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EWIIAAPAAYP BAND OF KUMEYAAY INDIANS

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

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,

Defendant-in-Intervention.

CASE NO. 14CV2261H WVG

DEFENDANT-IN-INTERVENTION EWIIAAPAAYP BAND OF KUMEYAAY INDIANS' MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO PLAINTIFFS' FIRST CAUSE OF ACTION RE: APA 706(1) NEPA CLAIM AND SECOND AND THIRD CAUSES OF ACTION

Date: November 16, 2015
Time: 10:30 a.m.
Place: Courtroom 15A
Judge: Hon. Marilyn Huff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

STATUTES

TABLE OF AUTHORITIES

I. INTRODUCTION

In this action, Plaintiffs challenge the Bureau of Indian Affairs' issuance of a Record of Decision ("ROD") approving a Wind Lease Agreement (the "Lease"), as amended and entered into by and between the Tribe and Tule Wind LLC ("Tule Wind"). The Lease is for the Tule II Wind Power Generation Project (the "Project") to be located on the Tribe's reservation (the "Big Reservation").[1] *See Complaint*, ¶ 30. Plaintiffs challenge a simple lease approval made in furtherance of Congress' statutory policies, i.e., to promote tribal economic development and self-governance pursuant to specific federal laws regarding approval of leases on Indian reservations between federally recognized Indian tribes and their lessees.

The Ewiiaapaayp Band of Kumeyaay Indians (the "Tribe") is a federally recognized Indian tribe. The Federal Defendants are individually named in their official capacities due to their employment with and decision making authority within and regarding the U.S. Department of the Interior, Bureau of Indian Affairs (the "BIA")[2]. The BIA is a federal agency that serves as a trustee to federally recognized Indian tribes, including the Tribe, and Congress has enacted federal statutory policies favoring tribal economic development and self-governance.

The BIA as trustee to Indian tribes is not a land manager. Rather, consistent with Congressional intent and statutory mandates, the BIA leaves the land management function to Indian tribes, such as the Tribe in this instance.

Here, the BIA deferred to the Tribe's sovereign authority over the Tribe's Big Reservation and reported in the ROD that the Tribe required Tule Wind to apply to the U.S. Fish & Wildlife Service ("FWS") for a permit under the Bald and Golden Eagle Protection Act ("BGEPA"). Tule Wind has applied to FWS for said permit consistent with the Tribal directive. *See Complaint*, ¶ 51:21-22.

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[1] The Tribe has a "small" reservation in Alpine, California, approximately 40 miles from the Big Reservation.

[2] For ease of reference, the Federal Defendants will be referred to collectively as the "BIA".

Construction and operation of the wind facilities contemplated under the Lease have not commenced. *See Complaint*, ¶ 58.

Plaintiffs' argument that supplementation of the Environmental Impact Statement ("EIS") is required after the major federal action, i.e., approval of the Lease, is wrong. Plaintiffs' additional claim that federal agencies granting regulatory approvals are required to obtain a permit under the Migratory Bird Treaty Act of 1918 (16 U.S.C. §§ 703-711) (the "MBTA") and BGEPA prior to approval of tribal land leases for wind power projects by third parties is wrong, also.

II. BACKGROUND

A. Federal Policy Background: The Federal Government Promotes Tribal Economic Development; Promotion of Congressional and Executive Branch Policy

Federal policy encourages tribal governments to engage in economic development activities. The cornerstone of this federal objective is the Indian Reorganization Act of 1934 ("IRA") (25 U.S.C. § 461 *et seq.*), which Congress enacted to "encourage [tribal] economic development."[3] Congress has since repeatedly reaffirmed this federal policy by enacting significant federal Indian laws that advance the IRA's goals of encouraging strong tribal governments, tribal self-determination, and tribal self-sufficiency. *See e.g.*, the Indian Self-Determination Act, 25 U.S.C. §§ 450f *et seq.*; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*; the Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458aa *et seq.*; and the Tribal Self-Governance Amendments of 2000, 25 U.S.C. §§ 458aaa *et seq.*

The federal policy to promote tribal economic development reflects the federal government's recognition that tribal governments, unlike the states, lack an adequate tax base for raising revenues for tribal programs and therefore must raise

[3] *See* Felix S. Cohen, Handbook of Federal Indian Law 147 (1982 ed.).

revenues through economic development activities. Advancement of this federal policy will benefit tribal governments *and* the federal government because tribal self-determination and self-sufficiency decreases tribal dependency on federal resources.

With these benefits in mind and in light of the United States' interest in domestic energy production, Congress has also encouraged tribes to engage in energy development to promote self-determination and self-sufficiency. For example, Title V of the Energy Policy Act of 2005[4] authorizes Indian tribes to enter into leases or "business agreements" for energy resource development on tribal lands, including: exploration, extraction and processing of energy mineral resources; construction and operation of electric generation, transmission or distribution facilities and facilities to process or refine energy resources developed on tribal land. *See* 25 U.S.C. §§ 3501-3506.

Here, the Tribe's interest in the Lease approval and the Project was created and is protected under federal law. *See e.g.*, The Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415 (generally requires that the Secretary of the Interior approve leases of Indian lands); and 25 C.F.R. Part 162. Additionally, consistent with federal law and policy, the BIA in the ROD recognizes the Tribe's sovereign right to impose conditions on Tule Wind's use of the Tribe's lands, e.g., the Tribe's requirement that Tule Wind apply for a BGEPA permit.

Unfortunately, Plaintiffs invite the Court to interfere with the Tribe's sovereign authority to administer land use and environmental matters on the Big Reservation under the guise of an Administrative Procedures Act ("APA") action against the BIA. Plaintiffs have no private right of action under the MBTA and BGEPA and the BIA is not required to obtain any such permit(s) as part of the Lease approval process. Yet Plaintiffs hope to override Tribal sovereign authority

[4] The Indian Tribal Energy Development and Self-Determination Act of 2005, enacted as Title V of the Energy Policy Act of 2005.

and decades of federal Indian policy by securing a federal court order requiring the BIA to apply for a permit(s) that is not required of the federal government. Plainly, adjudicating Plaintiffs' APA § 706(1), MBTA, and BGEPA claims would frustrate Tribal self-governance and the statutory objectives of Section 415 and the Energy Policy Act of 2005.

Congress has elected to authorize the federal government to exercise prosecutorial discretion to enforce the MBTA and BGEPA—both criminal statutes. Additionally, Congress and the Executive Branch have emphasized and promoted policies of tribal self-governance, energy development on Indian lands, and tribal economic development. When taken together, it cannot reasonably be assumed that Congress intended to permit Plaintiffs' to maintain the challenged claims.

B. Role of the BIA in Lease Approval

The BIA is entrusted with managing and protecting Native American interests. *See e.g.*, 25 U.S.C. § 2; *McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002) ("It is well established that the BIA holds a fiduciary relationship to Indian tribes, and its management of tribal [interests] is subject to the same fiduciary duties." (citing *United States v. Mitchell*, 463 U.S. 206, 224-226, 103 S.CT. 2961, 77 L.Ed.2d 580 (1983))).

Various statutes and regulations govern the form and approval of leases involving Native American lands. *See e.g.*, 25 U.S.C. § 415 (authorizing the Secretary of the Interior to approve leases of tribal land). The Secretary of the Interior has delegated authority for lease approval to the Bureau of Indian Affairs ("BIA").

The Tribe requested that the BIA approve the Lease for the development of the Project. Plaintiffs do not challenge the authority of the BIA to approve the Lease. Rather, Plaintiffs challenge the environmental review process utilized by the BIA to support Lease approval.

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The BIA's Lease approval is grounded in federal policy promoting autonomy of the Tribe. 25 U.S.C. § 415. *See e.g., Wapato Heritage, LLC v. US*, 637 F.3d 1033 (9th Cir. 2011). The BIA's approval of the Lease indicates that the Lease contained the standard statutory or regulatory provisions and there were no violations of federal statutes or regulations concerning the leasing of Tribal land. 25 U.S.C. § 415.

Federal law and associated regulations prescribe the BIA's course of action in approval of the Lease. The statute pertaining to approval of leases of tribal lands states in relevant part:

> (a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connections with the operations under such leases …

25 U.S.C. § 415(a).

In addition to the above statute, there are regulations governing the leasing and permitting of trust land. 25 CFR Part 162. However, with the exception of the requirement that "no lease shall be approved or granted at less than the present fair rental value," the regulations do not specify under what circumstances the Secretary should or should not approve a lease.

The BIA's obligation to act in furtherance of Tribal interests does not mean that the BIA assumes Tribal contractual obligations or has management duties for Tribal land. *See e.g., United States v. Algoma Lumber Co*., 305 U.S. 415, 419-422; 59 S.Ct. 267, 83 L.ED. 260 (1939); and *McNabb v. United States*, 54 Fed.Cl. 759, 760 (2002).

The BIA approves leases of tribal land in accordance with federal statutes and federal policy promoting Tribal economic development and favoring Indian self-determination. The BIA's approval keeps with the underlying political and social policies encouraging tribal self-government and economic development, especially with regard to Tribal resources.

At the Lease approval stage, the BIA was not subject to any specific, mandatory directives derived from the MBTA or BEGEPA.[5]

III. ARGUMENT

A. Legal Standard

The Tribe brings this motion for partial judgment on the pleadings under Federal Rule of Civil Procedure 12(c).[6] 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"); *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)).

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[5] Plaintiffs do not challenge the underlying authority of the Secretary, by and through the BIA, to approve the Lease pursuant to 25 U.S.C. § 415 or 25 CFR Part 162.

[6] 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."

The Tribe is entitled to partial judgment as a matter of law in its favor on Plaintiffs' first cause of action, specifically, their Administrative Procedures Act § 706(1) National Environmental Policy Act ("NEPA") supplementation claim, on the ground that supplementation of environmental analysis is not required after Lease approval; and Plaintiffs' second and third claims under the MBTA and BGEPA on the grounds that neither statute requires the BIA to obtain a permit(s) as a pre-condition to Lease approval.

B. The Court Should Enter Judgment Against Plaintiffs on the 706(1) Claim that the BIA was Required to Supplement the EIS After Lease Approval, i.e., Issuance of the ROD

The Bureau of Land Management ("BLM") issued its Tule Wind Phase I Final EIS, including analysis of the Phase II project, on October 14, 2011. *See Complaint* ¶ 37. BLM issued its ROD for the Phase I project in December 2011. *See Complaint* ¶ 38. After BLM approved the ROD for the Phase I project, the BIA issued a Phase II project Notice of Availability of the Draft Phase II Avian and Bat Protection Plan ("Notice of Availability"). *See Complaint* ¶¶ 39 & 42. In the Notice of Availability, the BIA provided notice that it would rely on the BLM's 2011 Final EIS for Lease approval. *See Complaint* ¶ 42. The BIA issued the ROD approving the Lease on December 16, 2013. *See Complaint* ¶¶ 1, 47.

Plaintiffs assert that the BIA failed to supplement the BLM's 2011 Final EIS in response to Plaintiffs' formal demands made after Lease approval in December 2013. *See Complaint* ¶¶ 55-57 (alleging demands made in January 2014, May 2014, and September 2014). In the First Cause of Action, Plaintiffs contend that the BIA failed to comply with NEPA and that the BIA is unlawfully withholding and unreasonably delaying agency action to supplement to EIS in contravention of the APA, 5 U.S.C. § 706(1). *See Complaint* ¶¶ 61-63.

Alleged procedural violations of NEPA "are reviewed under the Administrative Procedure Act." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011). However, Plaintiffs' attempt to simultaneously

characterize their claims as a challenge to final agency action and on-going failure to take action is misplaced.

The APA, 5 U.S.C. § 706(1), allows challenges where an "agency failed to take a discrete action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (*"SUWA"*) (emphasis added). "Absent such an assertion, a Section 706(1) claim may be dismissed for lack of jurisdiction." *San Luis Unit Food Producers v. United States*, 709 F.3d 798, 803-04 (9th Cir. 2013) (citation omitted); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006) (affirming dismissal of a breach of trust claim for lack of jurisdiction because the government was not required "to take discrete nondiscretionary actions").

APA § 706(1) authorizes courts to "compel agency action" where an agency has ignored specific legislative command. *See e.g. SUWA*. APA § 706(1) is inapplicable to this case because the Complaint does not identify any statute, regulation, case, or other law that requires the BIA to take the specific action Plaintiffs demand, *i.e.*, to supplement the EIS after issuance of the December 2013 ROD granting Lease approval.

Essentially, Plaintiffs make the same argument that was rejected by the United States Supreme Court in *SUWA*. In support of their failure to supplement claim under APA § 706(1), Plaintiffs argue that after the BIA's issuance of the ROD, Plaintiffs presented evidence of significant new circumstances or information that requires a "hard look" under NEPA. *See Complaint* ¶¶ 55-57; and 61-63.

The United States Supreme Court held in *Marsh v. Oregon Natural Resources Council* that supplementation is necessary only where "there remains 'major federal actio[n]' to occur." 490 U.S. 360, 374 (1989). In *Marsh*, a dam construction project that was the subject of environmental review was not yet completed. *Id*. at 364. Here, like in *SUWA*, the Lease approval is a major federal

action requiring review under NEPA, and that federal action was complete upon issuance of the ROD in December 2013.

The Lease approval is the "proposed action" contemplated by 25 U.S.C. § 415 and the associated leasing regulations. There is no on-going "major federal action" that could require supplementation by the BIA after the issuance of the ROD. Lease approval marked the consummation of the BIA's decision making process. *See e.g., Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Once the Lease was approved, the Tribe became responsible for management and supervision of the lessee's activities on Tribal lands consistent with federal policies promoting tribal self-governance, economic development, and tribal self-determination. In other words, once the Lease was approved, rights and obligations were determined and the agency action was final. *Id*. at 178.

In light of *SUWA*, Plaintiffs' APA § 706(1) claim arising out of the BIA's purported failure to supplement the BLM's EIS after Lease approval cannot stand as a matter of law. Plaintiffs have failed to demonstrate that the BIA failed to take a discrete agency action that it was required to take. Judgment should be entered in Defendants' favor accordingly.

C. The Court Should Enter Judgment Against Plaintiffs on the Second and Third Claims Because The Federal Government Is Not Engaging in Prohibited Activities under the MBTA and BGEPA When the Government Acts in a Regulatory Role to Approve the Tribe's Lease

The bald eagle and golden eagle are currently protected by two acts of Congress: the Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668c), and the Migratory Bird Treaty Act of 1918 (16 U.S.C. §§ 703-711).

The MBTA is enforced by FWS through the U.S. Department of Justice ("DOJ"), and there is no private cause of action enabling others to bring suit to enforce this law. *See e.g., Turtle Island Restoration Network v. US Department of Commerce*, 438 F.3d 937 (9th Cir. 2006). The MBTA imposes only criminal penalties on those who violate the MBTA.

Like the MBTA, FWS enforces the BGEPA through the U.S. Department of Justice and there is no private cause of action enabling others to bring suit to enforce this law. *See e.g.*, *Protect our Eagles v. City of Lawrence*, 715 F.Supp. 996, 998 (D. Kan. 1989) ("[T]here is no language in that Act purporting to create a private right of action against the Department of the Interior.")[7]. The BGEPA imposes both civil and criminal penalties on those who violate the BGEPA.

Plaintiffs lack a meritorious challenge under the APA alleging that the federal government violated the MBTA or BGEPA because neither statute applies to the federal government when issuing regulatory approvals such as the Lease approval at issue here.

Plaintiffs ask this Court to find that they can use the APA as a vehicle to enforce the MBTA and BGEPA against the federal government. However, to be successful under the APA, Plaintiffs must identify a statute applicable to the BIA and a violation of that statute by the BIA. *See Sierra Club v. Martin*, 110 F.3d 1551, 1154-56 (11th Cir. 1997) (holding plaintiff could not bring an APA claim against the federal government to enforce the terms of the MBTA because "[t]he MBTA . . . does not subject the federal government to its prohibitions."). Furthermore, the MBTA cannot be used to sue the BIA, even through the APA. *See Sierra Club v. Martin*, 110 F.3d 1551 (11th Cir. 1997); *Newton County Wildlife Ass'n v. U.S. Forest Service*, 113 F.3d 110 (8th Cir. 1997). *Cf. Humane Society of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000).

Congress enacted the MBTA and BGEPA as criminal laws because it sought to stop private citizens from taking eagles and migratory birds, not to stop the federal government from making regulatory approvals that might incidentally take protected birds. This intent is made clear by the fact that Congress did not include a private right of action in either statute, and instead reserved all enforcement

[7] The Department of the Interior is the parent agency of the BIA.

authority to the federal government. Moreover, Congress chose not to include the federal government within the meaning of "person" for purposes of the MBTA and BGEPA. Accordingly, Congress did not intend for the MBTA and BGEPA to apply to the BIA, or for private citizens to enforce the MBTA and BGEPA against the federal government.

The inapplicability of these statutes to the BIA for purposes of Plaintiffs' claims is buttressed by the fact that the BIA has not committed a take and the BIA has no other responsibilities under the statutes. Simply put, the BIA is not responsible for enforcing the MBTA or BGEPA, issuing take permits, or engaging in the activity that Plaintiffs contend will result in take. Therefore, neither statute can be the basis for an underlying obligation and resulting violation.

Plaintiffs sued the BIA for approving the Lease. The purpose of the federal action under 25 U.S.C. § 415 and Part 162 is to authorize the Lease to ensure the Tribe can exercise its sovereign authority over its lands in a manner consistent with the federal policies of tribal self-governance and self-determination. Given the objectives of the federal action, and Congress' intent that the federal government be the exclusive enforcer of the MBTA and BGEPA, Plaintiffs' claims do not advance the actual purposes of the federal schemes at issue here.

1. The Court Should Enter Judgment Against Plaintiffs On Their Claims Under the MBTA and BGEPA Because No Take or Violation of the Acts Has Occurred

Plaintiffs ask the Court to apply a broad interpretation of the MBTA and BGEPA to invalidate the BIA's Lease approval. Plaintiffs' argument fails for multiple, independent reasons: (1) the BIA had no duty to obtain a permit under the MBTA or BGEPA; (2) the Ninth Circuit has rejected Plaintiffs' interpretation of the MBTA; and (3) Plaintiffs' broad interpretation of the MBTA and BGEPA would stop the BIA approval of Tribal leases contrary to federal law and policy, including renewable energy development on the Tribe's lands. Accordingly, the Court should reject Plaintiffs' MBTA and BGEPA claims as a matter of law.

a. The BIA Had No Duty to Obtain Permits Under the MBTA and BGEPA

The MBTA and BGEPA are both criminal statutes enforced by FWS. *See* 16 U.S.C. §§ 703–12 (MBTA), 668–668d (BGEPA). The MBTA 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. *Id.* §§ 703–04. The BGEPA contains similar prohibitions for acts performed with knowledge or wanton disregard for the consequences. *Id.* § 668(a).

There is no statutory or regulatory directive for the BIA, when acting in its regulatory capacity, to obtain or require an applicant to obtain a permit. The MBTA and BGEPA have been applied to agencies that seek to kill birds intentionally in violation of the Acts.[8] *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).

The Tribe is not aware of any case in any Circuit that has interpreted the MBTA or BGEPA or their implementing regulations as requiring an agency to secure a permit from FWS before authorizing a third party to engage in an activity that has the mere *potential* to result in the incidental take of migratory birds or eagles. Indeed, "[n]o permit is currently available to authorize incidental take under the [MBTA]." *Eagle Permits; Take Necessary To Protect Interests in Particular Localities*, 74 Fed. Reg. 46862 (Sept. 11, 2009).

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[8] *See, e.g.*, *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 Fish & Wildlife 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 BGEPA where Forest Service approved use of herbicides).

Plaintiffs may not, through the courts, compel the BIA to follow procedures that simply do not apply in these circumstances.[9] *E.g.*, *Li v. Kerry*, 710 F.3d 995, 1003 (9th Cir. 2013) (no claim under APA 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 MBTA and BGEPA, unlike the Endangered Species Act, do not require the BIA to even consult with FWS before approving a project. *Compare* 16 U.S.C. §§ 668 *et seq.* (BGEPA) (no mandatory consultation procedures), 703 *et seq.* (MBTA) (same), *with* 16 U.S.C. § 1536(a)(2) (Endangered Species Act) (mandatory consultation for all federal agencies).[10]

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

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[9] The only case that has ever found that an agency violated the MBTA or BGEPA 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 MBTA does not apply to federal agencies at all). *Glickman*, 217 F.3d 882, which merely stands for the proposition that a federal agency may be required to obtain a permit in limited circumstances, did 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 MBTA.

[10] Federal agencies do not have to "ensure" they do not violate MBTA or BGEPA. *See* Complaint ¶ 23. *E.g.*, *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1576 (S.D. Ind. 1996) (concluding that the MBTA *does not* apply to lawful, commercial activity not intending to take birds); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438-39 (1992) (discussing whether an unrelated *appropriations act*, not the MBTA, required the Forest Service to ensure compliance with the MBTA).

b. The Ninth Circuit Has Rejected Plaintiffs' Interpretation of the MBTA

The BIA's duty under the MBTA is not as expansive as Plaintiffs suggest. Plaintiffs' entire MBTA claim relies on an incorrect assumption—that if there is a chain of causation between the BIA's approval of a project and the potential for a take of migratory birds, then the BIA violated the MBTA. *See, e.g.*, *Complaint* ¶¶ 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 of the MBTA. In *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991), the Ninth Circuit noted that the MBTA has a narrower definition of "take" than the Endangered Species Act and found that the difference is intentional:

> Under the regulations promulgated pursuant to the [MBTA], "take" is defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. [Citation.] The definition describes physical conduct of the sort engaged in by hunters and poachers, conduct which was undoubtedly a concern at the time of the statute's enactment in 1918. The statute and regulations promulgated under it make no mention of habitat modification or destruction.

More recently, the Ninth Circuit in *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) , affirmed that the MBTA applies to prohibit "physical conduct of the sort engaged in by hunters and poachers" and not to "'habitat destruction,' even that which 'le[ads] indirectly to bird deaths.'" The indirect chain of causation upon which Plaintiffs rely simply does not support a claim that the BIA violated the MBTA.

Although the Ninth Circuit and district courts therein have not precisely delineated the types of projects or activities that constitute a prohibited take under the MBTA, case law does not support Plaintiffs' argument. For example, activities that "may result in the foreseeable deaths of migratory birds" or may "disturb[]

both birds and their nests" are not considered a take under the MBTA. *City of Sausalito*, 386 F.3d at 1203, 1225. Cutting down trees that may contain bird nests and baby birds is also not considered "take" under the MBTA. *Earth Island Inst. v. Carlton*, No. Civ. S-09-2020 FCD/EFB, 2009 WL 9084754, at *25 (E.D. Cal. Aug. 20, 2009) (project to fell fire-killed trees). On the other hand, illegally applying pesticides that kill birds may be a take, at least in the *criminal* context. *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) (emphasis added).

Recent federal court decisions have uniformly rejected claims under the APA that collaterally attack an agency's inherently discretionary authority to enforce the MBTA and BGEPA. A district court in the Northern District of California, for example, declined to issue a preliminary injunction, finding that plaintiffs were unlikely to succeed on the merits even though the highway project in question actually *did* kill birds after it was approved. *Native Songbird*, No. 13-CV-02265-JST, 2013 WL 3355657, at *4. 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 [MBTA] 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 [MBTA] appear to be rare, and the cases cited by Plaintiffs do not support such an expansive interpretation of its scope.

Id.

1. In this district, the Court has similarly rejected the notion that the MBTA or BGEPA imposes a general duty on agencies to require permits when acting in their routine, regulatory capacities. In *Protect Our Communities*

Foundation v. Jewell, Judge Sammartino held that the BLM had no duty to obtain or require an MBTA permit (or a permit under the BGEPA) prior to granting a right-of-way under the Federal Land Policy and Management Act. No. 13-cv-575-JLS, 2014 WL 1364453, at *20–22 (S.D. Cal Mar. 25, 2014). In *Protect Our Communities Foundation v. Salazar*, Judge Curiel also held that the BLM had no duty to obtain or require an MBTA permit. No. 12-cv-2211-GPC, 2013 WL 5947137, at *18–19 (S.D. Cal Nov. 6, 2013). In *Protect Our Cmtys. Found. v. Chu*, Judge Lorenz came to a similar conclusion with respect to both the MBTA and BGEPA. No. 12-cv-3062 L (BGS), [2014 U.S. Dist. LEXIS 42410, at *25–27] (S.D. Cal. Mar. 27, 2014).

2. 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. Cape Wind Assocs.*, the District of the District of Columbia aptly explained:

3. 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.

4. No. 10-cv-1067-RBW, 2014 WL 985394, at *32 (D.D.C. Mar. 14, 2014).

5. Other districts have squarely rejected Plaintiffs' theory that the APA may be used to enforce the MBTA or BGEPA if they can posit some chain of causation between the 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 –16] (D. Me. Feb. 20, 2015) ("What is more, the plaintiffs cannot show in the administrative record that eagle take has occurred or will occur at the Oakfield Project, arguing instead that '[i]t is difficult to believe that the [project] . . . will not result in any take whatsoever.' . . . On the facts and law presented by the plaintiffs, and without treating the plaintiffs' speculation as fact, the Corps has not violated the Bald and Golden Eagle Protection Act.") (citations omitted). Plaintiffs' allegation that a protected bird or eagle will be taken is similarly attenuated and speculative—the BIA's regulatory approval of the Lease has not and could not itself result in a take of a protected bird or eagle.

Ultimately, this Court need not decide precisely where the line is between projects that will "take" birds under the MBTA or BGEPA and projects that are outside of the MBTA or BGEPA's sweep. The regulatory approval for a lease of tribal land for a wind project that has not even begun construction is not "physical conduct of the sort engaged in by hunters and poachers"—the type of activity the Ninth Circuit has held implicates the MBTA. It is not a take of a protected eagle and therefore not a violation of the BGEPA. Plaintiffs' request that the Court overturn the BIA's Lease approval as violating the MBTA contradicts Ninth Circuit precedent and should be rejected.

Hence, Plaintiffs' claims alleging violations of the MBTA and BGEPA are categorically different from the usual claims of environmental injury or violation of environmental law. Allowing an APA claim would be clearly inconsistent with Congress' purpose in enacting these statutes as criminal provisions, and vesting prosecutorial discretion in the Executive branch to enforce these statutes.

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i. Judicial review would inappropriately interfere with the Assistant Secretary's implementation of 25 U.S.C. § 415 and 25 C.F.R. Part 162

Congress granted the Department of the Interior the authority to approve leases of tribal land for "public, religious, educational, recreational, residential or business purposes" and to create requirements for granting such approvals. 25 U.S.C. § 415(a). Nothing in Congress' authorization created BGEPA or MBTA responsibilities related to lease approval.

Plaintiffs do not allege that the Assistant Secretary failed to follow BGEPA or MBTA procedures. Instead, Plaintiffs claim that the BIA's act of approving the Lease is a violation of the BGEPA and MBTA, meaning the Assistant Secretary violated the substance of these laws. *See Complaint*, ¶¶ 64-68. However, the BGEPA and MBTA do not have procedural requirements applicable to the BIA.

In assessing this issue, courts must look at how judicial review could affect the responsible agency's implementation of its statutory authority. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998). Here, review of Plaintiffs' BGEPA and MBTA claims would affect the BIA's compliance with 25 U.S.C. § 415 and implementation of Part 162, effectively leaving all similar future lease approvals to the discretion of the FWS contrary to federal law and policy.

Consistent with Congress' intent, the BIA promulgated the Part 162 regulations that govern approval of tribal land leases. Like the authorizing statute, the Part 162 regulations do not require the Assistant Secretary to implement the BGEPA or MBTA or to comply with procedural requirements related to the BGEPA or MBTA. 25 C.F.R. Part 162.

Permitting Plaintiffs to challenge the Lease approval under the BGEPA and MBTA would effectively amend the Part 162 regulations to include BGEPA and MBTA requirements without the consent of Congress or the BIA, without input from the public, and most importantly, without input from federally recognized Indian tribes. Doing so would interfere with future Part 162 administrative actions

because it would allow parties opposed to a lease to sue the Assistant Secretary any time there is a remote possibility of an eagle or migratory bird take. Additionally, it would give such parties two bites at the apple; one when challenging the Assistant Secretary's approval of a lease under Part 162 and another when challenging FWS's permit determination under the MBTA and/or BGEPA. As such, allowing Plaintiffs to litigate their BGEPA and MBTA claims would inappropriately interfere with future implementation of Section 415 and the Part 162 regulations.

IV. CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court grant the Tribe's Motion for Partial Judgment on the Pleadings as to Plaintiffs' APA § 706(1) claim in the first cause of action that the BIA was required to supplement the EIS after the Lease was approved; and reject Plaintiffs' claim that federal agencies granting approval of tribal land leases are required to obtain a permit(s) under the MBTA and BGEPA as a pre-condition to such approval, dismissing Plaintiffs' second and third claims as a matter of law.

Dated: August 28, 2015

Respectfully submitted,

By: s/ Bradley G. Bledsoe Downes

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CERTIFICATE OF SERVICE

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

/s/ Bradley G. Bledsoe Downes