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10.654.02

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

UNITED STATES BUREAU OF INDIAN AFFAIRS, DARRYL LACOUNTE, in his official capacity as Director of the United States Bureau of Indian Affairs, AMY DUTSCHKE, in her official capacity as Regional Director of the Pacific Region of the United States Bureau of Indian Affairs, UNITED STATES DEPARTMENT OF THE INTERIOR, DEBRA A. HAALAND , in her official capacity as Secretary of the Interior, and DARRYL LACOUNTE, in his official capacity exercising the authority of the Office of the Assistant Secretary of the Interior for Indian Affairs,

Defendants,

TERRA-GEN DEVELOPMENT COMPANY, LLC,

Intervenor-Defendant,

Case. No. 3:20-cv-02343 JLS (DEB)

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' AND TERRA-GEN DEVELOPMENT COMPANY, LLC'S MOTIONS FOR PARTIAL DISMISSAL**

Date: May 13, 2021
Time: 1:30 pm
Judge: Hon. Janis L. Sammartino

Courtroom 4D

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## INTRODUCTION

Plaintiffs Backcountry Against Dumps, et al. ("Plaintiffs") hereby respond to the motions for partial dismissal under Federal Rules of Civil Procedure ("FRCivP"), Rule 12(b)(6), filed by the Federal Defendants United States Bureau of Indian Affairs, et al. ("Federal Defendants") (Dkt 60) and Intervenor-Defendant Terra-Gen Development Company, LLC ("Terra-Gen") (Dkt 46). Motions filed under Rule 12(b)(6) attack only the legal sufficiency of the challenged pleading and therefore must accept the truth of its well-pleaded facts. Both motions seek dismissal of the Second and Third Claims for Relief in Plaintiffs' First Amended and Supplemental Complaint ("FAC") filed January 22, 2021 (Dkt. 42).

The Second Claim for Relief alleges that the Federal Defendants' approval of a 25-year lease of land between the Campo Band of Diegueno Mission Indians ("Tribe") and Terra-Gen allowing the latter to construct and operate a 60-turbine wind energy project ("Campo Wind Project" or "Project") violates the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. section 703. (Dkt 42 at ¶¶130-159.) The Third Claim for Relief alleges that the Federal Defendants' approval of the Project violates the Bald Eagle and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668. (Dkt. 42 at ¶¶160-180.)

The Defendants' motions argue that each of these claims for relief fails to "state a claim for relief that is plausible on its face," citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Fed. Def. MPA (Dkt. 60-1) at 7; Terra-Gen MPA (Dkt. 46-1) at 6. Both motions are without merit and should be denied, for three reasons.

First, they are premised on the false narrative that Plaintiffs seek to impose "vicarious liability" on the Federal Defendants for potential future violations of the MBTA and the Eagle Act by Terra-Gen. Not so. As the FAC makes clear, the Federal Defendants are unlawfully implementing a new interpretation of the MBTA and the Eagle Act that allows the "incidental take" of migratory birds including eagles that a federal district court has already declared unlawful. (FAC (Dkt. 42) ¶¶138-143.)

Second, the motions are based on the erroneous notion that the Ninth Circuit has

upheld the Federal Defendants' new, unlawful interpretation of these two laws. Manifestly, it has not. Instead, it has done just the opposite. As the FAC points out, the Ninth Circuit has been careful to avoid just that interpretation of its rulings. (FAC (Dkt. 42) ¶¶144-159.)

Third, the motions ask this Court to either ignore, or to contravene, the recent ruling of the District Court for the Southern District of New York, per the Honorable Valerie E. Caproni, declaring unlawful and vacating the Defendant United States Department of the Interior's new policy, adopted in December 2017 and repeated in the Department's promulgation of an implementing regulation which became effective on March 8, 2021, declaring that "the MBTA does not prohibit incidental takes or kills [of migratory birds] because the statute applies only to activities specifically aimed at birds." (*Natural Resources Defense Council v. U.S. Dep't of the Interior*, 478 F.Supp.3d 469, 472, 489 (S.D.N.Y. August 11, 2020); FAC (Dkt. 42) ¶¶139-142.) This Court should reject the Defendants' attempt to end-run Judge Caproni's throughly researched and carefully written ruling on this controlling issue.

Each of these points is explicated in the Argument section of this Memorandum.

## FACTUAL BACKGROUND

The Project includes both the Campo Wind Facilities on the Reservation, and the Boulder Brush Facilities on adjacent private lands.[1] (FAC (Dkt. 42) ¶2.) The Campo Wind Facilities would be located within a 2,200 acre corridor on the Tribe's Reservation, and consist of sixty 586-foot to 604-foot tall turbines, three 374-foot tall meteorological towers, 15 miles of new access roads, an electrical connection and communication system, a collector substation, an operation and maintenance facility, a gen-tie line, and other components needed for construction and operation. (*Id*.) The Boulder Brush Facilities on 320 acres of private land adjacent to the Reservation would include a

[1] This summary is taken from the FAC, whose factual allegations are taken as true on review of a motion to dismiss under FRCiv.P 12(b)(6). *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

substation, gen-tie line, switchyard, and access roads. (*Id*.) The Boulder Brush Facilities are under the land use and permitting jurisdiction of the County of San Diego, and would require a Major Use Permit from the County. (*Id*.)

The Project is a dangerous and completely unnecessary industrialization of low-density rural neighborhoods and high quality wildlife habitat in an area with an extremely high wildfire risk and frequent low-flying military, commercial and private aircraft. (*Id*. ¶4.) The Project poses grave threats to birds and other wildlife, to aviation safety, and to human health and safety in adjacent and nearby residential neighborhoods both within and outside the Reservation from high-speed turbine rotor and blade breakage and ejection, from excessive noise – especially infrasound and low frequency noise ("ILFN") – and from fires sparked by overheating and malfunctioning turbine rotors, causing potentially catastrophic wildfires. (*Id*.) Far less harmful and more efficient energy development solutions exist, such as distributed (*i.e.* small scale and localized) generation projects (such as roof-top solar arrays) near energy demand centers in already-disturbed areas, or much smaller, quieter and less visually intrusive, reduced-capacity turbines. (*Id*.)

Wind power is widely perceived to be an ecologically safe and reliable renewable energy source, but in truth, it is anything but. (*Id*. ¶5.) Unlike roof-top solar power that eliminates environmental harm due to its small scale and proximity to the place where its electricity is used, wind power is unsafe, unreliable and environmentally destructive. (*Id*.) Much as hydroelectric dams were once thought to be environmentally benign, but are now known to block salmon migration, waste water through evaporation, harm downstream habitat by releasing warm rather than cold water of low rather than high dissolved oxygen content, fill with sediment, and pose downstream safety risks from leaks, collapse and overtopping due to poor foundation design and construction, and just as nuclear energy was initially promoted as safe and reliable but is now known to be neither, so too wind power has not withstood careful scrutiny. (*Id*.) The Project's 230-foot long, 40-ton, 200-mph spinning blades kill birds and bats much like a giant vacuum in the sky that creates a huge, 460-foot-wide vortex. (*Id*.) Its 50- to 75-ton nacelles

(rotors) overheat and spew flaming debris, causing wildfires. (*Id.*) Its unrelenting, pulsating whooshing noise emits infrasound and low-frequency sound waves that harm human health and disturb sleep for miles.

The Project's ridge-top towers and power lines prevent aerial firefighting, and their unceasingly blinking red lights turn the night sky into a nightmarish spectacle. (*Id.*) Its enormous blade sweep poses aviation hazards because tower warning lights are hundreds of feet below the blade tips, creating a 20-story-high and 40-story-wide blade sweep zone invisible to planes at night for each turbine tower. (*Id.*) This extreme hazard has already caused airplane collisions and deaths at existing wind turbine energy projects. (*Id.*) Each day when the sun rises and sets, its swirling blades cause blinding shadow flicker. (*Id.*) When its blades break, they fly through the sky, pointed-end over jagged-end, posing extreme safety hazards to homes, cars and people alike. (*Id.*)

And, due to uncertain winds and frequent breakdowns, on average its wind capacity factor (the amount of energy actually produced over a year as a fraction of the turbines' rated maximum capacity) is only about 30 percent. (*Id.*) Unlike roof-top solar, it lacks any battery storage capacity and thus requires augmentation from other, often fossil fuel, energy sources. (*Id.*) And, unlike solar panels, which are increasingly American made, virtually all wind turbines–like the ones in this Project–are built overseas and provide no manufacturing jobs here at home. (*Id.*)

This Court should disregard those portions of Terra-Gen's "Background" statement (Terra-Gen MPA at 2-5) that attempt to interject factual claims that are not based on – and instead are contrary to – the facts alleged in Plaintiffs' FAC. On a Rule 12(b)(6) motion to dismiss, the court must "accept as true all of the factual allegations set out in plaintiffs' complaint." (*RescueCom Corp. v. Google Inc*. 562 F.3d 123, 127 (2nd Cir. 2009.) A Rule 12(b)(6) motion challenges the legal sufficiency of plaintiff's allegations, not their truth. Therefore it is improper for a defendant to advance its own version of the facts in support of such a motion. (*Id.*)

For the same reason, this Court should reject Terra-Gen's invitation to depart from

the limited scope of its review by taking "judicial notice" of Federal Defendants' Record of Decision ("ROD") and Final Environmental Impact Statement ("EIS") to advance facts that contradict the FAC's allegations. (Terra-Gen MPA at 3, n. 2.) Although "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice" (*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,551 U.S. 308, 322 (2007)), "a court cannot take judicial notice of *disputed* facts contained in such public records." (*Khoja v. Orexigen Therapeutics, Inc*. ("*Khoja*"), 899 F.3d 988, 999 (9th Cir. 2018) (emphasis added.).) "'Just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth.'" ( *Id*. (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2011).)

Terra-Gen argues that this Court may take judicial notice of the ROD and EIS because they "'are not subject to reasonable dispute,'" asserting that the information therein "'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" (*Id.*; quoting Fed. R. Evid. 201(b).) Not so. Because Plaintiffs' FAC disputes the accuracy of statements in the ROD and Final EIS, Terra-Gen's characterization of them as "not subject to reasonable dispute" must fail.

Likewise, Terra-Gen argues that this Court should treat the ROD and Final EIS as if they "were incorporated into the Complaint" because they "form the basis" of Plaintiffs' claims and because the FAC "refers extensively" to them. (Terra-Gen MPA at 3 n. 2. "Yet 'it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." (*Khoja v. Orexigen Therapeutics, Inc.,* _ F.Supp.3d_ (S.D. Cal 2020) , No. 15-CV-540 JLS (JLB), 2020 WL 6395629, at *5 (S.D. Cal. Nov. 2, 2020) (quoting *Khoja*, 899 F.3d at 1003).)

Because Terra-Gen seeks judicial notice of disputed facts within the ROD and Final EIS, its request is improper. This Court must decide Defendants' motions to dismiss based upon the facts properly alleged in the FAC.

## STANDARD OF REVIEW FOR MOTIONS TO DISMISS

Rule 12(b)(6) motions are "viewed with disfavor and rarely granted." (*Broam v. Brogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).) Because such motions test only the legal sufficiency of the challenged pleading, the court must "accept as true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally." (*RescueCom Corp v. Google Inc.*, *supra*, 562 F.3d at 127; *Doe v. United States*, *supra*, 419 F.3d at 1062.) Therefore, all reasonable inferences from the facts alleged are drawn in plaintiff's favor in determining whether the complaint states a valid claim. (*Braden v. Wal-Mart Stores, Inc*. 588 F.3d 585, 595; *Barker v. Riverside County Office of Ed.*, 584 F.3d 821, 824 (9th Cir. 2009).) Any ambiguities in the pleading must be resolved in plaintiff's favor. (*International Audiotext Network, Inc. v. AT&T Co,* 62 F.3d 69, 72 (2nd Cir. 1995).)

"The court measures the 'legal sufficiency of a complaint' by whether it meets the pleading standards set forth in . . . FRC[iv]P 8, containing general pleading rules." (*Federal Civil Procedure Before Trial*, The Rutter Group (2021) § 9:187.5.) Rule 8 directs that "[a] pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . .; [¶](2) a short and plain statement of the claim showing that the pleader is entitled to relief; and [¶](3) a demand for the relief sought . . . ." (*Id.*)

To survive a Rule 12(b)(6) motion, the complaint need only state a "facially plausible" claim for relief. (*Shroyer v. New Cingular Wireless Services, Inc*. ("*Shroyer*"), 622 F.3d 1035, 1041 (9th Cir. 2010).)

## JURISDICTION

The Court has jurisdiction over this action under 28 U.S.C. sections 1331 (federal question), 1337 (regulation of commerce), 1346 (United States as defendant), 1361 (mandamus against an officer of the United States), 2201 (declaratory judgment) and 2202 (injunctive relief), and under the Administrative Procedure Act ("APA"), 5 U.S.C. sections 701-706 (review of final agency action), because (1) the action arises under the

APA, the National Environmental Policy Act ("NEPA"), the MBTA and the Eagle Act; (2) the Federal Defendants are either agencies of the United States government or individuals sued in their official capacities as officers of the United States; (3) the action seeks a declaratory judgment voiding the Federal Defendants' Project approvals; and (4) the action also seeks further injunctive and mandamus relief until the Federal Defendants comply with applicable law.

## LEGAL BACKGROUND

The Migratory Bird Treaty Act as amended ("MBTA"), 16 U.S.C. section 701 *et seq*., directs that unless otherwise permitted,

> it shall be unlawful at any time, *by any means or in any manner, to . . . take [or] kill . . . any migratory bird* . . . nest, or egg of any such bird . . . included in the terms of the conventions between the United States and Great Britain . . . the United Mexican States . . . the government of Japan . . . and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments . . . ."

(16 U.S.C. §703 (emphasis added).)

The MBTA applies with equal force to federal agencies as it does to private individuals. (*Humane Society of the U.S. v. Glickman* ("*Humane Society*"), 217 F.3d 882, 884-88 (D.C. Cir. 2000) ("There is no exemption in [16 U.S.C.] § 703 for . . . federal agencies."); *American Bird Conservancy, Inc. v. F.C.C.*, 516 F.3d 1027, 1031 (D.C. Cir. 2008) ("the MBTA applies to federal agencies").) And, it may be enforced against the federal government by private citizens through the APA. (*Id*.) "[A]nyone who is 'adversely affected' by an agency action alleged to have violated the MBTA has standing to seek judicial review of that action." (*City of Sausalito v. O'Neill* ("*City of Sausalito*"), 386 F.3d 1186, 1203-04 (9th Cir. 2004) (citing *Seattle Audubon Soc'y v. Evans,* 952 F.2d 297, 302-03 (9th Cir. 1991); *Humane Society*, 217 F.3d at 888.)

Federal agencies like the United States Department of the Interior and BIA must ensure that their actions do not result in violations of the MBTA. (*City of Sausalito* v, 386 F.3d at 1225; *Humane Society,* 217 F.3d at 885; *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-39 (1992); Exec. Order No. 13186, Responsibilities of Federal

Agencies to Protect Migratory Birds, 66 Fed.Reg. 3853 (Jan. 17, 2001).)

The Bald and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668, likewise forbids the taking or killing of bald and golden eagles "in any manner." (*Id.*) It sets forth criminal and civil prohibitions against the taking of golden eagles. Subdivision (b) makes it a civil offense to "take . . . *in any manner*. . . any golden eagle." (16 U.S.C. §668(b) (emphasis added).) Under the Eagle Act, "'take' includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." (16 U.S.C. §668c; 50 C.F.R. §22.3 ("Take includes also pursue, shoot, shoot at, poison, wound, kill, capture, collect, or molest or disturb").) Regulations adopted pursuant to the Eagle Act direct that no person may "take . . . any golden eagle . . . except as allowed by a valid permit issued under this part [22 of 50 C.F.R.]." (50 C.F.R. §22.11.)

The Federal Defendants recently revised their MBTA regulations effective March 8, 2021 to expressly *allow* the incidental take of migratory birds:

> *The prohibitions of the Migratory Bird Treaty Act* (16 U.S.C. 703) that make it unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, or kill migratory birds, or attempt to engage in any of those actions, *apply only to actions directed at migratory birds*, their nests, or their eggs. Injury to or mortality of migratory birds that results from, but is not the purpose of, an action (*i.e., incidental taking or killing) is not prohibited by the Migratory Bird Treaty Act.*

(85 Fed.Reg. 1134, 1165 (January 7, 2021); 86 Fed.Reg. 8715 (February 9, 2021) (delaying effective date from February 8, 2021 to March 8, 2021); codified at 50 C.F.R. § 10.14 (emphasis added.).

This new regulation conflicts directly with the MBTA's imposition of strict liability on persons who take migratory birds "by any means and in any manner." (16 U.S.C. § 703.) In *Natural Resources Defense Council v. U.S. Dep't of the Interior*, *supra*, 478 F.Supp.3d 469, the district court held that the MBTA's prohibition against the killing of migratory birds "by any means and in any manner" means exactly what it says and says exactly what it means: "Any means of killing is a violation, which plainly includes . . . building wind turbines . . . ." (*Id.* at 482.) Consequently, that court declared unlawful and vacated the U.S. Department of Interior's Solicitor Opinion M-37050 (also known as

the "Jorjani Opinion") because the Department of Interior interpreted this Opinion to mean, and therefore implemented this Opinion as a policy that, "the MBTA does not prohibit incidental takes or kills [of migratory birds] because the statute applies only to activities specifically aimed at birds." (*Id*. at 472, 489.)

The primary question posed by Defendants' motions to dismiss is whether the Federal Defendants are free to implement their new unlawful interpretation of the MBTA by approving wind turbines (specifically, the 60, 600-foot tall turbines in Terra-Gen's Project) notwithstanding the fact (as alleged in the FAC) that they will foreseeably kill migratory birds, just because the Project's construction and operation is not an activity that is "specifically aimed at birds." Plaintiffs' FAC properly states claims for relief under the MBTA and the Eagle Act against the Federal Defendants by alleging that their approval of this Project and its foreseeable take of migratory birds without the "take" permits required under the MBTA and the Eagle Act therefore violates those statutes.

## ARGUMENT

### I. THE SECOND CLAIM FOR RELIEF STATES FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF FOR VIOLATION OF THE MBTA

#### A. DEFENDANTS IGNORE THE UNLAWFULNESS OF FEDERAL DEFENDANTS' EXEMPTION OF INCIDENTAL TAKE FROM THE MBTA'S PERMIT REQUIREMENT.

Defendants challenge the Second Claim for Relief, alleging that Federal Defendants' approval of the Project violates the MBTA, on the ground that "an agency acting in a regulatory capacity as [the Defendant Bureau of Indian Affairs] has done here does not violate the MBTA or BGEPA when it issues a regulatory approval," as "[s]uch 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.'" (Fed. Defs.' MPA at 1, quoting *Protect Our Communities Found. v. Jewell* ("*POC I*"), 825 F.3d 571, 585-586 (9th Cir. 2016); Terra-Gen MPA at 1 (arguing that "[t]he Ninth Circuit has rejected each of

[Plaintiffs'] arguments, holding unequivocally that the Bird Act and the Eagle Act do not impose liability on an agency that approves a project in its regulatory capacity").)

Both Defendants argue that the Federal Defendants cannot be held liable for any violation of the MBTA (or the Eagle Act) because the Federal Defendants "did not sanction or authorize the taking of migratory birds without a permit; [instead, they] 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." (Fed. Defs.' MPA at 10, quoting *POC I*); Terra-Gen MPA at 8 (similarly arguing that "[t]he Ninth Circuit rejected [Plaintiffs'] arguments both because the 'causal mechanism in question is too speculative and indirect to impose liability [on the agency] for engaging in routine regulatory action' and because [the federal defendant] conditioned approval of the right-of-way on the developer's compliance with 'all applicable laws and regulations,' which includes the Bird Act and the Eagle Act").)

*POC I* is now readily distinguishable. The Ninth Circuit was not aware that the Federal Defendants would *not* be enforcing the MBTA and the Eagle Act when it decided *POC I* and its successor, *Protect Our Communities Foundation v. LaCounte* ("*POC II*"), 939 F.3d 1029, 1044 (9th Cir. 2019). To the contrary, both rulings are predicated on that Court's express and emphatic conviction that Defendants *would* enforce these laws. Plaintiffs did not succeed with this claim in *POC I* because

> BLM's ROD indicate[d] that its approval of the Project is *expressly contingent on Tule [Wind]'s compliance with* 'all applicable laws and regulations,' *which in this case includes the MBTA and the Eagle Act,* as well as the securing of 'all necessary local, state and Federal permits, authorizations and approvals.

*POC I,* 825 F.3d at 587 (emphasis added). Likewise in *POC II*, the Court relied on the fact that "the ROD said that Tule [Wind, LCC, the project developer] would comply with BIA requirements for approval [of Eagle Act permits]" and "the ROD confirms that Tule *must comply* with 'any requirements for an eagle take permit under the [Eagle Act]' and spells out the consequences of noncompliance." 939 F.3d at 1043 (emphasis added).

These statements reflect the Ninth Circuit's premise that permits under these laws *were required* for the incidental take of protected birds by a wind turbine project. Indeed, the *POC II* Court was emphatic in confirming that "[*o*]*f course, Tule must comply* with [the Eagle Act] at all times during construction and operation of the project," and that plaintiffs' legitimate concerns about protecting these birds "can be addressed through the [Eagle Act] permitting process." (*Id*. at 1044 (emphasis added).)

Here, by contrast, contrary to their previous representation to the Court, and contrary to the express "compliance with law" premise that animated the Ninth Circuit's rulings in *POC I* and *POC II*, Federal Defendants have *not* required, and *will* not require, Terra-Gen's compliance with the MBTA and the Eagle Act because the Department of the Interior has reversed its previous interpretation of the MBTA. It no longer takes the position that MBTA permits are required for incidental takings of migratory birds. To the contrary, as explained above, it takes just the opposite position: it insists that *no* takings permits are required for "incidental" takings by wind energy projects and the like.

In support of their arguments, both Defendants cite and quote throughout their memoranda from *POC I* and *POC II*, *supra; Backcountry Against Dumps v. Chu*, 215 F.Supp.3d 966 (S.D. Cal. 2017) (*modified on reconsideration sub nom. Backcountry Against Dumps v. U.S. Dep't of Energy*, 2017 WL 2988273 (S.D. Cal. 2017); *Protect Our Communities. Foundation v. Black*, 2016 WL 4096070 (S.D. Cal. 2016); *POC I*; and *Protect Our Communities. Foundation v. Salazar*, 2013 WL 5947137 (S.D. Cal. 2013) (*aff'd sub nom. Backcountry Against Dumps v. Jewell*, 674 F.App'x 657 (9th Cir. 2017).

However, each of these cases, and Defendants' reliance on them, assumes that the defendant agency will require a permit under the MBTA (and the Eagle Act, where it is also raised) for *incidental* takings of protected birds. As Plaintiffs' properly allege in their FAC, that is no longer the case. (FAC (Dkt. 42) ¶¶139-142.) Since 2017, Defendant United States Department of the Interior has adopted a new policy that "the MBTA does not prohibit incidental takes or kills [of migratory birds] because the statute applies only to activities specifically aimed at birds." (*Natural Resources Defense Council v. U.S.*

*Dep't of the Interior, supra*, 478 F.Supp.3d at 472.)

Federal Defendants' new policy of *not* enforcing the MBTA's strict prohibition against the taking – "by any means or in any manner" – of migratory birds, and specifically, of *not* recognizing that "incidental takes or kills" of migratory birds by wind turbines require a permit under the MBTA (and by extension, the Eagle Act), has been declared unlawful by the U.S. District Court for the Southern District of New York. (*Id.*, 478 F.Supp.3d at 489.) Consequently, Defendants' reliance on the rulings that antedate, and therefore do not address, the Department of the Interior's new, unlawful, policy of construing the MBTA in a manner that does not require permits for incidental takings, is now unavailing, as those rulings are now inapposite.

For this reason, Defendants' reliance on the fact that the approval documents may refer to "compliance with the MBTA as a potentially required permit" (Fed. Defs.' MPA at 12) does not avail Defendants. As the FAC properly alleges, Federal Defendants no longer interpret the MBTA to require a permit for the incidental take of migratory birds by wind turbine projects. (FAC (Dkt. 42) at ¶¶137-143.) To the contrary, Federal Defendants now affirmatively take the position, officially codified in their regulations, that "[t]he prohibitions of the Migratory Bird Treat Act . . . that make it unlawful . . . to . . . kill migratory birds . . . apply only to actions directed at migratory birds," and thus "incidental taking or killing [of migratory birds] is not prohibited by the Migratory Bird Treaty Act." (50 C.F.R. §10.14.) That means that Federal Defendants will *never* require an MBTA permit for the Project's foreseeable, but nonetheless incidental, take of birds.

Plaintiffs' allegations that Federal Defendants' approval of the Project means that the Project will operate without an MBTA permit notwithstanding the fact that it will foreseeably kill migratory birds are thus "facially plausible," as required to survive a Rule 12(b)(6) motion. (*Shroyer,* 622 F.3d at 1041.)

And, there can no longer be any doubt that Federal Defendants' refusal to require MBTA permits for the incidental take of migratory birds violates that statute. As Judge Caproni properly ruled, Federal Defendants' new interpretation of the MBTA (and by

extension, the Eagle Act) is unlawful. (*Natural Resources Defense Council v. U.S. Dep't of the Interior, supra*, 478 F.Supp.3d at 489.)

Consequently, Defendants' core argument that "BIA's approval of the [wind turbine] lease here is plainly not an authorization to Terra-Gen to take migratory birds or eagles" in violation of the MBTA and the Eagle Act is just wrong. (Fed. Defs.' MPA at 15; Terra-Gen's MPA at 14.)

### B. THE ALLEGATIONS OF THE SECOND CLAIM FOR RELIEF PROPERLY ALLEGE A CLAIM UNDER THE MBTA

As shown, Defendants' core argument that Federal Defendants' approval of the Project does not violate the MBTA rests on the false premise that Federal Defendants will require an MBTA permit for the Project in the event it threatens to take migratory birds. In fact, as Plaintiffs properly allege in their FAC, Federal Defendants have no intention of requiring an MBTA permit for the Project because they have adopted a new policy that exempts incidental takings from the permit requirement of the MBTA. Therefore Defendants' motions to dismiss Plaintiffs' Second Claim for Relief for violation of the MBTA must be denied.

Defendants fail to show how the following allegations are inadequate to allege a "facially plausible" basis for Plaintiffs' claim for relief under the MBTA.

Paragraph 134 of the FAC plausibly alleges that

> [a]n MBTA permit is required for the Project because it will foreseeably take migratory birds. The FEIS admits that some "171 avian species were detected in the [Project's] biological study area," including many raptors such as golden eagle, Cooper's hawk, red-tailed hawk, northern harrier and American kestrel, and other sensitive species such as California condor, long-eared owl, and burrowing owl. FEIS at 39 and Appendix H at 99-103. Raptors, crows and species allied with them are among those at greatest risk of being killed, because they are the birds most frequently observed in the rotor-sweep zone, where the spinning blades collide with and kill birds. FEIS at RTC-28. Other migratory bird species inhabiting or using the Project site included the California horned lark, the loggerhead shrike, the gray vireo, the least Bell's vireo, the southwestern willow flycatcher, the olive-sided flycatcher, the yellow warbler, the Bell's sage sparrow, the southern California rufous-crowned sparrow, the Vaux's swift and the tricolored blackbird. FEIS Appendix H at 96-100. [*Id.*]

Paragraph 135 of the FAC plausibly alleges that

As the FEIS recognizes – albeit in language that attempts to blame the victim – many "special-status bird species have the potential to collide with towers and transmission lines and have the potential to be electrocuted by the transmission towers associated with the Tule Wind Project, resulting in injury or mortality." FEIS at 88 ("Direct effects on avian species . . . may include collisions with wind turbines and Met towers, and electrocution from overhead transmission lines"); FEIS Appendix H at 119 (direct impacts of the project will "include continuing operational impacts such as avian and bat collisions with wind turbines"), 136 (the Project will potentially cause golden eagle collision with turbines), 137 ("Red-tailed hawks, turkey vultures, and common ravens . . . have the greatest risk of collision with Project turbines. . . [but] many species were observed on site and collision is possible with any of the species"), 139 ("impacts to bats could result in mortality or injury due to collisions at wind turbines). Raptors such as golden eagles are particularly at risk because they necessarily look down rather than ahead when they are hunting their ground-dwelling prey (such as squirrels), and thus can unknowingly fly directly into the path of the rotor blades, which reach speeds of up to 200 mph at their tips. [*Id*.]

Paragraph 136 of the FAC plausibly alleges that

[I]n addition to the direct killing of these birds, the FEIS admits that wind turbines create "a behavioral avoidance area, thereby establishing a barrier in the aerial habitat used by birds and bats." FEIS at 88; FEIS Appendix H at 126. This displacement of birds from their nesting and foraging habitat – thereby directly harming or killing the displaced birds – also constitutes a take under the MBTA. 16 U.S.C. §703.

Paragraph 137 of the FAC plausibly alleges that

Despite the fact that the Project is likely to kill migratory birds during both the construction and operation phases, Defendants have not applied for or secured any permits for the Project under the MBTA. FEIS at 88 ("Direct effects on avian species protected under the Migratory Bird Treaty Act resulting from construction and operations of Alternative 1 [the approved Project] may include collisions with wind turbines and Met towers, and electrocution from overhead transmission lines"), 90-91 ("both build alternatives' construction and operations would result in adverse biological resource effects related to . . . migratory birds protected by the Migratory Bird Treaty Act"). And while Defendants have listed compliance with the MBTA as a potentially required permit, nowhere in their FEIS nor in their ROD is there any requirement that the Project applicant obtain any MBTA permit. FEIS at 2.

Paragraph 138 of the FAC plausibly alleges that

Defendants refused to obtain, or to require the Tribe or Terra-Gen to obtain, an MBTA takings permit despite their knowledge that the Defendant United States Department of the Interior has, since at least December 22, 2017, taken the unwavering position that "the Migratory Bird Treaty Act does not prohibit incidental take" of migratory birds. Interior Solicitor Opinion M-37050, adopted pursuant to Interior Secretary Order 3345 on December 22, 2017 (capitalization altered). Pursuant to this position, Defendants would never apply for, let alone issue, a taking permit under the MBTA for the foreseeable takings of migratory birds due to the construction and operation

of wind turbine energy projects such as the Campo Wind Project. Defendants' adoption of Opinion M-37050 reversed the Interior Solicitor's previous position, set forth in Opinion M-37041, entitled "Incidental Take Prohibited Under the Migratory Bird Treaty Act," that held that the incidental take of migratory birds without a taking permit was prohibited by the MBTA.

Paragraph 139 of the FAC plausibly alleges that

> Defendants have continued to take the position that the MBTA does not prohibit the take of migratory birds as a result of the construction and operation of wind energy projects, and thus does not require that a take permit for wind energy projects be obtained before such projects may be constructed and operated, despite the judgment and injunction entered by the Federal District Court for the Southern District of New York in the matter *Natural Resources Defense Council v. U.S. Dep't of the Interior*, 2020 WL 4605235, on August 11, 2020 vacating M-37050 specifically on the grounds that it violated the MBTA. District Judge Valerie Caproni held that the MBTA's prohibition against the killing of migratory birds "by any means or in any manner" means exactly what it says and says exactly what it means: "Any means of killing is a violation, which plainly includes . . . building wind turbines . . . . ." 2020 WL 4605235 at *10.

Paragraph 140 of the FAC plausibly alleges that

> On October 8, 2020, the Department of the Interior filed its notice of appeal from Judge Caproni's judgment, confirming its intent to continue to interpret the MBTA's prohibition against the killing of migratory birds "by any means or in any manner" not to apply to activities such as the authorization of wind turbines that foreseeably, but only incidentally, kill migratory birds.

Paragraph 141 of the FAC plausibly alleges that

> On January 7, 2021, the Department of the Interior further confirmed its intent to continue to interpret the MBTA's prohibition against the killing of migratory means by authorizing wind turbines by publishing its Final Rule formally adopting its position that the MBTA does not prohibit the incidental take of migratory birds as a regulation codified in Title 50 of the Code of Federal Regulations, Part 10. 86 Federal Register 1134 (January 7, 2021).

Paragraph 142 of the FAC plausibly alleges that

> Consequently, when Defendants approved the Campo Wind Project without first applying for a take permit under the MBTA, or requiring the Tribe or Terra-Gen to obtain a take permit under the MBTA, Defendants knowingly participated in the authorization and implementation of a project that would result in the foreseeable and inevitable deaths of migratory birds without any possibility that the project would ever receive a take permit under the MBTA.

Paragraph 143 of the FAC plausibly alleges that

> By failing to first obtain, or require that the Tribe or Terra-Gen obtain, an MBTA taking permit before approving the Project, and thereby authorizing the unpermitted taking of migratory birds, Defendants violated the MBTA

(16 U.S.C. section 703). Because Defendants violated the MBTA, they failed to proceed in accordance with law as required by the APA, thus contravening the APA's prohibition against unlawful agency action (5 U.S.C. section 706(2)(A) and (D)).

Paragraph 144 of the FAC plausibly alleges that

Defendants' unlawful authorization of illegal, permitless taking of migratory birds here is similar to the U.S. Fish and Wildlife Service's ("FWS"") "issu[ance of] a permit allowing a third party to operate a 'commercial enterprise' in a national wilderness area, based on a legally mistaken construction of the governing federal statute, which prohibited such commercial activities" in *Wilderness Society v. U.S. Fish & Wildlife Service* ("*Wilderness Society*"), 353 F.3d 1051, 1055 (9th Cir. 2003) (en banc). *Protect Our Communities Foundation v. Jewell* (*"POC I"*), 825 F.3d 571, 587 (9th Cir. 2016). The Ninth Circuit correctly distinguished the facts, and its ruling, in *Wilderness Society* from the facts, and its ruling, in *POC I*, where the plaintiffs had failed to demonstrate that the defendant BLM had based its approval on a "legally mistaken construction of the governing federal statute." *Id.* Here, Defendants have adopted a "legally mistaken construction" of the MBTA, as Judge Caproni held in *Natural Resources Defense Council v. U.S. Dep't of the Interior*, *supra*, 2020 WL 4605235.

Paragraph 148 of the FAC plausibly alleges that

The second reason that the *POC I* and *II* cases are distinguishable is that Defendants assume far more than a mere "regulatory role" in supervising the Tribe's development of this energy project on its Reservation. The Ninth Circuit had understood, and so held, that in *POC I* and *II* the agency defendants and officials acted in a "purely regulatory capacity." *POC I*, 825 F.3d at 585, 586; *POC II*, 939 F.3d at 1043 ("'the APA does not target regulatory action [by an agency] that permits a third-party grantee . . . that only incidentally leads to subsequent unlawful conduct by that third party,'" quoting from *POC I*). But here, Defendants along with the Tribe and Terra-Gen are all participating in the unlawful activity. Defendants both *hold title as trustee* and *manage* the Tribe's "Indian Reservation lands held in trust by the federal government," which are "administered by the Bureau of Indian Affairs (BIA)." BIA, Campo Wind Project, Draft Environmental Impact Statement ("DEIS") , Appendix C, "Regulatory Settings," p. C-1.

Paragraph 149 of the FAC plausibly alleges that

Here, Defendants do not merely issue regulatory approvals as was the case with the Bureau of Land Management in *POC I* and was assumed without analysis to be the case with the BIA in *POC II*. Instead, by law Defendants exercise broad discretion both in their fiduciary role as the trustee for the Tribe, and under applicable statutes and regulations in selecting, developing and managing land uses on the Reservation. Under settled Supreme Court jurisprudence, the United States Government (including most directly Defendants Secretary of the Interior and BIA and their officials) bears

> the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited [Native American] people. . . . Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court,

> [the United States Government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.
>
> *Seminole Nation v. United States* (*"Seminole Nation"*), 316 U.S.286, 296, 62 S.Ct. 1049, 1054 (1942) (footnote omitted); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1101 (8th Cir. 1989) (repeating this quotation from *Seminole Nation* and affirming BIA's duty to clean up and maintain solid waste disposal sites on Reservation). When managing trust lands for Indian tribes, BIA assumes responsibility for assuring that all applicable laws are followed and bears liability if it fails to fully protect the tribes' interests and welfare. *Id.*

Paragraph 150 of the FAC plausibly alleges that

> This strict and exacting fiduciary standard is reflected and carried forward in the comprehensive, parallel statutory and regulatory framework that governs Defendants' approval of the subject Campo Wind Project lease. Under 25 U.S.C. section 415(a), Defendant Secretary of the Interior through BIA exercises broad discretion in reviewing and approving any leases of Indian trust land "for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases." "Prior to approval of any lease . . . pursuant to this section, the Secretary of the Interior shall:"
>
> first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; *and the effect on the environment* of the uses to which the leased lands will be subject.
> *Id*. (emphasis added).

Paragraph 151 of the FAC plausibly alleges that

> In exercising their managerial responsibility under this statutory authorization, Defendants must observe and comply with a detailed regulatory scheme codified in 25 C.F.R. Part 162. 77 Fed.Reg. 72440-72509 (November 28, 2012). The "commercial leasing regime created for trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government," and this statute and its implementing regulations thus serve to "define the contours of the United States' fiduciary responsibilities." *Brown v. U.S.*, 86 F.3d 1554, 1563 (Fed. Cir. 1996) (emphasis removed).

Paragraph 152 of the FAC plausibly alleges that

> The governing regulations for wind and solar resource ("WSR") leases mandate that the lease include provisions requiring that "[t]he lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Consequently, "the lessee must agree not to use any part of the leased

premises for unlawful purposes." *Rosebud Sioux Tribe v. U.S.*, 75 Fed.Cl. 15, 28 (Ct. Cl. 2007). Importantly, "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).

Paragraph 154 of the FAC plausibly alleges that

[] Defendants' managerial responsibilities in supervising the Tribe's development of the Reservation are more analogous to the supervisorial position that NMFS occupied with respect to management of the California gray whale and its hunting by the Makah Tribe in *Anderson v. Evans*, 371 F.3d 475, 480, 486 (9th Cir. 2004). There, the Ninth Circuit set aside NMFS's improper issuance of a five-whale take permit quota to the Makah Tribe in violation of NEPA and the MMPA, a statute much like the MBTA and the Eagle Act in that it forbade the take of marine mammals except by permit. *Id*. at 480, 486 ("explaining that the agency environmental assessment unlawfully authorized a 'quota for the "land[ing]" of the gray whales'"(*POC I*, 825 F.3d at 587)). There, as here, the agency defendants perform both managerial as well as purely regulatory duties, and thus the MBTA's take prohibition may be enforced against them directly.

Paragraph 155 of the FAC plausibly alleges that

Because here Defendants serve in both a regulatory capacity and a supervisorial or managerial role in overseeing the Tribe's development of its Reservation, the rationale for not enforcing the MBTA's and Eagle Act's take prohibitions against the defendant agency in the *POC* cases is inapplicable.

Paragraph 156 of the FAC plausibly alleges that

The third reason that the *POC I* and *II* cases are distinguishable is that unlike in those cases, here there is no suggestion that Plaintiffs seek to create "agency vicarious liability" as a substitute remedy for the wind energy operator's failure to secure required permits. *POC I*, 825 F.3d at 586. To the contrary, in this case Plaintiffs ask the Court to enforce Defendants' *own*, and *explicit,* duty to abide by the regulation that governs their conduct, pursuant to the APA's command that the courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A). It is axiomatic that agencies must abide by their own regulations, as the APA specifically requires agency compliance with the "procedure required by law." 5 U.S.C. § 706(2)(D).

Paragraph 157 of the FAC plausibly alleges that

As noted, the procedural regulations governing Defendants' approval of wind and solar resource ("WSR") leases mandate that "all WSR leases must include the following provisions : . . . (3) The lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Thus, Defendants have a duty to include in the Tribe's lease with Terra-Gen a requirement that the lessee "must comply with all applicable laws . . . ." 25 C.F.R. § 162.542(c)(3). Those "applicable laws" include the MBTA. And, to assure that Defendants have clear authority to enforce these required lease terms, the

> governing regulations provide further that "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).
>
> Paragraph 158 of the FAC plausibly alleges that
>
> Contrary to the explicit requirement of this governing regulation mandating that wind energy leases "comply with all applicable laws," Defendants have adopted a policy expressly refusing to enforce the MBTA's prohibitions against the unpermitted taking of migratory birds "by any means or in any manner," including incidental but foreseeable takings by wind energy projects. 16 U.S.C. § 703. Defendants' unlawful policy renders compliance with the MBTA impossible, and thereby foreseeably causes the unpermitted taking of migratory birds in violation of the MBTA.

The foregoing allegations of the Second Claim for Relief allege a plausible basis for stating a claim for relief for violation of the MBTA. Because Defendants' approval of the Project thus violated the MBTA, they also failed to proceed in accordance with law as required by the APA, 5 U.S.C. sections 706(2)(A) and (D).

## II. THE THIRD CLAIM FOR RELIEF STATES FACTS SUFFICIENT TO STATE A CLAIM FOR RELIEF FOR VIOLATION OF THE EAGLE ACT

### A. DEFENDANTS IGNORE THE UNLAWFULNESS OF FEDERAL DEFENDANTS' EXEMPTION OF INCIDENTAL TAKE FROM THE EAGLE ACT'S PERMIT REQUIREMENT.

Defendants move to dismiss Plaintiffs' Third Claim for Relief under the Bald and Golden Eagle Protection Act ("Eagle Act"), 16 U.S.C. section 668, on the same grounds stated in their motion to dismiss Plaintiffs' Second Claim for Relief under the MBTA. (Fed. Defs' MPA at 1; Terra-Gen MPA at 1-2.) The Eagle Act sets forth criminal and civil prohibitions against the taking of golden eagles. Subdivision (b) makes it a civil offense to "take . . . in any manner. . . any golden eagle." 16 U.S.C. §668(b). Under the Eagle Act, "'take' includes also pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb." (16 U.S.C. §668c; 50 C.F.R. §22.3 ("Take includes also pursue, shoot, shoot at, poison, wound, kill, capture, collect, or molest or disturb").) Regulations adopted pursuant to the Eagle Act direct that no person may "take . . . any golden eagle . . . except as allowed by a valid permit issued under this part [22 of 50

C.F.R.].” (50 C.F.R. §22.11.)

Defendants’ motions to dismiss Plaintiffs’ Eagle Act Claim for Relief fail for the same reason their motions to dismiss the MBTA Claim fail. In both cases, Federal Defendants concede that although the Project will foreseeably kill eagles, they do not interpret the Eagle Act to require permits for incidental takes. (FAC (Dkt. 142) ¶163.)

### B. THE ALLEGATIONS OF THE SECOND CLAIM FOR RELIEF PROPERLY ALLEGE A CLAIM UNDER THE EAGLE ACT.

Defendants do not show how any of the following allegations fail to plausibly allege that Federal Defendants’ approval of the Project violates the Eagle Act.

Paragraph 162 of the FAC plausibly alleges that

> [T]he FEIS recognizes that Project operation would almost assuredly kill birds, including golden eagles. The FEIS admits that some “171 avian species were detected in the [Project’s] biological study area,” including many raptors such as golden eagles, all of which will be exposed to potential collision with the turbines. FEIS at 39 and 136 (the Project will potentially cause golden eagle collision with turbines); DEIS Appendix H at 99-103. Raptors including golden eagles are among those at greatest risk of being killed, because they are the birds most frequently observed in the rotor-sweep zone, where the spinning blades collide with and kill birds. FEIS at RTC-28. And, because raptors including golden eagles are typically looking down as they glide through the air hunting for prey on the ground, they do not see the spinning blades of wind turbines in front of them as they approach the turbines. It is thus a near certainty that the Project will “take” golden eagles and thereby violate the Eagle Act. And while Defendants have stated that they will require preparation of a BBCS (ROD 37-38), they also admit that even with the BBCS, avoidance of protected species including the golden eagle may not be feasible. FEIS Appendix H at 142.

Paragraph 163 of the FAC plausibly alleges that

> Defendants violated the Eagle Act by approving the Project knowing that (1) the Project would foreseeably kill and otherwise take eagles and (2) Defendants would not require Terra-Gen or the Tribe to obtain a takings permit under the Eagle Act for the Project as necessary to assure that the foreseeable takings of eagles are avoided to the extent possible. Despite the fact that the Project is likely to kill eagles, Defendants have not applied for or secured any permits for the Project under the Eagle Act, nor required Terra-Gen or the Tribe to do so, nor indicated any intent to do so.

Paragraph 164 of the FAC plausibly alleges that

> Consequently, when Defendants approved the Campo Wind Project, Defendants participated in the authorization and implementation of a project that would result in the foreseeable and inevitable deaths of golden eagles without first applying for a take permit under the Eagle Act, or requiring

Terra-Gen or the Tribe to obtain a take permit under the Eagle Act.

Paragraph 165 of the FAC plausibly alleges that

> Defendants' unlawful authorization of illegal, permitless taking of golden eagles here is similar to the FWS' "issu[ance of] a permit allowing a third party to operate a 'commercial enterprise' in a national wilderness area, based on a legally mistaken construction of the governing federal statute, which prohibited such commercial activities" in *Wilderness Society,* 353 F.3d at 1055. *POC I*, 825 F.3d at 587. As noted, the Ninth Circuit correctly distinguished the facts, and its ruling, in *Wilderness Society* from the facts, and its ruling, in *POC I*, where the plaintiffs had failed to demonstrate that the defendant BLM had based its approval on a "legally mistaken construction of the governing federal statute." *Id.* Here, Defendants have adopted a "legally mistaken construction" of the Eagle Act, just as they had adopted a mistaken construction of the MBTA as Judge Caproni pointed out in *Natural Resources Defense Council v. U.S. Dep't of the Interior*, *supra*, 2020 WL 4605235.

Paragraph 166 of the FAC plausibly alleges that

> By failing to first obtain, or require that the Tribe or Terra-Gen obtain, an Eagle Act permit before approving the Project, and thereby authorizing the unpermitted taking of golden eagles, Defendants violated the Eagle Act. Because Defendants violated the Eagle Act, they failed to proceed in accordance with law as required by the APA, thus contravening the APA's prohibition against unlawful agency action (5 U.S.C. section 706(2)(A) and (D)).

Paragraph 167 of the FAC plausibly alleges that

> As noted, Defendants' conduct in this case is distinguishable from that of the agency defendants in *POC I* and *II*, for three reasons. First, the Ninth Circuit was not aware that the Federal Defendants would *not* be enforcing theMBTA and the Eagle Act when it decided *POC I* and its successor, *POC II*. To the contrary, the Ninth Circuit's rulings in both cases are predicated on that Court's express and emphatic conviction that the Defendants *would* enforce these laws. Plaintiffs did not succeed with this claim in *POC I* because there, as the Ninth Circuit explained,
>
> BLM's ROD indicate[d] that its approval of the Project is *expressly contingent on Tule [Wind]'s compliance with* 'all applicable laws and regulations,' *which in this case includes the MBTA and the Eagle Act,* as well as the securing of 'all necessary local, state and Federal permits, authorizations and approvals.
>
> *POC I,* 825 F.3d at 587 (emphasis added). Likewise in *POC II*, the Court relied on the fact that "the ROD said that Tule [i.e., Tule Wind, LLC, the project developer] would comply with BIA requirements for approval [of Eagle Act permits]" and "the ROD confirms that Tule *must comply* with 'any requirements for an eagle take permit under the [Eagle Act]' and spells out the consequences of noncompliance." 939 F.3d at 1043 (emphasis added). Based on these statements, it appears that the Ninth Circuit would agree with Plaintiffs here that permits under these laws *are required* for the incidental take of protected birds by the Campo Wind Project. Indeed, the *POC II*

Court was emphatic in confirming that "*[o]f course, Tule must comply* with [the Eagle Act] at all times during construction and operation of the project," and that plaintiffs' legitimate concerns about protecting these birds "can be addressed through the [Eagle Act] permitting process." *Id*. at 1044 (emphasis added).

Paragraph 168 of the FAC plausibly alleges that

Here, by contrast, in direct contravention of their previous representation to the Court, and contrary to the express "compliance with law" premise that animated the Ninth Circuit's rulings in *POC I* and *POC II*, Defendants have not required, and will not require, the Tribe's and Terra-Gen's compliance with the MBTA and the Eagle Act because the Department of the Interior has reversed its previous interpretation of the MBTA. It no longer takes the position that MBTA permits are required for incidental takings of migratory birds. To the contrary, as explained above, it takes just the opposite position: it insists that *no* takings permits are required for "incidental" takings by wind energy projects and the like, and has not required such permits under either the MBTA or the Eagle Act for the Project.

Paragraph 169 of the FAC plausibly alleges that

The second reason that the *POC I* and *II* cases are distinguishable is that here, Defendants assume far more than a mere "regulatory role" in supervising the Tribe's development of this energy project on its Reservation. The Ninth Circuit had understood, and so held, that in *POC I* and *II* the agency defendants and officials acted in a "purely regulatory capacity." *POC I*, 825 F.3d at 585, 586; *POC II*, 939 F.3d at 1043 ("'the APA does not target regulatory action [by an agency] that permits a third-party grantee . . . that only incidentally leads to subsequent unlawful conduct by that third party,'" quoting from *POC I*). But here, Defendants along with the Tribe and Terra-Gen are all participating in the unlawful activity. Defendants both *hold title as the trustee,* and *manage* the Tribe's "Indian Reservation lands held in trust by the federal government," which are "administered by the Bureau of Indian Affairs (BIA)." BIA, Campo Wind Project, Draft Environmental Impact Statement ("DEIS") , Appendix C, "Regulatory Settings," p. C-1.

Paragraph 170 of the FAC plausibly alleges that

Here, Defendants do not merely issue regulatory approvals as was the case with the Bureau of Land Management in *POC I* and was assumed (without analysis) to be the case with the BIA in *POC II*. Instead, by law defendants exercise broad discretion both in their fiduciary role as the trustee for the Tribe, and under applicable statutes and regulations in selecting, developing and managing land uses on the Reservation. As noted, under settled Supreme Court jurisprudence, the United States Government (including most directly Defendants Secretary of the Interior and BIA and their officials) bears

the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited [Native American] people. . . . Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [the United States Government] has charged itself with moral obligations of

the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

*Seminole Nation*, 316 U.S. at 296, 62 S.Ct. at 1054 (footnote omitted); *Blue Legs v. U.S. Bureau of Indian Affairs*, *supra*, 867 F.2d at 1101 (repeating the above quote from *Seminole Nation* and affirming BIA's duty to clean up and maintain solid waste disposal sites on Reservation). When managing trust lands for Indian tribes, Defendants assume responsibility for assuring that all applicable laws are followed and bear liability if they fail to fully protect the tribes' interests and welfare. *Id.*

Paragraph 171 of the FAC plausibly alleges that

As noted, this strict and exacting fiduciary standard is reflected and carried forward in the comprehensive, parallel statutory and regulatory framework that governs Defendants' approval of the subject Campo Wind Project lease. Under 25 U.S.C. section 415(a), Defendant Secretary of the Interior through BIA exercises broad discretion in reviewing and approving any leases of Indian trust land "for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases." "Prior to approval of any lease . . . pursuant to this section, the Secretary of the Interior shall:"

first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject. [Id.]

Paragraph 172 of the FAC plausibly alleges that

As noted, in exercising their managerial responsibility under this statutory authorization, Defendants must observe and comply with a detailed regulatory scheme codified in 25 C.F.R. Part 162. 77 Fed.Reg. 72440-72509 (November 28, 2012). The "commercial leasing regime created for trust lands in 25 U.S.C. § 415(a) and 25 C.F.R. part 162 imposes general fiduciary duties on the government," and this statute and its implementing regulations thus serve to "define the contours of the United States' fiduciary responsibilities." *Brown v. U.S.*, *supra*, 86 F.3d at 1563 (emphasis removed).

Paragraph 172 of the FAC plausibly alleges that

The governing regulations for wind and solar resource ("WSR") leases mandate that the lease must include provisions requiring that "[t]he lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Consequently, "the lessee must agree not to use any part of the leased premises for unlawful purposes." *Rosebud Sioux Tribe v. U.S.*, *supra*, 75 Fed.Cl. at 28. Importantly, "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. §

162.542(c)(1).

Paragraph 174 of the FAC plausibly alleges that

Similarly, Defendants' managerial responsibilities in supervising the Tribe's development of the Reservation are more analogous to the supervisorial position that NMFS occupied with respect to management of the California gray whale and its hunting by the Makah Tribe in *Anderson v. Evans*, *supra*, 371 F.3d at 480, 486. There, the Ninth Circuit set aside NMFS's improper issuance of a five-whale take permit quota to the Makah Tribe in violation of NEPA and the MMPA, a statute much like the MBTA and the Eagle Act in that it forbade the take of marine mammals except by permit. *Id*. ("explaining that the agency environmental assessment unlawfully authorized a 'quota for the "land[ing]" of the gray whales'"(*POC I*, 825 F.3d at 587)). There, as here, the agency defendants perform both managerial as well as purely regulatory duties, and thus the Eagle Act's take prohibition may be enforced against them directly.

Paragraph 175 of the FAC plausibly alleges that

Because here Defendants serve in both a regulatory capacity and a supervisorial or managerial role in overseeing the Tribe's development of its Reservation, the rationale for not enforcing the MBTA's and Eagle Act's take prohibitions against the defendant agency in the *POC* cases is inapplicable.

Paragraph 176 of the FAC plausibly alleges that

The third reason that the *POC I* and *II* cases are distinguishable is that unlike in those cases, here there is no suggestion that Plaintiffs seek to create "agency vicarious liability" as a substitute remedy for the wind energy operator's failure to secure required permits. *POC I*, 825 F.3d at 586. To the contrary, in this case Plaintiffs ask the Court to enforce Defendants' *own*, and *explicit,* duty to abide by the regulation that governs their conduct, pursuant to the APA's command that the courts "shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A). It is axiomatic that agencies must abide by their own regulations, as the APA specifically requires agency compliance with the "procedure required by law." 5 U.S.C. § 706(2)(D).

Paragraph 177 of the FAC plausibly alleges that

As noted, the procedural regulations governing Defendants' approval of wind and solar resource ("WSR") leases mandate that "all WSR leases must include the following provisions: . . . (3) The lessee must comply with all applicable laws, ordinances, rules, regulations and other legal requirements under [25 C.F.R.] § 162.014." 25 C.F.R. § 162.542(c)(3). Thus, Defendants have a duty to include in the Tribe's lease with Terra-Gen a requirement that the lessee "must comply with all applicable laws . . . ." 25 C.F.R. § 162.542(c)(3). Those "applicable laws" include the Eagle Act. And, to assure that the Defendants have clear authority to enforce these required lease terms, the governing regulations provide further that "[t]he obligations of the lessee and its sureties to the Indian landowners are also enforceable by the United States, so long as the land remains in trust or restricted status." 25 C.F.R. § 162.542(c)(1).

Paragraph 179 of the FAC plausibly alleges that

> Contrary to the explicit requirement of this governing regulation mandating that wind energy leases include provisions requiring the lessee to "comply with all applicable laws," Defendants have failed to enforce the Eagle Act's prohibition against the unpermitted incidental taking of golden eagles by wind energy projects. Defendants' unlawful refusal to enforce the Eagle Act's prohibition against the unpermitted incidental takings of golden eagles by wind energy projects renders compliance with those statutes impossible, and thereby foreseeably causes the unpermitted taking of eagles in violation of the Eagle Act.

Because the foregoing allegations plausibly allege that Federal Defendants' approval of the Project without requiring a take permit for the foreseeable taking of eagles violates the Eagle Act, Plaintiffs have adequately pleaded a claim for relief under that statute and the APA. Because Defendants violated the Eagle Act, they failed to proceed in accordance with law as required by the APA, 5 U.S.C. sections 706(2)(A) and (D). Defendants' motions to dismiss this claim on the grounds it fails to allege facts that state a claim for relief for violation of the Eagle Act are accordingly without merit.

## CONCLUSION

For each of the foregoing reasons, the Defendants' motions to dismiss Plaintiffs' Second Claim for Relief for violation of the MBTA and Third Claim for Relief for violation of the Eagle Act are without merit and should be denied.

Alternatively, should the Court determine that the foregoing allegations are insufficient to state claims for relief under the MBTA and the Eagle Act, Plaintiffs respectfully request leave to amend in accordance with the liberal policy of FRCiv.P 15(a)(2) that "[t]he court should freely give leave [to amend] when justice so requires."

Dated: April 29, 2021

Respectfully submitted,

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