

1 Lisa T. Belenky (Cal. Bar No. 203225)  
CENTER FOR BIOLOGICAL DIVERSITY  
2 351 California St., Suite 600  
3 San Francisco, CA 94104  
(415) 632-5307  
4 Fax: (415) 436-9683  
lbelenky@biologicaldiversity.org

5 Matthew Vespa (Cal. Bar No. 222265)  
6 SIERRA CLUB  
7 85 Second Street, 2nd Floor  
San Francisco, CA 94105  
8 Phone: (415) 977-5753  
9 Fax: (415) 977-5793  
matt.vespa@sierraclub.org

10 Gregory Buppert (DC Bar No. 1002591)  
11 *Pro hac vice* application forthcoming  
DEFENDERS OF WILDLIFE  
12 1130 17th Street, N.W.  
Washington, DC 20036-0046  
13 Telephone: 202.682.9400  
14 Fax: 202.682.1131  
gbuppert@defenders.org

Babak Naficy (Cal. Bar No. 177709)  
LAW OFFICES OF BABAK NAFICY  
1504 Marsh Street  
San Luis Obispo, CA 93407  
Phone: (805) 593-0926  
Fax: (805) 593-0946  
babaknaficy@sbcglobal.net

15 *Counsel for Plaintiffs.*

16  
17 **IN THE UNITED STATES DISTRICT COURT**  
18 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

19 SIERRA CLUB, CENTER FOR BIOLOGICAL  
DIVERSITY, and DEFENDERS OF WILDLIFE,

20 Plaintiffs

21 v.

22 JAMES KENNA, California State Director, Bureau  
23 of Land Management, UNITED STATES  
BUREAU OF LAND MANAGEMENT, and  
24 KEN SALAZAR, Secretary, United States  
Department of the Interior,

25 Defendants.  
26

Case No.

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

27  
28 COMPLAINT

**INTRODUCTION**

1  
2 1. In this case, the Plaintiffs challenge the Bureau of Land Management’s (“BLM”) approval and issuance of a right-of-way grant to the North Sky River Wind Energy Project (the  
3 “North Sky River Project” or “Project”) for violations of the Endangered Species Act (“ESA”),  
4 16 U.S.C. §§ 1531 *et seq.*, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321  
5 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.* The North Sky  
6 River Project is comprised of approximately 100 wind turbines slated for 12,781 acres of private  
7 lands and an access road, transmission line, and fiber optic communication line right-of-way  
8 across public lands administered by BLM in the southern Sierra Nevada Mountains in Kern  
9 County, California. BLM granted North Sky River Energy, LLC, the Project’s proponent, the  
10 right-of-way across public lands that will be used for the construction and operation of the North  
11 Sky River Project and the transmission of energy to the power grid.  
12

13 2. Wind turbines pose a significant risk to avian species, and the North Sky River Project is  
14 located in a region with known occurrences—historical and modern—of the endangered  
15 California condor and along a concentrated migratory corridor for other bird species, including  
16 the endangered southwestern willow flycatcher. Additionally, the lands in the vicinity of the  
17 Project support a robust population of golden eagles, one of the largest raptors in North America,  
18 that is protected under the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*  
19 Because of its location in an ecologically sensitive landscape, the North Sky River Project will  
20 have significant impacts on California condors, southwestern willow flycatchers, golden eagles,  
21 and numerous other migratory bird species.

22 3. BLM acknowledged that the sole purpose of its right-of-way grant to North Sky River  
23 Energy was to provide a direct access route to the North Sky River Project site, yet the agency  
24 elected to ignore the environmental impacts of the wind development project in its ESA and  
25 NEPA analyses. Instead, it looked solely at the impacts of improving and using the access road,  
26 transmission line, and fiber optic communication line right-of-way, and on that basis made a “no  
27 effect” determination for impacts to listed species under the ESA and reached a “finding of no  
28

1 significant impact” (“FONSI”) under NEPA. BLM unlawfully isolated and limited its ESA and  
2 NEPA analyses even though the right-of-way is a necessary component of the North Sky River  
3 Project which will have significant adverse direct, indirect, cumulative, and reasonably  
4 foreseeable impacts on wildlife, including threatened and endangered species. For these reasons  
5 and others set forth herein, the Plaintiffs seek: (i) an order vacating BLM’s decision record,  
6 environmental assessment (“EA”), “no effect” determination under the ESA, “finding of no  
7 significant impact” under NEPA, and right-of-way grant to North Sky River Energy and  
8 remanding the matter to BLM to correct the ESA and NEPA violations identified herein; (ii) an  
9 injunction prohibiting and halting the development and use of the access road for the  
10 construction or operation of the Project, and prohibiting and halting all development of the  
11 transmission line and fiber optic communication line within the right-of-way until Defendants’  
12 ESA and NEPA violations are remedied; and (iii) such other equitable relief as may be  
13 appropriate.

14 **JURISDICTION AND VENUE**

15 4. Jurisdiction is proper in this Court pursuant to the ESA’s citizen suit provision, 16 U.S.C.  
16 § 1540(g), the APA’s scope of review provision, 5 U.S.C. § 706(2), and 28 U.S.C. § 1331  
17 (federal question jurisdiction). This Court may also issue a declaratory judgment or an injunction  
18 pursuant to 28 U.S.C. §§ 2201 (declaratory relief) and 2202 (injunctive relief). This cause of  
19 action arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531 *et seq.*,  
20 NEPA, 42 U.S.C. §§ 4321 *et seq.*, and the APA, 5 U.S.C. §§ 701 *et seq.*, and implementing  
21 regulations established pursuant to these federal statutes. An actual, justiciable controversy  
22 exists between Plaintiffs and Defendants and the challenged decision is in full force and effect  
23 such that a live controversy exists between the parties. Plaintiffs have exhausted all non-futile  
24 administrative remedies available to them.

25 5. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(1) and 1391(e)(1)  
26 because Defendant James Kenna, who is the California State Director of the BLM, resides in this  
27  
28

1 judicial district, and pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(3)(A),  
2 because Defendant's ESA violations occur in this judicial district.

3 6. Pursuant to 16 U.S.C. § 1540(g)(2)(A), Plaintiffs gave written notice of the ESA  
4 violations alleged herein to Defendants by certified letter posted on February 7, 2012, more than  
5 sixty days before initiating this lawsuit.

6 **PARTIES**

7 7. Plaintiff SIERRA CLUB is a national nonprofit organization of approximately 608,000  
8 members, roughly 146,000 of whom live in California. The Sierra Club is dedicated to  
9 exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the  
10 responsible use of the earth's ecosystems and resources; to educating and encouraging humanity  
11 to protect and restore the quality of the natural and human environment; and to using all lawful  
12 means to carry out these objectives. The Sierra Club's members and staff regularly use and  
13 intend to continue to use the public lands in California, including areas affected by the  
14 challenged decision, for observation, research, aesthetic enjoyment, and other recreational,  
15 scientific, and educational activities. The Sierra Club's members and staff have and continue to  
16 derive scientific, recreational, educational, conservation, and aesthetic benefits from the  
17 continued existence of California's wildlife, including wildlife found in the vicinity of the North  
18 Sky River Project. BLM's failure to examine the significant adverse impacts of the North Sky  
19 River Project on California condors, southwestern willow flycatchers, golden eagles, and  
20 numerous other avian species will harm the interests of the Sierra Club, its staff, and its  
21 members. The relief requested will redress their harm.

22 8. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a nonprofit  
23 corporation with offices in San Francisco, Los Angeles, and Joshua Tree, California; Oregon;  
24 Arizona; New Mexico; and Washington, D.C. The Center is actively involved in species and  
25 habitat protection issues throughout North America, and has over 42,000 members including  
26 many members who reside and recreate in California. One of the Center's primary missions is to  
27 protect and restore habitat and populations of imperiled species throughout western North  
28

1 America. The group's members and staff include individuals who are avid birdwatchers and  
2 naturalists, and have biological, health, educational, scientific research, spiritual, and aesthetic  
3 interests in the ecosystems and the species and habitats affected by the decision at issue, and  
4 intend to continue to do so in the future. The Center's members and staff regularly use and  
5 intend to continue to use the public lands in California, including areas affected by the  
6 challenged decision, for observation, research, aesthetic enjoyment, and other recreational,  
7 scientific, and educational activities. The Center's members and staff have researched, studied,  
8 observed, and sought protection for many imperiled species, including the California condor,  
9 southwestern willow flycatcher, golden eagles, and many migratory birds that may be affected  
10 by the project. The Center's members and staff have and continue to derive scientific,  
11 recreational, educational, conservation, and aesthetic benefits from the continued existence of  
12 these imperiled species in the wild and the preservation of the ecosystems upon which they  
13 depend. The decision to grant a right-of-way for the access road, transmission line, and fiber  
14 optic communication line for the North Sky River Project will allow construction and operation  
15 of a project that will significantly impact the environment by killing many avian species and is a  
16 detriment to achieving the Center's goal of protection and recovery of imperiled species, and its  
17 members and staff are injured by the decision challenged in this action. These injuries would be  
18 redressed by the relief sought.

19 9. Plaintiff DEFENDERS OF WILDLIFE ("Defenders") is a national nonprofit  
20 organization dedicated to the protection and restoration of all native wild animals and plants in  
21 their natural communities. Based in Washington, D.C., and with a regional office in Sacramento,  
22 California, Defenders has over 380,000 members across the nation, including over 55,000  
23 members in California. Defenders has members and staff who visit the Southern Sierra Nevada  
24 Mountains and the nearby Tehachapi Mountains to observe southwestern willow flycatchers,  
25 California condors, golden eagles, and numerous other migratory bird species, photograph,  
26 recreate, engage in scientific exploration, and otherwise use the public lands in the vicinity of the  
27 North Sky River Project. Defenders staff and its members derive scientific, aesthetic,  
28

1 recreational, and spiritual benefit from California's wildlife, including wildlife found in the  
2 vicinity of the North Sky River Project, and have an interest in the preservation of the state's  
3 wildlife and the recovery of its threatened and endangered species. As an organization,  
4 Defenders is an active participant in the development of renewable energy in California in a  
5 manner that minimizes its impacts on wildlife and habitat while achieving California's carbon  
6 emissions reduction goals. Defenders routinely provides scientific and technical guidance on  
7 wildlife issues to BLM and to renewable energy developers. Defenders is also active in many  
8 other aspects of wildlife conservation and protection in California, including efforts to protect  
9 and recover endangered California condors, endangered southwestern willow flycatchers, and  
10 golden eagles. BLM's grant of a right-of-way to North Sky River Energy for the Project without  
11 examination of the adverse impacts of the wind facility on California condors, southwestern  
12 willow flycatchers, golden eagles, and numerous other migratory bird species will harm the  
13 interests of Defenders, its staff, and its members. The relief requested will redress their harm.

14 10. Plaintiffs submitted written comments on BLM's draft EA and FONSI for the North Sky  
15 River Project.

16 11. Defendant JAMES KENNA is the California State Director of the United States Bureau  
17 of Land Management based in Sacramento, California, and is sued here in his official capacity.  
18 Defendant UNITED STATES BUREAU OF LAND MANAGEMENT is the agency within the  
19 United States Department of the Interior that manages the National System of Public Lands,  
20 including the lands that would be utilized for the access road, transmission line, and fiber optic  
21 communication line for the North Sky River Project under the right-of-way grant. Defendant  
22 KEN SALAZAR is the Secretary of the Department of the Interior and is sued here in his official  
23 capacity.

## 24 **LEGAL BACKGROUND**

### 25 **A. The Endangered Species Act**

26 12. Congress enacted the ESA, in part, "to provide a means whereby the ecosystems upon  
27 which endangered species and threatened species depend may be conserved, [and] to provide a  
28

1 program for the conservation of such endangered species and threatened species. . . .” 16 U.S.C.  
2 § 1531(b). The Fish and Wildlife Service (“FWS”) is the federal agency that has been delegated  
3 responsibility for administering the ESA with regard to the California condor, the southwestern  
4 willow flycatcher, and most other terrestrial species. *See* 16 U.S.C. §§ 1532(15), 1533, 1536,  
5 1539, 1540; 50 C.F.R. §§ 10.1, 402.01(b).

6 13. The ESA affords protections to species listed as “endangered” or “threatened.” 16 U.S.C.  
7 § 1532(6), (16), (20). As relevant here, Section 9(a)(1) of the ESA makes it “unlawful for any  
8 person subject to the jurisdiction of the United States to . . . take any such [endangered] species  
9 within the United States.” 16 U.S.C. § 1538(a)(1)(B). The ESA defines the term “take” as “to  
10 harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in  
11 any such conduct.” 16 U.S.C. § 1532(19). “Take” includes “significant habitat modification or  
12 degradation where it actually kills or injures wildlife by significantly impairing essential  
13 behavioral patterns, including breeding, feeding or sheltering,” and an “intentional or negligent  
14 act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent  
15 as to significantly disrupt normal behavioral patterns which include, but are not limited to,  
16 breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.

17 14. Section 7(a)(2) of the ESA requires that each federal agency “shall, in consultation with  
18 and with the assistance of the Secretary, insure that any action authorized, funded, or carried out  
19 by such agency . . . is not likely to jeopardize the continued existence of any endangered species  
20 or threatened species or result in the destruction or adverse modification” of such species’  
21 designated critical habitat. 16 U.S.C. § 1536(a)(2). For the species at issue here, the agency  
22 must consult with FWS acting for the Secretary. If listed species “may be present” in the area of  
23 a proposed action, a federal agency must prepare a “biological assessment,” 16 U.S.C. §  
24 1536(c)(1), to “evaluate the potential effects of the action” on listed species and critical habitat,  
25 50 C.F.R. § 402.12(a). ESA regulations define the “[e]ffects of the action” broadly to include:

26 direct and indirect effects of an action on the species . . . , together with the effects  
27 of other activities that are interrelated or interdependent with that action . . . .

1 Interrelated actions are those that are part of a larger action and depend on the  
2 larger action for their justification. Interdependent actions are those that have no  
independent utility apart from the action under consideration.

3 50 C.F.R. § 402.02. The “[a]ction area” for considering effects to listed species is defined as “all  
4 areas to be affected directly or indirectly by the Federal action and not merely the immediate area  
5 involved in the action.” *Id.*

6 15. A federal agency’s determination that its action “may affect” a threatened or endangered  
7 species triggers “formal consultation” with FWS, unless FWS “concur[s]” in writing that the  
8 action is not likely to “adversely affect” any threatened or endangered species. 50 C.F.R. §  
9 402.14(a), (b). The “may affect” threshold is low—the consultation obligation is triggered by  
10 “[a]ny possible effect, whether beneficial, benign, or adverse, or of an undetermined character.”  
11 51 Fed. Reg. 19926, 19949 (June 3, 1986).

12 16. If the action agency initiates formal consultation under section 7, FWS must evaluate the  
13 status of the listed species, “[e]valuate the effects of the action and cumulative effects on the  
14 listed species,” and “[f]ormulate its biological opinion as to whether the action, taken together  
15 with cumulative effects, is likely to jeopardize the continued existence of listed species” based  
16 on its review of all applicable information. 50 C.F.R. § 402.14(g)(2)-(4). The conclusion of the  
17 formal consultation process is the issuance of a biological opinion by FWS “detailing how the  
18 agency action affects the species” and setting forth FWS’s opinion whether the action is “likely  
19 to jeopardize” the continued existence of a listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R.  
20 § 402.14(h)(3). If FWS finds that a federal action is likely to adversely affect but not likely to  
21 jeopardize the continued existence of a threatened or endangered species based on its review of  
22 all of the relevant information, FWS will issue an “incidental take statement” in conjunction with  
23 its biological opinion specifying: (i) the amount and impact of any incidental take of the species  
24 anticipated from the proposed action; (ii) the reasonable and prudent measures necessary or  
25 appropriate to minimize the impact of such take; and (iii) the “terms and conditions” the action  
26 agency must comply with to implement the foregoing measures. 16 U.S.C. § 1536(b)(4); 50  
27 C.F.R. § 402.14(i). The take of a listed species by a federal agency or any permittee is  
28

1 authorized only to the extent that it is in compliance with such a statement and its terms and  
2 conditions.

3 17. In contrast, where a proposed project requires no federal agency approvals, “incidental  
4 take” of listed species can only be permitted under ESA § 10(a) in conjunction with a habitat  
5 conservation plan. 16 U.S.C. § 1539(a).

6 **B. The National Environmental Policy Act**

7 18. Congress enacted NEPA in recognition of the “profound impact of man’s activity on the  
8 interrelations of all components of the natural environment,” including “industrial expansion,  
9 resource exploitation, and new and expanding technological advances.” 42 U.S.C. § 4331(a).  
10 NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a).

11 19. NEPA requires that federal agencies prepare a “detailed statement”—known as an  
12 environmental impact statement—for all “major Federal actions significantly affecting the  
13 quality of the human environment.” 42 U.S.C. § 4332. The environmental impact statement, or  
14 “EIS,” is intended to create an open, informed, and public decision-making process to insure  
15 “that environmental information is available to public officials and citizens before decisions are  
16 made and before actions are taken” and “to help public officials make decisions that are based on  
17 understanding of environmental consequences, and take actions that protect, restore, and enhance  
18 the environment.” 40 C.F.R. § 1500.1. A federal agency’s obligation to prepare an EIS extends  
19 to any federal action that “will or may” have a significant effect on the environment. 40 C.F.R. §  
20 1508.3 (emphasis added). The federal agency must “[r]igorously explore and objectively  
21 evaluate” a range of alternatives to proposed federal actions and their impacts in the EIS. 40  
22 C.F.R. § 1502.14(a).

23 20. In determining the scope of an EIS, NEPA requires that federal agencies evaluate  
24 “connected actions” and “cumulative actions” in the same impact statement. 40 C.F.R. §  
25 1508.25(a). “Connected actions” are those actions which (i) “[a]utomatically trigger other  
26 actions” requiring an EIS, (ii) “[c]annot or will not proceed unless other actions are taken  
27 previously or simultaneously”, or (iii) “[a]re interdependent parts of a larger action and depend  
28

1 on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1). Cumulative actions “have  
2 cumulatively significant impacts” when considered with “other proposed actions.” 40 C.F.R. §  
3 1508.25(a)(2).

4 21. NEPA establishes several criteria for determining whether an impact is significant,  
5 including (i) the “[u]nique characteristics of the geographic area such as proximity to historic or  
6 cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically  
7 critical areas,” (ii) “[t]he degree to which the effects on the quality of the human environment are  
8 likely to be highly controversial,” (iii) “[t]he degree to which the action may establish a  
9 precedent for future actions with significant effects,” (iv) “[w]hether the action is related to other  
10 actions with . . . cumulatively significant impacts,” (v) “[t]he degree to which the action may  
11 adversely affect an endangered or threatened species,” and (vi) “[w]hether the action threatens a  
12 violation of Federal, State, or local law or requirements imposed for the protection of the  
13 environment.” 40 C.F.R. § 1508.27(b).

14 22. In reviewing the effect an action may have on the environment, and in considering the  
15 effects of possible alternatives, the agency must consider the direct, indirect, and cumulative  
16 impacts on the environment. 40 C.F.R. § 1508.8. “Direct effects . . . are caused by the action  
17 and occur at the same time and place.” *Id.* “Indirect effects . . . are caused by the action and are  
18 later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects  
19 may include growth inducing effects and other effects related to induced changes in the pattern  
20 of land use, population density or growth rate, and related effects on air and water and other  
21 natural systems, including ecosystems.” *Id.* The “[c]umulative impact is the impact on the  
22 environment which results from the incremental impact of the action when added to other past,  
23 present, and reasonably foreseeable future actions regardless of what agency (Federal or non-  
24 Federal) or person undertakes such actions. Cumulative impacts can result from individually  
25 minor but collectively significant actions taking place over a period of time.” 40 C.F.R. §  
26 1508.7.

27 ///

1 23. The evaluation of mitigation measures is an essential component of an EIS. A federal  
2 agency is required to evaluate possible mitigation measures in defining the scope of the EIS, in  
3 examining impacts of the proposed action and alternatives, and in explaining its ultimate  
4 decision. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1505.2(c), 1508.25(b).

5 24. A federal agency may conduct a preliminary NEPA analysis—known as an  
6 environmental assessment or EA—to determine whether the impacts of a proposed action are  
7 significant and require analysis in an EIS. 40 C.F.R. §§ 1501.4, 1508.9. An EA must include  
8 “discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the  
9 environmental impacts of the proposed action and alternatives, and a listing of agencies and  
10 persons consulted.” 40 C.F.R. § 1508.9(b). The agency must “provide sufficient evidence and  
11 analysis” of the direct, indirect, and cumulative environmental impacts of the proposed action  
12 and the alternatives to supports its determination “whether to prepare an environmental impact  
13 statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1).

14 **C. The Administrative Procedure Act (“APA”)**

15 25. The APA provides that a “person suffering legal wrong because of agency action, or  
16 adversely affected or aggrieved by agency action within the meaning of a relevant statute, is  
17 entitled to judicial review thereof.” 5 U.S.C. § 702.

18 26. The APA provides that a court shall set aside agency “findings, conclusions, and actions”  
19 that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”  
20 5 U.S.C. § 706(2)(A).

21 **FACTUAL ALLEGATIONS**

22 **A. BLM Granted North Sky River Energy an Access Road, Transmission Line, and  
23 Communication Line Right-of-Way for the North Sky River Project.**

24 27. The North Sky River Project is a wind energy development project comprised of  
25 approximately 100 wind turbines spread across 12,781 acres of private lands and an access road,  
26 transmission line, and fiber optic communication line right-of-way across public lands  
27 administered by BLM in the southern Sierra Nevada Mountains in Kern County, California.  
28

1 Topography in the vicinity of the Project is rugged and mountainous. The right-of-way grant  
2 sought by the Project proponent across public lands administered by the BLM is an essential  
3 component of the North Sky River Project. It provides the only feasible access road analyzed by  
4 BLM in its EA and the most direct and lowest cost transmission line connection and fiber optic  
5 communication line connection.

6 28. In reviewing the impacts of the right-of-way, BLM made a “no effect” determination for  
7 impacts to listed species in its ESA analysis and reached a “finding of no significant impact” in  
8 its NEPA analyses. On December 21, 2011, BLM issued a decision record approving a right-of-  
9 way grant to North Sky River Energy based on the agency’s EA and FONSI. The decision  
10 record states that it provides a right-of-way authorization that is effective immediately and in full  
11 force and effect when issued. On February 2, 2012, BLM issued the right-of-way grant which  
12 became effective on February 14, 2012, and which authorizes the developer to improve existing  
13 road segments, construct new road segments, and install and operate underground electrical  
14 transmission lines and fiber optic communication lines in a trench parallel to the access road.  
15 North Sky River Energy was expected to commence construction of the access road in the spring  
16 of 2012.

17 29. The sole purpose of the right-of-way grant is to provide road access and transmission and  
18 fiber optic communication line connections for the construction and operation of the wind  
19 facility. Nonetheless, BLM limited the analysis in its EA to the impacts of the access road,  
20 transmission line, and fiber optic communication line and did not examine the impacts of the  
21 wind turbines on the North Sky River Project site.

22 30. Because of its location in an ecologically sensitive landscape, the North Sky River  
23 Project will significantly impact and harm endangered California condors, endangered  
24 southwestern willow flycatchers, federally protected golden eagles, and numerous other  
25 migratory bird species.

26 ///

27 ///

**B. The North Sky River Project Will Significantly Impact and Harm Protected Species.**

31. FWS listed the California condor (*Gymnogyps californianus*) as endangered in 1967; it is also listed as an endangered species under the California Endangered Species Act, Cal. Fish & Game Code § 2050 *et seq.*; 14 Cal. Code Reg. § 670.5(a)(5)(A), and is a fully protected species under California law, Cal. Fish & Game Code § 3511. After facing near extinction and requiring a captive breeding program, California condors were reintroduced to the wild in 1992. Twenty years later, their populations remain perilously low. As of 2008, only about 160 condors existed in the wild. Lead poisoning, electrocution from colliding with power poles, poaching and accidental shootings, and habitat destruction continue to threaten the species. Wind energy development is an emerging and significant threat to the survival and recovery of California condors.

32. FWS listed the southwestern willow flycatcher (*Empidonax traillii extimus*) as endangered in 1995 and all subspecies of willow flycatchers (*Empidonax traillii*) are listed as endangered species under the California Endangered Species Act, Cal. Fish & Game Code § 2050 *et seq.*; 14 Cal. Code Reg. § 670.5(a)(5)(K). The small, olive-gray migratory song bird spends April through September in the southwestern United States. It requires densely vegetated riparian areas, but livestock grazing, dams, water withdrawal, and sprawl have eliminated roughly ninety percent of the species' habitat. Wind energy development is an emerging and significant threat to the survival and recovery of the species.

33. The golden eagle (*Aquila chrysaetos*)—one of the largest raptors in North America—is protected under the federal Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*, and is also a fully protected species under California law, Cal. Fish & Game Code § 3511. Golden eagles prefer to nest in rugged, open habitats and favor the undeveloped habitats of the western United States. Golden eagle populations are declining in many portions of the species' range, and surveys estimate a twenty-six percent decline in eagle populations in the western United States. Wind energy development is a known threat to golden eagles. FWS is investigating the deaths of eight golden eagles at the Pine Tree Wind Farm located immediately south of the North

1 Sky River Project site, and other wind facilities in California's Altamont Pass have in recent  
2 years killed approximately sixty-seven golden eagles each year.

3 34. The North Sky River Project site extends from the western margin of the Mojave Desert  
4 upslope to the southern end of Kelso Valley, a north-south trending valley that connects to the  
5 Kern River Valley to the north. The Project site ranges from approximately 3000 feet to 7000  
6 feet in elevation and is characterized by Mojave Desert scrub habitats at lower elevations and  
7 woodland habitats at higher elevations. Riparian habitat along Cottonwood Creek approximately  
8 bisects the Project site from the northwest corner to the southeast corner. The Project site also  
9 contains many small ephemeral creeks and drainages and is within one mile of Butterbredt  
10 Springs, a nationally recognized hotspot for migratory birds on public lands and Important Bird  
11 Area, which BLM manages as an "area of critical environmental concern."

12 35. The Project site contains prominent ridgelines, cliffs, and canyons. Turbines will be  
13 located along or near ridgelines on the Project site, and the top of their rotor sweep will be up to  
14 five hundred feet from the ground.

15 36. Kelso Valley is a documented corridor for concentrated waves of migratory birds moving  
16 northward during the spring and returning in the fall. Migrating birds utilize multiple canyons  
17 that pass through or near the Project site to access Kelso Valley. Kelso Valley connects to the  
18 Kern River Valley, which is an important stopover and nesting area for migratory species and  
19 includes the South Fork Kern Important Bird Area, the Audubon Society's Kern River Preserve,  
20 and the California's Department of Fish and Game's Canebrake Ecological Reserve Units.  
21 Audubon's Kelso Creek Sanctuary lies in the Kelso Valley. The southwestern willow flycatcher,  
22 as well as swifts, vireos, swallows, thrushes, warblers, tanagers, grosbeaks, buntings, and orioles,  
23 are known to utilize the Kelso Valley migratory route.

24 37. High numbers of migrating birds also pass through the Butterbredt Springs area, within  
25 one mile from the North Sky River Project site. In 2006, surveys documented species  
26 composition and birds-per-hour rates for migratory waves moving through riparian habitat along  
27 Cottonwood Creek on the Project site similar to that previously documented at Butterbredt  
28

1 Springs. The Project site contains more extensive riparian habitat than the Butterbredt Springs  
2 area. The California Department of Fish and Game (“CDFG”) concluded that “[i]t is likely that  
3 the Project site is equally or more important than Butterbredt Canyon/Spring for avian  
4 migration.”

5 38. California condors historically used habitat in the southern Sierra Nevada Mountains and  
6 near by Tehachapi Mountains prior to their decline and removal from the wild. Reintroduced  
7 condors forage throughout hundreds of square miles of their historical range, and CDFG expects  
8 that condor use in the vicinity of the Project will increase in the near future as the species  
9 continues to recover. Habitat on the Project site contains cliffs that are potential roost, perch,  
10 and nest sites, and resources preferred by condors for feeding events.

11 39. Golden eagles both permanently reside in the southern Sierra Nevada Mountains and  
12 nearby Tehachapi Mountains and migrate through the area. The lands in the vicinity of the  
13 Project support a medium to high density resident golden eagle population.

14 40. An existing wind project adjacent to the North Sky River Project site, Pine Tree Wind  
15 Farm, which is owned and operated by the Los Angeles Department of Power and Water, has  
16 one of the highest avian fatality rates in the nation. The ninety turbines at Pine Tree Wind Farm,  
17 which went into operation in 2010, are also located at the south end of Kelso Valley. Eight  
18 golden eagle deaths have been reported for Pine Tree, including two fatalities reported on March  
19 4, 2012. Data from Pine Tree’s first full year of operations documented a total of 1595 bird  
20 fatalities, and a rate of 17.7 fatalities per turbine per year.

21 41. The North Sky River Project will utilize more turbines than the Pine Tree facility, and the  
22 North Sky River Project site contains better riparian and foraging habitat for eagles and other  
23 avian species than the Pine Tree site. Fatality rates for the North Sky River Project are expected  
24 to equal or exceed those reported for the Pine Tree site.

25 42. The North Sky River Project is likely to significantly impact and harm endangered  
26 southwestern willow flycatchers. North Sky Wind Energy’s biologists documented willow  
27 flycatchers on the Project site thirty-five times during the 2010 spring migration. The high  
28

1 number of observations indicates that the topography and habitat of the Project site concentrates  
2 willow flycatchers migrating to breeding habitat in the South Fork Kern Important Bird Area.  
3 Migrating willow flycatchers that are ascending from or descending to stopover habitat along  
4 Cottonwood Creek or at Butterbrecht Springs will pass through the rotor sweep areas for wind  
5 turbines at the North Sky River Project.

6 43. The North Sky River Project is likely to significantly impact and harm endangered  
7 California condors. In addition to the species' historical use of the area, on July 18, 2011, FWS  
8 detected two California condors within three miles of the Project site and determined that it was  
9 "likely" that one of the birds flew directly over the Project site. Both the CDFG and FWS  
10 determined that condors were at risk of a turbine strike at the North Sky River Project.

11 44. The North Sky River Project is likely to significantly impact and harm golden eagles. Six  
12 pairs of golden eagles nested, and eight inactive nest sites were detected, within ten miles of the  
13 North Sky River Project site in 2010 and 2011. Observers also documented more than fifty  
14 instances of golden eagles foraging over the Project site.

15 45. Despite the well documented fact that the project may affect listed species, the BLM  
16 made an erroneous "no effect" determination and failed to ensure against jeopardy to these listed  
17 species in consultation with the FWS as required by Section 7(a)(2) of the ESA, 16 U.S.C.  
18 §1536(a)(2). The BLM's action in this regard also substantially diverged from past practice for  
19 similar projects such as the neighboring Pine Tree wind project. For the Pine Tree wind project  
20 BLM initiated consultation with the FWS regarding impacts of the whole of the action and  
21 included within the action area both federal and non-federal lands; BLM sought a concurrence  
22 from FWS regarding its conclusions that the wind turbines may affect, but were not likely to  
23 adversely affect southwestern willow flycatcher and other species. In addition, Plaintiffs are  
24 informed and believe and based thereon allege that no incidental take permit regarding the  
25 potential incidental take from the North Sky River Project has been applied for by North Sky  
26 River Energy or any other entity under the ESA §10(a), 16 U.S.C. §1539(a).

27 ///

1 **C. The BLM Right-of-Way Is An Essential Component of the North Sky River Project.**

2 46. The right-of-way grant for the access road, transmission line, and fiber optic  
3 communication line to North Sky River Energy is an essential component of the North Sky River  
4 Project. The sole purpose of the right-of-way is to facilitate the construction and operation of the  
5 wind energy facility and to transmit energy generated by the Project to the power grid. BLM  
6 acknowledged in the EA that “[a]n access route across public land would provide the most direct  
7 and efficient access” to the Project site. The transmission line and fiber optic communication  
8 line will be physically connected to the facility.

9 47. When it granted the right-of-way for the access road, transmission line, and fiber optic  
10 communication line to North Sky River Energy, BLM erroneously concluded that the right-of-  
11 way was not a component of the entire North Sky River Project which would require the agency  
12 to analyze the entire suite of impacts expected from the Project. BLM also erroneously  
13 concluded that the installation and operation of the wind turbines on the Project site was not an  
14 interrelated, interdependent, connected, or cumulative action with the right-of-way grant, or a  
15 source of indirect or cumulative impacts, which required analysis by the agency.

16 48. Without the North Sky River Project, BLM would not have authorized the right-of-way  
17 grant for the construction of new roads, the road improvement work, and the installation of  
18 transmission and fiber optic communication lines. The new roads, road improvements,  
19 transmission lines, and fiber optic communication lines do not have a purpose or utility that is  
20 distinguishable from the entire North Sky River Project; they are components of a single project  
21 -- to develop a wind energy facility on the Project site and transmit energy to the power grid. The  
22 access road, transmission line, and fiber optic communication line will not generate revenue  
23 independent of their connection to the wind energy facility.

24 49. The other benefits BLM claims may result from the activities authorized under the right-  
25 of-way grant—additional dust control and stormwater control resulting from an all weather  
26 gravel road surface replacing the existing road and gate installation—do not justify the  
27  
28

1 construction and improvement of roads and the installation of transmission and fiber optic  
2 communication lines in the absence of the North Sky River Project.

3 50. North Sky River Energy will develop the access road, transmission line, and fiber optic  
4 communication line right-of-way to support the construction and operations of the North Sky  
5 River Project, at the same time or immediately prior to the installation of the wind energy  
6 facility, and the wind energy facility is a reasonably foreseeable outcome of BLM's right-of-way  
7 grant.

8 51. North Sky River Energy has firm plans to commence construction of the North Sky River  
9 Project and, in addition to the right-of-way grant from BLM, has actively pursued the permits  
10 and authorizations required to do so. The Kern County, California Board of Supervisors  
11 approved the company's application for zoning changes and a conditional use permit for the  
12 Project on September 13, 2011. CDFG approved the company's application for a streambed  
13 alteration permit for the Project on January 30, 2012.

14 52. According to its decision record, BLM did not include the impacts of the wind energy  
15 facility in its NEPA analysis because the company would pursue an alternative private lands  
16 access route if BLM did not grant the right-of-way.

17 53. The private lands access route described by BLM is not a feasible alternative. The  
18 private lands route is approximately three times longer than the public lands route and would  
19 require purchase or easement negotiations with over one hundred private landowners. Because  
20 of the steep topography and narrow canyons on the private lands route, it cannot accommodate  
21 the materials and equipment needed to construct wind turbines for the North Sky River Project,  
22 and the necessary transmission and communication lines could not be co-located with the private  
23 lands access road. North Sky River Energy cannot meet its 2012 project benchmarks for  
24 financing if it must utilize the private lands alternative. For all of these reasons, the private lands  
25 access route is not a feasible alternative to the route across the public lands and therefore, the  
26 right-of-way grant for access across public lands is an essential component of the North Sky  
27 River Project.

**CLAIMS FOR RELIEF**

**First Claim for Relief: Violations of the ESA**

54. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged herein.

55. The ESA requires that: “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of an endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected states, to be critical ...” 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the agency must prepare a biological assessment for the purpose of identifying all endangered or threatened species which are likely to be affected by the action, 16 U.S.C. § 1536(c)(1), and must consult with the appropriate wildlife agency whenever such actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). BLM’s decision record, no effect determination, and right-of-way grant to North Sky River Energy violates the ESA and the ESA implementing regulations because:

a. BLM made a “no effect” determination by unlawfully limiting the scope of its ESA effects analysis to the effects of the access road, transmission line, and fiber optic communication line while ignoring that its right-of-way grant is an essential component of the larger North Sky River Project. BLM ignored any analysis of the effects of the wind turbines in the action area, which will have significant adverse effects on endangered California condors and southwestern willow flycatchers.

b. BLM made a “no effect” determination by unlawfully limiting the scope of its ESA effects analysis to the effects of the access road, transmission line, and fiber optic communication line and ignored any analysis of the effects of the interrelated and interdependent wind energy facility in the action area, which will have significant adverse effects on endangered California condors and southwestern willow flycatchers.

1 c. BLM ignored the indirect, cumulative, and reasonably certain future impacts of  
2 the North Sky River Project on endangered California condors and southwestern willow  
3 flycatchers that will result from the agency's grant of the access road, transmission line, and fiber  
4 optic communication line right-of-way.

5 d. BLM failed to ensure against jeopardy to endangered California condors and  
6 southwestern willow flycatchers, in consultation with FWS, from the significant adverse impacts  
7 that will result from the right-of-way and the wind energy facility.

8 56. BLM's authorization and issuance of the right-of-way grant based on an erroneous "on  
9 effect" determination failed to comply with the ESA, 16 U.S.C. § 1536(a)(2), 50 C.F.R. §§  
10 402.11-14, and is subject to judicial review, 16 U.S.C. § 1540(g).

11 **Second Claim for Relief: Violations of NEPA and the APA**

12 57. Plaintiffs incorporate each of the foregoing allegations as if they were fully realleged  
13 herein.

14 58. NEPA, 42 U.S.C. §§ 4321-4370, is the "basic national charter for protection of the  
15 environment." 40 C.F.R. § 1500.1 and requires federal agencies to take into account the  
16 environmental consequences of their proposed actions before projects are approved or  
17 undertaken by the agency. 42 U.S.C. § 4332(2)(C). BLM's decision record, EA, FONSI, and  
18 right-of-way grant to North Sky River Energy are arbitrary and capricious and violate NEPA, the  
19 NEPA implementing regulations, and the APA for the following reasons:

20 a. BLM unlawfully isolated, segmented, and limited its consideration of the decision  
21 to grant the right-of-way by constraining the scope of its NEPA analysis to the impacts of the  
22 access road, transmission line, and fiber optic communication line, while ignoring that its right-  
23 of-way grant is an essential component of the larger North Sky River Project. BLM ignored any  
24 analysis of the effects of the installation and operation of wind turbines at the North Sky River  
25 Project site, which will have significant adverse effects on wildlife.

26 b. BLM unlawfully isolated and limited its consideration of the decision to grant the  
27 right-of-way by constraining the scope of its NEPA analysis to the impacts of the access road,  
28

1 transmission line, and fiber optic communication line, and ignoring any analysis of a substantial  
2 connected, interrelated, and cumulative action, the installation and operation of wind turbines at  
3 the North Sky River Project site, which will have significant adverse impacts on wildlife.

4 c. BLM ignored the indirect, cumulative, and reasonably foreseeable impacts of the  
5 installation and operation of wind turbines at the North Sky River Project site that will result  
6 from the agency's grant of the access road, transmission line, and fiber optic communication line  
7 right-of-way.

8 d. BLM unlawfully failed to prepare an environmental impact statement identifying  
9 and analyzing the significant direct, indirect, cumulative, and reasonably foreseeable impacts to  
10 wildlife that will result from the right-of-way and the installation and operation of wind turbines  
11 at the North Sky River Project site.

12 59. The BLM's authorization and issuance of the right-of-way grant without complying with  
13 NEPA is arbitrary, capricious, an abuse of discretion, in excess of statutory authority and  
14 limitations, short of statutory right, not in accordance with the law and procedures required and  
15 subject to judicial review under the APA. 5 U.S.C. §§ 706(2)(A), (C), (D).

16 **PRAYER FOR RELIEF**

17 WHEREFORE, the Plaintiffs respectfully request that this Court:

18 A. Declare that BLM's authorization of the right-of-way grant in the decision record and  
19 issuance of the right-of-way grant to North Sky River Energy for the North Sky River Project, in  
20 reliance on its erroneous "no effect" determination, violates the ESA and the ESA implementing  
21 regulations.

22 B. Declare that BLM's reliance on the EA and FONSI to authorize the right-of-way grant in  
23 the decision record, and the issuance of a right-of-way grant to North Sky River Energy for the  
24 North Sky River Project violates NEPA, the NEPA implementing regulations, and the APA.

25 C. Vacate BLM's decision record, EA, no effect determination, FONSI, and right-of-way  
26 grant to North Sky River Energy for the North Sky River Project and remand the matter to the  
27  
28

1 agency for review in compliance with the ESA, the ESA implementing regulations, NEPA, the  
2 NEPA implementing regulations, and the APA.

3 D. Issue an injunction (i) prohibiting BLM from issuing any notice to proceed pursuant to  
4 the right-of-way grant to North Sky River Energy for any construction or development activities,  
5 (ii) halting any construction, development, or operations activities already underway pursuant to  
6 the right-of-way grant until the Defendants' violations are fully remedied, and (iii) restricting  
7 access across public lands for any future construction, development, or operations activities  
8 associated with the North Sky River Project until Defendants' violations are fully remedied.

9 E. Award Plaintiffs their reasonable attorneys' fees and costs for this action.

10 F. Grant Plaintiffs such other and further equitable and injunctive relief as may be just and  
11 proper.

12 Respectfully submitted this the 13th day of April 2012.

13 /s/Lisa T. Belenky  
14 Lisa T. Belenky (Cal. Bar No. 203225)  
15 CENTER FOR BIOLOGICAL DIVERSITY  
16 351 California St., Suite 600  
17 San Francisco, CA 94104  
18 (415) 632-5307  
19 Fax: (415) 436-9683  
20 lbelenky@biologicaldiversity.org

21 Matthew Vespa (Cal. Bar No. 222265)  
22 SIERRA CLUB  
23 85 Second Street, 2nd Floor  
24 San Francisco, CA 94105  
25 Phone: (415) 977-5753  
26 Fax: (415) 977-5793  
27 matt.vespa@sierraclub.org

28 Gregory Buppert (DC Bar No. 1002591)  
*Pro hac vice* application forthcoming  
DEFENDERS OF WILDLIFE  
1130 17th Street, N.W.  
Washington, DC 20036-0046  
Telephone: 202.682.9400  
Fax: 202.682.1131  
gbuppert@defenders.org

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Babak Naficy (Cal. Bar No. 177709)  
LAW OFFICES OF BABAK NAFICY  
1504 Marsh Street  
San Luis Obispo, CA 93407  
Phone: (805) 593-0926  
Fax: (805) 593-0946  
babaknaficy@sbcglobal.net

*Counsel for Plaintiffs*