Docket No. 17-55647

In the

United States Court of Appeals

For the

Ninth Circuit

PROTECT OUR COMMUNITIES FOUNDATION, et al.,

Plaintiffs and Appellants,

v.

MICHAEL BLACK, et al.,

Defendants and Appellees,

TULE WIND, LLC, et al.,

Intervenors, Defendants and Appellees,

Appeal from a Decision of the United States District Court for the Southern District of California, No. 3:14-cv-02261-JLS-JMA · Honorable Janis L. Sammartino

BRIEF OF APPELLEE EWIIAAPAAYP BAND OF KUMEYAAY INDIANS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Appellee Ewiiaapaayp Band of Kumeyaay Indians states that it is a federally recognized Indian tribe and it has no parent corporation or any publicly held corporations that own 10% or more of its stock.

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I. STATEMENT OF JURISDICTION

The Ewiiaapaayp Band of Kumeyaay Indians (the "Tribe") generally agrees with Appellants' jurisdictional statement but notes that Appellants did not challenge the BIA's lease approval under 25 U.S.C. § 415 – the specific federal statute authorizing the BIA ("BIA") to review and approve proposed leases of Tribal trust land.

A. Introduction

Appellants challenge the District Court's decisions upholding the BIA's issuance of a Record of Decision ("ROD") approving a Wind Lease Agreement ("Lease"), as amended, between the Tribe and 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* ER 248, ¶ 30.[1] Appellants challenge through the Administrative Procedures Act ("APA"), the National Environmental Policy Act ("NEPA"), and the Bald and Golden Eagle Protection Act ("BGEPA") 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] Ewiiaapaayp Band of Kumeyaay Indians' supplemental excerpts of record are cited herein as "ESER." Appellants' excerpts of record are cited herein as "ER."

In 2010, the Tribe and Tule Wind entered the Lease to develop the Project on the Tribe's reservation. *See* ER 44. 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 ("FEIS"). The EIS analyzed the potential environmental impacts of the full Tule Wind Project and other separate, but related project proposals. *See* ER 44. The Bureau of Land Management ("BLM") acted as the lead Federal Agency for purposes of preparing the EIS. *See* ER 44. The BIA and the Tribe were cooperating agencies. *See* ER 44; 40 C.F.R. § 1501.6(b).

Appellant Protect Our Communities Foundation ("POCF") participated in the public EIS process and previously challenged under NEPA the sufficiency of the FEIS with this Court. *Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016), *reh. den.* (Aug. 17, 2016).[2]

The BIA is permitted to use an existing EIS if the BIA determines the EIS adequately analyzes the environmental effects of the proposed action and reasonable alternatives. 43 C.F.R. § 46.120(c). In approving the Lease in December 2013, the BIA adopted the very same FEIS that this Court previously determined legally sufficient under NEPA. *See Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016), *reh. den.* (Aug. 17, 2016). A cooperating

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

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).

The Lease was submitted to the BIA for approval in February 2010 under the Indian Long-Term Leasing Act ("Leasing Act"), 25 U.S.C. § 415, and the BIA approved it in December 2013 as evidenced by the BIA's Record of Decision ("December 2013 ROD"). *See* ER 44.

NEPA is a process-oriented statute requiring federal agencies to consider the environmental impact of their actions. This dispute involves the government's obligations under NEPA regarding approval of a ground lease on the Ewiiaapaayp Indian Reservation – not public lands. NEPA ensures the agency will only reach a decision on a proposed action after carefully considering environmental impacts of the proposed action.

An agency must supplement an Impact Statement or Assessment if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Here, the BIA has gathered, documented, and considered information concerning the environmental impacts of its actions. No significant new information was provided regarding potential

impacts to eagles following the FEIS. Rather, any purported new information was simply a repeat of analysis and conclusions contained in the FEIS.

II. STATEMENT OF ISSUES

The Tribe states that the issues relevant for consideration are:

1. Whether the BIA may adopt the BLM's 2011 FEIS in support of the BIA's December 2013 ROD approving the Lease;

2. Whether the BIA was required to supplement the 2011 FEIS based on information submitted regarding potential impacts to golden eagles when the 2011 FEIS previously expressly addressed such impacts and provided mitigation for such impacts;

3. Whether the BIA's implementation of the mitigation measures required the BIA to consult with FWS and accede to FWS' initial comments as a pre-condition to Lease approval; and

4. Whether the BIA is required to obtain an eagle take permit under BGEPA prior to approval of the Lease or to require the lessee to obtain a pre-construction permit under BGEPA.

III. STATEMENT OF FACTS

The BLM issued its Final EIS ("FEIS") for the Tule Wind Project, including analysis of both Phase I and Phase II of the Tule Wind Project, on October 14, 2011. *See* ER 250, ¶ 37. BLM issued its ROD for the Phase I project in December

2011. *See* ER 251, ¶ 38. After BLM approved its ROD for the Phase I project, the BIA issued a Phase II Project Notice of Availability of the Draft Phase II Avian and Bat Protection Plan ("Notice of Availability"). *See* ER 252-253, ¶¶ 39 & 42. In the Notice of Availability (ER 108-110), the BIA provided notice that it would rely on the BLM's 2011 Final EIS for Lease approval. *See ER 253* ¶ 42. The BIA issued the ROD approving the Lease on December 16, 2013. *See ER 234* ¶¶ 1, 47.

The EIS evaluated the full proposed Tule Wind Project, including reasonable alternatives. *See Protect Our Communities Found. v. Jewell*, 825 F.3d 571 (9th Cir. 2016), *reh. den.* (Aug. 17, 2016).

The evaluation of the proposed project and one alternative in particular are relevant to Appellants' 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 FEIS) consisted of up to 128 turbines to be built in two phases. *See* ER 47. 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).[3] *See* ER 132. "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. *See* ER 49.

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

BLM, as the NEPA lead agency, identified 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 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 FEIS analyzed the full Project, and the BIA issued its December 2013 ROD, which describes its compliance with the FEIS mitigation measures, 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, and Federal renewable energy policies encouraging development of renewable energy projects on Tribal lands. *See* ER 51-53.

The BIA's final agency action was the December 2013 ROD approving the Lease for a wind project on the Tribe's reservation that constitutes a significant economic and industrial development opportunity on remote reservation lands to promote the Tribe's socio-economic needs. *Id*. The BIA decision at issue in this

matter involved a 20-turbine portion of Phase II on an otherwise stranded and inaccessible ridgeline. ER 44. The Tule Wind Project required approvals from several federal, state, 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 FEIS specifically contemplated that these multiple agencies would make independent decisions within their respective jurisdictions. ESER1.

A. Procedural History

The district court resolved two of Appellants' claims in response to motions for judgment on the pleadings and resolved the remaining issues against Appellants on cross-motions for summary judgment.

The district court determined that the BIA did not violate the APA and BGEPA by not obtaining an eagle permit or requiring Tule Wind to obtain an eagle permit prior to Lease approval or as a condition of Lease approval. BIA included a requirement in the ROD that Tule Wind apply for an eagle permit before operation of Phase II. The district court determined that the BIA did not directly authorize the take of eagles, therefore, the BIA was not required to seek an eagle permit.

The district court determined that the BIA could rely on the FEIS. In regard to BIA's consultation with the FWS, the district court concluded that the BIA engaged in required consultation in accordance with the FEIS mitigation measures.

The district court determined that the FEIS contained a sufficient range of alternatives and that the BIA appropriately considered new information as part of its decision to approve "all, none, or part" of Phase II.

The district court determined that Appellant's purported new information regarding the Project's risks to golden eagles was not new or significant as it merely confirmed the conclusions in the FEIS, i.e., that the ridgeline turbine locations posed risk to eagles.

IV. DISCUSSION

A. Summary of Argument

The BIA fully satisfied its NEPA obligations by relying on the FEIS for the December 2013 ROD to approve a ground lease of a portion of the Tribe's reservation for Phase II of the Tule Wind Project. The FEIS contained sufficient alternatives analyses and the BIA's decision was consistent with both the alternatives analysis and mitigation measures described in the FEIS. The FEIS analyzed the full Tule Wind Project including up to 128 wind turbines and expressly provided that the BIA would authorize "all, none or part of the second portion of the project" based on the outcome of eagle studies. The five action alternatives considered in the FEIS fully encompassed the construction of "all, none or part" of the 20 turbines authorized on the ridgelines within the Tribe's reservation. The BIA was not required to supplement the EIS based upon

information provided after the 2011 FEIS because the information submitted was: 1) not new or significant; and 2) no significant changes to Phase II were approved as required under NEPA to trigger a supplemental EIS.

The BIA was not required under BGEPA to obtain a pre-Lease approval eagle permit or to require the lessee, Tule Wind, to obtain such a permit prior to Lease approval because BGEPA does not require any such permit as part of the Lease approval process.

Finally, the BIA was required, consistent with its statutory mission and federal policy, to consider the Tribe's economic development, self-determination, and self-governance interests and to balance those interests in review and approval of the Lease.

B. Standard of Review

"We review de novo the district court's grant of summary judgment." *Chemeheuvi Indian Tribe v. Jewell*, 767 F.3d 900, 903 (9th Cir. 2014). "Summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (citing Fed. R. Civ. P. 56(a)).

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

The arbitrary and capricious standard of review is "highly deferential; the agency's decision is entitled to a presumption of regularity, and we may not substitute our judgment for that of the agency." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (internal quotation marks omitted).

Separately, courts also give deference to an agency's interpretation of the statutes and regulations that define the scope of its authority. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984).

C. Argument

1. Federal Policy Promotes Economic Development on Indian Lands

The Tribe's Reservation consists of the East Ewiiaapaayp Reservation reserved on February 10, 1891 and expanded in December 2000, totaling 4,542 acres, and the West Ewiiaapaayp Reservation, which was established in 1986 and expanded in 1997, totaling approximately 10 acres. The East Ewiiaapaayp Reservation is the location of the Project and remains mostly unchanged since establishment with no utilities or infrastructure of any kind, a hazardous dirt road of 12 miles rising 1,200 feet with no legal access (e.g., easement) leading to it, and no trust assets or trust resources on the Reservation other than its wind resource. *See* ESER52-53.

The United States Department of the Interior ("Interior") is an executive department charged, among other duties, with managing and administering the

lands of Indian reservations. The BIA is an agency within Interior that oversees programs, activities, and operations relating to Indian lands and affairs. 25 U.S.C. § 2.

The BIA's enabling statute gives the Commissioner of Indian Affairs (under the direction of the Secretary of the Interior) the "management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. In the early twentieth century, the federal government's policy toward Native American tribes encouraged individual land ownership and assimilation of Native Americans into general American society. *See Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1205 (9th Cir. 2001) (*en banc*). That approach was unsuccessful, and Congress changed its policy to instead promote tribal sovereignty and self-government, principally through the passage of the Indian Reorganization Act. *Id.*

"Its role now is as a partner with tribes to help them achieve their goals for self-determination while also maintaining its responsibilities under the Federal-Tribal trust and government-to-government relationships." *See https://www.bia.gov/bia.*

The Tribe's interest in the Lease approval and the Project was created and is protected under federal law. *See e.g.*, The Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415 (generally requires that the Secretary of the Interior approve leases of Indian lands); and 25 C.F.R. Part 162. Congress adopted section 415 to

encourage long-term commercial leases of Indian land and thereby to enhance its profitable development. H.R.Rep. No. 1093, 84th Cong., 1st Sess. 1, *reprinted in* 1955 U.S.Code Cong. & Admin.News 2691. Since the enactment of section 415, business leases have become, as Congress hoped, an important source of income for Indians, and can be called the "cornerstone of a reservation economic development program." Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands,* 26 Stan.L.Rev. 1061, 1063 (1974). *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1074 (9th Cir. 1983).

a. Federal Policy Background: The Federal Government Promotes Tribal Economic Development; Promotion of Congressional and Executive Branch Policy

Federal policy encourages tribal governments to engage in economic development activities. The cornerstone of this federal objective is the Indian Reorganization Act of 1934 ("IRA") (25 U.S.C. § 461 *et seq.*), which Congress enacted to "encourage [tribal] economic development."[4] Congress has since repeatedly reaffirmed this federal policy by enacting significant federal Indian laws that advance the IRA's goals of encouraging strong tribal governments, tribal self-determination, and tribal self-sufficiency. *See e.g.*, the Indian Self-Determination Act, 25 U.S.C. §§ 450f *et seq*.; the Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.*; the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*; the

[4] *See* Felix S. Cohen, Handbook of Federal Indian Law 147 (1982 ed.).

Tribal Self-Governance Act of 1994, 25 U.S.C. §§ 458aa *et seq.*; and the Tribal Self-Governance Amendments of 2000, 25 U.S.C. §§ 458aaa *et seq.*

The federal policy to promote tribal economic development reflects the federal government's recognition that tribal governments, unlike the states, lack an adequate tax base for raising revenues for tribal programs and therefore must raise revenues through economic development activities. Advancement of this federal policy will benefit tribal governments *and* the federal government because tribal self-determination and self-sufficiency decreases tribal dependency on federal resources.

With these benefits in mind and considering the United States' interest in domestic energy production, Congress has also encouraged tribes to engage in energy development to promote self-determination and self-sufficiency. *See* 25 U.S.C. §§ 3501-3506.

b. Role of the BIA in Lease Approval

The BIA is entrusted with managing and protecting Native American interests. *See e.g.*, 25 U.S.C. § 2; *McDonald v. Means*, 309 F.3d 530, 538 (9th Cir. 2002) ("It is well established that the BIA holds a fiduciary relationship to Indian tribes, and its management of tribal [interests] is subject to the same fiduciary duties." (citing *United States v. Mitchell*, 463 U.S. 206, 224-226, 103 S.CT. 2961, 77 L.Ed.2d 580 (1983))).

Various statutes and regulations govern the form and approval of leases involving Native American lands. *See e.g.*, 25 U.S.C. § 415 (authorizing the Secretary of the Interior to approve leases of tribal land). The Secretary of the Interior has delegated authority for lease approval to the BIA ("BIA").

The Tribe requested that the BIA approve the Lease for the development of the Project. Appellants did not challenge BIA's approval of the Lease or otherwise exhaust their administrative remedies before the Interior Board of Indian Appeals. Rather, Appellants utilize the APA to challenge the environmental review process utilized by the BIA to support Lease approval.

The BIA's Lease approval is grounded in federal policy promoting autonomy of the Tribe. 25 U.S.C. § 415. *See e.g., Wapato Heritage, LLC v. US*, 637 F.3d 1033 (9th Cir. 2011). The BIA's approval of the Lease indicates that the Lease contained the standard statutory or regulatory provisions and there were no violations of federal statutes or regulations concerning the leasing of Tribal land. 25 U.S.C. § 415.

Federal law and associated regulations prescribe the BIA's course of action in approval of the Lease. The statute pertaining to approval of leases of tribal lands states in relevant part:

> (a) Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational,

> recreational, residential, or business purposes, including the development or utilization of natural resources in connections with the operations under such leases …

25 U.S.C. § 415(a).

In addition to the above statute, there are regulations governing the leasing and permitting of trust land. 25 CFR Part 162. However, except for the requirement that "no lease shall be approved or granted at less than the present fair rental value," the regulations do not specify under what circumstances the Secretary should or should not approve a lease.

The BIA's obligation to act in furtherance of Tribal interests does not mean that the BIA assumes Tribal contractual obligations or has management duties for Tribal land. *See e.g., United States v. Algoma Lumber Co*., 305 U.S. 415, 419-422; 59 S.Ct. 267, 83 L.ED. 260 (1939); and *McNabb v. United States*, 54 Fed.Cl. 759, 760 (2002).

The BIA approves leases of tribal land in accordance with federal statutes and federal policy promoting Tribal economic development and favoring Indian self-determination. The BIA's approval keeps with the underlying political and social policies encouraging tribal self-government and economic development, especially regarding Tribal resources.

In interpreting the BIA's action to approve the Lease, the Court must consider the related legislation that Congress enacted before and after NEPA and

BGEPA regarding economic development on Indian reservations and federal policy promoting tribal economic development, self-governance, and self-determination. *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 143 (2000). The APA, NEPA and BGEPA do not limit or repeal those federal laws and policies promoting Tribal economic development and self-governance.

2. BIA Permissibly Adopted and Relied on the FEIS to Satisfy its NEPA Obligations

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).

NEPA imposes no substantive requirements upon the agency's ultimate decision. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980). NEPA requires agencies to take certain procedures so that both the decision-makers and the public are informed about significant environmental impacts *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998). NEPA's purpose is to "ensure a process, not to ensure any result." *Id*.

NEPA requires that where several actions have a cumulative or synergistic environmental effect, this consequence must be considered in an EIS. *Sierra Club*

v. Penfold, 857 F.2d 1307, 1320–21 (9th Cir.1988) (citations omitted). "[W]here several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS." *City of Tenakee Springs v. Clough,* 915 F.2d 1308, 1312 (9th Cir.1990) (citations omitted). A single EIS is required when the "projects are 'connected,' 'cumulative,' or 'similar' actions under the regulations implementing NEPA." *Native Ecosystems Council v. Dombeck,* 304 F.3d 886, 894 (9th Cir.2002) (citing 40 C.F.R. § 1508.25).

"Although federal agencies are given considerable discretion to define the scope of NEPA review, connected, cumulative, and similar actions must be considered together to prevent an agency from 'dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" *Id.* (quoting *Thomas v. Peterson,* 753 F.2d 754, 758 (9th Cir.1985)).

a. The FEIS Sufficiently Addressed Project Alternatives

NEPA's implementing regulations require federal agencies to consider a range of alternatives to a proposed project and to adequately analyze them. However, NEPA 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 the Interior,* 608 F3d. 592, 601-602 (2010). The Tule Wind Project comprises two separate phases due to the differing jurisdictions of the BLM and BIA. The FEIS

recites this fact and provides that various agencies would use the EIS to make decisions within their respective jurisdictions. ESER1-3. NEPA's implementing regulations provide a clear duty for federal agencies: to "present the environmental impacts of the proposal and the alternatives in comparative form." 40 C.F.R. § 1502.14. The Tule Wind Project that was the subject of the EIS provided a project description including up to 128 wind turbines and associated facilities and associated power transmission facilities. ER132.

This Court has previously upheld the range of alternatives contained in the FEIS. Both the BIA and the Tribe were cooperating agencies in the preparation of the FEIS. The Tribe's purpose and need was plainly stated in the FEIS. The FEIS' scope considered the full Tule Wind Project including both Phase I and Phase II. To that end, the FEIS included a mitigation measure describing how Phase II would be authorized by the BIA.

b. The BIA Appropriately Addressed Mitigation for Phase II

Here, the BIA's jurisdiction is different than that of the BLM. Only the BIA has authority to review and approve leases of Tribal lands. 25 U.S.C. § 415. The BIA may adopt and rely on the FEIS for which the BIA served as a Cooperating Agency. The FEIS expressly provided that the BIA would utilize the FEIS for the BIA's decision regarding the Lease. Despite Appellants' protests, the BLM's determinations regarding Phase I of the Tule Wind Project within the BLM's

jurisdiction are not binding on the BIA within the BIA's jurisdiction. Rather, the FEIS provided a flexible process to authorize "all, none or part" of Phase II. The FEIS provides that "all, none or part of the second portion of the project would be authorized" by BIA based on the outcome of eagle studies. ER146. In *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-53 (1989) the Supreme Court held that NEPA does not require that an EIS contain a fully developed and adopted mitigation plan. The mitigation measure maintained BIA's discretion to authorize "all, none or part" of Phase II based upon the pending eagle studies.

3. BIA Independently Conducted its NEPA Analysis

The BIA adopted BLM's EIS, which analyzed the full Tule Wind Project. The BIA independently considered the EIS, the alternatives, public comments, consulted with the FWS and the California Department of Fish & Game ("CDFG"), commissioned additional Avian studies, permissibly balanced federal policies and the interests of the Tribe with environmental concerns documented in the EIS, and adopted appropriate mitigation as part of the BIA's final agency action.

The 2013 ROD describes the BIA's decision to authorize 20 turbines; 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 as well as federal renewable energy policies encouraging

development of renewable energy projects on Tribal lands; mitigation; and micrositing. ER44, ESER4-10.

Ironically, had the BIA not independently analyzed the EIS, including balancing of federal priorities favoring the Tribe's interests, the BIA could have simply adopted the BLM's conclusions and abandoned Phase II – presumably reaching Appellants' preferred position. The BIA satisfied its obligation to independently take a "hard look" at the environmental consequences of its action to review and approve the Lease.

4. BIA's Approval Was Consistent with the FEIS' Mitigation Measures

The FEIS evaluated the full proposed Tule Wind Project, including reasonable alternatives. The BIA thoroughly explained its rationale for approving 20 turbines in its ROD. The ROD discussed the BIA's balancing of statutory policies and interests, including federal policies promoting Tribal economic development and self-determination, with project impacts and benefits. The full Tule Wind Project proposal consisted of up to 128 wind turbines to be constructed in two phases. Phase I would consist of 65 turbines located in McCain Valley (Phase I) and the remaining 63 turbines to be located on the adjacent ridge (Phase II). "Alternative 5" as adopted by the BLM involved only the development of Phase I because it considered the project with the Phase II turbines removed. ESER11. BLM, as the NEPA lead agency identified a preferred alternative and

selected Alternative 5 for BLM's purposes. *See* 40 C.F.R. 1502.14(b). While Appellants presumably prefer BLM's selected Alternative 5, the BLM's selected alternative is contrary to federal policies encouraging Tribal economic development and energy development on Tribal lands and was akin to a "no action" or "no build" alternative that would deny economic benefits to the Tribe.

The FEIS assumed that Phase II would consist of seven turbines on State lands, eighteen (18) on Tribal lands, and the remainder of turbines on BLM land. ESER12-13. Figure ES-2 of the EIS demonstrates 19 turbine locations on the Tribe's reservation and additional turbines located immediately along the reservation border with BLM land. ESER14. Figure C-2A of the alternatives shows 17 turbines on Tribal land, with 3 turbines on adjacent BLM land. Figure C-2B shows 18 turbines on Tribal land, with three turbines located on immediately adjacent BLM land. ESER15. The Cumulative Impacts section depicts 18 to 21 turbines on Tribal land (Figures F2-A and F-2B). ESER16-17.

Appellants argue that the EIS only analyzed 18 turbines on the Tribe's reservation rather than the 20 turbines authorized by the 2013 ROD. The BLM did not authorize the 63 ridgeline turbines evaluated in the FEIS. BIA's approval of 20 turbines is consistent with analysis and alternatives in the FEIS and is well within the larger spectrum of 63 ridgeline turbines analyzed in the FEIS.

To that end, the FEIS contemplated that the BIA would authorize "all, none or part of" Phase II. ER146. The BIA, after public release, utilized an August 2012 Project-Specific Avian and Bat Protection Plan ("PSABPP") in support of the reduced version of Phase II. The BIA circulated the updated PSABPP for public and agency comment in 2012, and included the final version as Attachment D to its ROD. ESER18, ER65-66, ER108-110. The Phase II PSABPP built upon analysis in the FEIS, 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 ROD approving 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).

Even if the BIA concluded that the effects to eagles could not be avoided due to constraints in alternatives, those effects do not have to be avoided by the agency, but they must be disclosed, discussed, and mitigated, if possible. *See* 40 C.F.R. 1500.2(e). Here, the FEIS included significant discussion of potential effects to eagles. Further, BIA's ROD (final agency action) included findings that implementation of the identified mitigation measures would reduce the impacts to eagles and other birds "to an acceptable level while meeting the purpose and need for this project." ESER19.

5. BIA was Not Required to Prepare a Supplemental EIS Because No New Information was Presented and No Significant Changes Were Made

The FEIS analyzed various alternatives for siting of Phase II turbines and discussed potential impacts to eagles.

a. Locations of Turbines Was Not Substantially Changed

The FEIS anticipated that the precise turbine locations would change and the FEIS adopted a number of setbacks to provide boundaries for those changes. ESER20. Those setbacks affected the placement of turbines on the Tribe's reservation. ESER21-22, ESER23.

The FEIS evaluated the maximum impacts from a range of turbine quantities and sizes. ESER24-25. The FEIS considered that the turbines could vary in size from 1.5 megawatts to 3.0 megawatts (and sizes in between). ER191. Due to potential size differentials, turbine locations were anticipated to be adjusted due to engineering, geotechnical conditions, and setbacks. Therefore, precise turbine locations were not finally determined in the EIS, rather, locations were described within project corridors.

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 the 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 FEIS specified dimensions of turbines and other project features, and the methods used to construct them, but in this case, the FEIS 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.

b. Eagle Information was Not New or Significant

The FEIS studied eagles in detail and contained mitigation measures that would ensure the best design for impact mitigation. Appellants submitted comments regarding potential impacts to golden eagles after the FEIS and prior to the BIA's 2013 ROD. However, Appellants' comments merely repeated conclusions in the FEIS and did not present new, significant evidence regarding potential impacts to golden eagles. As such, the BIA was not obligated to prepare a supplemental EIS. *See Or. Nat. Res. Council v. Lyng*, 882 F.2d 1417, 1424 (9th Cir. 1989) (finding supplemental EIS not required where previous EIS and comprehensive management plan "had already contemplated" agency actions "of the type and magnitude proposed").

The subsequent 2013 ROD reasonably concluded that imposing a requirement to apply for an eagle take permit and halting operations of certain turbines during periods of higher risk to eagles would address concerns regarding potential eagle impacts. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376–77 (1989) (deferring to "substantial agency expertise" in "factual dispute").

c. BLM's Preferred Alternative for Phase I was Not Binding on the BIA for Phase II

Appellants argue that "[A]n SEIS is necessary where an EIS rejected an alternative on environmental grounds, but an agency shortly thereafter adopts a decision 'that closely resembles the rejected alternative.'" Opening Brief, 41 (citing *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006)).

Boody is inapposite as BLM's decision regarding Phase I did not preclude the BIA's subsequent decision regarding Phase II. In fact, the FEIS expressly contemplated the BIA's action. In *Boody*, the Forest Service approved an alternative nearly identical to one it had previously rejected. Here, the BIA did not reject an alternative in the FEIS. The BIA, the agency with jurisdiction to approve the Lease on Tribal lands, approved 20 turbines for Phase II, which was within the scope of the full Tule Wind Project analyzed in the FEIS. As discussed above, the ridgeline portion of the Tule Wind Project was analyzed with a potential for 63 wind turbines. While the BLM chose not to approve ridgeline turbines under its

jurisdiction, the BLM's preferred alternative did not foreclose the BIA's approval of the Lease, including 20 turbines to be located on the Tribe's reservation, subject to mitigation measures designed to protect eagles.

6. BIA Consulted with its Sister Agency FWS

FEIS 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." ER146. The post-EIS studies considered by the BIA when adopting its ROD include: 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. *See* ESER26; ER75-77.

Despite Appellants' protestations about purported lack of consultation between the BIA and FWS regarding impacts of the Project on golden eagles, the record is littered with evidence contradicting Appellants' position. *See e.g.*, ESER27-42; and ER93-102. The BIA's diligence and good faith in consultation are evidenced in the record.

Appellants seek to impose an Endangered Species Act Section 7-type consultation requirement on the BIA. However, this case does not require Section

7 consultation. Section 7 imposes on all agencies a duty to consult with either the Fish and Wildlife Service or the NOAA Fisheries Service before engaging in any discretionary action that may affect a listed species or critical habitat. *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003). The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts. *Id*. The consultation requirement reflects "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978).

Here, the BIA did not have any obligation to consult with FWS or other agencies under the Endangered Species Act. Rather, the BIA consulted with FWS and other agencies as part of the NEPA process. BIA satisfied its obligation under the FEIS mitigation measures to consult with FWS and others. The FEIS required only *consultation* with the FWS. *Id. See also* ER146-147. The FEIS *also* required consultation with the Tribe. *Id*. The record is replete with demonstrations of 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.*, ESER43 (FWS approval of project ABPP),

ESER44 (Dep't of Interior Tasking Profile), ESER45 (FWS response to the BIA's request for evaluation of ABPP), ESER46 (the BIA response to FWS comments), ESER47 (the BIA coordination with FWS), ESER48-51 (FWS Biological Opinion), ER91 (response to comments on ABPP and Fire Plan, including CDFG comment letter).

To the extent Appellants contend BGEPA or NEPA required the BIA to put Appellants' interests above all others, the Ninth Circuit has rejected that position. *See e.g., Gros Ventre Tribe v. United States*, 469 F.3d 801, 811 (9th Cir. 2006) (holding that the United States does not have to regulate off-reservation resources in a manner consistent with a tribe's best interests so long as it complies with general regulations and statutes). Likewise, the Ninth Circuit has determined that "[c]onsultation is not the same as obeying those who are consulted." *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986).

Therefore, no violation of the Administrative Procedure Act can be demonstrated by Appellants. *Id*. Appellants' dissatisfaction with the outcome of the environmental review process does not render the BIA's Lease approval arbitrary and capricious.

7. BGEPA Does Not Require a Pre-Construction Eagle Take Permit

Appellants argue that BIA was required to condition approval of the Lease on satisfaction of a mandate that Tule Wind obtain an eagle permit from FWS prior to construction of the Project. Opening Brief, 23; 47. In support of their argument, Appellants cite FWS' policy encouraging early coordination with the FWS in the project planning process.

As discussed above, BIA consulted with FWS. Appellants' dislike the outcome of the consultation, which does not render the BIA's approval of Phase II or its decision to require Tule Wind to apply for an eagle permit prior to operation arbitrary and capricious. Further, Appellants' arguments plainly ignore the facts of this matter. Tule Wind applied for an eagle permit prior to construction. *See* ER 257, ¶ 51. FWS' separate process for review and approval of Tule Wind's eagle permit is on-going. *Id*.

The BGEPA provides that, absent a permit or other exemption, it is 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, common 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). The FWS administers the BGEPA, including overseeing the issuance of permits and ensuring compliance with the statute. The

BGEPA explicitly provides for both criminal and civil enforcement. *Id*. § 668(a)–(b).

The FWS has enacted a regulation that pertains to permits for the "incidental take" of eagles. 50 C.F.R. § 22.26; *see* Eagle Permits; Take Necessary To Protect Interests in Particular Localities, 74 Fed. Reg. 46,836 (Sep. 11, 2009). There, the FWS explained that "[p]ersons and organizations that obtain licenses, permits, grants, or other such services from government agencies are responsible for their own compliance with the BGEPA and should individually seek permits." 74 Fed. Reg. 44,843 (Sep. 11, 2009). It further explained, however, that "agencies must obtain permits for take that would result from agency actions that are implemented by the agency itself (including staff and contractors responsible for carrying out those actions on behalf of the agency)." *Id*.

Here, the BIA did not, by approving the Lease, take "agency actions ... implemented by the agency itself" that would directly or proximately result in the incidental take of eagles by it or Tule Wind. Hence, any requirement that the BIA independently seek a permit, or confirm that a lessee obtain permits before Lease approval or as a condition of Lease approval, is not statutorily supported and places the BIA in the position of policing third-party compliance with the BGEPA – a role that has been statutorily placed with FWS.

The relationship between the BIA's Lease approval and any potential harm to eagles is too attenuated to support any requirement that the BIA obtain a permit under the BGEPA prior to Lease approval. The BIA simply exercised its trust responsibility to the Tribe when it approved the Lease in accordance with federal law. The BIA will not construct the Project or operate it upon completion. Tule Wind and the Tribe are not agents of the BIA and the BIA does not exercise regulatory authority over the Project. *See e.g., United States v. Algoma Lumber Co*., 305 U.S. 415, 419-422; 59 S.Ct. 267, 83 L.ED. 260 (1939); and *McNabb v. United States*, 54 Fed.Cl. 759, 760 (2002).

The BIA merely acted pursuant to its authority under 25 USC § 415(a) to approve the Lease. The BGEPA permit requirements and enforcement thereof are matters for the FWS to address pursuant to its independent regulatory authority and are not properly pre-conditions to Lease approval.

a. BIA is Not Responsible for Tule Wind's Compliance with the Law

Appellants cite *FCC v. NextWave Pers. Communications,* 537 U.S. 293 (2003), for the proposition that an agency must comply with all laws prior to taking final agency action. *NextWave* is the linchpin of Appellants' argument that the BIA must seek a permit pursuant to the Eagle Act, but Appellants' overbroad argument is not supported by that decision.

In *NextWave*, a Chapter 11 debtor filed a petition with the Federal Communications Commission seeking reconsideration of the FCC's decision to cancel the debtor's FCC-issued license for failure to pay the purchase price installment payments. The FCC's action violated the Section 525(a) of the Bankruptcy Code which expressly prohibits a governmental unit from revoking government issued licenses due to a debtor's failure to pay a debt dischargeable in bankruptcy. In that matter, *NextWave* challenged the FCC's action under the APA as not being in accordance with law. The FCC's action was in violation of the prohibitions of the Bankruptcy Code, which was applicable to the FCC's decision-making solely because the licensee was a debtor in bankruptcy when the FCC asserted that the licenses were cancelled due to non-payment, i.e., the FCC acted contrary to the Bankruptcy Code.

Appellants exaggerate the impact of their quoted language and their argument leads to absurd results. Will the BIA be required to ensure that Tule Wind complies with "any laws", e.g., pays its taxes in accordance with the Internal Revenue Code and state law; complies with banking requirements; complies with all corporate formalities; complies with all employment requirements; etc., prior to Lease approval? All such requirements fall within the "any law" rubric and would result in no permit or approval ever being issued by any agency. Surely that is not the intent of the APA.

Appellants' citation to *Anderson v. Evans* suffers a similar fate as the Marine Mammal Protection Act ("MMPA") expressly prohibited the issuance of a whaling permit by the federal National Oceanic and Atmospheric Administration absent compliance with the MMPA, which was not satisfied. *Anderson v. Evans*, 371 F.3d, 475, 501 (9th Cir. 2002).

Likewise, *Wilderness Society v. US Fish & Wildlife Svc.*, 353 F.3d 1051 (9th Cir. 2003) fails to support Appellants' position because the Wilderness Act expressly prohibited the Fish and Wildlife Service from approving a commercial enterprise to operate within the designated wilderness area. FWS' approval of a commercial enterprise's operation within the area violated an express prohibition and was overturned as not in accordance with law.

Similarly, *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101 (9th Cir. 2012) fails to support Appellants' position as that case addressed unenforceability of conservation measures under the Endangered Species Act. Here, the BGEPA remains enforceable by the FWS against those that engage in prohibited take in violation of the law.

The BGEPA does not extend to agency action that only potentially and indirectly could result in the taking of migratory birds or golden eagles. Rather, the BGEPA simply makes it unlawful to take eagles. The BIA has not taken any

eagles.[5] FWS' prediction of eligibility of the Project for a take permit does not result in take. Likewise, FWS' initial prediction is not final agency action by the FWS regarding the now-pending eagle take application. Even if eagle take occurs at some point in the future, which it could pursuant to an eagle permit, it is clear that the BIA's Lease approval is not the proximate cause of any anticipated take and any such take is not imminent because construction of the Project has not commenced, and the Project is not operational.

The BIA's mere Lease approval does not violate the BGEPA.

i. BIA Lease Approval Does Not Take Protected Birds and is Not Required to Proceed with the Project.

Appellants claim that construction and operation of the Project cannot proceed "but for" the BIA's Lease approval, that the FEIS forecasts certain death for eagles, and that the inevitable result of that Lease approval is eagle take.

BIA's Lease approval pursuant to 25 USC § 415(a) will not be the proximate cause of any purported eagle take. Authorization to construct and operate the Project is subject to certain conditions, including the Tribe-imposed condition that Tule Wind apply for an eagle permit(s) from the FWS. The terms and conditions of the very permit(s) Appellants desire, and the Tribe has required application for, might be cost prohibitive or otherwise unacceptable to Tule Wind and/or the Tribe.

[5] Likewise, Tule Wind and the Tribe have not taken any eagles.

Likewise, FWS could deny the application(s) for any such permit(s), which Appellants' forecast as inevitable. Further, failing the approval by FWS of an eagle permit, Tule Wind and the Tribe might not be willing to proceed with the Project considering the potential for civil penalties and criminal prosecution under BGEPA.

ii. Appellants' Description of USFWS' Position is Misleading

Appellants repeatedly characterize the FWS as an expert agency and recite in summary Appellants' desired FWS position regarding the Project. Appellants' offer FWS' "expert" opinion regarding permitting, among other things. FWS' purported "expert" opinions proffered by Appellants are not official agency positions, but are instead opinions of individual agency employees preliminarily evaluating the issues with the Project. In any event, Tule Wind has applied for a permit from FWS consistent with the Tribe's requirement as recited in the ROD.

b. BGEPA Does Not Provide a Private Cause of Action to Appellants; Thus, Their APA Challenge Must Fail

FWS enforces the BGEPA through the U.S. Department of Justice and there is no private cause of action enabling others to sue to enforce this law. *See e.g.*, *Protect our Eagles v. City of Lawrence*, 715 F.Supp. 996, 998 (D. Kan. 1989) ("[T]here is no language in that Act purporting to create a private right of action

against the Department of the Interior."). The BGEPA imposes both civil and criminal penalties on those who violate the BGEPA.

Appellants lack a meritorious challenge under the APA alleging that the federal government violated the BGEPA because that statute does not apply to the federal government when issuing regulatory approvals such as the Lease approval.

Appellants ask this Court to find that they can use the APA as a vehicle to enforce the BGEPA against the federal government. However, to be successful under the APA, Appellants must identify a statute applicable to the BIA and a violation of that statute by the BIA. *See Sierra Club v. Martin*, 110 F.3d 1551, 1154-56 (11th Cir. 1997) (holding plaintiff could not bring an APA claim against the federal government to enforce the terms of the MBTA because "[t]he MBTA . . . does not subject the federal government to its prohibitions.").

Congress enacted BGEPA because it sought to stop private citizens from taking eagles, not to stop the federal government from making regulatory approvals that might incidentally take protected birds. This intent is made clear by the fact that Congress did not include a private right of action in the statute, and instead reserved all enforcement authority to the federal government. Moreover, Congress chose not to include the federal government within the meaning of "person" for purposes of the BGEPA. Accordingly, Congress did not intend for the

BGEPA to apply to the BIA, or for private citizens to enforce the BGEPA against the federal government.

The inapplicability of BGEPA to the BIA is buttressed by the fact that the BIA has not committed a take further action and the BIA has no other responsibilities under the statutes. Simply put, the BIA is not responsible for enforcing BGEPA, issuing take permits, or engaging in the activity that Appellants contend will result in take. Therefore, BGEPA cannot be the basis for an underlying obligation and resulting violation.

Appellants sued the BIA for approving the Lease. The purpose of the federal action under 25 U.S.C. § 415 and Part 162 is to authorize the Lease to ensure the Tribe can exercise its sovereign authority over its lands in a manner consistent with the federal policies of tribal economic development, self-governance and self-determination. Appellants ignore the actual federal law pursuant to which the Lease was approved, i.e., 25 U.S.C. § 415. Instead, in support of their BGEPA argument, Appellants assert that Congress directed the BIA to "ensure that wind turbines on tribal lands comply with all applicable environmental laws" by citing to provisions regarding BIA approval of Tribal Energy Resource Agreements (TERA). Opening Brief, 55, fn 14.

The Tribe did not seek approval of a TERA by the BIA, which would require that the TERA include such a provision. *See* Addendum 7; 25 U.S.C. §

3504(e)(2)(B)(iii)(VII). The reference to the TERA statutory provisions are inapplicable. Rather, the Tribe sought approval of the Lease pursuant to the Long-Term Leasing Act, 25 U.S.C. § 415, which does not contain any such express requirement.

Appellants further cite the BIA's leasing regulations that became effective on January 4, 2013. 25 C.F.R. 162.565(a) provides that BIA, among other things, will, "identify potential environmental impacts and ensure compliance with all applicable environmental laws, land use laws, and ordinances" as part of the BIA lease approval process. *See* Addendum 10. However, the Appellants' cited regulation was not the basis for approval of the Lease. *See* ER 44. 25 C.F.R. 162.565 was published in the *Federal Register* on December 5, 2012 and became effective on January 4, 2013. The Tribe submitted the Lease to the BIA before January 4, 2013, the effective date of the new leasing regulations (77 Fed. Reg. 72440 (Dec. 5, 2012). Therefore, the Lease was reviewed pursuant to the leasing regulations in effect at the time of submission. *See* 25 C.F.R. § 162.008(b)(1); and ER 44. The leasing regulations utilized for approval did not contain similar language. *See* 25 C.F.R. Part 162 (2001).

Appellants citation to inapplicable statutes and regulations does not support their argument to compel compliance with BGEPA prior to BIA making its decision to approve of the Lease. Further, assuming *arguendo* that the BIA's

regulations that served as the basis for approval of the Lease did require compliance with "applicable environmental laws" BGEPA has been demonstrated not to apply to the BIA's Lease approval. Appellants may not, through the courts, compel the BIA to follow procedures that simply do not apply in these circumstances. *See, e.g.*, *Li v. Kerry*, 710 F.3d 995, 1003 (9th Cir. 2013) (no claim under APA where plaintiff fails to identify a legal duty imposed by the relevant statute; no "license to 'compel agency action' whenever the agency is withholding or delaying an action we think it should take"); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010) ("[A]bility to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command.").

There is no statutory or regulatory requirement that the BIA must obtain or require Tule Wind to obtain an eagle permit. The BIA's regulatory approval of the Lease has not and could not itself result in a take of a protected bird or eagle. The BIA acted in accordance with the law.

8. Appellants Waived Their Migratory Bird Treaty Act ("MBTA") Argument

In the decision below, the district court rejected the Appellants' argument that the MBTA required the BIA to obtain a permit from the FWS prior to approval of the Lease. On this appeal, Appellants did not argue in their opening brief that the MBTA required the Federal Defendants to take any action prior to approval of

the Lease. Hence, Appellants' MBTA argument is waived. "We review only issues which are argued specifically and distinctly in a party's opening brief." *Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir.1994) (citing *Miller v. Fairchild Indus., Inc.,* 797 F.2d 727, 738 (9th Cir.1986)).

V. CONCLUSION

For the foregoing reasons, the Ewiiaapaayp Band of Kumeyaay Indians respectfully requests that this Court affirm the district court's rulings in favor of the Defendants-Appellees and Intervenor-Appellees.

Dated: January 26, 2018

Respectfully submitted,

/s/ Bradley G. Bledsoe Downes

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(B) and Ninth Circuit Rule 32-1, I certify that this Answer Brief is proportionately spaced, has a typeface of 14 points or more, and contains 8,793 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rules 32(a)(5) and 32(a)(6).

Dated: January 26, 2018

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STATEMENT OF RELATED CASE REQUIRED BY CIRCUIT RULE 28-2.6

The Ewiiaapaayp Band of Kumeyaay Indians is not aware of any other cases pending in this Court or any other that are related to this case.

Dated: January 26, 2018

Respectfully submitted,

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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 by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin Largent