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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

WESTERN WATERSHEDS PROJECT and	)	3:11-cv-00053-HDM-VPC
CENTER FOR BIOLOGICAL DIVERSITY,	)	
	)	
Plaintiffs,	)	
	)	ORDER
vs.	)	
	)	
BUREAU OF LAND MANAGEMENT,	)	
	)	
Defendant, and	)	
	)	
SPRING VALLEY WIND LLC,	)	
	)	
Defendant-Intervenor.	)	
_____	)	

This case concerns approval of a wind energy facility in Spring Valley, Nevada. Plaintiffs are two environmental organizations - Western Watersheds Project and Center for Biological Diversity.<sup>1</sup> Defendant is the Bureau of Land Management

<sup>1</sup> Originally, there were five plaintiffs, including three Native American tribes - the Confederated Tribes of the Goshute Reservation,

1 (BLM). Intervening defendant is Spring Valley Wind, LLC, the  
2 energy company developing the wind facility at issue.

3 Plaintiffs filed a motion for a temporary restraining order  
4 and/or preliminary injunction pursuant to Federal Rule of Civil  
5 Procedure 65 seeking to bar the BLM from issuing a Notice to  
6 Proceed or otherwise authorizing construction and site clearing for  
7 the Spring Valley Wind Energy Facility set to commence on March 28,  
8 2011.

9

10 **I. Factual Background<sup>2</sup>**

11 The Spring Valley Wind Energy Facility project is an  
12 industrial scale alternative energy project to be constructed in  
13 and around Spring Valley in east-central Nevada near Great Basin  
14 National Park. Approximately 430 acres is the total area estimated  
15 for use for the project (including short-term and long-term  
16 disturbance). This is approximately 5.6 percent of the total right

17 \_\_\_\_\_  
18 Duckwater Shoshone Tribe and Ely Shoshone Tribe. On March 17, 2011,  
19 the Tribes filed a voluntary dismissal with prejudice of all their  
20 claims. The only remaining cause of action is the environmental  
21 plaintiffs' National Environmental Protection Act (NEPA) claim. The  
22 court does not address the cultural impacts of the project in deciding  
23 the motion for a preliminary injunction.

24 <sup>2</sup> The facts in this section are taken from the final  
25 environmental assessment (hereinafter cited to as EA) and other  
26 documents in the Decision Record (hereinafter cited to as PAR).  
27 Specific cites accompany facts noted in the analysis section of this  
28 memo.

1 of way. The project would advance United States' goal of providing  
2 renewable energy generation options to Nevada. It would generate  
3 enough energy to power 45,000 Nevada homes, up to \$3 million in tax  
4 benefits to local school districts, and provide 225 jobs during the  
5 construction phase. The overall expected economic benefit for  
6 Nevada from the project is \$45 million. Approval of the project  
7 makes it eligible for millions of dollars of federal financing  
8 under the American Recovery and Reinvestment Act, which requires  
9 that qualifying projects commence construction no later than  
10 September 30, 2011.

11 The project area is not untouched. The existing landscape has  
12 been modified through past and current human habitation, road  
13 development, ranching and mining activities, and transmission  
14 lines. Project construction would incorporate existing structures  
15 and include over 25 miles of new roads, between 66 and 75 lighted  
16 400-foot tall wind turbines, two gravel pits, over nine miles of  
17 new fencing, a microwave tower, electrical lines, switchyard, and  
18 other facilities.

19 Project site clearing and construction is scheduled to begin  
20 the week of March 28, 2011. Erection of the wind turbines is  
21 scheduled for March 2012. The Spring Valley Wind Facility is  
22 expected to be commercially operational by June 2012.

23 Site clearing and construction for the project is set to begin  
24 March 28, 2011. This would impact native vegetation and wildlife,  
25 including the greater sage-grouse. There are 38 sage-grouse leks  
26 (mating grounds) in Spring Valley, three within a mile of the  
27 project site, but none in the project area. The project site  
28

1 itself is in low quality sagebrush habitat, the highest-quality  
2 habitat is located outside the project area, and the area already  
3 contains existing roads and transmission lines. In addition, to  
4 offset potential impacts, Spring Valley Wind committed \$500,000  
5 (eligible for federally matched funding) to enhancing sagebrush  
6 habitat in the area.

7         The operation of the turbines beginning in 2012 would also  
8 impact local bat populations. The public land designated for the  
9 project is near a large seasonal bat cave in the Great Basin, the  
10 Rose Guano Cave. The Rose Guano Cave is located four miles from the  
11 Spring Valley Wind project site and is a seasonal roost site to  
12 over one million Brazilian free-tailed bats<sup>3</sup> during their fall  
13 migration in August and September. The bats' migratory path takes  
14 them near the Spring Valley Wind Project site. The bats also  
15 travel up to 50 miles one-way at night to forage for insects, and  
16 may consume their body weight nightly.

17         Bats are vulnerable to mortality from operational wind  
18 turbines because wind turbines attract insects that the bats feed  
19 on and are perceived by the bats as potential migratory rest-stops  
20 or roosting sites. Bats are killed by contact with moving turbine  
21 blades and by "barotrauma." Barotrauma is a phenomenon that occurs  
22 when air pressure changes near spinning turbine blades. The change  
23 in air pressure causes the bats lungs to suddenly expand, bursting  
24 blood vessels. Ninety percent of bat fatalities near wind turbines  
25 may be attributed to barotrauma.

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26         <sup>3</sup> The Brazilian free-tailed bat (*Tadarida brasiliensis*) is one  
27 of the most abundant bat populations in the United States.  
28

1 **II. Procedural Background**

2 In June 2009, the federal government announced plans for the  
3 BLM to "fast track" the approval process for renewable energy  
4 projects across the United States. "The fast track process is  
5 about focusing [BLM] staff and resources on the most promising  
6 renewable energy projects." (BLM Opp'n Ex. A) The Spring Valley  
7 Wind Facility was approved for a "fast track."

8 In December 2009 and July 2010, the BLM issued preliminary  
9 environmental assessments (EAs) for the project. The preliminary  
10 EAs concluded that the project would pose no significant  
11 environmental impacts.

12 In response to these documents, the BLM received over 67  
13 public comment letters, containing almost 1,000 comments.  
14 Plaintiffs were among those who submitted written comments and met  
15 with the BLM over their concerns with the preliminary EAs. Several  
16 agencies and organizations, including the U.S. Fish and Wildlife  
17 Service, Nevada Department of Wildlife, National Parks Service, and  
18 Southern Nevada Water Authority, were also initially concerned  
19 about the preliminary EAs.

20 On October 15, 2010, the BLM approved the project through a  
21 Decision Record and Finding of No Significant Impact (FONSI) and  
22 issued a Final Environmental Assessment which addressed comments  
23 and concerns. As a result, it did not complete an environmental  
24 impact statement (EIS).

25 The final EA tiers to the BLM's 2005 Final Programmatic EIS on  
26 Wind Energy Development on BLM Administered Lands in the Western  
27 United States (Wind PEIS), a document that evaluates the  
28

1 consequences of wind energy development across BLM lands, and the  
2 2007 Ely Resource Management Plan's Final EIS. The final EA also  
3 relies on a detailed Avian and Bat Protection Plan (ABPP) to  
4 mitigate project impacts on bats and birds. The ABPP mitigation  
5 measures include: (1) creation and utilization of a Technical  
6 Advisory Committee (TAC) to monitor bat and bird mortality and  
7 ensure the implementation of mitigation measures should the  
8 mortality rates reach BLM designated thresholds; (2) a radar  
9 detection system to monitor flight and migratory habits and  
10 potentially trigger turbine breaks and feathering during periods of  
11 high flight activity; (3) wind turbine operation curtailment and  
12 shut downs; and (4) a mitigation fund. The mitigation measures do  
13 not include the recommendation of orienting wind turbines parallel  
14 to bat and bird flight patterns because doing so would render the  
15 turbines useless based on area wind flow.

16 On October 22, 2010, the BLM issued two rights-of-way to  
17 Spring Valley Wind, LLC. One was for the wind generation facility  
18 and substation, and the other was for a switchyard, overhead  
19 electrical lines, fiber-optic cable, microwave tower, and  
20 associated facilities.

21 On November 13, 2010, the environmental plaintiffs filed an  
22 administrative appeal and petition for stay to the Interior Board  
23 of Land Appeals (IBLA). On January 11, 2011, those plaintiffs  
24 filed a notice of dismissal of their appeal.<sup>4</sup>

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25 <sup>4</sup> On November 15, 2010, the now dismissed Tribal plaintiffs filed  
26 their own administrative appeal to IBLA. The Tribes dismissed their  
27 appeal on January 20, 2011. If the IBLA fails to rule on a petition  
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1 On January 25, 2011, plaintiffs filed a complaint with this  
2 court alleging the BLM violated the National Environmental Policy  
3 Act (NEPA), 42 U.S.C. § 4321 *et seq.* On February 28, 2011,  
4 plaintiffs filed a motion for temporary restraining order and/or  
5 preliminary injunction, seeking to enjoin site clearing and  
6 construction of the project. Defendants BLM and Spring Valley  
7 Wind, LLC opposed the motion on March 15, 2011 in separate  
8 responses.

### 9 10 **III. Legal Standard for a Preliminary Injunction<sup>5</sup>**

11 *Winter v. Natural Resources Defense Council Inc.* set forth a  
12 four-factor test the court must apply before issuing injunctive  
13 relief. 129 S. Ct. 365, 374 (2008). Plaintiffs seeking injunctive  
14 relief must establish: (1) a likelihood of success on the merits,  
15 (2) a likelihood plaintiffs will suffer irreparable harm in the  
16 absence of preliminary relief, (3) the balance of equities sharply  
17 favors the plaintiffs, and (4) an injunction is in the public  
18 interest. *Id.*

19 The court may also use a "sliding scale" approach. If there  
20 exist "'serious questions going to the merits ... and the balance  
21 of hardships tips sharply in the plaintiff's favor,'" then the  
22 court may issue an injunction, assuming the other *Winter* factors

23 \_\_\_\_\_  
24 for stay within 45 days, the stay is deemed denied and the decision  
25 made effective.

26 <sup>5</sup> The standard for a preliminary injunction and a temporary  
27 restraining order are the same. See *Lockheed Missile & Space Co. v.*  
28 *Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995).

1 are met. *Alliance for Wild Rockies v. Cottrell*, 2011 WL 208360, at  
2 \*7 (9th Cir. Jan. 25, 2011) (internal citations omitted).

3 An injunction is not a remedy that issues automatically in an  
4 environmental case. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311  
5 (1982). There is no presumption that environmental harm should  
6 outweigh other harms to the public interest. *Winter*, 129 S. Ct. at  
7 382. Plaintiffs have a heavy burden in establishing the need for  
8 an injunction. *Id.* at 374. The court, when it issues an  
9 injunction, must craft it as narrowly as possible. *Monsanto Co. v.*  
10 *Geertson Seed Farms*, 130 S. Ct. 2743, 2758 (2010).

#### 11 12 **IV. Analysis**

##### 13 A. Likelihood of Success on the Merits

14 Plaintiffs claim the BLM conducted a "fast track" approval of  
15 the Spring Valley Wind Facility so that the project could take  
16 advantage of federal financing under the American Recovery and  
17 Reinvestment Act, which required project approval by the end of  
18 2010. It is alleged this approval process was pushed by high-level  
19 BLM officials and Spring Valley Wind, LLC proponents in violation  
20 of NEPA. Specifically, plaintiffs claim: (1) there are significant  
21 and unknown environmental impacts to the project site that warrant  
22 an EIS, not just an EA; (2) the BLM's decision provided no detailed  
23 statement of reasons establishing that the project's impacts are  
24 insignificant; (3) the BLM failed to take a "hard look" at the  
25 environmental impacts without adequate scientific data, including  
26 impacts to bats and sage-grouse, and the cumulative environmental  
27 impacts of the project; (4) the decision did not properly consider  
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1 or address public comments and opposing views; and (5) the final EA  
2 failed to consider an adequate range of alternative courses of  
3 action.

4           1. *APA and Review of the BLM's Decision*

5           The Administrative Procedures Act, 5 U.S.C. § 706, governs the  
6 court's review of agency action under NEPA. The court must  
7 determine if the agency action in question was "arbitrary,  
8 capricious, an abuse of discretion, or otherwise not in accordance  
9 with law," or "without observance of procedure required by law." 5  
10 U.S.C. §§ 706(2)(A), (D) (2006). This standard requires the court  
11 to ensure that the agency has taken the requisite "hard look" at  
12 the environmental consequences of its proposed action, the agency's  
13 decision is based on a reasoned evaluation of all the relevant  
14 factors, and the agency has sufficiently explained why the  
15 project's impacts are insignificant. *National Parks & Conservation*  
16 *Assoc. v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001).

17           This is a highly deferential standard and the court must defer  
18 to an agency's decision that is "fully informed and well-  
19 considered." *Blue Mountains Biodiversity Project v. Blackwood*, 161  
20 F.3d 1208, 1211 (9th Cir. 1998) (internal citation omitted). The  
21 court must be careful not to substitute its own judgment for that  
22 of agency experts. See *Greenpeace Action v. Franklin*, 14 F.3d 1324,  
23 1332 (9th Cir. 1993); *Marsh v. Oregon Natural Resources Council*,  
24 490 U.S. 360, 378 (1989).

25           An agency decision is arbitrary and capricious where it  
26 "relied on factors Congress did not intend it to consider, entirely  
27 failed to consider an important aspect of the problem, or offered  
28

1 an explanation that runs counter to the evidence before the agency  
2 [at the time of its decision] or is so implausible that it could  
3 not be ascribed to a difference in view or the product of agency  
4 expertise." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.  
5 2008) (*en banc*) (quotations omitted). Plaintiffs have the burden of  
6 showing that any decision or action by the agency was arbitrary and  
7 capricious. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

8           2. *NEPA Requirements for an Environmental Impact*  
9           *Statement*

10           NEPA requires federal agencies, like the BLM, to prepare an  
11 environmental impact statement EIS for all "major Federal actions  
12 significantly affecting the quality of the human environment." 42  
13 U.S.C. § 4332(2)© (2006). This is to ensure that the agency "will  
14 have available, and will carefully consider, detailed information  
15 concerning significant environmental impacts; it also guarantees  
16 that the relevant information will be made available to the larger  
17 [public] audience." *Robertson v. Methow Valley Citizens Council*,  
18 490 U.S. 332, 349 (1989).

19           The requirement to prepare an EIS is triggered when a proposed  
20 project will "significantly affect" the environment. 42 U.S.C. §  
21 4332(2)(C). An agency may prepare an EA "to decide whether the  
22 environmental impact of a proposed action is significant enough to  
23 warrant preparation of an EIS... An EA is a 'concise public  
24 document that briefly provide[s] sufficient evidence and analysis  
25 for determining whether to prepare an EIS or a finding of no  
26 significant impact' (FONSI)." *Blue Mountains Biodiversity Project*,  
27 161 F.3d at 1212 (quoting 40 C.F.R. § 1508.9). EAs may "tier" to  
28

1 other NEPA documents, but tiering does not eliminate the EIS  
2 requirement when a proposed project significantly affects the  
3 environment. 40 C.F.R. §§ 1502.20, 1508.28. If an agency decides  
4 not to prepare an EIS, it must provide a detailed statement of  
5 reasons explaining why the proposed project's impacts are  
6 insignificant. *Blue Mountains Biodiversity Project*, 161 F.3d at  
7 1212.

8 "An EIS must be prepared if 'substantial questions are raised  
9 as to whether a project ... may cause significant degradation of  
10 some human environmental factor.'" *Id.* (internal citations  
11 omitted). Plaintiffs need not show that significant effects *will*  
12 occur, it is enough to raise "substantial questions" whether a  
13 project *may* have a significant effect on the environment. *Id.* To  
14 determine if a project may have "significant" impacts, an agency  
15 must evaluate ten NEPA factors. 40 C.F.R. § 1508.27(b). The  
16 factors at issue in this case are: effects that are "highly  
17 uncertain or involve unique or unknown risks" or are "likely to be  
18 highly controversial"; "[u]nique characteristics of the geographic  
19 area such as proximity to historic or cultural resources, park  
20 lands, [] wetlands, [] or ecologically critical areas"; "[t]he  
21 degree to which the action ... may cause loss or destruction of  
22 significant scientific, cultural, or historic resources"; and the  
23 presence of cumulative impacts. See 40 C.F.R. §§ 1508.27(b)(3)-(5),  
24 (7)-(8). Just "one of these factors may be sufficient to require  
25 preparation of an EIS." *Ocean Advocates v. U.S. Army Corps of*  
26 *Engineers*, 402 F.3d 846, 865 (9th Cir. 2005).

27 An agency's decision to forego issuing an EIS may be justified  
28

1 by the adoption of mitigation measures to offset potential  
2 environmental impacts. *Babbitt*, 241 F.3d at 733-34 (citing *Wetlands*  
3 *Action Network v. United States Army Corps of Eng'rs*, 22 F.3d 1105,  
4 1121 (9th Cir. 2000); *Friends of Payette v. Horseshoe Bend*  
5 *Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993).). Further,  
6 if "significant measures are taken to 'mitigate the project's  
7 effects, they need not completely compensate for adverse  
8 environmental impacts.'" *Wetlands Action Network*, 222 F.3d at 1121  
9 (quoting *Friends of Payette*, 988 F.2d at 993.). The proposed  
10 mitigation measures must be "developed to a reasonable degree." *Id.*  
11 Mitigation measures with supporting analytical data are sufficient  
12 to support a finding of no significant impact. See *Idaho Sporting*  
13 *Congress v. Thomas*, 137 F.3d 1146, 1151 (9th Cir. 1998). "In  
14 evaluating the sufficiency of mitigation measures, [the court]  
15 consider[s] whether they constitute an adequate buffer against the  
16 negative impacts that may result from the authorized activity[,  
17 s]pecifically, ... examin[ing] whether the mitigation measures will  
18 render such impacts so minor as to not warrant an EIS." *Babbitt*,  
19 241 F.3d at 734 (citing *Greenpeace Action*, 14 F.3d at 1332.).

20 (a) Sage-Grouse Impacts

21 Sage-grouse may be threatened by range fragmentation and  
22 habitat destruction. Here, existing roads and facilities already  
23 fragment area sage-grouse habitats. (EA 58) The project area is  
24 not one with high-quality sagebrush, suitable for sage-grouse  
25 habitats. (EA 58, 165) Of the 38 sage-grouse leks in Spring  
26 Valley, there are none in the project area. (EA 59) The closest  
27 lek is 1.5 miles from the site, is separated from the project by  
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1 State Highway 893, and averages only three birds per year. *Id.* Two  
2 other leks about 6000 feet from the project's boundaries are  
3 inactive and are divided by U.S. Highway 50/6, State Highway 893  
4 and other dirt roads. *Id.* Telemetry data collected between 2008  
5 and 2010 by the Southern Nevada Water Authority recorded no birds  
6 in the project area. *Id.* The EA determined that construction  
7 would temporarily disturb some sage-grouse habitat, but that the  
8 area disturbed encompassed only four percent of the total habitat.  
9 Permanent disturbance would be even more minimal at one percent of  
10 the total habitat. (EA 105-106)

11 The BLM will implement mitigation measures to reduce the  
12 impact on sage-grouse. Permitted activities are restricted during  
13 sage-grouse mating season, from March 1 to May 15, within two miles  
14 of an active lek. (EA 160, 164-9) There are stringent  
15 requirements to prevent weed infestation and protect soil resources  
16 that will be managed by a third-party contractor under the  
17 direction of the BLM. (SVW Opp'n Inlow Decl. ¶ 3) Spring Valley  
18 Wind will provide \$500,000 for sagebrush enhancement and  
19 restoration for locations with higher-quality habitat. (EA app. F,  
20 at 18) This amount is eligible for matching federal and state  
21 funds. In addition, the BLM will work to reduce predation through  
22 mitigation measures, such as the installation of anti-perching  
23 devices on existing and new power lines. (EA 166)

24 After considering the record and the mitigation measures to be  
25 implemented by the BLM, the court concludes that the plaintiffs  
26 have not shown that substantial questions have been raised that the  
27 project will cause significant degradation to the sage-grouse  
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1 population and habitat. The agency did not abuse its discretion in  
2 deciding not to prepare an EIS relative to the sage-grouse.

3 (b) Bat Impacts

4 The Rose Guano Cave is four miles east of the project site and  
5 a seasonal migratory stop-over to approximately one million  
6 Brazilian free-tailed bats between August and September. (EA 61)  
7 During their fall migration, the bats remain at the cave for only  
8 four days before leaving the local area. *Id.* While at the cave,  
9 the bats' nightly foraging pattern takes them to high altitudes  
10 around the valley and south of the project site to agricultural  
11 fields. (EA 61-62 (preliminary data showed that majority of bats  
12 reach altitudes of 1,200 feet after exiting the cave and before  
13 traveling south to agricultural fields where they sometimes forage  
14 at 2,400 feet above ground level, only some "portion of [the bat]  
15 plume drop[s] to forage in valley" in which the project site is  
16 located), 109 ("bats are ... expected to fly around the individual"  
17 wind turbines)) The project area is not a roosting site for the  
18 species. (EA 62)

19 Because of the cave's relative proximity to the project area  
20 and because the bats may occasionally fly near the project site  
21 while foraging or migrating, the BLM undertook a comprehensive  
22 review of available scientific reports regarding the bats'  
23 vulnerability to wind turbine mortality, either through barotrauma  
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1 or collision, while compiling the EA. (PAR 96<sup>6</sup>, 109<sup>7</sup>, 1546<sup>8</sup>, 1222<sup>9</sup>,  
2 1229, 1234, 1237-1239) The BLM also studied bat mortality rates  
3 from 11 wind energy facility studies that focused on facility and  
4 habitat sites similar to Spring Valley. (EA app. F, at 24) Based  
5 on these studies, the BLM concluded that the bat mortality  
6 threshold for the project would be 192 bats per year, or 2.5 bats  
7 per turbine per year.<sup>10</sup> *Id.* This threshold was developed through  
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10 <sup>6</sup>Baerwald, et al. 2008. *Barotrauma is a Significant Cause of Bat*  
11 *Fatalities at Wind Turbines.*

12 <sup>7</sup> Arnett, et al. 2009. *Effectiveness of Changing Wind Turbine*  
13 *Cut-in Speed to Reduce Bat Fatalities at Wind Facilities.* (2008 Annual  
14 Report (published 4/1/2009)).

15 <sup>8</sup> Baerwald, et al. 2009. *A Large-Scale Mitigation Experiment to*  
16 *Reduce Bat Fatalities at Wind Energy Facilities.*

17 <sup>9</sup> Sherwin, R.E. 2009. *A Study on the Use of Rose Guano Cave,*  
18 *Nevada, by Mexican Free-Tailed Bats* (*Tadarida brasiliensis*).

19 <sup>10</sup> The BLM considered data from a Montana Judith Gap Study which  
20 presents a bat mortality rate of 13.4 bats per turbine per year. (EA  
21 app. F, at 24) The data from the Judith Gap Study could not be  
22 verified like that of the other ten studies in the group. *Id.* The BLM  
23 also examined species-specific mortality threshold data. *Id.* at 29.  
24 While the species-specific mortality threshold for the Brazilian free-  
25 tailed bat is higher than the species-specific mortality threshold for  
26 other bat species, this appears to be due to the relative abundance  
27 of Brazilian free-tailed bats, which seems to be significantly higher  
28 than other species. *Id.* (The relative abundance of free-tailed bats

1 coordination between the BLM, NDOW, FWS, and other wildlife  
2 professionals and experts. *Id.*

3       Based on the data presented and potential concerns raised in  
4 these studies, the BLM properly developed a detailed process for  
5 addressing potential impacts on bats from the project and to ensure  
6 the bat mortality rate would not surpass 192 bats per year. That  
7 process is set forth in detail in the EA, particularly in the ABPP.  
8 *Id.* at 14-31. The process is divided into three sections: initial  
9 mitigation, pre and post-construction monitoring, and adaptive  
10 management based on monitoring results. *Id.* at 14. Initial  
11 mitigation measures include a Technical Advisory Committee (TAC) to  
12 monitor Spring Valley Wind Energy Facility (SVWEF) activities,  
13 "including mortality data, to determine the need for project  
14 mitigation." *Id.* Bat mortality would be monitored by the TAC  
15 through daily project site surveys to ensure that mitigation  
16 measures are promptly initiated once the mortality threshold is  
17 met. To ensure full functionality, the TAC will be funded in part  
18 by Spring Valley Wind, LLC. *Id.* at 15. Initial mitigation measures  
19 also include radar monitoring of bird and bat flight habits and  
20 patterns. The radar system is intended to serve as a "management  
21 tool to assist with selecting the most effective times for [turbine  
22 speed] curtailment," but may also be used as an "early warning"  
23 system, "providing advance detection of bird or bat activity ...  
24 with the ability to shut down turbines." *Id.* at 16. In addition,  
25 mitigation measures include turbine speed curtailment and shut  
26 downs. *Id.* at 17. Curtailment initially will be utilized during  
27 \_\_\_\_\_  
28 is 11.4 compared to 0-2 or 3 for other bat species).



1 the "highest use periods of August 1 through September 31, from  
2 sunset to 4 hours after sunset." *Id.* The proposed adaptive  
3 management process governs the implementation of up to five turbine  
4 curtailment mitigation phases if the designated bat mortality  
5 threshold is met. *Id.* at 22-23. These phases contemplate up to  
6 1,080 hours of cut-in speed curtailment and turbine shutdowns for  
7 up to 37,500 hours. *Id.* at 25. Other mitigation measures include  
8 "raptor proofing" facility infrastructure, nocturnal surveys, a  
9 \$500,000 wildlife fund, and public outreach. *Id.* at 17-18, 28.

10 The EA provides persuasive scientific data that the impact on  
11 the bats, if these mitigation measures are implemented, will not be  
12 significant. Studies of the bats at the Rose Guano Cave, located  
13 four miles east of the project site, suggest that the bat  
14 population is at the case for only two months out of the year, they  
15 remain in the cave for four days while there, and fly to 1,200 feet  
16 after leaving the cave to forage in agricultural fields south of  
17 the project site, reaching heights well above the 400 foot maximum  
18 turbine height. (EA 61) The bats may avoid the project site  
19 altogether. (EA 109) In addition, radar monitoring of bat flight  
20 and migratory habits in combination with turbine curtailment during  
21 times of high bat activity has been shown to reduce bat mortality  
22 by 53 to 87 percent. (EA 98)<sup>11</sup> Lastly, the predicted short-term  
23 disturbance of bat habitat and foraging area represents only 3.9  
24 percent of the total available foraging area within the project

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25 <sup>11</sup> Arnett, et al. 2009. *Effectiveness of Changing Wind Turbine*  
26 *Cut-in Speed to Reduce Bat Fatalities at Wind Facilities.* (2008 Annual  
27 Report (published 4/1/2009)).  
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1 boundaries, and the long-term disturbance is only 1.3 percent of  
2 the project area. (EA 96)

3 As a result of the BLM including extensive mitigation measures  
4 in the final EA, including an Avian and Bat Protection Plan (ABPP),  
5 and adopting an Alternative Development Alternative, state and  
6 federal agencies, such as the Nevada Department of Wildlife (NDOW)  
7 and the U.S. Fish and Wildlife Service (FWS), that had initially  
8 expressed concerns with bat attraction to turbines, potentially  
9 high bat mortality rates, and, therefore, potentially significant  
10 impacts on the environment in the preliminary EAs, supported the  
11 BLM's final EA and adoption of the FONSI. (PAR 771 (NDOW's concerns  
12 addressed in final EA), 772 (NDOW enthusiastically in support of  
13 mitigation measures), 867 (FWS believe the ABPP to be appropriate),  
14 520 (internal BLM concerns addressed in final EA)) Indeed, the  
15 substantial mitigation measures to be implemented by the BLM  
16 throughout the life of this project removes any significant  
17 uncertainty that there are substantial questions concerning  
18 potential environmental impacts.

19 The agency's decision to forego issuing an EIS is justified by  
20 the adoption of significant mitigation measures to offset potential  
21 environmental impacts. *Babbitt*, 241 F.3d at 733-34. These measures  
22 are supported by analytical data and they adequately buffer against  
23 any potential negative impacts. They support a finding of no  
24 significant impact not warranting an EIS. *See Idaho Sporting*  
25 *Congress*, 137 F.3d at 1151; *Babbitt*, 241 F.3d at 734. The court  
26 therefore concludes that the BLM did not abuse its discretion or  
27 act arbitrarily or capriciously in preparing and relying on the EA.

28

1 (c) EA Properly Tiered to Other Documents

2 "Tiering, or avoiding detailed discussion by referring to  
3 another document containing the required discussion, is expressly  
4 permitted" and encouraged under NEPA, so long as the tiered-to  
5 document has been subject to NEPA review. 40 C.F.R. §1502.02.  
6 Tiered analyses are viewed as a whole to determine whether they  
7 address all the impacts. *S. Or. Citizens Against toxic Sprays,*  
8 *Inc. v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983). A programmatic  
9 environmental impact statement (PEIS) may obviate the need for a  
10 site-specific impact statement. *Cf. Salmon River Concerned Citizens*  
11 *v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). However, new and  
12 significant issues that develop after an agency issues a PEIS  
13 should be evaluated in an EA. *Id.* Only where neither the general  
14 nor the site-specific documents address significant issues is  
15 environmental review rejected. *Te-Moak Tribe v. U.S. Dep't of the*  
16 *Interior*, 608 F.3d 592, 602-7 (9th Cir. 2010).

17 The 2005 Wind PEIS contemplated site-specific tiering when it  
18 stated: "The level of environmental analysis to be required under  
19 NEPA for individual wind power projects will be determined at the  
20 [field office] level. For many projects, it may be determined that  
21 a tiered ... [EA] is appropriate in lieu of an EIS." (Wind PEIS A-2  
22 - A-8)<sup>12</sup> The Wind PEIS analyzed the potential impacts of wind  
23 energy development on public lands, it specifically studied BLM  
24 lands in the western United States, and examined mitigation  
25 measures to reduce harmful impacts on natural, cultural, and  
26 socioeconomic resources.

27 \_\_\_\_\_  
28 <sup>12</sup> <http://windeis.anl.gov/documents/fpeis/index.cfm>.

1 Any new issues that developed after the Wind PEIS was  
2 published were addressed in detail in the final Spring Valley Wind  
3 EA. The EA specifically supplements the Wind PEIS with site-  
4 specific data on bats and sage-grouse on pages 52-53, 58-63, 96-98,  
5 101-102, 105-111, 151-153, 165, 167. The EA considered barotrauma  
6 in bats, bat flight patterns and height, the Fish and Wildlife  
7 Service's decision to list sage-grouse as "warranted" for the  
8 endangered species list, and 2008-2010 telemetry data concerning  
9 active and inactive leks in the project area. (EA 97, 108-109, 58-  
10 59)

11 An EA need not consider all mitigation measures proposed in a  
12 PEIS. Measures should be evaluated objectively and on a site-  
13 specific basis before being implemented. (Wind PEIS 5-1) The BLM  
14 considered the mitigation measures proposed by the Wind PEIS and  
15 implemented the ones most suited for the project site. (EA 160-173)  
16 The Wind PEIS lists hundreds of potential mitigation measures. (See  
17 e.g. EA 161-171) It would not be possible to implement all the  
18 suggested measures. Notably, when the EA did not adopt a  
19 mitigation measure, it explained why. For example, the Wind PEIS  
20 suggests orienting turbines to bat and bird flight paths. The BLM  
21 considered this mitigation measure and determined it was infeasible  
22 at the project site because the turbines could not take advantage  
23 of the wind flow through Spring Valley oriented in that position.  
24 (EA 164) Tiering the EA to the Wind PEIS was proper.

25 (d) "Hard Look" and Cumulative Impacts

26 In determining whether an action requires an EIS, the agency  
27 must consider whether the action "is related to other actions with  
28

1 individually insignificant but cumulatively significant impacts.”  
2 40 C.F.R. § 1508.27(b)(7). The EA’s discussion of cumulative  
3 impacts includes a detailed table that discusses past actions,  
4 present actions and future actions that may cumulatively impact the  
5 environment, including other impacts to the environment such as  
6 ranching and grazing and notes that adjustments may need to be made  
7 to maintain habitat quality of other species in the area, including  
8 utilizing existing fencing and vegetation treatment. (EA 148-151)  
9 It also tiers to the Wind PEIS<sup>13</sup> and notes that “direct, indirect  
10 and cumulative impacts” are “quantified where possible” in its  
11 individual “discussions of impacts on each affected source.” (EA  
12 148) Impacts on bats and sage-grouse are addressed in more detail  
13 in other sections of the EA, as set forth in the discussions above.  
14 (EA 81-122, 96-98, 101-102, 108-110, app. F) By tiering to the  
15 Wind PEIS and incorporating new scientific data into its final  
16 decision, together with articulations of substantial mitigation  
17 measures, the court concludes that the BLM sufficiently considered  
18 the cumulative impacts of the project and took a “hard look” as  
19 required.

20 (e) Reasons Impacts Insignificant

21 The BLM outlined why the environmental impacts from the  
22 project would be insignificant in the FONSI and the final EA. The  
23 FONSI references the Wind PEIS, Spring Valley EA and ABPP. The EA  
24 itself is a detailed statement of reasons explaining why

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25 <sup>13</sup> The Wind PEIS ultimately concluded that incremental effects  
26 from wind energy development would be minimal. (Wind PEIS 6-9, 6-12)  
27 The EA references this conclusion. (EA 148)  
28

1 environmental impacts are insignificant.

2 As discussed above, the EA explains in detail the nature of  
3 sage-grouse activity in Spring Valley, the lack of active leks  
4 within the project boundaries, and previous and present  
5 fragmentation of habitat. (EA 58-59) The EA determined that  
6 construction would temporarily disturb some sage-grouse habitat,  
7 but that the area disturbed encompassed only four percent of the  
8 total habitat. Permanent disturbance would be even more minimal at  
9 one percent of the total habitat. (EA 105-106) Sagebrush  
10 restoration and enhancement would reduce these impacts further. (EA  
11 25)

12 While there is some uncertainty as to how the project will  
13 impact the bat population that temporarily roosts at the Rose Guano  
14 Cave during migration, the EA, as tiered to the Wind PEIS, provides  
15 substantial scientific evidence that the project will not  
16 significantly affect the bat population if the mitigation measures  
17 expressed in the EA are implemented as planned. As discussed in  
18 depth in the EA, a TAC to monitor project activities and species  
19 mortality thresholds, nocturnal surveys, radar detection systems,  
20 phased turbine curtailment and shutdowns, a wildlife fund, and  
21 predator-proofing the area, in conjunction with already known bat  
22 habits should reduce the risk to bats to insignificant levels.

23 For the reasons stated here and set forth above, the court  
24 concludes that the BLM has provided a detailed statement of reasons  
25 explaining why the proposed project's impacts are insignificant.  
26 *Blue Mountains Biodiversity Project*, 161 F.3d at 1212.

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1 (f) Consideration of Alternatives

2 Plaintiffs contend that the BLM neglected to implement the  
3 following mitigation measures and alternatives: (1) avoid placing  
4 wind turbines near known bat colonies, migration corridors, or  
5 flight paths; (2) turbine arrays should be oriented to minimize bat  
6 and avian mortality; (3) avoid siting projects in sage-grouse  
7 leks; and (4) avoid creating attractions for raptors and predators.

8 The BLM adequately considered alternatives to mitigate  
9 potential environmental harms. The EA is tiered to the Wind PEIS,  
10 which considered over 200 possible mitigation measures. (EA 161-  
11 171) One of the mitigation measures adopted is the installation of  
12 anti-perching devices on existing and new power lines to prevent  
13 increased predation (predator or raptor-proofing the area). (EA  
14 166) Although the turbines will not be oriented parallel to known  
15 bird and bat movements,<sup>14</sup> they will be situated four miles east of  
16 the Rose Guano Cave and the bats usual foraging flight path takes  
17 them south to agricultural fields, away from the project. (EA 61)  
18 In addition, data from telemerty surveys (2008 to 2010) shows low  
19 quality sagebrush habitat and no sage-grouse activity and no active  
20 leks within the project's boundaries. (EA 58-59) The final EA also  
21 adopts the Alternate Development Alternative and Avian and Bat  
22 Protection Plan that incorporate as many mitigation measures for  
23 bats and sage-grouse as feasible given the project site's  
24 characteristics. The Alternate Development Alternative locates the  
25 wind turbines in a smaller project area, with a protective two mile

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26 <sup>14</sup> Orienting turbines in this way would render project inoperable.  
27 (EA 164)  
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1 buffer from the nearest active sage-grouse leks. (FONSI 3) The  
2 ABPP includes data from a two-year preconstruction study used to  
3 determine bat impacts, sets a bat mortality threshold at 192 bats  
4 per year, and suggests substantial mitigation measures, such as  
5 radar monitoring of bat activity and turbine speed curtailment to  
6 avoid meeting the threshold. *Id.* Thus, the EA specifically  
7 addresses each of the alternatives plaintiffs contend the BLM  
8 ignored and explains if the measure was adopted, modified, or  
9 rejected and why. (EA 164 - 165)

10 (g) Consideration of Public Comments

11 The BLM adequately considered and addressed public comments in  
12 the EA. 67 letters from the public containing almost 1,000  
13 comments in response to the preliminary EAs were addressed in the  
14 final EA. The bulk of the public comments are incorporated and  
15 addressed in Table 6.1.1 on pages 161-173 of the EA.

16 A number of agencies that voiced concerns at the outset of the  
17 review process, later concluded that the BLM had sufficiently  
18 addressed their concerns. For example, the Southern Nevada Water  
19 Authority (SNWA) and the Fish and Wildlife Service (FWS) initially  
20 expressed concerns about the sage-grouse in response to preliminary  
21 EAs. These concerns were resolved in the final EA. The SNWA  
22 acknowledged this in a letter lauding the project's sagebrush  
23 conservation plan and approving the Alternate Development  
24 Alternative. (PAR 1544) The FWS expressed concern over the  
25 proximity of leks to the project area. BLM telemerty data tracking  
26 sage-grouse movement in the project area from 2008-2010 addressed  
27 this concern and concluded that there was little, if any, sage-

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1 grouse activity within the project boundaries. (PAR 1572; EA 59)  
2 The BLM also looked to its National Sage-Grouse Habitat  
3 Conservation Strategy to determine that a two mile buffer between  
4 the project site and active leks was sufficient. The Nevada  
5 Department of Wildlife and FWS initially expressed concerns about  
6 the projects impacts on bats. (PAR 1588-1591) However, these  
7 agencies approved of the final ABPP and EA. In a letter, the NDOW  
8 stated that concerns raised early on in the process "have been  
9 addressed in this environmental assessment" and mitigation plan.  
10 (PAR 771) NDOW "enthusiastically support[ed] the use of adaptive  
11 management in ... minimizing wildlife mortality... [and] the use of  
12 a [TAC] to identify and solve project issues." (PAR 772) The FWS  
13 stated it believed the ABPP "to be appropriate" if the agency's  
14 "substantive comments are incorporated." (PAR 867) Internal BLM  
15 concerns and comments were also addressed in the final EA. (PAR  
16 520)

17 Based on the foregoing, the court concludes the BLM considered  
18 all the relevant factors, including important mitigation measures,  
19 took a "hard look" at the environmental impacts, and, therefore,  
20 did not act arbitrarily, capriciously, or abuse its discretion when  
21 it decided that the project's impacts on the environment would be  
22 insignificant and an EIS was not required. Accordingly, the court  
23 finds that plaintiffs are not likely to succeed on the merits of  
24 their claim that an EIS was required in this case.

25

26 B. Irreparable Harm

27 Plaintiffs must show that irreparable injury is likely in the  
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1 absence of an injunction. *Winter*, 129 S. Ct. at 375. For the  
2 reasons set forth above, irreparable injury to the sage-grouse  
3 population seems unlikely. The greater sage-grouse is a "candidate  
4 species" for the endangered species list, but has not be  
5 prioritized. (EA 58) Indeed, in the fall of 2010, the Nevada  
6 Department of Wildlife allowed hunting of sage-grouse throughout  
7 most of Nevada, including Spring Valley. (SVW Opp'n Harrison Decl.  
8 ¶ 4) In addition, fragmentation of habitat does not pose a  
9 substantial risk in this case. The project area is not one with  
10 high-quality sagebrush, suitable for sage-grouse habitats. (EA 58,  
11 165) Existing roads and facilities already fragment the area. (EA  
12 58) None of the 38 sage-grouse leks in Spring Valley are in the  
13 project area. (EA 59) The closest lek is 1.5 miles from the site,  
14 is separated from the project by State Highway 893, and averages  
15 only three birds per year. *Id.* Two other leks about 6000 feet from  
16 the project's boundaries are inactive and are divided by U.S.  
17 Highway 50/6, State Highway 893 and other dirt roads. *Id.*  
18 Telemetry data collected between 2008 and 2010 by the Southern  
19 Nevada Water Authority recorded no birds in the project area. *Id.*  
20 Thus, temporary disturbance of sage-grouse habitat is predicted to  
21 be only four percent of the total habitat and permanent disturbance  
22 only one percent of the total habitat. (EA 105-106) Finally, the  
23 BLM has designed mitigation measures to reduce the impact on sage-  
24 grouse including restricting project activities between March and  
25 May and within two miles of an active lek, managing weed  
26 infestation and soil resources, and funds for sagebrush enhancement  
27 and restoration. (EA 160, 164-9; SVW Opp'n Inlow Decl. ¶ 3; EA app.

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1 F, at 18) Given the poor quality of sagebrush habitat within the  
2 project boundaries, the lack of sage-grouse use of the project  
3 area, the BLM's mitigation measures, and Spring Valley Wind's  
4 commitment to enhance existing habitat, it is unlikely the sage-  
5 grouse population will suffer irreparable harm if the court denies  
6 the plaintiffs' request for injunctive relief.

7 In addition, the initial stages of development of the project  
8 pose no threat to the bats. Any risk to the bat population arises  
9 from operational wind turbines. The wind turbines will not be  
10 operational until April 1, 2012. (SVW Opp'n Inlow Decl. ¶ 16)  
11 There is no risk of irreparable harm to the bats *before* a decision  
12 on the merits of this case is determined. *Winter*, 129 S. Ct. at  
13 375.

14 Also, for the reasons set forth in detail above, the risks to  
15 the bats from operational wind turbines should be insignificant as  
16 well. As the studies considered and conducted by the BLM indicate,  
17 the Rose Guano Cave is a seasonal migratory stop-over for a large  
18 population of free-tailed bats, but the bats only use the cave for  
19 a limited period of time. (EA 61) Further, their foraging and  
20 migratory patterns tend to take them parallel to and away from the  
21 project site at high altitudes. *Id.* These habits when combined  
22 with the extensive mitigation measures proposed by the BLM -  
23 including but not limited to, radar detection and monitoring to  
24 break and feather turbine activity, phased turbine curtailment and  
25 shutdowns, a \$500,000 wildlife fund, and a TAC to regularly monitor  
26 project impacts so that the project will not exceed the reasonable  
27 bat mortality threshold of 192 bats per year set forth in the EA -  
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1 it is unlikely the bats will suffer irreparable harm. (EA 96, 98;  
2 EA app. F, at 15-31)

3 Accordingly, the court concludes that a denial of a  
4 preliminary injunction at this stage in the proceedings will not  
5 result in irreparable harm to either the sage-grouse or the free-  
6 tailed bats.

7  
8 C. Balance of Equities

9 Delaying this project would harm federal renewable energy  
10 goals. The United States government has ordered developing  
11 renewable, alternate energy sources to reduce the country's  
12 dependance on foreign oil and address concerns over climate change.

13 (BLM Opp'n Ex. E (Interior Orders 3285, 3289)) The Energy Policy  
14 Act of 2005 directs the Secretary of the Interior to approve  
15 renewable energy projects. Executive Order 13212 requires federal  
16 agencies to expedite renewable energy projects. (BLM Opp'n Ex. G)

17 The project is beneficial to Nevada's economic recovery. The  
18 project will generate enough energy to power 49,000 Nevada homes.  
19 (EA 5) Its property taxes will create over \$1.65 million in tax  
20 revenue for the state. (EA 144) It will create 225 construction  
21 jobs, with employment preferences to Nevada residents and about \$6  
22 million in wages during the construction period. (BLM's Opp'n  
23 D'Aversa 2d Decl. ¶ 3; SVW Opp'n Hardie Decl. ¶ 16) It will create  
24 up to 12 permanent operation positions. *Id.* Wages over the life of  
25 the project would be about \$15 million. *Id.* On the condition that  
26 the project is built, Spring Valley Wind has committed \$750,000 in  
27 economic benefits to White Pine County over the next 20 years. (SVW  
28

1 Opp'n Hardie Decl. ¶ 16D)

2 The defendants assert that a preliminary injunction would  
3 result in the loss of the project. Spring Valley Wind will likely  
4 lose federal funding through the ARRA if it does not begin  
5 construction on the project by the end of September 2011. *Id.* ¶ 10.  
6 It would also threaten the project's eligibility for an investment  
7 tax credit grant. *Id.* Without these financial incentives, it is  
8 likely the project would not be built. *Id.* In addition, an  
9 injunction would hinder Spring Valley Wind's ability to honor its  
10 contracts with Nevada Energy. *Id.* ¶11. Under these contracts,  
11 Spring Valley Wind must obtain construction financing by June 30,  
12 2011. *Id.* Finally, Spring Valley Wind has invested \$11 million in  
13 the project thus far. *Id.* ¶15. It will commit an additional \$12  
14 million to ensure the project is operational by June 30, 2012. *Id.*  
15 Spring Valley Wind faces a financial loss of \$23 million if the  
16 project is delayed. *Id.*

17 While the court recognizes that the denial of an injunction  
18 will result in the commencement of construction on the project, for  
19 the reasons set forth above, the court concludes that any  
20 disturbance of the sage-grouse and bat habitats will be minimal and  
21 will not significantly impact the environment as long as the  
22 mitigation measures set forth in the EA are complied with.<sup>15</sup>

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24 <sup>15</sup> In addition, the court, during the hearing on the plaintiffs'  
25 application for the injunction, urged the BLM, upon appropriate  
26 application by the plaintiffs, to consider the impact of the Texas  
27 Gulf Wind study might have, if any, on the mitigation measures set  
28 forth in the EA.

1 Therefore, the balance of equities tips in favor of the defendants.

2

3 D. Public Interest

4 The public has a strong interest in the project. Congress has  
5 articulated the public policy that our nation should incorporate  
6 clean energy as a necessary part of America's future and it is  
7 essential to securing our nation's energy independence and  
8 decreasing green house emissions. (SVW Opp'n Hardie Decl. ¶¶ 9-10  
9 (referencing ARRA of 2009 which amended Energy Policy Act of 2005))  
10 It is also important to Nevada's economic and clean energy goals.  
11 The state's unemployment rate is 14.9 percent. (BLM's Opp'n  
12 D'Aversa 2d Decl. ¶ 3) The project would generate over 220 new  
13 jobs with priority to Nevada residents and over \$20 million in  
14 wages. (BLM's Opp'n D'Aversa 2d Decl. ¶ 3; SVW Opp'n Hardie Decl. ¶  
15 16) Additionally, it would provide millions of dollars in property  
16 tax revenue. *Id.* Nevada is also committed to developing renewable  
17 energy sources. (SVW Opp'n, Ex. 3, Ex. C-1, Letter from Harry Reid  
18 to Mary D'Aversa ("I write to voice my support for the ...  
19 project[, which] ... represents an important milestone in  
20 developing Nevada's .. Clean energy resources.")) *See also* N.R.S. §  
21 701A.220. The project, which has contracted with Nevada Energy  
22 will certainly help the state reach these goals.

23 While the public also has a strong interest in preserving the  
24 environment and protecting species like the free-tailed bats and  
25 greater sage-grouse, as noted above, that interest in this case at  
26 this stage in the proceedings is outweighed by the other interests  
27 articulated in this decision.

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1 **V. Conclusion**

2 Having fully considered the administrative record and the  
3 arguments of the parties, and having weighed all relevant factors  
4 necessary for issuing a preliminary injunction - the likelihood of  
5 success on the merits, the likelihood of irreparable harm, the  
6 balance of equities, and the public interest - the court finds that  
7 the plaintiffs have failed to carry their burden of showing that a  
8 preliminary injunction should issue at this time. Plaintiffs'  
9 motion for a temporary restraining order/preliminary injunction  
10 (Docket No. 24) is DENIED.

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**IT IS SO ORDERED.**

DATED: This 28th day of March, 2011.

  
UNITED STATES DISTRICT JUDGE