

July 29, 2024

Sent via email:

VB BTS, II, LLC  
Attention Julie Heffernan  
750 Park of Commerce Drive  
Boca Raton, FL 33487  
[Fcc-faa@verticalbridge.com](mailto:Fcc-faa@verticalbridge.com)

Morris Mickelson  
Abby McKay  
NEPA/NHPA Specialist  
Lotis Environmental, LLC  
8899 Main Street  
Williamsville, NY 14221  
[Nepa.nhpa@thelotisgroup.com](mailto:Nepa.nhpa@thelotisgroup.com)  
[McKay@thelotisgroup.com](mailto:McKay@thelotisgroup.com)

Christine Heacock  
Federal Preservation Officer  
Federal Communications Commission  
[Christine.Heacock@fcc.gov](mailto:Christine.Heacock@fcc.gov)

**Request for Environmental Review of the Proposed Bears Ears Site (US-UT-5059)  
Near Utah State Route 95, San Juan County, Utah 84533, ASR Application  
A1261741.**

To Whom It May Concern:

The Southern Utah Wilderness Alliance, Archeology Southwest, Bears Ears Partnership, Grand Canyon Trust, National Parks Conservation Association, Public Employees for Environmental Responsibility (PEER), Sierra Club, and Utah Diné Bikéyah submit to the FCC this Request for Environmental Review of the proposed cellular communications tower identified as Bears Ears Site (US-UT-5059) near Utah State Route 95, San Juan County, Utah 84533, ASR Application A1261741.

The proposed tower is located on a Utah Trust Lands Administration parcel within the heart of Bears Ears National Monument, a landscape with one of the highest densities of cultural sites and resources in the United States. Bears Ears National Monument, managed by the Bureau of Land Management (BLM), is adjacent to Natural Bridges National Monument, the first ever International Dark Sky Park designated by the International Dark-Sky Association. The entirety of Natural Bridges, which is managed by the National Park Service (NPS), is listed on the National Register of Historic Places (NRHP) as the Natural Bridges Archeological District

protected under the National Historic Preservation Act (NHPA). At 480-feet tall, the proposed tower would surpass the tallest building in Utah — the Astra Tower in Salt Lake City, which will be 449 feet tall when it’s completed.

This Request for Environmental Review is submitted pursuant to the Federal Communication Commission’s (FCC or Commission) rules for environmental review, which provide that any interested persons may petition for environmental review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., of any proposed system cell tower that may pose significant environmental impacts. 47 C.F.R. § 1.1307(c).

As detailed below, the proposed cell tower requires full NEPA analysis instead of approval using the “Environmental Assessment Summary Report” (hereinafter Summary Report) submitted by the applicant. The Summary Report is significantly deficient, including, but not limited to: 1. Inadequate Tribal consultation; 2. Failure to include required information; and 3. Failure to analyze the environmental impacts of the 480-foot tower to the visual, cultural, natural, and other resources and values within Bears Ears National Monument (BENM) and Natural Bridges National Monument (Natural Bridges).

Because the proposed tower will have significant impacts on the resources and values of these two national monuments, and because better, less impactful alternatives likely exist outside of BENM, Petitioners request that a full and public Environmental Impact Statement be undertaken, which includes a range of alternatives to the proposed action. “Any Commission action deemed to have a significant effect upon the quality of the human environment requires the preparation of a Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS).” 47 C.F.R. § 1.1307.

At a minimum, a new EA must be prepared that complies with the FCC regulations and NEPA by fully analyzing the potential for significant environmental impacts to the cultural, natural, aesthetic, and other resources and values of the two national monuments.

## **I. Requestors**

The **Southern Utah Wilderness Alliance (SUWA)** is a non-profit environmental membership organization with members in all fifty states and offices in Utah, Washington, D.C., Chicago, and Portland. SUWA is dedicated to the sensible management of all federal public lands within the State of Utah, including the preservation and protection of plant and animal species, the protection of clean air and water, the preservation and protection of cultural and archaeological resources, and the permanent preservation of Utah’s remaining wilderness quality lands. SUWA staff and members actively supported both President Obama’s and President Biden’s exercise of their authority under the Antiquities Act to designate the Bears Ears National Monument and preserve the objects and values identified in both Proclamations. SUWA staff and members have worked for decades to obtain permanent, heightened protection for the Bears Ears area.

**Archaeology Southwest** is a private 501(c)(3) nonprofit organization headquartered in Tucson, Arizona, on the homelands of the Tohono O’odham Nation and the Pascua Yaqui Tribe. In our workplace and activities, we are striving for inclusion across race, gender, age, religion, and

identity. We are supported through donations and grants from individuals, foundations, and corporations. We practice **Preservation Archaeology**, a holistic and conservation-based approach to exploring and protecting heritage places while honoring their diverse values. We compile archaeological information, make it accessible and understandable, share it with the public and decision-makers, advocate for landscape-scale protection, and steward heritage properties and conservation easements. We are committed to real and ongoing collaboration with Indigenous communities.

**Bears Ears Partnership (BEP)** works to protect and build respect for the cultural and natural landscapes of the greater Bears Ears region. BEP prioritizes the building of broad consensus to protect and properly manage the greater Bears Ears cultural landscape through strong support of Tribal collaborative management of these lands while working with land managers and communities to find common ground and implement practical on the ground conservation and education programs.

The **Grand Canyon Trust** is a 501(c)(3) regional non-profit conservation organization whose mission is to safeguard the wonders of the Grand Canyon and the Colorado Plateau, while supporting the rights of its Native peoples. We envision a Colorado Plateau where wildness, a diversity of native plants and animals, clean air, and flowing rivers abound; where sovereign Tribal Nations thrive; where a livable climate endures; and where people passionately work to protect the region they love for future generations.

The mission of the **National Parks Conservation Association** is to “protect and enhance America’s National Park System for present and future generations.” Founded in 1919, NPCA is the leading citizen voice for the national parks. We are a national non-profit with headquarters in Washington, DC, and 29 regional and field offices across the country, including our field office in Salt Lake City, Utah. NPCA represents over 1.6 million members and supporters who care deeply about America’s shared natural and cultural heritage preserved by the National Park System.

**Public Employees for Environmental Responsibility (PEER)** supports current and former public employees who seek a higher standard of environmental ethics and scientific integrity within their agencies. We do this by defending whistleblowers, shining the light on improper or illegal government actions, working to improve laws and regulations, and supporting the work of other organizations.

The **Utah Sierra Club** is a team of organizers, volunteers, and grassroots activists who are working to solve the climate crisis in a way that is fair and equitable. We work with communities around Utah to build a movement that protects and defends everyone’s right to a healthy environment. From lands, water, climate, air, to justice for the communities impacted most by environmental degradation, we work on a variety of issues year after year to make sure our natural resources are protected for present and future generations.

**Utah Diné Bikéyah (UDB)** is a non-profit organization dedicated to healing of people and the Earth through supporting Indigenous communities and protecting their culturally significant,

ancestral lands. Our mission is to preserve and protect cultural and natural resources of our ancestral lands to benefit and bring healing to people and the Earth.

## **II. The Applicant and FCC Failed to Conduct Meaningful Tribal Consultation**

Federal agencies have dual obligations when considering the impacts of its undertakings on cultural resources. Pursuant to Section 106 of the National Historic Preservation Act (NHPA), the FCC must “make a reasonable and good faith effort” to identify cultural resources that may be affected by an undertaking. 36 C.F.R. § 800.4(b)(1). Pursuant to NEPA, FCC must take a “hard look” at the effects of the proposed action. *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). FCC<sup>1</sup> must comply with both statutes when considering whether to approve the application. There are serious deficiencies with the FCC’s purported Section 106 compliance here, including the utter failure to notify (much less consult with) necessary Indian tribes, an arbitrary area of potential effects (APE), and insufficient evaluation of whether identified cultural resources are eligible for listing on the National Register of Historic Places (NRHP).

### **A. NHPA requirements**

Congress enacted the NHPA in 1966 to implement a broad national policy encouraging the preservation and protection of America’s historic and cultural resources. *See* 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal “undertaking” unless the agency takes into account the effects of the undertaking on historic properties that are included in or eligible for inclusion in the National Register of Historic Places. 54 U.S.C. §§ 306108, 300320; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995).

To adequately “take into account” the impacts on archeological resources, all federal agencies must comply with binding Section 106 regulations established by the Advisory Council on Historic Preservation (Advisory Council). Under these regulations, if the proposed action is an undertaking,<sup>2</sup> the agency must determine “whether it is a type of activity that has the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a). An effect is defined broadly to include direct, indirect, and/or cumulative adverse effects that might alter the characteristics that make a cultural site eligible for listing in the National Register of Historic Places. *See id.* § 800.5(a)(1); *id.* § 800.16(i); 65 Fed. Reg. 77,698, 77,712 (Dec. 12, 2000).

The agency next “[d]etermine[s] and document[s] the area of potential effects” and then “[r]eview[s] existing information on historic properties within [that] area.” 36 C.F.R. § 800.4(a)(1)-(2). “Based on the information gathered, . . . the agency . . . shall take the steps necessary to identify historic properties within the area of potential effects.” *Id.* § 800.4(b). “The

---

<sup>1</sup> The FCC allows project applicants to perform the Section 106 consultation process, but the agency is ultimately responsible for ensuring compliance with the NHPA. Similarly, it also delegates aspects of the initial NEPA review to applicants but is responsible for NEPA compliance.

<sup>2</sup> Undertakings include any permit or approval authorizing use of federal lands. 36 C.F.R. § 800.16(y).

agency shall make a reasonable and good faith effort to carry out appropriate identification efforts.” *Id.* § 800.4(b)(1). To do so, an agency official “shall take into account past planning, research and studies . . . the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.” *Id.* As stated in the preamble to the Section 106 regulations, knowing the historic properties at risk from an undertaking is essential: “[i]t is simply impossible for an agency to take into account the effects of its undertaking on historic properties if it does not even know what those historic properties are in the first place.” 65 Fed. Reg. 77,698, 77,715 (Dec. 12, 2000).

If the undertaking is a type of activity with the potential to affect historic properties, then the agency must determine whether in fact those properties “may be affected” by the particular undertaking at hand. 36 C.F.R. § 800.4(d)(2).<sup>3</sup> Having identified the historic properties that may be affected, the agency considers whether the effect will be adverse, using the broad criteria and examples set forth in Section 800.5(a)(1). Adverse effects include *not only* the “[p]hysical destruction of or damage to all or part of the property,” *but also* “[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” *Id.* § 800.5(a)(2)(i) & (2)(v) (emphasis added). If the agency concludes that the undertaking’s effects do not meet the “adverse effects” criteria—that is, the agency concludes that there may not be an adverse effect from the undertaking—it is to document that conclusion and propose a finding of “no adverse effects.” *Id.* § 800.5(b), 800.5(d)(1).

If the agency official concludes that there *may be* an adverse effect, it engages the public and consults further with the state historic preservation officer, Native American tribes, consulting parties, and the Advisory Council in an effort to resolve the adverse effects. *Id.* §§ 800.5(d)(2), 800.6.

## **B. NHR eligibility determination**

A district, site, structure or object may be eligible for inclusion on the NHR depending on whether it:

- possess[es] integrity of location, design, setting, materials, workmanship, feeling, and association and
- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
  - (b) that are associated with the lives of persons significant in our past; or
  - (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

---

<sup>3</sup> The agency may also determine that there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them, at which point it consults with the State Historic Preservation Officer and notifies relevant Native American tribes of its conclusion. *Id.* § 800.4(d)(1).

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R § 60.4.

It is impossible to determine if properties are eligible for the NHR without consulting the appropriate Tribes which, as discussed below, the Applicant and the FCC failed to do. 36 C.F.R. § 800.4.

### **C. Bears Ears cultural landscape**

Nowhere does the Summary Report even mention that the proposed tower location is in the heart of Bears Ears National Monument. *See*, Exhibit 1. Bears Ears has been home to Native American communities “since time immemorial.” Proclamation No. 10,825, 86 Fed. Reg. 57,321 (Oct. 8, 2021). Their stories, from over 13,000 years of habitation, are interwoven into the landscape in the form of mud brick granaries and dwellings, rock art, tools, projectile points, pottery, and other cultural sites. *See generally id.* There is perhaps no worthier example of a National Monument than Bears Ears. In fact, the density of cultural and archaeological sites in the Bears Ears region “was an impetus for the passage of the Antiquities Act” itself. *Id.* at 57,321. The innumerable archeological and cultural resources located within BENM draw much of their meaning from the context and landscape in which they are embedded. *Id.* The concentration and locations of cultural objects have contributed to understanding how people in the region have interacted with one another and with the surrounding environment. *See id.* at 57,327-29.

Also nestled within BENM, and very close to the proposed tower location, is Natural Bridges. *See*, Exhibit 1. The entirety of this Monument is listed on the National Register of Historic Places (NRHP) as the Natural Bridges Archeological District protected under the National Historic Preservation Act (NHPA). *See*, Exhibit 2, p. 1.

Despite being located in the heart of BENM and adjacent to Natural Bridges, the archeological assessment in the Summary Report entirely ignores the deep and complex cultural significance of the surrounding landscape for local tribes. It has wholly failed to comply with the NHPA and NEPA.

### **D. The Applicant and FCC failed to make a reasonable and good faith effort to identify Tribes for consultation**

Section 106 of the NHPA requires federal agencies to “consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” 36 C.F.R. §§ 800.2(c)(2)(ii), 800.4–.6; 54 U.S.C. § 302706(b). This requires agencies to make a “reasonable and good faith effort” to consult with Tribes in a “manner respectful of tribal sovereignty.” 36 C.F.R. § 800.2(c)(2)(ii)(B); *see also* 47 C.F.R. Pt. 1, App. C (Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (hereinafter “Nationwide Programmatic Agreement”)).

With respect to the FCC, “Applicants...have been authorized... to initiate, coordinate, and assist the Commission with compliance with many aspects of the Section 106 review process for their Facilities.” 47 C.F.R. Pt. 1, App. C. “[T]o enable the Commission to fulfill its duty of consultation, Applicants shall use reasonable and good faith efforts to identify any Indian tribe or NHO that may attach religious and cultural significance to Historic Properties that may be affected by an Undertaking.” 47 C.F.R. Pt. 1, App. C, § IV.B. Unfortunately, the record here does not reflect a reasonable and good faith effort by either the Applicant<sup>4</sup> or the Commission.

According to the Summary Report (p. 5):

Lotis utilized the FCC’s Tower Construction Notification System (TCNS) to identify tribal entities with interest in the proposed undertaking. The initial TCNS filing was submitted on December 12, 2023. The FCC responded via email on December 15, 2023, indicating that thirteen (13) nationally recognized tribes were forwarded information regarding the location of the proposed undertaking via electronic or regular mail.

It does not appear that either the Applicant or the FCC made any effort beyond the TCNS to identify tribes for consultation. The 13 tribes contacted by the Applicant are: Blackfeet Nation, Crow Tribe, Eastern Shoshone Tribe, Kaibab Band of Paiute Indians, Kiowa Indian Tribe, Northwestern Band of Shoshone Nation, Pueblo of Zuni, San Juan Southern Paiute Tribe, Shoshone-Bannock Tribes, Skull Valley Band of Goshute, Southern Ute Tribe, Ute Indian Tribe, and the Ute Mountain Ute Tribe. Summary Report, Appendix D, pdf p. 147. This list is woefully inadequate.

In 2016, President Obama designated the 1.35-million-acre Bears Ears National Monument (hereinafter BENM), recognizing that “the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.” Presidential Proclamation 9558, Establishment of the BENM, December 28, 2016 (hereinafter “Proclamation 9558”). After President Trump shrunk the Monument by about 83 percent in 2017, President Biden used his authority under the Antiquities Act to reinstate the original boundaries of the Monument, which includes all lands surrounding the proposed tower site (*See*, Exhibit 1). Presidential Proclamation 10285, A Proclamation on BENM, October 8, 2021 (hereinafter “Proclamation 10285”).

Both proclamations recognize that, in addition to the five tribes listed above, “[a]pproximately two dozen other Tribal Nations and Pueblos have cultural ties to the area.” *Id.* The Draft Environmental Impact Statement for the BENM resource management plan (hereinafter “BENM

---

<sup>4</sup> The Summary Report was prepared and submitted for the Applicant, Vertical Bridge, by environmental consulting firm, Lotis Environmental (hereinafter “Lotis”). Vertical Bridge is referred to as VB BTS II, LLC in the Report.

DEIS”) identifies 32 Tribal Nations with cultural ties to the Monument, and that the BLM invited for consultation. BENM DEIS, Vol. 1, pp. 4-3 – 4-4.<sup>5</sup>

As to Natural Bridges National Monument (hereinafter “Natural Bridges”), in a letter to the Utah Trust Lands Administration (TLA) opposing the proposed tower location, the NPS stated: The indigenous cultural landscapes are considered sacred to the Monument’s 27 traditionally associated Tribal Nations and are an important value for the visitor experience.” Exhibit 2, pp. 1-2. Further, the letter states: “we trust that, through the National Historic Preservation Act (NHPA) Section 106 process, the project proponent will consult with the 27 traditionally associated Tribal Nations to understand their concerns for the sacred sites and landscapes affected by this project.” *Id.*, p. 2.

A number of these Tribal Nations are identified on the Natural Bridges’ website.<sup>6</sup> These include: the Hopi Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Paiute Indian Tribe of Utah, Pueblo of Acoma, Pueblo of Laguna, Pueblo of Santa Ana, Pueblo of Santa Clara, Pueblo of Zuni, San Juan Southern Paiute, Southern Ute Indian Tribe, Ute Indian Tribe of Uintah and Ouray Reservation, and Ute Mountain Ute Tribe.

Despite all of this publicly-available information, Lotis and the Commission identified and contacted only the 13 found through the TCNS. This is not a “reasonable and good faith effort.” Accordingly, the Applicant and the FCC failed to consult with at least a dozen tribes that may attach religious and cultural significance to the two Monuments and the Historic Properties therein.

Most notable are the Navajo Nation<sup>7</sup> and the Hopi Tribe, which are specifically identified in the proclamations, and, along with the Pueblo of Zuni, Ute Mountain Ute Tribe, and Ute Indian Tribe, make up the Bears Ears Commission (BEC).

In recognition of the importance of knowledge of Tribal Nations about these lands and objects and participation in the care and management of the objects identified above, and to ensure that management decisions affecting the monument reflect expertise and traditional and historical knowledge of Tribal Nations, a Bears Ears Commission (Commission) is reestablished in accordance with the terms, conditions, and obligations set forth in Proclamation 9558 to provide guidance and recommendations on the development and implementation of management plans and on management of the entire monument.

Proclamation 10285. As part of the consultation process, the Applicant and the FCC should have also contacted the Bears Ears Commission.

---

<sup>5</sup> The BENM DEIS Vol. 1 is found on BLM’s ePlanning: [https://eplanning.blm.gov/public\\_projects/2020347/200531796/20105487/251005487/BENM\\_DraftRMP-EIS\\_Vol1\\_508.pdf](https://eplanning.blm.gov/public_projects/2020347/200531796/20105487/251005487/BENM_DraftRMP-EIS_Vol1_508.pdf)

<sup>6</sup> <https://www.nps.gov/nabr/learn/historyculture/index.htm>

<sup>7</sup> The Navajo Nation is located less than 25 miles from the communications tower site.



In addition, there is no evidence that either the Applicant or the FCC have contacted either the National Park Service or the Bureau of Land Management for additional information, much less consultation. In their letter to TLA, “the NPS requests to be a consulting party in accordance with Section 106 of the NHPA to resolve any adverse effects the design alternative may pose to the NRHP listed property of the Natural Bridges Archeological District and other Monument resources.” Exhibit 2, p. 2.

Not only did the Applicant and the FCC fail to initiate consultation with at least a dozen necessary tribes, the BEC, NPS and BLM, the information provided was severely deficient.

*First*, each consultation letter sent by Lotis fails to mention that the tower is in the middle of BENM and adjacent to Natural Bridges. Summary Report, Appendix D, pdf pp. 149-164.

*Second*, the letters fail to mention the size of the tower on the landscape, or the fact that it will be 480-feet tall with blinking red lights at the top and midway points. *Id.*

*Third*, there is evidence that Lotis failed to attach or enclose the necessary information to all of the tribes. Each letter, dated February 9, states: “To aid you in your review please see the proposed undertaking’s information is as follows: Attached (or Enclosed), please find the requested materials which include site photographs taken in all four directions (north, south, east, and west) from the center of the proposed undertaking, a project summary, an aerial photograph, a topographic map, and form 620 (if requested).” *Id.* But, there was no information provided with the letters.

There are six “proof of submission” emails with Dropbox links, dated February 16, 2024, sent to the Blackfoot Nation, Southern Ute, Kiowa, Crow, Ute Indian Tribe, and Northwestern Band of Shoshone tribes. *Id.*, pdf pp. 166-172. It is unclear whether the information in the Dropbox link is the information referenced in the February 9, 2024 letters. There are also four receipts for priority mail, dated February 9, 2024, to the Pueblo of Zuni, Ute Indian Tribe, Blackfoot Nation, and Southern Ute Tribe. *Id.*, pp. 174-177. It is unclear what was in these mailings, but we assume it was the same information as in the Dropbox links. But the numbers don’t add up to 13 Tribes, so it appears that not all of the tribes were sent this information.

#### **E. The Applicant and the FCC used an inadequate area of potential effects for visual effects**

“The APE for visual effects is the geographic area in which the undertaking has the potential to introduce visual elements that diminish or alter the setting, including the landscape, where the setting is a character-defining feature of a Historic Property that makes it eligible for listing on the National Register.” *See*, 47 C.F.R. Pt. 1, App. C, VI.C.3. Instead of identifying a proper APE through proper consultation with the Tribes, however, Lotis automatically used the 1.5-mile

presumptive APE identified in the Nationwide Programmatic Agreement. This presumptive APE may be rebutted and/or modified by the specific location and circumstances of a particular project, as well as through proper consultation. *Id.*, VI, C.4, 5.

The 1.5-mile APE does not come close to accurately capturing the scope of the area that will be visually impacted by the 480-foot tower, and thus, an expanded visual effects APE is necessary. The viewshed analysis performed by SUWA (Exhibit 3), clearly shows that the tower will be visible from vast distances across the surrounding landscape, well beyond 1.5 miles. Indeed, photos of the project area clearly show that the proposed tower site provides sweeping views of the surrounding landscape; that alone makes it obvious that visual impacts, from what could become the second tallest structure in the State of Utah<sup>8</sup>, is not limited to 1.5 miles. *See*, Submission to Ute Indian Tribe, February 9, 2024, Attachment 2<sup>9</sup>; *see also*, Exhibit 4.

Accordingly, the visual effects APE violates the requirement to account for likely visual intrusions from the tower. 36 CFR § 800.5(a)(2)(iv), (v). Arbitrarily limiting the visual APE to 1.5 miles also ignores the ACHP's clear instruction in Section 106 Archaeology Guidance that the "input of consulting parties is crucial to this informed revision and refinement of the APE throughout Section 106 review." Advisory Council on Hist. Pres., *Section 106 Archeology Guidance*, p.19 (2009).

By inappropriately limiting the visual APE, the cultural survey also fails to adequately identify resources that are listed, or may be eligible for listing, on the NRHP. For example, the tower will be visible from the Bears Ears Buttes, and throughout the Natural Bridges Archeological District, but it was not included in the survey. *See*, Exhibit 3.

Our visual assessment map is an example of the minimum area that should be included in the visual effects APE. *Id.* To comply with Section 106, a proper viewshed analysis<sup>10</sup> must be conducted to determine the correct APE, in consultation with the Tribes and other appropriate consulting parties such as the BLM and NPS. Only then can the applicant make a good faith effort to identify properties that may be eligible for the NRHP, and adequately analyze the tower's potential effects on those properties.

#### **F. The Applicant and the FCC failed to adequately evaluate identified properties**

The Class III cultural resource survey of the APE for direct effects and visual effects documented three new sites (identifying one as eligible for the NRHP) and 39 new sites (identifying seven as eligible for the NRHP), respectively. Although the survey determined that eight total sites were eligible for listing under criteria (d), the analysis of the remaining, documented sites is insufficient for three reasons.

---

<sup>8</sup> The tallest structure in Utah is the 1,215-foot Kennecott Utah Copper LLC's Garfield Smelter Stack. The tallest building is the 450-foot Astra Tower in Salt Lake City.

<sup>9</sup> SUWA accessed the submission through the Dropbox link on the Feb. 9, 2024 letter from Lotis to the Ute Indian Tribe, Summary Report, Appendix C, pdf p. 161.

<sup>10</sup> Notably, the abstract of the Class III survey states that the survey was performed for a 460-foot tower, but the tower will in fact be a total of 480-feet high. This error should be corrected in a viewshed analysis.

*First*, the report failed to consider whether the ineligible sites could qualify as National Register districts by virtue of their integrated, interrelated, spatially connected, multi-site status. 36 C.F.R. § 60.3(d). Instead, the cultural assessment treated each documented site individually, and did not consider whether the relationship of the sites and the broader context of the landscape could make the sites eligible for the NRHP. This oversight is especially glaring considering the location of the documented sites in the greater Bears Ears landscape that is renowned for containing innumerable archeological and cultural resources spanning over 13,000 years (*See* 86 Fed. Reg. 57,327-29), and the Natural Bridges Archeological District is located just a few miles away.

*Second*, the assessment similarly failed to consider whether any of the sites could be listed under criteria (a) and ignored whether the location, density, and type of documented sites could reflect a broad pattern of history spanning the 13,000 years of habitation that is interwoven within the Bears Ears landscape. 36 C.F.R. § 60.3(a)

*Third*, the assessment entirely failed to determine if 30 of the documented sites are eligible for the NRHP. This error violates the heart of the NHPA, which *requires* federal agencies to determine if sites eligible for the NRHP may be adversely affected by a federal undertaking. 54 U.S.C. §§ 306108, 300320; *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). The potential to affect these sites cannot be brushed aside by a summary conclusion that there will be no adverse effects. Understanding if and why a particular site is eligible for the NHRP is critical to understanding if and to what extent the integrity of the site, including its setting, feel or association, will be affected by the undertaking. This error additionally violates NEPA's "hard look" provision because there is no explanation or analysis for the "no adverse effects" conclusion and it is impossible for the public to understand potential impacts or provide meaningful comment to the agency.

### **G. The findings of "no adverse effects" are unjustified and not supported by the record**

The Class III survey arbitrarily concluded that there would be "no adverse effect" for sites within the direct APE and the visual effects APE. The current record does not support this finding.

*First*, the assessment found that there would be no adverse effects to the one NRHP-eligible site (42SA35017, an ancestral Puebloan temporary camp) found within the direct APE simply because no portion of the tower would physically be constructed over the site, and, thus, it would not impact the integrity of the site. But the assessment does not explain how it came to this conclusion. Furthermore, the assessment does not discuss at all whether the tower would introduce "visual, atmospheric or audible elements that diminish the integrity of the property's historic significant historic features." 36 C.F.R. § 800.5(a)(2)(v). Considering that site 42SA35017 is located merely 60 feet northwest of the proposed tower (which will be the only modern structure for miles), it is very likely that 480-foot tower will introduce visual and atmospheric elements that diminish the integrity of the ancestral Puebloan camp. The generator and maintenance noises will introduce unnatural audible elements to the site. The assessment's failure to discuss and incorporate these factors into its analysis is arbitrary.

*Second*, as explained above, the assessment’s decision to limit the visual effects APE to a 1.5-mile radius, despite clear evidence that the tower’s visual impacts will extend much further, *see* Exhibit 3, means the assessment overlooks foreseeable harms to important sites.

*Third*, the impacts analysis for the visual effects APE likewise concludes that there would be no adverse effects on sites within that APE, despite admitting that the tower would contribute additional visual impacts. The assessment tempers this admission by concluding—without support—that the visual integrity (setting and feeling) would not be altered. This conclusion is arbitrary because the assessment does not identify specific visual impacts nor does it contain any analysis of the potential visual impacts, such as how the tower could impact both the setting and feel of individual sites and the greater landscape of interconnected cultural sites for which BENM was designated. *See* 86 Fed. Reg. 57,330-31 (“the unique nature of the Bears Ears landscape, and the collection of objects and resources therein, make the entire landscape within the boundaries reserved by this proclamation an object of historic and scientific interest in need of protection under 54 U.S.C. 320301.”)

For instance, the five tribes of the Bears Ears Commission have emphasized the importance of collectively maintaining the natural viewsheds as well as the visual and aesthetic settings of cultural resources within the greater Bears Ears landscape. *See* BENM DEIS, Vol. 2, Appendix L.<sup>11</sup> Dark night skies are of particular importance to the Tribal Nations. *Id.*, at 24-25 (“the night sky in open spaces should be protected in order to preserve these ancestral connections.”). Artificial blinking lights as proposed to be included on the tower pose a threat to the immense darkness of the BENM region and Natural Bridges. Yet the assessment contains no analysis of how the tower’s lighting could impact the dark night sky setting and feel for both individual sites and the broader cultural landscape. Without such analysis, it is arbitrary for the assessment to conclude that the visual integrity of the cultural sites within the visual APE will not be adversely affected by the proposed tower.

For all of these reasons, the Class III cultural survey must be redone to ensure meaningful tribal consultation, and to account for 1) a broader visual APE and 2) a thorough analysis of the proposed tower’s aesthetic impacts on cultural sites within both the direct and indirect APEs. Given the cultural density and the fact that BENM was designated as a national monument in part because of its cultural landscape, such an analysis should incorporate impacts to individual sites as well as cumulative impacts to the greater cultural landscape.

### **III. The Summary Report Fails to Include Required Environmental Information**

Because the proposed communication tower is over 450-feet tall, the applicant was required to submit an Environmental Assessment (EA), along with supporting documentation, when it filed the ASR application with the Commission. *See, Order on Remand in the Matter of National Environmental Policy Act Compliance for Proposed Tower Registrations, Effects of*

---

<sup>11</sup> Volume 2 of the BENM DEIS is found at:

[https://eplanning.blm.gov/public\\_projects/2020347/200531796/20105488/251005488/BENM\\_DraftRMP-EIS\\_Vol2\\_508.pdf](https://eplanning.blm.gov/public_projects/2020347/200531796/20105488/251005488/BENM_DraftRMP-EIS_Vol2_508.pdf)

*Communication Towers on Migratory Birds*, FCC 11-181, pp. 2-3, 9 (December 6, 2011) (hereinafter “Order on Remand”); 47 C.F.R. § 1307(d) (*See* Note to paragraph D).

FCC regulations provide a very specific list of information to be included in an EA. 47 C.F.R. § 1.1311. The Summary Report fails to include this information, and thereby fails to “explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect.” *Id.*, § 1.1308(b).

#### **A. The Summary Report fails to include a description of the site, or the surrounding area and uses**

According to FCC regulations, the EA is required to contain “a description of the facilities as well as supporting structures and appurtenances, **and a description of the site as well as the surrounding area and uses...**” *Id.*, § 1.1311(a)(1) (emphasis added). The EA fails to include this information.

##### 1. Description of the Site

The site of the proposed tower would be on a Utah Trust Lands Administration (TLA) parcel located within the boundaries of Bears Ears National Monument on Utah State Route 95 between the turnoffs for Natural Bridges National Monument and Halls Crossing. There is very little information in the report about the site itself, and the little that is there is inaccurate.

On the Proposed Project Summary page, under the sections Present Land Use, and Past Adjacent Land Use, instead of describing the land uses, the applicant identifies the area as consisting of “desert scrub.” Summary Report, p. 1. First, desert scrub is not a “land use.” Second, this assertion is incorrect. According to the Soil Survey (*Id.*, Appendix A, pdf pp. 30-37), the site is mostly a pinyon-Utah juniper woodland, as well as Basin big sagebrush. Based on the personal experience of the undersigned SUWA attorney at the project site, there appears to be significant old growth pinyon-juniper throughout the area, and there are extensive biological soil crusts, as well as numerous wildlife and bird species. *See*, Exhibit 4. The Summary Report provides no information about these, or any other ecological features of the proposed tower site and surrounding area.

Further, the Informal Biological Assessment (IBA) included with the Summary Report states that there are a number of wetlands within a .5-mile radius of the proposed tower site, and “the closest USFWS identified mapped wetland is approximately 250 feet southwest of the proposed undertaking’s lease area, and the proposed access/utility easement crosses a mapped riverine.” Summary Report, Appendix B, p. 1. The Summary Report contains no information about these wetlands or the riverine.

The impacts of the proposed tower on the natural and ecological resources are discussed in D, below.

## 2. Description of the Surrounding Area

As to the surrounding area, there is no mention in the entire Summary Report that the proposed site is in the heart of BENM. *See* Exhibit 1. Significantly, *none* of the Report's 20 maps identify BENM. Summary Report, Appendix A. Especially concerning is the National Atlas map of Utah which includes nearby Natural Bridges, Rainbow Bridge, and Grand Staircase National Monuments, but not the 1.35-million-acre BENM. *Id.*, pdf p. 21. The map is dated 2003 which, in itself, demonstrates the lack of accurate and up-to-date information used by Lotis to prepare this Report.<sup>12</sup>

Based on the lack of information provided, it appears that Lotis was not aware that President Obama designated the Bears Ears National Monument in 2016, stating:

Rising from the center of the southeastern Utah landscape and visible from every direction are twin buttes so distinctive that in each of the native languages of the region their name is the same: Hoon'Naqvut, Shash Jáa, Kwiyaqatu Nukavachi, Ansh An Lashokdiwe, or "Bears Ears." For hundreds of generations, native peoples lived in the surrounding deep sandstone canyons, desert mesas, and meadow mountaintops, which constitute one of the densest and most significant cultural landscapes in the United States. Abundant rock art, ancient cliff dwellings, ceremonial sites, and countless other artifacts provide an extraordinary archaeological and cultural record that is important to us all, but most notably the land is profoundly sacred to many Native American tribes, including the Ute Mountain Ute Tribe, Navajo Nation, Ute Indian Tribe of the Uintah Ouray, Hopi Nation, and Zuni Tribe.

Presidential Proclamation 9558, Establishment of the BENM, December 28, 2016.

Alternatively, Lotis may have been relying on inaccurate BENM boundaries from 2017, when President Trump reduced the monument by 83 percent, thereby excluding the area surrounding the proposed tower site. These boundaries may appear on the USGS Protected Area Database of the U.S. map, although it is impossible to tell due to the scale of the map used, and the illegible date of the map. Summary Report, Appendix A, pdf p. 20.

Regardless, in 2021, President Biden used his authority under the Antiquities Act to reinstate the original boundaries of the Monument, which includes all lands surrounding the proposed tower site, stating:

The Bears Ears landscape — bordered by the Colorado River to the west, the San Juan River and the Navajo Nation to the south, low bluffs and high mesas to the east and north, and Canyonlands National Park to the northwest, and brimming

---

<sup>12</sup> The United States map in Appendix A showing National Parks, National Forest System, National Wildlife Refuges, and Bureau of Land Management lands appears to be from 2010. The Summary Report's reliance on such outdated maps violates NEPA and the FCC regulations.

with towering sandstone spires, serpentine canyons, awe-inspiring natural bridges and arches, as well as the famous twin Bears Ears Buttes standing sentinel over the sacred region — is not just a series of isolated objects, but is, itself, an object of historic and scientific interest requiring protection under the Antiquities Act. Bears Ears is sacred land of spiritual significance, a historic homeland, and a place of belonging for indigenous people from the Southwest. Bears Ears is a living, breathing landscape...

Presidential Proclamation 10285, A Proclamation on BENM, October 8, 2021; Exhibit 1.

In sum, the area surrounding the proposed tower site is a national monument designated to protect a cultural and natural landscape of deep spiritual significance. Nowhere does the Summary Report mention this fact, or the fact that the proposed 480-foot communication tower with blinking red lights will indisputably and significantly impact and irretrievably defile and deface BENM.

### 3. Uses of the Surrounding Area

Uses of the surrounding area include Tribal ceremonies, and Tribal gathering of firewood, native seeds, nuts, roots, berries, medicines, and vegetation.

Resources found throughout the Bears Ears region, including wildlife and plants that are native to the region, continue to serve integral roles in the development and practice of indigenous ceremonial and cultural lifeways. From family gatherings, dances, and ceremonies held on these sacred lands, to gathering roots, berries, firewood, piñon nuts, weaving materials, and medicines across the region, Bears Ears remains an essential landscape that members of Tribal Nations regularly visit to heal, practice their spirituality, pray, rejuvenate, and connect with their history.

Proclamation 10285.

Additional uses include, but are not limited to, recreation such as sightseeing, hiking, camping, backpacking, photography, bird watching, hunting, viewing dark night skies, cultural site visitation, and driving for pleasure. While not identified as an object or value, the Biden Proclamation recognizes the importance of recreation to the Monument, and the increasing travel- and tourism-based economy in the region.

While not objects of historic and scientific interest designated for protection, the proclamation also describes other resources in the area, historic grazing, and world class outdoor recreation opportunities — including rock climbing, hunting, hiking, backpacking, canyoneering, whitewater rafting, mountain biking, and horseback riding — that support a booming travel and tourism sector that is a source of economic opportunity for local communities.

*Id.*

Due to the lack of due diligence in determining the land management and uses of area surrounding the proposed tower site, as well as insufficient Tribal consultation, the Summary Report is devoid of this necessary information.

**B. The Summary Report fails to contain a statement as to the zoning classification of the site or any communications with, or proceedings before, local, state, or Federal authorities**

According to FCC regulations, the EA is required to contain “[a] statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or Federal authorities on matters relating to environmental effect.” 47 C.F.R. § 1.1311(a)(2). The Summary Report fails to include this information.

1. Zoning Classification

Despite this readily available and public information, the Summary Report does not include the zoning classification of the proposed site. The TLA parcel is located inside the Bears Ears National Monument in the Agricultural (A-1) Zone, which sets maximum building heights at 35 feet.<sup>13</sup> The proposed tower exceeds this height limitation by a factor of 13.

2. Proceedings and Communications

The Summary Report states: “Lotis has not been informed of any communications or proceedings that have been made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect.” Summary Report, p. 1. It appears that the Applicant failed to inform its contractor that there have been proceedings and communications concerning the proposed tower since at least May 2023. This information is also public and readily available.

On May 1, 2023, an application was filed with TLA. We have not been provided any information about this application other than the following, provided on the TLA website: “Telecom tower would be built to accommodate broadband wireless carriers in the vicinity of Natural Bridges National Monument. This section directly abuts State Route 95 and would not require separate access easements. The existing access will be used as much as possible to access this site. Approx acreage of lease 9.13 ac.”<sup>14</sup> Again, there is no mention of BENM.

As mentioned, above, NPS submitted a letter to TLA opposing the proposed tower location and requesting “to engage with the Utah Trust Lands Administration (TLA) to explore alternatives

---

<sup>13</sup> See, San Juan County Code § 153.075.

<sup>14</sup> The project can be found on the Resource Development Coordinating Committee website at <https://rdcc.utah.gov>. The RDCC project number is 85315.



that would protect the Monument's unique resources while fulfilling the purpose of the application to expand cellular communication access in the area." Exhibit 2, p. 1. In response to a Governmental Records Access and Management Act (GRAMA) request SUWA submitted on February 23, 2024, TLA stated that "the contract is in the 'application stage' of the process," and therefore the records are protected.

In 2023 (we are unaware of the specific date), San Juan County received an application for approval of a 460-foot telecommunications tower. "San Juan County requested the applicant provide specific information relating to the proposed telecommunications tower. On December 27, 2023 the project applicant provided details of the project to San Juan County Planning & Zoning Administrator Kristen Bushnell."<sup>15</sup>

On February 8, 2024, the San Juan County Planning and Zoning Commission approved a conditional use permit (CUP) for the proposed tower, conditioned on the applicant obtaining a variance due to its height.<sup>16</sup> Because it appears that the proposed tower is now 480-feet tall, a new CUP may be necessary. Like the Summary Report, it is noteworthy that both the application to the county and the planning commission's staff report omitted the critical fact that the proposed Tower is located within the boundaries of BENM.

On March 4, 2024, in response to the Commission's CUP approval and variance requirement, UDB submitted a letter to the San Juan County Commission in opposition, stating:

Our homeland is the expanse of land between our four sacred mountains; it is our place of origin. Here our spiritual traditions are rooted. Today, we continue to rely on and utilize public lands, and especially lands in and near the Bears Ears National Monument for practicing our ceremonies, gathering herbs, firewood, and cedar poles, hunting for game, rejuvenating our spirits and caretaking of our sacred places. Our oral traditions, our stories, spring from the canyons and mountains of San Juan County, especially the greater Bears Ears area. Our people are surrounded by the spirits of the ancestors, and embraced by the ongoing evolution of their culture and traditions. For Navajo people, Bears Ears is a place for healing and a place for teaching our children about meaningful and lasting connections with sacred and storied lands.

... A 460-foot tower with blinking red lights that would be visible for miles and miles is akin to a dagger in the heart of our sacred Bears Ears. The impacts of such a stark intrusion cannot be mitigated.

Exhibit 5.

---

<sup>15</sup> See, Planning and Zoning Commission meeting agenda and staff report are found at <https://www.utah.gov/pmn/files/1082223.pdf>, p. 50.

<sup>16</sup> *Id.*, p. 53 ("The proposed 460 feet height of the tower exceeds the maximum 35 feet in the San Juan County land use ordinance. Consequently, the tower will require a variance.")

On March 12, 2024, SUWA and several San Juan County residents also submitted an “Opposition to Variance for Communications Tower” to the San Juan County Commission and the Planning and Zoning Commission, detailing the cultural, visual, environmental, and economic impacts of the tower. *See*, Exhibit 6. In addition, the Opposition letter explains in detail why San Juan County cannot legally approve the variance for the proposed tower. *Id.*, pdf pp. 7-8. To date, there has been no further information or proceedings concerning the required variance.

### **C. The Summary Report fails to include information about the environmental controversy surrounding the proposed tower**

The FCC regulations require the EA to contain “[a] statement as to whether construction of the facilities has been a source of controversy on environmental grounds in the local community.” 47 C.F.R. § 1.1311(a)(3). Despite considerable publicity—all of which is publicly available and easily accessible information—the EA fails to mention the substantial controversy surrounding the proposed tower. The following are some examples:

- During the Planning and Zoning Commission meeting, two county commissioners (Commissioners Rigg and Austin) moved for the CUP to go to a public hearing “due to this site location being in the middle of Bears Ears National Monument. While recognizing that there is not cell coverage in the area, [Rigg] believes this is an inappropriate site.”<sup>17</sup> Further, “Commissioner Rigg stressed that this kind of development needed to have tribal, BLM, National Parks, and other land management agencies input before moving forward. She questioned if it was appropriate to jump at the first proposal, in this area, instead of having all options available.” Meeting Minutes., p. 6. The two commissioners made a motion to deny the CUP. *Id.* Unfortunately, this motion failed. *Id.*
- As explained above, UDB submitted a letter to the San Juan County Commission in opposition to the required variance, stating: “Utah Diné Bikéyah strongly opposes a variance to allow a 460-foot telecommunications tower on Utah State Highway 95, near Natural Bridges National Monument, within Bears Ears National Monument.” Exhibit 5, p. 1.
- On March 1, 2024, Jonathan Thompson published an article, “[Huge telecom tower on its way to Bears Ears?](#)” in The Land Desk, an online newsletter: *See* Exhibit 7.
- As explained above, on March 12, 2024, SUWA and several San Juan County residents, submitted a letter to the County opposing the variance. Exhibit 6.
- Also on March 12, 2024, the Salt Lake Tribune published an article “[Proposed tower in Bears Ears would eclipse Utah’s tallest building.](#)” *See* Exhibit 8. The article identifies local opposition to the tower’s location in BENM. For example:

---

<sup>17</sup> The Planning Commission meeting minutes are found at <https://www.utah.gov/pmn/files/1136619.pdf>, pp. 5-7.

“I go out there quite a bit because it’s an area I like to go to when I need to get away and take a pause,” Davina Smith, a Diné resident of San Juan County running to represent District 69 in the Utah House of Representatives said.

“I have no doubt that there are better solutions that do not include having a gigantic tower in the middle of nowhere,” she continued. “Let’s work with [the U.S. Forest Service] and the Bureau of Land Management. It should be about collaboration with these agencies rather than having this 460-foot tower.

- As discussed above, on April 15, 2024, the NPS submitted a letter to TLA opposing the proposed tower’s location. Exhibit 2.
- On June 18, 2024, the Salt Lake Tribune published an Opinion by Mark Maryboy, “[An ugly tower threatens Bears Ears and my Navajo homeland.](#)” Exhibit 9. Mr. Maryboy served from 1984 to 2000 as a San Juan County commissioner, and from 1990 to 2006, was a delegate to the Navajo Nation Council. *Id.* The Opinion states:

For many years, the Navajo and other local tribes — Hopi, Uintah, Ouray Ute, Zuni and Ute Mountain Ute — worked together to gain federal protection for this land. But what we gained is now threatened by developments that defile and dishonor the cultural and spiritual significance held by Navajo and other Native peoples.

The most recent example is the plan to build a 460-foot telecommunications tower on a parcel of land owned by a Utah state agency, the Trust Lands Administration. The land that would house the tower is in the heart of the Bears Ears National Monument.

If erected, this alien-looking tower will be a spear in the heart of the Bears Ears area. I am also saddened to think there will likely be more inappropriate developments on Utah Trust Lands within Bears Ears, now that the state has derailed a proposed land exchange between the Trust Lands Administration and the federal government.

- On June 24, 2024, Fox 13 Salt Lake City [published a video and news article](#) “Controversial telecom tower planned to go up in Bears Ears National Monument,” which includes statements from former San Juan County commissioner and Navajo Nation member Willie Greyeyes. Exhibit 10.

This opposition to the proposed tower by two San Juan County Planning and Zoning Commissioners, local residents and organizations, and the National Park Service demonstrates exactly the kind of significant controversy on environmental grounds that was required to be disclosed and discussed in the EA.

**D. The Summary Report fails to contain information on considerations that led to the selection of this particular site, unavoidable adverse environmental effects, and reasonable alternatives to the proposed site**

According to the FCC regulations, the EA is required to contain “[a] discussion of environmental and other considerations which led to the selection of the particular site and, if relevant, the particular facility; the nature and extent of any unavoidable adverse environmental effects, and any alternative sites or facilities which have been or might reasonably be considered.” 47 C.F.R. § 1.1311(a)(4).

1. Considerations for site selection

A significant, unknown question is why a developer from Florida is intent on putting a 480-foot lighted, metal tower in the middle of an exquisite natural, cultural, and historical national monument landscape that holds so much significance to so many Native American Tribes, and that is adjacent to another national monument which is the first ever International Dark Sky Park and is listed on the National Register of Historic Places (NRHP). The considerations that led the Applicant to decide that this is an appropriate location should be explained in detail in the EA. Instead, the Summary Report states:

Many factors are taken into consideration when choosing a site for a cellular communications tower. Early in the process, our locations are driven by landlord willingness to lease their ground. Once a willing landlord is located, there are other factors such as the ability to successfully zone a particular project. Finally, much time and thought is given to the constructability of a particular location. Can legal access be obtained? Can we get power and telephone cables to our facility? However, the ultimate deciding factor as to what locations are selected is input from our wireless client base.

Summary Report, p. 1. This general list of considerations given to all projects contains no specific information relative to the selection of this particular site.

As to the ability to successfully zone this project, as discussed above, the Applicant is required to obtain a variance from the County in order to construct the tower at the proposed location. SUWA’s letter opposing the variance explains in detail why, “[g]iven that approval of the variance constitutes an illegal use variance and rezone of the subject property, which is expressly prohibited by the variance statute, the County cannot support such a finding with substantial evidence.” Exhibit 6, pdf p. 8.

As to the “ultimate deciding factor,” there is no evidence that the Applicant has solicited input from its client base other than requesting location approvals from the County Commission and TLA. As discussed above, there is significant local opposition to the proposed site.

Notably, there is no information about the environmental considerations that led to the selection of this site. In fact, it appears that the Applicant is doing everything possible to avoid such

considerations by purposefully excluding any mention of the site's location in BENM in its TLA, County, and FCC applications; ignoring impacts to Natural Bridges; ignoring local opposition; failing to conduct meaningful tribal consultation; and, as discussed below, ignoring significant environmental impacts.

## 2. Unavoidable adverse environmental effects and reasonable alternatives

The Summary Report fails to mention numerous unavoidable adverse environmental impacts that will significantly damage the natural and cultural resources of BENM and Natural Bridges. The requirement that an EA discuss “the nature and extent of any unavoidable adverse environmental effects” (47 C.F.R. § 1.1311(a)(4)) is not limited to the resources identified in § 1.1307, which only identifies the “types of facilities” that require preparation of an EA. 47 C.F.R. § 1.1307(a). It is not a finite list of effects or resources that the EA must analyze. To the contrary, “[t]he EA is a document which shall explain the environmental consequences of the proposal and set forth sufficient analysis for the Bureau or the Commission to reach a determination that the proposal will or will not have a significant environmental effect.” 47 C.F.R. § 1.1308.

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

An agency is prohibited from authorizing site-specific “activities with environmental impacts—direct, indirect, or cumulative—that have not been considered in either a site-specific [EA] or a broader NEPA document to which the [EA] tiers.” *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 854 (10th Cir. 2019) (“that is the purpose of NEPA: to require federal agencies . . . to analyze environmental consequences before initiating actions that potentially affect the environment.” *Id.*) (cleaned up).

An EIS is required:

if “any `significant' environmental impacts *might* result from the proposed agency action, then an EIS must be prepared before the action is taken.” *Sierra Club*, 717 F.2d at 1415 (emphasis in original); see also, e.g., *Town of Cave Creek, Ariz. v. FAA*, 325 F.3d 320, 327 (D.C. Cir. 2003); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); *North Carolina v. FAA*, 957 F.2d 1125, 1131 (4<sup>th</sup> Cir. 1992); *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423, 432-33 (5<sup>th</sup> Cir. 1985).

*American Bird Conservancy, v. CTIA*, 516 F.3d 1034, 1033 (D.C. Cir. 2008).

Because the proposed tower will result in significant environmental impacts to BENM and Natural Bridges, and the cultural, natural, visual, and ecological resources therein, a full and complete analysis of these environmental effects is required in an EIS.

At a minimum, the FCC and the Applicant must prepare an EA that fully complies with NEPA and the FCC regulations. “If the Bureau determines that the action **may** have a significant

environmental impact, the Bureau will require the applicant to prepare an EA . . . , which will serve as the basis for the determination to proceed with or terminate environmental processing." *Id.* (emphasis added). Further, both NEPA and the FCC regulations

require[] an EA when an action "**may**" have a significant environmental effect, *see NPRM*, 21 F.C.C.R. at 13,247 (stating that "an EA shall be required pursuant to Section 1.1307(c) or (d) if the Bureau processing an otherwise categorically excluded action finds, in response to a petition or on its own motion, that the proposed construction **may** have a significant environmental impact."). The *Order's* demand for definitive evidence of significant effects — noting Petitioners' failure to make a "scientific showing that the population of any specific bird species has decreased as a result of collisions" — plainly contravenes the "may" standard. . . . Similarly, the *Order's* suggestion that scientific consensus is a precondition to NEPA action is inconsistent with both the Commission's regulation and with the statute. As the court has admonished, "[i]t must be remembered that the basic thrust of the agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known." *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1091-92 (D.C. Cir. 1973). A precondition of certainty before initiating NEPA procedures would jeopardize NEPA's purpose to ensure that agencies consider environmental impacts before they act rather than wait until it is too late.

*Id.* (emphasis added). Because the proposed tower **may** have significant environmental effects, the agency must, at a minimum, prepare an EA that considers **all** environmental impacts.

The required hard look at "environmental consequences" includes direct, indirect, and cumulative impacts. 40 C.F.R. § 1508.1(i) (effective May 20, 2022). The regulations treat effects and impacts as synonymous, and they are broadly defined.

Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative. Effects also include effects on Tribal resources and climate change-related effects, including the contribution of a proposed action and its alternatives to climate change, and the reasonably foreseeable effects of climate change on the proposed action and its alternatives. Effects may also include those resulting from actions which may have both beneficial and adverse effects, even if on balance the agency believes that the effects will be beneficial.

40 C.F.R. § 1508.1(i)(4) (effective July 1, 2024).<sup>18</sup> The Summary Report fails to take a hard look at these effects.

With a few exceptions, discussed below, the Summary Report only includes the limited resources and circumstances listed in § 1.1307, and concludes, without any analysis, that there will be no impacts to any of the resources and that no extraordinary circumstances, but for tower height, apply. It certainly does not contain factual information sufficient to explain the proposed tower's environmental consequences to enable the Commission to determine its impacts (*see*, 47 C.F.R. § 1.1311(b)), much less take the hard look required by NEPA. To the contrary, the Summary Report is replete with unsupported conclusions about a limited set of potential impacts.

While the proposed tower is not located within a wilderness area or wildlife preserve (47 C.F.R. § 1.1307(a) and (b)), it is located in the heart of a Presidentially-designated unique resource, BENM, which unquestionably qualifies as an “other like area” pursuant to the FCC regulations: “[i]n the case of wilderness areas, wildlife preserves, **or other like areas**, the statement shall discuss the effect of any continuing pattern of human intrusion into the area (e.g., necessitated by the operation and maintenance of the facilities).” 47 C.F.R. § 1.1311(b). The EA fails to recognize the significance of the area and discuss the effects of either the initial or continuing human intrusion into BENM.

#### *b. Visual Impacts*

In addition to this human intrusion, the proposed tower will significantly and irreparably damage the visual resources of BENM and Natural Bridges. The proposed tower will be clearly visible, day and night, across the two monuments, well beyond the 1.5 miles NHPA APE used to identify historic and cultural sites. *See*, Exhibit 3. As discussed above, limiting the visual APE to 1.5 miles, and the Summary Report's failure to analyze the aesthetic impacts of the proposed tower on BENM and Natural Bridges, violates NEPA's “hard look” provision. There is no explanation of why the NEPA analysis was limited by the NHPA assessment, no discussion or analysis for the “no adverse effects” conclusion, and it is impossible for the public to understand potential impacts or provide meaningful comment to the agency.

---

<sup>18</sup> We strongly urge the FCC to apply the most recent CEQ regulations, effective July 1, 2024. “The regulations in this subchapter apply to any NEPA process begun after July 1, 2024. **An agency may apply the regulations in this subchapter to ongoing activities and environmental documents begun before July 1, 2024.**” 40 C.F.R. § 1506.12 (emphasis added). Nonetheless, the FCC must implement its current regulations “in concert with” the Phase 2 CEQ regulations. “...an agency's existing NEPA procedures remain in effect until the agency revises its procedures consistent with § 1507.3; **however, agencies should read their existing procedures in concert with the final rule to ensure they are meeting the requisite requirements of both wherever possible.**” 89 Fed. Reg. 35442, 35530 (5/1/2024).

Even under the previous regulations, effects is defined broadly: “Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.” 40 C.F.R. § 1508.1(g)(4) (effective Sept. 14, 2020).

The five tribes of the Bears Ears Commission have articulated the importance of the BENM viewshed:

Viewsheds are [the] visible portion of the landscape seen from any particular vantage point. Everything in the natural world – rocks, plants, animals, water, and other natural elements – has meaning and character. All these elements are interconnected and viewsheds are important beyond that of simply being ‘scenery’ in the sense of a view from a rock or overlook . . . . Any disruption to the natural world would negatively affect the viewshed, and by extension Native people whose spiritual power resides in that natural world.

BENM DEIS, Vol. 2, Appendix L, p. 23.

Proclamation 10285 emphasizes that the entire Bears Ears landscape encompasses visual and scenic resources that must be protected, stating “The Bears Ears landscape . . . is not just a series of isolated objects, but is, itself, an object of historic and scientific interest requiring protection under the Antiquities Act.” BLM recognizes that “[t]he large remote, isolated, and rugged/primitive character of the Monument landscape is foundational to the Monument’s designation and the associated Monument objects and values.” Analysis of the Management Situation (AMS), p. 5-7.<sup>19</sup> Beyond NHPA-related impacts, Tribal Nations, visitors and recreationists from around Utah, the country, and the world, and nearby residents all highly value the extremely scenic, minimally developed, and highly intact scenic quality within the Monument. *Id.*, pp. 5-68, 6-195.

Recognized as “one of the most naturally dark outdoor spaces of its size left in the lower 48 states,” BENM has pristine night skies where only “natural sources of light, such as starlight, airglow, aurora and zodiacal light, are visible to the human eye.” BENM DEIS, Vol. 1, p. 3-277. All of the five tribes view night skies as an important cultural resource: “There is consensus that the night sky in open spaces should be protected in order to preserve these ancestral connections. Light and dust pollution are factors that affect the quality of the night sky.” *Id.*, p. 25.

Dark night skies are also featured in the designating proclamation: “From earth to sky, the region is unsurpassed in wonders. The star-filled nights and natural quiet of the Bears Ears area transport visitors to an earlier eon. Against an absolutely black night sky, our galaxy and others more distant leap into view. As one of the most intact and least roaded areas in the contiguous United States, Bears Ears has that rare and arresting quality of deafening silence.” Proclamation 9558.

Designated in 2007, Natural Bridges was the first ever International Dark Sky Park. NPS has recognized dark night skies as an important resource that plays a critical role in natural resource

---

<sup>19</sup> The AMS is found on BLM’s ePlanning:  
[https://eplanning.blm.gov/public\\_projects/2020347/200531796/20068264/250074446/BENM\\_Final-AMS\\_20220928.pdf](https://eplanning.blm.gov/public_projects/2020347/200531796/20068264/250074446/BENM_Final-AMS_20220928.pdf)



processes and the evolution of species, as well as contributing to the national park visitor experience. NPS Management Policies 2006, § 4.10.<sup>20</sup>

As the National Park Service states in their letter opposing the proposed tower:

Viewsheds from Natural Bridges are a protected and interpreted resource, and we prioritize maintaining a natural condition for viewscape areas from the Monument; particularly important is the viewshed from the Monument to the Bears Ears landscape feature. The indigenous cultural landscapes are considered sacred to the Monument's 27 traditionally associated Tribal Nations and are an important value for the visitor experience. Additionally, the entirety of the Monument is listed on the National Register of Historic Places (NRHP) as the Natural Bridges Archeological District protected under the National Historic Preservation Act (NHPA). We believe a 460-foot cell tower located within the viewshed from the Archeological District will negatively impact the integrity of this historic property's setting and feeling.

Exhibit 2, pp. 1-2. The Summary Report makes no mention of this, and Lotis failed to include Natural Bridges as part of its Section 106 consultation. The Summary Report's failure to analyze the impacts of the proposed tower to Natural Bridges violates NEPA.

Because of the height of the proposed tower, it is required to have lights, so as to be visible to passing aircraft. These lights are intended to contrast starkly with their surroundings and are highly visible during the day and even more so at night when viewed against a darkened sky. The Summary Report (cover letter) states that the proposed tower will have a "Triple Red LED" lighting system. These lights will be at the top and midway point of the tower. While blinking red lights may reduce impacts to birds, they make the tower even more visible across the landscape. While the distance at which cell towers and other structures may be recognizable, depending on topography and other landscape characteristics, is generally 3-5 miles, the exception to this is a lit structure, which can be visible and recognizable at significantly greater distances both at night and during the day.

"In determining whether Historic Properties in the APE may be adversely affected by the Undertaking, the Applicant should consider factors such as the topography, vegetation, known presence of Historic Properties, and existing land use." 47 C.F.R. Pt. 1, App. C, VI.E.2. Due to its height, industrial design, and red blinking lights, as well as the lack of vegetative or other screening, and the topography of surrounding area, the proposed tower, within in the natural setting of BENM and Natural Bridges, will be visible for well beyond a five-mile radius, including from the Bears Ears buttes, and numerous cultural, historical, and religious sites, hiking trails, campsites (including Natural Bridges' one campground), and roads - including the Historic Hole-in-the-Rock trail, and the Trail of the Ancients and Bicentennial National Scenic

---

<sup>20</sup> See also, Rich, C. and Longcore, T., eds. (2005). Ecological Consequences of Artificial Night Lighting. <http://darkskyparks.org/dark-skies-and-nature-conservation/>. (Accessed 7-23-2024)

Byways. *See*, Exhibit 3. The Summary Report's failure to analyze the impacts of the proposed tower to these sites and resources violates NEPA's hard look requirement.

Notably, without even mentioning the Trail of the Ancients or the Bicentennial National Scenic Byways by name, the Summary Report (p. 8) concludes: "The proposed undertaking is located more than one (1) mile from the closest national byway. Therefore, no additional consultation is required." There is no analysis of where, and to what extent, the proposed tower will be visible along this popular, scenic road as it travels through BENM and into Natural Bridges. As shown in our viewshed analysis map, and given the topography and lack of vegetative cover, the Trail of the Ancients and Bicentennial National Scenic Byways will be visible for miles. Exhibit 3. The Summary Report's failure to analyze the visual impacts of the proposed tower to the Trail of the Ancients violates NEPA's hard look requirement.

The addition of 24 guy wires will make the tower even more visible by increasing the total occupied area within the viewshed. The straight edges of the tower and guy lines will be irregularities within BENM and Natural Bridges, which will attract attention when viewed in contrast with the surrounding natural setting. This tower will not fit harmoniously into the existing natural environment. To the contrary, it will contrast starkly with the natural surroundings, causing significant adverse impacts on the natural, visual, and cultural landscape of immense cultural and religious significance to so many Tribes, local residents, and thousands of visitors come to experience every year.

The NPS specifically requested that TLA conduct "a viewshed analysis and an assessment of the vertical Area of Potential Effect (APE) from key viewpoints in Natural Bridges including all the overlooks." Exhibit 2, p. 2. **We request the applicant and the FCC conduct this viewshed analysis for BENM and Natural Bridges.**

*c. Impacts to Native Wildlife, Birds, and Vegetation*

"Birds, mammals, reptiles, insects, and other animals are inextricably tied to traditional Indigenous spiritual, cultural, and economic beliefs. Many species, especially bird and raptor species, are valued as brothers, sisters, and kin to Indigenous people." BENM DEIS, Vol. 1, p. 3-197.

The FCC's regulations require an EA to provide factual (not conclusive) information in sufficient detail to explain the environmental consequences so that the Commission is able to reach a determination concerning the proposal's environmental impacts. 47 C.F.R. § 1.1311(b). Further, the EA is required to "deal specifically with any feature of the site which has special environmental significance" including "natural migration paths for birds and other wildlife." *Id.* Unfortunately, the Summary Report is devoid of information about the birds and wildlife that may be impacted by the proposed tower. Instead, it states:

The USFWS has indicated its concern of the impact of towers on migrating bird populations. The proposed undertaking and design process for this undertaking could not conform to all the USFWS recommendations to decrease potential

effects on migratory birds. Lotis has assessed the potential habitat for migratory birds and has determined that potential habitat is present at and around the proposed undertaking. This habitat includes desert trees and shrubs and a few wetlands in the surrounding area.

...

Based upon the efforts during this IBA as well as the current data made available, surrounding habitat has the potential to support migratory birds; however, potential negative effects of a nearby tower are unknown and the addition of another tower may or may not negatively affect migratory birds.

Summary Report, Appendix B, p. 2.<sup>21</sup> There are numerous problems with this unsubstantiated conclusion.

*First*, it appears that Lotis failed to conduct any actual bird or animal surveys. And, despite mentioning that they assessed potential habitat for migratory birds, no information or data is provided. Nor is there any mention of their natural migration paths. Instead, Lotis merely states that habitat includes “desert trees and shrubs and a few wetlands” (*Id.*), and repeatedly references the landscape as “desert scrub.” *Id.*, p. 1. As discussed above, this characterization is incorrect. The site and surrounding areas are native pinyon-juniper and Basin big sagebrush ecological sites with healthy understories of native grasses, forbs, and cryptobiotic soils. Both of these native plant communities provide habitat for a diversity of native wildlife and birds, including migratory birds.

In addition, the wetlands and riverine habitats, and their associated birds and other species, were not identified or discussed, despite their proximity to the proposed site and the impacts of the access road. The IBA states that there are a number of wetlands within a .5-mile radius of the proposed tower site, and “the closest USFWS identified mapped wetland is approximately 250 feet southwest of the proposed undertaking’s lease area, and the proposed access/utility easement crosses a mapped riverine.” Summary Report, Appendix B, p. 1. The wetlands map provided in Appendix F of the Summary Report does not actually identify any wetlands, only riverine. And, it does not show where the access road crosses the riverine.

The Summary Report (p. 6) states: There is a small ephemeral runoff which runs perpendicular to the access road; however, the access road is already existing, and there are no proposed changes to the existing access road.” However, in its current condition, the access road is unlikely to support the heavy equipment and vehicles necessary to construct the tower. *See*, Exhibit 4. Wetlands, riparian areas, and riverine systems are especially rare in this dry landscape, and thus particularly important to birds, wildlife, and other species, necessitating further analysis.

---

<sup>21</sup> The Summary Report (p. 4) states that there is a 33-foot mast telecommunication tower 24.43 miles to the east. According to BLM’s ePlanning website, the communication facilities at Cedar Mesa include a 40-foot tower, and the facilities at Upper Horse Flat include a 70-foot tower. We do not know how far these towers are from the proposed facility. Nonetheless, the impacts of these much smaller, unlit towers are not comparable to the proposed 480-foot lit, guyed tower and associated facilities and infrastructure.

Proclamation 10285 states that there are “rare and important plant and animal species” and a “variety of threatened, endangered, sensitive, endemic, or otherwise rare species of wildlife, fish, and plants” in the Monument. Proclamation 9558 specifically identifies a wide variety of native vegetation and species as objects of historic and scientific interest in BENM. The BENM DEIS also provides an extensive list of “game species, upland game birds, neotropical migratory birds, waterfowl, raptors, reptiles, amphibians, fish, macroinvertebrates, and other small non-game animal species.” BENM DEIS, Vol. 1, pp. 3-196-197. Because BENM “is largely undeveloped; therefore, the habitats that support wildlife and fish are relatively undisturbed and play an important role in maintaining landscape intactness and connectivity for wildlife.” *Id.*, p. 3-197. The proposed tower would fragment this landscape intactness and wildlife habitat connectivity, and these impacts must be analyzed in the EA.

The Summary Report’s failure to identify, much less analyze, any of native wildlife, bird, and other species and their habitats in and around the project area violates NEPA and the FCC regulations.

The bird and bat species listed below are all considered to have predicted suitable habitat in and directly surrounding the proposed tower site according to [USGS's Gap Analysis Project \(GAP 2018\) Species Habitat Maps](#). These species are also all listed in the [Utah Wildlife Action Plan \(Utah DWR, 2021/2022 Addendum\)](#) as a Species of Greatest Conservation Need with a national (n) or subnational/state (S) rank of vulnerable (3), imperiled (2), or critically imperiled (1); or are listed as a federally threatened or endangered species.

- Black rosy-finch - S1
- Burrowing owl - S3 (breeding population)
- California condor - federally endangered
- Ferruginous hawk - S3 (breeding population)
- Fringed myotis - S2 (breeding population)
- Long-eared myotis - S3
- Long-legged myotis - S3
- Mexican spotted owl - federally threatened
- Olive-sided flycatcher - S3
- Peregrine falcon - S3 (breeding population)
- Pinyon jay - N3, under review for ESA listing
- Spotted bat - N3
- Townsend's big-eared bat - N3
- Yuma myotis - S3

Despite this easily accessible, public information, the IBA states that the only species of concern identified in the project area through the Utah Division of Wildlife Resource’s (DWR) website (<https://dwrapps.utah.gov/HeritageDataRequest/>)<sup>22</sup> is pinyon jay. Summary Report, Appendix B, pdf p. 41. Proclamation 9558 specifically mentions pinyon jays, and this species is currently

---

<sup>22</sup> We could not access the website through the link provided.

proposed for listing under the Endangered Species Act and is undergoing a 12-month status review by the Fish and Wildlife Service after an initial finding that listing may be warranted. The U.S. Fish and Wildlife Service listed pinyon jay as a Bird of Conservation Concern as of 2021 within Bird Conservation Region 16, Southern Rockies/Colorado Plateau. The Utah Division of Wildlife Resources (UDWR) designated pinyon jay as a Species of Greatest Conservation Need (SGCN) in its 2020 changes to the Utah SGCN list,<sup>23</sup> which is part of its Wildlife Action Plan, stating that pinyon jay “is undergoing significant range wide declines.”

Despite the importance of pinyon jay and its likely presence in the project area, the IBA and the Summary Report claim, without any analysis or supporting information, that the project is not likely to adversely affect this species. Summary Report, Appendix B, pdf p. 41. SUWA’s USGS GAP analysis for pinyon jay identified the proposed tower site and surrounding area as core areas for breeding habitat. Exhibit 11. The applicant and FCC must conduct pinyon jay surveys for this project. If pinyon jay nests are found, the breeding colony should be buffered by a 500 meter no-treatment/disturbance zone as recommended by the [\*Conservation Strategy for the Pinyon Jay\*](#) led by the U.S. Fish & Wildlife Service.

As to Mexican Spotted Owl, a threatened species, Lotis determined that there is “no preferred habitat present,” and thus the proposed tower will have no effect. Summary Report, Appendix B, pdf p. 41. SUWA’s USGS GAP analysis for MSO identified the proposed tower site and surrounding areas as having both medium and high presence of predicted suitable habitat. Exhibit 11. The applicant must conduct MSO surveys for the proposed tower.

SUWA’s undersigned attorney conducted a search using UDWR’s publicly available **SGCN mapping tool** to determine what species have been observed in or near the project area. This easy search resulted in a much more substantial list of species than the limited search conducted by the applicant. According to this search, species observed in and surrounding the project area include, but are not limited to: long-eared myotis, northern leopard frog, Allen’s big-eared bat, fringed myotis, pinyon jay, band-tailed pigeon, flammulated owl, peregrine falcon, northern pygmy-owl, Mexican spotted owl, spotted bat, long-legged myotis, midget faded rattlesnake, kit fox, and Yuma myotis.

SUWA’s GAP analysis also identified the project location and surrounding area as winter elk and mule deer habitat, and a mule deer migration corridor. Exhibit 11. The BENM DEIS identified the project area as substantial elk and crucial mule deer winter range. Exhibit 12. Photos from the project area show evidence of wildlife presence. Exhibit 4. Nowhere does the Summary Report even mention mule deer or elk.

To comply with NEPA and the FCC regulations, the applicant must conduct surveys for these species and their habitats in the project location and surrounding areas, and include the survey results, and all available scientific information, in the EA or EIS.

---

<sup>23</sup> The list of SGCN can be found on the Utah Division of Wildlife Resources website at: <https://wildlife.utah.gov/pdf/WAP/2022-05-sgcn-list.pdf>.

**Second**, while the negative effects of another nearby tower are relevant to cumulative impacts, they are not relevant to the direct and indirect impacts of the proposed tower that both NEPA and the FCC regulations mandate must be analyzed. Stating that the tower “may or may not” have an impact does not suffice. To comply with NEPA, the FCC and the Applicant must analyze the impacts of the proposed tower – not rely on the unknown impacts of some smaller tower in a different location.

The impacts of cell towers and other types of towers on birds, bats, and other species are well known, yet the Summary Report contains no scientific studies or data. While the flashing lights might mitigate these impacts, they will not eliminate them. These studies, as well as those related to radio frequency (RF) emissions<sup>24</sup> effects on wildlife, are germane here and must be considered and incorporated into the EA to assess the impacts of the proposed tower.<sup>25</sup>

For example, one study “suggest[s] that avian fatalities can be reduced, perhaps by 50-71%, at guyed communication towers by removing non-flashing/steady-burning red lights.”<sup>26</sup> While this would be a significant reduction in bird fatalities, flashing lights do not completely eliminate impacts. Notably, while a later study found 54–86% fewer fatalities at guyed medium towers (116-146 m AGL) than at guyed tall towers (>305 m AGL), the study found 16 times more fatalities at guyed medium towers than at unguyed medium towers, and tall, guyed towers were responsible for 70 times as many bird fatalities as the unguyed medium towers and nearly five times as many as guyed medium towers.<sup>27</sup> The proposed tower is a guyed, lit tower that is the maximum medium height used in these studies. Importantly, the FCC and applicant will need to determine whether the 480-foot-tall tower at issue here (146 m) would be considered medium or tall, due to the fact that the proposed tower location is significantly higher in elevation than where the studies were conducted in Michigan.

**Third** is the claim that the proposed project “could not conform to all the USFWS recommendations to decrease potential effects on migratory birds.” Summary Report, Appendix B, p. 2. Remarkably, the Summary Report (p. 4) references USFWS’s recommended guidance from 2013. Reliance on the 2013 guidance is yet another example of the applicant’s failure to do proper due diligence and use up-to-date information - the 2013 guidance was replaced in 2021 by

---

<sup>24</sup> Notably, there is no RF study in the Summary Report, as required by the FCC regulations. *See*, 47 C.F.R. § 1.1307(b). Instead, the Summary Report states: “Per the applicant, the antenna structure will comply with the established criteria regarding radio frequency exposure limits in accordance with FCC rules, including those rules found at 47 CFR § 1.1307 and § 1.1310, as published at the time of this report.” Summary Report, p. 7. This unsubstantiated, generalized statement fails to comply with both the FCC regulations and NEPA.

<sup>25</sup> While we provide a couple of citations and references to published scientific papers, the burden is on the FCC and the Applicant to prepare a legally and scientifically valid environmental analysis. There are numerous other scientific studies that are relevant here.

<sup>26</sup> Gehring et al., Communication towers, lights, and birds: successful methods of reducing the frequency of avian collisions, *Ecological Applications*, (19)2, 2009, pp. 505-514.

<sup>27</sup> Gehring et al., Effects of Towers and Guys on Avian Collisions, *Journal of Wildlife Management*, 75(4):848-855. 2011.

the Recommended Best Practices for Communication Tower Siting, Construction, Operation, Maintenance and Decommissioning.<sup>28</sup>

The Summary Report claims that the applicant “has taken these recommended interim guidelines into consideration and has mitigated the potential effect on migratory birds by siting the proposed undertaking away from sensitive locations such as critical habitats, wilderness areas, wildlife refuges, and wetlands, where species of concern are more likely to be present.” Summary Report, p. 4. This claim is false – the proposed location is in the heart of BENM, a highly sensitive location, is sited near a number of small, yet important wetlands, and, the access road impacts a riverine. As discussed below, there are a number of species of concern in and around the project area.

The following are the recommended best practices for the siting and construction of new towers in the 2021 guidance that the applicant either failed to consider, failed to analyze, or ignored altogether (*see*, fn 28):

- “Co-locate communications equipment on existing communication towers or other structures (e.g., billboard, water and transmission tower, distribution pole, or building mounts). This recommendation is intended to reduce the number of towers across the landscape.” *Id.*, p. 1. The applicant did not even consider a co-location alternative. Opportunities for co-location likely exist outside of the monument, especially in or close to nearby towns and communities, that would meet the purpose of the proposed tower to provide improved emergency services and wireless services for those towns and communities.
- “All new towers should be sited to minimize environmental impacts to the maximum extent practicable” by:
  - “Plac[ing] new towers within existing “antenna farms” (i.e., clusters of towers) when possible.” There is no evidence that the applicant attempted to analyze whether this is feasible.
  - “Select[ing] already degraded areas for tower placement.” The area of the proposed tower is not degraded. To the contrary, it contains healthy communities of pinyon-juniper and Basin big sagebrush, and other native vegetation, including old growth, and extensive cryptobiotic soils. *See*, Exhibit 4.
  - Not siting towers “in or near wetlands, other known bird concentration areas (e.g., state or federal refuges, staging areas, rookeries, and Important Bird Areas), or in known migratory bird movement routes, daily movement flyways, areas of breeding concentration, in habitat of threatened or endangered species, key habitats for Birds of Conservation Concern, or near the breeding areas (“leks”) of prairie grouse.” As discussed above, the Summary Report contains no information about birds, wildlife, or their habitats, and the proposed location very close to several wetlands. As

---

<sup>28</sup> The 2021 guidance can be found here: <https://www.fws.gov/sites/default/files/documents/usfws-communication-tower-guidance.pdf>

- discussed further, below, there are numerous bird and wildlife species and their habitats in and around the project area.
- Avoiding “ridgelines, coastal areas, wetlands or other known bird concentration areas.” According to the Utah Geological Survey statement, “the waypoint provided plots on a topographically high ridge.” Summary Report, Appendix D, pdf p. 188. And, as already mentioned, it is near wetlands and may be within bird concentration areas.

The 2021 guidance also recommends designing, siting, and constructing towers and associated facilities “so as to avoid or minimize habitat loss within and adjacent to the tower ‘footprint’.” The FCC regulations required an EA to “detail any substantial change in the character of the land utilized,” such as “deforestation...or other extensive change of surface features.” 47 C.F.R. § 1.1311(b); *See also, Id.*, § 1.1308(a)(7) (An EA is required for “[f]acilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). The Summary Report (p. 5) makes no mention of the pinyon-juniper deforestation and destruction of other native vegetation and cryptobiotic soils that will result from construction of the tower and improvement, expansion and maintenance of the access road. Consequently, the applicant failed to consider this impact minimization recommendation, and the Summary Report violates this relevant requirement.

It is readily apparent that the applicant did not even try to conform to the USFWS recommendations, and, therefore the Summary Report’s claim that “the proposed undertaking will not have significant adverse impact on migratory birds due to the location and design utilizing an avian friendly lighting system as well as bird diverters at the manufacturer recommended spacing” is arbitrary and capricious, and not based on any reasonable information or data.

Further, by analyzing only the proposed tower type, size, and location, the Summary Report fails to analyze any reasonable alternatives, in violation of NEPA and the FCC regulations. *See*, 47 C.F.R. § 1.1311(a)(4) (An EA must contain “[a] discussion of... any alternative sites or facilities which have been or might reasonably be considered). For example, the Summary Report fails to assess any reasonable sites outside of BENM, or co-location of towers, or areas away from wetlands.

Further, the applicant’s failure to make any effort to comply with the USFWS guidance, and the lack of any information on migratory birds or ESA protected species, should lead the USFWS to charge the applicant and the FCC with take under the ESA and the MBTA.

### **The Undersigned Request Consulting Party Status**

The undersigned organizations request consulting party status pursuant to 47 C.F.R. Pt. 1, App. C (“An Applicant shall consider all written requests of other individuals and organizations to participate as consulting parties and determine which should be consulting parties. An Applicant is encouraged to grant such status to individuals or organizations with a demonstrated legal or



economic interest in the Undertaking, or demonstrated expertise or standing as a representative of local or public interest in historic or cultural resources preservation.”).

### **Conclusion**

With this Request for Environmental Review, we submit a Petition signed by over 3,000 people opposing the proposed 480-foot communications tower in the heart of Bears Ears National Monument.

Because the FCC and the applicant failed to conduct meaningful consultation with Tribal Nations and federal agencies, failed to include required environmental information in the Summary Report, and failed to evaluate potentially significant environmental effects, the FCC and the applicant violated NEPA, the ESA, the Migratory Bird Treaty Act, and the FCC regulations. The Summary Report is devoid of essential and required information necessary to enable the Commission or interested persons “to reach a determination concerning the proposal's environmental impact.” 47 C.F.R. § 1.311(b). Because the proposed tower will have significant impacts to BENM and Natural Bridges, and their visual, cultural, and environmental resources and values, the applicant and the FCC must prepare and Environmental Impact Statement for this project. At a minimum, a legal-compliant EA must be prepared.

Thank you for the opportunity to submit this Petition for Environmental Review. Please direct any questions to Judi Brawer at the contact information, below.

Judi Brawer, Wildlands Attorney  
Southern Utah Wilderness Alliance  
[judi@suwa.org](mailto:judi@suwa.org)  
208-871-0596

Paul Reed, New Mexico State Director  
Preservation Archaeologist  
Archeology Southwest  
[preed@archaeologysouthwest.org](mailto:preed@archaeologysouthwest.org)

Joe Neuhof, Executive Director  
Bears Ears Partnership  
[joe@bearssearspartnership.org](mailto:joe@bearssearspartnership.org)

Tim Peterson, Cultural Landscapes Director  
Grand Canyon Trust  
[tpeterson@grandcanyontrust.org](mailto:tpeterson@grandcanyontrust.org)

Erika Pollard  
National Parks Conservation Association  
[epollard@NPCA.org](mailto:epollard@NPCA.org)

Timothy Whitehouse, Executive Director  
Public Employees for Environmental Responsibility (PEER)  
[twhitehouse@peer.org](mailto:twhitehouse@peer.org)

Maria Archibald, Lands and Water Programs Senior Coordinator  
Sierra Club, Utah Chapter  
[maria.archibald@sierraclub.org](mailto:maria.archibald@sierraclub.org)

Janet Slowman-Chee, Executive Director  
Utah Diné Bikéyah  
[janet@utahdinebikeyah.org](mailto:janet@utahdinebikeyah.org)

Serve copy of Request for Environmental Review on the ASR Applicant pursuant to 47 C.F.R. § 1.47. *See* 47 C.F.R. 17.4(c).