
NONE	510	NONE	545	NONE	580
NONE	511	NONE	546	NONE	581
NONE	512	NONE	547	NONE	582
NONE	513	NONE	548	NONE	583
NONE	514	NONE	549	NONE	584
NONE	515	NONE	550	NONE	585
NONE	516	NONE	551	NONE	586
NONE	517	NONE	552	NONE	587
NONE	518	NONE	553	NONE	588
NONE	519	NONE	554	NONE	589
NONE	520	NONE	555	NONE	590
NONE	521	NONE	556	NONE	591
NONE	522	NONE	557	NONE	592
NONE	523	NONE	558	NONE	593
NONE	524	NONE	559	NONE	594
NONE	525	NONE	560	NONE	595
NONE	526	NONE	561	NONE	596
NONE	527	NONE	562	NONE	597
NONE	528	NONE	563	NONE	598
NONE	529	NONE	564	NONE	599
NONE	530	NONE	565	NONE	600
NONE	531	NONE	566	NONE	601
NONE	532	NONE	567	NONE	602
NONE	533	NONE	568	NONE	603
NONE	534	NONE	569	NONE	604
NONE	535	NONE	570	NONE	605
NONE	536	NONE	571	NONE	606
NONE	537	NONE	572	NONE	607
NONE	538	NONE	573	NONE	608
NONE	539	NONE	574	NONE	609
NONE	540	NONE	575	NONE	610
NONE	541	NONE	576	NONE	611

SER	ER	SER	ER
NONE	612	NONE	633
NONE	613	NONE	634
NONE	614	NONE	635
NONE	615	NONE	636
NONE	616	NONE	637
NONE	617	NONE	638
NONE	618	NONE	639
NONE	619	NONE	640
NONE	620	NONE	641
NONE	621	NONE	642
NONE	622	NONE	643
NONE	623	NONE	644
NONE	624	NONE	645
NONE	625	NONE	646
NONE	626	NONE	647
NONE	627	NONE	648
NONE	628	NONE	651
NONE	629	NONE	652
NONE	630	NONE	654
NONE	631	NONE	655
NONE	632		

Documents in SER Cited as Large Ranges

SER
117-161
162-181
287-5146
720-1134

PROOF OF SERVICE

I hereby certify that on September 26, 2016, I electronically filed the foregoing Reply Brief of Petitioners with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I further certify that I filed true and correct copies of Petitioners' Further Excerpts of Record simultaneously using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no unregistered users participating in this case.

/s/ David H. Becker