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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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.

Case No. 3:14-cv-02261-H-WVG

Plaintiffs' Points and Authorities in Opposition to Defendants' 12(c) Motions for Partial Judgment on the Pleadings

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

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GLOSSARY

ABPP	Avian and Bat Protection Plan
APA	Administrative Procedure Act
BGEPA	Bald and Golden Eagle Protection Act
CDFG	California Department of Fish and Game
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FWS	Fish and Wildlife Service
MBTA	Migratory Bird Treaty Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
ROD	Record Of Decision

INTRODUCTION

On August 28, 2015, Federal Defendants, Defendant-Intervenor Ewiiaapaayp Band of Kumeyaay Indians ("the Tribe"), and Defendant-Intervenor Tule Wind LLC (collectively referred to as "Defendants") each separately filed Rule 12(c) motions requesting that this Court grant partial judgment to Defendants with respect to Plaintiffs' claims arising under the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. §§ 668-668d, and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. §§ 703-712. The motions also request judgment with respect to one of Plaintiffs' claims arising under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, concerning Plaintiffs' allegation that Defendant Bureau of Indian Affairs "(BIA") failed to engage in supplemental NEPA review—or to even determine if such supplementation was warranted under the circumstances—when BIA obtained crucial new information bearing on the adverse environmental impacts of Phase II of the Tule Wind project soon after issuance of BIA's December 2013 lease approval and accompanying Record Of Decision ("ROD"). *See* ECF Nos. 33, 34, & 35. For the reasons explained herein, Defendants' motions must be rejected.

BACKGROUND

On September 24, 2014, Plaintiffs—a nonprofit conservation organization and two individuals who are adversely affected by the project's impacts—filed this suit against Federal Defendants seeking a Court order invalidating BIA's December 2013 lease approval and ROD associated with Phase II of the Tule Wind project that Plaintiffs claim BIA issued in violation of BGEPA, the MBTA, and NEPA. *See* ECF No. 1. The following legal and factual background is necessary to place Defendants' motions in proper context.

A. Pertinent Legal Background

1. Administrative Procedure Act

Pursuant to the Administrative Procedure Act ("APA"), a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

2. BGEPA

BGEPA strictly prohibits "take" of any bald or golden eagle "at any time or in any manner" "without being permitted to do so" by the U.S. Fish and Wildlife Service ("FWS"). *See* 16 U.S.C. § 668(a) (imposing criminal penalties for unlawful take done "knowingly, or with wanton disregard"); *id.* § 668(b) (imposing civil penalties for unlawful take on a strict liability basis). BGEPA defines the term "take" broadly to include "wound, kill . . . molest or disturb." *Id.* § 668c. "Take" under BGEPA includes direct incidental take, such as electrocution of eagles from power lines or collisions with wind turbines, as well as indirect incidental take, such as habitat modification or other human disturbances that adversely impact eagles.

BGEPA allows FWS to issue permits authorizing the take or disturbance of golden eagles provided that such take "is compatible with the preservation of . . . the golden eagle." 16 U.S.C. § 668a. In 2009, FWS promulgated implementing regulations for the FWS's issuance of incidental take permits for both individual instances of take as well as "programmatic take" for take that is recurring. 50 C.F.R. § 22.26. FWS may issue an eagle take permit only if the take is: (1) "compatible with the preservation" of eagles; (2) necessary to protect an interest in a particular locality; (3) associated with but not the purpose of the activity; and (4) for individual instances of take, the take cannot practicably be avoided; or for programmatic take, take is unavoidable even though advanced conservation practices are being implemented. *Id.* § 22.26(f). For purposes of these regulations,

"compatible with the preservation" of eagles means "consistent with the goal of stable or increasing breeding populations." 74 Fed. Reg. 46,836, 46,837 (Sept. 11, 2009) (codified at 50 C.F.R. pt. 22).

To avoid liability under BGEPA, a project developer that wishes to build a project in known eagle habitat must coordinate with FWS before project construction to determine whether the project is likely to kill or disturb eagles and, if so, whether such take can be avoided, or if it is unavoidable whether take can at least be substantially minimized by readily available measures. During this process, FWS must evaluate several factors, including eagles' prior exposure and tolerance to similar activity in the vicinity, the availability of alternative suitable eagle nesting or feeding areas that would not be detrimentally affected by the activity, cumulative effects of other permitted take and other additional factors affecting regional eagle populations, and the possibility of permanent loss of an important eagle use area. *See* 50 C.F.R. § 22.26(e). If the take or disturbance of eagles cannot be avoided entirely through minimization measures, a permit must be acquired prior to project construction in order to avoid liability when eagles are taken without authorization. However, if FWS determines that "take is not likely to occur," the regulations provide that a permit is not required. *See id.* § 22.26(g). Acquisition of a permit where there is a likelihood of eagle take ensures compliance with BGEPA by authorizing ongoing unavoidable take, as well as by promoting eagle conservation through required implementation of avoidance and mitigation measures such as compensatory mitigation. *Id.* § 22.26(c).

To carry out the statutory directive that BGEPA permits must be "compatible with the preservation" of golden eagles, 16 U.S.C. § 668a, FWS has issued additional guidance for wind energy companies specifically, explaining that golden eagle take permit "applicants must reduce the unavoidable mortality to a no-net-loss standard for the duration of the permitted activity. *See* ECF No. 1 ¶ 24. The no-net-loss standard "means that these actions either reduce another ongoing form of

mortality to a level equal to or greater than the unavoidable mortality, or lead to an increase in carrying capacity that allows the eagle population to grow by an equal or greater amount." *Id.*

FWS has also created an eagle risk evaluation system, which is used to determine on a case-by-case basis whether a particular wind project will meet the standards in 50 C.F.R. § 22.26 for issuance of a programmatic eagle take permit. *See* ECF No. 1 ¶ 25. Sites posing the highest risk to eagles are designated as Category 1 sites, which connotes a "[h]igh risk to eagles" with "low" "potential to avoid or mitigate impacts." *Id.* FWS categorizes the risk level for each project based on eagle migration trends and concentrations, eagle fatality estimates, effects on the local eagle population, and cumulative eagle take in the region. *Id.*

Because of the grave eagle risk posed by Category 1 sites, FWS has interpreted BGEPA to require that "[p]rojects or alternatives in category 1 should be *substantially redesigned* to at least meet the category 2 criteria." ECF No. 1 ¶ 26 (emphasis added). In turn, FWS "recommends that project developers *not build projects at sites in category 1 because the project would likely not meet the regulatory requirements*" mandated by BGEPA. *Id.* The loss of an eagle breeding/nest territory due to project construction or operation is particularly damaging for eagles because it prevents future breeding and incubating of fledglings in that location. According to the FWS, if an activity results in the permanent abandonment of a golden eagle territory, FWS calculates that loss as the take of 4 golden eagles annually until such time as a breeding pair returns to that territory. ECF No. 1 ¶ 26.

3. MBTA

The MBTA strictly prohibits killing migratory birds without authorization from the Interior Department (via FWS). Enacted to fulfill international treaty obligations, the MBTA provides that "[u]nless 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 . . . any migratory bird." 16 U.S.C. § 703(a) (emphasis added). FWS is authorized to permit the killing of birds otherwise protected by the MBTA when doing so would be compatible with migratory bird conventions. *Id.* § 704(a).

FWS has promulgated regulations establishing criteria for MBTA permits, including a regulation, 50 C.F.R. § 21.27, that authorizes a permit when an applicant—which can be a private entity or a federal regulatory agency—demonstrates a "compelling justification." *Id.* In 2012, for example, the National Marine Fisheries Service ("NMFS")—a federal agency—applied to FWS for a permit under this regulation that would "authorize incidental take of two [species of] migratory birds . . . by NMFS in its regulation of the shallow-set longline fishery" in Hawaii. *See* 77 Fed. Reg. 1501, 1502 (Jan. 10, 2012). The purpose of that permit is to "authorize incidental take of migratory birds" that will be killed as an inevitable albeit unintended effect of the fishing lines regulated by NMFS. *Id.* FWS granted the special purpose permit to NMFS in August 2012, authorizing incidental take of migratory birds resulting unintentionally from longline fishing authorized by NMFS to third parties in NMFS's regulatory capacity. *See* 77 Fed. Reg. 50,153 (Aug. 20, 2012).

Where federal agencies undertake a project that will inevitably result in migratory bird mortalities—regardless of whether the mortalities are intentional—without first obtaining authorization from FWS to kill migratory birds, the agency's actions are unlawful. In particular, courts have held that activities undertaken by federal agencies without an MBTA permit that will result in unauthorized incidental take of migratory birds constitute violations of the MBTA. *See, e.g., Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 174-75 (D.D.C. 2002) (holding that Navy training exercises, which were not directed at wildlife, but did have the predictable and "direct consequence of killing and harming migratory birds,"

violated the MBTA's take prohibition, and explaining that "the MBTA prohibits both intentional and unintentional killing."), *vac'd as moot sub nom.*, *Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

4. NEPA

Congress created NEPA more than four decades ago "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . ." 42 U.S.C. § 4321. In light of this mandate, the Supreme Court has explained that NEPA is "intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321).

In achieving NEPA's substantive goals, Congress created specific mechanisms whereby federal agencies must evaluate the environmental and related impacts of, and reasonable alternatives to, a particular federal action. The regulations implementing NEPA define two such mechanisms as the Environmental Impact Statement ("EIS") and the Environmental Assessment ("EA"). These procedural mechanisms are designed to inject environmental considerations "in the agency decisionmaking process itself," and to "'help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.'" *Pub. Citizen*, 541 U.S. at 768-69 (emphasis added) (quoting 40 C.F.R. § 1500.1(c)). Therefore, "NEPA's core focus [is] on improving agency decisionmaking," *Pub. Citizen*, 541 U.S. at 769 n.2, and specifically on ensuring that agencies take a "hard look" at potential environmental impacts and environmentally enhancing alternatives "as part of the agency's process of deciding whether to pursue a particular federal action." *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 100 (1983).

The Council on Environmental Quality ("CEQ")—an agency within the Executive Office of the President—has promulgated regulations implementing NEPA that are "binding on all Federal agencies." 40 C.F.R. § 1500.3. These regulations provide that the agency's alternatives analysis "is the heart" of an EIS or EA. 40 C.F.R. § 1502.14. The regulations require that the decisionmaking agency "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* In addition to analyzing reasonable alternatives to the proposed action, an EIS or EA must thoroughly analyze the direct, indirect, and cumulative environmental impacts of the proposed action. *See* 40 C.F.R. § 1508.8.

Federal agencies "shall to the fullest extent possible . . . encourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2. The discovery of significant new circumstances or information must be made "available to public officials and citizens before decisions are made and before actions are taken," because "public scrutiny [is] essential to implementing NEPA." *Id*. § 1500.1(b). "In the case of an action with effects of national concern notice shall include publication in the Federal Register," as well as other means of reasonably informing the interested public of the proposed decision. *Id.* § 1506.6(b).

At the conclusion of the NEPA process—once all permits and other legal authorizations have been obtained and all minimization and mitigation measures have been considered and certain measures adopted as enforceable conditions of the decision under review—the agency issues a ROD. *See* 40 C.F.R. § 1505.2. Until an agency issues a legally valid ROD—based on the receipt of all mandatory permits and appropriate consideration of minimization and mitigation alternatives—"no action concerning the proposal shall be taken which would: (1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives." *Id.* §

1506.1(a). Pursuant to the CEQ regulations, "[i]f any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved." *Id.* § 1506.1(b).

When a federal action or its impacts present "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" or "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns," the agency must supplement a pre-existing EIS or EA. 40 C.F.R. § 1502.9(c)(1)(ii). "Whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal action' to occur, and if the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

B. Pertinent Factual Background

1. The Tule Wind Project

The Tule Wind Project is slated for construction approximately 60 miles east of San Diego, California. The Project comprises two distinct components—a 65-turbine project that the Bureau of Land Management ("BLM") authorized in 2011 on BLM-administered lands in the McCain Valley ("Tule Wind Phase I"), and the 20-turbine project that BIA separately authorized in December 2013 on the Tribe's lands on ridgelines above the McCain Valley ("Tule Wind Phase II") which is the subject of this lawsuit. When combined, Phases I and II of the Tule Wind Project have at least nine eagle nests within ten miles of the project site, with one nest closer

than 1,000 feet of a turbine on the tribal ridgeline in Phase II. Tule Wind LLC has not yet started construction on either phase of the Tule Wind Project.

Initially, BLM intended to serve as the lead agency in authorizing both phases of the Tule Wind Project for a combined build-out of up to 134 turbines on BLM lands and on the Tribe's lands that are held in trust by BIA (hereafter "BIA trust lands"); however, due to eagle mortality concerns raised by FWS and the California Department of Fish and Game ("CDFG") with respect to the proposed turbines on BIA trust land, BLM ultimately ceded responsibility for authorizing Tule Wind Phase II to BIA.

2. BLM's December 2011 ROD Authorizing Tule Wind Phase I

Leading up to BLM's issuance of a Draft EIS for public comment in November 2010, FWS raised numerous concerns with the overall project's anticipated impacts on migratory birds, and especially golden eagles, and expressed heightened concern about the proposed turbines on BIA trust lands on the ridgeline. In particular, FWS disagreed with Tule Wind LLC's assessment that this is a low-risk project site for eagles, and FWS urged BLM to consider "phasing" the project to authorize Tule Wind Phase I first and Tule Wind Phase II second—if at all—because of the outstanding concerns with eagle mortality on the BIA trust lands. *See* ECF No. 1 ¶ 32.[1]

In November 2010, BLM issued its Draft EIS, which analyzed five alternatives for the Tule Wind project, four of which would have constructed all 134 turbines (including all 18 turbines proposed on the tribal ridgeline) and one alternative that would have reduced the turbine layout by eliminating 62 turbines,

[1] In deciding a Rule 12(c) motion, a court must assume the validity of plaintiffs' well-pled allegations in their complaint. *See, e.g., Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989) (explaining that "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false."). Accordingly, Plaintiffs cite herein to the factual allegations made in their Complaint, which the Court must assume to be true for purposes of deciding the pending motions.

including all of those on the tribal ridgeline. *See* ECF No. 1 ¶ 33. With regard to the ridgeline turbines, none of the Draft EIS alternatives considered modifications to the project's siting or any other alternatives that could avoid or minimize the impact of those turbines on eagles. BLM selected in the Draft EIS as the preferred alternative the reduced turbine alternative that did *not* authorize any turbines on the tribal ridgeline because under that alternative "impacts to golden eagles would be reduced with the removal of turbines within areas considered high risk [for] any known active golden eagle nest"—i.e., the ridgeline on BIA trust lands. *Id.* BLM explained that "[t]his alternative would reduce impacts to golden eagles by siting turbines farther away from nesting eagles," and would avoid the potential loss of the Canebrake eagle territory. *Id.* BLM's Draft EIS also acknowledged that other migratory birds would almost certainly be killed by the project as planned. *Id.*

In response to the Draft EIS, FWS expressed its expert view that "the *operation of wind turbines proposed by the project would result in an adverse impact to golden eagles*." ECF No. 1 ¶ 35 (emphasis added). Hence, FWS indicated that "[w]e support BLM's preferred alternative as presented in the DEIS"—i.e., to defer consideration of placing any turbines on the BIA trust lands. In response to these comments, BLM, BIA, and Tule Wind LLC decided in October 2011 to phase the project so that BLM could authorize Phase I immediately while more eagle data were compiled concerning Phase II of the project to better inform whether any turbines should ultimately be built on the tribal ridgeline. ECF No. 1 ¶ 36. Those entities also agreed that in the event that Phase II ultimately came to fruition, BIA would serve as the lead agency responsible for authorizing that portion of the project. *See id.*

On October 14, 2011, BLM issued its Tule Wind Phase I Final EIS. *See* ECF No. 1 ¶ 37. The EIS reiterated the risks to eagles—particularly on the ridgelines on BIA trust land—and endorsed as the final BLM action a reduced turbine alternative authorizing construction only of 65 turbines in the McCain Valley (i.e., Phase I) but

specifically not authorizing any turbines on the tribal ridgeline. *Id.* The only alternatives considered in the Final EIS other than the selected alternative would have contained 128 turbines, meaning that they all would have included construction and operation of 18 ridgeline turbines on tribal land. *Id.* None of the alternatives specifically considered macrositing (i.e., moving the entire project) or micrositing (i.e., shifting the location of specific turbines within the project footprint) options on the tribal ridgeline so as to at least reduce the grave risk to eagles. *Id.* In the Final EIS, BLM explained that "[t]urbines removed under this alternative include the turbines presenting high risk of collision for golden eagles based on topography, landforms, and distance to known active nests." *Id.* "Removed turbines were those turbines along the entire northwestern ridgeline east of the known active golden eagle territories within the potential use areas of these eagles." *Id.* BLM's Final EIS continued to emphasize the high mortality risk to other migratory birds. *Id.*

One of the key mitigation measures that BLM built into its EIS—identified as "MM BIO-f10" in the EIS—was that "[c]onstruction of the Tule Wind project would be authorized in two portions" and "[c]onstruction of the second portion of the project *would occur at those turbine locations that show reduced risk to the eagle population following analysis of detailed behavior studies of known eagles in the vicinity of the Tule Wind project*." ECF No. 1 ¶ 38 (emphasis added). BLM stated that "[p]ending the outcome of eagle behavior studies, *all, none or part of the second portion of the project would be authorized*," and in any event such a decision would only occur "in consultation with the required resource agencies . . . and other relevant permitting entities"—i.e., FWS. *Id.* (emphasis added).

3. BIA's September 2012 Tule Wind Phase II NOA

Immediately after issuance of BLM's Phase I ROD, BIA set in motion the separate process by which Tule Wind LLC would receive BIA's lease approval to construct Phase II of the project on the tribal ridgeline. Tule Wind LLC and its contractors began drafting a Tule Wind Phase II Avian and Bat Protection Plan

("ABPP"), which does not supplant the permitting requirements under BGEPA or the MBTA when a project will kill or otherwise "take" eagles or other migratory birds. *See* ECF No. 1 ¶ 39.

As reflected in various formal memoranda from FWS that BIA has included in the administrative record in this case—as well as many additional FWS documents that BIA has thus far excluded from the record—FWS has expressed its very grave concerns with BIA's authorization of up to 20 Phase II turbines on the BIA trust lands due to the significant harms posed by the project to migratory birds generally and golden eagles in particular. ECF No. 1 ¶¶ 40-43. Among other concerns, FWS has strongly criticized both BIA and Tule Wind LLC (and its contractors) for using erroneous methodologies in preparing the Tule Wind Phase II ABPP, reaching scientifically unsound conclusions in the ABPP, and failing even to consider micrositing, macrositing, or other construction and operation alternatives that would eliminate or at least reduce the substantial risk of eagle mortality on the BIA trust lands. *Id.*

Undeterred by FWS's concerns, however, BIA issued a Notice of Availability of the Draft Tule Wind Phase II ABPP (and a Tule Wind Phase II Fire Plan) for a 30-day comment period on September 19, 2012. ECF No. 1 ¶ 42. BIA did not publish this notice in the Federal Register. *Id.* Nor did BIA issue for public comment any draft EIS or EA—supplemental or otherwise—analyzing the environmental impacts of constructing 20 tribal ridgeline turbines (two more than even BLM considered in its EIS rejecting approval of the ridgeline turbines at that time) or considering reasonable alternatives to constructing all 20 turbines, such as the micrositing and macrositing options long urged by FWS. *Id.* Instead, anomalously, BIA stated in the Notice of Availability that the proposed action is somehow "consistent with" the Final EIS prepared by BLM in 2011, and thus that BIA would rely on BLM's EIS as "the primary NEPA document used in the decisionmaking process" for BIA's lease approval for Tule Wind Phase II, despite

acknowledging that BLM's "ROD made no decisions for lands under the jurisdiction of BIA . . . [and] made no decision to move forward with the wind turbines on the ridgeline portion of project," and thus did not consider any alternatives to that action or, logically, any information, data, or evidence compiled after BLM's October 2011 EIS. *Id.*

In response to the Notice of Availability, FWS reiterated its serious concerns with the methodologies and conclusions of the Draft ABPP, and criticized the Draft ABPP's refusal to acknowledge the high eagle mortality risk and the highly likely loss of an eagle breeding territory that will occur if the project is constructed as planned. *See* ECF No. 1 ¶ 43. FWS continued to urge "BIA, the Ewiiaapaayp Band of Kumeyaay Indians, and the project proponent [to] consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take"—i.e., micrositing or macrositing changes to reduce eagle mortality risk. *Id.* While FWS recommended abandoning Tule Wind Phase II altogether, FWS explained that "[i]n the event that BIA decides to move forward with approving this project, we recommend [that] BIA condition[] the lease on this project to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act, prior to project construction." *Id.* Echoing FWS's recommendation that BIA consider micrositing alternatives, CDFG—the state wildlife agency with jurisdiction over migratory birds (including golden eagles)—stated that "[d]ue to their proximity to the nest site, the relative nest density, overall productivity of the Cane Brake nests, and the overlap of the estimated home range with the Reduced Ridgeline Project, the Department recommends the BIA remove turbines H-1 and H-2 as part of the Reduced Ridgeline Project." *Id.*

4. BIA's December 2013 Tule Wind Phase II ROD

After receiving FWS's comments on the Notice of Availability, BIA and Tule Wind LLC never addressed the eagle mortality concerns repeatedly raised by FWS and others. *See* ECF No. 1 ¶ 44. Nor did BIA ever conduct any NEPA review

whatsoever to analyze: (1) the serious impacts to migratory birds (and particularly eagles) that FWS predicted if BIA followed through with authorizing Tule Wind Phase II on the ridgeline, or (2) various Tule Wind Phase II alternatives urged by FWS and CDFG to avoid or reduce the anticipated impacts to golden eagles and other birds. *Id.* Neither of these issues—which had arisen *after* BLM's 2011 Final EIS—was analyzed in any way in BLM's EIS or ROD, meaning that they entirely escaped review under NEPA. However, on March 8, 2013, Tule Wind LLC finalized its Phase II ABPP ("Final ABPP")—which does not constitute an agency NEPA document and has never been subjected to public review and comment — which continued to rely on the same outdated methodologies harshly criticized by FWS in concluding that the risk to eagles was low.

FWS expressed grave concerns with the Final ABPP's continued reliance on an outdated eagle mortality model and severe mortality underestimates resulting from the misuse of the outdated model. *See* ECF No. 1 ¶ 46. FWS also continued to press BIA and Tule Wind LLC to consider macrositing and micrositing alternatives to the full-project build-out of 20 turbines on the tribal ridgeline. In particular, because of FWS's conclusion that this project presents a high mortality risk to eagles—and is likely to cause the loss of at least one eagle breeding territory—FWS explained to BIA and Tule Wind LLC that an eagle take permit should be obtained *before* any construction begins. *Id.*

Despite the longstanding concerns of BIA's sister agency (i.e., FWS) that had yet to be addressed, on December 16, 2013, BIA issued its ROD authorizing a lease to Tule Wind LLC to construct and operate up to 20 turbines on the ridgelines on BIA trust land, which is two turbines more than BLM's EIS ever contemplated on BIA trust land. *See* ECF No. 1 ¶ 47. BIA's ROD relied heavily on the Final ABPP in reaching an extremely low prediction of eagle mortality compared to FWS's estimate of high mortality and the disturbance or complete loss of an eagle breeding territory, albeit while BIA nevertheless conceded in its ROD that Tule Wind Phase

II will kill golden eagles through BIA's prediction that the project would kill approximately "3.6 golden eagles over 20 years." ECF No. 1 ¶ 48. The Final ABPP did not consider or address any macrositing or micrositing alternatives that FWS and CDFG urged BIA and Tule Wind LLC to consider before project approval. *Id.*

Despite conceding that this project will inevitably kill golden eagles, BIA issued its ROD authorizing construction and operation *before Tule Wind LLC even obtained a necessary pre-construction eagle take permit from FWS* and merely indicated in the ROD that the Tribe has agreed to direct the Applicant to *apply* for an eagle take permit. ECF No. 1 ¶ 51. Anomalously, the ROD only provides that Tule Wind LLC will "*apply* for an eagle take permit" "prior to initiating *operation* of the project," *id.* meaning that: (1) the project may be fully constructed and begin operation before a BGEPA permit is obtained; and (2) the project may operate indefinitely while FWS considers an eagle take permit application *or even if the permit application is denied because the risks are too high*. *Id.*

In short, for reasons that are totally unexplained in the ROD and in contravention of FWS's repeated warnings of extreme risks to eagles, BIA did not even require Tule Wind LLC to *obtain* an eagle take permit before commencing operation of a project that the expert federal agency that implements BGEPA warns will have dire consequences for eagles—despite the fact that BGEPA makes it flatly unlawful to kill eagles without such a permit. Nor, for that matter, did BIA require Tule Wind LLC to even apply for a BGEPA permit—let alone obtain one—prior to *construction* despite the fact that, by allowing Tule Wind LLC to construct the entire project before completion of FWS's review of Tule Wind LLC's eagle take permit application, BIA thereby undermined FWS's review by effectively foreclosing or at least seriously constraining FWS's permit review consideration of siting and other reasonable alternatives to reduce eagle take because the turbines will have already

been built by the time that FWS completes its review of an eagle take permit application for Tule Wind Phase II.[2]

BIA's ROD also confirmed that BIA undertook no independent NEPA review in connection with approving the lease to Tule Wind LLC to construct and operate 20 turbines on the tribal ridgeline. Rather than preparing its own NEPA review to analyze the impacts of and reasonable alternatives to construction and operation of the 20 ridgeline turbines—including the new issues raised by FWS in 2012 and 2013—BIA relied solely on BLM's 2011 Final EIS for NEPA purposes. *See* ECF No. 1 ¶ 53. BIA asserted in the December 2013 ROD that it "can adopt another agency's environmental review to meet those requirements if it has addressed all the environmental issues associated with the trust land action," and in BIA's view, "[t]he BLM's [FEIS] fully addressed all of the environmental issues for the Proposed Action" notwithstanding the fact that the ridgeline part of the project was *not* endorsed in the EIS precisely because of the extremely high risk to golden eagles. *Id.* While BIA conceded that important post-2011 information existed that was not considered in BLM's 2011 EIS—such as the Final ABPP relied on by BIA, new eagle use data and telemetry information, recent expert comments from FWS and CDFG concerning eagle risks and reasonable alternatives, and information such as the Fire Plan concerning the project's wildfire risks—none of that information was given a "hard look," or, for that matter, even a sideways glance, in any supplemental NEPA document. *Id.*

[2] BIA likewise did not obtain MBTA take authorization from FWS or withhold lease approval pending Tule Wind LLC's receipt of MBTA take authorization from FWS, despite the fact that migratory birds will, in fact, be regularly killed by this project as even the Final ABPP concedes. *See* ECF No. 1 ¶ 54.

5. Plaintiffs' Post-ROD Notices of Legal Violations

On January 29, 2014—approximately one month after BIA issued its Tule Wind Phase II ROD—Plaintiffs sent a 35-page formal demand letter to BIA, along with dozens of attachments consisting mostly of FWS and CDFG records concerning Tule Wind Phase II that Plaintiffs had recently obtained through public records requests, explaining the various ways in which BIA's failure to conduct any NEPA review whatsoever under the circumstances violated NEPA and its implementing regulations. *See* ECF No. 1 ¶ 55. In particular, Plaintiffs explained that BIA could not lawfully rely on BLM's 2011 EIS as a substitute for BIA's own duty to take a "hard look" at the impacts of and alternatives to Tule Wind Phase II. Plaintiffs' letter noted that even if reliance on the BLM EIS were otherwise proper, the existence of significant post-2011 information, data, and conclusions from the expert wildlife agencies that were never considered in the 2011 BLM EIS compelled BIA to engage in supplemental NEPA review before issuing its December 2013 ROD or, at minimum, when receiving critical new information bearing on the environmental impacts of the project in the form of key FWS and CDFG documents as part of Plaintiffs' letter. The letter also explained why BIA's authorization of Phase II project construction and operation in the absence of BIA or Tule Wind LLC first obtaining a valid eagle take permit and migratory bird take authorization from FWS violated BGEPA, the MBTA, their implementing regulations, and the APA. On May 2, 2014, Plaintiffs sent a supplemental demand letter providing additional FWS records further highlighting the unlawful nature of BIA's ROD on NEPA, BGEPA, and MBTA grounds. *See* ECF No. 1 ¶ 56. BIA never responded to either letter. *Id.*

In the meantime, Tule Wind LLC submitted an eagle take permit application to FWS in March 2014. On August 1, 2014, however, FWS returned to Tule Wind LLC its BGEPA permit application package, finding that it was incomplete and lacked key information. *See* ECF No. 1 ¶ 57. FWS formally determined that the

project is "a Category 1 - High Risk Project because it *poses a high risk to eagles and the potential to avoid or mitigate impacts is low*," and urged "that when [Tule Wind LLC] appl[ies] for an Eagle Act permit, [it] *consider a different turbine siting design for the proposed turbines on the ridgeline or moving the project to another location to minimize and avoid eagle take at the Tule Wind Project*." *Id.* (emphasis added). Plaintiffs sent a second supplemental demand letter to BIA on September 16, 2014 underscoring the legal violations committed by BIA in issuing its ROD and in its ongoing failure to prepare any supplemental NEPA review. *Id.* BIA again failed to take any action in response to Plaintiffs' letters (or even to respond to them). To Plaintiffs' knowledge, Tule Wind LLC has not resubmitted its BGEPA application to FWS.

Due to BIA's issuance of its December 2013 ROD without either BIA or Tule Wind LLC having first obtained an eagle take permit from FWS in connection with Tule Wind Phase II—let alone BIA conditioning lease approval and ROD issuance on Tule Wind LLC deferring Tule Wind Phase II construction until and unless FWS has issued an eagle take permit for this project—Tule Wind LLC may now begin project construction (and operation) on BIA trust land before FWS renders a final decision on the company's eagle take permit application (or even if FWS denies it). *Id.*

6. Plaintiffs' Lawsuit

Plaintiffs filed their Complaint on September 24, 2014, raising claims under three statutes: BGEPA, the MBTA, and NEPA.

Under BGEPA—Plaintiffs' Second Claim—Plaintiffs have challenged BIA's decision in December 2013 to give federal lease approval to this project, thereby authorizing its construction and operation without awaiting any decision from FWS on issuance of a BGEPA permit, and without even conditioning federal lease approval on the receipt of such a permit. *See* ECF No. 1 ¶¶ 64-66. Especially in light of FWS's view—as the expert federal agency charged by Congress with

implementing BGEPA—that Tule Wind Phase II will inevitably kill many golden eagles, poses a grave risk to the local eagle population, and is highly likely to cause the loss of an eagle breeding territory, BIA's decision to nevertheless plow ahead and issue its December 2013 lease approval and ROD in the absence of BIA or Tule Wind LLC having obtained an eagle take permit (or having even committed in the lease or ROD to obtaining such a permit before project construction and operation commences) constitutes agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A)—i.e., not in accordance with BGEPA—and "without observance of procedure required by law," *id*. § 706(2)(D).

Likewise, under the MBTA (i.e., Plaintiffs' Third Claim), Plaintiffs have challenged BIA's December 2013 decision to authorize Tule Wind Phase II construction and operation—which will inevitably kill, disturb, harass, and otherwise take many migratory birds—without BIA or Tule Wind LLC first obtaining MBTA take authorization from FWS, and without BIA even conditioning lease approval or ROD issuance on the receipt of MBTA take authorization prior to commencement of project construction and operation. *See* ECF No. 1 ¶¶ 67-68. By giving federal approval to Tule Wind Phase II construction and operation with full knowledge that neither BIA nor Tule Wind LLC had obtained the legally required MBTA take authorization from FWS (nor would they prior to project construction and operation), BIA issued its December 2013 lease approval and ROD in such a manner that is "not in accordance with law," 5 U.S.C. § 706(2)(A)—i.e., the MBTA—and "without observe of procedure required by law," *id*. § 706(2)(D).

Under NEPA, Plaintiffs have brought several distinct legal challenges, only one of which is the subject of Defendants' motions. First, Plaintiffs contend that BIA violated NEPA by relying on BLM's 2011 Final EIS in order to avoid undertaking its own independent NEPA assessment before BIA approved the Tule Wind Phase II lease and issued its December 2013 ROD, especially given that BLM refused in its 2011 decision documents concerning Tule Wind Phase I to authorize

any turbines on the ridgelines on BIA trust land due to high eagle mortality risks in that location. *See* ECF No. 1 ¶ 59. Defendants have not moved for judgment with respect to this claim.

Second, Plaintiffs have alleged that because BIA failed to prepare any independent NEPA review in connection with its December 2013 lease approval and ROD, BIA never provided the public with an opportunity to review and comment on crucially important information bearing on the environmental impacts of and reasonable alternatives to Tule Wind Phase II (e.g., the expert views of FWS and CDFG provided to BIA after BLM's 2011 Final EIS and before BIA's December 2013 ROD). *See* ECF No. 1 ¶ 62. Accordingly, not only did BIA prematurely issue its lease approval decision in a manner that will inevitably prejudice FWS's review of any BGEPA permit application and/or MBTA take authorization request in violation of 40 C.F.R. § 1506.1(a), but BIA also failed to "insure" that this significant new information—never before considered in any NEPA document by BLM or BIA—was available to public officials and interested citizens "to the fullest extent possible," 40 C.F.R. § 1500.2, before making a final project decision concerning Tule Wind Phase II and issuing a ROD providing final federal authorization for construction and operation of this project on BIA trust land, in violation of NEPA, its implementing regulations, and the APA. *See* ECF No. 1 ¶ 62. Defendants have not sought judgment as to this claim.

Third, even if reliance on BLM's 2011 Final EIS were appropriate, Plaintiffs have claimed that BIA violated NEPA by failing in connection with its December 2013 lease approval and ROD issuance to conduct any independent NEPA review whatsoever—supplemental or otherwise—to analyze: (1) the post-2011 emergence of significant new information from the expert federal and state wildlife agencies (FWS and CDFG) concerning projected environmental impacts of Tule Wind Phase II on eagles and other migratory birds; (2) the post-2011 emergence of significant new information from the expert wildlife agencies concerning reasonable

alternatives to building 20 turbines on BIA trust land (e.g., macrositing and micrositing alternatives); and (3) the fact that BIA's ROD authorizes a substantial change to the proposals considered by BLM in its 2011 Final EIS because BIA authorized 20 ridgeline turbines, which is more than 10% larger in size than any proposal contemplated by BLM. *See* ECF No. 1 ¶¶ 60-61. With respect to this claim, Plaintiffs have alleged both that BIA violated NEPA by issuing its December 2013 ROD without observance of procedures required by NEPA under the circumstances in contravention of 5 U.S.C. § 706(2)(D), and/or BIA violated NEPA by failing to prepare, or in the alternative, by deciding not to prepare a supplemental NEPA document before issuing its December 2013 ROD as both arbitrary, capricious, and not in accordance with law pursuant to 5 U.S.C. § 706(2)(A) and as unlawfully withheld and unreasonably delayed agency action pursuant to 5 U.S.C. § 706(1). Defendants have also not sought judgment as to this claim.

Finally, and related to their third claim, Plaintiffs have also challenged BIA's failure—*after* issuance of its 2013 ROD—to prepare any supplemental NEPA review in connection with the emergence of additional significant new information bearing on the environmental impacts of and reasonable alternatives to Tule Wind Phase II, as provided by Plaintiffs through their extensive January 2014 demand letter with dozens of highly pertinent exhibits primarily consisting of project-specific materials and expert opinions by FWS and CDFG concerning issues such as eagle mortality estimates, appropriate scientific methodologies, and reasonable project alternatives. *See* ECF No. 1 ¶ 61. With respect to this claim, Plaintiffs have also alleged that BIA has acted arbitrarily, capriciously, and not in accordance with law pursuant to 5 U.S.C. § 706(2)(A) and has unlawfully withheld and unreasonably delayed legally required agency action pursuant to 5 U.S.C. § 706(1). This is the only NEPA-based claim as to which Defendants have sought judgment.

LEGAL STANDARD

In deciding a Rule 12(c) motion for judgment on the pleadings, "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). Judgment on the pleadings is only proper if 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." *Id.* Accordingly, judgment "may only be granted when the pleadings show that it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Enron Oil Trading & Transp. Co v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997) (citation and quotation marks omitted).

Although a party's reliance on documents outside the pleadings ordinarily converts a motion for judgment on the pleadings to a motion for summary judgment, reliance on documents that were explicitly referenced in the pleadings and thereby incorporated into the pleadings by reference does not convert the motion to one for summary judgment. *See, e.g.*, *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." (emphasis added)); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (same); *Callan v. Merrill Lynch & Co.*, No. 09-cv-566 BEN (BGS), 2010 WL 3452371, at *7 n.2 (S.D. Cal. Aug. 30, 2010) (Benitez, J.) (finding that "the Court may refer to the [document] without converting the motion for judgment on the pleadings to a motion for summary judgment" because the document "is incorporated by reference into and forms an integral part of the Complaint").

ARGUMENT

For the reasons explained in detail below, Plaintiffs have alleged facts in their Complaint that are more than sufficient to defeat a Rule 12(c) motion for partial judgment on the pleadings. Accordingly, this Court should reject Defendants' motions because Defendants have failed to clearly establish that there is no set of facts that could entitle Plaintiffs to the relief they seek and that Defendants are therefore entitled to judgment as a matter of law.

I. DEFENDANTS HAVE FAILED TO CLEARLY ESTABLISH THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW WITH RESPECT TO PLAINTIFFS' BGEPA CLAIM.

Defendants request that this Court dismiss Plaintiffs' BGEPA claim (Second Claim For Relief) and in the process disregard the highly unique facts of this case in which the expert federal wildlife agency charged with implementing BGEPA—i.e., FWS—has not only repeatedly expressed grave concerns about the substantial risk that Tule Wind Phase II poses to golden eagles through the inevitable killing of many eagles and the virtually certain permanent loss of a golden eagle territory as a result of project construction and operation, but also has insisted that BIA is *required* under a statute that FWS administers (BGEPA) to either itself obtain an eagle take permit for Tule Wind Phase II prior to project construction or at least condition BIA's federal lease approval on Tule Wind LLC obtaining such a permit prior to project construction. Accordingly, for the reasons explained below, under these facts, in which BIA has deliberately ignored FWS's concerns and sidestepped the *only* legal mechanism for authorizing take of golden eagles by providing federal lease approval for construction and operation of this project in the absence of either BIA or Tule Wind LLC having first obtained an eagle take permit from FWS, Defendants have not even remotely established that there is no set of facts under which this Court could ultimately find that BIA's authorization of Tule Wind Phase

II was issued "not in accordance with law" or "without observance of procedure required by law" in contravention of the APA. 5 U.S.C. § 706(2)(A), (D).

As a threshold matter, there can be no dispute that BGEPA's prohibitions expressly apply to the kinds of activities at issue in this case that result in the killing, wounding, and disturbing of golden eagles even though the taking of eagles is not the purpose of the activity. *See* 16 U.S.C. § 668c (defining "take" of eagles broadly to include any activities that "wound, kill, . . . molest, or disturb" eagles); *id.* § 668(a)-(b) (prohibiting anyone "without being permitted to do so" from "knowingly, or with wanton disregard for the consequences of his act take . . . any golden eagle"). Indeed, in 2009, FWS issued regulations establishing a permitting program specifically for authorizing the incidental take of eagles under appropriate circumstances and subject to stringent safeguards designed to protect eagles. *See* 74 Fed. Reg. at 46,836. Pursuant to those regulations, several wind energy companies have submitted eagle take permit applications and at least one facility has obtained a BGEPA incidental take permit. *See* 79 Fed. Reg. 36,552 (June 27, 2014). Hence, the BIA-approved Tule Wind Phase II wind energy project that will foreseeably and predictably kill, wound, and disturb golden eagles *is* an activity that is squarely covered by BGEPA's prohibitions and therefore requires that either BIA or Tule Wind LLC obtain an eagle take permit from FWS before project construction and operation, lest BIA's project authorization be issued "not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

Defendants raise four specific arguments for why Plaintiffs' BGEPA claim should be dismissed: (1) federal agencies acting in a regulatory capacity are not required to obtain BGEPA permits before authorizing third party activities even when an agency knows that the project will operate in violation of federal law, *see* ECF No. 35-1 at 5; ECF No. 34-1 at 12-13; ECF No. 33 at 7-10; (2) Tule Wind LLC, not BIA, is exclusively responsible if a permit is not obtained before the project takes golden eagles in violation of BGEPA, *see* ECF No. 35 at 9-11;

(3) Plaintiffs' claim is premature because BGEPA is not implicated until an eagle has been taken, *see* ECF No. 35-1 at 6-9; and (4) seeking a BGEPA permit is discretionary, *see* ECF No. 35-1 at 11-13. These arguments cannot withstand close scrutiny under the particular facts alleged in Plaintiffs' Complaint.

First, Defendants' blanket assertion that federal agencies may *never* be required to obtain a BGEPA permit when acting in a regulatory capacity in authorizing third party activities makes no legal or logical sense, particularly in light of Congress' unequivocal mandate in the APA that *every* federal agency decision—including lease approvals and project authorizations to third parties—"*shall*" be "set aside" if issued "not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (emphasis added). The Court of Appeals has routinely recognized the import of this mandate in cases involving the actions of federal agencies in authorizing third party conduct that was likely to violate federal law, consistently setting aside those federal approvals precisely because the Court found those decisions to have been issued "not in accordance with law" under the APA. *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004) (holding that the National Marine Fisheries Service did not act "in accordance with law" when it authorized the hunting of gray whales by a Tribe that did not obtain permission to take whales in the manner required by the Marine Mammal Protection Act); *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1062 (9th Cir. 2003) (holding that the FWS did not act "in accordance with law" when it authorized a third party to engage in a commercial activity in a designated wilderness area in violation of the Wilderness Act); *cf. Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1128 (9th Cir. 2012) (setting aside a BLM authorization for a private party to construct a natural gas pipeline where the private party was unlawfully relying on voluntary conservation measures to satisfy its ESA obligations). Because the legal claims in those cases are functionally indistinguishable from Plaintiffs' BGEPA claim in this case challenging, under the

APA, BIA's issuance of its December 2013 lease approval and ROD in a manner that is "not in accordance with law," 5 U.S.C. § 706(2)(A)—i.e., BGEPA—there is no reason, especially at the Rule 12(c) stage, for this Court to deviate from the plain terms of the APA and circuit precedent which both expressly condone APA suits against federal agencies acting in their regulatory capacities to authorize third party activities.

Moreover, the extraordinary facts set forth in Plaintiffs' Complaint (and supported by Federal Defendants' own documents) only reinforce that BIA acted "not in accordance with law" by giving federal authorization for project construction and operation without either BIA or Tule Wind LLC first obtaining a BGEPA permit and in the absence of BIA at least conditioning lease approval on Tule Wind LLC obtaining such a permit prior to project construction and operation. As alleged in Plaintiffs' Complaint, which, again, the Court must assume to be true at this stage of the proceedings, FWS—the agency charged by Congress with administering and implementing BGEPA—has *repeatedly* stressed to BIA its serious concerns with Tule Wind Phase II and has determined, in its expert assessment, that this project *will*, at minimum, kill many golden eagles and almost certainly cause the permanent loss of an eagle breeding territory. *See* ECF No. 1 ¶¶ 40-54.

In turn, in discharging its duties under BGEPA, FWS urged BIA in an October 2012 formal memorandum to abandon Tule Wind Phase II altogether, but stated that in the event that BIA decides to move forward with approving this project BIA should at the very least "*condition[] the lease on this project to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act,* ***prior to project construction***." ECF No. 1 ¶ 43 (emphasis added). Given that BIA not only refused to seriously consider abandoning the project as FWS urged, but instead authorized project construction *and* operation without even adopting the minimum approach the expert federal agency believed to be legally necessary under the circumstances to ensure compliance with a statute that FWS administers (i.e.,

conditioning project approval on Tule Wind LLC obtaining a BGEPA permit prior to project construction), these compelling facts are more than sufficient to demonstrate at the Rule 12(c) stage that BIA may have issued its lease approval and ROD "not in accordance with law" and hence in violation of the APA. 5 U.S.C. § 706(2)(A).

This conclusion is not undermined in any way by Judge Sammartino's ruling in *Protect Our Communities Foundation v. Jewell*, Civ. No. 13-cv-575 JLS (JMA), 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014) (*POCF I*), upon which Defendants rely. In that case, the court was *not* reviewing a situation in which FWS had repeatedly warned the lead agency of grave risks to eagles and, in turn, made clear that a BGEPA permit should be in place prior to project construction and operation, as is the case here. *See* ECF No. 1 ¶ 43. To the contrary, the court's brief one-paragraph discussion concerning BGEPA suggests that BLM and the company *had* "satisfied [their] obligations under [] BGEPA" by developing specific measures "in consultation with . . . FWS" that would "avoid impacts to eagles." *POCF I*, 2014 WL 1364453, at *21.

Hence, whereas in *POCF I* the lead agency and the company worked *with* FWS to develop specific measures to avoid any take of eagles (thereby obviating the need for a BGEPA permit in the court's view), in this case BIA has repeatedly thumbed its nose at FWS and in the process (1) entirely failed to adopt (or even consider) *any* of FWS's specific recommendations concerning macrositing or micrositing changes to the project design that could reduce eagle impacts, and (2) plowed ahead with project approval without even conditioning federal authorization on the receipt of a BGEPA permit prior to project construction as FWS explicitly instructed. Accordingly, *POCF I* certainly does not address the unique and dispositive facts alleged in this case, which by any measure establish that BIA provided federal authorization for a project with full knowledge that it will kill, disturb, and otherwise take many golden eagles—despite the fact that the project

lacks a legally valid BGEPA permit that FWS urged BIA to make a condition of lease approval—and that, in turn, will repeatedly violate BGEPA and its regulations when BIA-authorized project construction and operation commences. If ever there were federal authorization issued "not in accordance with law," this is it.

Second, Defendants contend that Tule Wind LLC—not BIA—is exclusively responsible for any legal violations in connection with project construction and operation, and that Plaintiffs have therefore directed their BGEPA claim at the wrong entity. *See* ECF No. 35-1 at 10-11. Specifically, Defendants contend that "in approving the Tribe's lease to Tule, [BIA] had no legal duty to obtain or to require Tule [Wind LLC] to obtain an eagle take permit." *Id.* at 11. This is not so.

As explained, Plaintiffs do *not* seek to challenge Tule Wind LLC's past or future compliance with BGEPA in connection with Tule Wind Phase II (an action that can only be pursued by the federal government); rather, Plaintiffs seek to challenge whether, under the specific facts alleged here, *BIA* issued its federal approval for this third party project in a manner that is "not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Suits of this kind challenging federal agency decisions authorizing third party conduct that the agency knows or should know will violate federal law are routine and frequently result in courts—including the Ninth Circuit—vacating the agency approval as not in accordance with law. *See supra* at 25. Therefore, whether Tule Wind LLC is exclusively liable for future BGEPA violations that the federal government might prosecute is legally irrelevant to the question before the Court: whether *BIA* authorized third party conduct in a manner that is not in accordance with law, consistent with well-established Ninth Circuit APA precedent.

Further, even Defendants' contention that BIA had no legal duty to itself obtain a BGEPA permit or to condition its lease approval on Tule Wind LLC obtaining a BGEPA permit prior to construction is specious, particularly in light of FWS's interpretations of BGEPA as it applies to wind projects (and in particular to

Tule Wind Phase II). For example, as FWS explained to BIA's sister agency, BLM, in 2010 when BLM was considering alternatives to the Tule Wind Project, federal agencies are *not* immune from BGEPA liability when acting in their regulatory capacities where providing federal authorization for a project that will kill eagles and the agency knows that a regulated third party is unlikely to obtain a BGEPA permit before project construction and operation. Specifically, FWS interpreted BGEPA's requirements in the following manner:

> [I]f unauthorized take results from the agency action of leasing or issuing the right-of-way, ***that agency action may constitute sufficient involvement to incur derivative liability under the Eagle Act***. Thus, BLM may wish to consider whether to *condition its right-of-way permit on the applicant obtaining a permit under the Eagle Act*, and take appropriate administrative action if the applicant fails to comply with its Eagle Act permit or exceeds the permitted take. . . . [In determining whether to obtain its own BGEPA permit,] the BLM may consider such factors as the willingness of the applicant to meet their responsibilities under the Eagle Act on their lands (*e.g., if they are not willing to avoid take, and the BLM knows this, the BLM might not be able to reasonably assume that eagles will be protected, and the BLM may consider obtaining its own permit to avoid liability*).

See Exhibit A at 4 (FWS, May 2010 Final Response to Mar. 12, 2010 BLM Questions) (emphases added).[3] Hence, in FWS's view, where, as here, a regulated

[3] This document was part of the January 29, 2014 demand letter package that Plaintiffs submitted to BIA, and which Plaintiffs specifically incorporated by reference in their Complaint. *See* ECF No. 1 ¶ 55. Although Plaintiffs herein rely to some extent on documents outside of the pleadings, all of the quotes and/or documents to which Plaintiffs refer in this opposition (or attach as exhibits) are fully incorporated by reference in Plaintiffs' Complaint due to Plaintiffs' express reference to these quotations and materials in the Complaint. Accordingly, under well-established Circuit precedent, Plaintiffs' citation to these documents does not convert Defendants' motions into motions for summary judgment. *See supra* at 22 (citing cases). The same is true for federal register notices and law review articles cited herein, as to which courts routinely take judicial notice or otherwise rely upon. *See, e.g.*, 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed."); *Rohnert Park Citizens to Enforce CEQA v. U.S. Dep't of Transp.*, Civ. No. 07-cv-4607 TEH, 2009 WL 595384, at *3 (N.D. Cal. Mar. 5, 2009) ("Although

third party (Tule Wind LLC) has clearly expressed its intention to the regulating federal agency (BIA) that it will commence construction and operation of a wind energy project that will indisputably and foreseeably kill eagles *before* obtaining a BGEPA permit (and even if Tule Wind LLC *never* obtains such a permit), BIA was compelled to itself obtain the necessary permit before authorizing the project to proceed, or, at bare minimum, was required to "condition its [lease approval] on the applicant obtaining a permit under the Eagle Act" *prior* to any project construction and operation to avoid violations of federal law. *Id.* at 4. Otherwise, as the FWS correspondence makes clear, BIA cannot be said to be acting "in accordance with law" within the plain meaning of the APA, 5 U.S.C. § 706(2)(A).

In any event, FWS yet again provided its legal interpretation of BGEPA when it formally directed BIA to expressly condition its lease approval—should BIA decide to authorize this project—on the lessee (Tule Wind Phase II) obtaining a BGEPA permit *before* project construction. As noted, in October 2012, FWS specifically instructed that should BIA "move forward with approving this project" notwithstanding the FWS's concerns that the site is highly hazardous to eagles, BIA should at least "*condition[] the lease on this project to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act, prior to project construction*." ECF No. 1 ¶ 43 (emphasis added). These formal pronouncements by FWS to both BLM with regard to Tule Wind Phase I (before BLM eliminated consideration of ridgeline turbines) and BIA with regard to Tule Wind Phase II confirm that BIA *does* in fact have a legal obligation, as a federal agency, to either obtain its own permit to avoid inevitable violations of federal law or condition its federal approval of this project on the third party lessee first coming

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the Federal Register entries are not part of the administrative record, the Court must take judicial notice of them."); *OSO Grp., Ltd. v. Bullock & Assocs., Inc.*, Civ. No. 09-1906 SC, 2009 WL 2422285, at *2 n.3 (N.D. Cal. Aug. 6, 2009) (explaining that even where a court does not take judicial notice of a law review article, "[t]he Court may consider the law review article submitted as support for a party's" position).

into compliance with such laws before project construction and operation commences in a manner that renders BIA's lease approval not in accordance with law. At bare minimum, Plaintiffs have alleged sufficient facts for the Court to scrutinize the full record before rendering judgment on the matter.

Third, Defendants contend that even if Plaintiffs could maintain an APA cause of action against BIA under the circumstances, it is premature because BGEPA violations are not implicated until take occurs because, in Defendants' view, BGEPA "does not prohibit actions that merely have the potential to take eagles." ECF No. 35-1 at 6-9. Indeed, Tule Wind LLC has argued that "Plaintiffs have only alleged that BIA's regulatory approval of the Lease will *indirectly* cause a take at some *indeterminate time in the future*." ECF No. 33 at 13 (emphases added). Defendants have seriously mischaracterized the applicable facts and law.

As explained, the project before the Court is certainly *not* a project that "merely ha[s] *the potential* to take eagles," ECF No. 35-1 at 6 (emphasis added), nor will it "*indirectly* cause a take at *some indeterminate time in the future*." ECF No. 33 at 13 (emphases added). Rather, as described in Plaintiffs' Complaint, this is a project that ***will indisputably cause many*** eagle deaths, disturbances, and other "takes" of golden eagles from the moment that it begins operation through *direct* collisions with its massive turbine blades. This is not sheer conjecture; to the contrary, as Plaintiffs have set forth in their Complaint, *FWS*, the expert agency on eagle conservation and responsible for overseeing BGEPA compliance, has for several years explained its expert opinion to BIA and Tule Wind LLC that Tule Wind Phase II presents an extremely high mortality risk to golden eagles and is highly likely to cause the near-immediate loss of at least one golden eagle breeding territory, which alone is calculated as *four* eagle deaths per year after the territory has been destroyed. *See* ECF No. 1 ¶¶ 1, 26, 33, 40, 43, 46, 48, 50.

Indeed, the crucial question pertaining to Tule Wind Phase II is not *if* eagles will be killed or even *when* the first eagle deaths will occur; instead, the question is

whether this project—estimated by FWS to pose an unusually grave risk to golden eagles—will cause *population-level* effects to the regional eagle population affecting its long-term viability, as is evidently one of FWS's serious concerns about this project. Hence, even Tule Wind LLC has conceded in its Tule Wind Phase II Avian and Bat Protection Plan, as it must, that this project will *unavoidably* kill golden eagles despite the implementation of all measures to which the company has committed itself in that plan. *See* ECF No. 1 ¶¶ 49-50.

Accordingly, in light of the fact that BIA provided federal authorization for this project to proceed in the absence of any pre-construction (or even pre-operation) legal compliance with BGEPA, and with full knowledge that this project *will* kill *many* eagles without an appropriate permit in place, there is no legal or logical reason under pertinent APA precedent for why this Court must await a dead eagle carcass to adjudicate the merits of Plaintiffs' claims challenging BIA's *December 2013* lease approval and ROD that Plaintiffs contend were issued *nearly two years ago* in a manner that was "not in accordance with law." 5 U.S.C. § 706(2)(A). That lease approval indisputably constituted a final agency action for purposes of APA review, and part and parcel of that final decision was the determination to ignore FWS's protestations and authorize project construction *and* operation without a BGEPA permit in place. In sum, there is simply no sound reason in law or logic why Plaintiffs may not seek judicial review of the legality of that decision now, along with their other challenges to the very same lease decision.

Finally, Defendants assert that, even if BIA were otherwise liable under the APA for BGEPA violations when acting in a regulatory capacity, the decision as to whether to obtain a BGEPA permit is discretionary and thus BIA was under no duty to obtain a permit or require Tule Wind LLC to do so even though BIA's authorization will inevitably lead to eagle takes in the absence of a legally required permit. *See* ECF No. 35-1 at 11-13. This argument must be rejected because it again seeks to conflate whether Plaintiffs have a private right of action under

BGEPA to seek relief directly against Tule Wind LLC with whether Plaintiffs can bring suit under the APA based on a federal agency's decision that contravenes BGEPA's permitting regime and hence is "not in accordance with law." 5 U.S.C. § 706(2).

As the FWS's correspondence with BIA makes clear, Defendants' reference to the fact that the decision by a *private party* to seek a BGEPA permit is "discretionary"—in the sense that the private party may elect to violate BGEPA and then be subject to criminal enforcement by FWS in the event of a violation—has *nothing* to do with the distinct question of whether a *federal agency* has issued a decision or other federal authorization that is "not in accordance with law." 5 U.S.C. § 706(2)(A). Whereas Congress has entrusted to FWS criminal enforcement responsibility over matters involving purely private conduct that adversely affects eagles, where, as here, a federal agency is involved in licensing, permitting, leasing, or otherwise authorizing conduct that will have adverse effects on eagles (or other legally protected natural resources) Congress has created a mechanism—the APA—for ensuring that *every* federal agency decision is in "accordance with law" and "in observance of procedure required by law" before such authorization is granted. 5 U.S.C. § 706(2)(A), (D). In turn, Congress has mandated that courts set aside *all* federal agency authorizations failing to conform to requisites of the APA. *Id.* Thus, irrespective of the purportedly discretionary nature of FWS's BGEPA criminal enforcement scheme vis-à-vis purely private conduct, Defendants have ignored the fact that federal agencies are held to a standard under the APA that requires that *their* decisions not run afoul of federal law.

This is why, again, the Ninth Circuit has routinely found agency decisions to be not in accordance with law when agencies have approved third party activities where the agency knew that the third party conduct would affect federally protected marine mammals, federally protected wilderness areas, and federally protected endangered species in ways that were not in compliance with the applicable federal

environmental statutes. *See supra* at 25. Although the federal government could have independently brought criminal or civil enforcement suits against the third parties involved in those lawsuits when they violated federal law, that fact had absolutely nothing to do with whether the Court, in a properly pled APA case such as this one, set aside the *agency's* authorization of the third party conduct in a manner that was not in accordance with law. Thus, even if it were true that Tule Wind LLC may, in its "discretion," opt to roll the dice and risk government prosecution by killing federally protected eagles without obtaining a BGEPA permit in connection with Tule Wind Phase II, that in no way absolves *BIA* from ensuring compliance with BGEPA before providing federal authorization for the project by either itself obtaining a BGEPA permit or conditioning its lease approval on Tule Wind LLC doing so prior to project construction and operation. Indeed, it is difficult to conceive of how it would promote BGEPA's overriding eagle conservation purposes to leave eagle protection to the vagaries of potential post hoc criminal prosecution when there is a readily available legal mechanism for bringing the project into legal compliance *before* eagles are killed and the damage is irreversibly done, i.e., the APA's expansive authorization of suit against any federal agency for acting in a manner that is "not in accordance with law." *See FCC v. NextWave Pers. Commc'ns*, 537 U.S. 293, 300 (2003) (explaining that the APA "requires federal courts to set aside federal agency action that is 'not in accordance with law,' which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." (emphasis in original)).

For all of these reasons, and given the extremely unusual facts of this case in which FWS has repeatedly urged BIA to, at minimum, condition lease approval on the receipt of a BGEPA permit prior to project construction and operation in order to come into compliance with this statutory scheme before large numbers of eagles are killed, Defendants have fallen far short of their burden to clearly establish that there

is no set of facts under which Plaintiffs could prevail in demonstrating that BIA's lease approval was not in accordance with BGEPA.

II. DEFENDANTS HAVE ALSO FAILED TO CLEARLY ESTABLISH THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW WITH RESPECT TO PLAINTIFFS' MBTA CLAIM.

In many respects mirroring the arguments they made in the BGEPA context, Defendants request that this Court dismiss Plaintiffs' MBTA claim—i.e., Plaintiffs' Third Claim for Relief—based on Defendants' view that BIA, as a federal agency acting in a regulatory capacity, has no legal duty to itself obtain MBTA take authorization before approving a project on BIA trust land that will inevitably kill and otherwise take migratory birds, or to require its third party lessee (Tule Wind LLC) to obtain such a permit or take authorization prior to commencing project construction and operation. *See* ECF No. 35-1 at 13-17; ECF No. 33-1 at 7-15; ECF No. 34-1 at 9-18. Defendants' misplaced position cannot be sustained by this Court, particularly based on the extensive facts presented in Plaintiffs' Complaint and relevant case law.

A. BIA's Authorization Of An Industrial Wind Project That Will Directly And Foreseeably Kill Many Migratory Birds In Violation Of The MBTA Is Agency Action That Is "Not In Accordance With Law."

Defendants' central argument for dismissing Plaintiffs' MBTA claim is that in approving the Tribe's lease to Tule Wind LLC, BIA had "no legal duty to obtain or to require Tule [Wind LLC] to obtain a[n] MBTA permit for the project." ECF No. 35-1 at 13; *see also* ECF No. 33 at 7-10; ECF No. 34-1 at 12-13. In taking this position, Defendants rely on a recent district court decision in *POCF I*—which is currently on appeal to the Ninth Circuit. Defendants' arguments miss the mark for several reasons.

1. Industrial Wind Turbines "Take" Migratory Birds Within The Meaning Of The MBTA.

In contrast to BGEPA which, by its plain terms, indisputably applies to incidental take, there is a lack of uniformity in the federal courts as to whether the MBTA covers incidental take of migratory birds and, if so, under what circumstances. Although Defendants have not directly argued that the prohibitions of the MBTA are inapplicable to direct and foreseeable incidental take of migratory birds caused by wind energy operation, Defendants rely heavily on *POCF I* which did, in part, hinge its rejection of MBTA claims arising in that case on Judge Sammartino's holding that "the governing interpretation of the MBTA in the Ninth Circuit is quite narrow and holds that the statute does not even prohibit incidental take of protected birds from otherwise lawful activity." *POCF I*, 2014 WL 1364453, at *21 (citing *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302 (9th Cir. 1991)). However, this is a misreading of the MBTA and circuit precedent construing the statute, and for the following reasons should not be adopted by the Court as a basis for dismissing Plaintiffs' MBTA claim.[4]

As Federal Defendants concede in their brief, the expert federal wildlife agency charged by Congress with implementing the MBTA—FWS—has formally interpreted the applicable MBTA prohibitions to apply not only to action

[4] Although Defendants rely on Judge Sammartino's decision in *POCF I*, that ruling is of very limited persuasive value, if any, as to the Court's resolution of the MBTA claim in *this* case for several reasons. First, it is black-letter law that "[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011) (citation omitted). Second, in any event, *POCF I* is now pending on appeal before the Ninth Circuit and no party to that appeal—including the federal government or Tule Wind LLC—has filed briefs even defending Judge Sammartino's conclusion that the MBTA's prohibitions do not encompass direct, albeit incidental, take of migratory birds. Rather, the Federal Defendants have conceded in the Court of Appeals that the MBTA applies to inherently hazardous activities such as the operation of wind turbines and Tule Wind LLC waived its right even to file a brief on appeal.

specifically directed *at* other birds, but also that such prohibitions clearly encompass take that *directly and foreseeably* causes the killing of birds regardless of whether that is the purpose of the action. *See* ECF No. 35-1 at 13 (discussing FWS incidental take permit scheme under the MBTA); *see also* 16 U.S.C. § 703(a) ("[I]t shall be unlawful at *any* time, by *any* means or in *any* manner to . . . kill . . . *any* migratory bird." (emphases added)).[5]

That the MBTA in fact applies to "any" action in which the killing of migratory birds is a foreseeable, direct consequence is compelled not only by the plain language of the statute, but also by Congress' direction to FWS to establish MBTA permitting regulations for the incidental take of migratory birds by federal military operations. In response to the district court decision finding that, in carrying out certain training exercises, the Navy was "knowingly engaged in activities that have the direct consequence of killing and harming migratory birds," and hence violated the MBTA although Navy personnel were not "purposefully firing their guns or aiming their bombs directly at the birds," *Pirie*, 191 F. Supp. 2d at 174 & n.6, Congress enacted the National Defense Authorization Act for Fiscal Year 2003. *See* Pub. L. No. 107-314, § 315, 116 Stat. 2458 (2002). The pertinent provision of that statute—entitled "Incidental Takings of Migratory Birds During Military Readiness Activities"—provides that the "Secretary of the Interior *shall exercise the authority of that Secretary under section 3(a) of the Migratory Bird Treaty Act* (16 U.S.C. § 704(a)) to prescribe regulations to exempt the Armed Forces *for the incidental taking of migratory birds* during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department

[5] The broad, plain language of the MBTA is reinforced by its legislative history. *See, e.g., United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1080-81 (D. Colo. 1999) (explaining that the MBTA legislative history confirms that "Congress intended the MBTA to regulate more than just hunting and poaching," as also evidenced by the fact that the Act and the various conventions "protect[] many species that are not considered game birds.").

concerned." *Id*. at § 315(d) (emphases added). Plainly, FWS could not "exercise [its] authority under" the MBTA to issue regulations prescribing conditions for "incidental take" unless such take was covered by the MBTA in the first instance. *Id*.[6]

Further buttressing the fact that incidental take is covered by the MBTA is the U.S. Department of Justice's successful enforcement over more than four decades bringing *criminal* MBTA actions against private activities—*including wind energy facilities*—that, although not targeting migratory birds, have the direct and foreseeable result of killing them, and hence are indistinguishable *in practical effect* from intentional killings. *See, e.g.*, *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 684-86, 691 (10th Cir. 2010) (sustaining the government's position that there was MBTA liability because it was "reasonably foreseeable" that "unprotected oil field equipment" traps and kills migratory birds); *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978) (imposing liability for unintentionally poisoning birds through application on crops of a highly toxic pesticide); *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1071 (sustaining the government's position that a company's "power poles" that were "preferred locations for perching, roosting, and hunting by birds of prey" directly and proximately caused the deaths of 38 birds of prey); *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 528, 534 (E.D. Ca. 1978) (sustaining the government's position that the application of pesticides to a field known to be used by migratory birds triggered MBTA liability), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978); *United States v. Duke Energy Renewables*, No. 2:13-cr-00268-KHR (Information, ECF No. 1) (D. Wyo. Nov. 7, 2013) (FWS suit bringing criminal charges against a wind energy facility for "unlawfully tak[ing]

[6] FWS has also made clear that its existing MBTA permitting scheme can be applied to incidental take under appropriate circumstances, *see supra* at 5 & 45, and the agency has also embarked on a new rulemaking focused on incidental take by inherently hazardous industrial activities such as wind power. *See* 80 Fed. Reg. 30,032, 30,032-36 (May 26, 2015).

approximately 58 migratory birds . . . without permit or other authorization" from FWS); *United States v. Pacificorp Energy*, No. 2:14-cr-00301-KHR (Information, ECF No. 1) (D. Wyo. Dec. 19, 2014) (federal government charging a wind energy company for killing "migratory birds . . . at its 'Seven Mile Hill' wind facility in Carbon County, Wyoming, without permit or other authorization from the United States Fish and Wildlife Service.").[7]

Contrary to the district court's holding in *POCF I*, and Defendants' cursory references to the Ninth Circuit's ruling in *Seattle Audubon*, *see* ECF No. 35-1 at 16; ECF No. 33 at 10; ECF No. 34-1 at 14, there is nothing in pertinent circuit precedent that compels a different conclusion. Rather, on close scrutiny, the Court of Appeals' reasoning in *Seattle Audubon* and more recent cases *supports* Plaintiffs' position that MBTA liability exists here.

The issue in *Seattle Audubon* was whether certain timber sales approved by the Forest Service in northern spotted owl habitat violated the MBTA as well as the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544. *See* 952 F.2d at 298-99. In addressing that issue, the Court explained that various "[c]ourts have held that the [MBTA] *reaches as far as direct, though unintended*" killing of migratory birds, such as "bird poisoning from toxic substances." 952 F.2d at 303 (citing, e.g., the Second Circuit's ruling in *FMC Corp.* and the Eastern District of California's ruling in *Corbin Farm Service*). Crucially, the Court did *not* express disagreement with those rulings, which the Court read as standing for the propositions that MBTA

[7] Although several courts have reached the opposite conclusion in the criminal law context, a "majority of appellate and lower courts have found that incidental taking is subject to misdemeanor liability under Section 703(a), so long as the conduct of such activity is both the actual and proximate cause of the taking." Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 27 (2013); *id*. ("The current trend of judicial authority is towards the expanded view of the MBTA's prohibitions to include incidental taking with an outer limit of activities that are too attenuated under a probable causation analysis.").

"liability" at least flows from inherently "dangerous conditions or substances" regardless of intent, *id*. (describing *FMC Corp.*, 572 F.2d 902), and that liability may attach to "those who did not intend to kill migratory birds" but took actions that would predictably do so. *Id*.; *see also Corbin Farm Serv.*, 444 F. Supp. at 532 ("The use of the broad language 'by any means or in any manner' belies the contention that Congress intended to limit the imposition of criminal penalties to those who hunted or captured migratory birds. Moreover, a number of songbirds and other birds not commonly hunted are protected by the conventions and so by the Act.").[8]

Rather, in *Seattle Audubon* the Court held that the "reasoning of those cases [was] inapposite" to a situation involving *only* "*habitat destruction*, leading *indirectly*" to potential impacts on owls. 952 F.2d at 303 (emphases added). In particular, the Court contrasted the take prohibition in the MBTA to the one in the ESA, and held that "*[h]abitat destruction* causes 'harm' to the owls under the ESA but does not 'take' them within the meaning of the MBTA." *Id*. at 303 (emphasis added); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) (holding that, where the plaintiff "allege[d] only that migratory birds and their nests will be disturbed *through habitat modification*," the "Park Service did not need to seek authorization [under the MBTA] from" the FWS) (emphasis added) (citing *Seattle Audubon*, 952 F.2d at 303))).[9]

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[8] If, as the cases cited in *Seattle Audubon* have held, a *criminal* action may be brought without evidence of intent to kill migratory birds, then it would make no sense for the Court to hold that a *civil* action that merely seeks to ensure that federal agencies will act in accordance with the law requires evidence of such intent.

[9] Although Defendants attempt to characterize Tule Wind Phase II as mere "habitat modification" to avoid the application of the MBTA, that is of no consequence to *this* lawsuit since Plaintiffs' Complaint makes clear that Plaintiffs are *not* arguing that habitat modification alone is sufficient to trigger MBTA protections. Instead, *this* case involves *direct* killings of migratory birds from turbine collisions, which is precisely the kind of inherently hazardous activity that courts have routinely held falls squarely within the strictures and safeguards of the MBTA.

In short, as confirmed by the Justice Department's regular prosecution of activities that foreseeably but unintentionally result in the unauthorized taking of migratory birds, and in particular the government's criminal prosecution of several wind power projects for killing eagles and other migratory birds without MBTA take authorization, the foreseeable killing of birds through the *normal* operation of industrial wind turbines is the sort of "direct, though unintended" take that *is* squarely covered by the MBTA's broad prohibitions. *Seattle Audubon*, 952 F.2d at 303. Indeed, operating huge spinning turbines in habitat known to be occupied by eagles and other migratory birds is the paradigmatic example of an inherently "dangerous condition" for birds migrating through the airspace where the turbines will be erected and hence an activity which *Seattle Audubon* suggests *is* appropriately regulated under the MBTA. *Id.* Accordingly, there is nothing in the Ninth Circuit's precedents that forecloses application of the plain terms of the MBTA here; rather, the Court of Appeals' reasoning, including the other rulings cited with approval by the Court, supports such application.[10]

[10] In *United States v. Citgo Petroleum Corp.*, No. 14-40128, 2015 WL 5201185 (5th Cir. Sept. 4, 2015), the Fifth Circuit recently adopted a much narrower reading of the MBTA's scope than the majority of courts to address this issue (including the Ninth Circuit). However, this out-of-circuit ruling should have no bearing on the Court's disposition of this case for three reasons. First, the Fifth Circuit ruling conflicts with the federal government's *own* position concerning the scope of the MBTA (as the party that brought the *Citgo* enforcement suit), which is presumably why Defendants have *not* argued in this case that direct, albeit incidental take falls outside the scope of the MBTA. Second, the Fifth Circuit ruling addresses the narrow question of whether an oil company could be criminally charged with "'taking" a migratory bird by failing to cover certain oil equipment, and thus did "not present an opportunity to interpret 'kill,'" *id.* at *10 n.10, which is a *distinct* statutory prohibition, *see* 16 U.S.C. § 703(a), that clearly applies to the foreseeable killing of migratory birds through the operation of industrial wind turbines. Third, even insofar as the "take" prohibition is concerned, the Fifth Circuit's ruling adopts an unduly narrow reading of the MBTA's plain language, it seriously undermines the migratory bird protection purposes of the MBTA and the various treaties the statute implements, and it is inconsistent with a close reading of the Ninth Circuit's own MBTA precedents by which this Court is bound. *See supra* at 39-41.

2. Federal Agencies May Be Sued Under The APA For Taking Or Authorizing Actions That Will Violate The MBTA.

As the Supreme Court has explained, the APA "requires federal courts to set aside federal agency action that is 'not in accordance with law,' []—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *NextWave*, 537 U.S. at 300 (emphasis in original). Consequently, as already explained in the BGEPA context, if BIA's authorization of a project on federally administered trust lands that will kill migratory birds in the absence of MBTA take authorization is "not in accordance with" the MBTA, then the APA is clear: BIA's authorization must be "set aside" pending compliance with the MBTA, i.e., procurement of take authorization by either BIA itself or Tule Wind LLC.

Defendants have not disputed that federal agencies *are* subject to the prohibitions of the MBTA, and hence that a federal agency may be sued under the APA for *carrying out an action* that kills birds in violation of the MBTA. Any such argument would contravene the plain terms of the statute. *See, e.g.*, *The Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 885-86 (D.C. Cir. 2000) ("There is no exemption in § 703 for . . . federal agencies . . . . 'No valid reason has been or can be suggested why [the statutory prohibitions] should apply to private persons and not to federal or state officers.'" (quoting *United States v. Arizona*, 295 U.S. 174, 184 (1935))). "Indeed, it would be odd if [federal agencies] were exempt" from the MBTA's prohibitions on killing migratory birds without a permit because, once again, the MBTA implements various treaties, which are "undertakings between nations" and "bind the contracting parties." *Id*. at 887. And it would be especially odd to exempt *BIA* from such compliance with the MBTA, since BIA is an agency within the Department of the Interior, the component of the Executive Branch *most*

responsible for implementing the MBTA and effectuating the underlying treaties. *Id*. at 883.[11]

Accordingly, it is apparent that if BIA *itself* constructed and operated an industrial-scale wind project knowing that the project would foreseeably and directly kill migratory birds in violation of the MBTA, then BIA could be successfully sued under the APA on the grounds that the action would be "not in accordance with law." 5 U.S.C. § 706(2)(A). Consequently, Defendants' argument in their motions for judgment on the pleadings reduces to the proposition, as articulated by Judge Sammartino in *POCF I*, that "Federal agencies are not required to obtain a permit before acting in a *regulatory capacity* to authorize activity" by third parties that will directly and foreseeably kill migratory birds in violation of the MBTA. *POCF I*, 2014 WL 1364453, at *21 (emphasis added). That argument is untenable for several reasons.[12]

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[11] In *Glickman*, the D.C. Circuit was "willing to assume," as the government argued, that "the *criminal* enforcement provision [of the MBTA] could not be used against federal agencies," but the court held that that had nothing to do whether a claim for relief could be brought against an agency under the APA. 217 F.3d at 886 (emphasis added). Indeed, the government's position that federal agencies are immune from criminal enforcement renders the availability of APA relief in appropriate circumstances all the more essential because the APA is the *only* legal mechanism by which agencies may be called to account for MBTA violations.

[12] Defendants have attempted to distinguish *Glickman* on the sole basis that, in that case, the "agency itself [wa]s directly killing migratory birds," whereas in this case BIA, acting in its "regulatory capacity," *authorized* Tule Wind LLC to undertake an action that violates the MBTA. ECF No. 35-1 at 14. However, the notion that the availability of MBTA-based APA claims should turn on whether a federal agency is undertaking an action itself or, rather, *authorizing someone else to undertake the very same action* makes no legal or logical sense. Importantly, Defendants have *not* denied, nor can they, that if BIA were *itself* constructing and operating Tule Wind Phase II, then BIA could be sued under the APA for failing to comply with the MBTA's mechanisms prior to constructing and operating the turbines. But if it would be a violation of the APA for BLM to take migratory birds, as Defendants evidently concede, *see id.* (discussing *Glickman*, 217 F.3d 882), then the legal answer cannot sensibly be any different merely because BIA has instead provided its legal authorization—without which the action could never proceed—to someone else to engage in the very same activity.

First, it overstates Plaintiffs' position, which is simply that BIA must ensure compliance with the MBTA—*either* by obtaining a the legally required take authorization itself *or* by requiring that Tule Wind LLC do so—before authorizing a project on BIA trust lands that will foreseeably kill migratory birds protected by the MBTA in order for its action to be deemed "in accordance with law" and in "observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). That is hardly a revolutionary proposition. Indeed, as discussed extensively above, this Circuit's precedents have consistently established that it is not "in accordance with law" for a federal agency to authorize another party's actions that require federal approval and will violate a federal environmental statute. *See supra* at 25.[13]

Indeed, as these Ninth Circuit precedents demonstrate, federal agencies cannot avoid having their authorizations deemed "not in accordance with law" by blaming the legal violations on third parties (whose actions cannot proceed without federal authorization), especially where, as here, the federal agency *knows* that the regulated third party intends to proceed with federally authorized project construction and operation *without* first obtaining the necessary permit through the exclusive legal mechanism for authorizing take of migratory birds. Defendants cannot avoid this conclusion by disingenuously claiming that Tule Wind LLC—not BIA—remains responsible for complying with all federal laws, including the MBTA, as it constructs and operates the project, ECF No. 35-1 at 14, because BIA inexplicably failed to defer lease approval and project authorization until Tule Wind LLC came into compliance with the MBTA, let alone expressly conditioned federal

[13] Indeed, while finding that habitat modification alone was insufficient to trigger the MBTA's prohibitions, this Ninth Circuit's decision in *Seattle Audubon*—which involved federal authorization of timber cutting by third parties—in no way suggests that an APA claim could not be pursued if there *would* have been an impermissible take. *See* 952 F.2d at 302-03; *see also Sausalito*, 386 F.3d at 1225 (holding that "the Park Service does not need to seek authorization from the Secretary" based solely on the finding that the plaintiff "alleges only that migratory birds and their nests will be disturbed through habitat modification.").

project approval on Tule Wind LLC obtaining take authorization from FWS prior to construction and operation.

The validity of Plaintiffs' legal position is further confirmed by the recent experience of another federal agency in requesting and obtaining an MBTA permit in circumstances that are functionally indistinguishable from those here. In that instance, the National Marine Fisheries Service ("NMFS") sought and obtained from FWS a "special purpose permit" under the MBTA for its *regulatory activities* that result in incidental take of seabirds. 77 Fed. Reg. 50,153, 50,153 (Aug. 20, 2012). NMFS does not itself engage in the fishing activities in U.S. waters that cause migratory bird take but, rather, authorizes third parties to do so; nonetheless, because those federally authorized activities foreseeably result in the killing of some MBTA-protected species, NMFS sought an MBTA permit to come into compliance with federal law *in its regulatory capacity*. *Id.*; *see also* 77 Fed. Reg. 1501, 1502 (Jan. 10. 2012) (explaining that seabirds are killed "when they are unintentionally hooked or entangled in fishing gear" associated with longline fishing). FWS did not refuse to process NMFS's permit request but, rather, granted a permit to the agency with enforceable conditions designed to "result in improved information about sources of take in the fishery and means of reducing take." 77 Fed. Reg. at 50,154. Accordingly, FWS's actions in authorizing an MBTA take permit to NMFS for activities authorized in NMFS's regulatory capacity leave little doubt that federal agency activities, including those authorizing third party conduct, resulting in the direct, foreseeable killing of MBTA-protected species are encompassed within the MBTA statutory scheme and may be subjected to a permitting process under existing FWS regulations. *See also Turtle Island Restoration Network v. U.S. Dep't of Commerce*, No. 12-00594 SOM-RLP, 2013 WL 4511314, at *10-12 (D. Haw.

Aug. 23, 2013) (upholding MBTA permit for incidental take resulting from NMFS's authorization of longline fishing).[14]

In sum, Defendants' blanket assertion that federal agencies are not legally obligated to obtain MBTA take authorization must be rejected because it fails to grapple with applicable circuit precedent and recent regulatory developments such as NMFS's receipt of an MBTA permit in its regulatory capacity, especially where the regulated entity (Tule Wind LLC) has expressed its intent to proceed in violation of the MBTA. At the very least, given the standard of review at the motion for judgment on the pleadings stage, Defendants have fallen far short of *clearly establishing* that there is no set of facts under which BIA might have itself been required to obtain MBTA take authorization before approving the lease at issue, or, alternatively, at least expressly condition its federal lease approval on Tule Wind LLC obtaining MBTA take authorization before commencing project construction and operation to ensure that BIA's action was issued "in accordance with law" and in "observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). Accordingly, because, at minimum, there remains a crucial dispute of material fact, disposition of these claims at the Rule 12(c) stage is inappropriate.

[14] Judge Sammartino's ruling in *POCF I* noted that several "[d]istrict courts within the Ninth Circuit," as well as in other jurisdictions, have declined to adopt the "interpretation of the MBTA proposed by Plaintiffs," *POCF I*, 2014 WL 1364453, at *21—a position also advocated by Defendants in their Rule 12(c) motions. Those district court rulings are either factually inapposite because they do not involve direct, foreseeable killings of the kind at issue here, and/or they reflect the same flaws in legal analysis embodied in the *POCF I* ruling that is now on appeal to the Ninth Circuit. No federal appellate court has yet weighed in on this issue.

B. Defendants' Other Arguments Concerning Plaintiffs' MBTA Claim Also Fail To Support A Rule 12(c) Dismissal.

Although the Court need not reach additional grounds for rejecting Defendants' motions for judgment on the pleadings with respect to Plaintiffs' MBTA claim given Defendants' failure to establish that there is no set of facts that could entitle Plaintiffs to the relief sought and thus that Defendants are entitled to judgment as a matter of law, Plaintiffs nevertheless explain why Defendants' other arguments are also unpersuasive.

1. Where Federal Authorization Or Approval Is A But For Cause Of Inevitable MBTA Violations, A Court Need Not Wait For A Dead Bird Carcass To Find An APA Violation.

As they did with respect to Plaintiffs' BGEPA claim, Defendants contend that even if Plaintiffs could maintain an APA cause of action against BIA under the circumstances, it is premature because the MBTA is not implicated until migratory bird take occurs because, in Defendants' view, the MBTA "does not prohibit actions that merely have the potential to take" migratory birds. ECF No. 35-1 at 13-14. This argument is no more persuasive in the MBTA context than it is in the BGEPA framework.

As explained, according to FWS, this project is certain to kill *many* golden eagles and other migratory birds protected by the MBTA. The threat posed to federally protected bird species by poorly sited industrial wind energy facilities is not a new phenomenon; in 2009—when there were far fewer projects than there are today—FWS "estimated that wind turbines cause[d] as many as 440,000 bird deaths per year." R. Kyle Evans, *Wind Turbines and Migratory Birds: Avoiding a Collision Between the Energy Sector and the Migratory Bird Treaty Act*, 15 N.C.J.L. & Tech. On. 32, 46 &

n.86 (2014). While some project sites pose higher risks than others (with Tule Wind Phase II considered by FWS to be in the highest risk category), modern industrial-scale wind projects are *inherently* hazardous to birds. They involve massive spinning turbines that occupy the same airspace used by migratory birds; the turbines can "attain incredibly high speeds at the blade tips, up to 180 mph, creating added difficulties for migrating birds attempting to navigate through or around" the turbines; and they are "often placed in wind corridors directly in the path of migratory birds." *Id*. at 47. "Raptors are especially susceptible to wind turbine collisions," since their feeding and flight behaviors place them directly in the path of turbines. *Id*. at 49. Consequently, at least "some incidental taking of protected birds is inevitable in the operation of wind energy facilities . . . ." Ogden, *supra*, at 33. Bird kills from turbine collisions have been especially well-documented at projects in California. The "first large-scale wind energy development took place in California," which alone is "estimated to kill . . . 1,766 birds annually, including between 881 and 1330 raptors." Evans, *supra*, at 48 & n.95.

Hence, there is no legitimate dispute that this project will *unavoidably* kill hundreds, if not thousands, of migratory birds during its lifespan—each of which requires specific authorization from FWS before such takes may lawfully occur. Accordingly, in light of the fact that BIA provided federal authorization for this project to proceed in the absence of any pre-construction legal compliance with the MBTA, and with full knowledge that this project *will* kill *many* migratory birds in violation of the MBTA, Defendants have failed to provide a compelling rationale—much less *any* rationale—for why this Court must await the inevitable bird deaths before Plaintiffs may challenge whether BIA's *two-year-old* lease approval was issued "not in accordance with law." 5 U.S.C. § 706(2)(A). There is simply no sound basis for deferring Plaintiffs' MBTA claim until bird carcasses begin piling up below this project's turbines; BIA long ago issued its final decision on this

project which is subject to APA review *now*, and in any event deferring the resolution of this claim would severely undermine FWS's ability to review a request for MBTA take authorization in connection with this project (if Plaintiffs prevail) because project construction and operation would already be a *fait accompli*. In sum, Defendants' approach would turn the APA on its head by allowing BIA to issue a final decision it knows to be in violation of federal law without any opportunity for judicial review of the agency's action until such time as the Court (and FWS) have limited options to remedy the underlying legal violation.

2. That FWS May Exercise Its Prosecutorial Discretion In Enforcing The MBTA Does Not Excuse Federal Agencies From The APA Requirement That Their Decisions Must Be "In Accordance With Law."

Defendants assert that, even if BIA were otherwise liable for MBTA violations when acting in a regulatory capacity, the decision as to whether to obtain a permit under the MBTA is entirely discretionary and thus BIA was under no duty to obtain MTBA take authorization or require Tule Wind LLC to do so even though BIA's authorization will inevitably lead to violations of federal law. *See* ECF No. 35-1 at 16-17. The Tribe repackages this argument by asserting that "[a]llowing 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." ECF No. 34-1 at 17. Defendants' contentions are misplaced.

As explained in the BGEPA context, Defendants' reference to the fact that the decision by a *private* party to seek an MBTA permit is discretionary (subject to criminal and civil enforcement by FWS in the event of a violation) has absolutely *nothing* to do with the question of whether a *federal agency* has issued a decision or other federal authorization that is "not in accordance with law." 5 U.S.C. § 706(2). Whereas Congress has entrusted to FWS enforcement responsibility over matters

involving purely private conduct that adversely affects migratory birds, where a federal agency is involved in licensing, permitting, leasing, or otherwise authorizing conduct that will have adverse effects on bird species (or other legally protected natural resources) Congress has created a mechanism—the APA—for ensuring that *every* federal agency decision is in "accordance with law" before such authorization is granted, and, in turn, Congress has mandated that courts set aside all federal agency authorizations failing to conform to law. *Id.* Thus, irrespective of the purportedly discretionary nature of FWS's MBTA permitting regime that may apply to private parties, federal agencies are held to a standard under the APA that requires that *their* decisions not run afoul of federal law.

In any event, there is nothing in the relevant case law that supports Defendants' counterintuitive assertion that merely requiring BIA to ensure compliance with the permitting mechanisms of the MBTA would somehow interfere with, rather than facilitate, FWS's administration of the MBTA through FWS's exercise of prosecutorial discretion. To be clear, Plaintiffs' right to seek judicial relief *against BIA* under the APA is in no way dependent on, and in no way challenges, any exercise of prosecutorial discretion by FWS, which is not even a party to this case. Indeed, as other courts have held in the context of MBTA-based APA challenges, "because the APA provides a cause of action to challenge unlawful agency actions, whether or not one federal agency has violated a federal law is not an issue left to the prosecutorial discretion of another federal agency." *Pirie*, 191 F. Supp. 2d at 177. Hence, the fact that FWS might prosecute private parties that, in their discretion, opt not to obtain MBTA permits, is totally unrelated to the question before this Court of whether BIA issued federal authorization for a project that is not in accordance with the MBTA when it refused to condition federal lease approval on pre-construction compliance with the MBTA.[15]

[15] Just as Plaintiffs' APA-based challenge to *BIA's* December 2013 ROD and lease approval for its failure to accord with federal law does not in any way interfere with

3. The Narrow APA Relief Sought By Plaintiffs Against A Federal Agency Will Not Open The Floodgates To Litigation.

Setting forth a policy rationale supporting Defendants' position, Tule Wind LLC has trotted out a parade of horribles that it alleges will occur if the Court were to ultimately sustain Plaintiffs' MBTA position on the merits. *See* ECF No. 33 at 14-15. Not only does Tule Wind LLC assert—without any substantiation—that "Plaintiffs' interpretation . . . could shut down the renewable energy industry," *id.* at 14, but also that it "would open almost every facet of American life to enforcement action." *Id.* at 15. These statements are nothing more than groundless hyperbole that can be easily dispensed with.

First, this case addresses the narrow question of whether a *federal agency* may be sued under the APA for authorizing a specific project that the agency knows will result in violations of the MBTA because the kind of activity at issue is inherently hazardous to birds. Obviously, a *private* party who owns a house or other building where "window strikes" occur, *see* ECF 33 at 14, cannot be sued under the federal APA and, because there is also no citizen suit provision in the MBTA, there is no way to bring suit against the vast majority of sources of bird mortality. Accordingly, just as the D.C. Circuit's ruling in *Glickman* more than a decade ago has not opened the floodgates to MBTA litigation in federal courts, nor would the limited ruling Plaintiffs seek here.

FWS's implementation and enforcement of the MBTA, *see Pirie*, 191 F. Supp. 2d at 177, neither does Plaintiffs' challenge interfere with BIA's approval of leases on tribal lands, as the Tribe asserts. *See* ECF No. 34-1 at 18-19. Contrary to the Tribe's suggestion, Plaintiffs' claims do not inappropriately graft onto BIA's lease approval decisions *new* legal requirements; rather, as is the case with *any* federal lease approval or other decision subject to the APA, BIA's decision in this case must be set aside if it is not in accordance with federal law—"which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *NextWave*, 537 U.S. at 300 (emphasis in original).

Second, federal courts in the criminal law context have been persuaded *by the federal government* to reject the slippery slope argument on the grounds that MBTA liability for incidental take is confined to relatively limited situations—like this one—in which it is foreseeable that the *specific* activity in question will cause migratory bird deaths. Hence, although office buildings or other activities may *cumulatively* cause many bird deaths, that is *not* the test that has been invoked by courts in applying the MBTA. Rather, as one court reasoned in sustaining the government's position that applying the MBTA to an inherently hazardous activity would not open the courthouse door to every action that might incidentally kill a migratory bird, "[b]ecause the death of a protected bird is generally not a probable consequence of driving an automobile, piloting an airplane, *maintaining an office building*, or living in a residential dwelling with a picture window, such activities would not normally result in liability" under the MBTA. *Moon Lake Elec. Ass'n*, 45 F. Supp. 2d at 1085 (emphasis added); *see also Corbin Farm Serv.*, 444 F. Supp. at 535 (explaining that a "hypothetical car driver . . . does not stand in the same position as the defendants here," who could foresee that the application of pesticides to a field used by migratory birds would kill birds). By the same token, because Plaintiffs' APA claim is predicated on BIA's authorization of an activity that *does* incur MBTA liability because killing a migratory bird is not only a probable, but an unavoidable, consequence of operating an industrial wind turbine project, the situation here is easily distinguishable from those posited by Tule Wind LLC for the very reasons that the federal government itself has (successfully) stressed in the criminal law context.

Finally, given that renewable energy companies and their investors presumably recognize the inherent legal and economic risks of constructing and operating wind energy projects in essential habitat for eagles and other migratory birds—especially in light of the recent FWS prosecutions of at least two major wind energy facilities under the MBTA, *see supra* at 38-39—it is particularly peculiar

that Tule Wind LLC would assert that suits such as this one *against a federal agency for adherence with the APA* "could shut down the renewable energy industry." ECF 33 at 14. If anything, the opposite is true—i.e., by ensuring that federal agency decisions concerning renewable energy development on public lands are "in accordance with law" *before* such projects are built, federal regulators can help steer project developers through the appropriate legal mechanisms so that developers may obtain the necessary permits, and thus, immunity from MBTA prosecution by FWS. Accordingly, there is no legal or logical basis for rejecting Plaintiffs' MBTA claim on the policy-based grounds that it could have untoward effects on the wind energy industry in particular or countless everyday activities in general.

For all of these reasons, Defendants have failed to carry their substantial burden to clearly establish that they are entitled to judgment as a matter of law with respect to Plaintiffs' MBTA claim.

III. DEFENDANTS HAVE FAILED TO CLEARLY ESTABLISH THAT THEY ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW WITH RESPECT TO PLAINTIFFS' POST-ROD SUPPLEMENTAL NEPA CLAIM.

Defendants also request that the Court dismiss one of Plaintiffs' four NEPA claims—i.e., Plaintiffs' claim challenging BIA's failure very soon after issuing its December 2013 ROD to prepare supplemental NEPA review (or its failure even to determine *whether* it must prepare supplemental NEPA review under the circumstances) when BIA indisputably received extensive new information from Plaintiffs memorializing the positions of FWS and CDFG concerning the extremely high mortality risk posed by Tule Wind Phase II to golden eagles and other migratory birds and those agencies' expert views that BIA should evaluate macrositing, micrositing, and other alternatives before granting federal lease approval, and in any event BIA should consider those alternatives before project

construction and operation commences. ECF No. 1 ¶ 61. Defendants assert as a blanket matter that there can be no ongoing duty to supplement NEPA review after federal lease approval has been provided because there is no longer any "major Federal action" remaining to which NEPA duties may attach. *See* ECF 35-1 at 17-20; ECF 33 at 6-7; ECF 34-1 at 7-9. Defendants' generalized contention fails to hold water under the specific facts of this case.[16]

A. BIA Received Information Constituting Significant New Circumstances Or Information Relevant To Environmental Concerns And Bearing On The Action Or Its Impacts.

Under the applicable NEPA regulation, a federal agency "shall prepare supplements" to a pre-existing EIS or EA if the agency discovers "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" that the agency has not previously analyzed in a formal NEPA document. 40 C.F.R. § 1502.9(c)(1)(ii). In evaluating the "significance" of new information under NEPA in order to determine whether to prepare supplemental NEPA review, agencies must consider factors such as whether the new information indicates that the action will result in adverse impacts to the natural environment, effects to cultural resources (such as golden eagles), controversy over the effects of the action, and whether the action is likely to violate Federal laws such as BGEPA and the MBTA. *See* 40 C.F.R. § 1508.27(b).

Here, it is unassailable that the new information concerning Tule Wind Phase II provided by Plaintiffs to BIA approximately one month after the agency issued its ROD—via Plaintiffs' detailed January 29, 2014 letter along with fifty exhibits

[16] To be clear, even if Defendants were correct that there are no set of facts under which Plaintiffs could state a claim for relief related to post-ROD supplemental NEPA review—which they are not—this case would nevertheless proceed to the merits because Defendants have not (and cannot) move for judgment on the pleadings with respect to Plaintiffs' three other NEPA claims. *See* ECF No. 1 ¶¶ 59-62; *see also supra* at 19-21.

obtained directly from FWS and CDFG through public records requests—constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" as contemplated by NEPA, especially given that many of the "significance" factors under 40 C.F.R. § 1508.27(b) are implicated by these documents. Most of the materials submitted to BIA post-dated BLM's 2011 Final EIS for Tule Wind Phase I, meaning that they have *never* been considered or analyzed in *any* formal NEPA document prepared by *any* agency (BIA, BLM, or otherwise). For example, among other materials, Plaintiffs provided the following information to BIA in that January 29, 2014 submission (and hereby attach these materials as exhibits for the Court's convenience):

- Plaintiffs' 35-page, single-spaced letter quoting extensively from and summarizing the fifty exhibits from FWS and CDFG suggesting legal violations under NEPA, BGEPA, and the MBTA and highlighting those agencies' expert views that this project presents a high risk to golden eagles and other migratory birds (Exhibit B);

- Internal correspondence by FWS officials in February 2012 noting "the lack of coordination with BIA on addressing eagle concerns" for the Tule Wind Phase II ridgeline turbines; stating that "[i]t is hard to say whether our concerns will be completely side-stepped by BIA or not"; and explaining that "[i]t is clear to us that [Tule Wind LLC], BIA, or the Tribe, should seek an Eagle take permit, if the project is built" (Exhibit C);

- Internal correspondence by an FWS eagle biologist in March 2012 raising serious concerns with the Tule Wind Phase II Draft ABPP, which he found "to be lacking key information necessary for a complete review of the project design, project direct, indirect, and cumulative impacts to [golden eagles] and detailed information and calculations leading to full disclosure of modeling risk to eagles"; concluding that "[a]fter examining the limited data provided in the ABPP, and the inferences drawn from those data, the ABPP lacked or did not present robust data which would lead the average reader to arrive at the conclusions that the project would induce low mortality rate and that the project had no earlier fatal flaws identified"; admonishing the fact that "the project proponent has none or minimal data

on eagle occurrence during non-breeding season, including migration"; criticizing that "the project proponent presents few data to analyze the impact of the project to other birds, including passerines and raptors"; and finding "[t]he project proponent fails to evaluate potential projected rates of mortality which may be incurred by the proposed project on other avifauna, and advanced conservation practices and/or adaptive management which may be imposed to lessen the take of migratory birds" (Exhibit D);

- Internal correspondence between FWS officials in April 2012 raising various concerns over the methodology used by BIA and Tule Wind LLC to calculate eagle mortality risk and indicating that "[a] primary issue is whether this project, as proposed, can meet the no net loss conservation standard of the [BGEPA] permitting regulations, due to the fact it is fairly close to a nest site," meaning that this project might not ever satisfy the BGEPA permit issuance criteria due to the extremely high risk it poses to golden eagles (Exhibit E);

- FWS's formal memorandum in May 2012 explaining to BIA that "we found the ABPP lacking in key information necessary for a complete review of the project design; direct, indirect, and cumulative impacts to golden eagles; and detailed information and calculations leading to full disclosure of modeling risk to eagles"; opining that "[b]ased on what is presented and our knowledge of golden eagles in the area, we believe ***the Phase II project represents a high risk for golden eagle mortality and 'disturbance'*** based on the known number of golden eagle territories within a 10-mile radius of the project site, the proximity of the active Cane Brake nest site to proposed turbine locations, and the topographic location of at least two of the turbines"; noting that "even if the most restrictive strategy in the ABPP . . . can be implemented, *it remains unclear whether the risk of mortality and disturbance to breeding and nonbreeding golden eagles can be reduced to a level consistent with the goal of maintaining stable or increasing breeding populations*"; finding that "[u]nder these circumstances, the additional take associated with Phase II of the project does not appear 'unavoidable' or consistent with the implementation guidance established for issuing eagle take permits"; and concluding that *"[w]e are concerned that Phase II of the Tule Wind project alone could meet or exceed regional take thresholds . . . .* [c]onsistent with the implementation guidance for eagle take permits, we recommend that Tule Wind, LLC . . . and the Bureau of Indian Affairs be informed of this concern and ***the likelihood that we may not be able to issue an eagle take permit for Phase II of this project***" (Exhibit F);

- FWS's formal memorandum in June 2012 determining that "construction and operation of Phase II of the Tule Wind facility ***has a high potential to result in injury or mortality of golden eagles*** **and the** ***loss of golden eagle breeding territories***"; explaining that "[t]he conditions outlined in the Draft ABPP as presented *would not likely meet the conservation standard of the Bald and Golden Eagle Protection Act*" for permit issuance; "recommend[ing] the Bureau of Indian Affairs and the project proponent *consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take*"—i.e., micrositing or macrositing alternatives; and concluding that there is "great potential to cause the loss of a territory and would likely cause ongoing mortality of breeding eagles and their offspring" and further that "[t]he options proposed in the draft ABPP to curtail up to 4 turbines near this nest site, *would not alleviate the potential loss of this territory*" because the "curtailment options presented do not span enough of the golden eagle breeding season and fledgling period to avoid loss of the Cane Brake nest territory" (Exhibit G);

- Internal correspondence between FWS officials in October 2012 stating that FWS "and the BIA are still at odds regarding certain issues in the ABPP, especially the risk level to golden eagles from the project as currently proposed"; explaining that "there is no disagreement between our agencies that the potential exists for eagle mortality under the proposed project alternative, and it is clear from the BIA's response below that they are not requiring or recommending the project proponent to pursue design or siting changes to avoid or reduce that risk"; and concluding that "because no project design or siting changes have been incorporated into the revised ABPP and we believe the concentration of eagles in this area warrants a very conservative approach by [FWS] in its review and potential support of an ABPP at this specific ridgeline location," and further that "we believe that [FWS's] June 22, 2012, position that the ABPP for the proposed project would not likely meet the conservation standards of BGEPA remains valid" (Exhibit H);

- FWS's formal memorandum in October 2012 stressing that it "has determined that construction and operation of the Tule Reduced Ridgeline Wind Project has a ***high potential to result in injury or mortality of golden eagles, and the loss of golden eagle breeding territories***"; emphasizing that ***"[w]e do not concur with the analysis presented in the ABPP or with the calculated estimates***"; clarifying that ***"[w]e are concerned that the proposed turbine operations have a high potential for***

ongoing take of eagles and the loss of a productive golden eagle breeding territory, based on the proximity to an occupied eagle territory"; opining that "there is a the potential for this territory to become an ecological trap by attracting eagles into a desirable nest site that possess high risk for both breeding eagles and any young they produce"; stating FWS's "disagree[ment] with the BIA's assertion that the August 17, 2012 version of the ABPP sufficiently addressed our concerns" because "[a] comparison of documents revealed minimal changes were made"; concluding that "[t]he conditions outlined in the ABPP, as presented, would not likely meet the conservation standard of the Bald and Golden Eagle Protection Act," urging "the BIA, the Ewiiaapaayp Band of Kumeyaay Indians, and the project proponent [to] consider a different turbine siting design or moving the project to another location to minimize and avoid eagle take"—i.e., micrositing or macrositing changes to reduce eagle mortality risk; and clarifying that "[i]n the event that BIA decides to move forward with approving this project, ***we recommend BIA condition[] the lease on this project to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act, prior to project construction***" (Exhibit I);

- CDFG's October 2012 formal memorandum raising concerns about the project's effects on golden eagles "[d]ue to [its] proximity to the nest site, the relative nest density, overall productivity of the Cane Brake nests, and the overlap of the estimated home range with the Reduced Ridgeline Project"; "recommend[ing] the BIA remove turbines H-1 and H-2 as part of the Reduced Ridgeline Project"; and noting that "[t]he PSABPP is narrowly focused on golden eagle" which CDFG viewed as problematic because "[i]n addition to golden eagle other avian . . . species could be affected by the project" (Exhibit J).

Accordingly, in light of the highly pertinent information BIA received in January 2014 bearing on the extremely serious risk that Tule Wind Phase II poses to golden eagles and other migratory birds—i.e., post-2011 information from the federal and state expert wildlife agencies that has *never* been subjected to NEPA review by BIA or any other federal agency—Defendants cannot legitimately deny (nor have they even attempted to deny) that these materials necessarily constitute significant new circumstances or information relevant to environmental concerns that bear directly on the environmental impacts that will result from the

BIA-authorized Tule Wind Phase II wind energy facility, as contemplated by NEPA's regulations at 40 C.F.R. § 1502.9(c)(1)(ii).

B. That BIA Approved The Lease In December 2013 Does Not Mean That There Are No Facts Under Which BIA Could Be Found Obligated To Prepare Supplemental NEPA Review.

Recognizing that there is no basis upon which they can plausibly dispute that the post-2011 materials provided to BIA very soon after the agency authorized Tule Wind Phase II constitute significant new information relevant to the project's environmental impacts, Defendants have instead adopted the much narrower argument that, as a matter of law, once BIA issued its December 2013 lease approval and ROD there are no set of circumstances under which BIA could be obligated to supplement prior NEPA review because there is no longer any remaining major Federal action for purposes of NEPA. *See* ECF No. 35-1 at 17-20; ECF 33 at 6-7; ECF 34-1 at 7-9. Defendants' position cannot withstand close scrutiny.

In their cursory recitations of the applicable legal standard governing supplemental NEPA review, Defendants primarily cite to two Supreme Court decisions that are actually helpful to *Plaintiffs'* position in this case. In *Marsh v. Oregon Natural Resources Council*, the Court reviewed a supplemental EIS claim in the context of new information received by the U.S. Army Corps of Engineers in connection with a Corps-authorized dam project when construction of the dam had been one-third completed. 490 U.S. 360, 367 (1989). Although, as Defendants note, the Court generally explained that there must "remain 'major Federal action' to occur" in order to trigger the supplemental NEPA review obligation, *id.* at 374 (quoting 42 U.S.C. § 4332(2)(C)), the Court clarified that "[i]t would be incongruous with this approach to environmental protection, and with [NEPA's] manifest concern with preventing uninformed action, for the blinders to adverse

environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Id.* at 371. In turn, relying on the fact that construction of the federally approved dam had not yet been completed, the Court concluded that "[t]here is little doubt that if all of the information" received by the Corps "was both new and accurate, the Corps would have been required to prepare a second supplemental EIS." *Id.* at 385. The only reason the Court found that supplemental NEPA review was not required in *Marsh* was because the Corps—unlike BIA in this case—had formally evaluated the new information and properly determined that it did not rise to the level of "significance" under NEPA. *Id.*

In *Norton v. Southern Utah Wilderness Alliance*, the Court reviewed a challenge to BLM's alleged failure to supplement its prior NEPA review when BLM obtained new information in connection with the agency's programmatic land use plan outlining that agency's objectives in a particular geographic area for the next twenty years. 542 U.S. 55, 72-73 (2004). The Court explained that supplemental NEPA review would have been triggered by significant new information in *Marsh* because "[t]he dam construction project that gave rise to environmental review *was not yet completed*," *id.* at 73 (emphasis added), but contrasted the programmatic land use plan before the Court because BLM's approval of a programmatic land use plan is "completed when the plan is approved" and any future site-specific decisions made pursuant to that land use plan to authorize any specific activities will be subject to their own *separate* NEPA review processes. *Id.* Hence, the central holding of *Marsh* and *Norton* is that supplemental NEPA obligations attach to federally authorized *site-specific* (rather than programmatic) projects that have not yet completed project construction.

This instruction from the Supreme Court is only bolstered by lower court decisions interpreting those rulings. For example, in a post-*Norton* case concerning a Forest Service timber sale contract authorizing a third party to cut trees in a

national forest, a district court within the Ninth Circuit found that these types of site-specific contracts, leases, and authorizations—where the activity had yet to be carried out—constituted ongoing "major Federal action" for purposes of supplemental NEPA review despite the fact that the Forest Service had already issued the contracts at issue. *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 939-40 (N.D. Cal. 2006). In reaching that conclusion, the court engaged in "a close reading of" *Marsh*, *Norton*, and circuit precedent, and ultimately found "that the timber projects are akin to the site-specific dam construction project at issue in *Marsh* rather than a programmatic-level land use plan at issue in *SUWA*." *Id.* at 939. That same analysis applies to the BIA lease approval and ROD in this case for the following reasons.[17]

First, there is no doubt that BIA's federal lease approval and ROD in connection with Tule Wind Phase II is a site-specific project authorization, rather than a programmatic decision. This distinction is crucial because, unlike the situation before the Supreme Court in *Norton* where a programmatic plan had been issued as a final matter but no environmentally damaging actions could be authorized and implemented without further site-specific decisionmaking processes subject to full NEPA review, it is unassailable that BIA will *not* be subjecting Tule Wind Phase II to any additional NEPA review at subsequent stages, therefore reinforcing the critical importance of BIA bringing to bear all relevant significant information *before* this federally approved project commences construction and operation. Thus, as was the case in *Bosworth*, this Court should conclude that BIA's federal authorization of Tule Wind Phase II is "akin to the site-specific dam

[17] Federal Defendants also cite to the Ninth Circuit's decision in *Cold Mountain v. Garber*, 375 F.3d 884, 893–94 (9th Cir. 2004) and subsequent cases relying on it. *See* ECF No. 35-1 at 18-19. However, as the more recent decision in *Bosworth* explains, the facts of *Cold Mountain* are distinguishable from many site-specific project decisions where the action—construction or otherwise—has not yet commenced (much less been completed). *Bosworth*, 465 F. Supp. 2d at 939.

construction project at issue in *Marsh*" and the timber sale contracts at issue in *Bosworth*. 465 F. Supp. 2d at 939.

Second, consistent with the dam project in *Marsh* and the logging projects in *Bosworth*, the federally authorized "action" for NEPA purposes in this case—the BIA-authorized Tule Wind Phase II wind energy facility—has not yet completed construction. Indeed, the Supreme Court found that the supplemental NEPA obligation attached in *Marsh* despite the fact that dam construction was approximately one-third completed; here, it is undisputed that Tule Wind LLC has not even *begun* project construction and that there remain various impacts and alternatives that BIA could still consider and analyze through supplemental NEPA review if BIA were to suspend, revoke, amend, or otherwise modify its lease approval *before* Tule Wind LLC completes project construction. *See* ECF 35-1 at 19 n.8 (conceding that BIA has the authority to amend the lease, especially if the lease were initially approved in violation of federal laws such as BGEPA, the MBTA, or NEPA as Plaintiffs contend). Thus, the core purposes of NEPA would undoubtedly be served by requiring supplemental NEPA analysis here.[18]

Third, the facts of this case are even more compelling for requiring supplemental NEPA review than those presented in *Marsh* and *Bosworth*. In those cases, the plaintiffs did not challenge the adequacy of the agency's NEPA review when it issued the initial decision but *only* whether that initially adequate NEPA review required supplementation at a later date due to the emergence of new

[18] In *Bosworth*, the court also looked to several other factors related to the timber sale contracts themselves in determining that supplemental NEPA review obligations attached to those activities. 465 F. Supp. 2d at 939. Given that the parties in this case are at the Rule 12(c) stage without the benefit of a full administrative record, it would be premature to dismiss this claim without providing Plaintiffs at least an opportunity upon reviewing documents within the whole record (e.g., any lease agreements or other stipulations between the Tribe and Tule Wind LLC, BIA and Tule Wind LLC, and/or BIA and the Tribe) to argue why the specific facts underlying this particular case compel the conclusion that there exists a major Federal action for purposes of supplemental NEPA review.

information and circumstances relevant to the project's environmental impacts. Here, in addition to their supplemental NEPA claim predicated on the extensive submission Plaintiffs provided to BIA in January 2014 immediately after BIA issued its lease approval and ROD, Plaintiffs' are *also* challenging BIA's complete failure to conduct *any* independent NEPA review in connection with the December 2013 ROD as well as BIA's reliance instead on BLM's 2011 Final EIS concerning Tule Wind Phase I.

Given that FWS and CDFG repeatedly put BIA on notice that its federal authorization of Tule Wind Phase II was virtually certain to pose grave risks to golden eagles and other migratory birds—viewpoints that have only been underscored to BIA through the submission provided by Plaintiffs in January 2014—Plaintiffs, FWS, and other members of the public reasonably believed that BIA would, in response to comments from Plaintiffs and others calling for formal NEPA review of pertinent issues, conduct some independent NEPA review subject to notice and public comment *before* approving the lease and issuing its ROD for Tule Wind Phase II. *See* ECF No. 1 ¶ 43. When BIA refused to do so, and instead rushed ahead with its December 2013 lease approval and ROD issuance without ever subjecting any formal NEPA document concerning Tule Wind Phase II to public scrutiny, Plaintiffs had no choice but to obtain all pertinent project-related information from FWS and CDFG through open records requests—rather than BIA providing those documents through the NEPA process Congress created for public review of such materials—resulting in the very short lag time of approximately one month between BIA's lease approval and Plaintiffs' submission to BIA requesting supplemental NEPA review of the project prior to construction. *See* 40 C.F.R. § 1500.1(b) (requiring agencies, pursuant to NEPA, to make all pertinent information "available to public officials and citizens *before decisions are made and before actions are taken*" because "public scrutiny [is] essential to implementing NEPA." (emphasis added)).

Hence, under these unique circumstances, where Plaintiffs have made extensive factual allegations in their Complaint establishing that BIA purposefully (and unlawfully) truncated its decisionmaking process which had the inevitable effect of preventing interested members of the public from exercising their rights under NEPA to submit and review pertinent information concerning the impacts of this high risk project *before* BIA provided federal authorization for its construction and operation, it would be highly prejudicial and legally erroneous for the Court to dismiss Plaintiffs' supplemental NEPA claim at the Rule 12(c) stage because it would encourage agencies to engage in hurried decisionmaking in the absence of public scrutiny under NEPA in order avoid the attachment of supplemental NEPA obligations on the basis of no remaining major Federal action. Agency shell games of this sort cannot and should not be condoned. *See, e.g., Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.").

For all of these reasons, Defendants have failed to clearly establish that there is no set of facts under which the BIA-authorized action before the Court could trigger supplemental NEPA review obligations under 40 C.F.R. § 1502.9(c)(1)(ii).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motions for judgments on the pleadings.

DATED: October 21, 2015

Respectfully submitted,

By: /s/ *William S. Eubanks II*
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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.

Respectfully submitted,

/s/ William S. Eubanks II