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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

TULE WIND LLC and

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

INTERVENOR-DEFENDANTS TULE WIND LLC AND EWIIAAPAAYP BAND OF KUMEYAAY INDIANS' JOINT CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Hearing Date: Feb. 16, 2017
Time: 9:30 a.m.
Place: Courtroom 4A
Judge: Hon Janis L. Sammartino

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,

Intervenor-Defendants.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. ARGUMENT 4

A. The Legal Standard is Highly Deferential to the BIA 4

B. The BIA Relied on a Thorough EIS and Appropriately Addressed Post-EIS Issues as Intended in the EIS. 6

1. The BIA was Not Obligated to Prepare a Supplement Because There Was No New Information. 7

2. Plaintiffs Fail to Identify New Eagle Issues. 8

3. Plaintiffs Fail to Identify New or Significant Project Changes. 11

C. NEPA Does Not Require Finalized Mitigation Measures. 15

D. The BIA Was Not Obligated to Delegate Its Decision to Sister Agencies. 16

1. The BIA Was Not Required to Defer to FWS. 16

2. The BIA Was Not Required to Defer to BLM. 17

E. Plaintiffs Failed to Exhaust Administrative Remedies, thereby Waiving Analysis of Additional Alternatives. 20

F. Plaintiffs Fail to Show that the BIA Acted Arbitrarily or Capriciously in Approving the Lease Between the Ewiiaapaayp Tribe and Tule Wind. 20

IV. CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir.1998) 5

California v. Block, 690 F.2d 753 (9th Cir. 1982) 15

Center for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157 (9th Cir.2003) 5

City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986) 20

City of Las Vegas. v. FAA, 570 F.3d 1109 (9th Cir. 2009) 6

Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992 (9th Cir. 2010) 19

Dubois v. U.S. Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996) 13

Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754 (9th Cir. 1996) 19

Kleppe v. Sierra Club, 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718 (1976) 6

Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008) 5

League of Wilderness Defenders v. Allen, 615 F.3d 1122 (9th Cir. 2010) 5

Marsh v. Or. Natural Resources Council, 490, U.S. 360 (1989) 7

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 5

Nat. Parks and Cons. Assoc. v. U.S. Dep't of Transportation, 222 F.3d 677, 681 (9th Cir. 2000) 16

New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683 (10th Cir. 2009) 13

Protect Our Communities Found. v. Jewell, No. 13-cv-575-JLS (JMA), 2014 WL 1364453 (S.D. Cal Mar. 25, 2014) 2, 6

Protect Our Communities Found. v. Jewell, No. 14-55666 (9th Cir. 2016), *reh. den.* (Aug. 17, 2016) 2, 6

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 4, 16, 19

South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior, 588 F.3d 718, 727 (9th Cir. 2009) 16

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) 6, 19

Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior, 608 F.3d 592 (9th Cir. 2010) 15

U.S. Postal Serv. v. Gregory, 534 U.S. 1 (2001) 5

Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519 (1978) 19, 20

Wark Enters. LLC v. Multibank, 2009-1 RES-ADC Venture LLC, No. C12-5266 RBL, 2013 U.S. Dist. LEXIS 94038 (W.D. Wash. June 28, 2013) 5

STATUTES

25 U.S.C § 415 18

43 U.S.C. §§ 1701-1782 18

5 U.S.C. § 706 5

5 U.S.C. § 706(2)(a) 6

REGULATIONS

40 C.F.R. § 1500.1(b) 19

40 C.F.R. § 1500.4(j); § 1502.21 7

40 C.F.R. § 1501.5 18

40 C.F.R. § 1501.6(b) 1

40 C.F.R. § 1502(b) 3

40 C.F.R. § 1502.9(c) 7

40 C.F.R. § 1502.9(c)(1)(ii) 12

40 C.F.R. § 1505.2 17
40 C.F.R. § 1505.3 9
46 Fed. Reg. 18026 (Mar. 23, 1981) ..... passim

I. INTRODUCTION

In this action, Plaintiffs challenge the issuance of a Record of Decision ("ROD") by the Bureau of Indian Affairs ("BIA"), approving a Wind Lease Agreement ("Lease"), as amended, between the Intervenor-Defendants Ewiiaapaayp Band of Kumeyaay Indians (the "Tribe") and Intervenor-Defendant Tule Wind LLC ("Tule Wind"). The Lease is for the Tule II wind power generation project ("Project") to be located on the Tribe's reservation. *See Complaint*, ECF No. 1, p. 16, ¶ 30. Plaintiffs challenge a simple lease approval to promote tribal economic development and self-governance under specific federal laws governing leases on Indian reservations between federally recognized Indian tribes and their lessees.[1]

In 2010, the Tribe and Tule Wind entered into the Lease to develop a portion of the Project on the Tribe's reservation. TULE0105460.[2] Numerous federal, state and local agencies coordinated in the preparation of a nearly 6,000-page Environmental Impact Statement ("EIS") involving over eight years of study yielding a final EIS in October, 2011. The EIS analyzed the potential environmental impacts of the Tule Wind Project and other separate, but related project proposals. TULE0000003. The Bureau of Land Management ("BLM") acted as the lead Federal Agency for purposes of preparing the EIS. The BIA and the Tribe were cooperating agencies. TULE0000061; *see* 40 C.F.R. § 1501.6(b).

Plaintiffs Protect Our Communities Foundation ("POCF") participated in the public EIS process (TULE0002788, TULE 0003758, TULE 0004995, TULE0005110, TULE 0005190), and previously challenged the sufficiency of the EIS with this Court. *Protect Our Communities Found. v. Jewell*, No. 13-cv-575-

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[1] For a more detailed discussion of federal policy regarding Tribal land leasing and related interests, *see* ECF No. 34-1, pp. 8-9.

[2] "TULE___" refers to pages of the administrative record lodged with the Court.

JLS (JMA), 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014).[3] POCF appealed that decision and the Ninth Circuit Court of Appeals confirmed that the EIS complied with National Environmental Policy Act ("NEPA"). *Protect Our Communities Found. v. Jewell*, No. 14-55666 (9th Cir. 2016), *reh. den.* (Aug. 17, 2016).

In December 2013, when approving the land lease at issue in this matter, the BIA adopted the very same EIS that this Court and the Ninth Circuit Court of Appeals previously determined legally sufficient. Plaintiffs' repeated the same claims brought in *POCF. v. Jewell* against the BIA in this case. A cooperating agency may adopt a lead agency's EIS without recirculating it, or may adopt only a portion of the lead agency's EIS, and may reject part of the EIS, as appropriate. *See* Council on Environmental Quality Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 30 (Adoption of EISs), 46 Fed. Reg. 18026 (Mar. 23, 1981).

Two of the three claims Plaintiffs' POCF renewed in this litigation were dismissed in an Order dated March 29, 2016. Plaintiffs' narrow, remaining claim that the BIA violated NEPA is made pursuant to the Administrative Procedures Act ("APA"). Plaintiffs argue the EIS was insufficient and that the BIA is compelled to prepare a supplement to the EIS,[4] despite the overwhelming evidence that the NEPA review was thorough and complete.

II. BACKGROUND

The EIS evaluated the full proposed Tule Wind Project, including reasonable alternatives. This Court previously found the EIS discussion of the twelve Project alternatives complied with NEPA:

> Concerning plaintiffs' allegations that the BLM failed to

[3] The other Plaintiffs did not participate in the public EIS process, as discussed below.

[4] ECF No. 59-1, pp. 30, 35.

> comply with the National Environmental Policy Act in preparing the environmental impact statement, the panel held that: the district court properly determined that the environmental impact statement's purpose-and-need statement was adequately broad; the BLM acted within its discretion in dismissing alternative proposals; ***the mitigation measures provided ample detail and adequate baseline data for the agency to evaluate the overall environmental impact of the project; and the environmental impact statement took a "hard look" at the environmental impact of the project.***

Id. at 4 (emphasis added).

The evaluation of the proposed project and one alternative in particular are relevant to Plaintiffs' current NEPA claim that at the time of its decision, the BIA was required to prepare a supplemental EIS. The full project proposal (as modified through the NEPA and permitting processes and described in the final EIS) consisted of up to128 turbines to be built in two halves. Phase I would consist of 65 turbines located in McCain Valley (Phase I) and the other half would consist of approximately 63 turbines located on the adjacent ridge (Phase II).[5] "Alternative 5," as adopted by the BLM involved the development of only Phase I because it considered the project with the Phase II turbines removed. TULE0000390. BLM, as the NEPA lead agency, was required by NEPA to identify an environmentally preferable alternative, 40 C.F.R. § 1502(b), and selected Alternative 5 for BLM's purposes.

The environmentally preferable alternative is not always the same as an agency's preferred alternative. *See* Council on Environmental Quality Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 4.a., 46 Fed. Reg. 18026 (Mar. 23, 1981). NEPA does not require agencies to adopt the environmentally preferred alternative because decision-makers have discretion to

[5] Within the record, Phase II is referred to variously as the "Reduced Ridgeline Project," the "western" portion of the project, or similar designations.

legitimately balance other priorities. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, at 350-351 (1989) (an agency may balance the benefits of the project against environmental impacts). The BIA adopted BLM's EIS, which analyzed the full Project, and issued its December 2013 ROD, which describes some of the considerations that the BIA had to balance in reaching its decision, including promotion of the Tribe's economic development and self-determination on the Tribe's reservation held in trust for the Tribe, and Federal renewable energy policies encouraging development of renewable energy projects on Tribal lands. TULE0105454, TULE0105464-65, TULE0105473-76.

The BIA's "action" was to review the Lease for a wind project on the Tribe's reservation that constitutes significant economic and industrial development opportunity on remote reservation lands to promote the Tribe's socio-economic needs. TULE0105465. The BIA decision at issue in this matter involved a 20-turbine portion of Phase II on an otherwise stranded and inaccessible ridgeline. TULE0105454. The project as a whole required approvals from several federal, state, and local agencies and tribal governments: the BLM; the BIA; the Tribe and other tribes; the California State Lands Commission ("CSLC"); and the County of San Diego, among others. The EIS specifically contemplated that these multiple agencies would make independent decisions within their respective jurisdictions. TULE0002498.

III. ARGUMENT

A. The Legal Standard is Highly Deferential to the BIA

Congress enacted NEPA in 1969 to protect the environment by requiring federal agencies take certain procedural safeguards before making a decision affecting the environment. The NEPA process is designed to "ensure that the agency... will have detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to

the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998). The purpose of NEPA is to "ensure a process, not to ensure any result." *Id*. "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision-making to the end that the agency will not act on incomplete information, only to regret its decision after is it too late to correct." *Center for Biological Diversity v. U.S. Forest Serv*., 349 F.3d 1157, 1166 (9th Cir. 2003).

The legal review standard is highly deferential to the BIA as the agency with the expertise and charged with the discretion to make decisions within that its statutory authority. Under the Administrative Procedures Act ("APA"), the BIA's decision can be set aside only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The highly deferential standard is "extremely narrow," *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 6–7 (2001) , and a reviewing court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *League of Wilderness Defenders v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), overruled in part on other grounds as noted in *Wark Enters. LLC v. Multibank*, 2009-1 RES-ADC Venture LLC, No. C12-5266 RBL, 2013 U.S. Dist. LEXIS 94038, at *2 (W.D. Wash. June 28, 2013)).

When considering whether an action is arbitrary or capricious, the APA requires the court to uphold an agency decision even if a court might disagree with the decision. *See, e.g., Lands Council*, 537 F.3d at 993 ("[W]e are not free to 'impose on the agency [our] own notion of which procedures are 'best' or most likely to further some vague, undefined public good.'") (citation omitted). Agency decisions must be upheld unless the agency "'entirely failed to consider an important aspect of the problem,' or offered an explanation 'that runs counter to

the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *Id.* at 987 (citation omitted). This deference is highest when reviewing an agency's technical analyses and judgments "in an area involving a 'high level of technical expertise.'" *Id.* at 993 (citation omitted).

Plaintiffs' steep burden under the APA is to demonstrate that the BIA was arbitrary and capricious in its fulfillment of NEPA. 5 U.S.C. § 706(2)(a). NEPA imposes no substantive requirements upon the agency's ultimate decision. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, at 227 (1980). In this regard, NEPA is essentially a procedural statute. *Id.* A federal agency takes a "hard look" at the environmental consequences of its proposed action and bases its decision on a reasoned evaluation of the relevant factors will pass the APA test. *See e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S.Ct. 2718 (1976); and *City of Las Vegas. v. FAA*, 570 F.3d 1109, at 1115 (9th Cir. 2009).

The facts discussed below illustrate that Plaintiffs' fail to show that the BIA's action was arbitrary or capricious; to the contrary, the ROD was supported and well-reasoned.

B. The BIA Relied on a Thorough EIS and Appropriately Addressed Post-EIS Issues as Intended in the EIS.

The combined draft EIS and final EIS total more than 8,000 pages in length and incorporated public and expert input. This Court already found the EIS took a hard look at impacts, including impacts to avian species. *Protect our Communities Foundation v. Jewell*, No. 13CV575 JLC JMA, 2014 WL 1364453, *aff'd, Protect Our Communities Found. v. Jewell*, No. 14-55666 (9th Cir. 2016), *reh. den.* (Aug. 17, 2016). The BIA supported its ROD with a robust EIS and appropriately addressed post-EIS and pre-ROD issues. NEPA's implementing regulations encourage agencies to incorporate material by reference, particularly in

an EIS. *See* 40 C.F.R. § 1500.4(j); § 1502.21 ("Agencies shall incorporate material into an [EIS] by reference when the effect will be to cut down on bulk without impeding agency and public review of the action"). Likewise, it is reasonable to adopt another federal agency's EIS. *See* Council on Environmental Quality Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 30 (Adoption of EISs), 46 Fed. Reg. 18026 (Mar. 23, 1981).

The BIA employed updated biological studies to inform the final turbine locations and associated land disturbance in a manner that was not only permissible, but intended, and spelled out as post-EIS requirements in the EIS itself. The BIA appropriately considered other agencies' comments and as explained below, the BIA was not obligated under the NEPA law, regulation, or guidance to prepare a supplement to the EIS.

1. **The BIA was Not Obligated to Prepare a Supplement Because There Was No New Information.**

Plaintiffs claim a supplemental EIS should be prepared because the EIS was inadequate or because there was new information. ECF No. 59-1, at pp 36-46. A supplemental EIS is only required if there are substantial changes to the project, or significant new information is identified. 40 C.F.R. § 1502.9(c). To trigger a supplement, the new information must be sufficient to show the agency action will have a significant affect not already considered. *Marsh v. Or. Natural Resources Council*, 490, U.S. 360, at 374 (1989). That is not the case here. Plaintiffs neither identify new information, nor any significant changes that would trigger the need for a supplement.

Plaintiffs continue trivial debate about matters fully addressed in the EIS, identifying only that (a) wildlife agencies – with which the BIA consulted closely – commented on potential eagle impacts; (b) the project layout changed in minute ways, as anticipated in the EIS; and (c) the BIA and Tule Wind developed some of the detailed project studies and plans called for in the EIS. These matters

are neither new, nor significant.

Impacts to eagles were addressed *exhaustively* in the EIS, and continued monitoring of eagle nests and behavior was required by both the EIS mitigation measures adopted in the ROD, and the FWS-approved Avian and Bat Protection Plan ("ABPP"). The ABPP was incorporated into the EIS. TULE0010702-93; TULE0013440. Detailed project design and engineering were also anticipated by the EIS, as discussed below. The BIA went above and beyond the minimum requirements set out in the EIS by ensuring thorough and continued consultation with agencies. The BIA also adopted thoughtful conditions for its approval – conditions called for in the EIS – that were tailored to minimize potential eagle impacts and other environmental impacts.

2. **Plaintiffs Fail to Identify New Eagle Issues.**

Eagle issues were addressed *extensively* in the EIS. Indeed it was identified as a "major issue" for the evaluation. TULE0000067. Tule Wind conducted avian studies over multiple years (2005 to 2008), and conducted focused eagle surveys in 2010 and 2011. TULE0000445. The studies followed state and federal protocols. Tule Wind further analyzed eagles in its June 2010 Golden Eagle Information report and its September 2010 Applicant's Environmental Document. TULE 0013786; TULE0010865. In June 2011, the latest season of surveys were available and incorporated into the EIS. TULE0013808. The agencies independently evaluated potential eagle impacts in EIS Section D.2. TULE0000538, TULE0000551-53, TULE0000585-86, TULE0000596-97, TULE0000602, TULE0000614-21. The EIS concluded that risk to eagles and other avian species was present, but could be minimized through the implementation of several mitigation measures. TULE0000623-26. The EIS includes a number of mitigation measures relating to birds and eagles, and the BIA adopted those measures. TULE0105463; TULE0107989.

The EIS explicitly requires implementation of the 2011 ABPP. TULE0105461. The FWS endorsed the 2011 ABPP as "appropriate in its adaptive management approach to avoid and minimize take of migratory birds, bats and eagles within the Phase I area." TULE0005904. The FWS-approved an "adaptive management" structure because while the interactions with animals are inherently unpredictable, the ABPP can adapt to observed behavior and conditions. TULE0010772; TULE0108005. Mitigation measure BIO-10b required implementation of the ABPP's forward-looking plan. TULE0000711. Subsequently collected information from monitoring of project operations would also be presented to a Technical Advisory Committee that includes the FWS as a member. TULE0105484. The ABPP required future monitoring and studies, including nest surveys and telemetry. TULE0010758, TULE0010767. In its approval of the 2011 ABPP, the FWS "anticipated reviewing additional data necessary to evaluate a supplemental ABPP for Phase II." TULE0005904.

The BIA prepared an updated ABPP that used the results of updated surveys to refine Phase II mitigation and adaptive management. The BIA circulated the updated ABPP for public and agency comment in 2012, and included the final version as Attachment D to its ROD. TULE0105460, TULE0108093, TULE0111557. The Phase II ABPP built upon the analysis in the 2011 ABPP and EIS, but contains nothing new or unanticipated. The BIA, consistent with 40 C.F.R. § 1505.3, included appropriate conditions, including mitigation measures and monitoring and enforcement programs, in its approval of the Lease. *See also*, Council on Environmental Quality Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 34c, 46 Fed. Reg. 18026 (Mar. 23, 1981).

The outcome of these eagle behavior studies informed the BIA in authorizing "all, none or part of" Phase II. TULE0000624. Plaintiffs' suggestion that the EIS should be supplemented after preparation of studies and refined mitigation measures *required by the EIS itself* is circular and illogical. The BIA

adopted additional mitigation measures "based on and designed specifically to address the unique conditions of the ridgeline site." TULE0105463-64. The BIA used the latest information available to reach a prudent, well-reasoned decision that is virtually identical to the project contemplated for the Tribe's land in the EIS.

EIS mitigation measure BIO-10f specifically called for Phase II to be authorized at those "turbine locations that show reduced risk to the eagle population following analysis of detailed behavior studies of known eagles in the vicinity of the Tule Wind project." TULE0000624. The post-EIS studies considered by the BIA when adopting its ROD are as follows: (1) a 2012 nest survey that replicated the studies conducted in 2010 and 2011, (2) an eagle telemetry study, which analyzed the territory of eagles already known to be present in the area, and (3) 2012 eagle observations to supplement those eagle observations made previously. TULE0107949, TULE0107957-59.

The BIA implemented the consultation requirements of the EIS's mitigation measure BIO-10f in good faith. TULE 015484. The BIA committed to this measure, stating during the post-EIS, pre-ROD period that the BIA would "stay in close contact [with the FWS] on the tribal portion of the Tule wind project." TULE00014503. The BIA followed through on its commitment. *See, e.g.* TULE0105549, TULE0107064, TULE-0107517-29; TULE0107948. The BIA can hardly be faulted for its diligence.

The BIA's ROD incorporates updated field work from 2011-2012 to refine the project design. The results allowed the BIA to identify the areas and behaviors coincident with highest risk: the northernmost turbines during fledging season. TULE0107974. The BIA developed criteria to minimize risk by requiring Tule Wind to shut down the turbines during these periods. The BIA ROD explained the development of and rationale for adopting this impact minimization measure. TULE0105482-83. For instance, the 2012 ABPP quantified the impacts of curtailing the operation of four, rather than two of the northernmost turbines,

and doing so for longer periods, but determined that no significant additional benefit would result. TULE0105482; TULE0107970.

The BIA went above and beyond the EIS's minimization measures by requiring Tule Wind to apply to the FWS for an eagle permit, which was perfectly consistent with the EIS:

> "Other issues will be resolved during the permitting and agency review process described in Section A, Introduction/Overview of this EIR/EIS, which will need to be resolved prior to project construction. Such permitting includes consultation with the U.S. Fish and Wildlife Service (USFWS) under Section 7 of the Endangered Species Act …; USFWS determination of consistency with the Bald and Golden Eagle Protection Act … (the USFWS-approved Avian and Bat Protection Plan and their determination of consistency for the Tule Wind Project is available for review on the CPUC project website).

TULE0000090.[6]

Despite the fact that the California Department of Fish and Game ("CDFG") does not have jurisdiction over the Tribe's reservation,[7] Plaintiffs complain that the BIA did not adopt CDFG's suggestion to eliminate, rather than curtail the two northernmost turbines. ECF No. 59-1 at p. 25. The BIA carefully considered CDFG's comment. The BIA chose not to allow operation of the two turbines during periods of higher risk, rather than to remove them entirely, a decision within the agency's discretionary authority and explicitly anticipated by the EIS. TULE0000624.

3. Plaintiffs Fail to Identify New or Significant Project Changes.

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[6] The determination of consistency letter is a reference to the October 3, 2011 FWS letter. TULE0005904.

[7] See, e.g., *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975); and *U.S. v. Humboldt County*, 615 F.2d 1260 (9th Cir. 1980).

The EIS assumed that Phase II would consist of 7 turbines on State lands, and 18 on Tribal lands, with the remainder of the turbines to be located on BLM land. TULE0000062, TULE0000076. This is depicted in Figure ES-2 of the EIS, with 19 turbine locations shown on the Tribe's reservation, and additional turbines located immediately along the border with BLM land. TULE0000133. Figure C-2A of the alternatives analysis shows 17 turbines on Tribal land, with 3 turbines immediately adjacent on BLM land, and Figure C-2B shows 18 turbines on Tribal land, with three turbines located immediately adjacent on BLM land. TULE0000423. The Cumulative Impacts section depicts 18 to 21 turbines on Tribal land (Figures F2-A and F-2B). TULE0002749-51.

Plaintiffs assert that the EIS only analyzed the placement of 18 turbines on the Tribe's reservation, rather than the 20 turbines authorized by the BIA's ROD. Plaintiffs further complain about the inclusion of two turbines on the Tribe's land that were analyzed in the EIS along the border between BLM and the Tribe's reservation. Plaintiffs overstate the modifications. *Cf*. TULE0107830. Plaintiffs also overstate the NEPA threshold for a supplemental EIS, asserting that this detail constitutes a significant change that requires a supplemental EIS to analyze any minor differences.

Because the BLM did not authorize the westernmost or ridgeline turbines located within its jurisdiction, the BIA's approval of 20 turbines does not carry the possibility of exceeding the 63-turbine envelope evaluated in the original EIS. The area of disturbance would be 13 acres less than analyzed in the EIS. Taken as a whole, Phase II now constitutes a *reduction* in project size. The subset of 20 turbines on 62 acres that the BIA approved, including those located along the Tribe/BLM border, were well within the larger spectrum of 63 turbines on 75 acres of land analyzed in the EIS.

When a project involves a minor variation of an alternative discussed in an EIS, a supplemental EIS need not be prepared. 40 C.F.R. § 1502.9(c)(1)(ii).

"If it is qualitatively within the spectrum of alternatives that were discussed in the [EIS]," … "no Supplement EIS would have to be prepared. Council on Environmental Quality Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question 29(b)A, 46 Fed. Reg. 18026 (Mar. 23, 1981). The EIS is consistent with this cannon of NEPA evaluations. The final EIS points out that a reduction in project size is an insignificant change and does not require analysis of a new alternative. TULE0000058.

Plaintiffs suggest that *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009), where the agency modified its plan to be qualitatively different and "well outside the spectrum" of anything previously considered in the EIS applies to the BIA's approval. To the contrary, the BIA's ROD clearly states that Tule Wind proposed a "reduced intensity project on the ridgeline – on both tribal and CSLC lands," TULE0105453, and that "the lease anticipates that approximately 62 acres of the 75 acres analyzed in the FEIR/EIS will actually be impacted on the trust land." TULE0105461. The relatively minor modifications of the Tule Wind project are qualitatively *and* quantitatively within the spectrum analyzed in the EIS.

Plaintiffs also cite *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996) to support their argument that a supplemental EIS was required. *Dubois* and *New Mexico* only make the point that a supplemental EIS is not required when the selected action is merely a reduced version of a previously-considered alternative, as is the case with the reduced intensity Phase II project.

The EIS anticipated that the precise turbine locations would change and the EIS adopted a number of setbacks to provide boundaries for those changes. TULE0001817. Those setbacks affected the placement of turbines on the Tribe's reservation. TULE0001150-51, TULE0105541. If the project was approved with fixed turbine locations, there would be no need for establishing minimum setback distances; fixed features do not require further consideration of placement.

TULE0001150-51.

The EIS evaluated the maximum impacts from a *range* of turbine quantities and sizes. TULE0006460-61. The EIS considered that the turbines themselves could range from 1.5 megawatts each to 3.0 megawatts (and sizes in between). TULE0000064. For instance, the full project (Phase I and Phase II combined) consisting of 67 3.0 megawatt ("MW") turbines would require 134 1.5 MW turbines to generate the same output. Each turbine size requires different turbine spacing and other design differences. The EIS points out in the noise discussion that utilizing larger turbines would decrease noise emissions by resulting in larger setback distances. TULE0001619. Turbine locations were *anticipated* to change because it is impractical to identify exact locations for yet-to-be selected turbine equipment that would be manufactured in the future. The adjustability present in the EIS reflects the reality that a project must have the ability to make final engineering changes based on the size of the turbine selected, geotechnical survey results, etc.

The EIS anticipated adjustments to turbine locations not only for turbine size, but for final engineering. TULE0000090. The dots on the maps in the EIS were not engineered drawings precise enough for construction purposes. The EIS could not and did not take into account the conditions on the ground or under the ground, as would be determined by a land survey and site-specific geotechnical conditions that require drilling samples to assess soil characteristics for the final project design. TULE0000107, TULE0000227, TULE0001184, TULE0105541. Instead, project features were assumed to be located within corridors of potential ground disturbance. *See, e.g.* TULE0000448, TULE0000492, TULE0000699. Survey corridors within which the project disturbance might occur are referenced throughout the EIS because the precise locations within those corridors could not be known in advance. To facilitate this flexibility, the EIS calculated maximum temporary and permanent impacts to

habitats. TULE0000062-63. Construction activities would be limited to the areas defined by final engineering plans. TULE0000091.

Flexibility in locating final project facilities is consistent with NEPA. NEPA's "focus is on the assessment of environmental impacts, and the project details are usually a means to that end." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 600 (9th Cir. 2010). Federal agencies may approve a project without knowing exact locations. In *Te-Moak Tribe*, identification of the dimensions of sites and access roads, the methods used to construct them, and the total surface disturbance area was sufficient for NEPA purposes, even though the *locations were not known*. *Id.* The EIS for the Tule Wind project specified the dimensions of turbines and other project features, and the methods used to construct them, but in this case, the EIS identified the general locations of turbines. The BIA's approval involved reduced surface disturbance. Such minor modifications are well within the tolerances permitted by NEPA. *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (requiring a reasonably thorough analysis).

The BIA's approval involved environmental impacts that were substantially the same as analyzed for the Tribe's land in the EIS. Plaintiffs identify no new or significant project changes that were not fully addressed in the EIS. Plaintiffs' claim that a supplement was warranted is trifling, unfounded and inconsistent with NEPA.

C. NEPA Does Not Require Finalized Mitigation Measures.

Plaintiffs' claim that proposed mitigation measures were insufficient is not supported by the record. The EIS outlined numerous mitigation measures in considerable detail. NEPA establishes no substantive requirement that environmental impacts be mitigated or avoided. The mitigation measures proposed in an EIS "need not be legally enforceable, funded, or even in final form to comply

with NEPA's procedural requirements." *Nat. Parks and Cons. Assoc. v. U.S. Dep't of Transportation*, 222 F.3d 677, 681 (9th Cir. 2000). Rather, the mitigation discussion must provide only "sufficient detail" to indicate that environmental impacts have been fairly evaluated. *South Fork Band Council Of Western Shoshone Of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989))

D. The BIA Was Not Obligated to Delegate Its Decision to Sister Agencies.

Plaintiffs obfuscate agency authority and jurisdiction. The BIA, BLM and FWS are all federal agencies within the Department of Interior. Plaintiffs' arguments that these three agencies must make joint decisions are completely inconsistent with each agency's respective authority and jurisdiction, and fail to recognize their distinct statutory duties and priorities. BLM's decision to authorize certain aspects of the Tule Wind Project on BLM lands is not binding on the BIA. Similarly, the BIA had no obligation to predetermine FWS approval.

1. **The BIA Was Not Required to Defer to FWS.**

Plaintiffs argue that the BIA could not have authorized any ridgeline turbines for construction without getting the prior approval of the FWS. ECF No. 59-1, pp. 14-15. The EIS required only *consultation* with the FWS. *Id. See also* TULE0000624-25. The EIS *also* required consultation with the Tribe. *Id*. The record is full of the BIA's extensive consultation with wildlife agencies, including close cooperation with the FWS on the preparation of the BIA's ROD, and the requirement that Tule Wind apply for an eagle permit. *See, e.g.*, TULE0005902 (FWS approval of project ABPP), TULE0105413 (Dep't of Interior Tasking Profile), TULE0107272 (FWS response to the BIA's request for evaluation of ABPP), TULE0107530 (the BIA response to FWS comments), TULE0107638 (the BIA coordination with FWS), TULE0108186 (FWS Biological Opinion),

TULE0108651 (response to comments on ABPP and Fire Plan, including CDFG comment letter).

The FWS is reviewing Tule Wind's application for an eagle permit, the area over which it has authority and expertise, making its own decision and imposing its own conditions of approval. ECF No. 38-1, p. 26. The BIA fulfilled its duty to consult with the FWS and the Tribe, and made a decision that balanced the considerations of both.

2. **The BIA Was Not Required to Defer to BLM.**

Plaintiffs suggest that the BIA should have deferred to BLM's adoption of Alternative 5. ECF No. 59-1, p. 9. Although NEPA's implementing regulations require agencies to consider a range of alternatives to a proposed project and to adequately analyze them, it does not require an agency to adopt any particular alternative. 40 C.F.R. § 1505.2; *Te-Moak Tribe of Western Shoshone of Nev. V. U.S. Dep't of Interior* F.3d 592, 601-602 (2010).

The factual record reflects this truth: the agencies involved in the environmental review intended that each responsible agency would retain discretion over portions of the project *within their respective jurisdictions,* regardless of which alternative was identified as the environmentally preferred alternative. TULE0000061-63. Even the description of the BLM's preferred alternative only required the BIA to "consider reduction of turbines." TULE0000088. The FEIS further elucidates:

> The conclusions in Sections E.3.1 through E.3.5 for the Tule Wind Project Alternatives result in the overall environmentally superior alternative as Tule Reduction in Turbines Alternative combined with Alternative Gen-Tie Route 2 Underground with Collector Substation/O&M Facility on Rough Acre Ranch. *Consideration and adoption of this alternative and/or a variation or other combination of alternatives would be at the discretion of the BLM, BIA, Ewiiaapaayp Band of Kumeyaay Indians,*

CSLC, and County of San Diego.
TULE0002498 (emphasis added). This clear division of authority is consistent and reinforced by discussion of the various agency decisions involved. *See* TULE 0000006, TULE0003875, TULE0002475-76, TULE0002485. For instance, the FEIS explains that the County of San Diego would have "sole responsibility" in making a decision on portions of the projects analyzed in the final EIS, "including which, if any, of the alternatives evaluated in the [final EIS] should be adopted." TULE0002500.

Plaintiffs conflate the facts to describe agency authority. Phase II of the project contained turbines on both BLM and Tribal land, but Plaintiffs suggest falsely that BLM has jurisdiction over Tribal lands, stating the BLM "deliberately chose not to authorize any turbines on BIA trust land, and instead ultimately ceded responsibility to BIA for Tule Wind Phase II." ECF No. 59-1, p. 12. Ln. 9-13. Plaintiffs' conclusion is contrary to the record. "BLM does not have authority to grant or deny an application on Native American lands. We are in discussions trying to find a solution that doesn't foreclose access to the Ewiiaapaayp reservation, but still complies with BGEPA." TULE00145556.

Plaintiffs' conclusion is also contrary to the law. The BLM never had authority over the BIA trust land to cede. The BLM's authorizing statute, the Federal Land Policy Management Act, 43 U.S.C. §§ 1701-1782, grants BLM no such authority; only the BIA holds authority over the leasing of Tribal lands. 25 U.S.C § 415; 25 C.F.R. Part 162, Subpart F (2010). And BLM's status as a lead agency for purposes of supervising the preparation of the EIS did not expand BLM's authority. 40 C.F.R. § 1501.5.

NEPA did not require the BIA to adopt BLM's preferred alternative because NEPA is a procedural statute designed only to ensure *consideration* of the

environmental analysis; NEPA does not mandate particular results. 40 C.F.R. § 1500.1(b); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754 (9th Cir. 1996). A reviewing court's only role is to verify that the agency has considered the EIS. *Strycker Bay Neighborhood Council, Inc. v. Karlen* 444 U.S. 223, at 227-228 (1980); *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Consistent with NEPA, the BLM fully recognized this standard, stating that the "identification of a preferred alternative does not constitute a commitment or decision, and there is no requirement to select the preferred alternative in the record of decision." TULE0000089. It is well settled that NEPA provides cooperating agencies with authority to adopt or reject the lead agency's preferred alternative. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989) (citing *Strycker's Bay* and *Vermont Yankee*).

Plaintiffs' misleading statement obscures the fact that: (a) both the BLM and the BIA had jurisdiction over different portions of Phase II,[8] (b) the BLM made no decision regarding the BIA portion of the project,[9] (c) the BLM deferred a decision of Phase II turbines on BLM-administered land "pending the outcome of eagle behavior studies,"[10] and (d) the BIA contemplated that BLM would still authorize project components on BLM land for the portion of Phase II located on BIA land.[11] The BLM subsequently did so, issuing authorizations for the following Phase II components: access roads, two construction laydown yards, overhead electrical lines and underground electrical lines.[12] The BLM did not

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[8] TULE0000423 (map), and TULE 0110191, TULE0000390 (EIS description of Alternate 5: removal of Phase II turbines).

[9] TULE0000089.

[10] TULE0000624.

[11] TULE 0014168, TULE0110201.

[12] *See* Intervenor-Defendants' Request for Judicial Notice ("Intervenor RJN"), Discussion, Section A (Exh. A). Judicial notice requested. As noted in *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010), the Court

preclude the development of Phase II, and the identification of a preferred alternative precluded neither the BIA, nor any other agency from authorizing Phase II.[13] To the contrary, the BLM supported the BIA's decision, even though it may have disagreed.

E. Plaintiffs Failed to Exhaust Administrative Remedies, thereby Waiving Analysis of Additional Alternatives.

Plaintiffs are required to participate in the administrative process. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986). They must also exhaust administrative remedies by identifying issues for agency consideration before complaining that an analysis was erroneously omitted. Failing to raise them constitutes waiver. *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-554 (1978). Here, two of the three Plaintiffs did not participate in the numerous opportunities for public input, and the third actively participated, yet omitted from its comments on the EIS (TULE00005195 (distributed generation)), to the BIA (TULE0110615 (distributed generation)), *and* in its previous lawsuit challenging its EIS allegations (*Protect Our Communities Found. v. Jewell*, No. 13-cv-575-JLS (JMA), 2014 WL 1364453 (distributed generation)) the alternative analyses it now seeks. Plaintiffs waived their claims to supplemental EIS analysis of layouts or eagle mitigation.

F. Plaintiffs Fail to Show that the BIA Acted Arbitrarily or Capriciously in Approving the Lease Between the Ewiiaapaayp Tribe and Tule Wind.

Plaintiffs have a high burden of proving the BIA's actions were irrational. The BIA evaluated environmental impacts using a substantial and thorough EIS developed with extensive agency and public input. The EIS has

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may judicially notice facts based on the information taken from publicly available government websites.

[13] Intervenor RJN, Discussion, Section B (Exhibits B and C). Judicial notice requested.

passed judicial review. The EIS studied eagles in detail, and contained mitigation measures that would ensure the best design for impact minimization. The BIA not only implemented those measures, it went further by conditioning its approval on Tule Wind (a) applying for an eagle take permit from the FWS, and (b) halting operations of certain turbines during periods of higher risk to eagles. The EIS contains analysis incorporating contingencies for project modifications. For instance, the 201 MW project could range from 67 to 134 turbines. The 20 turbines that BIA approved are well within the project parameters analyzed in the EIS; it represents a reduced project size.

The BIA thoroughly explained its rationale for approving 20 turbines in a detailed ROD. The ROD also discussed the BIA's balancing of statutory interests and goals of Tribal self-determination and economic needs with project impacts and benefits. Plaintiffs preferred the EIS's Alternative 5. For the portion of the project within the BIA's jurisdiction, Alternative 5 was tantamount to the "no action" alternative, or "no build" alternative. The decision to select an alternative was clearly within the BIA's discretion.

Other Federal agencies had objectives and parameters that are different from the BIA. But neither NEPA, nor the APA, require the BIA to adopt another agency's decision or its preferred alternative. NEPA does not require a particular outcome; it requires consideration of environmental impacts in the BIA's decision making, and the BIA fulfilled that obligation. The BIA also fulfilled its tribal trust responsibility under 25 C.F.R Part 162 and other federal policies and addressed each of the environmental consideration raised by Plaintiffs in its ROD.

The BIA thoroughly discussed and provided its well-reasoned and fully supported rationale in the ROD; it did not act arbitrarily or capriciously. Courts owe government agencies deference to that agency's discretion and expertise. The BIA's ROD did not violate NEPA or the APA.

IV. CONCLUSION

For the foregoing reasons, Tule Wind respectfully requests that the Court grant Intervenor-Defendants' Cross-Motion for Summary Judgment, deny Plaintiffs' Motion for Summary Judgment and dismiss all of Plaintiffs' remaining claims.

Dated: October 25, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby state and certify that on October 25, 2016, I filed the foregoing document using the ECF system, and that such document will be served electronically and on all parties of record.

Jeffrey B. Durocher
By: Jeffrey B. Durocher