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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING**

ALBANY COUNTY CONSERVANCY, )  
 )  
 and )  
 )  
 J. MICHAEL LOCKHART, )  
 )  
 *Petitioners,* )  
 )  
 v. )  
 )  
 TIMOTHY NOVOTNY, Field Manager, )  
 Rawlins Field Office, U.S. Bureau of )  
 Land Management, )  
 )  
 TRACY STONE-MANNING, Director, )  
 U.S. Bureau of Land Management, )  
 )  
 and )  
 )  
 DEB HAALAND, Secretary, )  
 U.S. Department of Interior, )  
 )  
 *Respondents.* )  
 )

Civ. No. \_\_\_\_\_

**PETITION FOR REVIEW OF  
FINAL AGENCY ACTION**

**INTRODUCTION**

1. This case challenges the Bureau of Land Management’s (“BLM’s”) authorization of a right of way (“ROW”) to construct, operate, maintain, and eventually decommission a proposed electric transmission line (“Rock Creek Line” or “Project”) on BLM-administered public lands in Albany and Carbon counties, Wyoming. In support of its authorization, BLM

prepared an Environmental Assessment (“EA”) pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, which finds that no significant environmental effects are likely to result from the Project. That EA, however, is fatally flawed for numerous reasons. As a result, BLM’s Finding of No Significant Impact (“FONSI”) and Decision Record effectuating the challenged ROW are arbitrary and capricious, and undertaken without the procedure required by law.

2. At its core, NEPA endeavors to foster environmentally conscious decisionmaking. It does this in large part by encouraging those who will be most affected by a particular federal decision to identify and inform federal officials about the likely impacts of their decision—effects that local stakeholders know and understand best. Here, however, BLM decided that those stakeholders’ views do not matter. BLM chose instead to conduct its review of the Project in secret—without any public notice or input whatsoever—despite explicit and repeated requests from the public to participate in the NEPA process.

3. The federal government’s decision to ignore the concerns and views of Wyoming residents who will bear the action’s impacts unsurprisingly renders its analysis deficient. Even though the Project is explicitly meant to connect to the grid only one industrial-scale wind farm comprised of more than 100 turbines (the Rock Creek Wind Facility), BLM evaded any consideration of how that facility will impact the local environment and economy by alleging—without any explanation or support—that the Project could be built elsewhere. This is concerning because the Rock Creek Wind Facility is just one of many large-scale, commercial wind farms the federal government has foisted on Albany and Carbon County residents without even attempting to examine the magnitude of harm that such an unprecedented concentration of turbines will have on Wyoming in either the short or long term.

4. At the very minimum, BLM’s decisions here merit careful scrutiny by federal officials in an Environmental Impact Statement (“EIS”) that considers and incorporates the views of those local stakeholders who will bear the brunt of federal energy policy for decades to come. By instead relying on a mere EA that does *none* of these things, BLM’s Decision Record flouts the basic purposes of NEPA and the agency’s own guidance implementing the Act.

5. For these reasons, and those alleged below, BLM’s authorization of the Rock Creek Line violates NEPA, the policies and regulations implementing NEPA, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. The decisions challenged here must be set aside.

### **JURISDICTION**

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).

### **PARTIES**

7. Petitioner Albany County Conservancy (“ACC”) is a nonprofit corporation with hundreds of members and is headquartered in Laramie, Wyoming. As a grassroots organization comprised of concerned residents, ACC works to protect and preserve the open spaces of Albany County through community outreach and education efforts, as well as direct advocacy. Although ACC appreciates and encourages sustainable energy generation, it is committed to ensuring that such projects will exist in harmony with the ecosystems found in and surrounding Albany County by encouraging thorough pre-construction site assessments and studies that minimize harms to environmental, historic, and cultural resources in the region.

8. Petitioner ACC’s members and supporters routinely visit the areas of BLM land that will be impacted by the ROW challenged in this case to view, study, or otherwise appreciate

the wildlife that frequent these areas. Petitioner ACC's members and supporters derive immense personal, scientific, professional, recreational, and aesthetic enjoyment from viewing wildlife in these areas unimpeded by industrial-scale energy projects and associated infrastructure such as access roads and transmission lines.

9. Petitioner J. Michael Lockhart is a resident of Albany County, Wyoming. Mr. Lockhart is a trained wildlife biologist and retired after a 33-year career with the U.S. Fish and Wildlife Service. Over his professional career, and since his retirement, Mr. Lockhart has focused on field research to assess risks to bald and golden eagles from various development projects, including transmission lines and wind energy facilities. Since 2014, Mr. Lockhart has been trapping and satellite tagging golden eagles for three separate research projects in Wyoming, including for the U.S. Fish and Wildlife Service, the U.S. Geological Survey, and Conservation Science Global, Inc. Mr. Lockhart has intimate knowledge and familiarity with breeding, foraging, migration, and other behaviors, as well as essential habitat needs, of eagles in Wyoming.

10. Mr. Lockhart has spent considerable time in central and south-central Wyoming researching eagle habitat use and movements and evaluating wind project development risks to eagles, including in areas that will be affected by the Rock Creek Line and Wind Facility. Since 2014, Mr. Lockhart has trapped and tagged at least 196 golden eagles in Wyoming as part of the research projects described above, which allows researchers to assess area activity patterns of eagles and potential impacts from wind energy projects. Six golden eagles tagged by Mr. Lockhart in Wyoming died by wind turbine strikes, which is more than a quarter of the 22 eagles tagged by Mr. Lockhart for which death could be definitively determined via necropsy; these six also account for half of 12 documented deaths of eagles that were actually satellite-tagged on or

adjacent to active wind projects in Wyoming. Additional eagles tagged by Mr. Lockhart were killed by transmission lines, vehicle collisions, and electrocution—all of which are sources of mortality that will undoubtedly be compounded by wind energy facilities improperly sited in sensitive areas for eagles.

11. Mr. Lockhart derives immense personal, scientific, professional, recreational, and aesthetic enjoyment from observing bald and golden eagles (and other bird species) engaging in their natural behaviors in the Project area unimpeded by wind turbines, transmission lines, and energy-related vehicles that threaten death and injury to eagles. Moreover, Mr. Lockhart's strong interests in the eagles that inhabit the Project area and the surrounding region are harmed by BLM's failure to take a hard look at the Project's foreseeable impacts to bald and golden eagles, or any serious evaluation of cumulative impacts to eagles in the region.

12. Petitioners have been working to protect important natural, scenic, cultural, and historic qualities of Wyoming for many years, including by preparing and submitting comments on numerous wind energy and transmission line projects planned in the immediate vicinity of the Rock Creek Line and listed in the EA for this Project. For example, Petitioners ACC and Mr. Lockhart, respectively, prepared and submitted comments to BLM and the U.S. Fish and Wildlife Service regarding the Two Rivers Wind Project, which is proposed to be located in Carbon and Albany counties. Petitioner ACC also submitted several comment letters to the Western Area Power Administration regarding the Rail Tie Wind Project, also planned for construction and operation in Albany County. More broadly, Petitioner ACC has submitted comments on other proposed rules and projects that could affect the organization's interests in preserving wildlife, historic, and cultural resources in and around Albany County, including its recent submission of supportive comments to BLM regarding its "Public Lands Rule," which

proposes to modernize BLM's management of the public lands under its administration by prioritizing healthy landscapes, abundant wildlife habitat, clean water, and balanced decisionmaking.

13. Had Petitioners been invited to submit comments on the Project (or even notified that BLM was engaged in NEPA review for the Rock Creek Line), they most certainly would have prepared and submitted detailed comments that would have informed the agency's decisionmaking process. In fact, Petitioners comments would have raised all of the concerns identified in this Petition, including alerting BLM to the necessity of preparing a robust cumulative impacts analysis and an EIS to study the Project's significant effects on the human environment. Indeed, these are precisely the kinds of concerns that Petitioners ACC and Mr. Lockhart have raised to federal agencies—including BLM—with respect to comparable projects in this region.

14. The legal violations alleged in this Petition, traceable directly to BLM's conduct, have caused and continue to cause concrete injury to the aesthetic, conservation, recreational, scientific, educational, historic, cultural, and wildlife preservation interests of Petitioners and members of Petitioner ACC, including by reducing their opportunities to view, and/or adversely affecting the behavior of, the wildlife that Petitioners and their members enjoy observing and otherwise benefit from. Petitioners' interests are also harmed from BLM's deprivation of their right to participate in the NEPA process and to inform the agency of their views regarding a project on public lands that will impact federal trust resources (including federally protected eagles and migratory birds) of particular interest to Petitioners. Petitioners' actual, concrete interests have been, are currently being, and, absent relief from this Court, will continue to be adversely and irreversibly injured by BLM's failure to comply with federal law. Relief from this

Court, including vacatur of the challenged decisions pending full compliance with the NEPA, the Act's implementing regulations, and the APA, will remedy Petitioners' injuries, including by allowing Petitioners and ACC's members to submit comments on the Project, and obtaining meaningful review of the aggregate effects of this Project in combination with the myriad other planned or extant wind energy facilities, transmission lines, and other intrusive development projects in Albany and Carbon counties.

15. Respondent Timothy Novotny is the Field Manager of BLM's Rawlins Field Office. Mr. Novotny is responsible for overseeing BLM's management of the lands and waters that will be impacted by the Rock Creek Line and Wind Facility, and bears responsibility for ensuring the agency's management of those public lands complies with NEPA and the APA. Mr. Novotny gave final authorization for and signed both the FONSI and Decision Record challenged in this case. He is sued solely in his official capacity.

16. Respondent Tracy Stone-Manning is the Director of BLM, which is an agency or instrumentality of the United States within the Department of Interior. Director Stone-Manning is responsible for overseeing BLM's management of various public lands and waters, including those that will be occupied by the Rock Creek Line, and has the responsibility to ensure that the agency's management of public lands and resources complies with NEPA and the APA.

Respondent Stone-Manning is sued solely in her official capacity.

17. Respondent Deb Haaland is the Secretary of the Interior and is ultimately responsible for overseeing the work of BLM, a constituent agency within the U.S. Department of Interior. She is sued solely in her official capacity.

## **STATUTORY AND REGULATORY FRAMEWORK**

### **A. The National Environmental Policy Act**

18. Congress enacted NEPA in 1969 to “encourage productive and enjoyable harmony between man and his environment” and to promote government efforts “which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

19. NEPA is intended “to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process” and it “establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” 40 C.F.R. § 1500.1(a).

20. The Council on Environmental Quality (“CEQ”)—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, which are “binding on all federal agencies” to effectuate this purpose. *Id.* § 1500.3(a). NEPA regulations are “intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies.” *Id.* § 1500.1(b).

21. To this end, NEPA requires federal agencies to prepare a “detailed statement”—known as an EIS—for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EIS must describe (1) “the reasonably foreseeable environmental effects of the proposed agency action,” (2) “any reasonably foreseeable adverse environmental effects which cannot be avoided,” and (3) “a reasonable range of alternatives to the proposed action.” *Id.* § 4332(C)(i)-(iii). The purpose of the EIS “is to ensure agencies



consider the environmental impacts of their actions in decision making. It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1. NEPA further provides that agencies “shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(H).

22. The EIS must “specify the underlying purpose and need to which the agency is responding in proposing the alternatives.” 40 C.F.R. § 1502.13. The alternatives analysis, described by CEQ as the “heart of the NEPA process,” CEQ, Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations (“Forty Questions”), 46 Fed. Reg. 18,026, 18,026 (Mar. 23, 1981), must then “present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the affected environment (§ 1502.15) and the environmental consequences (§ 1502.16).” 40 C.F.R. § 1502.14. Each alternative should be “considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits.” *Id.*

23. Agencies are directed to consider a broad range of environmental effects including “ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health” impacts and must address them in the EIS “whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.1(g)(4).

24. Direct effects are those “caused by the action and occur at the same time and place,” while indirect effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* § 1508.1(g)(1), (2). Cumulative impacts are those that result from the “incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable future actions,” regardless of whether undertaken by other federal agencies or private third parties. *Id.* § 1508.1(g)(3). “Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

25. Where an agency is uncertain as to whether an EIS is required, the agency may prepare an EA that provides “sufficient evidence and analysis for determining whether” the action’s effects will have a significant environmental impact. 40 C.F.R. § 1501.5(c). If the effects are expected to be significant, the agency must prepare an EIS, *id.*; if not, it must prepare a FONSI that explains the reasons why the action “will not have a significant effect on the human environment,” *id.* § 1508.1(1). Like an EIS, an EA must also identify the purpose and need for the proposed action, any alternatives thereto, and “the environmental impacts of the proposed action and alternatives,” *id.* § 1501.5(c).

26. According to BLM’s own NEPA guidance, “[a]n EIS level analysis should be completed when an action meets either of the two following criteria”: (1) “the impacts of a proposed action are expected to be significant”; or (2) “[i]n circumstances where a proposed action is directly related to another action(s), and cumulatively the effects of the actions taken together would be significant, even if the effects of the actions taken separately would not be significant.” Dep’t of the Interior, Managing the NEPA Process—Bureau of Land Management (“NEPA Manual”), at 6 (2020), <https://bit.ly/3OkvEaP>. Moreover, “[R]OWs] for major

reservoirs, canals, pipelines, *transmission lines*, highways, and railroads” are the “types of BLM actions [that] will normally require the preparation of an EIS.” *Id.* at 6-7; *see also* BLM, National Environmental Policy Act Handbook, H-1790-1 (“NEPA Handbook”), at 70 (2008), <https://bit.ly/3Oj2gSf> (same).

27. According to BLM, the environmental significance of a given project (and, thus, whether an EIS or EA is required) is determined according to its “context” (e.g., “society as a whole (human, national), the affected region, the affected interests, and the locality”), and the “intensity” (or, “severity”) of the Project’s effects in those contexts. *See* NEPA Handbook at 70-74; *see also* BLM, FONSI for the Rock Creek Transmission Gen-Tie Line, at 1 (Mar. 2023) (explaining that BLM’s determination of the Project’s environmental significance “is based upon the context and intensity of the Proposed Action, as defined in section 7.3 of the [NEPA Handbook]”). BLM has listed “ten considerations for evaluating intensity,” including “the degree to which the effects are likely to be highly controversial,” “whether the action may establish a precedent for future actions with significant impacts,” “whether the action is related to other actions with cumulatively significant impacts,” and “unique characteristics of the geographic area,” among others. *See* NEPA Handbook at 71-74; *see also* BLM, FONSI for the Rock Creek Transmission Gen-Tie Line, at 1-3 (Mar. 2023) (summarizing the ten “intensity/severity” factors and BLM’s findings regarding each as applied to the Project).

28. To the extent that a specific issue has already been decided or evaluated in a prior EIS or EA, a federal agency may tier subsequent analyses to that EA or EIS when it “would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review.” 40 C.F.R. § 1501.11(a). Nevertheless, NEPA documents prepared in

support of a subsequent “project- or site-specific action” may not avoid the requisite analysis of “issues specific to the subsequent action.” *Id.* § 1501.11(b).

29. Public participation is a cornerstone of the NEPA process because such participation ensures that officials “have considered [the] relevant environmental information, and the public has been informed regarding the decision-making process.” 40 C.F.R. § 1500.1. As such, CEQ’s binding regulations command agencies to “[s]olicit appropriate information from the public” during the NEPA process, and “[p]rovide public notice of NEPA-related hearings, public meetings, and other opportunities for public involvement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions.” *Id.* § 1506.6(d), (b); *see also* CEQ, Forty Questions, 46 Fed. Reg. 18,026, 18,037 (Mar. 23, 1981) (“Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSI.”). “In all cases, the agency shall notify those who have requested notice on an individual action.” 40 C.F.R. § 1506.6(b)(1).

30. “Although [public] scoping is not required” for EAs—which is an additional public-facing process an agency may undertake before it begins preparing an EIS or EA to determine the scope of issues the EIS or EA will address, 43 C.F.R. § 46.235—BLM’s regulations implementing NEPA obligate the agency “to the extent practicable, [to] provide for public notification and public involvement when an [EA] is being prepared.” 43 C.F.R. § 46.305(a); *see also id.* § 46.305(b) (providing that BLM “may seek comments on an [EA] if they determine it to be appropriate, such as when the level of public interest or the uncertainty of effects warrants”). According to BLM’s own guidance that implements BLM’s and CEQ’s binding NEPA regulations, because agencies are directed to “encourage and facilitate public

involvement in the NEPA process to the fullest extent possible,” “some public involvement is required in the preparation of an EA . . . .” NEPA Handbook, at 76.

**B. The Administrative Procedure Act**

31. Under the APA, a reviewing court “shall” set aside agency actions, findings, or conclusions when they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or when they are adopted “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). An agency action is arbitrary and capricious if the agency “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,” or if the agency’s decision “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

32. When reviewing agency action under the APA, the court must ensure that the agency reviewed the relevant data and articulated a satisfactory explanation establishing a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43. The agency’s failure to do so renders its decision arbitrary and capricious. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

**FACTUAL BACKGROUND**

**A. The Rock Creek Line and the Rock Creek Wind Facility**

33. The Project proponent, Rock Creek Wind, LLC, applied for a ROW permit authorizing the Rock Creek Line in 2021. As proposed, the ROW will authorize the construction, operation, maintenance, and eventual decommissioning of a 230-kilovolt (“kV”) electric transmission line (i.e., gen-tie line) across BLM-administered public lands in Albany and Carbon

counties, Wyoming. The authorizations embodied by the ROW cover 4.7 miles of a larger, 38.1-mile gen-tie line that will originate from the proposed Rock Creek Wind Facility site on private land in Albany County, and will terminate at the existing Aeolus Substation in Carbon County.

34. The explicit purpose of the Rock Creek Line is to deliver electricity generated by the proposed Rock Creek Wind Facility to the grid. According to the Project proponent, the Rock Creek Wind Facility will generate approximately 590 megawatts (“MW”) of energy with “a maximum of up to 129 turbines spread over approximately 14,900 acres in Carbon County and 32,620 acres in Albany County, for a total of 47,520 acres.” Letter from Rock Creek Wind, LLC, to Carbon County Planning and Development Department at 1 (Aug. 18, 2021), <https://bit.ly/458AJJ9>.<sup>1</sup> These commercial-scale turbines will be nearly 600 feet tall.

35. The Rock Creek Wind Facility is slated to be constructed approximately five miles from the Bamforth National Wildlife Refuge, which “consists of 1,166 non-contiguous acres in three parcels and includes mixed-grass uplands and wetland habitats.” U.S. Fish and Wildlife Service, Bamforth National Wildlife Refuge, <https://bit.ly/3JZhLMz> (last visited July 14, 2023). According to the U.S. Fish and Wildlife Service, the Refuge and its wetlands complexes “provide important water resources that support resting, nesting and foraging areas for migratory birds in the semiarid environment of the Laramie Plains basin.” *Id.* This includes species such as American white pelicans, California gulls, double-crested cormorants, black-crowned night herons, American avocets, snowy egrets, western meadowlarks, vesper sparrows, horned larks, brown-headed cowbirds, and Brewer’s sparrows. *Id.* Due to the high concentration

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<sup>1</sup> In contrast to the Project proponent’s representations to Carbon County, BLM’s EA for this Project states that “Rock Creek’s objective [is] to reliably deliver up to 400 MW of renewable energy produced from the proposed Rock Creek Wind Facility on private land to the existing Aeolus Substation.” BLM, Rock Creek Gen-Tie Line Environmental Assessment: DOI-BLM-WY-D030-2023-0011-EA, at 20 (Mar. 2023).

of avian diversity found in this area and the availability of fresh water resources in an otherwise arid environment, the Audubon Society has designated the Bamforth National Wildlife Refuge as an “Important Bird Area.” Nevertheless, none of the documents prepared by BLM and discussed below even mention the existence of the Refuge, let alone analyze how the proposed ROW will affect its avian populations.

**B. Petitioners’ Efforts to Participate in the Rock Creek Line NEPA Process**

36. On April 5, 2022, Petitioner ACC sent a letter to BLM generally urging the agency to prepare an EIS to evaluate the environmental effects of the Rock Creek Line due to its “cumulative impacts and impacts from connected actions involving all other industrial wind energy sites in the area either individually or cumulatively which will have significant impact on golden eagle populations.” That letter also explicitly requested that BLM notify Petitioner ACC “of all NEPA and/or [National Historic Preservation Act] processes occurring in Albany County,” including those conducted in support of the “Rock Creek power line.” Petitioners, however, never received any reply to that letter nor any notice regarding any forthcoming or active NEPA analyses conducted in support of the Rock Creek Line.

37. Thereafter, Petitioner ACC made repeated attempts via email and telephone to obtain information from BLM (through various agency officials) about the Rock Creek Line and the status of the agency’s review of that project. But, like its April 5, 2022 letter, Petitioners emailed and telephonic requests went unanswered.

38. After sending its April 5, 2022 letter, Petitioner ACC regularly monitored BLM’s “ePlanning” website (where the agency posts draft and final NEPA documents to notify the public and solicit comments) searching for postings related to the Rock Creek Line. During those

routine searches, however, Petitioners never encountered any such documents related to Rock Creek.

39. In April 2023, in the absence of any response from BLM regarding the Rock Creek Line, Petitioner ACC retained counsel to formally request information concerning the status of BLM's review of the Rock Creek Line. The resulting letter to BLM, dated May 5, 2023, explained that "the widespread proliferation of commercial-scale wind energy development and other development-related pressures in Albany County and surrounding counties" made it imperative "that BLM conduct a thorough, transparent decisionmaking process for the Rock Creek Wind Project that not only ensures compliance with laws such as NEPA and the NHPA, but also allows for meaningful public participation by stakeholders (including [Petitioner ACC])." Counsel for Petitioner ACC requested a "prompt response" no later than May 19, 2023—i.e., two weeks after Petitioners ACC submitted the letter to BLM.

40. Petitioner ACC did not receive a response to its May 5, 2023 letter until June 27, 2023—nearly eight weeks after BLM received the letter, and nearly six weeks after Petitioner ACC requested a response to that letter. On that day, Petitioner ACC received via certified mail a letter, dated five days earlier, which informed Petitioner ACC that BLM had in fact conducted a NEPA analysis for the Rock Creek Line in March 2023, but declined to invite any public participation whatsoever during that process, let alone notify the public of the agency's final decision. Nowhere in its response did BLM explain why it took the agency nearly eight weeks to inform Petitioner ACC merely that it had completed a NEPA analysis and issued a final decision in March 2023, which predated Petitioner ACC's request for information by more than a month.



C. **BLM's Environmental Assessment for the Rock Creek Line**

41. The Rock Creek Line EA—which was completed without any public involvement—defines the purpose and need for the Project as responding “to the ROW application that Rock Creek submitted for the construction, operation, maintenance, and eventual decommissioning of a proposed Gen-Tie Line on public lands administered by the BLM.” It also notes that the Project proponent’s “goals and objectives” for this ROW “are to reliably deliver up to 400 MW of renewable energy produced at the proposed Rock Creek Wind Facility to the existing regional transmission grid using designated utility corridors to the extent practicable.”

42. The Rock Creek Line EA likewise identifies the Proposed Action as “the grant of a ROW for the construction, operation, maintenance, and eventual decommissioning of a section of the Gen-Tie Line on approximately 4.7 miles of Federal BLM- administered lands.” Because BLM “determined that the non-federal land portion of the [Rock Creek] Line is an ‘indirect effect’ of the [ROW],” the EA ostensibly analyzes the entire length of the Line—i.e., all 38.1 miles, including those located on adjacent private land.

43. Although the EA lists both the Rock Creek Wind Facility and the Aeolus Substation as cumulative effects, it does not include either in the scope of the Proposed Action itself because the “Wind Facility is entirely on private land, and its interconnection to the Aeolus Substation may be achieved by a non-federal gen-tie line option.” Thus, by asserting that “their effects cannot be prevented or modified by BLM decision making,” BLM characterized the preexisting Substation as merely “part of baseline environmental conditions,” and “construction, operation, maintenance, and decommissioning of the Rock Creek Wind Facility on private land” as cumulative effects that “could proceed without BLM approval of the requested ROW grant.”

44. The EA does not explain BLM’s conflicting classifications of the non-federal portion of the Rock Creek Line, which it treats as an “indirect effect,” and the Rock Creek Wind Facility, which it treats as a “cumulative effect.” This omission is conspicuous since BLM’s rationale for excluding the Wind Facility from analysis (i.e., “[b]ecause these non-federal actions and their effects cannot be prevented or modified by BLM decision making”) would also exclude the 33.4-mile portion of the Rock Creek Line located on private land.

45. The EA indicates that routing the Rock Creek Line to avoid federal lands would add 5.9 miles to the Rock Creek Line; however, it fails to explain the practical or financial implications of such a rerouting. For example, although adding nearly six miles of additional line to the Project (i.e., making it roughly 15% longer) will necessarily increase its overall cost, the EA fails to provide an estimated price-tag.<sup>2</sup> Nor does the EA articulate the additional logistical hurdles inherent in private land acquisition or the increased costs of any necessary private land purchases or leases that would only increase the overall Project price-tag. The EA likewise does not explain whether this increased price-tag (due to a longer transmission line and heightened logistical burdens related to private land acquisition) renders the non-federal route economically or logistically infeasible, nor whether the Project proponent would entertain certain modifications to the Rock Creek Wind Facility to reduce its environmental impacts in exchange for the cost-savings earned by utilizing the proposed route on federal land.

46. Given its severely limited scope—i.e., its failure to include the Rock Creek Wind Facility, or indeed, any wind facility, in its analysis of direct and indirect effects of the Project—

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<sup>2</sup> Upon information and belief, Petitioners submit that the cost of installing overhead, 230-kV transmission line exceeds \$1.8 million per mile, not including the cost of acquiring property rights to effectuate any such installation. This means that the non-federal route alluded to by BLM will add more than \$10.62 million to the Project’s final cost.

the EA proceeds to dismiss or discount the vast majority of the Project's likely environmental effects. For example, in considering the Proposed Action's likely effects on wildlife, including migratory birds and bats, the EA states that "[i]mpacts on bats, raptors, and other migratory birds from project development on BLM lands were addressed and disclosed in the [EIS prepared for the Rawlins Resource Management Plan ("RMP") in 2008]." That RMP, however, merely concluded that "power lines . . . and wind turbines would increase the potential of injury and death to bats, raptors, and other migratory birds as a result of collisions." And, in fact, the 2008 RMP deferred consideration of those effects to future, site- or project-specific NEPA documents like those challenged here. *See* BLM, Rawlins RMP and EIS at A38-46 (2008) ("Any new wind energy development proposal would be evaluated on a case-by-case basis. The limitations and restrictions placed on development of wind energy projects or proposals would depend on the locations of sensitive resources and the potential environmental impacts to those resources from the proposals."); *see also id.* at A38-125 (responding to concerns about the EIS's failure to address "the potential negative impacts of [poorly sited wind energy farms]" on avian species by noting that "[i]mpacts from proposed mineral and energy exploration and production will require additional NEPA analysis"). As such, neither the EA nor the 2008 Rawlins RMP even attempts to quantify the mortality, disturbance, and nest failure attributable to the Project, let alone explain what kind of effect those fatalities and other harms will have on the local bat and avian populations.

47. BLM's "cumulative impacts" analysis is equally shoddy. As a threshold issue, this section of the EA explains that for birds and bats, BLM's cumulative impacts analysis is limited to planned or foreseeable projects located within ten miles of the Rock Creek Line (i.e., the "Cumulative Impacts Analysis Area" or "CIAA"). The only explanation given as to why

BLM chose this 10-mile buffer is that it “reflects the extent of the baseline survey area for project-specific data.” Yet, as BLM is well aware, bird and bat species that will inevitably be killed by the Rock Creek Line and Wind Facility routinely travel well over ten miles when searching for food or territory, and during seasonal migrations. By instead limiting its CIAA to ten miles, BLM arbitrarily excluded from its cumulative impacts analysis several industrial-scale energy projects located within the immediate vicinity of the Rock Creek Line, including the largest windfarm in the United States (Chokecherry/Sierra Madre Wind), which will be located just 34 miles away (i.e., a fraction of the distance covered in a single day by raptors hunting for prey), and which will impact the same resources as those that will be impacted by the Project. Nor, despite the fact that it is within BLM’s arbitrarily circumscribed 10-mile CIAA, does the EA even mention the critically important Bamforth National Wildlife Refuge or the diverse wildlife species from the refuge that would be placed at risk of mortality and disturbance from the Project and other nearby wind facilities and development disturbances.

48. Even after arbitrarily circumscribing the relevant analysis area, BLM’s cumulative impacts “analysis” fails to take the “hard look” at the effects of its decision as required by NEPA. Indeed, despite the express purpose of the Project (i.e., to deliver power from the Rock Creek Wind Facility to the grid), and BLM’s representation that that facility would be “included in the cumulative effects analysis in this EA,” the agency’s “analysis” completely omits any *evaluation* of the Rock Creek Wind Facility’s expected impacts on birds and bats. Instead, BLM merely lists twelve other renewable energy projects located within ten miles of the Project and summarily states that the “types of cumulative impacts on wildlife and fish due to ongoing and reasonably foreseeable future projects would be similar to the direct and indirect impacts described above but to a greater degree due to the extent of development across the

CIAA.” The EA does not even state the kinds of effects that can be expected from the other twelve projects within the CIAA, let alone evaluate their aggregate effects on the environment in the short or long term. In sum, the EA’s *ipse dixit* regarding cumulative effects cannot inform BLM’s decisionmakers because it neither identifies nor considers the relevant environmental information necessary to complete a cumulative impacts analysis.

**D. BLM’s FONSI and Decision Record**

49. On March 15, 2023, Mr. Timothy Novotny, BLM’s Field Manager for the Rawlins Field Office signed both a FONSI and Decision Record memorializing BLM’s decision to grant a ROW for the Rock Creek Line according to the terms outlined in the EA.

50. In relevant part the FONSI concludes that the Rock Creek Line “will not result in new impacts other than those analyzed and disclosed in th[e] EA and Rawlins [RMP].” According to the FONSI, the Rock Creek Line will “not result in significant effects and therefore preparation of an [EIS] is not required.” In support of this conclusion, the FONSI cites the ten “intensity factors” described above and summarily discusses BLM’s finding regarding each as applied to the Project.

51. BLM’s conclusions in the FONSI are inadequately explained and/or run contrary to its own EA for the Rock Creek Line and the Rawlins RMP. For example, in determining whether “the action is related to other actions with individually insignificant but cumulatively significant impacts,” the FONSI merely states that the “Proposed Action is related to other actions but collectively the level of impact would not approach a significant impact for any resource.” BLM makes this finding despite expressly acknowledging in the EA that the Rock Creek Wind Facility—an industrial energy facility comprised of at least a hundred commercial-scale turbines that have demonstrated population-level impacts on birds and bats—is both the

very reason for the Proposed Action's existence, and, if not an indirect effect, at the very least is a cumulative effect thereof. Elsewhere, BLM has acknowledged that "ROW-approved actions for power lines . . . and wind turbines" are significant sources of mortality for birds and bats, and that mortality is compounded by "the location, height, spacing, [], and density of development . . . ." BLM, Rawlins RMP and EIS at 4-453 (2008). The FONSI's single sentence to the contrary, offered without any supporting evidence, fails to offer any explanation of how BLM reconciled these conflicting conclusions despite the dearth of cumulative impacts analysis in the Project EA, whether for the Rock Creek Wind Facility or the dozen other operating or proposed wind energy projects identified by BLM as cumulative effects to local resources.

52. Because BLM did not solicit public comments on the Project, the FONSI fails to recognize that several of BLM's intensity/significance factors are implicated by the Project. For instance, the FONSI concludes that the Project will not adversely affect "[u]nique characteristics of the geographic area such as "wetlands" or "ecologically critical areas" because "[n]either the Rawlins RMP, as amended, nor interdisciplinary team review found unique characteristics in the geographic area which would be adversely affected." However, had Petitioners been permitted to comment on the EA, they would have pointed out that the Rock Creek Line and Wind Facility will sit just five miles away from the Bamforth National Wildlife Refuge. According to the U.S. Fish and Wildlife Service, this Refuge contains "*important water resources* that support resting, nesting and foraging areas for migratory birds in the semiarid environment of the Laramie Plains basin" and has been designated an "Important Bird Area" by the Wyoming Chapter of the Audubon Society. Despite this, neither the EA nor the FONSI examine what effect the Project will have on the avian populations that depend on the Bamforth National Wildlife Refuge as a vital stopover location during migration. Nor do these documents ever explain why the agency

does not consider this Refuge to be an ecologically critical area that will be adversely affected by an industrial wind farm and transmission line sited near its border.

53. In addition, although BLM acknowledges in the EA that there is at least one active bald eagle nest and four active golden eagle nests within one mile of the proposed Project, and despite conceding that the Project will cause direct habitat loss for eagles and migratory birds and further that “[d]isturbance related to increased human presence and noise could cause individual raptors to avoid nesting or abandon nests” in the Project area, neither the EA nor FONSI explains how BLM intends to comply with the Bald and Golden Eagle Protection Act or the Migratory Bird Treaty Act with respect to the direct or indirect effects of the BLM-authorized Project. Rather, BLM merely states in the EA that “[i]n addition to the BLM, Rock Creek would coordinate with agencies that have potential jurisdiction over the Proposed Action to obtain any necessary permits and approvals.” Yet, without any further explanation as to whether, in fact, BLM or the project proponent have obtained, or have committed to obtain, authorizations from the U.S. Fish and Wildlife Service to take eagles or migratory birds prior to Project construction, BLM’s FONSI fails to explain why the Project does not “threaten[] a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”

54. Likewise, although BLM acknowledges in the EA that the Project, in combination with reasonably foreseeable effects, will “physically affect historic properties . . . [and] result in visual, atmospheric, or auditory effects to historic properties for which setting and feeling are character-defining aspects of the property,” and that the Project area contains at least 52 cultural resources (including 12 that “have been found eligible for the National Register of Historic Places), it summarily concludes in its FONSI that the Project’s direct, indirect, and cumulative effects would not affect unique characteristics of the area such as historic and cultural resources,

nor would they result in significant adverse effects to resources (including those that are eligible for listing in the National Register of Historic Places) with scientific, historic, or cultural value. In reaching this cursory conclusion of non-significance, BLM disregards that the Project, “in combination with the ongoing and reasonably foreseeable actions, could contribute to cumulative impacts on the visual, atmospheric, and auditory elements that diminish the integrity of a historic property’s historic features”; rather, BLM relies on “the relatively small scale of the Proposed Action” and “the proximity to other transmission lines and large wind-development projects”—i.e., the very actions that are reasonably foreseeable cumulative effects. In other words, BLM avoided undertaking a proper cumulative impacts evaluation to historic and cultural resources by focusing only on the direct and indirect impacts of this Project (in contrast to the additive effects of nearby projects), and reached an arbitrary and capricious non-significance determination in the FONSI as a result.

55. On March 15, 2023, Mr. Novotny signed the Decision Record for the Rock Creek Line. Along with the FONSI, the Decision Record marks the culmination of BLM’s decisionmaking process for the Rock Creek Line and memorializes the agency’s decision “to approve the authorization to construct, operate, and maintain, and eventually decommission a 4.7-mile, 230 kV transmission line to serve the Rock Creek Wind Energy Project.”

### **PETITIONERS’ CLAIMS FOR RELIEF**

#### **Claim 1 – Violations of NEPA and the APA**

1. All allegations set forth above are incorporated here by reference.
2. By failing to solicit and/or consider public comments regarding the Rock Creek Line, BLM has failed to take a “hard look” at the environmental effects of the Project, in



violation of NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

3. Because BLM did not invite any public participation in its decisionmaking process for the Rock Creek Line, the agency's FONSI and Decision Record violate NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

4. By failing to evaluate all of the Project's environmental effects, e.g., those caused by the Rock Creek Line *and* Wind Facility, and instead labeling a significant portion a mere "cumulative effect"—rather than a "direct" or "indirect effect"—and by failing to coherently explain that decision, BLM's FONSI, Decision Record, and the EA on which it relies, violate NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

5. By assuming that the Project proponent would build the Rock Creek Wind Facility on private land in the absence of a ROW from BLM, without analyzing the financial and logistical feasibility of that approach, BLM's FONSI, Decision Record, and the EA on which it relies, violate NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

6. By failing to explain its differential treatment under NEPA of two similarly situated aspects of the larger Project—i.e., classifying the gen-tie line on private lands as indirect effects of the Project, while classifying the Rock Creek Wind Facility on private lands as cumulative effects—BLM's EA, FONSI, and Decision Record for the Project violate NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

7. By failing to evaluate the Project’s site-specific environmental effects, and instead tiering to the Rawlins RMP and EIS—a document that does not “concentrate on the issues specific to the [Project]” and only discusses the environmental impacts of wind energy generically—BLM’s EA, FONSI, and Decision Record for the Project violate NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

8. By arbitrarily circumscribing the cumulative impacts analysis area and by failing to take a hard look at the cumulative impacts of the Project, in combination with reasonably foreseeable actions that will affect wildlife, historic, cultural, and other local resources, BLM’s EA, FONSI, and Decision Record for the Project violate NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and the APA, 5 U.S.C § 706(2).

9. Because BLM failed to prepare an EIS for the Rock Creek Line, despite the Project implicating numerous significance criteria under BLM’s own guidance implementing NEPA, and because BLM failed to coherently explain its decision to forgo an EIS here, the agency’s FONSI and Decision Record for the Rock Creek Line violates NEPA, 42 U.S.C. §§ 4321-4347, its implementing regulations, 40 C.F.R. parts 1500-1508, 43 C.F.R. part 46, and BLM has arbitrarily and capriciously departed from its own guidance in violation of the APA, 5 U.S.C § 706(2).

**PRAYER FOR RELIEF**

**WHEREFORE**, Petitioners respectfully request that this Court:

(1) Declare that BLM’s EA, FONSI, and Decision Record for the Rock Creek Line violate NEPA and the APA;

- (2) Set aside and remand the EA, FONSI, and Decision Record pending the completion of environmental analysis consistent with the requirements of NEPA and the APA;
- (3) Enjoin BLM from implementing the Decision Record for the Rock Creek Line until the agency has fully complied with all of its obligations under NEPA and the APA;
- (4) Award Petitioners their attorneys' fees and costs; and
- (5) Grant Petitioners such other and further relief that the Court may deem is just and proper.

Respectfully submitted this 28th day of July, 2023.

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