UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION; DAVID HOGAN; and NICA KNITE,

Plaintiff,

v.

MICHAEL BLACK, Director, Bureau of Indian Affairs, et al.,

Defendants,

EWIIAAPAAYP BAND OF KUMEYAAY INDIANS,

Defendant-Intervenor,

TULE WIND LLC,

Defendant-Intervenor.

Case No.: 14cv2261 JLS (JMA)

ORDER GRANTING MOTIONS FOR JUDGMENT ON THE PLEADINGS

(ECF Nos. 33, 34, 35)

Presently before the Court are Intervenor-Defendant Tule Wind LLC's (Tule) Motion for Judgment on the Pleadings, (ECF No. 33); Defendant-in-Intervention Ewiiaapaayp Band of Kumeyaay Indians' (the Tribe) Motion for Partial Judgment on the Pleadings as to Plaintiffs' First Cause of Action Re: APA § 706(1) NEPA Claim and Second and Third Causes of Action, (ECF No. 34); and Federal Defendants' (Bureau of

Indian Affairs or BIA)[1] Motion for Partial Judgment on the Pleadings, (ECF No. 35). Also before the Court are plaintiffs The Protect Our Communities Foundation, David Hogan, and Nica Knite's (Plaintiffs) Opposition to Defendants' 12(c) Motions for Partial Judgment on the Pleadings, (ECF No. 38), and Tule's, the Tribe's, and BIA's Replies, (ECF Nos. 43, 44, 45). The Court vacated the hearing on these Motions and took these matters under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (Order, ECF No. 47.)

This case concerns the construction of the second phase of an industrial-scale wind farm and the well-being of eagles who nest in or pass through the same general area. More particularly, Plaintiffs, with the noble goal of protecting these eagles, challenge a federal agency's approval of the project despite its potential to harm eagles. The issue in this case and for these Motions is not whether the agency and those involved in building the wind farm may simply disregard the eagles' well-being. Harming or killing eagles is a serious offense that subjects offenders to civil fines, criminal fines, and even imprisonment. That is not in dispute. Rather, the question in this case and for these Motions is whether the agency that Plaintiffs sued—BIA—was obligated to take further steps to protect these birds under federal law. Because BIA did not have a legal obligation to proactively ensure that Tule would not violate other federal laws and because, after BIA issued its decision, there was no remaining major federal administrative agency action that would require supplemental environmental analysis, the Court **GRANTS** Tule's, the Tribe's, and BIA's Motions.

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[1] Plaintiffs sued individual defendants Michael Black, Sally Jewell, Kevin Washburn, Amy Dutschke, and John Rydzik in their official capacities as decision-makers within the U.S. Department of the Interior, Bureau of Indian Affairs. The Court refers to these defendants as BIA for simplicity.

BACKGROUND

I. Factual Background

Tule plans to construct eighty-five wind turbines approximately sixty miles east of San Diego, California. (Pls.' Opp'n, ECF No. 38, at 17.)[2] The project consists of two phases. Phase I involves sixty-five turbines on federal land in the McCain Valley, and Phase II comprises up to twenty turbines on the Tribe's land on ridgelines above the McCain Valley. (*Id.* at 17.) The Bureau of Land Management (BLM) approved Phase I in 2011. (*Id.* at 17.) This lawsuit pertains to the approval of Phase II.

The Tribe agreed to lease the land on the McCain Valley ridgelines—which falls within the Tribe's reservation—to Tule, so Tule could build and operate the twenty turbines called for in Phase II. (Tribe's Mot., ECF No. 34-1, at 7.) The Bureau of Indian Affairs, or BIA, "is a federal agency that serves as a trustee to federally recognized Indian tribes." (*Id.* at 7.) BIA issued its Record of Decision (ROD) approving the lease between the Tribe and Tule in December 2013. (Pls.' Opp'n at 17.)

There are at least nine eagle nests within ten miles of the project site. (Pls.' Opp'n at 17.) At one point the project was slated to include 134 turbines, with BLM acting as the lead agency authorizing both Phase I and Phase II. (*Id.* at 18.) However, officials with the U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game (CDFG) raised concerns about the possibility that the turbines, which would be placed in "wind corridors directly in the path of migratory birds," would lead to eagle deaths. (*Id.* at 18, 57.) The wind turbines' blades can spin up to 180 miles per hour on the tips, so collisions with birds can be fatal. (*See id.*) In light of these concerns, BLM passed responsibility for authorizing Phase II to BIA. (*Id.* at 18.)

BLM assembled an Environmental Impact Statement (EIS) for the entire project. (*See* Pls.' Opp'n at 18.) That agency issued its Draft EIS in November 2010, which

[2] Pinpoint citations to docketed materials refer to the CM/ECF page number electronically stamped at the top of each page.

included, among many other things, analysis of various alternative embodiments of the project and its impact on golden eagles. (*Id.* at 19.) BLM, BIA, and Tule decided to phase the project, allowing BLM to authorize Phase I in 2011 while putting off a decision on whether to approve Phase II until more data could be gathered. (*Id.*) Those organizations agreed that BIA, rather than BLM, would be responsible for approving Phase II. (*Id.*) BLM issued its Final EIS in October 2011. (*Id.*) The Final EIS considered the possibility of adding eighteen turbines on the Tribe's land, but did not consider "macrositing (i.e., moving the entire project) or micrositing (i.e., shifting the location of specific turbines within the project footprint) options on the tribal ridgeline so as to at least reduce the grave risk to eagles." (*Id.* at 20.) The Final EIS stated: "[C]onstruction of the second portion of the project *would occur at those turbine locations that show reduced risk to the eagle population following analysis of detailed behavior studies of known eagles in the vicinity of the Tule Wind project*." (*Id.* (citing Complaint at 19).) BLM further stated, "'Pending the outcome of eagle behavior studies, all, none or part of the second portion of the project would be authorized,' and in any event such a decision would only occur 'in consultation with the required resource agencies . . . and other relevant permitting entities.'" (*Id.*)

Soon after BLM approved Phase I, Tule began drafting the "Tule Wind Phase II Avian and Bat Protection Plan" (ABPP), studying the effects of Phase II on birds and bats. (*See id.* at 20–21.) BIA made the ABPP study available for public comment in September 2012, and concluded it was consistent with BLM's Final EIS. (*Id.* at 21–22.) FWS criticized the ABPP study's "erroneous methodologies" and "scientifically unsound conclusions," as well as its "refusal to acknowledge the high eagle mortality risk and the highly likely loss of an eagle breeding territory that will occur if the project is constructed as planned." (*Id.* at 21–22 (citing Complaint at 21–22).) FWS also took issue with Tule's failure "even to consider micrositing, macrositing, or other construction and operation alternatives that would eliminate or at least reduce the substantial risk of eagle mortality." (*Id.* at 21.) FWS recommended that BIA and Tule abandon Phase II or, if BIA were inclined to approve Phase II, recommended that BIA "condition[] the lease on this project

to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act, prior to project construction." (*Id.*) CDFG also had concerns about the plan, and recommended removing two turbines. (*Id.*) BIA did not conduct additional NEPA review in response to these agencies' concerns, and in March 2013, Tule finalized the ABPP study. (*Id.* at 23.)

In December 2013, BIA issued its ROD approving the lease from the Tribe to Tule and construction of up to twenty turbines on the ridgelines. (*Id.* at 23.) In its ROD, BIA concluded that Phase II will likely kill 3.6 golden eagles over twenty years. (*Id.* at 24 (quoting Compl. at 23–24).) FWS estimated a much higher eagle mortality rate. (*Id.*) No party obtained an "eagle take permit," which would protect Tule from criminal or civil liability if its turbines killed an eagle, before the lease was approved. (*See id.*) The lease agreement between the Tribe and Tule, however, requires Tule to apply for such a permit. (Tribe's Mot. at 7.) The lease does not require that Tule ultimately obtain the permit. (*See id.*) BIA's ROD provides that Tule must "'*apply* for an eagle take permit' 'prior to initiating operation of the project.'" (Pls.' Opp'n at 24 (quoting Compl. at 24).) In other words, Plaintiffs point out, Tule could have begun construction without having applied for the permit. (*Id.*) Tule may even begin to operate these turbines so long as it has at least applied for a permit, regardless of whether the permit is ultimately denied. (*See id.*) However, as Plaintiffs acknowledged in their Complaint, construction had not begun and Tule had already submitted a permit application, although that application was rejected based on failure to comply with certain formalities given the heightened risk the project posed to eagles. (*See* Complaint at 25, 28.) If Tule's turbines kill an eagle, Tule faces civil and potentially criminal liability. (Tribe's Reply, ECF No. 43, at 10–11.) The Tribe states that, if Tule is not able to obtain a permit, "Tule Wind and the Tribe might not be willing to proceed with the Project in light of the potential for criminal prosecution . . . for any purported anticipated incidental take related to the Project." (*Id.*)

About a month after BIA approved the lease, Plaintiffs sent BIA a formal demand letter, followed soon by a supplemental demand letter, explaining how the agency had

violated the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h (NEPA), by failing to conduct its own NEPA review and urging that additional study was necessary. (Pls.' Opp'n at 26.) In particular, the letter charged that BIA could not rely on BLM's EIS in light of the "existence of significant post-2011 information, data, and conclusions from the expert wildlife agencies," and that BIA violated the Administrative Procedure Act, 5 U.S.C. § 706 (APA), by failing to comply with NEPA; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (MBTA); and the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d, (Eagle Act).[3] (*Id.*)

In March 2014—two months after Plaintiffs sent the demand letter—Tule applied to FWS for an eagle take permit. (*Id.*) FWS returned the application package in August 2014, indicating it was incomplete. (*Id.*) FWS formally determined that the project was "a Category 1 High Risk Project" because it posed a high risk to eagles and there was little room to mitigate the risk within the project. (*Id.* at 26–27.) FWS recommended Tule consider different turbine sites or moving the project altogether. (*Id.* at 27) Plaintiffs sent another letter in September 2014 demanding that BIA withdraw or suspend its lease approval until Tule obtains an eagle take permit. (*Id.*)

II. Procedural History

The Protect Our Communities Foundation, one of the plaintiffs in this action, and another plaintiff litigated the propriety of BLM's approval of Phase I in a separate action before this Court. *See Protect Our Communities Found. v. Jewell*, No. 13CV575 JLS JMA, 2014 WL 1364453 (S.D. Cal. Mar. 25, 2014) [hereinafter "*POCF I*"]. Ruling on summary judgment in March 2014, the Court held that BLM had satisfied its obligations under NEPA and that the defendants in that case did not violate the APA by failing to require Tule to obtain an eagle take permit because "[f]ederal 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." *Id.* at *21. The plaintiffs'

[3] The Bald and Golden Eagle Protection Act is also often referred to as BGEPA.

appeal of that order is currently pending before the Ninth Circuit. *See Protect Our Communities Foundation v. Jewell*, No. 14-55842.

Plaintiffs filed this Complaint on September 24, 2014, alleging three claims for relief: (1) that BIA violated NEPA, its implementing regulations, and the APA by failing to prepare any supplemental NEPA review; (2) that BIA violated the Eagle Act, its implementing regulations, and the APA by approving the lease in its ROD; and (3) that BIA violated the MBTA, its implementing regulations, and the APA by approving the lease in its ROD. (*See* Complaint at 28–32.)[4]

Tule and the Tribe moved to intervene as defendants in November 2014 and December 2014, respectively. (ECF Nos. 10, 12.) The Court granted these Motions in January 2015. (Order, ECF No. 22.) Tule, the Tribe, and BIA (collectively Defendants) filed the instant Motions for Judgment on the Pleadings on August 28, 2015. (*See* ECF Nos. 33, 34, 35.) Defendants ask the Court to dismiss Plaintiffs' second and third claims in their entirety and Plaintiffs' first claim to the extent it is based on their demands for supplemental NEPA analysis after BIA issued its ROD approving the lease. (*See, e.g.*, BIA's Mot. at 28.)

LEGAL STANDARD

I. Federal Rule of Civil Procedure 12(c)

Any party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings attacks the legal sufficiency of the claims alleged in the complaint. *See Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2001). The Court must construe "all material allegations of the non-moving party as contained in the pleadings as true, and [construe] the pleadings in the light most favorable to the [non-moving] party." *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1014 (9th Cir. 1998). "Judgment

[4] This case was initially assigned to Judge Huff, but was transferred to this Court pursuant to Civil Local Rule 40.1 on October 23, 2015. (ECF No. 39.)

on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

"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.'" *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pleaded "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

As with Rule 12(b)(6), courts may exercise their discretion to grant plaintiffs leave to amend their complaints. *See Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008). Court should deny leave to amend, however, if they determine that "allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Id.* (quoting *Schreiber Distrib. Co. v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

II. The Administrative Procedure Act

This Court reviews Plaintiffs' claims under the APA "[b]ecause the statutes under which [they] seek[] to challenge administrative action do not contain separate provisions for judicial review." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205 (9th Cir. 2004). Under the APA, agency decisions must be upheld unless the Court finds that the decision or action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action taken "without observance of procedure required by law" may also be set aside. 5 U.S.C. § 706(2)(D).

Agency action is arbitrary and capricious if:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

City of Sausalito, 386 F.3d at 1206 (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). "This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). If the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made," a reasonable basis exists, such that the Court should not disturb the agency action. *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008).

Agencies are required to comply not only with laws they are charged with administering, but "*any* law." *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003). Importantly, however, "the only agency action that can be compelled under the APA is action legally required." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63, 124 S. Ct. 2373, 2379, 159 L. Ed. 2d 137 (2004) [hereinafter "*SUWA*"]. Plaintiffs bear the burden of showing that agency action violated the APA. *Protect our Communities Found. v. Salazar*, No. 12CV2211-GPC PCL, 2013 WL 5947137, at *2 (S.D. Cal. Nov. 6, 2013) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

ANALYSIS

I. The MBTA and the Eagle Act

The MBTA and the Eagle Act are reactive laws that punish those who "pursue, hunt, take, capture, kill," or possess migratory birds or eagles. *See* 16 U.S.C. § 707(a)–(b) (MBTA); *see also* 16 U.S.C. § 668(a) (the Eagle Act). The laws do have proactive components, however, under which individuals and entities may apply for permits excusing them from liability for incidentally killing or otherwise harming protected birds while engaged in otherwise lawful activities. *See, e.g.*, 50 C.F.R. § 22.26. As reactive laws

administered by the federal government—specifically FWS—neither the Eagle Act nor the MBTA provide a private right of action. *See Defs. of Wildlife v. Adm'r, E.P.A.*, 882 F.2d 1294, 1298 (8th Cir. 1989). Thus, Plaintiffs' causes of action are not for violations of the MBTA and the Eagle Act, *per se*, but for violations of the APA.

"Under the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm." *SUWA*, 542 U.S. at 64 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, (1990)). With this in mind, the only harm for which Plaintiffs may seek redress under the APA is that which they endure because of BIA's approval of the lease in a manner that does not accord with the law or fails to follow a required procedure. *See* 5 U.S.C. § 706(2)(a) & (d). Plaintiffs' injury depends, therefore, on BIA's having been legally obligated to either obtain an eagle take permit itself or to condition approval of the lease on Tule's obtaining an eagle take permit. Plaintiffs have not identified any authority showing that BIA was required to take these proactive steps under the MBTA or the Eagle Act. Nonetheless, both the MBTA and the Eagle Act loom over Tule if it decides to proceed with Phase II without obtaining a permit, and Tule may be prosecuted if it proceeds with Phase II without a permit and a turbine kills an eagle.

The MBTA provides that, unless otherwise permitted, "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture [or] kill . . . any migratory bird . . . nest, or egg of any such bird" unless permitted by the Secretary of the Interior. 16 U.S.C. § 703(a). At one point, all MBTA violations were misdemeanors. *United States v. Vance Crooked Arm*, 788 F.3d 1065, 1071 (9th Cir. 2015). Today, however, some violations are felonies, punishable by up to two years' imprisonment. *Id.*; 16 U.S.C. § 707(a)-(b). Regulations define "take" as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12. FWS enforces the MBTA. *See* 16 U.S.C. §§ 706, 707(a), (d). Regulations promulgated pursuant to the MBTA allow FWS to issue permits for "special purpose activities related to migratory birds, their parts, nests, or eggs" if an applicant is able to meet certain criteria or demonstrate some "other compelling justification." 50 C.F.R. § 21.27.

Similarly, the Eagle Act prohibits the taking, possession, sale, or transport of bald and golden eagles, except pursuant to Federal regulations. 16 U.S.C. § 668(a); 50 C.F.R. Part 22. A knowing or wanton "take" is criminally punishable by a fine of up to $5,000, imprisonment up to a year, or both. 16 U.S.C. § 668(a). Section 668(b) provides for civil penalties of up to $5,000 on a strict liability basis. 16 U.S.C. § 668(b). FWS may issue permits under the Eagle Act to take, possess, and transport bald and golden eagles for a variety of purposes provided such permits are compatible with the preservation of the bald eagle or the golden eagle. *See* 16 U.S.C. § 668a; 50 C.F.R. §§ 22.21–22.29. Pertinent here, 50 C.F.R. § 22.26 provides for permits to take eagles where the taking is associated with, but not the purpose of, otherwise lawful activities. FWS may issue these permits for "individual instances of take" where "the take cannot practicably be avoided" or for "programmatic take" where "the take is unavoidable even though advanced conservation practices are being implemented." 50 C.F.R. § 22.26(a)(1)–(2).

Defendants argue that Plaintiffs' MBTA and the Eagle Act claims fail as a matter of law because: (1) federal agencies acting in their regulatory capacities are not required to obtain Eagle Act and MBTA permits; (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; (3) if any entity is required to obtain an eagle take permit, it is Tule, not BIA; and (4) MBTA and Eagle Act permits are discretionary. (*See* BIA's Mot. at 12; *see also* Pls.' Opp'n at 33–34 (summarizing Defendants' arguments with respect to the Eagle Act).) The Court agrees with the first and second points, and therefore does not reach the third and fourth arguments.

Plaintiffs argue BIA's lease approval was tantamount to permitting Tule to kill eagles and that the Court should accept that as true for purposes of these Rule 12(c) Motions. But that argument involves more than just well-pleaded facts. Rather, it involves facts premised on a legal conclusion about the requirements of the MBTA and the Eagle Act. The Court does not need to accept legal conclusions as true. *See Iqbal*, 556 U.S. at 678–79. Rather, based on the well-pleaded facts of Plaintiffs' Complaint, this case presents

the following question: Whether, when an agency authorizes lawful conduct (such as constructing and operating a wind farm) by a third party, but that third party *may* later violate the law without necessarily breaching the terms of the agency's approval, the *agency* has acted "without observance of procedure required by law" or "not in accordance with law." If the answer is yes, the agency has violated the APA. Based on the authority this Court has reviewed, however, the answer is no.[5]

First, the facts as pleaded do not present a situation in which BIA has authorized the killing of eagles or other migratory birds. The lease approval required Tule to apply for a permit before beginning operation, so even if Tule ultimately constructs Phase II and a turbine kills an eagle, it may nonetheless be lawful according the FWS regulations. Plaintiffs allege in their Complaint:

> [T]he ROD only requires Tule Wind LLC to "*apply* for an eagle take permit" "prior to initiating *operation* of the project," *id.* at 4 (emphases added), meaning that: (1) the project may be fully constructed before a BGEPA [a.k.a., Eagle Act] permit is obtained; and (2) the project may operate indefinitely without a permit being granted *or even if a permit is rejected*.

(Complaint at 25–26.) Upon close reading, even Plaintiffs' Complaint couches the purported violations of the MBTA and the Eagle Act in terms of what "may" happen with construction of Phase II, while simultaneously acknowledging that BIA's ROD directs Tule to pursue a permit that would make these takings lawful. (*See id.*) Plaintiffs stated they believed construction would begin later during the year in which they filed their Complaint—2014—and it would begin operating soon thereafter. (*Id.* at 28.) Assuming that transpired, (although Defendants stated in their moving papers more than a year later that it had not, and that they may never begin construction without a permit, (*see* Tribe's Reply at 10–11)), building and operating a wind farm is not in itself a violation of the

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[5] That is unless a law by its terms requires other agencies to ensure compliance, such as the Endangered Species Act. *See* 16 U.S.C. § 1536(a)(2) ("Each Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . ."). The MBTA and the Eagle Act do not contain similar provisions.

MBTA or the Eagle Act. Assuming 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 Tule is able to obtain a permit. The Court cannot say, therefore, that BIA's approval of the lease violates those statutes.

As much as Plaintiffs would like to characterize BIA's ROD as authorization to violate the law, that simply is not what happened. As BIA points out in its Reply, it "approved the Tribe's lease with Tule based on assurances, and in reliance on the condition in the lease, that Tule must comply with all applicable laws, including all laws prohibiting unauthorized bird take." (BIA's Reply at 4.) The ROD itself is informative.[6] It states:

> [T]he lease allows the construction and operation of [Phase II] to proceed before an eagle take permit is issued, subject to the applicable requirements. However, the Applicant remains responsible for complying with all applicable federal laws, including the BGEPA. Any take of eagles caused by the Project, prior to the issuance of an eagle take permit, constitutes a violation of BGEPA that FWS may refer to the Department of Justice for enforcement. [citations.] Any unauthorized take of eagles is a violation of BGEPA.

(ROD § 1.2.2, ECF No. 46-3, at 13.) Allowing Tule to proceed with construction while admonishing them of their potential Eagle Act liability and obligation to comply with that law is not the same as authorizing Tule to kill eagles.

Second, the MBTA and Eagle Act are reactive laws, and do not require an agency permitting a third party's otherwise lawful activity to condition approval on obtaining permits administered by another agency. As was the case in *POCF I*, demonstrating this agency obligation was Plaintiffs' main hurdle. The Court again concludes that MBTA and the Eagle Act do not work that way. Upon conducting its own research and searching Plaintiffs' Opposition for authority showing that BIA was required to take some other action under these statutes, the Court comes up empty handed.

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[6] This document is incorporated by reference into the Complaint, so the Court may consider it for purposes of these Motions. *See Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043 (9th Cir. 2015) ("[Courts] may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." (internal quotation marks omitted)).

> In their own words, the legal theory upon which Plaintiffs rely is this:
>
> [T]he BIA-approved Tule Wind Phase II wind energy project that will foreseeably and predictably kill, wound, and disturb golden eagles *is* an activity that is squarely covered by BGEPA's prohibitions and therefore requires that either BIA or Tule Wind LLC obtain an eagle take permit from FWS before project construction and operation, lest BIA's project authorization be issued "not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

(Pls.' Opp'n at 33.) Plaintiffs cite the Supreme Court's statement in *NextWave* that federal agency action must accord with "*any* law, and not merely those laws that the agency itself is charged with administering." (*Id.* at 43, 51 (quoting *NextWave*, 537 U.S. at 300).) Plaintiffs argue that a government agency acts contrary to law when it approves conduct that *may* lead to a violation of law.[7] (*See* Pls.' Opp'n at 43, 51.) Notably, the Supreme Court in *NextWave* was addressing action by the Federal Communications Commission that violated the Bankruptcy Code. 537 U.S. at 299. That would be akin to BIA itself "taking" or killing eagles here, which obviously has not happened.

To support their argument that BIA must require a permit before allowing construction, Plaintiffs rely on cases that actually stand for a legal premise that does not fit their case: that an agency violates the APA when it permits an individual or entity to violate a law.[8] *See Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1069 (9th Cir. 2003) *amended on reh'g en banc in part*, 360 F.3d 1374 (9th Cir. 2004); *see also Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127–28 (9th Cir. 2012).

Anderson presented a very different situation. 371 F.3d at 501. In *Anderson* a federal agency granted an Indian tribe permission to hunt whales. *Id.* at 486. A statute made hunting whales illegal, and the tribe did not fit into any exemption. *Id.* at 494, 497.

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[7] Plaintiffs would undoubtedly quibble with this characterization of their argument, and would likely frame the unlawful taking of eagles as imminent. As discussed above, the Court does not see it that way.

[8] In some circumstances, agencies have the authority to authorize conduct that would otherwise violate a law—for example, FWS's ability to authorize incidental eagle takes.

By failing to consider this statute when granting the tribe permission to hunt whales, the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and therefore violated the APA. *Id.* at 501.

The analog to *Anderson* in this case would be BIA actually granting Tule a license to kill eagles. Obviously BIA lacks that authority, and that would violate the APA. But that is not what happened. Rather, BIA authorized a lease allowing construction of wind turbines while requiring Tule to apply for an eagle take permit and specifically warning Tule that it is subject to potential criminal or civil liability under the Eagle Act. Absent an affirmative duty to require Tule to obtain permits—which this Court cannot read *Anderson* to compel—BIA has not acted in an arbitrary or capricious manner that is not in accordance with law. *See id.* at 501. Plaintiffs attempt to extract the same obligation on BIA from *The Wilderness Society*, 353 F.3d at 1065–67. But that case stands for the same thing as *Anderson*: An agency violates the APA if it authorizes a third party to violate the law.[9] In sum, BIA is not responsible for proactively administering the MBTA and the Eagle Act, and did not violate the APA by failing to do so. *Accord POCF I*, 2014 WL 1364453, at *21 ("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.").

Third, practically speaking, Plaintiffs legal theory ignores how our bureaucratic government works. The FWS, not BIA, is responsible for administering the MBTA and

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[9] Specifically, in *Wilderness Society* a federal agency authorized a company to engage in commercial activities in a wilderness area. 353 F.3d at 1065. A federal statute prohibited commercial activities in wilderness areas. *Id.* at 1067. Approving commercial activities therefore violated the APA. *Id.* at 1059, 1067. The final precedential case Plaintiffs cite for this notion is *Center for Biological Diversity*, 698 F.3d at 1127–28. That case involved the Endangered Species Act (ESA), which explicitly requires federal agencies to ensure compliance. *See* 16 U.S.C. § 1536(a)(2); *Ctr. For Biological Diversity*, 698 F.3d at 1127 ("Section 7 of the ESA imposes a substantive duty on the BLM to ensure that its actions are not likely to jeopardize the continued existence of the listed fish or result in destruction or adverse modification of critical habitat."). In that case the Ninth Circuit held BLM violated ESA by failing to ensure that certain endangered species would be protected. *Ctr. For Biological Diversity*, 698 F.3d at 1128.

the Eagle Act, which is why BIA required Tule to pursue a permit with FWS. It would be absurd to say an agency violates the Administrative Procedure Act by directing third parties to avail themselves of the procedures administered by *other agencies*. *See Friends of Boundary, Mountains v. U.S. Army Corps of Eng'rs*, 24 F. Supp. 3d 105, 116 (D. Me. 2014) ("The BGEPA incidental take permit matter is a matter for FWS to monitor through its independent regulatory authority.").

Finally, at least with respect to the Eagle Act, FWS's own interpretation of the statutory and regulatory scheme suggests that BIA is not the agency responsible for assuring compliance with these laws. Rather, when establishing the Eagle Act permit program, FWS stated that individuals and entities that obtain other approvals from different agencies "are responsible for their own compliance" with the Eagle Act, and that government agencies should obtain permits if takes are likely to result from "agency actions that are implemented by the agency itself."[10] This interpretation is entitled to deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

Plaintiffs imply that FWS has interpreted BIA's obligations with respect to permitting differently, referring specifically to correspondence between FWS officials and BIA around the time BIA issued its ROD approving the lease. The way Plaintiffs explain

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[10] More completely, the relevant excerpt provides:

> Permits are available to Federal, State, municipal, or tribal governments; corporations and businesses; associations; and private individuals, all of which are subject to the prohibitions of the Eagle Act. Persons and organizations that obtain licenses, permits, grants, or other such services from government agencies *are responsible for their own compliance* with the Eagle Act and *should individually seek permits* for their actions that may take eagles. Government agencies must obtain permits for take that would *result from agency actions that are implemented by the agency itself* (including staff and contractors responsible for carrying out those actions on behalf of the agency).

Eagle Permits; Take Necessary to Protect Interests in Particular Localities, 74 FR 46836-01, at 46843 (emphasis added).

it, FWS "provided its legal interpretation" of the Eagle Act and "formally directed BIA to expressly condition its lease approval" on Tule obtaining a permit before construction. (Pls.' Opp'n at 39.) However, Plaintiffs' own Complaint shows that is not an accurate description of what happened. (*See* Complaint at 22 ("[I]n the event that BIA decides to move forward with approving this project, *we recommend* [that] BIA conditions the lease on this project to ensure a FWS permit is in place that would authorize take of golden eagles under the Eagle Act, prior to project construction." (emphasis added)).) As BIA aptly points out in its Reply, "No document quoted in Plaintiffs' brief states that BIA's approval of this tribal lease violates the Eagle Act or that the Eagle Act obligates BIA to secure a mandatory Eagle Act permit, though FWS surely hoped to enlist BIA in its effort to avoid impacts to protected bird species." (BIA's Reply at 6.)

Plaintiffs raise a plethora of other logical arguments throughout their sixty-six-page Opposition. None of them compel a different conclusion.[11] As discussed above, as the Court reads *Anderson*, *Marsh*, and *Center for Biological Diversity*, a federal agency violates the APA when it directly authorizes a violation of law that it does not have the power to authorize. The Court is not willing to expand that legal rule to hold that an agency violates the APA by permitting lawful activity while not proactively stopping potential unlawful conduct.

Consequently, Plaintiffs have not presented a viable legal theory by which they may proceed against BIA for violations of the MBTA or the Eagle Act via the APA. Defendants' Motions for Judgment on the Pleadings with respect to claims two and three are therefore **GRANTED**. The Complaint does not present facts showing that BIA

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[11] For example, Plaintiffs argue that BIA violated the APA because FWS warned the agency that it could be derivatively liable for eagle deaths, (Pls.' Opp'n at 38–39), or that BIA is required to obtain a permit in its regulatory capacity because another agency, National Marine Fisheries, obtained a permit for regulatory action, (*id.* at 54). Of course, an agency's possible future liability (only if certain circumstances occur) does not compel the conclusion that an APA violation *has* occurred, nor does another agency's prudent decision to obtain an eagle take permit make an APA violation out of BIA's decision not to pursue such a permit.

authorized a violation of the law. These claims are **DISMISSED WITHOUT PREJUDICE**.

II. NEPA Supplementation

NEPA requires that an EIS be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS should "provide full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.

Judicial review of an agency's EIS under NEPA is limited to a "rule of reason that asks whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *City of Sausalito*, 386 F.3d at 1206–07 (quoting *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992)). "The key question is whether the EIS's form, content, and preparation foster both informed decisionmaking and informed public participation." *Id.* (quotation omitted).

The Court, however, may not substitute its judgment for that of the agency. *See Protect Our Communities Found.*, 2013 WL 5947137, at *2 (citing *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958 (9th Cir. 2003)).[12] NEPA does not contain substantive environmental standards, nor does the statute mandate that agencies achieve particular substantive environmental results. *See id.* (citing *Ctr. for Biological Diversity*, 349 F.3d at 1166 (9th Cir. 2003)). Rather, this Court's role is to ensure that the agency "has taken a 'hard look' at a decision's environmental consequences." *City of Sausalito*, 386 F.3d at 1207.

In some circumstances, after issuing an EIS, NEPA may require supplemental study and process. *See SUWA*, 542 U.S. at 72–73. Most pertinently to Defendants' Motions, however, NEPA requires supplementation "only if 'there remains 'major Federal actio[n]'

[12] Not to be confused with *POCF I*, 2014 WL 1364453, which was decided by this Court.

to occur,' as that term is used in [42 U.S.C.] § 4332(2)(C)." *Id.* at 73. That is true even where there is new evidence that, if presented before major federal action was taken, might have required a "hard look" under NEPA. *Id.* (holding that evidence of increased off-road vehicle use in the relevant wilderness area did not require supplementation because the agency had already taken the only major federal action it would take—approving a land use plan); *see also Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 367 (1989) (holding supplementation required where the *agency itself* was constructing dams, and had not yet completed construction, which was a major federal action).

Defendants ask the Court to dismiss Plaintiffs NEPA claim to the extent it is based on their demands for supplemental NEPA analysis after BIA issued its ROD approving the lease. (*See, e.g.*, BIA's Mot. at 24.) Notably, Defendants are not asking for judgment on Plaintiffs' NEPA claim that BIA inappropriately relied on BLM's Final EIS. (*See id.*)

The major federal action here was approving the lease, much like the major federal action in *SUWA* was approving a land use plan. *See SUWA*, 542 U.S. at 73. BIA has approved the lease, and Plaintiffs identify no further major actions BIA will take aside from passive involvement as the trustee for the leased land. There is, therefore, no remaining major federal action. Like the Supreme Court in *SUWA*, *see id.*, this Court does not reach the question of whether the information received after BIA approved the lease was "significant" enough to require a hard look. Plaintiffs argument about "site-specific . . . projects that have not yet completed project construction" versus "programmatic" projects, (Pls.' Opp'n at 69)—although a clever attempt to get around unfavorable authority—is unpersuasive. The Supreme Court opinions in *Marsh* and *SUWA* do not draw this distinction. Far more simply, they look to whether any major federal action remains. *See SUWA*, 542 U.S. at 73; *Marsh*, 490 U.S. at 374.[13]

Thus, Defendants are entitled to dismissal of Plaintiffs NEPA claim to the extent it

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[13] Significantly, the district court case upon which Plaintiffs rely, *Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 939 (N.D. Cal. 2006), included ongoing federal involvement, requiring "written approval of the operating plan" by the Forest Service "prior to the commencement of logging."

seeks a remedy for BIA's refusal to supplement the EIS after it had approved the lease. Accordingly, Defendants' Motions are **GRANTED**. To the extent Plaintiffs' claim one seeks supplementation of the EIS based on additional information presented after BIA approved the lease, it is **DISMISSED WITH PREJUDICE**.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Tule's, the Tribe's, and BIA's Motions. (ECF Nos. 33, 34, 35.) Plaintiffs first claim is **DISMISSED IN PART WITH PREJUDICE** and Plaintiffs second and third claims are **DISMISSED WITHOUT PREJUDICE** in their entirety.

IT IS SO ORDERED.

Dated: March 29, 2016

Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge