



U.S. Fish and Wildlife Service

# **Issuance of an Incidental Eagle Take Permit for Top of the World Wind Energy Project Converse County, Wyoming**

## **Finding of No Significant Impact**

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**July 2021**

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Attachment 1: Environmental Assessment for the Issuance of an Incidental Eagle Take Permit  
for Top of the World Wind Energy Project, Wyoming

Attachment 2: Public Comments and Service's Response

Note: Under the current National Environmental Policy Act regulations at 40 C.F.R. § 1506.13, agencies have the option of applying the expired NEPA regulations if a project was begun prior to September 14, 2020. This project was constructed and became operational in 2010, well before the cutoff date for the expired regulations. Accordingly, both this Finding of No Significant Impact (FONSI) and the Environmental Assessment (EA) for this project were prepared using the expired NEPA regulations.

## **I. Introduction**

This FONSI addresses the issuance of an Incidental Eagle Take Permit (IETP) pursuant to the Bald and Golden Eagle Protection Act (Eagle Act) and its 2016 implementing regulations (16 U.S.C. §§ 668–668d; see also 50 C.F.R. § 22.26) to Top of the World Wind Energy, LLC (Applicant). The Applicant seeks a permit for non-purposeful take of eagles under the Eagle Act for the operation of the Top of the World wind energy project (collectively “Project”), located in Converse County, Wyoming. The Project consists of 110 wind turbines comprised of 66 General Electric 1.5-megawatt turbines and 44 Siemens 2.3-megawatt turbines with associated infrastructure and has been operating since November 1, 2010.

In accordance with the NEPA (42 United States Code [U.S.C.] §§ 4321–4347) and its implementing regulations (40 C.F.R. Part 1500; see also 46 C.F.R. Part 46), and United States Fish and Wildlife Service (Service) NEPA requirements (516 DM 1-4, 8), the Service prepared an EA analyzing the impacts to the human environment associated with permit issuance (*Environmental Assessment for the Issuance of an Eagle Take Permit for Top of the World Wind Energy Project*). As required as part of the permit application, the Applicant submitted an Eagle Conservation Plan (ECP) (Attachment A in the EA). The EA analyzed two alternatives, not issuing the permit (the no action alternative or alternative 1) or issuing the permit (the proposed action). The EA (USFWS 2021) is incorporated by reference into this FONSI and provided as Attachment 1. Permit issuance will authorize bald eagle and golden eagle take that is incidental to otherwise lawful operational activities described in the EA and ECP.

The EA and ECP detail the impacts of the incidental take on bald eagles and golden eagles and how these impacts will be avoided, minimized, and mitigated. IETPs may be issued only in compliance with the preservation standard of the Eagle Act. This means that to consider permit issuance, we must determine whether the take is compatible with the preservation of bald and golden eagles, defined as “consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species” (16 U.S.C. §§ 668–668d; see also 50 C.F.R. § 22.26). The EA evaluated the proposed action and a no action alternative, based on the ability of the alternatives to meet our purpose and need, and the associated impacts to the human environment.

Upon review of the EA, the Service concludes that a FONSI is appropriate. Following review and analysis, the Service has chosen to issue a permit for activities under our proposed action described in the EA.

## II. Background

The EA analyzes the effects of our proposed issuance of a 30-year IETP on bald eagles, golden eagles, and the human environment and evaluates impacts over the 30-year duration of the Project. The IETP will expire after 30 years. The Applicant could then choose to apply for a new permit.

The Service developed the *Eagle Conservation Plan Guidance Module 1: Land-based Wind Energy, Version 2* (ECP Guidance, USFWS 2013) to provide recommendations for the development of ECPs in support of issuance of IETPs for wind facilities. The ECP Guidance is intended to assist industry in avoiding and minimizing impacts to eagles that may result from site selection, construction, operation, and maintenance of land-based, wind energy facilities. The ECP Guidance provides recommendations for a staged approach to site evaluation, and development of an ECP with the Service.

The Service received a permit application package from the Applicant for the 200-megawatt Project on June 3, 2020. The application package included an ECP. The EA evaluates impacts to the human environment resulting from issuance of an IETP under the 2016 eagle regulations. Pursuant to the “high quality” information standards of the NEPA regulations (40 C.F.R. § 1500.1(b)), the EA also incorporated by reference the best available science, specifically updated population estimates and other information pertaining to eagles documented in the *Bald and Golden Eagles: Population demographics and estimation of sustainable take in the United States, 2016 update* (USFWS 2016a) and the *Programmatic Environmental Impact Statement for the Eagle Rule Revision* (PEIS; USFWS 2016b).

Since the project became operational in 2010, it has been responsible for the deaths of at least 51 golden eagles and five bald eagles. On October 10, 2013, the Applicant pleaded guilty in U.S. District Court of Wyoming to two counts of misdemeanor unlawful take of migratory birds. Resulting from this were fines, restitution, and community service in the form of a probationary period including a list of Mandatory Conditions of Probation. This includes the implementation of a Migratory Bird Compliance Plan (MBCP), which was developed with assistance from the Service. The purpose of the MBCP is to outline a framework for implementation of avoidance and minimization measures to ensure compliance under requirements of the Migratory Bird Treaty Act (MBTA) and the Eagle Act. The MBCP will remain in place until it is replaced by the IETP. Despite the implementation of the avoidance and mitigation measures outlined in the MBCP, some incidental take of migratory birds and eagles may still occur. As part of the Plea Agreement, as long as the Applicant continues to implement the MBCP and diligently pursues obtaining the IETP, the government would extend its “non-prosecution” agreement under the Eagle Act. The Plea Agreement would remain in place until either ten years after the sentencing, or the Applicant obtains an IETP which replaces the MBCP.

Our Collision Risk Model (CRM) predicts that there could be up to 1.8 bald eagles and up to 10.3 golden eagles taken per year at the Project (see EA Section 4.1.1).

The Applicant continues to demonstrate a good-faith effort to comply with the Eagle Act while we developed this EA and process the IETP application.

### **III. Alternatives Considered**

#### **Introduction**

The EA considered alternatives for issuance of a permit to take bald eagles and golden eagles at the Project. The EA analyzed the effects of our proposed issuance of a 30-year IETP on the human environment and evaluates impacts over the 30-year duration of the Project. The permit expires after 30 years. Afterwards, the Applicant would be required to seek another permit if the Applicant wishes to avoid the risk of prosecution for unauthorized eagle take.

NEPA requires Federal agencies to study, develop, and describe appropriate alternatives to recommended proposed actions with the potential to result in unresolved resource conflicts. 42 U.S.C. § 4332(2)(E). This is also consistent with CEQ and Department of Interior NEPA implementing regulations (40 C.F.R., Part 1500 and 43 C.F.R. § 46.300), and Service requirements (516 DM 1-4, 8).

The EA evaluated a no action alternative (alternative 1) and one action alternative (the proposed action). The following is a brief description of the two alternatives considered. For a complete description of the alternatives, as well as alternatives that were considered but not evaluated further, see Chapters 2 of the EA (Attachment 1, pages 8-10).

#### **No Action Alternative**

Under the no action alternative, we would take no further action on the IETP application. In reality, the Service must take action on the IETP application, determining whether to deny or issue the permit. We consider this alternative because regulations require evaluation of a no action alternative, and it provides a clear comparison of any potential effects to the human environment from the proposed action.

The no action alternative in this context analyzes predictable outcomes of the Service not issuing an IETP. Under the no action alternative, the Project would likely continue to operate without an IETP being issued. Thus, for purposes of analyzing the no action alternative, we assume that the applicant will continue to implement all measures required by other agencies and jurisdictions to operate the Project, but the conservation measures proposed in the IETP application package (that have not already been implemented by the Applicant) would not be required.

As outlined by the plea agreement, the Applicant would continue to provide a compensatory mitigation payment to the National Fish and Wildlife Foundation (NFWF) to offset any observed golden eagle fatalities resulting from the Project until the non-prosecution period ends in 2023. No post-construction eagle mortality monitoring would occur, and no additional data would be available to the Service to contribute to the overall refining efforts of the Collision Risk Model (CRM).

The project proponent may choose to implement some, none, or all of those conservation and adaptive management measures. Under this alternative, we assume that the Applicant will take

some reasonable steps to avoid taking eagles, but the Applicant would be liable for violating the Eagle Act should take of an eagle occur, once the current MBCP agreement expires in 2023.

Choosing the no action alternative is a potential outcome of the permit review process. In addition, analysis of the no action alternative is required by CEQ regulations (40 C.F.R. § 1502.14) and provides a baseline against which to compare the environmental impacts of the proposed action. We can deny an IETP if the permit application fails to meet one or more of several issuance criteria under 50 C.F.R. § 22.26 or because the risk to eagles is so low that an IETP is unnecessary.

### **Proposed Action**

Under the proposed action, we would issue a 30-year IETP to take up to 1.8 bald eagles and up to 10.3 golden eagles annually (for a total authorized take of up to 43 bald eagles and 326 golden eagles over the life of the 30-year permit) with associated conditions, as allowed by regulation. The Applicant will implement all measures required by other agencies and jurisdictions to conduct the activity at this site including Applicant-committed measures, the conservation commitments described in the Applicant's ECP and Avoidance and Minimization, Compensatory Mitigation, Post Construction Monitoring, and Adaptive Management. We used our CRM to estimate the number of annual bald eagle and golden eagle mortalities resulting from the Project operation and maintenance Chapter 4 of the EA (Attachment 1, pages 18-20).

The 30-year IETP would include specific permit conditions, including implementation of monitoring, reporting, and adaptive management, as discussed in the EA (Chapter 2, Attachment 1, pages 8-10) and in the ECP (Sections 8-10, pages 52-72).

The IETP is issued for 30 years. The permit would apply to the operation of all 110 turbines and ongoing operation of site infrastructure, effective immediately upon issuance of the permit. At the end of the 30-year permit term, the Applicant may choose to apply for a new permit under the regulations in place at that time.

As part of the proposed action alternative the Applicant will implement compensatory mitigation of offset take of golden eagles above the baseline take. The take limit of golden eagles is zero for all eagle management units (EMUs) (USFWS 2016a, USFWS 2016b); therefore, the Applicant is required to provide compensatory mitigation targeted to offset the predicted take of golden eagles, above the baseline used in the 2016 PEIS analysis, authorized by the 30-year permit (Id.; see also 81 Fed. Reg. 91504(2016)). As explained in the EA, the Project is in the Central Flyway Eagle Management Unit (EMU). The estimated take is analyzed at the local area population (LAP) scale, corresponding to a 109-mile radius around the Project and is based on the median natal dispersal distance of golden eagles (USFWS 2016a). Compensatory mitigation for golden eagles is not required for take estimated for the original project configuration, but is required for additional take resulting from configuration or operational changes due to the repower (i.e., the difference between the annual take of the project based on the original hazardous volume and operational hours and the estimate based on the increased hazardous volume and operational hours after repowering). Therefore, to offset the authorized take of golden eagles above the baseline, the Service has determined that the Applicant is required to retrofit or reframe high-risk

power poles. The number of retrofits will be derived using our REA based on the estimated annual golden eagle mortalities.

The number of retrofits was derived using our Resource Equivalency Analysis (Service 2013a), based on the estimated annual golden eagle mortalities. Briefly, and as explained more fully in the EA, retrofitting and re-framing power poles (e.g., installing eagle-safe perches, installing perching deterrents, insulating electrified phases) reduces eagle mortality by preventing electrocution.

The Applicant has committed and will be required to fully offset the authorized take of golden eagles by implementing compensatory mitigation as part of the conditions of the Permit. Together, these conservation and mitigation measures aim to ensure there will be no significant impacts to golden eagle populations. Compensatory mitigation must be additional or additive and is calculated using the Service's Resource Equivalency Analysis model for eagles, as outlined in the Eagle Conservation Plan Guidance Module 1-Land-based Wind Energy Version 2 (USFWS 2013).

Compensatory mitigation is not required for bald eagle mortality at the Project; however, the compensatory mitigation implemented to offset take of golden eagles will likely benefit bald eagles.

### Comparison of Effects of Alternatives

The following table compares the effects of the no action and the proposed action.

	<b>Proposed Action – Issue Permit</b>	<b>Alternative 1 – No Action</b>
<b>Eagle Take Levels</b>	Up to 54 bald eagles and up to 309 golden eagles over 30 years	Up to 54 bald eagles and 309 golden eagles over 30 years
<b>Avoidance and Minimization</b>	Project is operational and will continue to operate	Project is operational and will continue to operate
<b>Compensatory Mitigation</b>	The Applicant has committed, and will be required, to retrofit or reframe high-risk power poles or implement other Service approved mitigation proportional to the predicted and adjusted eagle take estimate as compensatory mitigating, for the loss of golden eagles as a condition of approval related to the IETP	Mitigation payments to NFWF for the loss of each eagle fatality, for the term of the MBCP based on Resource Equivalence Analysis
<b>Unmitigated Eagle Take</b>	Zero	Up to 54 bald eagles and 309 golden eagles over 30 years
<b>Adaptive Management</b>	The plan is to avoid and minimize impacts to avian resources	The plan is to avoid and minimize impacts to avian resources

	<b>Proposed Action – Issue Permit</b>	<b>Alternative 1 – No Action</b>
<b>Data Collected by Service</b>	Annual monitoring report of fatalities; reporting of injured eagles; information on the effects of specific, applied, conservation measures	None
<b>Company Liability for Eagle Take</b>	No (if in compliance with permit conditions)	No as long as covered by the duration and conditions of MBCP under court settlement and plea agreement ending in 2023.

Table 1. Comparison of the Effects of the No Action and the Proposed Action Alternatives.

### **Evaluation of Alternatives**

The EA evaluated potential impacts that could result from the issuance of the IETP. The EA was developed to assist the Service in evaluating effects on the human environment and in assessing the significance of the impacts that could result from the alternatives. “Significance” under NEPA requires the consideration of context and intensity (40 C.F.R. § 1508.27 of the expired regulations).

### **Selected Alternative**

The selected alternative for this action is the proposed action (issuance of an IETP), as described below and summarized in Table 1 above.

## **IV. Effects of Implementation**

As described in the EA, implementing the selected alternative would have no significant impacts on any of the environmental resources identified in the EA. Our selected alternative is consistent with our purpose and need as stated in the EA. A brief summary of the impact analysis and conclusions in the EA follows.

### **Eagles**

In determining the significance of effects of each alternative on bald eagles and golden eagles, we screened both alternatives against the Eagle Act’s Permit Issuance Criteria under 50 C.F.R. § 22.26 using quantitative tools available in our ECP Guidance (USFWS 2013). We also used updated population estimates and other information pertaining to eagles documented in the *Bald and Golden Eagles: Population demographics and estimation of sustainable take in the United States, 2016 update* (USFWS 2016a) and the *Programmatic Environmental Impact Statement for the Eagle Rule Revision* (USFWS 2016b).

Under our 2016 regulations, the Service has interpreted the conservation standard of the Eagle Act to require maintenance of stable or increasing breeding populations of eagles (50 CFR, Part 22; 81 Fed. Reg. 91494 (Dec. 16, 2016)). The Service independently evaluated the potential impacts from Project operations along with the implications for population level and cumulative



effects. We developed conservative risk estimates for the Project and determined our cumulative effects analysis to be protective of both eagle species.

## **Risk Estimate**

In the ECP Guidance (USFWS 2013), we provided a mathematical model that estimates fatality risk at wind project sites. The model relies on a logical assumption that there is a positive relationship between the number of minutes eagles are present in the air space near turbines, the number of turbines, and the risk of collision by eagles. Additionally, we used Evidence of Absence (EOA; Dalthorp et al. 2017) to analyze the post-construction mortality monitoring data collected on the project site from 2014 –2018 and used the resulting expected value to update the Service’s CRM. We used the “Single Class” module to yield an expected value for each model year and then updated the CRM iteratively, to account for adjusted operational daylight hours which varied annually, and then derived an annual fatality estimate that could be expected during future years of project operations under the assumption that the project would not exceed 4,180 operational daylight hours per turbine per year. Under current Service policy, projects that conduct robust post-construction mortality monitoring are eligible to be permitted at the mean annual estimate for both bald eagles and golden eagles, therefore all fatality estimates presented in this document represent the mean annual fatality estimates for each species.

The mortality monitoring requirements under the Selected Alternative will allow us to evaluate the Project’s risks and provide statistically meaningful results both during the permit term and in the future, should the Applicant seek a new permit.

## **Cumulative Effects**

To evaluate cumulative impacts for the LAP, we followed the guidance provided in Appendix F of the ECP Guidance (USFWS 2013). Utilizing this process, we estimated annual bald eagle fatality rates within the LAP (an 86-mile radius around the Project for bald eagles and a 109-mile radius for golden eagles). This analysis included available data from the Eagle Management Unit (EMU) in which the Project occurs (Central Flyway EMU). We developed this conservative estimate of population-level effects to be protective of the species.

### **Bald Eagles**

The predicted take of bald eagles at the Project is up to 1.8 per year. The estimated median population size of bald eagles in the Central Flyway EMU is 3,209 (Service 2016b). Based on the Service’s process to calculate the LAP, the population size in the LAP is estimated to be 56 bald eagles, and the annual 1% and 5% benchmarks for this local area population are one and three bald eagles, respectively. Currently, there are two long term projects with IETPs and one short-term disturbance permit within this LAP for which lethal take of bald eagles is authorized. Taken together, this Project’s take and the overlapping take of the other project could result in a total annual take of 6.07 bald eagles, or 10.86% of the LAP. This is above the 5% benchmark; however, the North American Breeding Bird Survey (BBS) population trend estimate for bald eagles in Wyoming and Project LAP is 9.9% and 18%, respectively (Sauer et al. 2017; USGS-PWRC 2020). Analyses conducted by the Service showed that over most of the United States, bald eagle populations are growing at a rate of approximately 5% per year (USFWS 2016c).

Additionally, a recently published report (Service 2020) estimated that bald eagle population have increased by a factor of 4.4 since 2009 across EMUs, excluding the southwestern U.S. and Alaska. Based on these results, the Service (2020) concluded that the bald eagle population has continued to increase rapidly since our previous survey.

This provides strong evidence that a take rate of approximately 11% (5% due to annual population growth plus 6% sustainable take from a stable population) would be consistent with the preservation standard in most LAPs. This and other data indicate that the bald eagle population in the LAP is likely considerably above the 2009 population level, which is the management objective specified in the 2016 PEIS (Service 2016a). The population growth in excess of 2009 population provides considerable additional capacity for take above the LAP benchmark, and our determination that a take rate in this LAP of up to 10.86% is consistent with the management objective of eagle populations.

Thus, even though take at the LAP level of 10.86% exceeds the 5% benchmark for the LAP associated with the Project, this level of bald eagle take from the local area is consistent with the management objective established in the PEIS and codified in regulation. The impacts to bald eagle populations at both the LAP and EMU scales are therefore not significant. It is reasonable to assume that bald eagles in the project vicinity are increasing and the conservative take estimate at the Project would not contribute to declines in the overall bald eagle population in the EMU.

Lastly, the IETP-Eagle Act regulations require the Service to consider whether unpermitted eagle mortality may be incompatible with the persistence of the Project LAP. The unpermitted take threshold within a LAP is 10%. We documented that bald eagles are not experiencing atypically high levels of unpermitted mortality in this LAP. Based on the Service's eagle mortality database (which tracks sources of unpermitted take), there were 31 reported bald eagle mortalities within the LAP between 2011 and 2020, for an average of 3.44 per year. These mortalities are all considered to be unpermitted take. Of these reported mortalities, all but seven were due to anthropogenic causes (e.g., electrocution, shooting, poisoning, collision with wind turbines, etc.). The cause of death of the remaining seven eagles are undetermined. On an annual basis, 3.4 unpermitted bald eagle takes equals about 6.14% of the total estimated bald eagle population in the LAP associated with the Project. This amount of unpermitted take is well below the 10% threshold level for unpermitted take within the LAP.

### Golden Eagles

The predicted take of golden eagles at the Project is 10.3 per year. The estimated median population size of golden eagles in the Central Flyway EMU is 15,327 (Service 2016b). Based on the Service's process to calculate the LAP, the population size in the LAP is estimated to be 1,570 eagles and the 1% and 5% benchmarks for this local area population are 16 and 79, respectively (Chapter 4 of the EA, Attachment 1, page 21). As discussed in the EA (Attachment 1), the Service's objective is to manage eagles by authorizing take at a level that is less than 5% of the LAP.

Two currently permitted long-term projects and four short-term permit projects overlap this Project's LAP boundary for golden eagles. Taken together, this Project's take and the overlapping take of the other projects could result in a total annual take of 16.43 golden eagles

(or 1.05% of the LAP). Hence, this level of cumulative take would not exceed the 5% benchmarks for the LAP. The Service has established take limits for golden eagle populations by EMU as described in the final EA for the 2009 Eagle Act take regulations and revised in the 2016 PEIS. For the Central Flyway EMU, the annual take limit is set at zero for golden eagles (USFWS 2016b); therefore, any permitted take must be offset by compensatory mitigation. The predicted take of golden eagles at the Project is 10.3 per year (for a total of up to 309 over the 30-year permit). Therefore, the Applicant has committed and will be required to fully offset the authorized take of golden eagles by implementing compensatory mitigation as part of the conditions of the IETP.

Our LAP analysis also included an assessment of unpermitted golden eagle take (unauthorized golden eagle mortality) that we are aware of within the LAP for the years 2011 to 2020 (the time interval selected for the LAP analysis). In making eagle permitting decisions, the Service is required to assess whether annual unauthorized eagle mortality would exceed 10% of the LAP associated with the Project or action (Id.; see also 81 Fed. Reg. 91499 (2016)).

Our analysis documents that there were 144 reported golden eagle mortalities within the LAP between the discovery period of 2011 and 2020, for an average of 16 per year. On an annual basis, 16 unpermitted golden eagle takes equals about 1.01% of the total golden eagle population in the LAP associated with the Project. This amount of unpermitted take is well below the 10% threshold level for unpermitted take within the LAP.

The Service will continue to encourage measures to reduce mortality from the sources identified in the EA and PEIS, including those identified for the Project. The adaptive management strategy outlined in the EA and the Applicant's ECP are intended to minimize ongoing take at the facility.

## **Conclusion**

The take that would be authorized by this permit does exceed 5% of the LAP for bald eagles (see Attachment 1- Section 4.2.1, page 20-21) but does not exceed 5% of the LAP for golden eagles (see Attachment 1- Section 4.2.2, page 21-22). The authorized take for bald eagles does not exceed the EMU level for bald eagles. As described above, the allowable EMU take level for golden eagles is zero; therefore, issuance of this permit would exceed the EMU take level. Accordingly, compensatory mitigation is required for the anticipated take of golden eagles by the Project. This take would be offset by commitments from the Applicant to retrofit high-risk power poles proportional to the predicted and adjusted eagle take estimate; therefore, the proposed action will not significantly impact golden eagle populations. See the "Mitigation and Monitoring" section below for more discussion. We have determined there would be no significant adverse cumulative effects to bald eagle or golden eagle populations by issuing an IETP to the Applicant.

## **Native American Cultural Values**

The National Historic Preservation Act (NHPA) is the principal federal law guiding federal actions with respect to the treatment of cultural, archaeological, and historic resources. Section 106 (54 U.S.C. § 306108) of the NHPA requires federal agencies, prior to taking action to

implement an undertaking, to consider the effects of their undertaking on historic properties and to give the Advisory Council on Historic Preservation (ACHP) and the State Historic Preservation Office (SHPO) a reasonable opportunity to comment regarding the undertaking. Historic properties are “any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on, the National Register...” of Historic Places [NRHP] (54 U.S.C. § 300308). The criteria used to evaluate the NRHP eligibility of properties affected by federal agency undertakings are contained in 36 CFR § 60.4.

We contacted ten native sovereign nation tribal leaders through formal letters, and other tribes potentially affected by this Project via email, to offer the opportunity for formal consultation concerning this potential federal action. The letters informed the tribal leaders and other potentially affected tribes of the receipt of the IETP application and the availability of a draft EA version for the purpose of a 30-day public comment period. To date, we have not received any comments or requests for formal consultation from our tribal partners.

To address the effects of eagle take on cultural practices, the Service assessed whether the proposed action or no action alternative would impact the religious and cultural significance of eagles to Native American communities. Cumulative effects of the proposed action for the non-purposeful take of bald and golden eagles will not result in regional population declines as the take of bald and golden eagles at the Project is expected to be below the sustainable take threshold for the EMU. In addition, the Service will review take thresholds in the EMUs on a regular basis relative to bald and golden eagle population and demographic parameters, and will modify or adjust the permitting regulations accordingly. If there is evidence that demand for permitted eagle take will exceed take thresholds for the EMUs, the regional structured-allocation process will ensure that authorized take necessary to meet the religious use for traditional ceremonies of a Native American Tribe will not be precluded due to other take being authorized for another purpose (USFWS 2009a). The IETP will include permit conditions to ensure all recoverable eagle remains, parts, and feathers are sent to the National Eagle Repository and could then be used for Native American cultural and religious purposes. As described above, we invited tribes to engage in consultation and have determined that the avoidance and minimization measures implemented at the project will also minimize effects to Traditional Cultural Properties (TCP). In depth discussion related to the environmental consequences of issuing IETP on TCPs can be found in the 2016 PEIS section 3.7.1.3 Federal and Tribal Statutes and is incorporated here by reference.

## **V. Public Comments**

The Service published the draft EA on the Service’s Mountain-Prairie Region’s website (<https://www.fws.gov/mountain-prairie/wind/>) on April 1, 2021, opening a 30-day public comment period which ended on April 30, 2021. We received one letter containing comments and recommendations during the public review period. The comments and responses, as well as the comment letter itself, are presented in Attachment 2. It has been determined that there is no new significant information and the Service has prepared this FONSI in accordance with NEPA regulations (40 C.F.R § 1508.13).

## **VI. Eagle Take Permit Issuance Criteria Required Determinations**

In consideration of this 30-year permit, we evaluated the selected alternative's ability to meet the required determinations of the permit issuance criteria identified in the Eagle Act's 2016 permitting regulations (50 CFR, Part 22; 81 Fed. Reg. 91494 (Dec. 16, 2016)).

Applicants whose otherwise lawful activities may result in take of eagles, can apply for IETP so that their projects may proceed without potential violations of the Eagle Act. The Service may issue an IETP for eagle take that is associated with, but not the purpose of, an activity. Such permits can be issued by the Service when the take that is authorized is compatible with the Eagle Act preservation standard; it is necessary to protect an interest in a particular locality; it is associated with, but not the purpose of, the activity; and it cannot be practicably avoided (50 CFR, Part 22; 81 Fed. Reg. 91551 (Dec. 16, 2016)). The preservation standard under the Eagle Act means to be consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species (50 CFR, Part 22).

The Eagle Act authorizes the Service to issue eagle take permits only when the take is compatible with the preservation of each eagle species, defined (50 CFR, Part 22.26(a); 81 Fed. Reg. 91551 (Dec. 16, 2016)) as "consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species."

We evaluated the Final Environmental Assessment's (EA) Selected Alternative's (USFWS 2018) ability to meet the issuance criteria's required determinations identified in the Eagle Act's 2016 permitting regulations (see 50 CFR § 22.26(f)). Under the regulations, the Service may not issue a permit unless the following issuance criteria are met:

- 1) The direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations within the eagle management unit and local area population, are compatible with the preservation of bald eagles and golden eagles.*

### **Bald eagles**

The direct and indirect effects of the estimated take of bald eagles is consistent with the Service's management objectives, as related to eagles, at the LAP and EMU levels. Based on the Service's process to calculate the LAP and currently available data for this process, the estimated take related to this Project combined with the overlapping take of the three other projects could result in a total annual take of 6.07 bald eagles (or 10.86% of the LAP). In situations where the 5% LAP take threshold is exceeded, in most cases across the United States, the "harder look" called for in the 2016 Eagle Rule revision will reveal that higher levels of bald eagle take from the local area are sustainable and consistent with the management objective established in the PEIS (USFWS 2016a) and Eagle Rule revision [81 Fed. Reg. 91494 (Dec. 16, 2016)].

Thus, even though take at the LAP level of 10.86% exceeds the 5% benchmark for the LAP associated with the Project, this level of bald eagle take from the local area is consistent with the

management objective established in the PEIS and codified in regulation. The impacts to bald eagle populations at both the LAP and EMU scales are therefore not significant based on the information and rationale discussed above in section IV- Effects of Implementation (page 6) and in Attachment 1, EA (Chapter 4.2.1, pages 20-21). Additionally, based on this information and rationale, it is reasonable to assume that bald eagles in the project vicinity are increasing and the conservative take estimate at the Project would not contribute to declines in the overall bald eagle population in the EMU. The Service finds that the direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations within the eagle management unit and local area population, are compatible with the preservation of bald eagles.

### **Golden eagle**

The direct and indirect effects of the estimated take of golden eagles is consistent with the Service's management objectives, as related to eagles, at the LAP and EMU levels. The existing permitted take of golden eagles within the Project's LAP, combined with the estimated take for the Project (16.43 golden eagles per year) equals 1.05% of the LAP, which is well below the 5% LAP benchmarks and therefore is compatible with the preservation of golden eagles. For the Central Flyway EMU, the annual take limit is set at zero for golden eagles (USFWS 2016b), therefore any permitted take must be offset by compensatory mitigation. The predicted take of golden eagles at the Project is 10.3 per year (for a total of up to 309 over the 30-year permit). Therefore, as described in the "Offsetting Compensatory Mitigation" section above, the Service has determined that the Applicant will retrofit high-risk power poles proportional to the predicted and adjusted eagle take estimate as compensatory mitigation, for the loss of golden eagles as a condition of approval related to the IETP. The Service finds that the direct and indirect effects of the take and required mitigation, together with the cumulative effects of other permitted take and additional factors affecting eagle populations within the eagle management unit and local area population, are compatible with the preservation of golden eagles.

#### *2) The taking is necessary to protect a legitimate interest in a particular locality.*

The Project is an operating wind facility consisting of 110 turbines. It has generated approximately 200 megawatts of renewable electricity each year since 2010. It previously received other environmental compliance authorizations including the Wyoming Industrial Siting Council permit and Wyoming Game and Fish Department Chapters 10 and 33 permits. The Project is therefore a legitimate interest in a particular locality. The Applicant is seeking an IETP to comply with the Eagle Act and District Court of Wyoming settlement, as they anticipate some unintentional take of bald eagles and golden eagles will occur from Project operations. The Service has determined that the taking is necessary to protect a legitimate interest in a particular locality.

#### *3) The taking is associated with, but not the purpose of, the activity.*

The Project currently collects and delivers renewable energy. The Service has determined that unintentional take of bald eagles and golden eagles is associated with, but not the purpose of, the Project.

- 4) *The applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles.*

The Applicant has implemented a Migratory Bird Compliance Plan (MBCP), which was developed with assistance from the Service. The purpose of the MBCP is to outline a framework for implementation of avoidance and minimization measures to ensure compliance under requirements of the Migratory Bird Treaty Act (MBTA) and the Eagle Act. The MBCP will remain in place until it is replaced by the Permit. Despite the implementation of the avoidance and mitigation measures outlined in the MBCP, some incidental take of migratory birds and eagles may still occur.

Accordingly, the ECP and the Selected Alternative includes an adaptive management framework to address potential long-term effects. The Service has determined that the take is unavoidable and that the applicant has applied all appropriate and practicable avoidance and minimization measures to reduce impacts to eagles

- 5) *The applicant has applied all appropriate and practicable compensatory mitigation measures, when required, pursuant to paragraph (c) of this section, to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.*

### **Bald eagles**

Per our eagle take permit regulations (50 CFR, Part 22), the Service could only require compensatory mitigation when the EMU take limit is exceeded, or if necessary to protect the LAP, neither of which is the case for the Project (i.e., this LAP can withstand this level of potential take). Hence, in this case the Service will not require compensatory mitigation for bald eagle take as related to this Project. The applicant has applied, or committed to applying, all appropriate and practicable compensatory mitigation measures, when required, pursuant to paragraph (c) of this section, to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

### **Golden eagles**

The proposed action incorporates measures to minimize and avoid to the maximum degree practicable, as required by regulation. To ensure that regional eagle populations are maintained consistent with the preservation standard, regulations require that any golden eagle take that cannot practicably be avoided and is above EMU take limits must be offset by compensatory mitigation at a 1.2 to 1 ratio. As golden eagle take limits for all EMUs were determined to be zero (Service 2016a), compensatory mitigation is necessary to offset any authorized take of golden eagles. The applicant will commit to retrofitting high-risk power poles proportional to the predicted and adjusted eagle take estimate as compensatory mitigation, for the loss of golden eagles as a condition of approval related to the IETP.

The number of retrofits will be derived using our Resource Equivalency Analysis (Service 2013), based on the estimated annual golden eagle mortalities.

- 6) *Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority according to the following prioritization order:*
- (i) Safety emergencies;*
  - (ii) Native American religious use for traditional ceremonies that require eagles be taken from the wild;*
  - (iii) Renewal of programmatic take permits;*
  - (iv) Non-emergency activities necessary to ensure public health and safety; and*
  - (v) Other interests.*

Issuance of the permit will not preclude issuance of another permit necessary to protect an interest of higher priority.

- 7) *Issuance of the permit will not interfere with an ongoing civil or criminal action concerning unpermitted past eagle take at the project.*

There are no ongoing civil or criminal actions concerning unpermitted past eagle take at the project. On October 10, 2013, the Applicant pled guilty in U.S. District Court to two counts of misdemeanor unlawful take of migratory birds. This was discussed further in Section I - Background, page 2.

## **Conclusion**

The Service has determined that issuing this permit is compatible with the preservation of the bald eagle and golden eagle and consistent with the goals of maintaining stable or increasing breeding populations in all eagle management units and the persistence of local populations throughout the geographic range of each species. In December 2016, USFWS published the *Programmatic Environmental Impact Statement for the Eagle Rule Revision* and on December 16, 2016, the USFWS published its final changes to eagle permitting regulations (USFWS 2016b, 81 Fed. Reg. 91494 (Dec. 16, 2016)), which took effect on January 15, 2017.

## **Significance Criteria under NEPA**

The Selected Alternative will not have a significant effect on the human environment. This conclusion is based on the following analysis of the significance criteria as defined in 40 CFR § 1508.27 (of the expired NEPA regulations) and as summarized in the EA.

## **Context**

NEPA requires the consideration of the significance of an action in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend on the effects in the locality rather than in the nation as a whole. Both short- and long-term effects are relevant per 40 CFR § 1508.27(a)(of the



expired NEPA regulations), and requires consideration of both short and long-term effects. *Id.* Significance requires consideration of both context and intensity. *Id.* For purposes of analyzing the Selected Alternative, the Service is required to consider effects of take permits on eagle populations at three scales: (1) the EMU, (2) local area, and (3) project area (defined as the Project footprint and an associated 10-mile buffer) (50 C.F.R. 22.26 (f)(1)). This is appropriate because the biologically-based bald eagle and golden eagle take thresholds are based on regional populations (USFWS 2009a, 2009b, 2016a, 2016b). The EMU and LAP scales consideration is as part of the cumulative effects analysis and is discussed in more detail in Section IV above the and in EA Chapter 4, pages 19- 23. The context of the Selected Alternative points to no significant environmental impact considering the following (as discussed in Attachment 1, EA):

- The Project occurs within the Central Flyway EMU, and our assessment is that bald eagle take authorized by the Service within this EMU is well below the annual take limit for this EMU. Since this authorized take is within the take limit for this EMU, no compensatory mitigation is needed for the potential take of bald eagles, to meet the Eagle Act preservation standard. The Applicant will be required and has committed to conduct compensatory mitigation, to offset the potential take of golden eagles, in the form of retrofitting high-risk power poles in this EMU.

At the LAP level, the Service-authorized take, added to projected take for the Project, would be 10.86% for bald eagles. This is above the 5% benchmark; however, the North American Breeding Bird Survey (BBS) population trend estimate for bald eagles in Wyoming and Project LAP is 9.9% and 19%, respectively (Sauer et al. 2017; USGS-PWRC 2020). Analyses conducted by the Service showed that over most of the United States, bald eagle populations are growing at a rate of approximately 5% per year (USFWS 2016c). Additionally, a recently published report (Service 2020) estimated that bald eagle population have increased by a factor of 4.4 since 2009 across EMUs, excluding the southwestern U.S. and Alaska. Based on these results, the Service (2020) concluded that the bald eagle population has continued to increase rapidly since our previous survey. This and other data indicate that the bald eagle population in the LAP is likely considerably above the 2009 population level, which is the management objective specified in the 2016 PEIS (Service 2016a). The population growth in excess of 2009 population provides considerable additional capacity for take above the LAP benchmark, and our determination that a take rate in this LAP of up to 10.86% is consistent with the management objective of bald eagle populations. This indicates that a take rate of approximately 11% would be consistent with the preservation standard in most LAPs. Thus, even though take at the LAP level of 10.86% exceeds the 5% benchmark for the LAP associated with the Project, this level of bald eagle take from the local area is consistent with the management objective established in the PEIS and codified in regulation. The impacts to bald eagle populations at both the LAP and EMU scales are therefore not significant.

We also documented, through an assessment of unpermitted take, that bald eagles are not experiencing atypically high levels of unpermitted mortality in this LAP. Based on the Service's eagle mortality database (which tracks sources of unpermitted take), there were 31 reported bald eagle mortalities within the LAP between 2010 and 2019, for an average

of 3.56 per year. These mortalities are all considered to be unpermitted take and are largely due anthropogenic causes (e.g., electrocution, shooting, poisoning, collision with wind turbines, etc.) and less due to natural causes or undetermined. On an annual basis, 3.56 unpermitted bald eagle takes equals about 6.37% of the total estimated bald eagle population in the LAP associated with the Project. This amount of unpermitted take is well below the 10% threshold level for unpermitted take within the LAP. Therefore, there are no significant adverse effects on bald eagles contributed by the Project under the Selected Alternative.

- The predicted take of golden eagles at the Project is 10.86 per year. The estimated median population size of golden eagles in the Central Flyway EMU is 15,327 (Service 2016b). Based on the Service's process to calculate the LAP, the population size in the LAP is estimated to be 1,570 eagles and the 1% and 5% benchmarks for this local area population are 16 and 79, respectively (Chapter 4 of the EA, Attachment 1, pages 21-22). As discussed in the EA (Attachment 1), the Service's objective is to manage eagles by authorizing take at a level that is less than 5% of the LAP. The current permitted take of golden eagles existing within this LAP combined with the estimated take for the Project is 16.43 golden eagles (or 1.05% of the LAP), which is well below the 5% LAP benchmarks. Hence, this level of cumulative take would not exceed the 5% benchmarks for the LAP. Our LAP analysis also included an assessment of unpermitted golden eagle take (unauthorized golden eagle mortality) that we are aware of within the LAP for the years 2010 to 2019 (the time interval selected for the LAP analysis). In making eagle permitting decisions, the Service is required to assess whether annual unauthorized eagle mortality would exceed 10% of the LAP associated with the Project or action. Our analysis documents that there were 157 total unpermitted golden eagle mortalities during this time period, for an average of 10.46 per year. On an annual basis, 10.46 unpermitted golden eagle takes equals about 0.66% of the total golden eagle population in the LAP associated with the Project. This amount of unpermitted take is well below the 10% threshold level for unpermitted take within the LAP. As described above, the EMU take level for golden eagles is zero, therefore issuance of this permit would exceed the EMU take level. Accordingly, compensatory mitigation is required for the anticipated take of golden eagles by the Project. This take would be offset by commitments from the Applicant to retrofit or reframe high-risk power poles or implement other Service approved compensatory mitigation measures proportional to the predicted and adjusted golden eagle take estimate. Therefore, there are no significant adverse effects on golden eagles contributed by the Project under the Selected Alternative.
- The Applicant may reduce the actual amount of bald eagle and golden eagle take (compared with our take estimates for the Project) through the implementation of adaptive management. Adaptive Management Plan consists of monitoring for impacts and avoiding, minimizing, and mitigating those impacts to eagles and other avian species based on the Project specifics and data. The stepwise process identified in the ECP will be used to guide the implementation of additional conservation measures as needed, and applies before actual take exceeds the permitted take levels. This will ensure that the impacts of issuing an IETP to the Project on the local and regional bald eagle and golden

eagle populations will be less than significant.

- Issuance of an IETP to the Project would have no significant adverse effects on environmental resources or values at the local or regional scale.

## **Intensity**

The term "intensity" refers to the severity of a proposed action's impact on the environment. In determining the intensity of an impact, 40 CFR § 1508.27(b) (of the expired NEPA regulations) directs Federal agencies to consider ten specific factors, each of which is discussed below in relation to the Selected Alternative for the Project.

*1) Impacts can be both beneficial and adverse and a significant effect may exist regardless of the perceived balance of effects.*

While consideration of the intensity of project impacts must include analysis of both beneficial and adverse effects, only a significant effect triggers the need to prepare an environmental impact statement (EIS). The potential beneficial effects and adverse impacts of the Selected Alternative are discussed briefly below.

*Beneficial Effects.* The selected alternative includes implementation of the ECP and adaptive management, which includes mortality monitoring that will benefit the Service's understanding of mortality of bald eagles and golden eagles at the Project. Our analysis is in comparison to the no action alternative under which the Project continues to operate without any IETP requirements and only limited conservation commitments. Issuance of this permit will allow the Project to operate in compliance with the Eagle Act should eagle take occur, while also providing the Service with valuable data from monitoring requirements.

*Adverse Effects.* As described in the EA, the Applicant has worked with the Service in development of the ECP and the MBCP to ensure that it contains commitments to avoid and minimize adverse effects on eagles. The selected alternative incorporates these measures. Even so, birds, including eagles, can be injured and killed by collision with wind turbines. The Project's ECP describes commitments to avoid and minimize impacts to eagles. Eagle mortality will be monitored and an adaptive management plan will be implemented to address impacts as operational data are gathered.

In summary, the analyses in the EA and implementation of the measures identified in the Selected Alternative (including those in the ECP) support the conclusion, and the Service hereby finds, that the Selected Alternative will not have a significant effect on the quality of the human environment.

*2) The degree to which the selected alternative will affect public health or safety.*

As discussed in Chapter 1 of the EA (Attachment 1), the proposed action is issuance of an IETP for non-purposeful take of eagles at the Project. The Service has determined that this action will have no effect on public health or safety.

*3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farm lands, wetlands, wilderness, wild and scenic rivers, or ecologically critical areas.*

The Service only evaluated whether to issue an IETP to the Applicant, thus, only potential impacts to eagles and effects of eagle take on cultural practices were considered in the EA analyses. As the Service is only evaluating whether to issue an IETP for the existing Project's operational activities, the Service has concluded that numerous resources would not be impacted by the proposed action or no action alternatives. These include: air quality, climate change, environmental justice, land use, fisheries, geology and soils, human health and safety, noise, social and economic values, surface waterbodies and floodplains, vegetation, visual resources, wetlands, migratory birds, bats, and other wildlife. Thus, these resources were not evaluated in the EA. The Service finds that issuance of an IETP to the Applicant would have no further impact on these resources.

*4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.*

No effects of the Selected Alternative were identified as being highly controversial. As a factor for determining within the meaning of 40 C.F.R. 1508.27(b)(4) whether to prepare a detailed EIS, controversy is not equated with the existence of opposition to a use. The NEPA implementation regulations (43 C.F.R. 46.30) define controversial as "a circumstance where a substantial dispute exists as to the environmental consequences of the proposed action and does not refer to the existence of opposition to a proposed action, the effect of which is relatively undisputed." This Project is likely to take eagles, and there is no dispute about that consequence. We received a letter containing comments and recommendations during the comments period. Comments were evaluated and addressed accordingly. It has been determined that there is no new significant information. The Service has determined that the selected alternative will not have effects on the quality of the human environment that are likely to be highly controversial.

*5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.*

The ECP prepared for the Project and the Service's CRM to estimate eagle take were developed to address any uncertainty regarding impacts. The selected alternative requires a rigorous mortality monitoring design to reduce uncertainty regarding impacts to eagles. Mortality monitoring will continue throughout the permit term at a number of turbines and frequency of occurrence as agreed to by the Applicant and the Service.

The adaptive management process will further reduce and monitor potential impacts to eagles from operation of the Project. Issuance of the permit and the implementation of the ECP will also reduce impacts to avian and bat populations.

Additionally, we did not identify predicted effects to any other environmental resources or values from operation and maintenance of the Project that are highly uncertain or involve unique or unknown risks.

As a result, the Service has determined that there are no predicted effects of the Selected Alternative on the human environment that are considered to be highly uncertain or involve unique or unknown risks.

*6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.*

Issuance of an IETP to the Project does not set precedent for, or automatically apply to other IETP applications the Service is reviewing or could review in the future. Each permit request will be evaluated on a case-by-case basis. Therefore, the selected alternative does not establish precedents for future actions or represent a decision in principle about a future action. Moreover, this Project will not limit the Service's discretion to impose additional conditions on processing future IETP applications under the Eagle Act's permitting regulations.

*7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts-which include connected actions regardless of land ownership.*

We evaluated cumulative effects on bald eagles as required by NEPA (40 C.F.R. 1508.8) and the Eagle Act's permitting regulations. Under 50 C.F.R. 22.26 (f)(1), when reviewing a permit application, the Service is required to consider effects of take permits on eagle populations at three scales: (1) the EMU, (2) local area, and (3) project area. Our evaluation also considers cumulative effects.

We incorporated data on mortality at wind farms and electric utilities, and additional information on population-limiting effects in our eagle cumulative impact assessment. We also discussed reasonably foreseeable future (EA, Section 4.2.4).

### **Bald Eagles**

The LAP of bald eagles for the Project is approximately 56 eagles and the annual 1% and 5% benchmarks for this local area population are one and three bald eagles respectively. Three currently permitted projects overlap this Project's LAP for bald eagles. Taken together, this Project's take and the overlapping take of the other projects could result in a total annual take of 6.07 bald eagles (or 10.86% of the LAP).

The Service has established take limits for bald eagle populations by EMU in the Final Environmental Assessment (FEA) for the 2009 Eagle Act take regulations and these were revised in the PEIS. This Project is within the Central Flyway EMU, which has an annual

take threshold of 70 bald eagles per year (USFWS 2016b). The predicted annual take of bald eagles at the Project is up to 1.8 bald eagle per year. Therefore, the annual population effects in the Central Flyway EMU would be well below the corresponding take threshold. Therefore, there are no significant adverse cumulative effects contributed by the Project under the Selected Alternative.

### **Golden Eagles**

The LAP of golden eagles for the Project is approximately 1,570 eagles and the 1% and 5% benchmarks for this local area population are 16 and 79, respectively. Two currently permitted projects overlap this Project's LAP boundary for golden eagles. Taken together, this Project's take and the overlapping take of the other projects could result in a total annual take of 16.43 golden eagles (or 1.05% of the LAP).

The Service has established take limits for golden eagle populations by EMU in the Final Environmental Assessment (FEA) for the 2009 Eagle Act take regulations and these were revised in the PEIS. This Project is within the Central Flyway EMU, which has an annual take threshold of zero golden eagles per year (USFWS 2016b). The predicted take of golden eagles at the Project is 10.3 golden eagle per year, however this exceeds the EMU take limit. Therefore, the Applicant has committed to retrofitting high-risk power poles proportional to the predicted and adjusted eagle take estimate as compensatory mitigation, for the loss of golden eagles as a condition of approval related to the IETP. Therefore, there are no significant adverse cumulative effects contributed by the Project under the Selected Alternative.

*8) The degree to which the action may adversely affect districts, sites, highways, structures, or other objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.*

The National Historic Preservation Act (NHPA) of 1966 (Public Law 89-665; 54 U.S.C. §300101 et seq.) is legislation intended to preserve historical and archaeological sites in the U.S. Historic properties are defined as “any prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion in the National Register of Historic Places maintained by the secretary of the Interior”. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register Criteria.” 36 CFR § 800.16 (l)(1). Some tribes and tribal members may consider eagle nests and other areas where eagles are present to be sacred sites provided for in the American Indian Religious Freedom Act of 1978 (42 U.S.C. 1996). Such sites may also be considered properties of traditional religious and cultural importance to an Indian Tribe (commonly referred to as Traditional Cultural Properties or TCPs), and as potential historical properties of religious and cultural importance of NHPA.

Our authority is limited to potentially authorizing take of eagles by the Project. Apart from eagles, impacts to historical resources associated with construction of the Project are outside the scope of our review.

No new ground-disturbing activities will occur as part of or related to issuing an IETP.

The Service currently manages bald and golden eagles at the Eagle Management Unit (EMU) level, which is defined as the four administrative flyways with some modifications. This Project occurs in the Central Flyway. We contacted ten native sovereign nation tribal leaders through formal letters, and other tribes potentially affected by this Project via email, to offer the opportunity for formal consultation concerning this potential federal action. The letters informed the tribal leaders and other potentially affected tribes of the receipt of the IETP application and the availability of a draft EA for the purpose of a 30-day public comment period. To date, we have not received any comments or requests for formal consultation from our tribal partners.

*9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973, or the degree to which the action may adversely affect a species proposed to be listed as endangered or threatened or proposed critical habitat.*

On March 18, 2020, the Service initiated an intra-service Section-7 consultation for the issuance of an IETP for the Project (EA, Attachment B). It was determined that the Project will have “no effect” on six federally listed species: Ute ladies’-tresses, and five Platte river species: least tern, piping plover, whooping crane, pallid sturgeon, and western prairie fringed orchid. The Service’s Wyoming Field Office reviewed the Intra-Service Section-7 Biological Evaluation Form and concurrence was transmitted to the Regional Migratory Birds Office on March 20, 2020. Our decision regarding the IETP will not alter the physical footprint of the Project and will not alter its impacts to federally threatened and endangered species; therefore, no further evaluation of impacts to species listed under the ESA is warranted for the Service’s decision of whether or not to issue an IETP.

*10) Whether the action threatens a violation of Federal, State, or local law requirements imposed for the protection of the environment.*

The selected alternative will not violate any Federal, State, or local law.

## **Findings**

Under the Selected Alternative, we estimate that up to 54 bald eagles and up to 309 golden eagles (1.8 bald eagle and up to 10.3 golden eagles annually) could be taken by the Project over a 30-year period. The selected alternative requires implementation of the ECP. The ECP includes required permit conditions that will result in additional monitoring and operational adjustments. Permit condition will be implemented based on the number of fatalities documented at the Project. Increased mortality monitoring associated with this alternative (i.e., evaluating all turbines during monitoring years), will help to ensure that fatalities are detected and will support validation of the take estimate. Increased monitoring also has the benefit of accelerating the use

of the stepwise table if a fatality is discovered, thereby helping reduce future fatalities. The issuance of an IETP to the Applicant would have no significant adverse effects on environmental resources or values. Based on the intensity and context of these effects and consideration of the elements associated with the selected alternative, issuance of an IETP to the Applicant as analyzed in the attached EA is not expected to result in significant adverse effects to the human environment.

## **VII. Conclusions**

The Service developed the EA and findings in accordance with the NEPA of 1969, as amended, and the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. §§1500-1508). The Service concludes that, with the implementation of the avoidance, minimization, mitigation, and adaptive management measures outlined in the ECP, the selected alternative for issuance of an IETP to the Applicant for the operation at the Project will result in no significant impacts to the quality of the human environment, individually or cumulatively with other actions in the general area.

It is our determination that the Selected Alternative is not a major Federal action significantly affecting the quality of the human environment under Section 102(2)(c) (42 U.S.C. §4332) of NEPA. Accordingly, an EIS is not required and our environmental review under NEPA is concluded with this finding of no significant impact (43 C.F.R. §46.325). As stated at the beginning of this document, the EA prepared in support of this finding is incorporated by reference and attached (Attachment 1) hereto. The EA is also available from the Service's Mountain-Prairie Region website at: <https://www.fws.gov/mountain-prairie/wind/>.

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Acting Regional Director  
Mountain-Prairie Region  
U.S. Fish and Wildlife Service

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Date



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**Attachment 1: Environmental Assessment for the Issuance of  
an Incidental Eagle Take Permit for Top of the World Wind  
Energy Project, Wyoming**

## **Attachment 2: Public Comments and Service's Response**