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TULE WIND LLC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION, DAVID HOGAN, and NICA KNITE,

Plaintiffs,

v.

MICHAEL BLACK, Director, Bureau of Indian Affairs; SALLY JEWELL, Secretary, Department of the Interior; KEVIN WASHBURN, Assistant Secretary for Indian Affairs, Department of the Interior; AMY DUTSCHKE, Regional Director, Bureau of Indian Affairs Pacific Region; JOHN RYDZIK, Chief, Bureau of Indian Affairs Pacific Region Division of Environmental, Cultural Resources Management & Safety,

Defendants,

and

TULE WIND LLC and

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,

Intervenor-Defendants.

CASE NO. 14-CV-2261 H-WVG

INTERVENOR-DEFENDANT TULE WIND LLC'S NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: Nov. 16, 2015
Time: 10:30 a.m.
Place: 15A
Judge: Hon. Marilyn L. Huff

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on November 16, 2015 at 10:30 a.m., or as soon thereafter as counsel may be heard before the Honorable Marilyn L. Huff, United States District Judge, in Courtroom 15A of the above-captioned court, located at 333 West Broadway, San Diego, California 92101, Defendant Tule Wind LLC ("Tule Wind") will and hereby does move for an order entering partial judgment on the pleadings on plaintiffs' first claim based on the National Environmental Policy Act and full judgment on the pleadings on plaintiffs' second and third claims based on the Bald and Golden Eagle Protection Act and Migratory Bird Treaty Act, respectively, pursuant to Federal Rule of Civil Procedure 12(c).

This motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, Declaration of Jeffrey Durocher and Tule Wind's Request for Judicial Notice, the records on file in this case, the arguments of counsel, and any other matter that the Court may properly consider, or that may be presented to the Court at the hearing.

Tule Wind respectfully requests that the Court grant its motion and enter judgment in the defendants' favors on plaintiffs' second and third claims.

Dated: August 27, 2015

Respectfully Submitted,

_____
Jeffrey Durocher

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I. INTRODUCTION

The Tule Wind Project is San Diego County's first utility-scale wind-energy project. The Bureau of Land Management ("BLM") studied the Tule Wind Project over eight years, yielding a Final Environmental Impact Statement ("FEIS") of approximately 6,000 pages. The Tule Wind Project will help achieve federal and state renewable-energy mandates and goals, contribute to a reliable, local supply of energy, support hundreds of new construction jobs, and generate millions of dollars of tax revenue over its life.

Intervenor-Defendant Tule Wind LLC ("Tule Wind") developed the Tule Wind Project (the "Project"), involving a Wind Lease Agreement (the "Lease") with the Ewiiaapaayp Band of Kumeyaay Indians. Plaintiffs challenge the approval of the Lease by the Bureau of Indian Affairs ("BIA") under 25 C.F.R. Part 162 that the BIA issued on December 16, 2013, under the National Environmental Policy Act ("NEPA"), Migratory Bird Treaty Act ("Bird Act" or "MBTA"), Bald and Golden Eagle Protection Act ("Eagle Act" or "BGEPA"), and the Administrative Procedure Act ("APA").

Tule Wind seeks partial judgment under Federal Rule of Civil Procedure 12(c) on Plaintiffs' first claim for relief under NEPA on the grounds that the BIA, as a matter of law, has no ongoing duty to prepare a post-decision NEPA supplement. NEPA requires environmental review preceding "major Federal actions." 42 U.S.C. § 4332(c). Plaintiffs allege an ongoing failure by BIA to supplement the exhaustive NEPA review of the Tule Wind project. U.S. Supreme Court precedent makes clear that the APA does not impose an ongoing duty to supplement when an agency has no ongoing major Federal action to take.

Tule Wind also seeks judgment as a matter of law under Rule 12(c) on Plaintiffs' second and third claims for relief under the Eagle Act and Bird Act, respectively, on the grounds that Ninth Circuit precedent precludes their claims. Plaintiffs' proposed application of the Bird Act and the Eagle Act is contrary to the

statutes and the cases interpreting these laws. Under Plaintiffs' proposed reading of these criminal statutes, any agency action that might potentially impact birds—e.g., any agency action that includes driving, construction of buildings, air travel, or other routine activities that are known to sometimes result in bird collisions—would be subject to challenge by a private party. This would eviscerate Congress's intent in enacting these statutes, and no court has held that the Bird Act or the Eagle Act requires a permit in circumstances analogous to this case, where the BIA has gone to extraordinary efforts to avoid and mitigate potential impacts to birds. The prevailing law in this Circuit is that an agency acting in its routine, lawful regulatory capacity—as BIA was acting here—does not violate the Eagle Act or Bird Act merely because the Plaintiffs theorize some attenuated chain of causation that results in the death of a protected eagle or bird at some indeterminate point in time in the future.

II. BACKGROUND

The Tule Wind Project underwent extensive environmental study and review over approximately eight years. *See* BLM, Record of Decision ("ROD") Tule Wind Project (Dec. 19, 2011) at 5 [hereinafter the "*BLM ROD*"].[1] BLM, the lead agency under NEPA, and the California Public Utilities Commission ("CPUC"), a co-lead agency due to its responsibilities under the California Environmental Quality Act, studied the Project together with two separate but related projects in a single environmental document: San Diego Gas & Electric's ("SDG&E") East County Substation project and Sempra Energy's Energía Sierra Juárez project. *See id.* at 18. BIA is a cooperating agency under NEPA and relied on the EIS prepared by BLM and the CPUC, as well as other materials, in

[1] Judicial notice requested. *See* Declaration of Jeffrey Durocher and Tule Wind's Request for Judicial Notice ("Tule Wind RJN"), ¶ 2 (Exh. A). As noted in *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010), the Court may judicially notice facts based on the information taken from publicly available government websites. All of the documents for which judicial notice is requested in this memorandum have been taken from publically available government websites. *See id.* ¶¶ 2–6.

approving the lease between the Ewiiaapaayp and Tule Wind. BIA, *ROD Approval of Lease for Tule Wind LLC on a portion of the Ewiiaapaayp Indian Reservation in San Diego County, California, for the Ewiiaapaayp Band of Kumeyaay Indians* (Dec. 16, 2013) at i [hereinafter the "*BIA ROD*"].[2]

As originally proposed and analyzed in the EIS, the Tule Wind Project would have consisted of up to 134 turbines on land administered by several different federal, state, and local agencies and tribal governments: BLM; BIA; the Ewiiaapaayp, Manzanita, and Campo Tribes; the California State Lands Commission; and the County of San Diego. *See BLM ROD* at 9. Though BLM analyzed the entire Project in the FEIS, it had land-use authority only over the portion of the project on BLM lands, and on December 19, 2011, it approved "Phase I" of the Project (also known as "Tule I"), which is within the McCain Valley and does not include turbines proposed for the western ridgeline on BIA-managed lands in this area. *Id.* at 2.

On December 16, 2013, BIA approved "Phase II" of the Project (also known as "Tule II"), which consists of up to 20 wind turbines on Native American land held in trust by the Federal Government. *BIA ROD* at ii. This is the portion of the Project challenged by Plaintiffs in this lawsuit. *E.g.*, Compl. ¶ 1. Neither BIA's Record of Decision ("ROD") nor the Lease authorized any take of any protected eagle or bird. *E.g.*, *BIA ROD* at ii; *BLM ROD* at 26. In fact, Tule Wind's agreement to seek a permit under the Eagle Act was a condition to both the ROD and the Lease, as was Tule Wind's agreement to comply with all applicable federal laws and regulations. *E.g.*, *BIA ROD* at ii–iii.

Previously, on March 12, 2013, Plaintiff Protect Our Communities Foundation and other individual and organizational plaintiffs challenged BLM's approval of Tule I on NEPA, Eagle Act, Bird Act, and APA grounds. Complaint at 1–4, *Protect Our Communities Found. v. Jewell*, No. 13-cv-575-JLS (S.D. Cal

[2] Judicial notice requested. *See* Tule Wind RJN, ¶ 3 (Exh. B).

Mar. 12, 2013), ECF No. 1.[3] The plaintiffs challenged the same underlying EIS at issue in this lawsuit. *See id.* at 1. The plaintiffs also challenged Tule I using a legal theory under the Eagle Act, Bird Act, and APA. *Id.* at 20–23. Their second and third claims against Tule I are identical to the theory they advance in Claim 2 and Claim 3 of the complaint filed this lawsuit—that a federal agency violates the Eagle Act or Bird Act whenever it lawfully acts in its routine, regulatory capacity to approve a project by a third party on federal lands for a take that has not yet occurred and may only occur at some indeterminate point of time in the future. *Compare id., with* Compl. ¶¶ 64–68.

BLM and Tule prevailed in the district court before Judge Sammartino on all claims in *Protect Our Communities Found. v. Jewell* (*POCF I*), No. 13-cv-575-JLS, 2014 WL 1364453 (S.D. Cal Mar. 25, 2014). Judge Sammartino held, among other things, that BLM had no duty to obtain or require Tule to obtain a Bird Act permit (or a permit under the Eagle Act) prior to granting a right-of-way under the Federal Land Policy and Management Act for Phase I of the Tule Wind Project. *Id.* at *20–22. The plaintiffs appealed to the Ninth Circuit Court of Appeals, where the case has been fully briefed but oral argument has not yet been scheduled.

For Tule I, construction and operation was authorized without requiring Tule Wind to first obtain an Eagle Act permit. *See id.* at *20. The Tule II project went further than the legally sufficient requirements of the EIS and the BLM's conditions of approval. The BIA in its narrow authority under the Indian Long-term Leasing Act[4] acknowledged:

> The Tribe has agreed to direct the Applicant to apply for an eagle take permit using the Service's 2013 Eagle Conservation Plan Guidance. Based on consultation with the [U.S. Fish and Wildlife] Service and the BIA, [Tule Wind] will apply for an eagle take permit, including the

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[3] Judicial notice requested. *See* Tule Wind RJN, ¶ 4 (Exh. C).

[4] 25 U.S.C. § 415.

> risk assessment model contained in the 2013 guidelines, prior to initiating operation of the project.

See BIA ROD at 4.

Although construction could theoretically move forward, BIA made clear that Tule Wind is obligated to comply with all applicable laws. The BIA ROD states at page 4:

> [T]he lease allows the construction and operation of the Proposed Action to proceed before an eagle take permit is issued, subject to the applicable requirements. However, the Applicant remains responsible for complying with all applicable federal laws, including the BGEPA. Any take of eagles caused by the Project, prior to the issuance of an eagle take permit, constitutes a violation of BGEPA that the FWS may refer to the Department of Justice for enforcement. (16 USC 668a, 668b). Any unauthorized take of eagles is a violation of BGEPA.

Clearly, Tule Wind is required to comply with applicable law, and nothing in the BIA ROD purports to change this requirement.

In March 2014, Tule Wind applied for an Eagle Act Permit pursuant to U.S. Fish and Wildlife regulations and guidance, and it continues to diligently pursue this permit today. *See, e.g.*, Compl. ¶ 57. The BIA anticipated delays in processing the Eagle Act permit (*see BIA ROD* at iii), but construction of Tule II is not imminent; additional state and federal approvals are first needed from state and federal agencies. *See, e.g.*, *BIA ROD* at 34 (Mitigation Measure MM HYD-6).

On September 24, 2014, Plaintiffs brought this action challenging BIA's approval of Phase II of the Project. The Court granted both the Ewiiaapaayp Tribe and Tule Wind leave to intervene as defendants on January 20, 2015, and each filed Answers to the Complaint on February 5, 2015. The administrative record has not yet been filed. No trial date has been set. Accordingly, Tule Wind seeks judgment as a matter of law on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) .

/ / /

III. ARGUMENT

A. Legal Standard

A motion under Rule 12(c), like a motion to dismiss under Rule 12(b)(6) , challenges the legal sufficiency of the claims asserted in the complaint. *Winter v. I.C. Sys., Inc.*, 543 F. Supp. 2d 1210, 1212 (S.D. Cal. 2008); *see also Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Marcotte v. GE Capital Servs.*, 709 F. Supp. 2d 994, 996–97 (S.D. Cal. 2010). A Rule 12(c) motion is "functionally identical" to a motion to dismiss and the "same standard" applies. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989) (the "principal difference" between Rule 12(b)(6) and Rule 12(c) "is the timing of filing");[5] *see also Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011). Accordingly, "[j]udgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Winter*, 543 F. Supp. 2d at 1212 (quoting *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989)).

Tule Wind is entitled to judgment as a matter of law in its favor on plaintiffs' second and third claims under the Eagle Act, Bird Act, and APA on the grounds that none of these statutes permits pre-enforcement review of agency action before any violation of the Eagle Act or Bird Act has occurred.

B. The Court Should Enter Judgment Against Plaintiff On Its Claims That The BIA Failed to Take a "Hard Look" At Whether To Prepare A Supplement Under NEPA Because the Duty To Consider A Post-ROD Supplement Only Exists If There Remains Major Federal Action to Occur.

Plaintiffs wish that BIA would take additional actions in response to Plaintiffs' numerous and voluminous post-ROD demands to retract its decision. Compl. at ¶ 55–56. Plaintiffs allege that BIA's "ongoing failure" to prepare any

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[5] Fed. R. Civ. P. 12(c) states: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."

supplemental review "in the time that has elapsed since BIA issued the ROD" violates NEPA. Compl. at ¶ 61. BIA's decision was made on December 13, 2013 and BIA has no further action remaining. An APA claim under 5 U.S.C. § 706(1) can only proceed where an agency has failed to take an action that it is *required to take*. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004). The BIA has no ongoing duty to prepare a supplement after its decision is made. In precisely the same circumstances – seeking a post-decision NEPA supplement – the U.S. Supreme Court found that after a federal decision-making process is final and complete, there is no ongoing "major Federal action" on which to base supplementation. *Id.* at 73. To the extent Plaintiffs' seek a post-ROD NEPA supplement to satisfy a purported ongoing duty by BIA to prepare such a supplement, their claim must be dismissed as a matter of law.

C. The Court Should Enter Judgment Against Plaintiff On Its Claims Under the Bird Act and Eagle Act Because No Take or Violation of the Acts Has Occurred

Plaintiffs ask the Court to apply an unprecedentedly broad interpretation of the Bird Act and of the Eagle Act to invalidate the BIA's approval of Phase II of the Project. Plaintiffs' argument fails for multiple, independent reasons: (1) BIA had no duty to obtain a permit under the Bird Act or Eagle Act; (2) the Ninth Circuit has rejected Plaintiffs' interpretation of the Bird Act; (3) Plaintiffs' overly broad interpretation of the Bird Act and of the Eagle Act would lead to absurd results and would chill renewable energy development on public lands. Accordingly, the Court should reject Plaintiffs' Bird Act and Eagle Act claims as a matter of law.

1. BIA Had No Duty to Obtain Permits Under the Bird Act and Eagle Act

The Bird Act and the Eagle Act are both criminal statutes enforced by the U.S. Fish and Wildlife Service. *See* 16 U.S.C. §§ 703–12 (Bird Act), 668–668d (Eagle Act). The Bird Act prohibits "at any time, by any means or in any manner,

to pursue, hunt, take, capture [or] kill . . . any migratory bird" unless permitted by the Secretary of the Interior. 16 U.S.C. §§ 703–04. The Eagle Act contains similar prohibitions for acts performed with knowledge or with wanton disregard for the consequences. *Id.* § 668(a). Neither statute provides a private right of action; thus Plaintiffs bring their challenge under the APA.

There is no statutory or regulatory directive for BIA, when acting in its regulatory capacity, to obtain or require an applicant to obtain a permit. The Bird Act and Eagle Act have been applied to agencies that seek to kill birds intentionally in violation of the Acts. *See, e.g.*, *Native Songbird Care & Conservation v. LaHood*, No. 13-CV-02265-JST, 2013 WL 3355657, at *4 (N.D. Cal. July 2, 2013) (distinguishing instances where an agency must obtain a permit from where an agency approves third-party action).[6]

But no case in any Circuit has interpreted the Bird Act or Eagle Act or their implementing regulations as requiring an agency to secure a permit from the U.S. Fish and Wildlife Service before authorizing a permittee to engage in activity that has the mere *potential* for incidental take of migratory birds or eagles in the course of otherwise legal activities.

Indeed, according to U.S. Fish and Wildlife Service rules implementing the Eagle Act, "[n]o permit is currently available to authorize incidental take under the [Bird Act]." *Eagle Permits; Take Necessary To Protect Interests in Particular Localities*, 74 Fed. Reg. 46,836, 46,862 (Sept. 11, 2009);[7] *see also BIA ROD* at 26 (the U.S. Fish and Wildlife Service does not have a similar

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[6] *See also Humane Soc'y v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (USDA proposed to directly and intentionally kill protected geese); *CBD v. Pirie*, 191 F. Supp. 2d 161 and 201 F. Supp. 2d 113 (D.D.C. 2002) (Navy proposed to directly take migratory birds), *vacated by CBD v. England*, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (mooted by legislation directing the U.S. Fish and Wildlife Service to promulgate regulations regarding military incidental take); *cf. Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 939 (D. Or. 1977) (no violation of the Eagle Act where Forest Service approved use of herbicides).

[7] Judicial notice requested. *See* Tule Wind RJN, ¶ 5 (Exh. D).

take permit process under the MBTA). Furthermore, the U.S. Fish and Wildlife Service has explained that Eagle Act permits are not appropriate for "routine activities such as hiking, driving, normal residential activities, and ongoing use of existing facilities, where take could occur but is unlikely" and should "not be unnecessarily burdensome to the public." 74 Fed. Reg. at 46,862.

Accordingly, Plaintiffs may not, through the courts, compel BIA to follow procedures that simply do not apply in these circumstances.[8] *E.g.*, *Li v. Kerry*, 710 F.3d 995, 1003 (9th Cir. 2013) (no APA claim where plaintiff fails to identify a legal duty imposed by the relevant statute; no "license to 'compel agency action' whenever the agency is withholding or delaying an action we think it should take"); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) ("[A]bility to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command.").

The Bird Act and the Eagle Act, unlike the Endangered Species Act, do not require BIA to even consult with U.S. Fish and Wildlife Service before approving a project. *Compare* 16 U.S.C. §§ 668 *et seq.* (Eagle Act) (no mandatory consultation procedures), 703 *et seq.* (Bird Act) (same), *with* 16 U.S.C. § 1536(a)(2) (Endangered Species Act) (mandatory consultation for all federal agencies).[9]

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[8] The only case that has ever found that an agency violated the Bird Act or Eagle Act in somewhat analogous circumstances did not survive appeal. *See Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996), *rev'd*, 110 F.3d 1551 (11th Cir. 1997) (holding the Bird Act does not apply to federal agencies at all). *Glickman* merely stands for the proposition that a federal agency may be required to obtain a permit in limited circumstances—*Glickman* does not address the issues of foreseeability or responsibility for third-party acts. Similarly, *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008), did not address issues of foreseeability or third party acts: "We thus conclude that the [FCC] acted reasonably in deferring consideration of" whether Commission-licensed towers were covered by the Bird Act.

[9] Plaintiffs claim otherwise. *See* Compl. ¶ 23. But they are wrong—Federal agencies do not have to "ensure" they do not violate Bird Act or Eagle Act. *E.g.*, *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996) (concluding that the Bird Act did not apply to Forest Service approval of a red pine salvage sale); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 39 (1992)

BIA acted in accordance with the law. There is no statutory or regulatory requirement that BIA must obtain or require Tule Wind to obtain a permit for incidental take that theoretically could occur.

2. The Ninth Circuit and Its Courts Have Rejected Plaintiffs' Interpretation of the Bird Act and Eagle Act

BIA's duty under the Bird Act and Eagle Act are not as expansive as Plaintiffs suggest. Plaintiffs' entire Bird Act and Eagle Act claims relies on an incorrect assumption—that if there is a chain of causation between BIA's approval of a project and the potential for a take of migratory birds or protected eagles, then BIA violated the Bird Act. *See, e.g.*, Compl. ¶¶ 64, 67 (arguing that an agency must obtain a permit before approving activities that will foreseeably kill birds or eagles).

The Ninth Circuit has rejected this interpretation. In *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991), the Ninth Circuit noted that the Bird Act and the Endangered Species Act contain intentional distinctions and that habitat destruction flowing from timber sales authorized by the Forest Service does not constitute "take" under the Bird Act. *Id*. at 303.

More recently, the Ninth Circuit in *City of Sausalito v. O'Neill*, 386 F.3d at 1225 (9th Cir. 2004), affirmed that the Bird Act does not apply to habitat destruction leading indirectly to bird deaths. Plaintiffs rely on the BIA's approval as part of an indirect chain of causation, which simply does not support a claim that the Bird Act or Eagle Act has been violated.

The case law of the Ninth Circuit and its district courts does not support Plaintiffs' argument. For example, governmental regulatory approval of activities that "may result in the foreseeable deaths of migratory birds" or may "disturb[] both birds and their nests" is not considered a take under the Bird Act.

(discussing whether an unrelated *appropriations act*, not the Bird Act, required the Forest Service to ensure compliance with the Bird Act).

*Id.*at 1203, 1225 (challenge to National Park Service approval of management plan for the Golden Gate National Recreation Area). Similarly, governmental regulatory approval of an operation to cut down trees that may contain bird nests and baby birds is also not considered "take" under the Bird Act. *Earth Island Inst. v. Carlton*, No. Civ. S-09-2020 FCD/EFB, 2009 WL 9084754, at *25 (E.D. Cal. Aug. 20, 2009) (challenge to U.S. Forest Service project to fell fire-killed trees). These failed challenges to government approvals are directly analogous to the Plaintiff's challenge to the BIA's approval of the Lease and are distinct from a private individual's act of illegally applying pesticides that poisons birds, which may constitute a take in the context of a criminal action. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

Recent federal court decisions have uniformly rejected claims under the APA that collaterally attack an agency's inherently discretionary authority to enforce the Bird Act and Eagle Act when no take has been authorized and no take has occurred. A district court in the Northern District, for example, declined to issue a preliminary injunction, finding that a challenge to a U.S. Department of Transportation-approved highway project that actually *did* kill birds after it was approved was unlikely to succeed on the merits. The plaintiffs' allegations in that case were very similar to Plaintiffs' here (except, again, the project in this Northern District case had actually killed migratory birds), and the district court rejected them:

> Plaintiffs' counsel at oral argument clarified that it is Plaintiffs' view that the APA and [Bird Act] authorize private suits against federal agencies whenever an agency authorizes a project implemented by third parties that, years later, has the unintended effect of taking even a single migratory bird. Private suits under the [Bird Act] appear to be rare, and the cases cited by Plaintiffs do not support such an expansive interpretation of its scope.

Native Songbird, No. 13-CV-02265-JST, 2013 WL 3355657, at *4.

In this district, the Court has similarly rejected the notion that the Bird Act or the Eagle Act imposes a general duty on agencies to require permits when acting in their routine, regulatory capacities. In *POCF I*, Judge Sammartino held that the BLM had no duty to obtain or require a Bird Act permit (or a permit under the Eagle Act) prior to granting a right-of-way under the Federal Land Policy and Management Act for Phase I of the Project. 2014 WL 1364453, at *20–22. In *Protect Our Communities Foundation v. Salazar*, Judge Curiel also held that BLM had no duty to obtain or require a Bird Act permit before issuing an approval related to a wind energy project on federal lands in Imperial County, California. No. 12-cv-2211-GPC, 2013 WL 5947137, at *18–19 (S.D. Cal Nov. 6, 2013). In *Protect Our Communities Foundation. v. Chu*, Judge Lorenz came to a similar conclusion with respect to both the Bird Act and Eagle Act regarding the U.S. Department of Energy's approval of a renewable energy transmission line project. No. 12-cv-3062 L (BGS), 2014 U.S. Dist. LEXIS 42410, at *25–27 (S.D. Cal. Mar. 27, 2014).

The holdings in the Southern District are consistent with the decisions of other district courts that have been confronted with this issue recently. In *Pub. Emps. for Envtl. Responsibility v. Beaudreu*, which involved a challenge to a regulatory approval by the Bureau of Ocean Energy Management, the District Court for the District of Columbia aptly explained:

> Even if the taking of migratory birds takes place at some point in the future, it is clear that no such taking has yet occurred and is not imminent at this point because construction of the Cape Wind project has not begun and the wind turbine generators that might take migratory birds are not operational. [¶] Given the statutory and regulatory text, the Court finds that the BOEM did not violate the Migratory Bird Treaty Act by merely approving a project that, if ultimately constructed, might result in the taking of migratory birds.

25 F. Supp. 3d 67, 117 (D.D.C. 2014).

Other districts have squarely rejected Plaintiffs' theory that the APA

may be used to enforce the Bird Act or Eagle Act if they can posit some chain of causation between a lawful regulatory approval and the eventual take of a protected bird or eagle. *E.g.*, *Friends of the Boundary Mts. v. U.S. Army Corps of Eng'rs*, 24 F. Supp. 3d 105, 114 (D. Me. 2014) ("The relationship between the Corps' regulatory permitting activity and any potential harm to migratory birds appears to be too attenuated to support a direct action against the Corps to enforce the MBTA's prohibition on 'takes.'"); *Protect Our Lakes v. U.S. Army Corps of Eng'rs*, No. 1:13-cv-402-JDL, 2015 U.S. Dist. LEXIS 21295, at *15 (D. Me. Feb. 20, 2015) ("Evergreen represents that it has 'begun to consult with USFWS about a programmatic take permit' for the Oakfield Project. However, the plaintiffs challenge the Corps and the USFWS for issuing the § 404 permit without requiring Evergreen to obtain any eagle take permits. The plaintiffs identify no authority establishing that the Corps or USFWS were required to issue any eagle take permits before the § 404 permit issued.") (citations omitted).

Plaintiffs' allegation that a protected bird or eagle will be taken is similarly attenuated and fundamentally speculative—BIA's regulatory approval of the Lease has not and could not itself result in a take of a protected bird or eagle. The BIA ROD and underlying Lease expressly require Tule's compliance with all applicable governmental regulations, including the Bird Act and Eagle Act. *E.g.*, *BIA ROD* at ii (Tule Wind "has agreed to comply with all applicable Federal laws, including the requirement for an eagle take permit under the BGEPA. . . . The Tribe has agreed to direct the Applicant to apply for an eagle take permit."). Clearly, BIA has not authorized any take of any protected bird, and Plaintiffs do not (because they cannot) allege that any take has occurred or is imminent.

Plaintiffs have only alleged that BIA's regulatory approval of the Lease will indirectly cause a take at some indeterminate time in the future. Even if assumed to be true, this theory does not support a cause of action under the Bird Act or Eagle Act, especially considering the fact that Tule Wind has applied for

and intends to obtain a permit under the Eagle Act.

Ultimately, this Court need not decide precisely where the line is between projects that will "take" birds under the Bird Act or Eagle Act and projects that are outside of the Bird Act or Eagle Act's sweep. The regulatory approval for a lease of tribal land for a wind project that has not even begun construction is not actionable under the Bird Act under Ninth Circuit precedent. It is not a take of a protected eagle and therefore not a violation of the Eagle Act. Plaintiffs' request that the Court overturn BIA's approval as violating the Bird Act and Eagle Act contradicts Ninth Circuit precedent and should be rejected.

3. Application of Plaintiffs' Theory of Bird Act and Eagle Act Enforcement Would Lead to Absurd Results and Chill Critical Renewable Energy Development on Federal Lands

Plaintiffs' proposed application of the Bird Act and Eagle Act would create an unhinged private right of action with no limits, one that was neither intended nor envisaged by Congress when it enacted these statutes. Many common, daily activities have the potential to kill birds. According to the U.S. Fish and Wildlife Service, the most common causes of bird deaths are as follows:

- Building window strikes: between 97 and 976 million per year;
- Communication towers: between 4 and 50 million per year;
- Transmission lines: as many as 174 million per year;
- Cars: as many as 60 million per year;
- Poisoning: at least 72 million per year; and
- Domestic and feral cats: 100s of millions per year.

See U.S. Fish & Wildlife Serv., Migratory Bird Mortality (Jan. 2002).[10] According to the U.S. Fish and Wildlife Service, the entire domestic wind industry, in contrast, is estimated to kill only approximately 33 thousand birds annually. *Id.*

Plaintiffs' interpretation of the Bird Act and the Eagle Act could shut down the renewable energy industry, particularly on public lands. It would also

[10] Judicial notice requested. *See* Tule Wind RJN, ¶ 6 (Exh. E).

subject individual Americans to federal permitting requirements regarding birds and eagles for activities that are common in their daily lives. It would, for example, permit a private challenge to: the Federal Aviation Administration's grant of a flying license to a private individual, if it did not require the pilot to obtain a permit under the Acts; the National Park Service's issuance of a permit for a public gathering on the National Mall; the USDA's issuance of a license to a retail pet store; or any federal approval involving the construction of an airport, a freeway, or even a building. Congress clearly did not intend, when it enacted the Bird Act and Eagle Act, to allow private parties to force judicial review whenever any federal agency takes any routine, regulatory action with respect to numerous forms of lawful commercial or private activity that may indirectly affect protected birds or eagles at some undetermined point in the future. *See, e.g.*, *City of Sausalito*, 386 F.3d at 1225 ("the definition of an unlawful 'taking' under the MBTA 'describes *physical* conduct . . . which was undoubtedly a concern at the time of the statute's enactment in 1918.'") (emphasis added).

Plaintiffs' proposed application of the Bird Act and Eagle Act would open almost every facet of American life to enforcement action. The reach of these acts is expansive—indeed, almost unlimited, if untethered from Congressional intent and common sense. *See, e.g.*, *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202, 1212–13 (D.N.D. 2012) ("[T]o extend the [Bird Act] to reach other activities that indirectly result in the deaths of covered birds would yield absurd results. . . . [T]he Government would have to criminalize driving, construction, airplane flights, farming, electricity and wind turbines, which cause bird deaths, and many other everyday lawful activities.").

Nothing in the language of the Acts or the cases interpreting them requires this extreme result, and the Court should reject Plaintiffs' claims accordingly.

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IV. CONCLUSION

For the foregoing reasons, Tule Wind respectfully requests that the Court grant Tule's Motion for Judgment on the Pleadings, partially reject Plaintiff's first claim, and reject Plaintiffs' second and third claims as a matter of law.

Dated: August 27, 2015

Respectfully Submitted,

Jeffrey Durocher

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CERTIFICATE OF SERVICE

I hereby state and certify that on August 28, 2015, I filed the foregoing document using the ECF system, and that such document will be served electronically and on all parties of record.

By:

/s/ Lana Le Hir
LANA LE HIR