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TULE WIND LLC

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants,

and

TULE WIND LLC and

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,

Intervenor-Defendants.

CASE NO. 14-CV-2261-JLS-JMA

INTERVENOR-DEFENDANT TULE WIND LLC'S REPLY TO PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' 12(c) MOTIONS FOR PARTIAL JUDGMENT ON THE PLEADINGS

Hearing Date:	Dec. 16, 2015
Time:	10:30 a.m.
Place:	4A
Judge:	Hon. Janis L. Sammartino

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I. INTRODUCTION

In 2013 the Bureau of Indian Affairs ("BIA") approved a 2010 lease between the Ewiiaapaayp Tribe (the "Tribe") and Tule Wind, LLC ("Tule") under its authority to review Tribal land leases. Plaintiffs seek to impose on the BIA procedures and standards far beyond their statutory duties by putting the BIA in charge of implementing complex statutory schemes not in its purview: the Bald and Golden Eagle Protection Act ("BGEPA") and the Migratory Bird Treaty Act ("MBTA"). This approach does not constitute a legally sufficient claim. Plaintiffs also attempt, with no legal basis and contrary to U.S. Supreme Court precedent, to introduce post-decision evidence to require BIA to perpetually revisit its decision because it is "site-specific," though BIA has no ongoing involvement.

Plaintiffs' factual errors, exaggerations, and incomplete information, *see, e.g.*, ECF 38 at 27 (ln. 10–11), 31 (ln.13–26), 46 (ln. 10–12), and 48, are not addressed herein because they are immaterial and irrelevant to the legal standard for granting Tule's motion. Even assuming that the alleged facts are true, almost all of Plaintiff's claims have no legal merit and fail under Federal Rules of Civil Procedure 12(c).

II. ARGUMENT

A. The Fish and Wildlife Service, not the Defendant Bureau of Indian Affairs, administers the BGEPA and the MBTA.

The plaintiffs spend several pages discussing their view of the BGEPA's extensive statutory and regulatory regime, as well as the Fish and Wildlife Service's ("FWS") BGEPA guidance. But the Federal Defendant, BIA, is not the agency charged with implementing the BGEPA. Only the FWS, acting under the Secretary of the Department of the Interior, has the expertise to authorize "take" (or deny requests for such authority) under the BGEPA. 16 U.S.C. § 668a.

Even knowing that Tule applied to the FWS for a BGEPA permit,[1] Plaintiffs claim that the BIA should have applied the FWS' standards to its 2013 lease approval. The BIA has regulatory standards for its limited role of approving leases between a Tribe and a private party, not the least of which is to "promote tribal control and self-determination." 25 C.F.R. § 162.021(a). The BIA regulations contain no reference to the BGEPA, nor do they contain a requirement for the BIA to police the implementation of some or all other federal statutes by sister agencies.

The BIA is not required to conduct extensive determinations, as Plaintiffs contend, regarding a Tribal lessee's compliance with each and every law. ECF 38 at 34 (ln. 17–22). In *FCC v. Nextwave Personal Communications Inc.*, 537 U.S. 293 (2003), the FCC issued a license containing a provision to prevent the effect of bankruptcy law on the license and security interest *for the benefit of the FCC itself*. *Nextwave* is inapplicable for two reasons. First, the BIA took no action that attempts to change, preclude the effect of, or even conflict with federal law. To the contrary, the BIA insisted that Tule seek a BGEPA permit, something it did not have to do. Second, the FCC itself was the debt holder in *Nextwave* and attempted to reclaim rights for itself in a manner that evaded bankruptcy law. BIA has no interest or ongoing involvement in the Tribal lease. *Nextwave* is not analogous.

Plaintiffs' supposition that *every* federal agency must determine compliance with *any and every* law is an unprecedented expansion of the APA that would be an untenable burden on the functioning of the federal government. ECF 38 at 34 (ln. 17–22). For instance, in the context of the BIA approval at hand, the agency would have also been required to determine Tule's compliance with all provisions of the Internal Revenue Code. This is not what the APA requires. Similarly, the

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[1] Compl. at ¶ 57; ECF No. 17 at 5 (ln. 15–20). Plaintiff's intimate that the FWS is no longer involved, "discharging its duties" regarding the project in October of 2012, ECF No. 38 at 26 (ln. 19), despite Tule's March 2014 application. Plaintiff's go so far as to claim that BIA's decision denies the FWS the ability to review a request, ECF 38 at 49 (ln. 5–7), even while FWS has an active request from Tule.

BIA was not required to determine compliance with the BGEPA or thousands of other statutes and regulations when consenting to the lease. Plaintiffs overstate the implication of *Nextwave*.

Plaintiffs concede that the FWS is the expert agency responsible for BGEPA compliance, ECF 38 at 31 (ln. 20–21), yet ignore the FWS permit regulations at 50 C.F.R. Part 22 (Eagle Permits), 50 C.F.R. Part 13 (General Permit Procedures), and a recent notice indicating FWS might endeavor to create clarity under the MBTA by creating an incidental take program that doesn't currently exist. 80 Fed. Reg. 30,032 (May 26, 2015).[2] Indeed, only one BGEPA permit has ever been issued to a wind project, and no MBTA permit has ever been issued to a wind energy project. Plaintiffs have invented a procedure[3] whereby the BIA determines BGEPA and MBTA compliance when consenting to a Tribal lease. Because no such law or procedure exists, the Plaintiff's BGEPA and MBTA claims are legally insufficient.

B. The BIA need not obtain or require pre-construction BGEPA or MBTA permits.

Plaintiffs have no claim that the BIA must obtain pre-construction permits as a matter of law because i) no violation has occurred and ii) regulatory agencies need not obtain permits when acting in their regulatory capacity. According to the FWS, obtaining a BGEPA permit by any party is clearly optional. 74 Fed. Reg.

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[2] The FWS is considering "various approaches to regulating incidental take of migratory birds, including issuance of general incidental take authorizations for some types of hazards to birds associated with particular industry sectors; issuance of individual permits authorizing incidental take from particular projects or activities; development of memoranda of understanding with Federal agencies authorizing incidental take from those agencies' operations and activities; and/or development of voluntary guidance for industry sectors regarding operational techniques or technologies that can avoid or minimize incidental take." 80 Fed. Reg. 30,032 (May 26, 2015).

[3] Plaintiffs may have adapted it from the Endangered Species Act ("ESA"). *See Center for Biological Diversity v. Bureau of Land Management*, 698 F.3d 1101 (2012) (dealing with the ESA, Section 7 of which, unlike the BGEPA and MBTA, does have an explicit requirement to obtain an expert opinion from the FWS). Even so, the agency and the applicant are not bound by FWS' opinion. *Id*. at 1107.

46,836, 46,842 (Sep. 11, 2009). And in the one case where an agency has *elected* to obtain an MBTA permit when regulating the fishing industry, *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, No. 12-00594 SOM-RLP, 2013 WL 4511314 (D. Haw. Aug. 23, 2013), it was not legally bound to do so. Plaintiffs aver that *Turtle Island* is not distinguishable from the present case. ECF 38 at 45 (ln. 6–8). But in that case, the National Marine Fishery Service ("NMFS") opted to seek a special purpose permit associated with its regulation of longline fishing gear, and nowhere is it established that the NMFS was *required* to do so. *Turtle Island* does not impose a minimum legal requirement applicable to all federal agencies, and the fact that BIA did not seek MBTA authorization before lease approval (or require Tule to do so before construction)[4] does not establish a viable claim.

The BIA has no duty to regulate *the potential* for wildlife "take" ahead of the FWS, before any violation occurs. Sufficient justification exists to grant Tule's motion on these grounds alone, but additional legal grounds exist.

C. Most Circuits strongly agree with the Ninth Circuit that the MBTA prohibits only direct "take," not incidental migratory bird deaths.

Plaintiffs continue to argue, contrary to established Ninth Circuit law, that the MBTA criminalizes unintentional bird fatalities. It does not. *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 303 (9th Cir. 1992); *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 2004); *Earth Island Inst. v. Carlton*, No. Civ. S-09-2020, 2009 WL 9084754 (E.D. Cal. Aug. 20, 2009); *Protect our Communities Foundation v. Salazar*, 12-CV-2211, 2013 WL 5947137 (S.D. Cal. Nov. 6, 2013); *Protect Our Communities Foundation v. Jewell*, No. 13-CV-575-JLS-JMA, 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014); *Protect Our Communities Foundation v. Chu*, No. 12-

[4] *Turtle Island* does not establish that fishing boats were required to obtain MBTA permits before engaging in fishing.

CV-3062, 2014 WL 1289444 (S.D. Cal. Mar. 27, 2014). If the MBTA does not even extend to unintended, incidental migratory bird deaths, then BIA certainly has no duty to ensure pre-construction MBTA authorization.

The Ninth Circuit's interpretation of the MBTA has been widely adopted around the country. *Mahler v. U.S. Forest Serv.*, 927 F. Supp. 1559, 1574 (S.D. Ind. 1996); *Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil & Gas, L.P.*, 840 F. Supp. 2d 1202 (D.N.D. 2012); *Friends of the Boundary Mts. v. U.S. Army Corps of Eng'rs*, 24 F. Supp. 3d 105 (D. Me. 2014); *Public Employees for Environmental Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 117–118 (D.C. 2014); *Protect Our Lakes v. U.S. Army Corps of Eng'rs*, No. 1:13-CV-402-JDL, 2015 U.S. Dist. LEXIS 21295 (D. Me. Feb. 20, 2015); *United States v. Citgo Petroleum Corp.*, 801 F.3d 477, 488–489 (5th Cir. 2015). Since this FRCP 12(c) motion was filed, a growing number of Circuits agrees with the Ninth Circuit. Most recently, the Fifth Circuit Court of Appeals in *Citgo* held that the MBTA prohibits only intentional acts. The primary decisions in the two Circuits finding otherwise involve criminal liability, not claims under the APA. *See Friends of the Boundary Mts.*, 24 F. Supp. 3d at 114. To the extent that the Second and Tenth Circuits have made contrary decisions, *Citgo* teaches that only the outcome in those cases is incongruous; the *Citgo* analysis accords with those Circuits' rationale. *Citgo*, 801 F.3d at 491–492. The Fifth Circuit declined "to adopt those courts' interpretations of the MBTA that substitutes the statute's misdemeanor criminal liability standard for *what the [MBTA] deems criminal*." *Id*. at 493 (emphasis added). We agree with the Eighth and Ninth Circuits, which, recognizing this distinction, have placed decisive weight on the meaning of "take."

Plaintiffs attempt to parse this well-reasoned appellate decision in a footnote, claiming that *Citgo* interpreted only "take," not "kill." ECF 38 at 41 (fn. 10).

However, no such distinction exists in that decision, the statute, or regulations. 16 U.S.C. § 703(a); 50 C.F.R. § 10.12 (defining "take" to include the act of killing). All the prohibited acts listed are entirely volitional acts, like hunt, capture, and sell and attempts to do so. Under the principle of *noscitur a sociis*, all the terms of prohibition should be treated similarly. "Where statutory terms 'are susceptible of multiple and wide-ranging meanings . . . those meanings are narrowed by the commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated.'" *U.S. v. Barry Lamar Bonds*, 784 F.3d 582, 597–598 (9th Cir. 2015) (citing *U.S. v. Williams*, 553 U.S. 285, 294 (2008)); *see also Yates v. U.S.*, 135 S. Ct. 1074, 1085–1088 (2015) (applying principles of *noscitur a sociis*, *ejusdem generis*, and the rule of lenity). Because the MBTA's list of prohibited acts all share a volitional nature in common, principles of statutory interpretation elucidate the prohibitions, which exclude omissions, unintentional acts, and incidental bird fatalities.

D. BIA's approval of the Tribal lease did not authorize "take" in violation of the Administrative Procedures Act ("APA").

Plaintiffs' claim two situations impose a duty on BIA to obtain or require permits on a particular timeframe. First is the fact that Congress, when faced with absurd circumstances that would have prohibited continued military readiness activity, chose to shield the Navy from an overly aggressive application of the MBTA. ECF 38 at 37 (ln. 3–6). Second, industrial wind turbine operators have twice impliedly conceded liability in negotiated settlements over criminal charges brought within the Tenth Circuit (where the law of incidental take is different). *Id*. Yet in many other cases, defendants succeeded without concession, and the particular political and criminal defense solutions by other parties in other circuit courts and different circumstances, do not through the APA become applicable to the BIA.

Plaintiffs argue that when an agency authorizes the hunting of an endangered

species of whale, citing *Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004), it acts in a "regulatory capacity" that governs agencies approving *other* activities that do not involve the direct authorization of take. But the BIA, by consenting to the Tribal land lease, has not authorized the take of any protected species; its decision explicitly disclaimed such authorization. *See* Tule Wind's Request for Judicial Notice (Exh. B), BIA Record of Decision at ii. *Anderson* involved a different statutory scheme under the Endangered Species Act ("ESA") that does not exist for non-endangered species.

Plaintiffs cite another ESA case where the agencies wrongly relied on voluntary measures by the proponent of the Ruby Pipeline to assess the pipeline's environmental impacts. *Center for Biological Diversity v. Bureau of Land Management*, 698, F.3d 1101 (9th Cir. 2012). The BIA is not acting in a similar manner by requiring Tule to apply for a permit because the BIA was not required to impose the permit's pursuit in the first place. An additional distinction is that BIA's extensive environmental evaluation did not assume reduced impacts, as was the case with the Ruby Pipeline. Impacts to eagles were not artificially minimized under NEPA, and Tule's avian mitigation measures are not voluntary. *Protect Our Communities Foundation v. Jewell*, No. 13-CV-575-JLS-JMA, 2014 WL 1364453, at *19–20 (S.D. Cal. Mar. 25, 2014) (describing the review and mitigation measures applicable to all phases of the Tule project). And like *Anderson*, the Ruby Pipeline involved a specific agency consultation procedure governed by Section 7 of the ESA with no MBTA or BGEPA parallel. 16 U.S.C. § 1536. The BIA did not artificially minimize impacts, and its decision was not unlawful under the APA.

E. BIA will not be vicariously liable for avian fatalities.

Plaintiffs argue that *Humane Soc'y v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) imposes on the BIA derivative liability for industrial activity on land leased to Tule by the Tribe. ECF 38 at 29 (BGEPA); ECF 38 at 42 (MBTA). *Glickman*

is not applicable because BIA is approving a lease, not engaging in direct, intentional killing of migratory birds at a discrete place and time to control geese populations, as was the federal agency in *Glickman*. *Glickman*, at 884; *see Protect Our Communities Foundation v. Jewell*, No. 13-CV-575-JLS-JMA, 2014 WL 1364453, at *21 (S.D. Cal. Mar. 25, 2014).

Plaintiffs advocate a "but-for" standard that would impose liability on BIA. ECF 38 at 47. No such standard exists or applies; to the contrary, a federal agency is not liable unless it engages directly in the activity. *Protect Our Communities Foundation v. Jewell*, 2014 WL 1364453, at *21.

The Plaintiffs' MBTA and BGEPA claims are meritless and should be dismissed in their entirety.

F. No "site-specific" rule makes NEPA applicable once agency action is complete.

Plaintiffs submitted lengthy post-decision letters asking BIA to re-evaluate its lease approval; however, supplemental NEPA review is not required once a Federal agency's action is complete. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 72–73 (2004). Because *Norton* involved a land use plan, Plaintiffs try to exempt "site-specific" projects from *Norton*'s holding. ECF 38 at 60–61. But most actions have a situs, and even the land use plan in *Norton* had boundaries. The dispositive issue is not whether there is an identifiable site, the issue is whether the federal agency's action is complete. Here, BIA's lease approval is complete. BIA has no ongoing oversight of the Tule project. *Cf. Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (supplement prepared because of *ongoing federal oversight* of dam project). Plaintiffs have no viable post-ROD NEPA claim.

IV. CONCLUSION.

Plaintiffs wish to substitute their own judgment for BIA's implementation of its statutory duty. Plaintiffs state the outcome it would have liked instead, but

Plaintiffs' substituted judgment is not what is required by law. The BIA consented to the Tribe's lease reasonably conditioned upon a requirement that Tule first *apply* for a BGEPA permit prior to construction and operation and that it operate in compliance with all wildlife laws; BIA did not violate the APA. The APA imposes no duty to obtain or require permits, or police every federal law applicable to the lease activity. The minimum standards (which the BIA exceeded) are less: BGEPA permits are optional. The FWS has not even developed an incidental take program under the MBTA. Because plaintiffs establish no duty, they have no viable BGEPA or MBTA claims.

None but a narrow question under NEPA remains a viable: whether BIA justifiably relied on the extensive NEPA review conducted for the project when it issued its decision.

Dated: November 18, 2015

Respectfully Submitted,

s/ Jeffrey Durocher
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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 and on all parties of record.

By:

s/ Jimmy Hulett
Jimmy Hulett