JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division
STACEY M. BOSSHARDT (D.C. Bar # 458645)
TY BAIR (Idaho Bar # 7973)
JOHN H. MARTIN (Colo. Bar # 32667)
Trial Attorneys
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-2912
(202) 305-0506 (fax)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION, et al., Plaintiffs, v. MICHAEL BLACK, et al., Federal Defendants, EWIIAAPAAYP BAND OF KUMEYAAY INDIANS, Defendant-Intervenor, TULE WIND LLC, Defendant-Intervenor.	CASE NO. 14-CV-2261 H-WVG **FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

This is the second case arising between Protect Our Communities Foundation ("the Foundation") and the U.S. Department of the Interior concerning the Tule Wind Project ("the Project"), a wind-energy utility project currently planned for development in San Diego County. In the first case, Protect Our Communities Found. v. Jewell, NO. 13CV575 JLS JMA, 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014) ("POCF I"), the Foundation, as well as two other plaintiffs, alleged that the Bureau of Land Management's ("BLM") approval of a right-of-way on BLM land to Tule Wind LLC ("Tule") for the first phase of the two-part Project violated the National Environmental Policy Act ("NEPA"), the Bald and Golden Eagle Protection Act ("BGEPA" or "Eagle Act"), and the Migratory Bird Treaty Act ("MBTA"). Plaintiffs invoked unconventional, and ultimately meritless, legal theories for how the Interior Department had allegedly violated the BGEPA and MBTA with BLM's approval of a right-of-way. Specifically, they claimed:

> BLM was required to obtain a permit under the MBTA because the Project will inevitably cause bird fatalities, either through collision with wind turbines or transmission lines, or through habitat modification and destruction . . . . Similarly, Plaintiffs claim that BLM was required to seek a permit for incidental take under the BGEPA because the Project will inevitably kill or disturb golden eagles.

POCF I at *20 (citations omitted). The Interior Department prevailed on all claims, and Judge Sammartino, adjudicating the case, could not have been clearer:

> BLM was not required to obtain permits under the MBTA or the BGEPA prior to granting Tule's right-of-way application. Federal agencies are not required to obtain a permit before acting in a regulatory capacity to authorize

> activity, such as development of a wind-energy facility, that may incidentally harm protected birds.

POCF I at *21. Similarly, the Court rejected the Foundation's multiple, varied claims under NEPA, which challenged nearly every element of the project's Environmental Impact Statement ("EIS"), finding that the agency had taken the necessary "hard look" at the project's impacts. Id. at 4–22.

Now, in this case, the Foundation joins with new individuals (collectively, "Plaintiffs") to allege that these same statutes were violated in the same manner by the Bureau of Indian Affairs' ("BIA") approval of a lease between the Ewiiaapaayp Band of Kumeyaay Indians ("the Tribe") and Tule, as part of the second phase of the Project. As to the BGEPA and MBTA, in language echoing the claims in POCF I, Plaintiffs contend that:

> [b]y approving a lease to Tule Wind LLC and authorizing Phase II construction and operation . . . without first obtaining an eagle take permit from the Service authorizing golden eagle take or requiring that Tule Wind LLC first obtain such a permit from the Service, BIA's ROD [(Record of Decision)] was issued "not in accordance with law" – i.e., BGEPA – and that ongoing authorization violates the APA.

Compl. (Doc. 1) ¶ 64; see also id. ¶ 67 (same allegations regarding the MBTA). Plaintiffs simply seek to relitigate the same failed legal theories advanced in POCF I.

The BGEPA and MBTA do not provide for citizen suits, so Plaintiffs have brought these claims under the Administrative Procedure Act ("APA"), which permits judicial review of agency action. 5 U.S.C. § 702. However, such review is limited, and agency action can be invalidated only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

Plaintiffs' second and third claims primarily allege that BIA acted "not in accordance with law" because BIA's Record of Decision ("ROD") purportedly violates the BGEPA, 16 U.S.C. § 668(a)-(b), the MBTA, 16 U.S.C. § 703(a), and the APA, 5 U.S.C. § 706. See Compl. ¶¶ 64-68. However, these claims simply ignore the clear precedent from POCF I, the extensive case law supporting this Court's ruling in POCF I, and the case law that has developed since POCF I. Dismissal here is compelled by the same precedent, bolstered by more recent decisions.

Furthermore, to the extent that Plaintiffs' second and third claims can be distinguished from their claims in POCF I, their claims here rely on an even more attenuated chain of causation between the federal agency's actions and the purported take of birds. Whereas in POCF I, BLM approved a right-of-way on BLM land, here, BIA merely approved the Tribe's lease of the Tribe's own land to Tule. Thus, the Court should dismiss Plaintiffs' second and third claims for failure to state a claim.

Plaintiffs have also once again alleged that the decision violates NEPA. One of their claims is that BIA has violated NEPA by not issuing a supplemental NEPA document in the time since it approved the lease. See Compl. ¶ 61 (challenging "BIA's decision not to prepare a supplemental EIS or any other supplemental NEPA document . . . in the time that has elapsed since BIA issued the ROD"). However, under NEPA and its implementing regulations "supplementation is necessary only if there remains 'major federal action' to occur." Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1085 (9th Cir. 2015) (quoting Norton v. S. Utah Wilderness Alliance ("SUWA")), 542 U.S. 55, 73 (2004); see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989). BIA's approval of the lease in December 2013 is the only major federal action at issue in this case,

and no major federal action remains to occur under BIA's leasing regulations. Indeed, a presumption of continued "major federal action" after lease approval would be inconsistent with both BIA's statutorily limited role in approving leases for activities on lands owned by another sovereign government, and the overarching federal policy of tribal self-determination. Accordingly, Plaintiffs' request that this Court compel supplemental NEPA analysis based on alleged significant new information[1] presented to the agency after its decision fails as a matter of law, and the Court should dismiss Plaintiffs' first claim to the extent it is based on that theory.

II. ARGUMENT

A. Legal Standard

A motion for judgment on the pleadings, provided for by Rule 12(c), challenges "whether the complaint at issue contains 'sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face.'" Harris v. Cnty. of Orange, 682 F.3d 1126, 1131 (9th Cir. 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). The Court, however, "is not required 'to accept as true a legal conclusion couched as a factual allegation.'" Id. A court's analysis of a Rule 12(c) motion is "substantially identical" to that of a Rule 12(b)(6) motion for dismissal for failure to state a claim upon which relief can be granted, because, in both cases, "a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." Chavez v. United States, 683

[1] Although this motion under Fed. R. Civ. P. 12(c) must accept the allegations of Plaintiffs' complaint as true, Federal Defendants also contend (and will demonstrate if this claim is permitted to proceed that the information submitted by the Foundation does not constitute "significant new information" sufficient to trigger a duty to supplement under NEPA.

F.3d 1102, 1108 (9th Cir. 2012) (citation and quotations omitted). Thus, under Rule 12(c), "a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Sprint Telephony PCS, L.P. v. Cnty. of San Diego, 311 F. Supp. 2d 898, 903 (S.D. Cal. 2004) (citation omitted).

B. The Court Should Enter Judgment for Federal Defendants on Plaintiffs' Claims 2 and 3 Because BIA Has No Duty to Obtain or Require Tule to Obtain a BGEPA Permit or an MBTA Permit for The Project.

Plaintiffs' second and third claims demand relief that has no basis in law because "[f]ederal agencies are not required to obtain a [BGEPA or MBTA] permit before acting in a regulatory capacity to authorize activity." POCF I at *21. Independently, Plaintiffs' claims fail on multiple grounds because: (1) the BGEPA and MBTA are not implicated before a take has occurred; (2) Tule, not BIA, is the appropriate entity to seek permits, as Tule is exclusively responsible for any takes that may occur; and (3) seeking permits under these acts is discretionary. As such, Claims 2 and 3 are properly dismissed because Plaintiffs "lack . . . a cognizable legal theory." Sprint Telephony PCS, 311 F. Supp. 2d at 903.

1. BIA Has No Legal Duty to Obtain or Require Tule to Obtain a BGEPA Permit for The Project.

The BGEPA, 16 U.S.C. §§ 668-668d, is a civil and criminal statute that prohibits the "take" of bald and golden eagles within the United States when done knowingly or with wanton disregard. 16 U.S.C. § 668(a). Civil penalties may also be assessed on a strict liability basis. Id. § 668(b). Pursuant to rulemaking authority granted to the Interior Department in the BGEPA, id. § 668a, in 2009, the United States Fish and Wildlife Service ("FWS") published a final rule

establishing a permit program for incidental take of protected eagles. Eagle Permits; Take Necessary To Protect Interests in Particular Localities; Final Rule, 74 Fed. Reg. 46,836 (Sept. 11, 2009). FWS may grant permits to applicants to authorize eagle takes that are "associated with, but not the purpose of, an activity" and meet certain other conditions. 50 C.F.R. § 22.26.

a. The BGEPA Is Not Implicated Before a Take Has Occurred.

Plaintiffs erroneously argue that, because an eagle take may potentially occur at some point in the future, BIA is liable for a violation of the BGEPA now. Compl. ¶¶ 64-66. The BGEPA is simply not that expansive. As with all issues of statutory interpretation, the Court begins by analyzing the text of the statute, and only when the statute is vague need the Court look to other indicators of meaning. United States v. Vance Crooked Arm, 788 F.3d 1065, 1073 (9th Cir. 2015). The plain text of the BGEPA precludes Plaintiffs' interpretation:

> Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both . . . .

16 U.S.C. § 668(a). The BGEPA clearly does not prohibit actions that merely have the potential to take eagles, and therefore BIA has not violated the act.

The only action BIA has taken is to approve a lease between the Tribe and Tule pursuant to BIA's limited authority to approve surface leases on tribal trust lands. See U.S. Department of the Interior, Bureau of Indian Affairs, Record of Decision: 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) ("BIA ROD");[2] see also 25 C.F.R. Pt. 162 (regulations governing BIA approval of tribal lease arrangements). And, in approving such a lease, BIA must defer to the tribal landowner. This is because unlike other federal land management agencies, the BIA must review and approve leases within the framework of a government-to-government relationship with the tribal landowner and the overarching federal policy of tribal self-determination. See Trust Mgmt Reform: Leasing/Permitting, Grazing, Probate & Funds Held in Trust; Final Rule, 66 Fed. Reg. 7068, 7080 (Jan. 22, 2001) (noting that "The final leasing regulations provide for more pervasive deference to tribal land and tribal self-determination."); Residential, Bus., & Wind & Solar Res. Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012) ("Tribal sovereignty and self-government are substantially promoted by leasing under these regulations, which

---

[2] This document is available at http://www.bia.gov/cs/groups/public/documents/text/idc1-024577.pdf (last visited July 24, 2015). This document is properly considered as part of this motion because Plaintiffs incorporate it by reference into their Complaint. Compl. ¶¶ 47, 64-68; see United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) ("A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.").

require significant deference, to the maximum extent possible, to tribal determinations that a lease provision or requirement is in its best interest.").[3]

BIA's actions in approving the lease here, therefore, are even more attenuated from the proposed wind project than in other cases – like POCF I -- where courts have rejected a plaintiff's attempt to premise liability for bird takes on regulatory approval. For example, the BIA's regulations in effect at the time the lease was submitted required that, when BIA reviewed a negotiated lease for approval regarding tribal land, the agency would defer to the tribe's determination that the lease is in its best interest, to the maximum extent possible. 25 C.F.R. § 162.107(a) (2012).[4] In both its old and new leasing regulations, BIA also recognizes the governing authority of the tribe having jurisdiction over the land to be leased, and the applicability of tribal law. 25 C.F.R. §§ 162.107(b), 162.109 (2012). See also 25 C.F.R. § 162.014(b) (2014) (recognizing that tribal laws generally apply to land under the jurisdiction of the tribe enacting those laws). In

---

[3] BIA published new regulations governing the surface leasing of trust and restricted lands on December 5, 2012, and these regulations became effective on January 4, 2013. Because the Tule Lease was submitted to BIA for approval before the effective date of the regulations, the lease was reviewed pursuant to the leasing regulations in effect at the time of submission. BIA ROD at i; 25 C.F.R. § 162.008(b)(1). Now that the lease has been approved, provisions of the new BIA leasing regulations will govern except where there is a conflict with the approved lease, in which case the provisions of the lease will govern pursuant to 25 C.F.R. § 162.008(b)(2). Therefore, where BIA's responsibilities for review and approval of the lease are discussed, the old leasing regulations are referenced. Otherwise, the new regulations apply.

[4] BIA's new leasing regulations contain numerous provisions requiring BIA to defer, to the maximum extent possible, to the Indian landowners' determination that various types of wind and solar resource lease provisions or actions related to the lease are in their best interest. 25 C.F.R. §§ 162.573(b), 162.577(c), 162.581(c), 162.585(c).

short, BIA has not taken any eagles or otherwise engaged in any conduct prohibited by BGEPA merely by approving the Tribe's lease with Tule. See POCF I at *21 ("BLM's approval of Tule's right-of-way application does not, by itself, harm or molest golden eagles").

b. Tule, not BIA, Is The Appropriate Entity to Seek a BGEPA Permit, as Tule Is Exclusively Responsible for Any Takes.

Plaintiffs again err by directing their suit against BIA, which acted merely as a regulator, and, as such, is "not required to obtain a permit." POCF I at *21. FWS stated clearly in establishing its BGEPA permit program that:

> Persons and organizations that obtain licenses, permits, grants, or other such services from government agencies are responsible for their own compliance with the Eagle Act and should individually seek permits for their actions that may take eagles. Government agencies must obtain permits for take that would result from agency actions that are implemented by the agency itself . . . .

74 Fed. Reg. at 46,843 (emphasis added). Plaintiffs' claim that BIA is liable for the actions of the Tribe's lessee finds no support in the statutory text or in FWS's interpretation. Moreover, even if the text were ambiguous, FWS's reasonable interpretation of the act defining the scope of its permit program is controlling because it was promulgated subject to notice-and-comment rulemaking procedures. Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-45 (1984).

Since POCF I, other judges in this district have similarly held that there is no basis in law for this type of claim. In Protect Our Communities Foundation v. Chu, the Foundation alleged that the Department of Energy violated the BGEPA and MBTA by issuing a Presidential permit to a company that allowed the company to construct a transmission line across the U.S.-Mexico border. NO.

12CV3062 L BGS, 2014 WL 1289444, at *1-2 (S.D. Cal. Mar. 27, 2014). Again, the claim was based on the theory that the Department of Energy had violated these acts by failing to obtain BGEPA and MBTA permits prior to issuing the Presidential permit. Id. Judge Lorenz, adjudicating that case, rejected the Foundation's argument:

> Plaintiffs fail to show that a permit is required under the MBTA for an unintentional, third party killing of migratory birds incident to construction of a project which was sanctioned by Presidential permit . . . . The Court finds that for the reasons outlined above, the Plaintiffs' Eagle Act claims fail for the same reasons that their MBTA claims fail.

2014 WL 1289444, at *9. Likewise, since POCF I, other courts are in accord with the Southern District of California's consistent holdings. See Protect Our Lakes v. U.S. Army Corps of Eng'rs, NO. 1:13-CV-402-JDL, 2015 WL 732655 (D. Me. Feb. 20, 2015) (The Corps did not violate the BGEPA by failing to obtain a BGEPA permit for a Maine wind farm prior to issuing it a Clean Water Act § 404 permit). As in these cases, Plaintiffs' claims here also target an agency acting in a regulatory capacity: "Plaintiffs . . . challenge the Bureau of Indian Affairs' December 16, 2013 Record of Decision approving a lease to Tule Wind LLC to construct and operate up to twenty industrial wind turbines on a ridgeline on the Ewiiaapaayp Indian Reservation." Compl. ¶ 1. Plaintiffs, however, acknowledge that it is Tule, not BIA, that is directly involved in the construction and management of the Project. Tule remains responsible for complying with all federal laws, including the BGEPA as it constructs and operates the project.[5] ROD

[5] All approved activities on the leasehold must comply with federal law. See 25 C.F.R. § 162.109 (2012) (providing that federal law applies to leases); 25 C.F.R.

at 4. BIA, in contrast, in approving the Tribe's lease to Tule, had no legal duty to obtain or to require Tule to obtain an eagle take permit. Nevertheless, Plaintiffs contend that the BIA is violating the BGEPA through its regulatory activities, i.e., approving the lease in the ROD. Compl. ¶ 64. This argument fails in the face of the plain text of the BGEPA and relevant caselaw.

In any event, as a factual matter, on the recommendation of FWS, the Tribe has agreed to direct Tule to apply for an eagle take permit, prior to initiating operation of the second phase of the Project. See ROD at 4. BLM did not require Tule to apply for a BGEPA permit for the first phase of the Project, but this Court nonetheless fully upheld that decision in POCF I.

c. Seeking a BGEPA Permit Is Discretionary.

Assuming, *arguendo*, that BIA could be responsible for a BGEPA violation, even though it acted only in a regulatory capacity, Plaintiffs' claim is still properly dismissed because Plaintiffs have misconstrued eagle permits as being "legally required." Compl. at ¶ 3. In FWS's final rule launching the permitting program, it provided extensive guidance on how it would construe its regulations. FWS was clear: "If avoiding disturbance is not practicable, the project proponent may apply for a take permit. A permit is not required to conduct any particular activity, but is necessary to avoid potential liability for take caused by the activity." 74 Fed. Reg. at 46,841 (emphasis added). FWS continues: "A programmatic permit is optional.

---

§ 162.014(a)(1) (2014) ("In addition to the regulations in this part, leases approved under this part…[a]re subject to applicable Federal laws and any specific Federal statutory requirements that are not incorporated in this part.")

Entities that engage in programmatic take[6] and who wish to obtain authorization for the take can choose whether to apply for the programmatic take permit or apply for standard permits for individual takes." 74 Fed. Reg. at 46,842 (emphasis added). Thus, to seek a permit, an entity must first "wish to obtain authorization," but that is clearly a non-mandatory standard, since "[a] permit is not required to conduct any particular activity." Id. at 46,841-42. The decision to apply is entirely a matter of business judgment: potential applicants themselves must weigh the expense of applying for a permit against the likelihood that their activities will result in a take. Furthermore, even if a potential applicant does apply, FWS may deny issuance of a permit solely on the determination that take is unlikely to occur. 50 C.F.R. § 22.26(g).

FWS's interpretation is reasonable given that the BGEPA is not violated until an eagle take has occurred. See supra Part II.B.1.a. Moreover, FWS's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). This highly deferential standard is easily met here.

Plaintiffs' theory of liability thus finds no support in the BGEPA, the statute's implementing regulations, or caselaw. Plaintiffs' claim that the BGEPA is violated merely because FWS established a permitting program that provides legal coverage for taking eagles is entirely without merit and contrary to the Interior Department's controlling interpretation of its BGEPA permit regulations.

---

[6] "Programmatic take means take that is recurring, is not caused solely by indirect effects, and that occurs over the long term or in a location or locations that cannot be specifically identified." 50 C.F.R. § 22.3.

In short, BIA simply had no legal obligation to obtain a BGEPA take permit or to require Tule to obtain such a permit prior to construction or operation of the Project. Thus Plaintiffs' BGEPA arguments necessarily fail as a matter of law.

2. BIA Has No Legal Duty to Obtain or Require Tule to Obtain a MBTA Permit for The Project.

Similar to the BGEPA, the MBTA, 16 U.S.C. §§ 703-12, is a criminal statute that prohibits the "take" or sale of any migratory bird covered by specified international conventions. 16 U.S.C. § 703(a). FWS may issue "special purpose" permits to allow for incidental take of migratory birds covered by the MBTA upon a showing of "compelling justification." 50 C.F.R. § 21.27. Because the MBTA and BGEPA share key similarities, the argument for a judgment on the pleadings for Plaintiffs' MBTA claim largely mirrors that for Plaintiffs' BGEPA claim.

a. The MBTA Is Not Implicated Before a Take Has Occurred.

As with the BGEPA, the MBTA likewise only criminalizes past violations of its take provision:

> Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird ...

16 U.S.C. § 703(a). The text of the act precludes Plaintiffs' theory that BIA has violated this provision by the mere possibility of future unintentional bird take by

third parties. Again, the only action BIA has taken is to approve the lease between Tule and the Tribe. Compl. at ¶ 1. Thus, no liability could attach. For example, in Public Employees for Environmental Responsibility v. Beaudreau, the court rejected the argument that the agency violated the MBTA by approving a project that it conceded will take migratory birds without an MBTA permit because it held that "[n]o such taking is yet reasonably certain" and, moreover, "on its face, the [MBTA] does not appear to extend to agency action that only potentially and indirectly could result in the taking of migratory birds." 25 F. Supp. 3d 67, 117 (D.D.C. 2014). Plaintiffs' MBTA claims fail based on the plain text of the statute.

b. Tule, Not BIA, Is The Appropriate Entity to Seek an MBTA Permit, as Tule Is Exclusively Responsible for Any Takes.

Again, Plaintiffs err by bringing suit against BIA because, like the BGEPA, the MBTA does not apply to agency action when the agency is acting solely in a regulatory capacity. POCF I at *21. At most, the MBTA prohibits agency action where the agency itself is directly killing migratory birds. See Humane Soc'y v. Glickman, 217 F.3d 882, 884 n.2 (D.C. Cir. 2000) (holding that the U.S. Department of Agriculture had to obtain an MBTA permit before the Department itself "round[ed] up resident Canada geese and kill[ed] them"). Plaintiffs' Complaint thus makes the fundamentally erroneous legal conclusion that "[w]here federal agencies undertake or authorize a project that will inevitably result in migratory bird mortalities . . . without first obtaining authorization from the Interior Department to kill migratory birds, the agency's actions are unlawful." Compl. ¶ 29. However, in POCF I, Judge Sammartino expressly rejected this argument as a matter of law: "Federal agencies are not required to obtain a permit before acting in a regulatory capacity to authorize activity, such as development of

a wind-energy facility, that may incidentally harm protected birds." POCF I at *21.

The Court's holding in POCF I is, once again, in accord with decisions of other judges of this Court, Protect Our Communities Found. v. Chu, 2014 WL 1289444, at *9, see supra Part II.B.1.b, as well as decisions of other courts, including courts that decided similar claims after POCF I. For example, in Friends of Boundary Mountains v. U.S. Army Corps of Eng'rs, the court held that the Army Corps, acting as a regulator, did not need to obtain a MBTA permit. *See* 24 F. Supp. 3d 105, 113-15 (D. Me. 2014) ("[B]ecause the Corps is not engaged in the challenged development activity, but is simply exercising its Congressionally-delegated power to consider permits for dredging and fill activity," no permit was required.). See also Native Songbird Care & Conservation v. LaHood, NO. 13-CV-2265-JST, 2013 WL 3355657, at *4 (N.D. Cal. Jul. 2, 2013) (holding that "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" is not supported); Beaudreau, 25 F. Supp. 3d at 116-18; Protect Our Cmtys. Found. v. Salazar, NO. 12CV2211-GPC PCL, 2013 WL 5947137, at *17-18 (S.D. Cal. Nov. 6, 2013).

Instead of relying on this Court's precedent or the extensive set of case law directly on point, Plaintiffs cite only Center for Biological Diversity v. Pirie, 191 F. Supp. 2d 161 (D.D.C. 2002), which is entirely distinguishable from the instant case because, in Pirie, like Glickman, discussed supra, the Navy was directly engaging in action that would kill or injure migratory birds (live-fire training exercises) and was not acting in a regulatory capacity. 191 F. Supp. 2d at 164-67.

c. Seeking an MBTA Permit Is Discretionary.

Assuming, arguendo, that BIA could be liable for an MBTA violation even though it is only acting in a regulatory capacity, this suit is still properly dismissed because the MBTA permitting program simply provides a mechanism to engage in lawful take of migratory birds, but in no way establishes an affirmative duty to apply for a permit. The regulations only state that "[a] special purpose permit is required before any person may lawfully take, salvage, otherwise acquire, transport, or possess migratory birds." 50 C.F.R. § 21.27(a) (emphasis added). There is no "explicit requirement that the permit be obtained at any time except 'before' the taking occurs." Beaudreau, 25 F. Supp. 3d at 117 (quoting 50 C.F.R. § 21.27(a)). Furthermore, Ninth Circuit precedent forecloses the broader interpretation proposed by Plaintiffs. At most, the Tribe's lease to Tule, as approved by the BIA, would have a tenuous and indirect connection to any avian mortality that may be attributable to the project. The Ninth Circuit has routinely held that federal agencies are not liable under the MBTA for decisions or activities that are indirectly responsible for injury or death to protected birds, such as the mere allowance of habitat modification. See Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302-03 (9th Cir. 1991); City of Sausalito v. O'Neill, 386 F.3d 1186, 1225 (9th Cir. 2004). Again, this is in accord with the law in other circuits. See, e.g., Newton Cnty. Wildlife Ass'n v. U.S. Forest Serv., 113 F.3d 110, 116 (8th Cir. 1997) (affirming district court order rejecting a wildlife association's motion "to enjoin timber sales because the Forest Service did not obtain a [MBTA] permit that the Fish and Wildlife Service does not require").

Plaintiffs' theory of liability improperly seeks to restructure the text of the MBTA. However, the MBTA does not require BIA to apply for a permit prior to exercising its regulatory oversight over tribal agreements with third parties

conveying interests in tribal trust land, including its lease with Tule, even if take of migratory birds at some future time by the lessee were foreseeable. Thus Plaintiffs' arguments for MBTA liability necessarily fail as a matter of law.

C. Defendants Had No Duty to Supplement the NEPA Analysis After BIA Issued the ROD Because There Is No Remaining "Major Federal Action."

Plaintiffs' Claim 1 asserts violations of under NEPA and requests request that the Court compel BIA "to prepare supplemental NEPA review." Compl. Prayer for Relief ¶ 3. The claim relies in part ona challenge the adequacy of the NEPA analysis underlying the BIA's December, 2013, ROD.[7] Those allegations will be resolved through summary judgment briefing on the full administrative record, which does not support Plaintiffs' claim that BIA's reliance on the 2011 FEIS was arbitrary and capricious, pursuant to § 706(2) of the APA. But Plaintiffs also argue that BIA has failed to carry out an ongoing duty to prepare a supplemental NEPA analysis "in the time that has elapsed since BIA issued the ROD." Compl. ¶ 61. Plaintiffs aver that this alleged failure amounts to "unreasonably delaying agency action in contravention of the APA." Id. ¶¶ 61–62. This claim fails as a matter of law and should be dismissed.

NEPA may require agencies to prepare supplemental NEPA documentation based on significant new information; however, "supplementation is necessary only if 'there remains major Federal action[n] to occur.'" SUWA, 542 U.S. at 73 (2004); see also Cold Mtn. v. Garber, 375 F.3d 884, 893–94 (9th Cir. 2004) (holding that the Forest Service's issuance of a ten-year special use permit to

[7] The claim includes Plaintiffs' contention that BIA should have supplemented its NEPA analysis before issuing the ROD, which is not challenged here.

operate a facility for testing brucellosis in bison left no "ongoing 'major federal action'" under NEPA and therefore required no supplemental environmental analysis despite purported new information that operation of the facility was adversely affecting bald eagles); Greater Yellowstone Coal. v. Tidwell, 572 F.3d 1115, 1122 (10th Cir. 2009) (finding no ongoing major federal action where an agency had previously issued a permit for operation of an elk feedground on federal land that was still in effect). In this case, the sole major federal action at issue was BIA's approval of the Project's lease on tribal land via the December, 2013, ROD. Compl. ¶ 1. BIA approved the lease (to which it is not a party) in 2013, and thus "[t]here is no ongoing 'major Federal action' that could require supplementation." SUWA, 542 U.S. at 73; see also Cold Mountain, 375 F.3d at 894 ("Because the Permit has been approved and issued, the Forest Service's obligation under NEPA has been fulfilled.").

Plaintiffs' Complaint implies that BIA was legally obligated to supplement the FEIS based on three "demand letters" the Foundation sent to BIA in 2014, well after BIA issued the ROD. Compl. ¶¶ 55–57. But critically, Plaintiffs do not allege any future major federal action by BIA related to this Project occurred after the ROD was issued, or is yet to occur. Nor do the regulations governing BIA lease approvals or the lease's terms provide for any such action by BIA. Indeed, the congressional policy of the regulations (promoting tribal self-sufficiency) would be undermined by any significant continuing role for federal agencies. See Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012) ("Tribal sovereignty and self-government are substantially promoted by leasing under these regulations . . ."); 25 C.F.R. § 162.107(a) (2012) ("We will also recognize the rights of Indian landowners to use their own land, so long as their Indian co-owners are in agreement and the value of

the land is preserved."); 25 C.F.R. § 162.107(b) (2012) ("We will promote tribal control and self-determination over tribal land and other land under the tribe's jurisdiction.").

Under the BIA's leasing regulations at 25 C.F.R. Part 162 and the terms of the lease, the BIA's only continuing role after approving the lease is to enforce the lease's terms. *See, e.g.*, 25 C.F.R. §§ 162.589—162.592 (detailing BIA's authority to investigate non-compliance and issue notices of violation, as well as the BIA's obligation to consult with the Indian landowners to determine remedies);[8] But an agency's authority to enforce compliance with the lease terms does not constitute major federal action subject to NEPA. Sierra Club v. Penfold, 857 F.2d 1307, 1314 (9th Cir. 1988) ("BLM's obligation to monitor compliance with statutory and regulatory requirements to deter undue degradation is insufficient" to constitute major federal action); 40 C.F.R. § 1508.18(a) (major federal action does "not include bringing judicial or administrative civil or criminal enforcement actions.") (emphasis added); Moapa Band of Paiutes v. U.S. Bureau of Land Mgmt., No. 2:10-CV-02021, 2011 WL 4738120 at *12 (D. Nev. Oct. 6, 2011) (holding that BLM could not be required to supplement its NEPA analysis after issuing a right of way, despite its authority to suspect the right of way for non-compliance, because "[m]ere authority to modify the terms of the ROW does not constitute major federal action yet to occur"); see also N.J. Dep't of Envtl. Prot. & Energy v.

---

[8] BIA also maintains authority to approve or deny lease amendments, assignments, subleases, and mortgages, subject to the parameters set out in the leasing regulations and the lease itself. That authority will not be implicated unless an amendment, assignment, sublease, or mortgage is submitted for BIA's review, and any such decision would constitute a separate final agency action with a unique administrative record.

Long Island Power Auth., 30 F.3d 403, 418 n.27 (3d Cir. 1994) ("enforcement powers do not give the Coast Guard ongoing legal control of the shipments for NEPA purposes. Indeed, the Coast Guard's non-action in this regard does not constitute federal action at all under NEPA."). And even if BIA were required to enforce the lease terms, it would do so in a manner consistent with the lease it already approved, and would accordingly not perform a new major federal action. See Grand Canyon Trust v. U.S. Bureau of Reclamation, 691 F.3d 1008, 1022 (9th Cir. 2012) (holding that the agency's annual operating plans for a dam did not change the criteria for the dam's operations, and thus did not trigger NEPA review); Ctr. for Biological Diversity v. Salazar, 791 F. Supp. 2d 687 (D. Ariz. 2011), aff'd by, 706 F.3d 1085 (9th Cir. 2013) ("BLM's ongoing role of overseeing [mine's] compliance with environmental and mining laws is not a major federal action requiring NEPA analysis.").

In sum, NEPA requires supplementation of an EIS only if major federal action remains to occur. Because lease approval was the only major federal action at issue in this case, and the governing regulations do not provide for any further major federal action related to that approval, BIA cannot as a matter of law have violated NEPA by not supplementing the FEIS in response to Plaintiffs' "demand letters." Plaintiffs cannot succeed in compelling a supplemental NEPA analysis under § 706(1) of the APA. See SUWA, 542 U.S. at 64 ("Thus, a claim under § 706(1) can proceed only where a plaintiffs asserts that an agency failed to take a *discrete* agency action that it is *required to take*.") (emphasis in original). To the extent Claim 1 of Plaintiffs' Complaint is based on this theory, it should be dismissed.

III. CONCLUSION

In short, Plaintiffs once again advance legal theories that have been roundly rejected in other courts, including those in this district. In POCF I, the court rejected a very similar lawsuit against the BLM for a different phase of this same project. Plaintiffs' claims that the BIA should be subject to BGEPA or MBTA liability here are even more attenuated than for the BLM in POCF I. Rather than directly approving a right-of-way for the wind developer, as in POCF I, BIA has simply approved a lease between the Tribe and a wind developer, who, after several more regulatory steps, may someday build a wind project. Plaintiffs' theories are therefore even more speculative than those rejected in POCF I. Similarly, Plaintiffs' NEPA claims necessarily fail as a matter of law because no further major federal action remains to occur that could require supplemental NEPA review.

For these reasons as well as the foregoing, Federal Defendants respectfully request that the Court grant Federal Defendants' Motion for Judgment on the Pleadings and dismiss Plaintiffs' second and third claims, Complaint ¶¶ 64-68, as a matter of law in their entirety, and dismiss Plaintiffs' first claim to the extent it is based on their demands for supplemental NEPA analysis after the ROD's issuance.

DATED this 28th of August, 2015.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division

/s/ Ty Bair
TY BAIR
Trial Attorney
STACEY M. BOSSHARDT
Senior Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-2912
(202) 305-0506 (fax)
stacey.bosshardt@usdoj.gov
tyler.bair@usdoj.gov

JOHN H. MARTIN
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife and Marine Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1383
(303) 844-1350 (fax)
john.h.martin@usdoj.gov

Attorneys for Federal Defendants

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/ Ty Bair
TY BAIR