

3. Protect Our Communities Foundation v. Lacounte, 939 F.3d 1029 (9th Cir. 2019)

Protect Our Communities Foundation, David Hogan, and Nica Knite (collectively, plaintiffs) brought suit against the Bureau of Indian Affairs (BIA),¹ challenging BIA's approval of an industrial-scale wind facility in Southern California. The project developer, Tule Wind, LLC (Tule), and Ewiiapaayp Band of Kumeyaay Indians (the Tribe) intervened as Defendants. Plaintiffs claim that BIA's environmental analysis did not comply with the National Environmental Protections Act (NEPA)² and that BIA's approval violated the Administrative Procedure Act (APA)³ and the Bald and Golden Eagle Protection Act⁴ (Eagle Act). The United States District Court for the Southern District of California granted defendants' motion for judgment on the pleadings on two claims⁵ and granted defendants' motions for summary judgment on the third.⁶ Plaintiffs appealed. Reviewing de novo, the Ninth Circuit affirmed.

Tule planned to construct an eighty-five turbine wind facility sixty miles east of San Diego. Phase I involved the construction of sixty-five turbines and required approval from the Bureau of Land Management (BLM), who is responsible for granting rights-of-way for use of federal lands. Phase II involved the construction of 20 turbines located on the Tribe's reservation and thus required approval from the BIA, who serves as a trustee for federally recognized Indian tribes. Pursuant to the NEPA's procedural requirements, the BLM prepared an Environmental Impact Statement (EIS) that covered both project phases. The EIS identified an "unavoidable adverse impact" to golden eagles and considered five project alternatives.⁷ In addition, Tule drafted a Project Specific Avian and Bat Protection Plan, describing ways to mitigate impacts on these species. Relying on this plan and the EIS, the BLM approved Phase I.⁸

In preparation for Phase II, Tule drafted a Supplemental Project-Specific Avian and Bat Protection Plan (SPP) which included updated eagle surveys and described measures to document and avoid bird impacts to meet the current Fish and Wildlife Service (FWS) no-net loss standard for local breeding eagle populations. The BIA also made the SPP available for public comment. Relying on the SPP and BLM's EIS, the BIA approved Phase II, issuing a Record of Decision (ROD). The ROD included several mitigation measures designed to avoid impacts to golden eagles and stipulated that Tule had to apply for an eagle take permit under the Eagle Act before operation. Plaintiffs filed suit alleging that the BIA violated the NEPA by relying on the BLM's EIS, violated the NEPA and the APA by failing to prepare any supplemental NEPA review, and violated the Eagle Act and the APA by approving the lease.

First, the Ninth Circuit held that the BIA properly relied on the BLM's EIS to satisfy its NEPA review requirement. Plaintiffs alleged that this reliance was improper because the BIA did not explain its decision to not implement one of the EIS's mitigation measures. They argue that the BIA was required to authorize turbine construction based on the assessed risk each location presents to golden eagles. However, the Ninth Circuit found that no explanation was necessary because the BIA did properly implement the mitigation measure. Outlined in the SPP, the BIA explained how Phase II will meet FWS' no-net loss and found that all twenty turbines could satisfy this standard.

Next, the Ninth Circuit reviewed the BIA's alternatives analysis. Plaintiffs contend that the BIA's analysis was deficient because the EIS did not consider an alternative where only some of the Phase II turbines were authorized. The BIA argued that plaintiffs failed to exhaust this argument and that

¹ Defendants included Darryl Lacounte in his official capacity as Acting Director of Bureau of Indian Affairs, David L. Bernhardt in his official capacity as Secretary of Interior, Tara Katuk Maclean Sweeney in her official capacity as Assistant Secretary for Indian Affairs, and Amy Dutschke in her official capacity as Regional Director of Bureau of Indian Affairs Pacific Region Division of Environmental Cultural Resources Management & Safety.

² National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

³ Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012).

⁴ Bald and Golden Eagle Protection Act, 16 U.S.C. § 668–668d (2012).

⁵ Protect Our Communities Found. v. Black, No. 14cv2261 JLS, 2016 WL 4096070 (S.D. Ca. Mar. 29, 2016).

⁶ Protect Our Communities Found. v. Black, 240 F. Supp. 3d 1055 (S.D. Ca. 2017).

⁷ Protect Our Communities Found. v. Lacounte, 939 F.3d 1029, 1033 (9th Cir. 2019).

⁸ BLM's approval survived review. Protect Our Communities Found. v. Jewell, 825 F.3d 571, 588 (9th Cir. 2016).

the BIA nevertheless satisfied its NEPA requirements. The court held that plaintiffs' argument is not waived because comments on the EIS raised the issue that a different number of turbines and different siting decisions were possible. Thus, the BIA had an opportunity to consider this issue before giving their approval. Moreover, the Ninth Circuit held that the EIS's alternative analysis was sufficient to satisfy the NEPA. Because the NEPA requires agencies to issue a single EIS for "connected, cumulative, and similar actions,"⁹ Phase II is not considered an isolated project. Although no mid-range alternative was considered as to the Phase II turbines, the EIS's fifth alternative did consider a mid-range alternative for the project as a whole.

The Ninth Circuit then rejected Plaintiffs' claim that the BIA needed to prepare a supplemental EIS (SEIS). Plaintiffs argued that the information contained in the SPP and third-party comments, that arose after the EIS was published, met the "new and significant" threshold that can trigger the SEIS requirement.¹⁰ The Ninth Circuit found that this information was not new or significant as the EIS already articulated and considered these issues. Nothing additional was required because the BIA maintained a hard look at the environmental impact of the project through its extensive discussion in the ROD and SPP.

Furthermore, the Ninth Circuit held that the BIA's approval was not contrary to law. While the Ninth Circuit has invalidated agency action that sanctioned unlawful conduct by third parties, action that permits a third party to engage in otherwise lawful behavior, and only incidentally leads to subsequent unlawful action, is permitted under the the APA. Because the BIA required Tule to apply for a permit and to comply with all applicable laws, the BIA's authorization did not violate the APA. The Ninth Circuit also held that the BIA's approval was not arbitrary or capricious even though the BIA did not condition its approval on Tule obtaining an Eagle Act take permit. Those who obtain permits from government agencies are responsible for their own compliance with the Eagle Act. Because compliance is Tule's responsibility, the Ninth Circuit held that the BIA's decision not to require a permit before issuing its approval was not irrational.

In sum, the Ninth Circuit found the EIS analysis sufficient to satisfy NEPA because the BIA followed the listed mitigation measures and adequately considered all reasonable and feasible alternatives. Nor did the BIA's NEPA analysis require a SEIS as any additional information was not new nor significant. Finally, the court held that the BIA's approval of Phase II of Tule's project did not violate the APA or the Eagle Act as Tule was responsible for its own compliance with the Eagle Act and still required to obtain a permit before operation.

⁹ Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir. 2000).

¹⁰ 40 C.F.R. § 1502.9 (2019).