



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
RAÚL R. LABRADOR

April 20, 2023

BLM Shoshone Field Office
Attn: Kasey Prestwich
400 West F Street,
Shoshone, ID 83352

Re: Comment on Draft EIS for Lava Ridge Wind Project

Director Prestwich:

Idaho Attorney General Raúl R. Labrador submits this comment in opposition to Magic Valley Energy, LLC's ("MVE") Lava Ridge Wind Project and the agency's preferred alternatives. The Project seeks to appropriate hundreds of thousands of acres of public land in Idaho for uses that will irreparably harm important State, federal, and public interests. In addition to the discussion below, the Idaho Governor's Office of Energy & Mineral Resources has also submitted a comment that describes in detail numerous harms to important Idaho interests. This comment shares those concerns and incorporates that comment's analysis of harm to relevant interests. Because of the significant harms the Project is certain to inflict, the only alternative that lawfully accounts for all relevant interests is "No-Action" Alternative A. The Project should be rejected, and these important lands must be safeguarded for other uses.

DISCUSSION

MVE is an out-of-state energy company that wants to take public lands and use them for private gain. The Project's unprecedented scope has raised significant concerns across the public-interest spectrum. And for good reason. Bulldozing across nearly 200,000 acres of public land to import 400 steel turbines that rise up 740 feet and crank 230-foot blades all day is going to cause unalterable damage and have serious collateral consequences. If the Project is approved, Idaho's people, resources, and interests will bear these harms so MVE can sell power to California. These concerns are reflected by the Idaho Legislature's joint resolution—unanimously passed—opposing the Project. *See Idaho House Concurrent Resolution 4, (2023).*

Indeed, the agency must steward these lands for the benefit of the public and ensure that any use is consistent with the land's public nature. *See* 43 U.S.C. § 1701(8). The agency must also ensure that uses do not violate protected interests, such as State, environmental, and tribal interests. But MVE's proposal and the agency's preferred alternatives are legally indefensible. The agency's Draft Environmental Impact Statement acknowledges as much, repeatedly noting the "irreversible and irretrievable" consequences posed by the Project.

It is well recognized in our federal system that Idaho retains sovereign interests in its water, air, wildlife and the well-being of its people. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 518–19 (2007). MVE's Project would infringe on each of these interests. And the BLM's Draft EIS fails to account for these harms in its proposed alternatives.

A. The Draft EIS Ignores Idaho's Sovereign Interest in its Wildlife.

Idaho has a special interest in preserving the wildlife within its borders. *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976) ("Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions."); *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 391 (1978) ("Protection of the wild life of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection.") (cleaned up). Indeed, "the protection of wildlife and other natural resources of a state are some of the state's most important interests." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 996 (9th Cir. 2002) (cleaned up). To protect this critical interest, Idaho law declares "[a]ll wildlife ... within the state of Idaho . . . to be the property of the state of Idaho" and requires the state to "preserve, protect, perpetuate, its wildlife" and "provide continued supplies of such wildlife for hunting, fishing and trapping." Idaho Code § 36-103(a). The Project will undermine Idaho's rights over its wildlife. And no amount of compensatory mitigation will adequately address the Project's deep harms.

The Magic Valley region holds some of Idaho's best hunting land for big game, upland bird species, small game, and waterfowl.¹ The Project will devastate wild game and other animals in the area. The Draft EIS recognizes this fact but gives it no weight.

The agency admits that the Project will "substantially fragment" wildlife habitat and "greatly impair the ability of wildlife to move through the" 200,000 acres

¹ *See* Idaho Fish & Game, Idaho Hunt Planner, *Magic Valley Region*, available at <https://tinyurl.com/3na669kk>.

of public land the wind farm would occupy. DEIS at ES-xxiii. But the Draft EIS fails to address the Project's impact on Idaho wildlife. To start, the Draft EIS only analyzes the Project's impact on mule deer and pronghorn—it fails to analyze, or even consider, the Project's impact on other game species. *See* DEIS at 3-462. Even so, this narrow analysis finds that the Project will irreversibly harm Idaho's wildlife. For example, the Draft EIS concludes that the Project would (1) permanently alter or destroy the seasonal habitat for mule deer and pronghorn, injure and kill many of these animals, DEIS at ES-xxiii; (2) permanently alter the habitat for deer and pronghorn and increase mortality for the species, DEIS at 3-477; (3) harm animals through turbine noise, vibration, and shadow flickering, *id.*; and (4) kill and injure many mule deer and pronghorn due to increased human activity—such as higher road density and construction activity. *Id.*

Thus, the Draft EIS concludes that hunting opportunities" will be significantly "diminished" due to the Project's "population-level" effects on mule deer and pronghorn. DEIS at EX-xxi; *id.* at 3-479–480. These "population-level effects" would be "irreversible," DEIS at 3-486, and would extend far beyond BLM land. Such effects will particularly burden tribal reserved rights in ways that will likely overtax Idaho lands and resources. Diminished wildlife habitats and tribal hunting grounds necessarily impact Idaho's right to manage its wildlife resources.

The agency's recommended alternatives do not mitigate the harm. They also would "have irreversible impacts on mule deer and pronghorn from human activities (e.g., vehicle use, construction equipment, maintenance activities), wind turbine operation (e.g. noise, vibration, shadow flicker caused by moving blades) and ground disturbance that would remove or alter habitat." DEIS at 3-485. As noted above, Idaho maintains the right and responsibility to "preserve, protect, and perpetuate" its wild game populations and to "provide continued supplies of such wildlife for hunting, fishing and trapping." Idaho Code § 36-103(a). MVE's devastation to Idaho wild game is a clear invasion of Idaho's legal rights.

Beyond wild game, the Project will devastate many other vulnerable animal populations in Idaho. The hundreds of sweeping blades slicing through the air, for example, are known to pulverize bat and bird populations.² Increased mortality from wind farms has even pushed some bat species to the point of *extinction*.³ These devastating impacts will affect the rest of Idaho's ecosystem. Bats maintain an equilibrium in the insect population and ensure that insects don't overwhelm local crop output. And a reduction in the predatory bird population will lead to a corresponding increase in rodents that harm crops.

² *See, e.g.,* K. Shawn Smallwood, Wildlife Society Bulletin, Vol. 37, Issue 1, (2013) <https://tinyurl.com/2p8vfpum>.

³ <https://tinyurl.com/5apta9ke>.

The Draft EIS proposes no adequate alternative to harmful effects on Idaho's wildlife. While the Draft EIS generally acknowledges the Project will harm Idaho wildlife, it still suggests preferred proposed alternatives that will cause "irreversible" damage to Idaho wildlife. Importantly, the Idaho Department of Fish and Game designates several bat species as "species of greatest conservation need" (SGCNs).⁴ The agency knows that the Project will very likely have a "population-level" effect on several of these SGCN bat species, but it disregards those consequences. DEIS 3-37, 3-41–42. Similarly, Idaho has designated several birds as SGCNs that the agency also recognizes will be severely and "irretrievably" harmed by the Project. *See, e.g.*, DEIS at 3-126 (all action alternatives will have irretrievable harm on sage grouse); *id.* 3-68, 3-78 (ferruginous hawks are "vulnerable to population-level effects from wind energy development). As trustee over its wildlife, Idaho has a special interest in preserving these populations. The Draft EIS's failure to account for, or even mention, Idaho's interest in SGCNs is a clear violation of federal law.

B. The Draft EIS Ignores Idaho's Sovereign Interest in its Water.

Our Constitution creates a system of "dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918 (cleaned up). When the States entered the Union, they "retained a residuary and inviolable sovereignty." *Id.* at 919 (quoting *The Federalist* No. 39 (J. Madison)). One of the states' retained powers is the right to hold title over all non-navigable waters. *United States v. Utah*, 283 U.S. 64, 75 (1931). The States have had a "traditional and primary power over . . . water use." *Solid Waste Agency of Northern Cook Cnty. v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (SWANCC); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources"). So the law has long recognized a state's ownership of its waters as "an essential attribute of [its] sovereignty." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997).

The Draft EIS acknowledges that "all action alternatives" will have "long-term irretrievable impacts on" Idaho's wetlands and surface waters. DEIS at 3-447. Ground disturbance from building and operating the wind farm will "remove or alter wetlands, change their function, change the rate and quantity of runoff from the fill footprint, compact soils, and alter flow patterns." DEIS 3-444. The Project could also pollute Idaho groundwater and surface water through inadvertent spills of hazardous materials, soil disruption. DEIS at 3-442, *id.* at Appendix 3-17–18. The Draft EIS irresponsibly entrusts MVE to mitigate these impacts while at the same time

⁴ Idaho Fish & Game, *Species of Greatest Conservation Need*, <https://tinyurl.com/mrxstkau>; *see also* Idaho Department of Fish and Game, *Idaho State Wildlife Action Plan*, (Jan. 2023) <https://tinyurl.com/ymjudprs>.

conceding that even perfect compliance with these mitigation measures “would reduce but not eliminate potential impacts to wetlands and waters.” DEIS at 3-445.

The Draft EIS also fails to analyze how these impacts will affect Idaho’s sovereign interests over its waters or even acknowledge that Idaho has such an interest.⁵ And by failing to account for Idaho’s sovereign interest in its water, the Draft EIS also falls short of the requirements of NEPA and the FLPMA. *See Ctr. for Biological Diversity v. Dep’t of Interior*, 623 F.3d 633, 641 (9th Cir. 2010) (NEPA requires agencies to take “a ‘hard look’ at the environmental consequences of its proposed actions”); *see also* 43 U.S.C. § 1701(a)(8) (requiring the Bureau to manage public lands in a manner that “will protect the quality of [its] water resource”).

C. The Draft EIS Ignores Idaho’s Sovereign Interests in its Air.

Idaho also has a sovereign interest “in all the air within its domain.” *Massachusetts v. EPA*, 549 U.S. at 518–19 (cleaned up). The Project appropriates Idaho’s wind for private profit. In doing so, it deprives Idaho of the ability to use state-owned land in the Magic Valley to harvest wind for energy. Wind in Idaho is a resource that belongs to Idaho, and MVE’s use diminishes it for use by Idaho and its people. The Draft EIS fails to consider Idaho’s interest in harvesting energy from its own wind.

D. The Draft EIS Ignores Idaho’s Sovereign Interests in its Land.

The Draft EIS also ignores the Project’s impact on Idaho’s land, namely the ability to fight and prevent fires. Fire season harms Idaho’s people, animals, agriculture, economy, air quality, and environment.⁶ As the agency recognizes, the Project’s increased use of power transmission would increase the risk of fire. DEIS 3-242. And the agency further recognizes that aviation resources for fire suppression will be increasingly needed but also impeded by the hundreds of skyscraping turbines. DEIS 3-245-51. So the Project would expose Idaho to greater

⁵ The Draft EIS “assumes,” without any stated justification, “that all wetlands and waters identified in [the] EIS are jurisdictional and therefore are waters of the United States per the Clean Water Act.” DEIS 3-442. But recent federal decisions addressing the scope of jurisdictional waters require the agency to reevaluate this conclusion and consider anew its recommendation. *See, e.g., Texas v. E.P.A.*, No. 3:23-cv-17 (S.D. Tex. Mar. 19, 2023) (enjoining EPA’s overbroad 2023 final rule that purports to expand the definition of “Waters of the United States” under the Clean Water Act); *West Virginia v. E.P.A.*, No. 3:23-cv-00032 (D.N.D. Apr. 12, 2023) (enjoining EPA’s 2023 final rule as to twenty-four states); *SWANCC*, 531 U.S. at 173–74.

⁶ *See, e.g.,* Idaho Dep’t of Env. Quality, *Idaho Wildfire Emissions Estimates: 2021 Wildfire Season*, <https://tinyurl.com/2psw6kw3>; Steve Kirch, KMVT, *The impacts of wildfires on Idaho livestock* (Aug. 4, 2022), <https://tinyurl.com/5xy52wv5>.

fire danger while simultaneously limiting Idaho's ability to fight fires. The Draft EIS fails to address this dilemma.

E. The Draft EIS Ignores Idaho's Sovereign Interest in its People.

Most importantly, Idaho has a critical sovereign interest in protecting “the health and well-being—both physical and economic—of its residents.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). The Project harms the physical and economic well-being of Idahoans in several ways. First, an influx of temporary labor and federal dollars to construct the Project could cause a temporary housing shortage and lead to long-term increases in housing costs that price out Magic Valley residents. The rapid influx of short-term labor will strain local infrastructure and services like public schools and law enforcement. *See* Draft EIS at ES-xix.

Second, the Project will rapidly increase the number of roads and traffic in the Magic Valley Region. The Project will require the construction of more than 500 new roads. This influx in traffic will raise the risk of traffic-related injuries and fatalities and place more strain on existing roads and bridges.

Third, a short-term influx of federal dollars threatens to create a boom-bust economic cycle in the Magic Valley region. The Draft EIS projects that the Project will bring in \$277 million during its two years of construction, but only \$15 million per year during the Project's operation. Draft EIS at ES-xix.

Fourth, the Project will dishonor the Minidoka National Historical Site—a memorial to the injustice of Japanese American internment camps that serves as a powerful reminder of the perils of acquiescing to government overreach in times of crisis. By placing 400-foot-tall wind turbines around the Minidoka Site, the Lava Ridge Wind Farm will strip the site of its historical authenticity and lessen its impact.

Fifth, a growing body of scientific literature shows that living close to large wind turbines can damage people's mental and physical health.⁷ The agency pays this important environmental factor no heed.

Sixth, the Project will permanently alter the beauty of Magic Valley. This will reduce tourism, recreation revenue, and residents' ability to enjoy the area. *See* 43

⁷ *See, e.g.,* Chiu et al. *Effects of low-frequency noise from wind turbines on heart rate variability in healthy individuals*, (2021) (heart rate variability) <https://tinyurl.com/52r2aajj>; Jeffery et al., *Adverse health effects of industrial wind turbines*, (2013) (“People who live or work in close proximity to [wind farms] have experienced symptoms that include decreased quality of life, annoyance, stress, sleep disturbance, headache, anxiety, depression, and cognitive dysfunction”) <https://tinyurl.com/z8krjkuc>.

U.S.C. § 1701(8) (requiring the Bureau to manage public lands “in a manner that will protect the quality of . . . scenic . . . values.”)

Seventh, the Project will also interfere with Idaho’s ability to promote its cattle and ranching industry. *See* Idaho Code § 22-103(4) (requiring the Idaho Department of Agriculture to “[e]ncourage and promote in every practical manner, the interests of agriculture [and] the livestock industries.”).

Eighth, the Project will have a generation capacity of 1,000 megawatts or more. DEIS, Introduction. This could tax the energy grid and threaten the stability and predictability of Idaho’s energy supply, but the Draft EIS doesn’t consider this, or even mention it.

Beyond this, the Project would create a significantly greater risk for aviation safety.⁸ A 2014 Special Investigation Report by the National Transportation Safety Board concluded that windfarm towers pose a critical hazard to agricultural planes and other low-flying aircraft.⁹ And MVE’s own planning documents note that there are at least eight small Idaho airports within the Project’s vicinity.¹⁰ Aviation disasters will inevitably increase, and that increase implicates Idaho’s resources and harms the environment. Idaho will have to send first responders to address crashes. Any crashes will fall on Idaho soil, endangering Idaho’s animals and people. And the fire, fuel, and debris damage caused by aviation crashes will irreversibly harm the environment.

For similar reasons, the Project would harmfully impact local economies dependent on the aviation industry. According to the 2020 Idaho Airport Economic Impact Analysis Update, the nearby Jerome County airport alone was responsible for 51 jobs, \$2.33 million in earnings, \$4.16 million in gross domestic product, and \$9.1 million in economic output.¹¹ If Lava Ridge reduces navigable airspace, local airports like this will suffer, causing job loss and economic harm. The economic harm to Jerome is just one example of the Draft EIS’s failure to consider direct economic and social harms caused by the Project. *See* DEIS at 3-264–71.

⁸ *See, e.g.,* Brent McDonald, NEW YORK TIMES, *For Crop-Dusters, Towers Pose a Hidden and Growing Danger*, (Oct. 2, 2014) (“At least five people, including three crop-duster pilots, have died after hitting [wind farm] towers since 2003”), <https://tinyurl.com/bmcfunpm>; *see also* *Town of Barnstable, Mass. v. F.A.A.*, 659 F.d 28, 32–33 (D.C. Cir. 2011) (citing favorably substantial evidence that a Massachusetts offshore windfarm would increase aviation safety risks).

⁹ <https://tinyurl.com/44vmbv4e>

¹⁰ Magic Valley Energy, LLC, “Lava Ridge Wind Project Plan of Development at 58–59,” (June 2021) <https://tinyurl.com/5d6akehn>.

¹¹ Idaho Transportation Department, *2020 Idaho Airport Economic Impact Analysis Update*, (July 2020), <https://tinyurl.com/y76zujxp>.

CONCLUSION

MVE's Project cannot be justified under the law. It represents a disregard for the environment and other vital interests entrusted to the agency's safekeeping. The Project cannot be squared with Congress's mandate in the FLPMA that the agency must manage all public lands to "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values." 43 U.S.C. § 1701(8). The agency's Draft EIS fails to take a hard look at the numerous sweeping environmental impacts the Project will cause. *Ctr. for Biological Diversity v. Dep't of Interior*, 623 F.3d at 641 (9th Cir. 2010). It also fails to account for numerous other relevant interests. And the Project would significantly intrude on Idaho's "residual and inviolable" sovereignty, disrupting the critical federal-state balance that underlies our constitutional system of "dual sovereignty." *Printz*, 528 U.S. at 918–19. On the other side of the balance sheet, only one private company will profit.

It's no surprise that the agency's failure here has catalyzed Idahoans from across the political spectrum to unite in opposition to the Project.¹² The agency should listen to these voices and reject MVE's attempt to capitalize personally at the expense of the public. The harms are overwhelming and are too great to ignore.

Sincerely,



RAÚL R. LABRADOR
Attorney General

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¹² See, e.g., Idaho Reports, *House unanimously opposes Lava Ridge Wind Project*, (Mar. 13, 2023), <https://tinyurl.com/4fmknd4j>; KPVI News, *Resolution against Lava Ridge adopted by Idaho Senate*, (Mar. 29, 2023), <https://tinyurl.com/3ytjm7xe>; KMTV 11, *Magic Valley officials request Idaho Governor and Attorney General adopt a 'no build option' for Lava Ridge Wind Project*, (Mar. 9, 2023) ("I have never seen a more diverse group come together against something as long as I have been involved in public service," said Twin Falls County Commissioner Don Hall.), <https://tinyurl.com/3yvvab97>.