Bradley Bledsoe Downes (CA SBN: 176291)
BLEDSOE DOWNES, PC
4809 East Thistle Landing Drive
Suite 100
Phoenix, AZ 85044
T: 480.346.4216
F: 480.346.4217
bdownes@bdrlaw.com

Attorney for Defendant-in-Intervention
EWIIAAPAAYP BAND OF KUMEYAAY INDIANS

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants, and

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,

Defendant-in-Intervention.

CASE NO. 14CV2261JLS (JMA)

DEFENDANT-IN-INTERVENTION EWIIAAPAAYP BAND OF KUMEYAAY INDIANS' REPLY TO PLAINTIFFS' OPPOSITION

Date: December 17, 2015
Time: 1:30 p.m.
Place: Courtroom 4A
Judge: Hon. Janis L. Sammartino

I. INTRODUCTION

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

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

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

Because the United States holds the land subject to the Lease in trust for the benefit of the Tribe, approval of the Lease had to be sought from the Secretary of the Interior under 25 USC § 415(a).

II. ARGUMENT

1. Plaintiffs' Claim for Supplemental Environmental Review Under

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

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

NEPA is not Supported by the Facts of this Matter or Plaintiffs' Cited Decisions

Plaintiffs claim that the BIA failed to supplement its environmental review after the BIA adopted the Record of Decision approving the Lease. A claim under the "unlawfully withheld" provision of 5 USC § 706(1) can proceed only if Plaintiffs can demonstrate that the "agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Plaintiffs claim that because construction of the Project by a third party has not commenced, there is still an on-going major federal action by the BIA that triggers the requirement to supplement the environmental review.

The Tribe is not aware of any existing authority to impose the purported obligation on the BIA. The pertinent regulation requires the BIA to supplement an EIS only where the agency plans on making "substantial changes [to] the proposed action that are relevant to environmental concerns" or where " there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR § 1502.9(c)(1)(i)-(ii).

There is no underlying or on-going "proposed action" in this case to trigger an obligation to supplement the environmental review after Lease approval. All future Project decisions will be made by the Tribe and Tule Wind pursuant the EIS-supported ROD evidencing the Lease approval.[3] The BIA has not proposed to amend the Lease approval, i.e., the federal action at issue, in any manner, let alone such a manner as to constitute a major federal action. Further, the Complaint contains no allegation that the BIA has taken any such action.

[3] To the extent that Plaintiffs contend the EIS or other environmental review was insufficient, improper, or otherwise not in accordance with the law, such a claim would presumably be the subject of Plaintiffs APA 706(2) claim(s).

Much the same as the *Norton v. Southern Utah Wilderness Alliance* case, approval of the Lease was a major federal action that was completed upon Lease approval, i.e., issuance of the ROD. Even though there will be implementation decisions made by the Tribe and Tule Wind, those decisions to implement the terms of the Lease and pursue the Project are not on-going major federal action. In fact, they are not federal action at all because neither the Tribe nor Tule Wind are agents of the federal government. Once the Lease approval occurred, the proposed federal action came to an end.

Plaintiffs cite *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) and *Sierra Club v. Bosworth*, 465 F.Supp.2d 931 (N.D. Cal 2006) for the proposition that the BIA was required to supplement the Final EIS after Lease approval. Both cases are inapposite to the facts at bar in large part because the BIA does not have a continuing role in the Project.

In *Marsh*, the Army Corps of Engineers ("ACOE") proposed a three-dam project designed to control the water supply in Oregon's Rogue River Basin. The ACOE proposed the construction of three large dams: the Lost Creek Dam on the Rogue River, the Applegate Dam on the Applegate River, and the Elk Creek Dam. The ACOE completed federal environmental review (an EIS) for the Elk Creek project in 1971, and, in 1980, released its final Environmental Impact Statement, Supplement No. 1 ("FEISS"). The Lost Creek Dam was completed in 1977, and the Applegate Dam was completed in 1981. After reviewing the FEISS, the ACOE's Division Engineer decided to proceed with the Elk Creek Dam and, in 1985, Congress appropriated funds for construction of the dam, which was one-third completed when the opponents filed their challenge regarding, among other things, failure to supplement the environmental review. *See Marsh*, at 363-365.

In *Marsh*, the ACOE was directly undertaking the construction and operation of the dam project at issue. *Id.* ACOE retained decision making authority over the construction of the dam and its operation. *Id.* Finally, the project

at issue conceptually started in 1961 and the third dam over which the Marsh case proceeded was commenced in or around 1985. *Id*.

In *Bosworth*, the opponents filed litigation against the United States Forest Service ("USFS") and other individuals challenging the validity of the programmatic environmental management plan conducted by the USFS pursuant to a presidential proclamation creating the Giant Sequoia National Monument. Specifically, four timber sales were at issue in that litigation. Important to the *Bosworth* decision is the fact that the USFS maintained on-going oversight or involvement in the administration of the timber sales, including, among others: authority to terminate or cancel the timber sale contracts based upon changed circumstances; and a duty to review and approve an operating plan for each of the timber sales (which operating plan approval is considered a major federal action).

Plaintiffs failed to allege any facts to support an argument that dam construction by the ACOE or timber sales administered and approved by the USFS are akin to the BIA's Lease approval here where there is no on-going BIA major federal action.

Rather, BIA's Lease approval is more akin to the situation in *Norton v. Southern Utah Wilderness Alliance* and the situation in *Cold Mountain v. Garber,* 375 F.3d 884 (9th Cir.2004) (USFS issuance of a permit to operate a bison capture facility in Montana). In *Cold Mountain*, the Ninth Circuit concluded that because the USFS did not have a continuing role after it issued a bison herding permit and that the USFS was not required to supplement its NEPA review. "We conclude, however, that there is no ongoing "major Federal action" requiring supplementation. *See* 42 U.S.C. § 4332(2)(C). Because the Permit has been approved and issued, the Forest Service's obligation under NEPA has been fulfilled. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004); *Marsh*, 490 U.S. at 374, 109 S.Ct. 1851." *Cold Mountain v. Garber*, 375 F.3d 884, 894 (9th Cir.2004).

None of Plaintiffs' cited cases present analogous facts to the BIA's Lease approval. Plaintiffs' cited cases concern supplementation of an EIS for specific projects that required significant implementation by the affected agency, i.e., were on-going major federal actions. Here, BIA approved the Lease in accordance with 25 USC § 415(a). Upon approval of the Lease the BIA's role ended as there is no on-going major federal action by the BIA. *See also, Hammond v. Norton*, 370 F.Supp.2d 226, 255 (D.D.C. 2005) ("[I]f the actions remaining … are 'purely ministerial,' … then … no [supplemental EIS] must be prepared."). Therefore, Plaintiffs' argument that post Lease approval supplementation is required is misplaced and should be rejected.

2. Plaintiffs Fail To Demonstrate Any Actual Or Direct Taking By The Bia That Would Trigger The Application Of The MBTA OR Eagle Act.[4]

Plaintiffs assert that when federal agencies undertake a project that might result in migratory bird or eagle mortalities without first obtaining a permit, such agency actions are unlawful. To make their point, Plaintiffs cite a vacated decision - *Ctr. for Biological Diversity v. Pirie*, 191 F.Supp.2d 161, 174-175 (D.D.C. 2002) (challenge to direct military bombing exercises that killed migratory birds), *vacated, Ctr. for Biological Diversity v. England*, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (vacated as moot as a result of legislative amendment of MBTA). Plaintiffs' argument fails upon a cursory examination. Plaintiffs' cited cases involve federal programs that have as their purpose or directly cause the taking or killing of migratory birds. *See e.g., Ctr. for Biological Diversity v. Pirie*, 191 F.Supp.2d 161, 174-175 (D.D.C. 2002), *vacated, Ctr. for Biological Diversity v. England*, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

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[4] The MBTA and Eagle Act arguments are combined for ease or review as they would otherwise be nearly identical and, therefore, repetitive.

Plaintiffs struggle to manufacture direct BIA action in this matter akin to military bombing that takes or kills migratory birds or golden eagles. The BIA's approval of the Lease is nothing like direct military bombing. There is no direct causal connection between the BIA's approval of the Lease and the taking or killing of migratory birds or golden eagles. The BIA's approval of the Lease is not the proximate cause of any purported future taking of migratory birds or golden eagles. As alleged in Plaintiffs' Complaint, Tule Wind's construction has not commenced and operation is not planned pending the completion of the US Fish and Wildlife Service's regulatory permitting activity. *See Complaint*, ¶¶ 51:21-22; and 58.

The relationship between the BIA's Lease approval and any potential harm to migratory birds or golden eagles is too attenuated to support any requirement that the BIA obtain a permit under the MBTA or the Eagle Act prior to Lease approval. The BIA simply exercised its trust responsibility to the Tribe when it approved the Lease in accordance with federal law. The BIA will not construct or operate the Project when it is completed. Tule Wind and the Tribe are not agents of the BIA and the BIA does not exercise regulatory authority over the Project. *See e.g., United States v. Algoma Lumber Co*., 305 U.S. 415, 419-422; 59 S.Ct. 267, 83 L.ED. 260 (1939); and *McNabb v. United States*, 54 Fed.Cl. 759, 760 (2002).

Given the attenuated relationship between the BIA's Lease approval and any potential harm to migratory birds or golden eagles, BIA was simply not required to obtain a permit under the MBTA or the Eagle Act prior to Lease approval. The BIA merely acted pursuant to its authority under 25 USC § 415(a) to approve the Lease. The MBTA and Eagle Act permit requirements and enforcement thereof are matters for the US Fish and Wildlife Service to address pursuant to its independent regulatory authority and are not pre-conditions to Lease approval.

Plaintiffs cite *FCC v. NextWave Pers. Communications* for the proposition that an agency must comply with all laws prior to taking final agency action. *NextWave* is the linchpin of Plaintiffs' argument that the BIA must seek a permit(s) pursuant to the MBTA and Eagle Act, but Plaintiff's overbroad argument is not supported by that decision.

In *FCC v. NextWave Pers. Communications*, a Chapter 11 debtor filed a petition with the Federal Communications Commission seeking reconsideration of the FCC's decision to cancel the debtor's FCC-issued license for failure to pay the purchase price installment payments. The FCC's action violated the Section 525(a) of the Bankruptcy Code which expressly prohibits a governmental unit from revoking government issued licenses due to a debtor's failure to pay a debt dischargeable in bankruptcy. In that matter, NextWave challenged the FCC's action under the APA as not being in accordance with law. The FCC's action was in violation of the prohibitions of the Bankruptcy Code, which was applicable to the FCC's decisionmaking solely because the licensee was a debtor in bankruptcy when the FCC asserted that the licenses were cancelled due to non-payment.

Plaintiffs exaggerate the impact of their quoted language and their argument leads to absurd results. Will the BIA be required to ensure that Tule Wind complies with "any laws", e.g., pays its taxes, complies with banking requirements, complies with all corporate formalities, complies with all employment requirements, etc., prior to Lease approval? All such requirements fall within the "any law" rubric and would result in no permit or approval ever being issued by any agency. Surely that is not the intent of the APA.

Plaintiffs' citation to *Anderson v. Evans* suffers a similar fate as the Marine Mammal Protection Act ("MMPA") expressly prohibited the issuance of a whaling permit by the federal National Oceanic and Atmospheric Administration absent compliance with the MMPA, which was not satisfied. *Anderson v. Evans*, 371 F.3d, 475, 501 (9th Cir. 2002).

Likewise, *Wilderness Society v. US Fish & Wildlife Svc.*, 353 F.3d 1051 (9th Cir. 2003) fails to support Plaintiffs' position because the Wilderness Act expressly prohibited the Fish and Wildlife Service from approving a commercial enterprise to operate within the designated wilderness area. FWS' approval of a commercial enterprise's operation within the area violated an express prohibition and was overturned as not in accordance with law.

Similarly, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt*., 698 F.3d 1101 (9th Cir. 2012) fails to support Plaintiffs' position as that case addressed unenforceability of conservation measures under the Endangered Species Act. Here, the MBTA and Eagle Act remain enforceable by the FWS against those that engage in take of subject birds or golden eagles in violation of those laws.

On their face, neither the MBTA nor the Eagle Act extend to agency action that only potentially and indirectly could result in the taking of migratory birds or golden eagles. Rather, the text of the MBTA and the Eagle Act simply makes it unlawful to take migratory birds and golden eagles, respectively. There is no mention of which entities must obtain the permit(s) and there is no explicit requirement that the permit(s) be obtained at any time except before the taking occurs. Even if the taking of migratory birds or golden eagles takes place at some point in the future, it is clear that the BIA's Lease approval has not caused a taking and that any purported future taking is not imminent because construction of the project has not commenced and the project is not operational.

The BIA's mere Lease approval does not violate the MBTA or the Eagle Act. No taking is yet reasonably certain.

3. The U.S. Department of Justice's Criminal Prosecutions are Irrelevant to the BIA's Action

Plaintiffs cite several cases to "buttress[] the fact that incidental take is covered by the MBTA." *See* ECF 38, p. 47-48: 5-6. However, the Plaintiffs'

cited cases each involve cases where the violations of the MBTA were attributed to the party who committed the taking – not a federal agency such as the BIA.

4. The National Marine Fisheries Service's Application to the US FWS is Irrelevant.

Plaintiffs argue that NMFS' application to the USFWS for a permit authorizing incidental take of migratory birds for longline fishing somehow requires BIA to apply for the suggested permit(s) prior to Lease approval. *See* ECF 38, p. 54:5-24. NMFS' decision to apply for such a permit does not indicate anything more than NMFS' decision to apply for such a permit and FWS' willingness to issue such a permit. It does not indicate any government-wide requirement or otherwise support Plaintiffs' position.

5. BIA Lease Approval Does Not Take Protected Birds and is Not Required to Proceed with the Project.

Plaintiffs claim that construction and operation of the Project cannot proceed "but for" the BIA's Lease approval and that the inevitable result of that Lease approval is a taking of migratory birds and golden eagles. *See e.g.*, ECF 38, p. 56:13-19. Again, Plaintiffs are wrong.

BIA's Lease approval pursuant to 25 USC § 415(a) will not be the proximate cause of any purported taking of migratory birds and golden eagles. Authorization to construct and operate the Project is subject to certain conditions, including the Tribe-imposed condition that Tule Wind, LLC apply for a permit(s) from the FWS. The terms and conditions of the very permit(s) Plaintiffs desire, and the Tribe has required application for, might be cost prohibitive or otherwise unacceptable to Tule Wind and/or the Tribe. Likewise, FWS could deny the application(s) for any such permit(s), which Plaintiffs' forecast as inevitable. Further, failing the approval by FWS of a permit(s), Tule Wind and the Tribe might not be willing to proceed with the Project in light of the potential for criminal prosecution under the

MBTA and/or Eagle Act for any purported anticipated incidental take related to the Project.

6. Plaintiffs' Description of USFWS' Position is Misleading

Plaintiffs repeatedly characterize the FWS as an expert agency[5] and recite in summary Plaintiffs' desired FWS position regarding the Project. *See e.g.*, ECF No. 38, p. 34:23-27.

Plaintiffs' offer FWS' "expert" opinion regarding permitting, among other things, as Exhibit 1 (ECF 38-1).[6] Based upon FWS' "expert" opinion, it is clear that the BIA was not required to obtain an MBTA or Eagle Act permit(s) prior to approval of the Lease and that the BIA properly could add a condition that the applicant, Tule Wind, LLC, apply for any required permit(s). In recognition of the Tribe's self-governance, the BIA coordinated with the Tribe to require that Tule Wind, LLC apply for any required permit(s) and that condition was recited in the BIA's ROD consistent with the FWS' "expert" opinion.

III. CONCLUSION

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

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[5] *See* e.g., ECF 38, pp. 19:13; 24:18; 25:17; 26:13; 27:28; 29:8; 29:25; 30:20; 32:14; 35:16; 35:27; 40:20 & 22; 45:17; 62:26; 64:15; and 67:24.

[6] FWS purported "expert" opinions proffered by Plaintiffs in exhibits such as ECF 38-1 are not official agency positions, but are instead opinions of individual agency employees preliminarily evaluating the issues with the wind power project. In any event, Tule Wind, LLC has applied for a permit from FWS consistent with the Tribe's requirement as recited in the ROD.

Dated: November 18, 2015

Respectfully submitted,

By: s/ Bradley G. Bledsoe Downes

Bradley Bledsoe Downes (CA SBN: 176291)
BLEDSOE DOWNES, PC
4809 East Thistle Landing Drive
Suite 100
Phoenix, AZ 85044
Attorneys for Defendant-in-Intervention, Ewiiaapaayp Band of Kumeyaay Indians

CERTIFICATE OF SERVICE

I hereby state and certify that on November 18, 2015 I filed the foregoing document using the ECF system, and that such document will be served electronically on all parties of record.

/s/ Bradley G. Bledsoe Downes