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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION, et al., Plaintiffs, v. MICHAEL BLACK, et al., Federal Defendants, EWIIAAPAAYP BAND OF KUMEYAAY INDIANS, Defendant-Intervenor, TULE WIND LLC, Defendant-Intervenor.	CASE NO. 14-CV-2261 JLS-JMA **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** Date: Dec. 17, 2015 Time: 1:30 pm Place: Courtroom 4A Judge Janis L. Sammartino

I. BIA Did Not Violate The MBTA Or The BGEPA.

The Bureau of Indian Affair's ("BIA") approval[1] of the Ewiiaapaayp Band of Kumeyaay Indians' ("Tribe") lease with Tule Wind LLC ("Tule") does not violate either the Migratory Bird Treaty Act ("MBTA") or the Bald and Golden Eagle Protection Action ("BGEPA"). Plaintiffs' claim that BIA needed to secure permits under those statutes before it could lawfully approve a lease between the Tribe and Tule has no basis in the plain text of those statutes or in any caselaw. Rather, there are no factual issues that would distinguish this case from the Court's previous decision rejecting these same arguments on legal grounds in Protect Our Communities Foundation v. Jewell, No. 13-CV-575-JLS (JMA), 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014) ("POCF I").

A. BIA did not violate the BGEPA.

The BGEPA is not violated until a bird is actually taken without a permit. See ECF No. 35-1 ("Fed. Br.") 5-6. Moreover, no provision of the BGEPA requires a permit before BIA may approve the Tribe's lease here. The BGEPA allows persons to avoid penalties for taking an eagle by obtaining a permit. The fact that a permitting program is available to shield persons from potential BGEPA penalties does not mean that a person violates the law by declining to secure a permit or that the BIA must condition its own regulatory decision approving the Tribe's lease.

Rather than address the critical differences between the BIA lease approval at issue here and the specific conduct proscribed by the BGEPA, Plaintiffs rely on several non-BGEPA cases (Pl. Br., ECF No. 38, at 25) to argue that BIA's lease approval is unlawful. This argument largely skips over the key issue in assuming a

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[1] The BIA's Record of Decision ("ROD") is available at http://www.bia.gov/cs/groups/public/documents/text/idc1-024577.pdf (last visited Nov. 17, 2015).

violation of BGEPA by Tule or the Tribe. Nor do Plaintiffs cogently explain how BIA's approval of a lease between the Tribe and Tule itself violates the BGEPA, as the BIA lease approval is the sole agency action before the Court for judicial review under the APA. The limited caselaw addressing BGEPA liability rejects Plaintiffs' theory that BIA itself violates BGEPA based on attenuated "but for" causation between the BIA approval of the Tribe's lease and future activities that will be undertaken by Tule pursuant to its lease with the Tribe. See, e.g., Friends of Boundary Mountains v. U.S. Army Corps of Eng'rs, 24 F. Supp. 3d 105, 116, 119 n.13 (D. Me. 2014). Plaintiffs' view of BGEPA liability is wholly untethered from the conduct prohibited by the text of the BGEPA and has been repeatedly rejected in all the caselaw under BGEPA, as explained in BIA's opening brief. Fed. Br. 9-10.

The non-BGEPA cases Plaintiffs cite are also inapposite because they address federal actions where the agencies authorized the very activities prohibited by the laws in question. In Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004), the court held that an agency acted unlawfully in authorizing an Indian tribe to take whales, an act directly prohibited by the Marine Mammal Protection Act, on the agency's mistaken belief that a treaty exempted the tribe from the statute's provisions. Id. at 501. So too in Wilderness Society v. U.S. Fish & Wildlife Service, 353 F.3d 1051 (9th Cir. 2003), the federal agency explicitly had authorized the third party to engage in commercial activities in a wilderness area, in direct contravention of the Wilderness Act, based on the agency's belief that the statute allowed commercial activities in wilderness areas if the commercial activities were benign and minimally intrusive. 353 F.3d at 1062, 1065 (amended on other grounds, 360 F.3d 1374 (9th Cir. 2003)). Thus, these cases would be analogous only if BIA directly had authorized unpermitted bird take in its decision. BIA, of course, did no such thing. BIA approved the Tribe's lease with Tule based on assurances, and in reliance on the condition in the lease, that Tule must comply

with all applicable laws, including all laws prohibiting unauthorized bird take. See ROD at 4 ("[T]he Applicant remains responsible for complying with all applicable federal laws, including the BGEPA."); see also ROD at ii, 24, 26. The cases Plaintiffs rely on provide no basis to extend BGEPA liability to federal agencies who are not themselves engaging in any prohibited activity.[2] Plaintiffs' theory of liability depends entirely on the mistaken assertion that BIA has authorized Tule to kill protected bird species. See, e.g., Pub. Emps. For Envtl. Responsibility ("P.E.E.R.") v. Beaudreau, 25 F. Supp. 3d 67, 118 (D.D.C. 2014) (distinguishing MBTA violations "attributed to the party who committed the taking."). That is not the case here, as BIA regulations require all lessees of tribal trust land to comply with all applicable law. 25 C.F.R. § 162.109 (2012).

Plaintiffs' theory, moreover, does not take account of the split nature of the federal decisionmaking at issue here, with BIA deciding whether to approve the Tribe's lease under 25 U.S.C. § 415(a); while the U.S. Fish and Wildlife Service ("FWS") has yet to decide whether to issue a permit under the BGEPA to Tule. Friends of Boundary Mountains, 24 F. Supp. 3d at 116 ("The BGEPA incidental take permit matter is a matter for FWS to monitor through its independent regulatory authority.") BIA fully expects Tule and the Tribe to continue to work with FWS on Tule's ongoing efforts to acquire a permit under the BGEPA and to comply with all other applicable wildlife laws.

Plaintiffs' reliance on Center for Biological Diversity v. Bureau of Land Management., 698 F.3d 1101 (9th Cir. 2012), in fact demonstrates the fatal flaw in Plaintiffs' theory. The court there concluded, among other things, that BLM had

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[2] Plaintiffs' citation (Pl. Br. 34) to FCC v. NextWave Personal Communications, is likewise inapposite because there the FCC cancelled a spectrum license held by a bankrupt debtor. 537 U.S. 293, 300-301 (2003). The Supreme Court found this action unlawful because the Bankruptcy Code prohibited revocation of a license for failure to pay a debt.

violated the Endangered Species Act ("ESA") by failing to ensure that its pipeline authorization would not jeopardize listed species. See id. at 1112-17, 1127-28. This holding highlights a key difference between the ESA and the BGEPA, as well as MBTA. Unlike these laws, Section 7 of the ESA imposes an affirmative duty on federal agencies to ensure that third-party actions they authorize do not result in ESA violations. 16 U.S.C. § 1536(a)(2) (requiring interagency consultation to insure avoidance of jeopardy to listed species or adverse modification of critical habitat). That Congress imposed such an affirmative duty on agencies in the ESA context demonstrates that Congress knows how to create such a duty where it intends to impose one on agencies. The fact that Congress did not impose such a duty in the BGEPA demonstrates that Congress did not intend for agencies to ensure against possible future violations of the BGEPA by third-party actors.

Even if a permit were required for Tule's project, the Secretary of the Interior interprets the BGEPA as not requiring an agency acting in its regulatory capacity to obtain that permit. Fed. Br. at 9, quoting 74 Fed. Reg. 46,836, 46,843 (Sept. 11, 2009). This formal interpretation is owed substantial deference. See Chevron, U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 843-44 (1984). Any take of eagles that may occur in the future from Tule's implementation of its Project would not result from "agency actions that are implemented by the agency itself" and accordingly BIA need not obtain a BGEPA permit. Plaintiffs' contrary interpretation of the BGEPA is inconsistent with the Act as well as the controlling interpretation of the statute and thus must be rejected. [3]

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[3] Plaintiffs assert that this is not FWS' position by quoting a document obtained from FWS. Pl. Br. 29-30 (citing ECF No. 38-1). This document does not state the Secretary of the Interior's formal interpretation of BGEPA and pertained only to internal deliberations within the Department of the Interior. Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 384 F.3d 1163, 1174-75 (9th Cir. 2004) (pre-decisional analysis of options does not undercut final decision); Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659 (2007) (agencies are

Rather, Plaintiffs' BGEPA claim should be dismissed at this stage of the case because it is premised on the same meritless legal theory as their identical claim and theory of BGEPA liability in POCF I. Plaintiffs' attempt to distinguish the Court's decision in that case (Pl. Br. 27) entirely ignores the legal basis for the Court's ruling, quoted in our opening brief, that:

> BLM was not required to obtain permits under the MBTA or the BGEPA prior to granting Tule's right-of-way application. Federal agencies are not required to obtain a permit before acting in a regulatory capacity to authorize activity, such as development of a wind-energy facility, that may incidentally harm protected birds.

POCF I, 2014 WL 1364453, at *21. Caselaw since the Court decided POCF I has likewise declined to find that federal agencies' regulatory decisions violate BGEPA. Fed. Br. 10, 14-15.

Nor does Plaintiffs' culling of selected quotes and subjective summaries of documents produced by FWS alter this legal conclusion. Pl. Br. 26-30. No document quoted in Plaintiffs' brief states that BIA's approval of this tribal lease violates BGEPA or that BGEPA obligates BIA to secure a mandatory BGEPA permit, though FWS surely hoped to enlist BIA in its effort to avoid impacts to protected bird species. See ECF No. 38-9 at 2 ("In the event that BIA decides to move forward with approving this project, we recommend BIA conditions the lease on this project to ensure a FWS permit is in place ….") (emphasis added). Nor may FWS' statements be read as a prediction of inevitable BGEPA violations because FWS has consistently remarked that it *could* issue a BGEPA permit, assuming Tule meets all regulatory requirements. Id. Contrary to Plaintiffs'

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not bound by the preliminary determinations of agency employees). Indeed the document suggests options to address litigation risks posed by legal theories, such as urged here, without endorsing those theories. ECF No. 38-1 at 4-5.

skewed depiction, FWS has not prejudged that question. Whether a BGEPA permit *will* issue will be determined in the BGEPA permit application process that the Tribal lease obligates Tule to pursue. The BGEPA claim fails as a matter of law.

B. BIA did not violate the MBTA.

Plaintiffs' contentions that BIA's lease approval violates the MBTA likewise lack merit. Plaintiffs argue that it is foreseeable that BIA's decision will, at some future time, lead to the injury or death of migratory birds from Tule's wind turbines and, thus, violates the criminal provisions of the MBTA.[4] Pl. Br. 35-41.

First, the plain text of the MBTA refutes this claim. Mirroring the arguments *supra* under the BGEPA, the MBTA does not require either BIA or Tule to obtain an MBTA permit before BIA may lawfully approve the Tribe's lease. See 80 Fed. Reg. 30,032, 30,035 (May 26, 2015) (observing that federal agencies do not violate MBTA "when acting in their regulatory capacities."). Moreover, the Court's decision in POCF I contained a plain holding to that effect. POCF I, 2014 WL 1364453, at *21. This reading of the Act has been followed by every court that has addressed the matter. Fed. Br.14-16 (collecting cases); Friends of Boundary Mountains, 24 F. Supp. 3d at 113 n.6; Backcountry Against Dumps v. Chu, S.D. Cal. Case No. 12cv3062-L-JLB, ECF No. 87, Slip Op. 22-24 (Sept. 29, 2015). Moreover, the MBTA is not violated until a protected bird species is actually taken (or otherwise subject to the prohibited conduct). The MBTA does not prohibit actions that may indirectly lead to the take of migratory birds in the future by third parties. P.E.E.R., 25 F. Supp. 3d at 117 ("[O]n its face, the [MBTA] does not

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[4] Plaintiffs mischaracterize the government's position on criminal liability under the MBTA (Pl. Br. 36-37), both as stated in its opening brief here and in its brief to the Ninth Circuit in POCF I. See Prot. Our Cmtys. Found. v. Jewell, 9th Cir. Case No. 14-55666, ECF No. 23-1 (Answering Brief for the Federal Defendants). As recognized in POCF I, Plaintiffs' arguments in this regard do not establish that a regulatory agency must either secure a permit under the MBTA or BGEPA. POCF I, 2014 WL 1364453, at *21 n.5.

appear to extend to agency action that only potentially and indirectly could result in the taking of migratory birds."). Accordingly, even if Tule were to take a migratory bird in the future without authorization, BIA itself would not be responsible for that statutory violation—not when it occurs, and particularly not before it occurs.

Plaintiffs' opposition closely tracks their argument for BGEPA liability based on non-BGEPA precedent. Pl. Br. 42-44. As discussed supra at 2, those arguments fail because BIA has not authorized the very act that is proscribed by federal law. See also P.E.E.R., 25 F. Supp. 3d at 118. Plaintiffs ignore the critical distinction in this case that BIA itself is not acting in any way to kill birds or take any of the myriad other actions proscribed by the MBTA, and BIA has not authorized Tule to do so either by approving the Tribe's lease.

The text of the MBTA does not support Plaintiffs' claim. Mere foreseeability of an act by some third party is not a route to BIA liability under the MBTA. Nonetheless, as required by federal regulation, the Tribe's lease does require Tule to comply with all applicable federal law, including the MBTA. ROD at ii, 4. Plaintiffs' argument reduces to the picayune objection that BIA has not instructed the Tribe that its lease must further detail how Tule will comply with the MBTA, or made concurrence by the FWS a pre-requisite of BIA lease approval. None of this implied regulatory two-step may be read into the MBTA, whose text does not prohibit the actions of regulatory agencies that, at some point in the future, indirectly may allow a regulated entity or person to take an otherwise lawful action that incidentally causes a migratory bird injury or death. See Seattle Audubon Soc'y v. Evans, 952 F.2d 297, 302-03 (9th Cir. 1991); City of Sausalito v. O'Neill, 386 F.3d 1186, 1225 (9th Cir. 2004). Because the MBTA does not explicitly require BIA to secure an MBTA permit prior to approving the Tribe's lease, Plaintiffs' arguments must fail.

II. BIA Did Not Violate NEPA.

Plaintiffs claim that BIA was required to supplement its National Environmental Policy Act ("NEPA") analysis when Plaintiffs submitted allegedly significant new information after BIA had already approved the lease at issue in this case. As discussed in Federal Defendants' opening brief, this claim fails as a matter of law because no major federal action remains to be performed by BIA once it approved the lease, and so further NEPA analysis is unnecessary.

NEPA may, in some circumstances, require supplementation even after an agency has already issued its "initial approval" of a project. Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373–74 (1989). But NEPA never requires supplementation unless further "major federal action" remains to be carried out by the agency. Norton v. S. Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 73 (2004). Once the agency no longer has "a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment" because no further major federal action remains to be performed, supplementation would not promote informed agency decisionmaking and is not required under NEPA. Marsh, 490 U.S. at 371–72 (quoting TVA v. Hill, 437 U.S. 153, 188, n.34 (1978)).

Plaintiffs' response consists largely of an attempt to convince the Court of the "significance" of the allegedly new information Plaintiffs submitted to BIA after the decisionmaking process had already concluded. Pl. Br. 54–59. The Court need not, and should not, reach this question,[5] which is governed by a "rule of reason" that "turns on the value of the new information to the *still pending decisionmaking process*." Marsh, 490 U.S. at 374 (emphasis added). As discussed in Federal Defendants' opening brief, there is no "still pending decisionmaking

[5] Federal Defendants do not "recognize[e]" (Pl. Br. 59) that Plaintiffs' submission compels supplementation under the rule of reason discussed in Marsh, nor are these extra-record documents admissible for judicial review of the ROD.

process" in this case. Fed. Br. 19–20. The BIA's leasing regulations and the terms of the lease clearly establish that BIA has no continuing role related to the approval of the lease. See 25 C.F.R. §§ 152.589–162.592. Plaintiffs' own Complaint concedes BIA's limited role by challenging BIA's "Record of Decision ('ROD') approving a lease to Tule Wind LLC to construct and operate" the wind project. Pl. Compl. (ECF No. 1) ¶ 1.

Plaintiffs attempt to circumvent this bar to their claim by arguing that BIA had, and still has, a continuing duty to supplement its NEPA analysis until the wind project is fully constructed. Pl. Br. 59. Plaintiffs extrapolate from multiple cases in an attempt to assemble a per se rule that supplementation may still be required as long as a project has not yet been fully constructed. Id. at 59–61. But the actual rule is set out in Marsh: supplementation may be required only "prior to the completion of agency action." 490 U.S. at 371.

In Marsh, the agency action was construction of a dam by the Army Corps of Engineers. Id. at 364–67. As the Court later noted when it recounted Marsh's facts in SUWA, the dam construction was the project, and the dam's construction was not yet completed when the new information was submitted to the Corps. 542 U.S. at 73. There thus remained a pending decisionmaking process which could be informed by new information. No such pending decisionmaking remains here, where the decision to approve of the lease between the Tribe and Tule was the only question put before BIA and no discretionary actions remain to be informed by new information.[6] See Greater Yellowstone Coal. v. Tidwell, 572 F.3d 1115, 1123 (denying a claim for supplemental NEPA review related to an elk feedground

[6] Plaintiffs have not made any attempt to distinguish the multiple cases cited in Federal Defendants' opening brief, which establish that ongoing authority to enforce a lease's terms—which is the sole authority retained by BIA here—does not constitute a major federal action that could require supplemental NEPA review.

located on federal land but operated by the State of Wyoming where the Forest Service had already issued the permit and, since that time, had "remained largely uninvolved" in the feedground's ongoing operations); Ctr. for Biological Diversity v. Salazar, 791 F. Supp. 2d 687, 698 (D. Ariz. 2011) (finding that monitoring to ensure compliance with permit terms is not a remaining federal action requiring NEPA supplementation).

Sierra Club v. Bosworth, cited by Plaintiff, supports this conclusion. In Bosworth, the Forest Service retained significant decisionmaking authority even after issuing a timber harvest contract, notably retaining an ongoing duty to provide "written approval of the operating plan prior to the commencement of logging." 465 F. Supp. 2d 931, 939 (N.D. Cal. 2006). Noting that operating plans are, in themselves, major federal action, the court found that "final approval of the project had yet to be executed" when the supplemental information was submitted to the Forest Service. Id. There is no similar pending final approval here: the approval of the lease concluded BIA's decisionmaking process.

Plaintiffs' position is not just legally unsupported—it is also inconsistent with the facts of this case. The ROD challenged here does not just authorize construction, but also "maintenance, operation, and decommissioning" of the turbines on tribal land. See ROD at ii. If Plaintiffs were correct that supplementation may be required until the authorized actions are completed, that duty would not expire with the completion of construction. It would extend until the turbines are decommissioned at the end of the 20-year life of the project. Id. at 24. This would create the kind of never-ending duty to supplement that the Supreme Court has expressly repudiated. Plaintiffs' position is contrary to NEPA, and they cannot succeed in this claim. Accordingly, Federal Defendants respectfully request that this claim be dismissed.

DATED this 18th of November, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ John H. Martin