No. 14-55842 (consolidated with No. 14-55666)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROTECT OUR COMMUNITIES FOUNDATION,

Plaintiff-Appellant,

v.

SALLY JEWELL, *et al*.,

Defendants-Appellees,

and

TULE WIND, LLC,

Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANT PROTECT OUR COMMUNITIES FOUNDATION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The opening brief of plaintiff Protect our Communities Foundation ("POC") addressed a single issue on appeal, and was based on a straightforward syllogism – (1) the Tule Wind Project, like other large industrial wind projects, will inevitably and foreseeably kill migratory birds, which is a violation of the Migratory Bird Treaty Act ("MBTA") unless the "take" is authorized pursuant to the mechanisms established by that statute; (2) under the MBTA, the *only* way in which the killing of migratory birds may be authorized is through a *permit* issued by the U.S. Fish and Wildlife Service ("FWS"); (3) no such permit has ever been requested, let alone obtained, by either the Bureau of Land Management ("BLM") or Tule Wind; and hence (4) BLM's authorization for Tule Wind to construct and operate a project on federal land that BLM *knows* will violate the MBTA cannot be deemed federal agency action that is "in accordance with law" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2) ("APA").

In response, Tule Wind has nothing to say because the company has waived its right to file a responsive brief. Tule Wind's silence is especially striking because, in the district court, Tule Wind was the *only* party to argue that incidental take of migratory birds associated with the normal operation of wind turbines is not

covered by the MBTA.[1] The government conceded below (and acknowledges even more explicitly in this Court) that the direct and foreseeable, albeit unintentional, take associated with an activity (such as operation of a wind power project) that is inherently hazardous to birds *does* indeed implicate the take prohibition of the MBTA. Since Tule Wind has now waived its argument that the MBTA has no applicability to the operation of its federally authorized wind turbines, and the government advances no such argument, one crucial underpinning of the ruling below has now been abandoned and should play no part in the Court's analysis. *See*, *e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1224 n.3 (9th Cir. 2013) (an issue must be "specifically and distinctly argued" in this Court in order for it to be "consider[ed] an issue on appeal"); *Moldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009) (arguments that are "inadequately briefed are waived").

What remains is Federal Defendants' contention that, even if it is entirely foreseeable that BLM's approval of the project will inevitably result in protected birds being killed by turbines in contravention of the MBTA's categorical

[1] Tule Wind took this position, although its parent company, Iberdrola Renewables, has acknowledged, in a publication applicable to all of its wind projects, that "*any death* of a protected bird *at a wind project is a violation*" of the MBTA. Supplemental Excerpts of the Record ("SER") 933 (emphasis added).

prohibition on migratory bird take without a FWS permit, BLM nonetheless acted in "accordance with law" and with "observance of procedure required by law," within the meaning of the APA, 5 U.S.C. §§ 706(2)(A), (D). As discussed in POC's opening brief and addressed further below, that position is impossible to reconcile with the plain terms of the APA or with pertinent precedent from this and other courts. Accordingly, the BLM Record of Decision ("ROD") and Right of Way Grant ("ROW") should be vacated and remanded pending compliance with the MBTA.

I. IT IS UNDISPUTED IN THIS COURT THAT THE FORESEEABLE KILLING OF MIGRATORY BIRDS BY INDUSTRIAL WIND PROJECTS SUCH AS TULE WIND IS SUBJECT TO THE MBTA'S TAKE PROHIBITION.

A. As The Government Concedes, Industrial Wind Turbines "Take" Migratory Birds Within The Meaning Of The MBTA.

The government makes no effort to defend that part of the district court's rationale that is predicated on the proposition that the MBTA "does not even prohibit incidental take of protected birds from otherwise lawful activity." POC's Excerpts of Record ("POC ER") at 35. Federal Defendants concede that "MBTA liability *plainly extends to non-hunting activities that incidentally but directly take migratory birds such as wind-turbine operations*" along with other industrial activities that are inherently hazardous to migratory birds and thus foreseeably kill

birds in the course of normal operations, "even if the take is unintentional," *i.e.*, it is not the *purpose* of the activity in question. Answering Brief of Federal Defendants ("Def. Br.") at 36-37 n.7 (emphasis added) (citing cases); *see also* POC Br. at 16-20.

Accordingly, the government expressly agrees with Plaintiffs that this Court's rulings in *Seattle Audubon Soc'y v. Evans*, 952 F.2d 927 (9th Cir. 1991) and *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 1995) should *not* be read as standing for the proposition that only the "intentional" taking of migratory birds is proscribed by the MBTA's take prohibition. *See* Def. Br. at 36 n.7. Indeed, Federal Defendants acknowledge that "[s]ome courts" – including, evidently, the district court in this case – have "misread" this Court's precedents as standing for the proposition that only "acts directed at migratory birds such as hunting or poaching" are covered by the MBTA's broad prohibition on the unauthorized taking of migratory birds. *Id*.; *see also* POC Br. at 21-23.

The government does assert that, under *Seattle Audubon* and *City of Sausalito*, the "mere allowance of *habitat modification*" that may, at most, only "indirectly" harm birds does not constitute a take under the MBTA. Def. Br. at 36 (emphasis added). That, however, is of no consequence to *this* appeal, since POC has made plain that it is *not* arguing that habitat modification alone is sufficient to

trigger MBTA protections. *See* POC Br. at 14 n.3. Instead, this case involves "direct killing *from turbine collisions*," *id*. (emphasis added) – which is precisely the kind of inherently hazardous industrial activity that the government admits, consistent with its position in pursuing criminal prosecutions under the Act, falls squarely within the Act's strictures and safeguards. *See* Def. Br. at 36 & n.7; *id*. at 39 (conceding that the MBTA "establishes criminal liability" if, while engaging in "activities that are *inherently dangerous* to migratory birds, a bird is actually taken without first obtaining a permit or operating under some other regulatory authorization") (emphasis added); *see also* POC Br. at 19-20.[2]

B. The Tule Wind Project, Like Other Major Industrial Wind Projects, Will Kill Migratory Birds Protected By The MBTA.

Consistent with their concession that "wind-turbine operation" falls within

[2] Since POC's opening brief was filed, the government has brought and resolved another criminal prosecution under the MBTA against an operating wind power project for engaging in the exactly the same kind of take that will result from the federally authorized project at issue here. In *United States v. Pacificorp Energy*, No. 2:14-cr-00301-KHR (D. Wyo. 2014), the government charged that the company killed "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*." *Id.* (Information, Dec. 19, 2014) (ECF No. 1) (emphasis added). That case was resolved through a plea agreement stating that the project "did take ('kill') approximately 336 'migratory birds,'" including "raptors, and passerine species such as larks, buntings, and sparrows," and that the "taking was unlawful, in that neither Defendant nor the person or entity acting on its behalf obtained a permit or other valid authorization to take the migratory birds listed in the charge." *Id*. (Plea Agreement, Dec. 19, 2014) (ECF No. 2), at 5.

the category of actions that are covered by the MBTA's take prohibition because it "incidentally but directly take[s] migratory birds," Def. Br. at 36, and is "inherently dangerous" to migratory birds, *id*. at 39, Defendants also make no serious effort to dispute that the Tule Wind project in particular – consisting of 62 massive turbines that will operate for at least three decades in habitats used by myriad bird species – will *unavoidably* kill migratory birds protected by the MBTA.

Instead, Defendants simply contend that BLM's Environmental Impact Statement ("EIS") adequately "determin[ed] which avian species are likely to be in the Project area and analyzed potential impacts to those species," including the "likelihood of collisions and other risks for individual species." *Id*. at 11. But regardless of whether that discussion and analysis is adequate for purposes of compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h ("NEPA"), the EIS and related documents referenced by the government leave no doubt that migratory birds will be killed in the very manner that the government concedes invokes the MBTA's prohibitions and protections.

As explained in POC's opening brief (at 9-11), and as is undisputed by the government, the EIS finds that the Tule Wind Project, like other industrial wind projects, would have "'unavoidable adverse impacts'" to migratory birds from

"strikes with turbines," POC ER at 126 (quoting Final EIS at ES-26). The EIS further finds that a number of bird species that use the Tule Wind site regularly fly at heights that will place them directly in the turbines' vast "rotor swept area" ("RSA") and hence in contact with the huge spinning turbines. POC Br. at 10-11; *see also* POC Br. at 11-12 (explaining that the U.S. Environmental Protection Agency, California Department of Parks and Recreation, and California Department of Fish and Game all advised BLM that the project would cause deaths of migratory birds); *see also* SER 434 (explaining that various federal agencies, as well as "State and County Representatives, non-governmental organizations[], and the public" all "expressed concern for the risk to migrating birds from wind turbine collisions").

Consequently, BLM's and Tule Wind's documents confirm that the only outstanding question is not *whether* migratory birds will be killed in violation of the MBTA, but *how many* will be killed. Indeed, even the limited avian surveys conducted by Tule Wind's own hired consultant found thousands of birds of more than fifty different species using the project site, including a number of species that regularly fly "within the rotor swept area," and hence will come into contact with the turbines. SER 731.[3]

[3] Defendants' assertion that the "Project area is not a major route for migratory

The consultant's reports document that bird kills will invariably result, with the only uncertainty being the extent to which such mortality will have *population level effects* on the affected species, all of which are protected from the MBTA's prohibition on *any* unauthorized take. *See, e.g.*, SER 732 (the "greatest potential impact" of the project "on avian species is *direct mortality or injury from collisions with turbines*") (emphasis added); SER 731 (acknowledging that there will be "[l]ocal mortality" from turbine operation, but asserting that such mortality is "not expected to have *population level consequences* for *most* species observed") (emphasis added); *see also id.* (explaining that ravens "often flew within the rotor swept area" but asserting that they have "relatively stable *populations*") (emphasis

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birds in the Pacific Flyway," Def. Br. at 15, is contradicted by Tule Wind's own consultant, which has explained that the "Pacific Flyway runs through the western portion of the United States *and subsequently, the Tule WRA [Wind Resources Area*]." SER 735 (emphasis added); *see also* SER 146 (concession in EIS that "[b]irds migrating in the Pacific Flyway may cross over the Tule Wind project area"); SER 371 (BLM "Response to Comments" stating that although "[n]ight-migrating birds" in the Pacific Flyway may "*generally* be migrating at an altitude higher than the upper limit of the turbines tips of the proposed Tule Wind turbines," a "potential for significant impacts" to such night-flying migrants still exists) (emphasis added). In any event, the extent to which the Pacific Flyway will be impacted by the project has little bearing on the question of *MBTA* compliance since it is undisputed (and indisputable) that various species of birds that *reside within the project area* and are fully protected by the Act will in fact regularly fly within the RSA and be killed or injured by the turbines, as has occurred at every other industrial wind project in California and elsewhere. *See also* SER 962 (explanation by Tule Wind's parent company that "[g]enerally speaking, the MBTA protects all birds occurring in the U.S. in the wild").

added); *id*. (stating that "[w]hite-throated swifts had the highest encounter rates during the summer *as they flew primarily within the RSA*" and that the "stability of white-throated swift *populations* is relatively unknown) (emphasis added).[4]

As explained in POC's opening brief (at 9), and as is undisputed by Defendants, raptors are at especially high risk of collision because of their well-documented "propensity," including at other wind projects in California, "to fly at heights similar to those encompassed by a turbine RSA." SER 741. In surveys at the Tule project site, Tule's consultant found that, depending on which of two turbine models is used, "[f]or flying raptor species," either "67 percent flew within the RSA" or "48 percent flew within the RSA." SER 746. Since raptor use of the site is higher than that at many other wind project sites where raptor mortality has been recorded, *see* SER 747 ("[c]ompared with to other facilities with seasonal use rates, the Tule WRA ranked fourth out of 18 in spring"), and "[h]igh raptor use has been associated with high raptor mortality at wind farms," *id*., Tule Wind's consultant leaves no doubt that such deaths will result directly from turbine

[4] *See also* SER 750 ("some resident species have behaviors that increase the risk of collisions with turbines because they fly within the RSA . . . [f]or example, horned larks have been commonly found as fatalities at wind farms"); SER 751 ("local mortality of resident species is not expected to have population level consequences"); *id*. ("mortality of migrants at the Tule Wind WRA is not expected to have population level implications").

operation, again raising only the question as to how extensive they will be. *See* SER 831 ("raptor morality is anticipated to be moderate"); *id*. ("it is unlikely that local mortalities would have a *population-level effect*") (emphasis added); SER 750 (notwithstanding any efforts to reduce raptor deaths, raptor "mortality *may not be eliminated* by advances in turbine technology and local mirco-siting") (emphasis added); SER 748 ("[r]ed-tailed hawks have commonly been documented as fatalities at existing wind farms").

Not surprisingly, therefore, the "Project-Specific Avian and Bat Protection Plan for the Tule Wind Project" ("ABPP"), which has been adopted by Tule Wind and approved by BLM as a condition of project authorization, *see* SER 503, 504, *assumes* that there will be bird mortalities from turbine operation. The Plan adopts a system for "*monitoring and reporting* bird . . . fatalities," SER 465 (emphasis added), for a period of at least three years post-construction, so as to estimate "mortality rates at the site and to determine whether the estimated mortality is lower, similar, or higher than the average mortality rates at other local, regional, and national projects." *Id*.; *see also id*. ("[f]atality surveys for baseline monitoring will begin with the next survey season (within 4 months) after commercial operation delivery"); SER 476 (The ABPP's "mitigation measures" "shall be designed to avoid any *significant reduction in species viability*" for affected bird

species) (emphasis added).

In short, Defendants do not deny, and based on the administrative record there can be no legitimate dispute, that the normal, anticipated operation of the Tule Wind project will in fact cause avian deaths in violation of the MBTA. Further, Defendants also admit, as they must, that there is only one way in which the killing of migratory birds may be authorized consistent with the plain terms of the MBTA – through the FWS's issuance of an MBTA "*permit or* . . . some other *regulatory authorization*" embodied in FWS regulations implementing the MBTA. Def. Br. at 39 (emphasis added). Here, however, it is also undisputed that neither Tule Wind, nor BLM, has ever obtained or even applied for such a permit encompassing the migratory bird collisions associated with the routine operation of the Tule Wind turbines.[5]

[5] Defendants make no argument that the ABPP constitutes such authorization, and for good reason; the FWS told BLM and Tule Wind that they should "be advised that the ABPP is *not a surrogate take permit . . . nor does it release any individual, company, or agency of its obligations to comply with Federal . . . statutes, or regulations*." SER 376 (emphasis added). Indeed, the ABPP itself concedes that the "MBTA makes it unlawful to . . . kill . . . *any* such [migratory] bird *without a permit*," and yet simultaneously recognizes that migratory birds will be killed by the Tule Wind project without the legally required permit. SER 471 (emphasis added).

II. BLM MAY BE SUED UNDER THE APA FOR AUTHORIZING A PROJECT THAT BLM KNOWS IS INHERENTLY HAZARDOUS TO BIRDS AND WILL KILL BIRDS IN VIOLATION OF THE MBTA.

A. Defendants' Argument That BLM Is Not *Criminally* Liable Has Nothing To Do With Whether It May Be Sued Under The APA.

Although the government as much as concedes that the Tule Wind project will violate federal environmental law when the project operates in the precise manner that has been authorized by BLM, Defendants nonetheless insist that the agency approval accords with the APA. Defendants, however, never coherently explain how BLM's ROW – without which Tule Wind could never operate the project on public land, *see* SER 489 ("This right-of-way grant *allows for the use of public land* for the Tule Wind Project.") (emphasis added) – may, under these circumstances, reasonably be deemed "in accordance with" rather than in contravention of the MBTA's prohibition on the unauthorized taking of *any* migratory birds. Nor do Defendants explain how BLM has acted in "observance of procedure required by law" when the agency, instead of expressly conditioning project operation on either BLM or Tule Wind securing an MBTA permit *from the FWS* – the *only* legal mechanism under the Act for authorizing take of migratory birds – instead conditioned it on compliance with a "plan" that, while recognizing that unlawful take will occur, concededly does *not* and legally cannot authorize

that take. *See supra* at n.5.[6]

Rather than squarely confront POC's APA-based argument, the government repeatedly but misleadingly asserts that the question is whether a federal agency may be held *criminally* liable for MBTA violations that result from actions the agency authorizes another party to carry out. *See* Def. Br. at 40 (asserting that the issue is whether "BLM is *criminally liable* for the foreseeable actions of third parties in reliance on a right-of-way grant authorizing the use of federal land") (emphasis added); *id*. at 35 (asserting that BLM's actions do not "violate[] the strict-liability *criminal provisions* of the MBTA") (emphasis added).

But that is not the issue, as POC's opening brief made clear. The fact that federal officials may be immune from criminal sanctions or, even more broadly, that such sanctions may not attach to anyone until a party has in fact unlawfully

[6] In marked contrast, BLM did expressly condition project approval on compliance with other specific legal mechanisms established in various environmental laws, e.g., (1) compliance with the "Biological Opinion [] issued by the USFWS," SER 496 – the legal mechanism for authorizing take and ensuring compliance with the Endangered Species Act ("ESA"), *see* 16 U.S.C. § 1536 (setting forth the process for the FWS to authorize incidental take of endangered and threatened species for federally permitted projects); (2) compliance with the section "404 permit process," SER 408-09, which is administered by the Army Corps of Engineers for authorizing impacts on jurisdictional wetlands under the Clean Water Act, *see* 33 U.S.C. § 1344; and (3) the National Historic Preservation Act ("NHPA") Section 106 "Memorandum of Agreement," SER 407 – the legal mechanism for agency actions that will affect historic properties protected by the NHPA. *See* 16 U.S.C. § 470f.

taken a migratory bird, *see* Def. Br. at 35 (asserting that "[a]bsent actual take" criminal sanctions may not be imposed) has nothing whatsoever to do with whether a federal agency may be subject to suit *under the APA* for undertaking or authorizing conduct that contravenes the "broad and unqualified" take prohibition in section 703 of the Act. *Humane Soc'y of the U.S. v. Glickman*, 217 F.3d 882, 885 (D.C. Cir. 2000).

Indeed, in *Glickman*, the D.C. Circuit was perfectly "willing to assume that the criminal enforcement provision [of the MBTA] could not be used against federal agencies," but the court nonetheless held that the "argument goes nowhere" with respect to whether agencies could be sued under the APA for making a decision that would *result* in the unlawful killing of migratory birds if implemented. *Id*. at 886.

The *Glickman* court explained that "[e]ven without a specific review provision" – i.e., before the APA was enacted – "*there still could have been a [civil] suit against the appropriate federal official for injunctive relief to enforce § 703*" so as to *prevent* an unlawful take that would otherwise have occurred. *Id*. (emphasis added). As in *Glickman*, therefore, "Defendants are, in short, quite mistaken in supposing that § 703 could not be enforced against federal agencies

except through the criminal provisions" of the Act. *Id*.[7]

B. *Glickman*, As Well As This Court's Precedents, Support The Availability Of An APA Claim.

Defendants attempt to distinguish *Glickman* on the sole basis that, in that case, the "federal agency was the entity actually conducting the activities found to violate the MBTA" whereas in this case BLM, "acting in its regulatory capacity," *authorized* Tule Wind to undertake an action that violates the MBTA. Def. Br. at 40. However, the notion that the availability of an MBTA-based APA claim 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 BLM were *itself* constructing and operating the Tule Wind project, then BLM could be sued under the APA for failing to comply with the MBTA's permitting mechanisms prior to operating the turbines. *See* POC Br. at 25. But if it would be a violation of the APA for BLM to take migratory birds, as Defendants evidently concede, then

[7] *Glickman* likewise undermines any notion that APA-based relief cannot be obtained against a federal agency *before* any "actual take" has occurred, as Defendants appear to suggest. Def. Br. at 35; *see Glickman*, 217 F.3d at 884 (explaining that the district court properly enjoined the agency action that *would have* resulted in the unlawful killings, "until such time as [the agencies] shall obtain valid permits to do so under the" MBTA).

the legal answer cannot sensibly be any different merely because BLM has instead provided its legal authorization – without which the action could never proceed – to someone else to engage in the very same activity.

Defendants' failure to provide a coherent (or any) answer to that argument is especially telling given the facts of this case. Not only do Defendants concede that it is "foreseeable" that the operation of the federally authorized turbines will result in migratory bird deaths in contravention of the MBTA, Def. Br. at 43, but Defendants also acknowledge that, in approving the use of federal land for this particular project, BLM was in fact *pursuing its own policy objectives*, and not merely permitting Tule Wind to advance its private commercial interests.

Indeed, Defendants themselves stress that approving the project was part and parcel of BLM's concerted effort to "make the development of renewable energy sources on public lands a national priority." Def. Br. at 2. Consistent with that representation, the ROW decision documents reflect that, in authorizing the project, BLM was indeed endeavoring to promote the federal government's *own* asserted interests in developing renewable energy resources on federal lands. *See* SER 384 ("Granting the ROW for the Tule Wind Project contributes to the public interest in developing renewable energy to meet Federal and state goals."); SER 390 (stating that approval of the project implements, along with other directives,

"Secretarial Order 3285 (March 11, 2009), which 'establishes the development of renewable energy as a priority for the Department of the Interior'").

There is, of course, no reason why BLM cannot invoke its authorities and policies to promote renewable energy projects on public lands (so long as the agency ensures that those projects comport with federal environmental law). However, what BLM cannot do, consistent with the APA, is attempt to wash its hands of the inevitable MBTA violations on the grounds that Tule Wind is purely a "private party" project, Def. Br. at 40, while the agency simultaneously portrays the project as a "national priority" that BLM says it approved, at least in part, so as to further its *own* institutional objectives. *Id*. at 2. On close inspection, therefore, there is no meaningful – let alone legally dispositive – distinction between the facts underpinning an APA claim in *Glickman* and those in this case.[8]

Nor is there any validity to Defendants' assertion that this Court's rulings somehow "foreclose" POC's ability to pursue an APA claim here. In fact, the opposite is true. *See* Def. Br. at 36. As POC previously noted, *see* POC Br. at 27 n.8, neither *Seattle Audubon* nor *City of Sausalito* remotely suggests that an APA

[8] The distinction becomes even more tenuous when it is recognized that, contrary to the government's suggestion that "non-federal third parties" played no role in the USDA program at issue in *Glickman*, Def. Br. at 39, the *Glickman* ruling itself makes clear that the program was carried out "*in conjunction with Virginia state agencies*." 217 F.3d at 378 (emphasis added).

claim may not be brought against a federal agency when the agency authorizes third party conduct *that violates the MBTA*.

Instead, the Court analyzed whether the authorized conduct – which, as the government acknowledges, involved only "habitat modification" in those cases, *see* Def. Br. at 36 – in fact constituted a "'taking' of migratory birds within the meaning" of the MBTA. *Seattle Audubon*, 952 F.2d at 303. But that analysis would have been utterly irrelevant if, in any event, an APA claim could not lie against the authorizing agencies (in those cases, the U.S. Forest Service and National Park Service) *as a matter of law*, as the government contends.

Hence, it is at least implicit in the Court's analysis in *Seattle Audubon* and *City of Sausalito* that when federal agencies authorize inherently hazardous conduct that *does* violate the MBTA – e.g, "direct, though unintended, bird poisoning from toxic substances," *Seattle Audubon*, 952 F.2d at 303, or, as here, direct, though unintended, bird strikes from routine wind turbine operation – that would indeed support an APA claim against the authorizing federal agency. Consequently, the government's concession that "MBTA liability extends to non-hunting activities that incidentally but directly take migratory birds such as wind-turbine operation," Def. Br. at 36, squarely supports the existence of an APA claim under the reasoning in *Seattle Audubon* and *City of Sausalito*.

And, notwithstanding the government's effort to distinguish the non-MBTA cases relied on by POC, this Court's approach in those cases also supports the existence of an APA claim here. *See* POC Br. at 26-27. Defendants argue that in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004) and *Wilderness Soc'y v. U.S. Fish & Wildlife* Serv., 353 F.3d 1051 (9th Cir. 2003), the federal agency authorized third party conduct that (the Court held) entailed "direct" and "explicit" violations of federal environmental law, Def. Br. at 40, 41. Yet that is exactly the situation here as well; BLM is authorizing a project that the agency concededly *knows* will "incidentally *but directly* take migratory birds . . . ." Def. Br. at 36 n.7 (emphasis added).

BLM also knows that neither it nor Tule Wind has any intention of requesting, let alone obtaining prior to project operation, an MBTA permit from the FWS, although that is the only lawful way to bring the project within the Act's protective scheme. Consequently, just as the federal agencies at issue in *Anderson* and *Wilderness Soc'y* could not avoid having their authorizations deemed "not in accordance with law" by blaming the legal violations on third parties, so too must BLM's authorization be deemed "not in accordance" with the MBTA's take prohibition and its exclusive legal mechanism for authorizing take. As the Supreme Court has instructed, 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." *FCC v. NextWave Pers. Communic's*, 537 U.S. 293, 300 (2003) (quoting 5 U.S.C. § 706(2)(A)).

Defendants cannot avoid this conclusion by disingenuously claiming to have "required Tule Wind to comply" with the MBTA "as a condition of the right-of-way," Def. Br. at 9. In fact, neither BLM's 37-page Record of Decision, nor the Right of Way itself, including 110 enumerated "Stipulations," even specifically *references* compliance with the MBTA, *see* SER 381 ("List of Acronyms and Abbreviations" in ROD); SER 490-535 (ROW), let alone expressly conditions the project on either BLM or Tule Wind obtaining an MBTA permit from the FWS for the migratory bird take that will result from turbine operation.

Indeed, rather than make any mention of the MBTA's sole legal mechanism for authorizing take, the ROW is expressly conditioned on "compliance with . . . *the Avian and Bat Protection Plan*," SER 504 (stipulation 36) (emphasis added); *see also* SER 503, 505 (stipulations 31, 37) – which indisputably is *not* an MBTA permit although it does acknowledge that bird deaths will unavoidably result from turbine operation. *See supra* at n.3; *see also* SER 503 (ROW grant providing that Tule Wind must develop and implement an "Avian Protection Plan related to

. . . collision of bird species," which shall "provide the framework necessary for implementing a program to *reduce* bird mortalities and document actions.") (emphasis added). This simply underscores that project approval was not "in accordance with law," and was made "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (D).[9]

C. Defendants' Remaining Arguments Are Also Unpersuasive.

Unable to proffer any persuasive legal or logical argument for how a federal agency's knowing authorization of MBTA-violating activity can be deemed "in accordance with law" or in "observance of procedure required by law," Federal Defendants resort to the predictable slippery slope argument, asserting that, e.g., "[u]nder Plaintiffs' theory, a city planning commission would be strictly liable for authorizing the construction of a tall building . . . ." Def. Br. at 37-38. As POC has already noted, however, *see* POC Br. at 29 n.10, that argument is untenable for

[9] Accordingly, Defendants' contention that "BLM essentially did exactly what Plaintiffs demand" by "requir[ing] Tule Wind to comply with all applicable laws, including the MBTA," Def. Br. at 38, borders on the nonsensical. BLM knows that the Tule Wind Project will kill migratory birds in violation of the MBTA and it also knows full well how to provide for compliance with the statute: by either obtaining a permit from FWS, or requiring Tule Wind to do so. Having opted instead to condition project approval on a "plan" that confirms that unlawful migratory bird killing will occur, BLM cannot seriously maintain that it has "required Tule Wind to comply" with the MBTA, let alone done "exactly what Plaintiffs demand."

a number reasons.

First, this case addresses the narrow question of whether a *federal* agency may be sued under terms of the *federal APA* for authorizing a 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 "city planning commission" 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 Defendants' hypothetical case against state officials in federal court. Accordingly, just as *Glickman* has not opened the floodgates to MBTA litigation in federal courts, nor would the limited ruling POC seeks here.[10]

[10] Defendants observe that "most, if not all states, have versions of the APA," Def. Br. at 38 n. 8, but neglect to explain how that relates to any issue before this Court. State authorizations for suit against state or local entities (and state court constructions of them) can differ dramatically from the federal APA, and so a federal court's ruling as to how the APA should be applied has no necessary, or even logical, relationship to how a state "version[] of the APA" should be implemented. Indeed, the case cited by Defendants makes this very point. That California case, *Ctr. for Biological Diversity v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008), recognizes a potential claim against state actors that is far broader than anything POC is arguing here. In that case, the court held that the plaintiff could pursue a state-based claim for *breach of the public trust* in connection with the operation of wind turbines in Altamont Pass that "have killed tens of thousands of birds, including between 17,000 and 26,000 raptors," *id*. at 1355, and that, while the plaintiff could not assert such a claim against the private wind project operators, it could do so *against governmental officials* for failing to take appropriate action to protect public trust resources – i.e., migratory birds – in connection with their approvals of the wind power projects. *Id*. at 1366 ("[T]he

Second, as POC has previously noted, federal courts in the criminal law context have been persuaded *by the government* to reject the slippery slope argument on the grounds that MBTA liability for incidental take is confined to situations – like this one – in which it is foreseeable that the *specific* activity in question will cause migratory bird deaths. *See* POC Br. at 29 n.10 (citing cases). 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. *United States v. Moon Lake Electric Ass'n*, 45 F. Supp. 2d 1070, 1085 (D. Colo. 1999) (emphasis added). By the same token, because Plaintiffs' APA claim is predicated on BLM's authorization of an

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public retains the right to bring actions to enforce the trust when the public agencies fail to discharge their duties."). To the extent that ruling has any relevance here, it supports POC's position that governmental actors may be called to account for authorizing actions that foreseeably result in the deaths of raptors and other migratory birds.

activity that, according to Defendants themselves, *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 Defendants for the very reasons that the government itself has (successfully) stressed in the criminal law context.

Finally, there is also no validity to Defendants' contention that sustaining POC's APA claim would somehow "interfere in the FWS's administration" of the MBTA. Def. Br. at 43. Defendants concede that the FWS already "has the authority to issue permits *covering incidental take* under 50 C.F.R. § 21.27," Def. Br. at 39 n.9 (emphasis added), and, indeed, that the FWS has recently done so in a directly analogous context, i.e., by issuing a permit (with protective conditions) to the National Marine Fisheries Service ("NMFS") "authorizing incidental bycatch of seabirds by the Hawaii longline fishery," which is "managed by NMFS." *Id*. at 42-43.

The FWS did not refuse to process NMFS's application on the grounds that federal agencies acting in their "regulatory capacity" are under no obligation to comply with the MBTA, as Defendants maintain. *Id*. at 40. Nor did the FWS reject or refuse to process NMFS's application on the grounds that the FWS prefers to "rel[y], as a practical matter, on enforcement discretion to address incidental

take." *Id*. at 39 n.9.

Accordingly, there is nothing in the record that supports Defendants' counterintuitive assertion that merely requiring BLM to ensure compliance with the MBTA's permitting mechanism would somehow "interfere" with, rather than facilitate, the "FWS's administration of that statute." *Id*. In any case, Plaintiffs' right to seek judicial relief *against BLM* under the APA is in no way dependent on, and in no way challenges, any exercise of prosecutorial discretion by the FWS, which is not even a party to this case. *See Ctr. for Biological Diversity v. Pirie*, 191 F. Supp. 2d 161, 177 (D.D.C. 2002), *vacated as moot sub nom.*, *Ctr. for Biological Diversity v. England*, No. 02-5163, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) ("[B]ecause 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.").

CONCLUSION

For the foregoing reasons, as well as those set forth in POC's opening brief, BLM's ROD and ROW should be vacated and remanded to BLM pending compliance with the MBTA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,212 words.

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PROOF OF SERVICE

I hereby certify that on January 23, 2015, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, which includes the following counsel of record for Federal Defendants and Defendant-Intervenor:

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