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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BACKCOUNTRY AGAINST DUMPS, DONNA TISDALE, and JOE E. TISDALE,

Plaintiffs,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, et al.,

Defendants.

TERRA-GEN DEVELOPMENT COMPANY, LLC,

Intervenor-Defendant.

CASE NO. 3:20-cv-02343-JLS-DEB

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR PARTIAL DISMISSAL

Date: May 13, 2021
Time: 1:30 PM
Judge: Honorable Janis L. Sammartino

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I. INTRODUCTION

Counts II and III of Plaintiffs' amended complaint fail to state cognizable claims for relief under Ninth Circuit precedent. These claims allege that the Bureau of Indian Affairs (BIA) violated the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (BGEPA), respectively, when it approved a lease for construction and operation of a wind-energy facility on tribal trust land, on the grounds that the subsequent construction and operation of the facility could result in future takes of species protected under these Acts. Under this Court's and Ninth Circuit case law, however, an agency acting in a regulatory capacity as BIA has done here does not violate the MBTA or BGEPA when it issues a regulatory approval. Such a theory would constitute an "attenuated secondary liability" that "verges on argument for unbounded agency vicarious liability" and "is too far removed from the ultimate legal violation to be independently unlawful under the APA." *Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 585–86 (9th Cir. 2016) (*POC I)*. Nonetheless, that is exactly the theory of liability on which Plaintiffs' Counts II and III rest. Accordingly, Plaintiffs have not pleaded, and cannot plead, cognizable claims for relief against the BIA here in Counts II and II. None of the allegations added to the amended complaint change this result. This Court should dismiss Counts II and III with prejudice.

II. STATUTORY BACKGROUND

A. Migratory Bird Treaty Act

The MBTA is a criminal statute that makes it unlawful to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory birds, as well as their nests and eggs, "[u]nless and except as permitted by regulations." 16 U.S.C. § 703(a); 50 C.F.R. § 10.1. The statute was enacted in 1918 to implement the Convention Between the United States and Great Britain for the Protection of Migratory Birds. U.S.–Gr. Brit., Aug. 16, 1916, 39 Stat. 1702. The Act has been amended to implement additional similar Conventions concluded with Mexico (1936), Japan (1972), and the Soviet Union (1976). *See* 16 U.S.C. § 703, 704(a). U.S. Fish and Wildlife Service (FWS) implements the MBTA on behalf of the U.S. Secretary of the Interior (Secretary).

Most relevant to this case is the Act's prohibition against "take," which is defined in the regulations as meaning "to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12. FWS is authorized to issue permits for take under certain circumstances, where it is "compatible with the terms of the conventions." 16 U.S.C. § 704(a); *see generally* 50 C.F.R. §§ 21.1–21.61. The regulations provide that take permits may be applied for to engage in falconry, scientific collecting, conservation education, taxidermy, and hunting of migratory waterfowl.

50 C.F.R. pt. 21. The regulations include a provision that applies to the incidental (*i.e.*, unintentional) take of migratory birds that occurs pursuant to military-readiness activities, but not to any other incidental take. 50 C.F.R § 21.15; *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017).

As a criminal statute, the MBTA does not expressly apply to the federal government, nor does it include a citizen-suit provision that allows private citizens to bring a cause of action to enforce its provisions. 16 U.S.C. §§ 706, 707(a), (d). However, the Ninth Circuit has found standing to bring suit where the plaintiff alleges he is "adversely affected or aggrieved" by an agency action alleged to have violated the MBTA. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1204 (9th Cir. 2004) (citation omitted).

B. Bald and Golden Eagle Protection Act

The BGEPA was enacted in 1940. As amended, it imposes criminal and civil penalties against "[w]hoever" shall "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" bald and golden eagles, except as permitted by the Secretary. 16 U.S.C. § 668(a)–(b). The Act defines "take" to include "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." *Id.* § 668c. The BGEPA is implemented by FWS on behalf of the Secretary.

The BGEPA's implementing regulations authorize FWS to issue permits for take of bald and golden eagles for scientific or exhibition purposes, religious purposes, to protect human or eagle health and safety, and falconry. *See generally* 50 C.F.R. §§ 22.21–22.25. The regulations also expressly authorize FWS to issue permits for take of eagles that is "associated with but not the purpose of [an] activity." *Id*. § 22.26(a) (2016). Such incidental take must be "compatible with the preservation of the bald eagle and the golden eagle" and "necessary to protect an interest in a particular locality." *Id*. For individual instances of such take, a permit application is appropriate only where it "cannot practicably be avoided," or, for programmatic take, where it is "unavoidable even though advanced conservation practices are being implemented." *Id*. § 22.26(a)(1)–(2).

Like the MBTA, the BGEPA does not expressly apply to the federal government and does not contain a citizen suit provision that provides a private right of action by citizens to independently enforce its provisions. *See* 16 U.S.C. § 668(a)–(b).

III. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' amended complaint centers on a record of decision (ROD) issued by the Department of the Interior's Principal Deputy Assistant Secretary for Indian Affairs approving a lease of land on the Reservation of the Campo Band of Diegueno Mission Indians (the Tribe) for development and operation of renewable

energy generation facilities consisting of sixty wind turbines. Amend. Compl. for Decl. & Inj. Rel. ¶¶ 1–2, ECF 42 (Amend. Compl.). "[T]he Project is slated to be constructed on 2,200 acres of land located within the Tribe's 16,512-acre Reservation near the rural community of Boulevard in eastern San Diego, approximately 70 miles east of the City of San Diego." *Id.* ¶ 27. The project will "include[] up to sixty 586-foot to 604-foot tall turbines, three 374-foot tall meteorological towers, 15 miles of new access roads, an electrical connection and communications system, a collector substation, an operation and maintenance facility, a generator-tie . . . line, and other components needed for construction and operation of the Project." *Id.*

Under the Indian Reorganization Act of 1934, Pub. L. 73-383, 48 Stat. 984, and Interior regulations, Interior holds certain lands in trust for Indian tribes and use of trust land for business purposes must be approved by BIA. *See generally* 25 U.S.C. § 5108; 25 C.F.R. pts. 162, 151.

Count I alleges that the ROD violates the Administrative Procedure Act, 5 U.S.C. §§ 701–06 (APA), and the National Environmental Policy Act, 42 U.S.C. §§ 4321–70 (NEPA). Counts II and III allege that BIA violated the MBTA, 16 U.S.C. §§ 703–12 (Count II), and BGEPA, 16 U.S.C. §§ 668–668d (Count III), by issuing the ROD approving the lease. Amend. Compl. ¶ 3. On the basis of these claims, Plaintiffs seek declaratory and injunctive relief vacating the lease approval.

Id. ¶¶ 27–32. With respect to Counts II and III, Plaintiffs allege that BIA has violated the MBTA and BGEPA because construction and/or operation of the Project is likely to kill migratory birds and golden eagles; however BIA has "not applied for or secured any permits for the Project under the MBTA" and, though it "will require preparation of a [Bird and Bat Conservation Strategy]" and compliance with all applicable laws, including the MBTA and BGEPA, has not specifically required "that the Project applicant obtain any MBTA permit" or a take permit pursuant to the BGEPA. *Id.* ¶¶ 137, 162.

Federal Defendants moved to dismiss these counts, Fed. Defs.' Mot. to Dismiss, ECF 40, after which Plaintiffs amended their complaint and the Court dismissed Federal Defendants' motion as moot in light of the amended complaint. Jan. 25, 2021 Order, ECF 43. However, Plaintiffs' basic factual allegations concerning the ROD and the planned wind project remain the same, as does Plaintiffs' theory of BIA's secondary liability for takes that may result from construction or operation of the project by Terra-Gen. Mostly, the Amended Complaint adds a legal argument attempting to distinguish Plaintiffs' claims here from those that the Ninth Circuit has previously dismissed. *Compare* Original Compl., ECF 1 *with* Amend. Compl., ECF 42. This attempt is to no avail. There is no escaping the fact that the Ninth Circuit has squarely rejected the basic theory of liability that Plaintiffs present here, under directly analogous circumstances.

This Ninth Circuit authority is dispositive. Accordingly, Counts II and III of Plaintiffs' Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

IV. ARGUMENT

Dismissal under Rule 12(b)(6) is appropriate when Plaintiffs fail to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In evaluating whether a complaint states such a claim, a court assumes the truth of a plaintiff's factual allegations, but does not assume legal conclusions to be true. *Id.* at 679. "A court may dismiss a claim either because it lacks 'a cognizable legal theory' or because it fails to allege sufficient facts to support a cognizable legal claim." *Amador v. Quicken Loans, Inc.,* No. 1:16-CV-01357, 2017 WL 2158672, at *2 (E.D. Cal. May 17, 2017) (quoting *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996)). Dismissal without leave to amend is appropriate when "it is clear . . . that the complaint could not be saved by any amendment." *Id.* (quoting *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991)). A court may consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (citations omitted).

Here, Counts II and III are incurably defective as a matter of law. The Ninth Circuit's decision in *POC I*, is dispositive. 825 F.3d at 585, 588. In that case, the Ninth Circuit held under directly analogous circumstances that neither the MBTA nor the BGEPA subjects federal agencies to secondary liability when those agencies are acting in "a purely regulatory capacity" because their regulatory action does not directly or proximately cause the "take" of migratory birds. *Id.* at 585. Specifically, in *POC I* the Ninth Circuit rejected claims that the Bureau of Land Management (BLM) had violated the MBTA and BGEPA by approving of a right of way that would allow for construction and operation of a wind project, because "[t]he causal mechanism in question is too speculative and indirect to impose liability on the BLM for engaging in routine regulatory action." *Id.* at 586–87. The Ninth Circuit further ruled that BLM was not required to obtain take permits itself to issue its regulatory approval, or to require the applicant to obtain such permits. *Id.* at 587–88.

The Ninth Circuit recently applied *POC I* to BIA project approvals, holding that "BIA's decision not to condition its approval on prior acquisition of a permit from another agency was not arbitrary or capricious." *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1044 (9th Cir. 2019) (*POC II*). As the Ninth Circuit held in *POC I*, a theory allowing liability under MBTA and BGEPA for agencies like BIA that act in a purely regulatory capacity to approve the grant of

property interests "verges on argument for unbounded agency vicarious liability" and is therefore impermissible. *POC I*, 825 F.3d at 586; *see also POC II*, 939 F.3d at 1043 (holding that *POC I* controls and forecloses claims against BIA in authorizing wind project).

Indeed, every court—including this one—that has been presented with the theory presented here in Counts II and III has rejected it. *Protect our Communities Found. v. Jewell*, No. 13-CV-575 JLS-JMA, 2014 WL 1364453, at *21 (S.D. Cal. Mar. 25, 2014) (Sammartino, J.), *aff'd*, 825 F.3d 571 (9th Cir. 2016) ("Federal agencies are not required to obtain a permit before acting in a regulatory capacity to authorize activity, such as development of a wind-energy facility, that may incidentally harm protected birds"); *see also Backcountry Against Dumps v. Chu*, 215 F. Supp. 3d 966, 985–86 (S.D. Cal. 2015); *Protect Our Communities Found. v. Chu*, No. 12-CV-3062-L-BGS, 2014 WL 1289444, at *9 (S.D. Cal. Mar. 27, 2014) (holding Plaintiffs failed to state a claim under MBTA and BGEPA in alleging that permit allowing construction of a project would lead to killing of migratory birds and protected eagles by third parties); *Protect our Cmtys. Found. v. Salazar*, No. 12-CV-2211-GPC(PCL), 2013 WL 5947137, at *18–19 (S.D. Cal. Nov. 6, 2013), *aff'd sub nom.*, 674 F. App'x 657 (9th Cir. 2017); *Protect Our Lakes v. U.S. Army Corps of Eng'rs*, No. 1:13-CV-402-JDL, 2015 WL 732655, at *1 (D. Me. Feb. 20,

2015); *Friends of Boundary Mountains v. U.S. Army Corps of Eng'rs*, 24 F. Supp. 3d 105, 113 (D. Me. 2014).

Here, Plaintiffs have not alleged, and plainly could not plausibly allege, that BIA itself has actually taken, or will ever take, any migratory birds or bald or golden eagles. There is no dispute that neither BIA nor any other named federal defendant is undertaking construction or operation of the planned Project. *See* Amend. Compl. ¶ 1 (alleging that Terra-Gen will "develop, construct, operate, and maintain" the facilities).

Federal Defendants' only conceivable role here is based on their jurisdiction over land held in trust by the United States for Indian tribes. *See* 25 C.F.R. § 162.010(a)(3) ("Prospective lessees . . . must submit the lease, and required information and analyses, to the BIA office with jurisdiction over the lands covered by the lease, for our review and approval."). Like the BLM in *POC I*, here the BIA "did not sanction or authorize the taking of migratory birds without a permit; it authorized the development of a wind-energy facility," and thus cannot be held to be "complicit in future unlawful activity, separately committed by a grantee, through a mere failure to intervene at the permitting stage." *POC I*, 825 F.3d at 587; *see also id.* at 588 ("[T]he same reasoning applies to defeat the imposition of liability" with respect to BGEPA claim.). Plaintiffs' Complaint

implicitly concedes as much; its only allegations of effects to migratory birds or eagles relate to the project to be carried out exclusively by Terra-Gen.

Furthermore, far from authorizing Terra-Gen to take migratory birds or eagles, which is not something BIA is empowered to do in any case, BIA has required Terra-Gen to comply with all applicable laws, including the MBTA and the BGEPA. Amend. Compl. ¶ 152; 25 C.F.R. § 162.014(a)(1) ("In addition to the regulations in this part, leases approved under this part . . . [a]re subject to applicable Federal laws and any specific Federal statutory requirements that are not incorporated in this part . . . ."). There is no dispute that the ROD includes mitigation measures to protect migratory birds and golden eagles. Amend. Compl. ¶¶ 56, 58. In particular, the ROD requires that the project proponent, Terra-Gen, develop a Bird and Bat Conservation Strategy detailing mitigation measures for submittal to the U.S. Fish and Wildlife Service, the agency charged with implementing and enforcing the MBTA and BGEPA. *Id.* ¶ 54. Based on the various mitigation measures, BIA concluded that the Project would not result in adverse effects to migratory birds or eagles. *Id.* ¶¶ 55, 57.

This Court previously considered MBTA and BGEPA claims that were virtually identical to those alleged here in Counts II and III and granted judgment to defendants on the pleadings, applying the same standard governing motions to dismiss under Rule 12(b)(6). *Protect Our Communities Found. v. Black*, No. 14-

CV-2261 JLS (JMA), 2016 WL 4096070, at *6–8 (S.D. Cal. Mar. 29, 2016) (Sammartino, J.) (granting judgment on the pleadings to defendants because "the facts as pleaded do not present a situation in which BIA has authorized the killing of eagles or other migratory birds"), *id.* at *4 ("Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.") (citations and quotations omitted). Here, as in the previous wind energy litigation before this Court in *Protect Our Communities*: (1) BIA is not secondarily liable for any future takes caused by project construction or operation; (2) BIA is not required to obtain permits to exempt any such future take; and (3) BIA need not require the applicant to have secured a take permit before issuing its regulatory lease approval. Indeed, BIA has "listed compliance with the MBTA as a potentially required permit" in its environmental review. Amend. Compl. ¶ 137; *Protect Our Communities*, 2016 WL 4096070, at *7 (even "[a]ssuming the wind farm as designed would result in eagle deaths, the Complaint does not allege that one of these eagle takings has occurred or necessarily will occur before [the project proponent] is able to obtain a permit," such that "BIA's approval of the lease" cannot violate the MBTA or BGEPA).

In sum, even assuming the truth of Plaintiffs' claims that BIA has "not applied for or secured any permits for the Project under the MBTA" and, though it "will require preparation of a [Bird and Bat Conservation Strategy]," it has not required "that the Project applicant obtain any MBTA permit" or a takings permit pursuant to the BGEPA (Amend. Compl. ¶¶ 137, 162), Plaintiffs fail to state cognizable claims on which relief could be granted in Counts II and III.

Plaintiffs' newly-asserted legal arguments in the Amended Complaint do not change this result. Plaintiffs assert that the binding Ninth Circuit precedent is distinguishable because BIA acted in more than a regulatory capacity in approving the lease here; rather, according to Plaintiffs, BIA was acting as a trustee responsible for managing tribal lands. Amend. Compl. ¶ 149. This argument ignores that the Ninth Circuit already addressed the BIA's role in a similar case and rejected arguments analogous to those offered by Plaintiffs here. BIA's role and action here are indistinguishable from those in *POC II*. In both cases, BIA approved a lease for a wind project; it did not approve take under MBTA or BGEPA. *See POC II*, 939 F.3d at 1044. Although BIA acts as a trustee to Indian tribes, BIA is not a party to tribal leases and nothing about BIA's approval process changes the fact that compliance with these statutes remains the developer's responsibility. *See Protect Our Communities*, 2016 WL 4096070, at *6 (agreeing that "(1) federal agencies acting in their regulatory capacities are not required to

obtain Eagle Act and MBTA permits; [and] (2) a violation of these statutes has not occurred because BIA's approval of the lease has not caused a 'take' of any eagle or migratory bird"). In *POC II*, the Ninth Circuit held that "BIA's decision not to condition its approval on prior acquisition of a permit from another agency was not arbitrary or capricious" because "compliance is [the developer's] responsibility," not BIA's. 939 F.3d at 1044. That holding is binding here.

Plaintiffs' attempt to sidestep *POC I* and *POC II* by relying on *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, No. 12-00594 SOM-RLP, 2013 WL 4511314, at *6 (D. Haw. Aug. 23, 2013), *aff'd in part, rev'd in part,* 878 F.3d 725 (9th Cir. 2017), to compare BIA's approval of a lease in its role as trustee for the benefit of a sovereign tribal nation with the National Marine Fisheries Service's regulation of swordfish and tuna fisheries is wholly inapt. *See* Amend. Compl. ¶ 153. Specifically, Plaintiffs assert that "NMFS had properly applied to FWS for a takings permit under the analogous Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq*. ('MMPA')" (Amend. Compl. ¶ 153) when NMFS had actually applied for an MBTA special use permit, not a permit under the Marine Mammal Protection Act. Furthermore, Plaintiffs overlook the fact that, on appeal, the Ninth Circuit overturned NMFS' MBTA permit as having been improperly granted. *Turtle Island Restoration Network v. United States Dep't of Com*. (*Turtle Island II)*, 878 F.3d 725, 741 (9th Cir. 2017) .

Plaintiffs also vastly overreach in attempting to compare BIA's approval of a tribe's lease to construct and operate a wind energy facility with NMFS' express grant of permission to take whales, as in *Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004). *See* Amend. Compl. ¶ 154. The Ninth Circuit and this Court previously distinguished *Anderson* as well as another case relied on by Plaintiffs, *Wilderness Society v. United States Fish and Wildlife Service*, 353 F.3d 1051 (9th Cir. 2003) (en banc), *amended in part on other grounds on reh'g en banc,* 360 F.3d 1374 (9th Cir. 2004) (en banc), *see* Amend. Compl. ¶ 144, as cases in which the agency did not merely approve a project in its regulatory authority, but "sanction[ed] conduct by third parties that was itself unlawful." *POC I*, 825 F.3d at 587; *Black*, 2016 WL 4096070, at *8. As explained above, BIA's approval of the lease here is plainly not an authorization to Terra-Gen to take migratory birds or eagles. Rather, BIA has required that Terra-Gen comply with the MBTA and BGEPA, statutes that are administered by the U.S. Fish & Wildlife Service. Simply stated, the cases cited by Plaintiffs stand in stark contrast to *POC I* and *POC II*, where the Ninth Circuit addressed agency action that is directly analogous to BIA's action here and held that the MBTA and BGEPA did not impose liability. *POC I* and *POC II* control here.

Finally, Plaintiffs' attempt to distinguish the Ninth Circuit authority based on U.S. Department of Interior Solicitor Opinion M-37050 and a recent MBTA

incidental take rule promulgated by the U.S. Fish & Wildlife Service, Regulations Governing Take of Migratory Birds, 86 Fed. Reg. 1134 (Jan. 7, 2021), is to no avail. *See* Amend. Compl. ¶ 138–39. Plaintiffs allege that the opinion and rule unlawfully conclude that the MBTA does not prohibit incidental takings of migratory birds and that, as a result, Terra-Gen will not, in fact, comply with the MBTA, despite the lease requirement that it comply with all applicable laws, including the MBTA. Amend. Compl. ¶ 158. This argument fails on its face to distinguish the Ninth Circuit's rulings in *POC I* and *POC II*, as those rulings did not depend on whether the Department of the Interior interpreted the MBTA as prohibiting incidental takings. Rather, the rulings rejected the theory of secondary liability for alleged future violations of the MBTA and BGEPA upon which the plaintiffs' claims rested. Counts II and III in this case depend on that very same impermissible theory of secondary liability. In *POC I* and *POC II*, the Court held that, as a matter of law, an agency approving a project in a regulatory capacity cannot be liable for potential future take by a private actor under the MBTA or BGEPA, and those holdings apply with full force to Counts II and III here.

Neither Solicitor Opinion M-37050 nor the MBTA incidental take rule have any bearing on the secondary liability of a federal agency that merely approves a project rather than future take under the MBTA, and, hence, have no bearing on the viability of Counts II and III here. In any event, the Department of the Interior

withdrew Solicitor Opinion M-37050 on March 8, 2021, and the January 2021 MBTA incidental take rule is currently being reviewed by the new administration. Protecting Public Health and the Environment, 86 Fed. Reg. 7037 (Jan. 20, 2021); Solicitor Opinion M-37065, *available at* https://www.doi.gov/sites/doi.gov/files/permanent-withdrawl-of-sol-m-37050-mbta-3.8.2021.pdf (last visited Apr. 14, 2021). Moreover, the opinion and rule only ever concerned the MBTA, and thus could not be a basis for distinguishing the alleged violation of the BGEPA in Count III here from Ninth Circuit precedent in any case.

Lastly, it is worth noting that Plaintiffs' premise that the incidental take rule is unlawful is a legal conclusion that cannot be assumed true for purposes of resolving the instant motion to dismiss, as is Plaintiffs' allegation that Terra-Gen will not comply with the MBTA and/or BGEPA simply because the rule exists, which is based on that same premise. *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

V. CONCLUSION

Counts II and III of Plaintiffs' Amended Complaint are foreclosed by binding Circuit precedent. Plaintiffs have not stated, and cannot state, cognizable

claims for relief against BIA for violating the MBTA and/or the BGEPA. Therefore, the Court should dismiss Counts II and III.

Respectfully submitted this 15th day of April, 2021.

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