No. 17-55647

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROTECT OUR COMMUNITIES FOUNDATION, *et al.*,

Plaintiffs-Appellants,

v.

WELDON LOUDERMILK, *et al.*

Defendants-Appellees,

&

TULE WIND, LLC, and EWIAAPAAYP BAND OF KUMEYAAY INDIANS,

Intervenors-Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
Civil Case No. 14-2261

BRIEF FOR THE FEDERAL DEFENDANT-APPELLEE

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INTRODUCTION

Plaintiffs-Appellants Protect Our Communities Foundation, et al. (POCF) challenge the decision of the Bureau of Indian Affairs (BIA) to approve a lease on land held in trust by the United States for the benefit of Intervenor-Defendant Ewiiaapaayp Band of Kumeyaay Indians (Tribe). The lease allows for the construction, operation, maintenance, and decommissioning of Phase II of the Tule Wind Project (the Project) of Intervenor-Defendant Tule Wind, LLC (Tule). Supplemental Excerpts of Record (SER) 360. The lease's terms were negotiated and executed by the Tribe and Tule, but BIA is required to approve leases of tribal trust land. *See* 25 U.S.C. § 415; 25 C.F.R. pt. 162.

In *Protect Our Communities Foundation v. Jewell*, 825 F.3d 571 (9th Cir. 2016) (*Tule I*), POCF alleged that Interior's decision to grant a right-of-way on Bureau of Land Management (BLM)-managed land for Phase I of the Project violated National Environmental Policy Act (NEPA), the Migratory Bird Treaty Act (MBTA), and the Bald and Golden Eagle Protection Act (Eagle Act). This Court rejected POCF's multiple and varied NEPA claims, which challenged nearly every element of the Project's environmental impact statement (EIS); it found that the agencies had taken the necessary "hard look" at the Project's impacts, examined a reasonable range of alternatives, and adequately discussed mitigation. *See Tule I*, 825 F.3d at 577-85.

This Court further rejected POCF's argument that the agencies had violated the MBTA, the Eagle Act, or the Administrative Procedure Act (APA) in approving a

right-of-way for Project construction and operation (because the latter was likely to lead to Tule's taking protected birds or eagles). This Court reasoned that federal agencies acting in their regulatory capacities—like BLM in *Tule I* and like BIA here—are "neither statutorily tasked with policing third-party compliance with the Eagle Act [or the MBTA] nor [are they] responsible for violations that might be independently committed by grantees, such as Tule." *Id.* at 588. This Court further reasoned that "the APA does not target regulatory action by [an agency] that permits a third-party grantee like Tule to engage in otherwise lawful behavior, and only incidentally leads to subsequent unlawful action by that third party." *Id.* at 586.

In the present case, POCF now joins with new individuals to allege that these same statutes were violated in much the same manner by BIA's approval of the lease for Phase II of the Project on BIA-managed land.[1] As described above, this Court rejected nearly all of those claims in *Tule I*. This Court should reject the claims again.

JURISDICTIONAL STATEMENT

(a) The district court had jurisdiction under 28 U.S.C. § 1331 because POCF's claims arise under federal law, namely, NEPA and the Eagle Act. Excerpts of Record (ER) 236, 260-63.

[1] The second phase of the Tule Wind Project, as authorized through BIA's approval of the lease, will be referred to in this brief as "Phase II." However, certain other documents refer to it as the "Tule Reduced Ridgeline Wind Project." *E.g.*, SER 1437.

(b) The judgment appealed from is final because it dismissed all of POCF's claims. ER 19. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court's judgment was entered on March 6, 2017. ER 277. POCF filed a notice of appeal on May 5, 2017. ER 41. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B)(ii), which grants 60 days for any party to appeal a judgment in a civil case in which one of the parties is a federal agency.

STATEMENT OF THE ISSUES

1. Whether BIA complied with the NEPA in approving the subject lease where the Project EIS that BIA helped to prepare fully analyzed all potential environmental impacts of Phase II as well as a reasonable range of alternatives?

2. Whether BIA's decision is consistent with the Eagle Act where BIA required Tule to comply with the Eagle Act at all times as a condition of the lease?

STATEMENT OF THE CASE

I. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

NEPA is a purely procedural statute that does not impose substantive environmental obligations but rather establishes the process by which federal agencies must evaluate and disclose the environmental effects of, and alternatives to, proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). At NEPA's core is the requirement to prepare a "detailed statement," known as an EIS, when the agency anticipates that its contemplated action may have

significant environmental effects. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11. An EIS generally describes, among other items, the proposed action's purpose and need, the alternatives to the action, the affected environment, and the environmental consequences of alternatives. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.10.

NEPA regulations promulgated by the Council on Environmental Quality ("CEQ") provide agencies with direction on how to prepare an EIS. The regulations direct agencies to involve the public in the planning and EIS preparation process as soon as practicable, by, among other things, preparing and circulating a draft EIS for public comment. *See* 40 C.F.R. §§ 1501.2, 1501.7 1502.09(a), 1502.19. The regulations then direct agencies, in finalizing the EIS, to consider and respond to public comments received on the draft EIS, including "any responsible opposing view" not addressed in the draft. *See id.* §§ 1502.09(b), 1503. The regulations also direct agencies to prepare a supplement to either the draft or the final EIS if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.09(c)(1)(ii); *see also Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 374 (1989).

After finalizing the EIS, an agency must select a course of action within the range of alternatives analyzed in the final EIS and issue a record of decision ("ROD"). *See id.* § 1505.1. A ROD essentially explains why the agency chose a particular alternative and whether all practical means for avoiding or minimizing environmental harm have been adopted and, if not, why not. *See id.* § 1505.2. As long as an agency

evaluates and discloses its proposed action's environmental effects, an agency is under no obligation to choose any particular course of action or even to avoid or minimize environmental harm stemming from its chosen action. *See Robertson*, 490 U.S. at 350; *Marsh*, 490 U.S. at 371.

II. FACTUAL BACKGROUND

The Project authorizes the construction, operation, maintenance, and eventual decommissioning of 82 wind turbines and associated facilities and infrastructure in the McCain Valley approximately 60 miles east of San Diego, California. The Project was authorized in two phases. Phase I involves 62 "valley" turbines on BLM-managed land (ER 49), the approval of which was upheld by this Court in *Tule I*. Phase II, which is at issue in this appeal, consists of 20 "ridgeline" turbines on tribal trust lands held by the United States for the benefit of the Tribe. ER 47, 49; SER 1425-36.

A. The Project's NEPA Process

In approving both phases of the Project, BLM and BIA relied on the same Project EIS to satisfy NEPA. SER 50, 52. Although BLM was the lead agency in preparing the Project EIS, BIA and the Tribe both served as cooperating agencies, as did other agencies. *Id.* The public portion of the NEPA process began in December 2010, when the agencies released the Project's draft EIS for public comment. SER 367. A 70-day public comment period followed. *Id.* After reviewing and responding to thousands of comments submitted during that period, SER 260.1-260.2, the agencies released the final Project EIS in October 2011. SER 1. In more than 5,000 pages, the

Project EIS comprehensively analyzes the Project's impacts on environmental, social, economic, biological, and cultural resources. *See* SER 9-16 (list of resources analyzed).

The Project EIS identifies the Tribe's purpose and need in developing the Project, focusing on the tribal government's directive to "facilitate the timely development of Ewiiaapaayp Band of Kumeyaay Indians' wind and solar energy resources through tribal renewable energy projects to serve environmental, cultural, governmental, economic and social needs of the tribe and its citizens." SER 98. BIA's ROD expands on this, noting that the "mission of the BIA and the basis for the acceptance of this ROD is to facilitate the economic well-being of the Ewiiaapaayp Tribe while fostering tribal self-sufficiency," and that the Project "is needed to provide the Tribe with significant and dependable annual revenues to supplement tribal governmental services and priorities." SER 1426. Consistent with this purpose and need, the Project EIS contained an in-depth analysis of the proposed action, five action alternatives, and two no-action alternatives. Four of the five action alternatives (Alternatives 1-4) used the same number and locations of turbines, while varying the location of other ancillary facilities. SER 117. Alternative 5 eliminated many of the proposed turbines, reducing the generating capacity to 186 megawatts. *Id.*; SER 360. Alternative 5 was developed to reduce potential indirect effects to the In-Ko-Pah Mountains Area of Critical Environmental Concern and to reduce the risk of golden eagle collision with operating turbines. SER 119. The Project EIS also considered other alternatives in lesser detail, but omitted them from the detailed analysis,

generally because they did not meet the agencies' purposes and needs or had greater environmental impacts. SER 117-118, 120-29, 362.1, 364-66.

The Project EIS's impacts analysis was based on a host of technical reports and surveys. *See, e.g.*, SER 262-317, 386, 421-55, 633-34. On multiple occasions during the NEPA process, the agencies preparing the Project EIS also requested additional information from Tule. *See, e.g.*, SER 880-1219. With respect to avian impacts, the record shows that the agencies preparing the Project EIS undertook extensive efforts to analyze potential impacts. In consultation with BLM, BIA, and the U.S. Fish and Wildlife Service ("FWS"), Tule conducted research regarding the presence of, and potential for impacts to, avian species in the vicinity of the Project area. SER 236-44, 261-315. These efforts included general avian surveys (*e.g.*, SER 635-831) and species-specific surveys for golden eagles (*e.g.*, SER 542-631, 1229-1304), all of which were completed before the Project EIS was finalized.

In addition to conducting research related to avian species, Tule worked with the agencies to develop a comprehensive set of mitigation measures to address those impacts. *See, e.g.,* SER 161 (Mitigation Measure BIO-7c); *see also* SER 500, 505. These measures are documented in the Project's original Avian and Bat Protection Plan ("ABPP"), which is the result of years of consultation and coordination among Tule and the agencies, as well as extensive site-specific scientific data, including point count surveys, nest surveys (for raptors generally and golden eagles specifically), camera data, satellite telemetry data, and ultrasonic acoustic survey data. *See* SER 456-541,

832-37, 838-79, 1305-98, 1399-1401. The original ABPP was incorporated by reference in the Project EIS. And, as discussed in the next section, a supplemental ABPP was later prepared to address Phase II of the Project.

The ABPP demonstrates that Tule and the agencies used state-of-the-art methodologies to collect information to evaluate risk and make siting and operational decisions to reduce the level of impacts to the maximum extent practicable." SER 460. For example, the ABPP includes seasonal and situational triggers that modify Project operations (e.g., partial or complete curtailment) to avoid or minimize impacts to avian species.[2] SER 460, 519-20. FWS concluded that the Project's overarching ABPP "is appropriate in its adaptive management approach to avoid and minimize take of migratory birds, bats and eagles within the Phase I project area." SER 358.

In addition to the ABPP, the Project EIS also analyzed a wide range of mitigation measures. SER 318-57, 363, 369-420. For biological resources, including birds, nearly 40 measures require a range of actions to mitigate impacts to those resources—including the development of plans such as the ABPP, a habitat restoration plan, and an invasive species control plan—and to conduct ongoing species monitoring and surveys. SER 78-90, 153-72. In addition to analyzing

[2] For example, the ABPP requires oversight by a joint scientific committee comprising federal, state, and tribal representatives to address unforeseeable or unreasonable impacts to eagles and other avian and bat species. SER 358.

mitigation measures in each resource chapter, a separate chapter discusses mitigation monitoring, reporting, and verification. SER 255-60.

B. Post-EIS Information and BIA's Lease Approval

The Project EIS anticipated that additional documents concerning monitoring for the purposes of mitigation would continue to be developed and released after the Project EIS was finalized. Indeed, the development of some of these documents — including the supplemental ABPP—were designated by the Project EIS as mitigation measures in their own right. SER 141. On August 17, 2012, Tule released the final version of its supplemental ABPP for Phase II. Along with the Fire Plan, it was made available for public comment, from September 19 to October 19, 2012.

The supplemental ABPP for Phase II followed the earlier overarching ABPP that was incorporated by reference in the Project EIS. The supplemental ABPP required multiple measures to reduce impacts to bats and birds, including "biological monitoring during construction activities, worker environmental awareness training, restoration of temporarily impacted areas, compensation for permanently impacted habitat at a minimum 1:1 ratio, minimization of impact areas, and control of fugitive dust as well as golden eagle-specific preconstruction nest surveys and no-activity buffers" around certain nests and curtailment of operations under certain conditions. ER 50 (BIA ROD, summarizing the supplemental ABPP for Phase II).

When BIA issued its ROD in December of 2013, it required implementation of the supplemental ABPP's mitigation measures. ER 50, 57-63. BIA found that these

mitigation measures would collectively "reduce the impacts to migratory birds, golden eagles, raptors, and bats to an acceptable level while meeting the purpose and need for this project." ER 62. But BIA did not whitewash the issue of impacts to eagles and did not assert that those impacts would be eliminated. BIA observed that, "[e]ven with the implementation of these measures, the [Project EIS] anticipated that construction and operation of the proposed project could kill golden eagles and adversely affect their foraging habitat." ER 50. In light of this continued risk, the Tribe and agencies required Tule to apply for an eagle take permit under the Eagle Act. *Id.* BIA further conditioned the lease on the Project's compliance with all applicable laws at all times, including the Eagle Act. *Id.* And BIA warned Tule that any unauthorized take of eagles is a violation of the Eagle Act that may result in civil or criminal prosecution. *Id.*

III. PROCEDURAL BACKGROUND

POCF filed suit seeking a declaration that BIA's decision to approve the lease violated NEPA, the MBTA, and the Eagle Act. ER 260-63. POCF asked the court to set aside the lease and to remand the decision to BIA for further consideration. ER 264. Tule and the Tribe intervened as defendants. ER 271-72.

Early in the suit, the district court dismissed the MBTA and Eagle Act claims for failure to state a claim under those statutes.[3] ER 28-36. The district court ruled that BIA does not violate the MBTA, the Eagle Act, or the APA by authorizing lawful conduct by a third party that potentially could later result in that third-party violating the law. ER 31. The court found nothing in the record suggesting that BIA actually had authorized unlawful takes of birds or eagles. ER 32. In fact, the district court found the opposite, as a condition of the lease, BIA required Tule to comply with all applicable laws, including those prohibiting unauthorized bird and eagle take, and cautioned Tule that it must apply for a permit from FWS before commencing Project operations and that any unpermitted take of any birds or eagles is unlawful and risks prosecution. *Id.* The district court opined that "[i]t would be absurd to say an agency violates the [APA] by directing third parties to avail themselves of the procedures administered by *other agencies*." ER 35.

Thereafter, acting on the parties' cross-motions for summary judgment, the district court entered judgment for BIA and the intervenors on the remaining NEPA claims. The court concluded that BIA complied with NEPA before approving the lease by relying on the 2011 Project EIS, including that document's analyses of potential alternatives to the proposal and potential mitigation measures. ER 8-13.

[3] The district court also dismissed the NEPA claim to the extent that it was based on a demand for supplemental NEPA analysis *after* BIA issued its final decision approving the lease. ER 37-39. POCF does not raise this issue on appeal.

Moreover, the court found that POCF's challenge to the alternatives analysis was barred for failure to exhaust administrative remedies. ER 12. The court further concluded that post-2011 information and alleged changes in project design did not require BIA to prepare a supplemental EIS before approving the lease because the post-2011 information was insignificant and the project design changes were minor. ER 14-17. Finally, the court concluded that BIA fully complied with NEPA's public participation requirements. ER 18. The district court thus entered final judgment for BIA. ER 19. POCF now appeals. ER 41.

SUMMARY OF THE ARGUMENT

The district court's judgment should be affirmed. Contrary to POCF's arguments, agencies do not make "binding commitments" in NEPA documents such as EISs. Rather, NEPA documents simply explore as a procedural matter the potential environmental impacts of, mitigation for, and alternatives to, a proposed action. The Project EIS fully analyzes Phase II's potential impacts on eagles and its mitigation to reduce those impacts. There is thus no reason for BIA to prepare a supplemental EIS.

Moreover, POCF has forfeited its NEPA challenge to the Project EIS's alternatives analysis by failing to raise any concern regarding the analysis during the public comment period. In any event, the Project EIS analyzes a reasonable range of alternatives allowing BIA to authorize any number of turbines from zero up to 20. BIA chose to authorize a lease allowing up to 20 turbines on tribal lands because the impacts of those turbines on eagles could be adequately reduced by the

implementation of additional mitigation measures developed as a result of the Project EIS. To the extent that FWS wishes to reduce potential eagle impacts even more, that agency will have the opportunity to accomplish that result in its separate permitting process for authorizing the incidental take of eagles under the Eagle Act.

BIA's decision here is fully consistent with the Eagle Act as well. As this Court held in *Tule I*, neither the Eagle Act nor the APA impose an obligation on regulatory agencies like BIA to ensure that regulated parties comply with the Act. By nonetheless requiring Tule to apply for a permit before commencing Project operations and to otherwise comply with the Eagle Act at all times, BIA exceeded the requirements of the Eagle Act and APA. Tule therefore must obtain authorization from FWS in a separate Eagle Act permitting process before taking any eagles, or risk violating the lease and subjecting itself to civil or criminal prosecution.

STANDARD OF REVIEW

This Court reviews the district court's judgment de novo, applying the same standard of review as the district court. *See Tule I*, 825 F.3d at 578. NEPA and Eagle Act compliance are reviewed under the APA. *Id.* Under the APA, an agency decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (citing 5 U.S.C. § 706(2)(A)). As this Court has noted, that "standard of review is highly deferential; the agency's decision is 'entitled to a presumption of regularity,' and [a court] may not substitute [its] judgment for that of the agency." *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th

Cir. 2014). "In general, a court will uphold agency decisions so long as the agencies have considered relevant factors and articulated a rationale connection between the factors found and the choices made." *Id.* (internal quotation marks omitted).

ARGUMENT

I. BIA FULLY SATISFIED NEPA BY RELYING ON THE PROJECT EIS.

POCF contends (at 24-32) that BIA violated NEPA by relying on what it calls "BLM's FEIS" without allegedly complying with that document. But this contention is based on a fundamental misunderstanding of NEPA and the record in this case.

Initially, POCF attempts to downplay BIA's role in preparing the Project EIS by calling the document "*BLM*'s FEIS." But POCF's label mischaracterizes the document. Although BLM was the lead federal agency, the document is more appropriately called the "Project EIS" because the 5,000 page-plus document examined the environmental impacts of all Project components and phases as proposed by all federal and state agencies involved. ER 61-63. BIA fully cooperated in the preparation of the Project EIS, and where BIA's action is the one being challenged in this suit, the Project EIS should be viewed as *BIA*'s EIS.

Equally misplaced is POCF's argument that BIA was obligated to implement the mitigation measures analyzed in the Project EIS. "[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. at 350; *see also Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360-61 (11th Cir. 2008). As such, EISs do not implement or adopt mitigation

measures. *See Robertson*, 490 U.S. at 352-53 & n.16 (explaining that NEPA requires EISs to discuss mitigation, but that the mitigation measures are not binding). NEPA documents such as EISs instead discuss potential mitigation measures and analyze them. *Id.*; *see also Okanogan Highlands All. v. Williams,* 236 F.3d 468, 473-77 (9th Cir. 2000). Decisions regarding which mitigation measures to adopt or reject are made later by an agency in a ROD or similar document. *See* 40 C.F.R. § 1505.2. Thus, contrary to POCF's argument (at 31), there were no "binding commitments" that were made in the Project EIS but were later rejected by BIA.

POCF bases its contrary argument on a misreading of NEPA regulations, which POCF contends (at 24) state that agencies must follow mitigation measures "enter[ed] into" in a NEPA document like an EIS. But the regulation from which POCF selectively quotes actually states that agencies shall implement mitigation and other conditions established in the EIS "*and* committed as part of the decision," (i.e., a ROD). 40 C.F.R. § 1505.3 (emphasis added). The regulation thus is consistent with the points made in the preceding paragraph. It requires agencies to include the adopted mitigation in subsequent agency grants, approvals, and permits. *Id.* § 1505.3(a)-(b). And it further requires agencies to make available the results of its mitigation. *Id.* § 1505.3(c)-(d). This regulation thus applies to *post*-decision mitigation adopted by the agency in the ROD or similar document. Therefore, this regulation is inapplicable here because POCF identifies no post-decision mitigation measure that was adopted by BIA in the ROD but that BIA is failing to implement.

POCF claims that BIA failed to implement the mitigation measure known as MM BIO-10f. But that provision is not a post-decision mitigation measure; rather, it contains *pre*-decision guidelines (not requirements) for determining which turbines to subsequently authorize in the ROD. BIA followed the guidance in MM BIO-10f, which states in relevant part:

> Construction of the second portion of the project would occur 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. Pending the outcome of eagle behavior studies, all, none or part of the second portion of the project would be authorized.

ER 146. This measure thus contemplates that additional studies will be conducted to determine which specific turbines to authorize. *Id.* And it reserves BIA's decision to authorize all, some or none of the proposed turbines based on those studies. *Id.*

The results of those studies showed that all of the turbines could be authorized with imposition of additional mitigation outlined in the supplemental ABPP (ER 57-62), which was based on the criteria and model established in FWS's Eagle Conservation Plan guidance (ER 60). BIA thus authorized up to 20 turbines on tribal trust lands because the turbines satisfied the final criteria for their authorization, namely that the turbines' risks to eagles could be adequately reduced through mitigation. ER 62 ("The adopted mitigation measures … reduce the impacts to … golden eagles … to an acceptable level while meeting the purpose and need for this project."); ER 63. MM BIO-10f contemplates nothing more from BIA.

Moreover, BIA made its decision only after consulting with FWS on the studies' results, as the district court found. ER 9 ("there is no question that BIA consulted with the required resource agencies, FWS and CDFG. [POCF] instead disagrees with how BIA used the consultation-obtained information."). POCF repeatedly criticizes BIA for not fully accepting all of FWS's recommendations. But NEPA does not require BIA to adopt another agency's recommendations. *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) ("a lead agency does not violate NEPA when it does not defer to the concerns of other agencies" (citing *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d 1140, 1146 (9th Cir. 2000))). NEPA requires only that an agency disclose another agency's concerns expressed as comments on a draft EIS and explain why the first agency finds such concerns to be unpersuasive. *See* 40 C.F.R. § 1502.09(b), 40 C.F.R. pt. 1503. Here, although FWS's recommendations came *after* the Project EIS's finalization and in response to the supplemental ABPP,[4] BIA nonetheless responded to them. ER 91-92; SER 1405-21.

For example, BIA acknowledged that, although the supplemental ABPP's annual fatality rate was calculated using an FWS-approved methodology, FWS had recommended calculating the rate using a newer Bayesian model instead. ER 91. But

[4] POCF thus also is incorrect to assert (at 29 n.6) that BIA was obliged to discuss and respond to FWS's views in the final Project EIS. *See California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982) (discussing 40 C.F.R. § 1502.9); *see also In re Big Thorne Project & 2008 Tongass Forest Plan*, 691 Fed. Appx. 417, 420 (9th Cir. 2017) ("NEPA requires only that an agency address comments on a *draft* EIS") (emphasis changed)).

BIA chose not to require that the supplemental ABPP analysis be redone using the newer Bayesian model because the newer model had not been field verified, FWS's most current guidelines did not require the model's use, and using the newer model would render the analysis for Phase II inconsistent with the analysis conducted for the remainder of the Project. *Id.* Moreover, BIA observed that FWS had the authority to require to Tule to use the Bayesian model as part of the Eagle Act permitting process in which Tule must engage before commencing Project operations. *Id.*

BIA also addressed FWS's concern with the Canebrake territory, which contains the eagle nest known to be closest to the Project. BIA required the curtailment of Project operations in the Canebrake territory during daylight hours from February 1 to April 30 during years when the territory is occupied and either of the two Canebrake nests nearest to the Project is active. ER 59. The supplemental ABPP showed that these limitations would significantly reduce the risk of golden eagle take over the Project's life. ER 59, 86.

Although POCF characterizes BIA as an agency that preordained the outcome of the NEPA process, the district court found that characterization "is simply not supported by the record." ER 9; *see also* SER 245.1 ("The identification of a preferred alternative does not constitute a commitment or decision principle."). Instead, the record shows that BIA fully disclosed in the Project EIS the risks to eagles of turbine operations near the ridgelines (e.g., ER 143; SER 67-68, 81, 137, 139, 151-52), and that it specifically reserved its authority to authorize all, part or none of the proposed

turbines based on the outcome of additional studies of that risk (ER 146). The record further shows that BIA consulted in good faith on the results of those studies with the required resources agencies and took steps beyond those proposed in the Project EIS to mitigate the risks identified by those agencies (ER 57-62), including by restraining the periods during which the higher risk turbines would operate (ER 59).

Finally, there is no merit to POCF's contention (at 29-31) that BIA had to conduct an "independent" NEPA analysis because BIA's ROD purportedly reached conclusions at odds with those in the Project EIS that BIA helped to prepare. In fact, there is no tension at all between the Project EIS's statement that 128 turbines, including 65 ridgeline turbines, would have "unavoidable adverse impacts" on eagles under NEPA (ER 44, 138), and the statement in BIA's ROD that impacts on eagles of 20 ridgeline turbines were unavoidable and adverse under NEPA but could be mitigated below a level of significance with the implementation of Phase II-specific mitigation measures (ER 45, 63). In both cases, the documents concluded that the impacts on eagles are "unavoidable" and "adverse" under NEPA.

To the extent that the conclusions in the Project EIS and BIA ROD differed regarding the effectiveness of mitigation, the differences stemmed from both (1) the narrower scope of the activities being analyzed (128 turbines versus 20); and (2) the additional mitigation measures outlined in the supplemental ABPP and required by BIA as part of the ROD but not analyzed in Project EIS. ER 58. Those measures include "biological monitoring during construction activities, worker environmental

awareness training, restoration of temporarily impacted areas, compensation for permanently impacted habitat at a minimum 1:1 ratio, minimization of impact areas, and control of fugitive dust as well as golden eagle-specific preconstruction nest surveys and no-activity buffers" around certain nests and curtailment of operations under certain conditions. ER 50; *see also* ER 58-59. Viewed in context, BIA's conclusions are entirely consistent with those in the Project EIS.

***

In the end, BIA did exactly what the Project EIS and MM BIO-10f contemplated. BIA conducted further studies, in consultation with the FWS and CDFG, to determine which turbines posed unacceptable risks to eagles under criteria borrowed from FWS. ER 60-62, 66-90. Those studies showed that the turbines could be authorized with the implementation of certain mitigation, so BIA authorized them subject to that mitigation. ER 51, 53, 63. POCF merely disagrees with BIA's decision to authorize any of the turbines. But NEPA does not mandate particular results. It mandates a process that BIA and its sister agencies meticulously followed. At the conclusion of that process, BIA determined that the mitigation imposed in the ROD greatly reduced the risk to eagles and that any remaining risk was acceptable in light of the countervailing economic benefits for the Tribe. ER 51, 53, 62. At the same time, BIA warned Tule that if those risks to eagles become a reality, Tule will be in violation of the law and its lease unless Tule first obtains a permit from FWS, which may impose additional conditions and obligations as a part of a permit. ER 50.

II. BIA'S ACTION IS CONSISTENT WITH THE PROJECT EIS'S ALTERNATIVES ANALYSIS, WHICH THIS COURT HAS ALREADY UPHELD.

A. The Project EIS considered a reasonable range of alternatives.

POCF next asserts (at 32-37) that the Project EIS did not consider a sufficient range of alternatives for Phase II. Judicial review of the range of alternatives considered in an EIS is reviewed "under a rule of reason standard which requires an agency to set forth only those alternatives necessary to permit a reasoned choice." *Tillamook Cty. v. U.S. Army Corps of Engineers*, 288 F.3d 1140, 1144 (9th Cir. 2002). In *Tule I*, this Court already has upheld the sufficiency of the range of alternatives considered in the Project EIS, ruling that the "range of alternatives considered in the EIS was not impermissibly narrow, as the agency evaluated all 'reasonable and feasible' alternatives in light of the ultimate purposes of the project." 825 F.3d at 580.

Phase I and Phase II are integral parts of a single overarching Project examined in a single detailed and thorough Project EIS. Thus, this Court's upholding of the alternatives analysis in *Tule I* applies equally to BIA's role in the overarching Project. In addition to two true no-action alternatives, the Project EIS considered five action alternatives. Four of those action alternatives are essentially the same for purposes of BIA's approval of a tribal lease for construction of turbines on the ridgeline within tribal land. ER 54-56. (BIA ROD, describing the alternatives). Under each of those alternatives, up to 20 turbines would be constructed on the ridgeline within or

adjacent to lands within BIA's approval authority.[5] *Id.* Similarly, the fifth alternative would eliminate all ridgeline turbines, which renders it functionally identical to a no-action alternative in terms of BIA's approval authority for Phase II. ER 49.

Critically, the Project's mitigation measures further provide that "all, none or part of the second portion of the project would be authorized" by BIA based on the outcome of eagle studies. ER 146; *see also* ER 45 (ROD). The five action alternatives considered in the Project EIS thus fully encompass the construction of "all, none or part" of the 20 turbines on the ridgeline, taking a hard look at the potential impacts of any combination of those turbines that might be authorized in pursuit of fulfilling the Tribe's purpose and need for the Project. In other words, the Project EIS effectively analyzed a range of wind energy development on the ridgeline, authorizing up to 20 wind turbines while acknowledging that the eagle studies might show that mitigation in the form of fewer turbines might be appropriate. The Project EIS thus afforded BIA the flexibility to authorize all, some, or none of the proposed ridgeline turbines based on the outcome of the monitoring efforts spelled out in the Project EIS.

[5] The Project EIS analyzed the impacts of up to 18 turbines specifically on tribal trust lands, along with impacts of two additional turbines straddling BLM and trust lands. ER 45. Although POCF argued in the district court that the approval of 20 turbines constituted a substantial change in project design that required BIA to prepare a supplemental EIS, the district court rejected that argument (ER 17), and POCF has abandoned it on appeal.

POCF argues this analysis of alternatives ranging from zero to 20 turbines was insufficient because the Project EIS did not analyze a so-called mid-range alternative specific to Phase II. But POCF cites no authority that requires multiple agencies examining discrete portions of a single larger project each to consider multiple action alternatives within its own jurisdictional authority. Moreover, zero to 20 is a narrow range by itself. BIA's consideration of that range is particularly reasonable where the range is viewed as part of the larger Project and where the Project EIS reaffirms BIA's authority to authorize any number of turbines within that narrow range. Agencies need only consider sufficient alternatives to permit a reasoned choice. *See Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 871–72 (9th Cir. 2004) ("NEPA does not require the EIS to have considered every conceivable permutation" of potential actions, but instead focuses on "whether an EIS's selection and discussion of alternatives foster informed decision-making and informed public participation." (internal quotation marks and citation omitted)). For purposes of this combined Project, the range of alternatives in the Project EIS afforded BIA the ability to make a reasoned choice of all, some or none of the turbines. The range therefore complies with NEPA. *See Tule I*, 825 F.3d at 580-81.

B. POCF's challenge to the alternatives analysis is barred by the "NEPA exhaustion" doctrine.

One reason why a mid-range alternative specific to the ridgeline turbines in Phase II was not developed was that no one suggested during the administrative

process that a range of zero to 20 with the discretion to choose any number within that narrow range was inadequate to allow BIA to make a reasoned choice. Where POCF did not suggest a mid-range alternative during the public comment period on the draft EIS, the district court correctly concluded that the NEPA exhaustion doctrine bars POCF from raising its objection in this litigation. ER 12.

NEPA promotes informed agency decision-making by requiring agencies to seek and respond to public comment on their proposed actions. *See* 40 C.F.R. pt. 1503. But it is difficult for agencies to make decisions informed by the public if no member of the public informs the agency of his or her specific concerns. Therefore, the Supreme Court long ago held that parties challenging an agency's compliance with NEPA must "structure their participation so that it . . . alerts the agency to [their] position and contentions," in order to allow the agency to give the issue meaningful consideration. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)). The Supreme Court warned that, otherwise, the NEPA process could become "a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider" the matters being raised in litigation. *Id.* at 553-54. Thus, under the NEPA exhaustion doctrine, if a potential litigant does not alert an agency to an issue during the public comment period, the litigant forfeits its ability to pursue that issue in court.

An argument of the kind presented here by POCF is a prototypical example of the kind of argument that courts have found to be forfeited. In *United States Department of Transportation v. Public Citizen*, 541 U.S. 752, 764-65 (2004), the Supreme Court held that plaintiffs had "forfeited any objection to the [NEPA document] on the ground that it failed adequately to discuss potential alternatives to the proposed action" where the plaintiffs had not raised that concern during the public comment process. *See also River Rd. All., Inc. v. U.S. Army Corps of Eng'rs*, 764 F.2d 445, 452–53 (7th Cir. 1985); *Seacoast Anti-Pollution League v. NRC*, 598 F.2d 1221, 1231 (1st Cir. 1979). Here, POCF concedes that it did not alert BIA to any concern about the range of alternatives specific to Phase II. That should be the end of the analysis.

POCF seeks to overcome forfeiture by invoking a limited exception to the exhaustion doctrine that allows a litigant to pursue an issue that a litigant failed to raise to the agency if the agency otherwise had "independent knowledge" of the issue. *See Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1091-93 (9th Cir. 2006) (*Rumsfeld* exception). POCF argues (at 33) that BIA had independent knowledge of the need to consider a mid-range alternative because BIA preserved its discretion to authorize all, some or none of the turbines within the zero to 20 turbine range that it analyzed. But that argument is illogical: BIA's preservation its discretion to authorize any number of turbines within the range it analyzed does not mean that the agency recognized a concurrent need to develop a separate alternative *within* that narrow range.

POCF further argues (at 32, 34-35) that BIA gained independent knowledge from third parties, who allegedly told the agency of the need to consider a mid-range alternative. The record does not support this argument. First, many of the comments on which POCF relies for this argument (such as those from FWS and CDFG) were in response to the supplemental ABPP, which was completed *after* the public comment period ended and *after* the Project EIS was finalized. *See* Br. at 32 (citing ER 102, 113); Br. at 34 (citing ER 95, ER 102, ER 107). These comments were too late because comments sufficient to preserve the argument must come during a comment period on a draft EIS *before* the document is finalized. *See Vermont Yankee*, 435 U.S. at 553; *Pub. Citizen*, 541 U.S. at 764; *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). BIA held a 70-day comment period allowing the public to share any concerns on the alternatives analysis in the draft Project EIS. ER 48. BIA received no comments suggesting that a mid-range alternative needed to be developed.

Second, even if these comments were made at the appropriate time, they do not suggest that the alternatives analysis in the Project EIS was inadequate. Instead, FWS's and CDFG's comments requested that BIA make different micro-siting decisions or urged BIA to make an ultimate decision in the ROD that selected fewer than the full number of turbines proposed to be authorized. So, too, with the other comments identified by POCF. *See* Br. at 34 (citing ER 130, 150-52, 178-80, 184, 200, 204). None of the comments suggested—and certainly not with the necessary precision—that the range of alternatives considered in the draft Project EIS was

insufficient. *See Vermont Yankee*, 435 U.S. at 553-54 (holding that "cryptic and obscure" comments are insufficient to preserve a NEPA challenge); *see also* 40 C.F.R. § 1503.3(a) (providing that comments "on a proposed action shall be as specific as possible"). The cited comments raised concerns about potential eagle impacts and (like FWS or CDFG) suggested different micro-siting decisions and mitigation measures, or they urged BIA to *choose* an alternative in its decision that authorizes fewer than the full number of turbines. Accordingly, the district court correctly concluded that "there is no indication on the record that any other party made" a timely and specific objection to lack of a mid-range alternative for Phase II. ER 12.

Finally, POCF's reliance on *Rumsfeld* is misplaced. There, "the record …was replete with evidence that the defendant recognized the specific shortfall of the PEIS raised by the plaintiffs." ER 12 at n.5 (quoting *Rumsfeld*, 464 F.3d at 1092) (alterations by district court). Here, there is no such evidence that BIA was aware of any concern regarding the Project EIS's lack of a mid-range alternative for the ridgeline turbines. As the district court recognized, without such specific evidence, "[POCF's] broad construction of the *Rumsfeld* exception would both directly contravene *Public Citizen* and almost completely swallow the exhaustion doctrine itself." ER 12.

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In sum, POCF has forfeited its challenge to the range of alternatives analyzed in the Project EIS by failing to object to the alternatives during the public comment period. In any event, the Project EIS examined a reasonable range of alternatives.

III. NO INFORMATION SUBMITTED AFTER THE PROJECT EIS REQUIRED SUPPLEMENTATION UNDER NEPA.

There is no reason to require BIA to prepare a supplemental Project EIS. Absent substantial changes in the proposed action, federal agencies need only prepare supplemental EISs in rare situations where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). Thus, to trigger a supplemental EIS, information must not only be new and relevant, but also "significant." New and relevant information rises to a level of significance where that information presents a "seriously different picture of the likely environmental harms stemming from the proposed project." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (quoting *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984)); *see also Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004). This standard imposes a sturdy barrier to the obligation to prepare a supplemental EIS.[6] The listing of a threatened species in a project area, for instance, does not clear this barrier. *See Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 344 (9th Cir. 1996)). The rationale for this barrier is that, if agencies were required to revisit their NEPA analyses every

[6] Accordingly, POCF is incorrect to assert (at 41) that the standard for finding new information to be potentially significant is "low." Rather the standard for determining whether impacts are sufficiently significant to prepare an EIS in the first instance is lower, but where those impacts already have been explored in an EIS the standard is higher. The case from which POCF derives this argument, *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 561-62 (9th Cir. 2006), shows this to be true. As further explained below, the agency in *Boody* prepared no NEPA document at all.

time they receive new and relevant information, the NEPA process would be endless and "intractable." *Marsh*, 490 U.S. at 373.

A. The Project EIS already discloses the threats to eagles.

POCF alleges essentially two categories of "significant new" information: (1) eagle nest surveys and eagle telemetry data, as reported in the supplemental ABPP; and (2) communications from FWS and the CDFG regarding the Project's potential to impacts on eagles. But none of this information is new and significant within the meaning of NEPA. Nor does any of the allegedly new information paint a seriously different picture of the environmental landscape from that already portrayed.

Initially, POCF mischaracterizes the meaning of the data from the latest nest survey and telemetry study. The documents themselves simply report the data. The alleged meaning and significance of the data are POCF's own unscientific conclusions. The supplemental ABPP's description of the nest survey, for instance, simply states that "no territory produced young in every year." ER 71. It does not, as POCF claims (at 39), state that this data indicates "the importance of preserving golden eagle territories." Similarly, the supplemental ABPP reports that the telemetry study found that two juveniles died during the study; but study does not, as POCF claims (at 39), conclude that "young eagles face significant threats." In fact, just the opposite of POCF's claims, the supplemental ABPP cautions against drawing any conclusions from those deaths because of the short duration of the study. ER 80.

Regardless, there is no indication in the supplemental ABPP's analysis of the latest nest survey and telemetry data that such information undermined any conclusion in the Project EIS pertaining to eagle impacts. In fact, the supplemental ABPP's analysis confirms that this information *predates* the Project EIS. ER 69-71; *see also* SER 130-31, 198 (referencing the surveys and data). "Where new information merely confirms the agency's original analysis, no supplemental EIS is" needed. *Tinicum Twp. v. U.S. Dep't of Transp.*, 685 F.3d 288, 298 (3d Cir. 2012).

The supplemental ABPP states that golden eagle nest surveys had been conducted every year since 2010. ER 69-71. Those annual surveys show that eagles occupy different territories in different years, with varying levels of reproductive success. *Id.* It thus is not new or significant information that there were occupied territories in the Phase II area, some of which produced offspring and some of which did not. Indeed, even POCF's own characterization of the survey data on the Canebrake territory implies that the data is not new because even POCF describes the data as indicating that the territory "*continued* to be active." All of these facts are represented in the Project EIS. *See e.g.,* SER 130-31, 134-37, 139, 144-45, 198.

Like the golden eagle nest surveys, the telemetry data is continually gathered and reported. ER 79. As is evident from the supplemental ABPP, the information that eagle flight paths traversed the Phase II area predates the Project EIS. *Id.* (Table 2-5). The Project EIS thus already discloses that eagles traverse the Phase II area. *See e.g.*,

ER 143; SER 137, 139. The latest telemetry study accordingly provides no new or significant information.

POCF also erroneously suggests that it is the purportedly new information in the nest survey and telemetry data that caused FWS to conclude that "there is a high potential to result in injury or mortality of golden eagles." In truth, that high potential for collisions with ridgeline turbines in Phase II had been FWS's position all along. SER 632. It is not a new position that stems from the data obtained in the latest nest survey or telemetry data. In fact, the record is clear that the use of such data is limited to aiding in the understanding of eagle movements and home ranges, but cannot be used to estimate potential fatalities. ER 24-25; SER 1424.

FWS's "concerns" regarding eagle mortality risks and loss of eagle breeding territory; the methodologies employed by BIA and Tule in estimating eagle fatalities; and whether BIA should consider macro-siting and micro-siting alternatives do not constitute significant new circumstances or information within the meaning of NEPA's implementing regulations. The Project EIS acknowledges that, absent further mitigation, eagles are likely to be taken, and nothing in FWS's comments is inconsistent with the analysis in the Project EIS. Nothing in these comments refutes that analysis or presents a significantly different view of the Project's likely impacts. For instance, POCF cites comments from FWS discussing the risk of loss of golden eagle territory. Br. at 39 (citing ER 112). But the Project EIS evaluated potential

golden eagle territory loss, and POCF does not explain how the post-Project EIS documents present a "seriously different picture" of that potential impact. SER 144.

The same is true regarding CDFG comments about risks to eagles and other migratory birds and recommending that BIA remove two turbines from the Project's configuration to lessen those risks. As with FWS's comments, CDFG's concerns do not constitute significant new circumstances or information because the Project EIS acknowledged and addressed the risks to eagles and other migratory birds. CDFG's proposal is completely consistent with that analysis. It is also consistent with BIA's latitude under the Project EIS to approve all, some, none of the potential turbines. In the end, there is nothing in either the comments of FWS or CDFG that constitute significant new information on the potential environmental effects of the Project.

B. None of the CEQ "significance" factors show that BIA needs to prepare a supplemental Project EIS.

None of the CEQ "significance" factors on which POCF relies (at 43-45) shows that any of the allegedly new information required a supplemental EIS. BIA, for example, already recognized in the Project EIS that eagles are valuable cultural resources and that the Project is in close proximity to them. ER 143; SER 137, 139, 245. Indeed, these are two factors that led BIA and the other agencies to prepare an EIS to explore eagle impacts. But POCF identifies no new and significant information regarding eagle impacts that requires additional exploration in a supplemental EIS. ER14-16.

For example, the Project EIS already fully acknowledges that "golden eagles *do use* the Tule Phase II area and *are threatened* by the ridgeline turbines." Br. at 40.

- "The flight paths gathered during these observations demonstrate eagle use of the ridge line area of the project and support limited golden eagle use in the valley." SER 137.

- "Eagle flights observed during these surveys were mapped. These data indicate eagle use of the ridgeline area and little to no use of the valley area." SER 139.

- "The proximity of active golden eagle nests to the proposed turbines in the northwestern portion of the project area makes it highly likely that an adult and juvenile eagles could collide with the turbines at some point within the lifetime of the project. In the worst case, this northwestern area of the project could become a continuing sink for golden eagles attempting to use nesting sites west of the project area." ER 143.

See also SER 67-68, 81, 94, 130-37, 139-40, 144-45, 147-48, 150-52. Accordingly, eagle impacts were examined extensively as part of the Project EIS's analysis of baseline environmental conditions, as part of its impacts analysis, and as a major focus of its mitigation measures. There thus is no reason to prepare a supplemental Project EIS to examine eagle impacts.

Similarly, there is no new substantial dispute about the size, nature, or effect of the Project. As shown above, the Project EIS already recognized the potential for eagle impacts. And BIA addressed FWS's concern over the potential loss of nesting territories by curtailing operations of the turbines. ER 59-60. POCF disagrees with BIA's decision to authorize Phase II, but a supplemental EIS is not required merely

because of a party's opposition to the decision. *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005).

The Project EIS also already recognizes the potential for cumulative impacts, including from habitat loss and fragmenting movement corridors. SER 249-54. POCF notes that FWS criticized the draft supplemental ABPP as containing an insufficient analysis of cumulative impacts. But POCF's reliance on this criticism is misleading because the supplemental ABPP is not a NEPA document. Criticism of that document should not be conflated with criticism of the cumulative impacts analysis in Project EIS. BIA informed FWS that the supplemental ABPP does not examine cumulative impacts because the Project's cumulative impacts were fully disclosed in the Project EIS. SER 1419. Neither FWS's comments regarding the draft supplemental ABPP nor POCF's arguments here demonstrate that any there are any new and significant cumulative impacts that the Project EIS did not explore.

POCF also errs in arguing (at 45, 50) that the Project is unlikely to qualify for an Eagle Act permit. As further discussed below at 38, BIA fully expects Tule to work with FWS in securing a permit to take golden eagles lawfully under the Eagle Act or in otherwise adapting the Project to comply with the Act. SER 1407. There is no reason to conclude that the Project is likely to violate the Eagle Act. It is also unclear how a supplemental EIS would shed any new light on this subject.

There is likewise no merit to POCF's suggestion that BIA left FWS's and CDFG's concerns unanswered. As discussed above, BIA did consider and address

these concerns in its ROD and in its responses to comments attached to the ROD. ER 59-60; SER 1403-04, 1408-21, 1423. Nothing in BIA's consideration of these comments suggests that the FWS or CDFG comments rise to the level of significance that would require supplemental NEPA analysis.

Finally, the record belies POCF's assertion (at 46-47) that BIA failed to make a determination that the Project EIS had fully examined all relevant information such that no supplemental EIS was required. In fact, BIA's ROD states that the Project EIS "included an analysis of all environmental issues associated with the construction and operation of all turbines on the ridgeline site including those sited on trust land." ER 45. This Court holds that such statements in a ROD provide adequate documentation of an agency's decision that no supplemental EIS is required. *See Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 855 (9th Cir. 2013) (holding that an agency's determination that "the Selected Alternative was fully analyzed in Chapter 3 of the [final EIS]" constituted "adequate documentation of … [a] reasoned decision that no SEIS was required"). POCF identifies no good reason for overturning BIA's finding that no supplemental analysis was necessary.

C. *Boody* is easily distinguishable.

POCF reliance (at 42) on *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 561-62 (9th Cir. 2006), is misplaced. There, BLM failed to perform *any* NEPA analysis of its policy decision to adopt a management alternative for the red tree vole that the agency concluded in a previous EIS would provide inadequate habitat. *Id.* at

559-62. But BIA did prepare an EIS for the Project here, thoroughly examining the Project's potential impacts on eagles and candidly disclosing that eagles are in the vicinity of the ridgelines and are threatened by the turbines. *See supra* at 30, 33. Accordingly, unlike the substantial questions regarding unexplored impacts to vole habitat in *Boody*, which were not addressed in any NEPA document, the impacts to eagles were addressed thoroughly in the Project EIS.

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In sum, none of the allegedly new information identified by POCF required BIA to supplement the Project EIS. Tellingly, POCF makes no attempt to distinguish this allegedly new information from the information underlying the Project EIS, or to explain how the information presents a "seriously new picture of the environmental landscape" from the one examined in the Project EIS. Indeed, the preparation of the new documents on which POCF relies (and FWS's and CDFG's comments thereon) sprang directly from, and was contemplated by, the Project EIS. *See, e.g.*, SER 141 (EIS requiring preparation of the supplemental ABPP). Had these documents presented a "seriously new picture of the environmental landscape," NEPA would require supplementation. *Weinberger*, 745 F.2d at 4188. But they do not, and they therefore present no basis to set aside BIA's decision as unlawful under NEPA.

IV. BIA ACTED CONSISTENTLY WITH EAGLE ACT AND THE APA.

POCF's final contention (at 47-55) that BIA's decision violates the Eagle Act similarly lacks merit. POCF speculates that it is foreseeable that BIA's decision to

approve a lease may, at some unknown future time, lead to unauthorized injury or death of golden eagles from Tule's wind turbines. POCF theorizes that BIA's decision violates the Eagle Act and therefore that the APA allows this Court to set aside the decision because it is "not in accordance with law." 5 U.S.C. § 706(2)(A). This Court rejected this exact argument by POCF in *Tule I*, 825 F.3d at 585-88, and that decision controls the outcome here.

Even if *Tule I* already had not rejected POCF's argument, the statute's plain language certainly refutes it. As the district court recognized (ER 28), the Eagle Act is a "reactive" statute and thus cannot conceivably be violated until an eagle is actually taken unlawfully (*i.e.*, without a permit or other authorization). The text of the statute makes this clear:

> [W]ithout being permitted to do so as provided in this subchapter, [it] shall [be unlawful to] take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof . . . .

16 U.S.C. § 668(b). This language notably does not prohibit activities that *may lead* to the take of eagles in the future. On its face, the Act is not violated until an eagle *is taken* without a permit. *Id.* Absent actual unpermitted take, it can never be a violation of the Act merely to issue a lease or to allow the construction and operation of a wind turbine. *See Tule I*, 825 F.3d at 585 (holding that "the MBTA does not contemplate attenuated secondary liability on agencies like [BIA] that act in a purely regulatory capacity, and whose acts do not directly or proximately cause the 'take' of [eagles]");

id. at 588 ("Despite some substantive differences between the MBTA and the Eagle Act, the same reasoning applies to defeat the imposition of liability on [BIA] here.").

Ignoring the statute's text and this Court's holding in *Tule I*, POCF argues that BIA acted unlawfully by requiring Tule to *apply* for an Eagle Act permit before beginning Project *operations* rather than requiring Tule to *obtain* a permit before beginning Project *construction*. But POCF ignores that BIA required much more from Tule than it simply applying for a permit before beginning operations. In fact, BIA (like BLM in *Tule I*) required Tule to "comply[] with all applicable federal laws, including the Eagle Act." ER 50; *see also Tule I*, 825 F.3d at 587. And BIA cautioned Tule that "[a]ny take of eagles caused by the Project, prior to the issuance of an eagle take permit, constitutes a violation of the [Eagle Act] that the FWS may refer to the Department of Justice for enforcement." ER 50. BIA further warned that "[a]ny unauthorized take of eagles is a violation of the Eagle Act" and the lease. *Id.*

Not only does POCF misstate the record, it also misstates the law. BIA had no obligation under the statute to require that Tule *apply* for a permit because regulatory agencies like BIA are not "statutorily tasked with policing third-party compliance with the Eagle Act." *Tule I,* 825 F.3d at 588. As FWS's rule authorizing the agency to grant permits for the incidental take of eagles makes clear, it is solely the applicant's responsibility to ensure its own Eagle Act compliance, and not a regulatory agency's. *See Tule I*, 825 F.3d at 588 (citing 74 Fed. Reg. 46,836, 44,843 (Sept. 11, 2009)). Thus, by requiring Tule to apply for a permit as a condition of the lease and cautioning Tule

that it must comply with the Eagle Act at all times, BIA met or exceeded the requirements of the Eagle Act. As the district court noted, it is "absurd to say an agency violates [the APA] by directing third parties to avail themselves of the procedures administered by other agencies." ER 35 (emphasis omitted).

POCF fails to comprehend that the Eagle Act does not require anyone to obtain a permit at all and certainly not before construction activities, which are extremely unlikely to take eagles with the mitigation required by BIA. SER 140. The Eagle Act *allows* a person to seek a permit to avoid potential civil or criminal liability, but the Act does not require one. If Tule takes an eagle at some future time without authorization, the Eagle Act will have been violated, as BIA warned. ER 50. But the Eagle Act does not prohibit persons or entities from engaging in otherwise lawful activities that are inherently dangerous to eagles. The Act instead establishes civil or criminal liability if, while engaging in those activities, an eagle is actually taken without first having obtained a permit or operating under some other regulatory authorization.

While POCF calls the potential Eagle Act violations here direct and certain, they are in truth equally as indirect and speculative as the potential MBTA and Eagle Act violations in *Tule I*. At most, BIA's approval of the tribal lease of trust lands, like BLM's approval of the right-of-way in *Tule I,* would be only indirectly responsible for any eagle injuries or deaths that directly result from Tule's future operations. Given BIA's limited role in approving the tribal lease (as opposed to being a lessor or grantor itself), its role is even more attenuated than BLM's in *Tule I*. Even if one

speculates that Tule's operations will take an eagle in the future *without a permit*, BIA would not be responsible for that unauthorized take—not when it occurs, and particularly not now *before* it occurs. Of course, BIA does not condone, and it certainly did not sanction, unauthorized eagle take. To the contrary, and at the risk of repetition, BIA conditioned the lease approval on Tule's compliance with all applicable laws, including the Eagle Act. ER 50. Accordingly, BIA's decision to approve the lease of tribal trust lands to Tule with the caveat that Tule must comply with all applicable laws is many steps removed from any unauthorized take of eagles that POCF (unjustifiably) speculates could be potentially caused by Tule's future operations. This Court's well-established precedent does not make BIA responsible for such an indirect and speculative link. *See Tule I*, 825 F.3d at 585-88; *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991) (MBTA); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1225 (9th Cir. 2004) (same).

As the district court recognized (ER 34, 36), none of the cases on which POCF relies is applicable here. Br. at 52 (citing *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004); *Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003); *Center for Biological Diversity v. BLM*, 698 F.3d 1101 (9th Cir. 2012) (*CBD*)). In fact, this Court rejected POCF's reliance on those cases in *Tule I*, 825 F.3d at 587. In those cases, the federal agency was the entity actually conducting the activities found to violate the statutes at issue or was authorizing others to commit violations of those statutes directly. Here and in *Tule I*, by contrast, BLM and BIA are merely acting in

their regulatory capacities by approving a lease or a right-of-way for a private party (Tule) to construct and operate a wind-energy project. The agencies are not themselves taking any birds or eagles, and they are not authorizing Tule to do so without first securing permission from FWS. The cited cases thus do not support POCF's argument that BIA is legally responsible for the potential future actions of a regulated entity like Tule. Nor does POCF's theory have any basis in the Eagle Act, which states that "it is unlawful" to engage in prohibited acts without authorization, but does not obligate BIA to ensure that actions by third parties using tribal trust lands do not result in future violations of the Act.

In *Anderson*, this Court held that the 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. 371 F.3d at 501. Likewise in *Wilderness Society*, the federal agency explicitly 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 such activities if they were benign and minimally intrusive. 353 F.3d at 1062, 1065. These cases would be analogous only if BIA directly had authorized unpermitted eagle take. BIA, of course, did no such thing: it approved a lease for a wind-energy-generating facility on the condition that the facility comply with all applicable laws, including the Eagle Act. ER 50. BIA expects Tule to work with the FWS on Tule's ongoing compliance efforts with the Eagle Act. SER 1407.

POCF similarly misplaces its reliance on *CBD*. If anything, as this Court recognized in *Tule I*, 825 F.3d at 587, that case demonstrates the fatal flaw in POCF's arguments. *CBD* concluded that BLM had violated the Endangered Species Act (ESA) in failing to ensure that its pipeline authorization would not jeopardize listed species or adversely modify their critical habitat, where BLM's authorization had unlawfully relied on a private party's unenforceable conservation measures. *See* 698 F.3d at 1112-17, 1127-28. This holding touches a key difference between the ESA and the Eagle Act. Unlike the Eagle Act, the ESA imposes an affirmative duty on federal agencies to "*insure* that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2) (emphasis added). That Congress imposed such an affirmative duty on agencies in the ESA demonstrates that Congress knows how to create such a duty where it intends for agencies to have one. The fact that Congress did not impose such a duty in the Eagle Act demonstrates that Congress did not intend for agencies to ensure against possible future violations of the Eagle Act by others.[7]

[7] In footnote 14 of its brief, POCF cites a statute and regulation for the first time on appeal. *See* Br. at 55 (citing 25 U.S.C. § 3504(e)(2)(B)(iii)(VII), 25 C.F.R. § 162.565(a)). Even if POCF's reliance on those provisions is not forfeited, they do not superimpose an ESA-like duty onto the Eagle Act, but rather require the Secretary of the Interior to ensure that any approved tribal-energy agreement includes a provision requiring a lessee's compliance with all applicable environmental laws. The record shows that BIA ensured such a provision was included in this lease. ER 50.

The present case ultimately cannot be meaningfully distinguished from *Tule I*. POCF contends that this case is different because "the record here clearly shows not only that Tule Phase II will kill eagles, but also that BIA knew that eagle fatalities from Tule II are inevitable." Br. at 52 (emphasis omitted). But that contention misstates the record in both *Tule I* and this case, not to mention the law. Contrary to the implication of POCF's position, the Eagle Act does not prohibit eagle fatalities per se. 16 U.S.C. § 668(b). The Act simply prohibits taking eagles *without a permit*. *Id.* It is mere baseless speculation that Tule will take eagles without a permit. As discussed above and moreover, POCF misstates the record when it states (at 52) that BIA knows that unpermitted take will occur. ER 50.

POCF further misstates the record in arguing (at 53) that BIA knew that Phase II likely will never qualify for a permit. As BIA explained in response to FWS's comments on the supplemental ABPP on which POCF relies, the supplemental "ABPP was not designed to meet the [conservation] standard of the [Eagle Act] because that is a requirement of the programmatic eagle take permit, which this ROD requires be applied for before the start of operation." SER 1407 (response to comment 1-5), SER 1422.1 (comment 1-5). Instead, BIA stated that Tule will satisfy the requirements for obtaining an Eagle Act permit when it applies for a permit from FWS. SER 1407. Thus, BIA expects Tule to work with FWS to secure a permit before eagle take occurs, as it must to comply with the lease. *Id.*; ER 50.

POCF's contention (at 53) that *Tule I* "*only* considered BLM's approval of lower-risk valley turbines" is not well taken. The valley turbines are of lower risk for eagles, but still pose risks to migratory birds. SER 68, 141-49. In any event, *Tule I*'s holding that BLM's approval of the right-of-way for the Project across BLM-managed lands did not violate the MBTA or Eagle Act did not depend on the degree of risk of avian fatalities. The holding instead depended on the fact that neither statute requires federal agencies acting in their regulatory capacities to mitigate the risk of unauthorized avian fatalities posed by the independent actions of the persons they regulate. *See Tule I*, 825 F.3d at 585-88. Because the same Eagle Act provision and a portion of the same Project is at issue here, the same holding must follow.

POCF tries to make hay out of the fact that FWS requested that BIA condition the lease on the acquisition of a permit before construction. While FWS may make such a request, neither the Eagle Act nor any other law requires BIA to grant it. Indeed, FWS itself has stated in a formal interpretation of its Eagle Act regulations that regulatory agencies like BIA need not ensure the Eagle Act compliance of the persons they regulate. *See* 74 Fed. Reg. at 44,843; *see also Tule I*, 825 F.3d at 585-88. Regardless, BIA did largely follow FWS's recommendation by requiring Tule to comply with the Eagle Act at all times and by requiring Tule to apply for a permit before beginning operations. ER 50. Thus, as BIA explained, if Tule's operations take an eagle before the company obtains a permit, not only could Tule face civil and criminal penalties, but Tule also will be in violation of the lease. *Id.*

Contrary to POCF's assertion (at 50), BIA fully explained why its ultimate decision differed slightly from FWS's recommendation. BIA explained that FWS's guidelines for the development of the conservation plan required for the permit application "are not yet final." SER 1407; SER 122. Because they were not yet final, FWS decided to allow Tule to proceed with construction before obtaining a permit, which was reasonable considering that it is overwhelmingly Project *operations* (not construction) that poses an unmitigatable threat to eagles. *Id.*; SER 140.1.

Finally, POCF is incorrect (at 48-50) that BIA's approval of a lease requiring Tule to comply with the Eagle Act somehow prejudices FWS's separate permitting process. Both Tule and BIA acknowledged that Tule likely will have to take additional steps to obtain a permit. SER 1407. Even assuming Tule constructs all 20 turbines in their currently proposed location before applying for a permit, FWS is under no obligation to authorize the take of eagles by any of them. Tule thus bears the monetary risk of constructing the turbines before obtaining a permit. But, as explained above at 39, that is a decision of risk that the Eagle Act allows Tule to make. SER 1402. The statute does not mandate a role for BIA in that process.

In sum, the Eagle Act does not forbid BIA's decision to approve a lease of tribal trust lands subject to Tule's compliance with all applicable laws. Nor does the Act require BIA to require Tule to obtain a permit at all, let alone before beginning Project construction. POCF's arguments therefore must fail, just as they did in *Tule I*.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the Federal Defendant-Appellee is unaware of any currently pending cases within the meaning of Local Rule 28-2.6.

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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Signature of Attorney or Unrepresented Litigant [/s/ Allen M. Brabender] Date [Jan 26, 2018]

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