Protect Our Cmtys. Found. v. Jewell: The Ninth Circuit Draws a Line in the Sand While Objectively Deciding a Case That Presents Two Different Environmental Objectives

I. OVERVIEW OF THE CASE

The use of renewable energy seems like an obvious goal that environmentalists should relentlessly encourage. But what happens when the construction and operation of a renewable energy source potentially threatens other environmentalist objectives? The Ninth Circuit Court of Appeals found itself deciding such a scenario when a collection of environmental advocacy organizations and a local resident challenged the Bureau of Land Management's (BLM) approval of a right-of-way permit for a wind energy project in San Diego County.[1] BLM's thirty-year term right-of-way permitted Tule Wind, LLC (Tule) to begin construction and operation of a wind energy facility on 12,360 acres of land in the McCain Valley, located 70 miles east of San Diego, CA (Project).[2] The plaintiffs sought injunctive and declaratory relief under the Administrative Procedure Act (APA), arguing that the BLM's issuance of the permit violated the National Environmental Policy Act (NEPA), the Migratory Bird Treaty Act (MBTA), and the Bald and

1. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571 (9th Cir. 2016).
2. *Id.* at 577.

Golden Eagle Protection Act (Eagle Act).[3] Currently, there is a circuit split on whether the MBTA applies to federal agencies.[4]

The BLM is an agency within the Department of Interior and "is charged with the management of federally owned land."[5] One responsibility the BLM is charged with is to grant rights-of-ways for the use of federally-owned lands.[6] Plaintiffs challenged the right-of-way grant the BLM approved to Tule that would allow for the construction and operation of a wind energy facility.[7] The BLM granted Tule's right-of-way grant permit after eliminating thirty-three of the originally proposed turbines, relocating several turbines to mitigate avian collisions, and distributing an environmental impact statement (EIS) for public comment.[8] The BLM submitted a final EIS of the Project and a Record of Decision (ROD) that provided specific details of the right-of-way grant.[9] The ROD indicated the permit was approved based on expresses mitigation conditions, including a Project-Specific Avian and Bat Protection Plan (the Protection Plan), which was created by Tule, BLM and U.S. Fish and Wildlife Service (FWS).[10] Plaintiffs argued the BLM failed to comply with NEPA because (1) the scope of the Project was too narrow, (2) the BLM did not consider viable alternatives, (3) the mitigation strategies were too vague and speculative, and (4) the EIS failed to take a "hard look" at the environmental impact caused by the project. Additionally, plaintiffs argued the BLM violated the MBTA, the Eagle Act, and the APA because it could potentially lead to the taking of migratory birds and eagles.[11]

The United States District Court for the Southern District of California rejected plaintiffs' arguments and granted summary judgment to the defendant.[12] Plaintiffs appealed to the Ninth Circuit who reviewed the grant of summary judgment de novo.[13] The Ninth Circuit affirmed the district court's judgment and *held* BLM did not violate NEPA, the

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3. *Id.* at 578.

4. *See* Newton Cty. Wildlife Ass'n v. U.S. Forest Service, 113 F.3d 110 (8th Cir.1997); *see* Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997); *see* Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882 (D.C. Cir. 2000).

5. *Protect Our Cmtys. Found.,* 825 F.3d at 577 (citing 43 U.S.C. §§ 1732(a), 1702(c) (2012)).

6. 43 U.S.C. § 1761(a) (2012).

7. *Protect Our Cmtys. Found.*, 825 F.3d at 577.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 579.

12. *Id.* at 578.

13. *Id.* (*citing* United States v. City of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003)).

MBTA, the Eagle Act, or the APA in issuing the right-of-way grant permit to Tule. *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 588 (9th Cir. 2016).

II. BACKGROUND

The National Environmental Protection Act was created by Congress to ensure agencies consider significant environmental impacts of major federal action while informing the public of the potential environmental impacts.[14] Under NEPA, federal agencies are required to prepare a detailed EIS "for major Federal actions significantly affecting the quality of the human environment."[15] The EIS must analyze the environmental impact of the proposed action, unavoidable adverse effects of the action, and alternatives to the action, among other things.[16] The EIS should provide decision-makers with enough detailed information regarding the environmental consequences of a proposed action so that they may make an informed decision.[17] The Ninth Circuit has held that when it reviews an EIS, it employs a "rule of reason" to determine the adequacy of the EIS to ensure the agency has provided a detailed discussion of the potential significant environmental impacts.[18]

The Ninth Circuit has also held that their "proper role [as decision-makers] is simply to ensure that the [agency] made no 'clear error of judgment' that would render its action 'arbitrary and capricious'" or contrary to law and thus be unlawful under the Administrative Procedure Act.[19] This, the court held, requires the court to "defer to an agency's determination in an area involving a 'high level of technical expertise.'"[20] For example, in *Lands Council v. McNair* (*Lands Council II*), the Ninth Circuit held that questioning the science behind the Forest's Service plan for commercial logging requires the court "to act as a panel of scientists," which was not proper review for a federal court.[21] "These technical determinations of the agency, reflecting the application of its specialized expertise, merit particular deference on review."[22]

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14. Churchill Cty. v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001) (*quoting* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)).

15. 42 U.S.C. § 4332(2)(C) (2012).

16. *Id.*

17. Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir. 1974) (citing Calvert Cliffs' Coord. Comm. v. A.E.C., 449 F.2d 1109 (D.C. Cir. 1971)).

18. *Churchill Cty.*, 276 F.3d at 1071.

19. Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (en banc), *overruled on other grounds by* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

20. *Id.*

21. *Id.* at 988.

22. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 581 (9th Cir. 2016) (citing

An EIS purpose-and-need statement shall "briefly specify the underlying purpose and need to which the agency is responding in proposing alternatives including the proposed action."[23] When a court reviews a purpose-and-need statement the court gives the agency "considerable discretion" in defining the statement.[24] But as the Ninth Circuit has held, "this discretion is not unlimited."[25] A purpose-and-need statement is evaluated under a reasonableness standard that ensures the statement reflects federal policy goals and statutory objectives.[26] Additionally, if the statement "unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained," it will fail.[27]

Lastly, although NEPA does not mandate substantive results, an agency should include a discussion of possible mitigation measures in the EIS.[28] The Ninth Circuit has held that when determining whether an agency has considered appropriate mitigation measures, the court looks to the reasonableness and sufficient detail of mitigation measures that show the potential environmental consequences of the proposed action.[29] "Perfunctory descriptions or mere lists of mitigations are insufficient."[30]

Agency action is not only subject to judicial review under NEPA, but could be subject to judicial review under other Acts, such as the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (Eagle Act). The MBTA is a federal criminal statute that "makes it illegal to 'pursue, hunt, take, capture, kill, attempt to take, capture or kill . . .' any migratory bird or 'any part, nest, or egg of any

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generally *Lands Council II*, 537 F.3d at 988).

23. 40 C.F.R. § 1502.13 (2012); see also Alaska Survival v. Surface Transp. Board, 705 F.3d 1073, 1084 (9th. Cir. 2013).

24. *Alaska Survival*, 705 F.3d at 1084.

25. Westlands Water Dist. v. U.S. Dep't of the Interior, 367 F.3d 853, 866 (9th Cir. 2004).

26. *See id.*

27. *Alaska Survival*, 705 F.3d at 1084.

28. *Alaska Survival*, 705 F.3d at 1084; *see also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351-52 (1989). In *Robertson*, the Court held that although NEPA does not impose substantive requirements, "the requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from the [Council of Environmental Quality's] implementing regulations." See *id.* The court held the demand for a detailed statement on adverse environmental impacts "is an understanding that the EIS will discuss the extent to which adverse effects can be avoided." *Id.* "There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Id.* at 352.

29. *Alaska Survival*, 705 F.3d at 1088.

30. *Id.* (citing Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998)).

such bird . . . , by any means or in any matter', 16. U.S.C. § 703, except as permitted by valid permit issued pursuant to regulations."[31]

Several Circuits are divided on whether the MBTA applies to federal agencies. The Eighth Circuit and the Eleventh Circuit have held that the MBTA does not apply to federal agencies because the only criminal penalty is through 16 U.S.C. § 707(a), which states that "any person, association, partnership, or corporation" that violates the MBTA "shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $15,000 or imprisoned not more than six months, or both."[32] The D.C. Circuit, however, held the MBTA does apply to agencies.[33] In *Humane Soc'y of the United States v. Glickman*, the D.C. Circuit held that "it would be odd if [agencies] were exempt" from the MBTA because the purpose of the Act was to enforce a treaty between the United States and Great Britain to protect migratory birds.[34] The court reasoned that if, for example, Canada started to slaughter eider ducks, they would no doubt be held acting contrary to the Treaty; therefore, if the MBTA applies to a sovereign nation, then there is no doubt the Act applies to agencies as well.[35]

Similar to the MBTA, the Eagle Act makes it illegal to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, . . . , or any golden eagle, alive or dead or any part, nest or egg thereof."[36] The Eagle Act, unlike the MBTA, calls for both criminal and civil enforcement, and agencies are also subject to liability under the Eagle Act.[37] Additionally, a FWS regulation explicitly states that an agency must obtain a permit if any agency action implemented by the agency itself would allow for taking of bald or golden eagles.[38]

Lastly, if a federal statute does not contain a provision for judicial review, the Ninth's Circuit reviews the statute under the APA.[39] For an

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31. Seattle Audubon Soc'y v. Washington Contract Loggers Ass'n., 952 F.2d 297, 303 (9th Cir. 1991) (quoting 16 U.S.C. § 703 (2012)).

32. 16 U.S.C. § 707 (2012); *see* Newton County Wildlife Ass'n, 113 F.3d 110, 115 (8th Cir. 1997); *see* Sierra Club v. Martin, 110 F.3d 1551, 1555 (11th Cir. 1997).

33. Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 888 (D.C. Cir. 2000). In 1997, the Director of the U.S. Fish and Wildlife Service distributed a memorandum stating federal agencies were immune from liability under the MBTA. *Id.* In *Glickman*, the D.C. Circuit found that the Forest Service's adoption of this interpretation of the Act was directly caused by the *Martin* case and other pending litigation. *Martin*, 110 F.3d at 1555; *Glickman*, 217 F.3d at 888.

34. *See Glickman*, 217 F.3d at 884, 887.

35. *Id.* at 887.

36. 16 U.S.C. § 668(b) (2012).

37. *Id.* at (a)-(b).

38. 74 Fed. Reg. 44,843 (Sep. 11, 2009).

39. City of Sausalito v. O'Neill, 386 F.3d 1186, 1205-06 (9th Cir. 2004).

agency action to be judicially reviewable in the Ninth Circuit, it must be final and affirmative.[40] Under the APA, an agency action may be set aside by the reviewing court if it is "not in accordance with law."[41] For example, the Ninth Circuit has held that granting a permit based on a misunderstanding of a federal statute is contrary to law under the APA and thus should be set aside.[42] Relying on an environmental assessment instead of creating an EIS, despite meeting the requirements under NEPA to create an EIS, is also considered an agency action contrary to law in the Ninth Circuit.[43]

III. THE COURT'S DECISION

A. Liability Under NEPA

In the noted case, the Ninth Circuit reaffirmed its standard approach to reviewing an EIS in holding that an EIS will be upheld if it provides an adequate statement of purpose and need, thorough detail of environmental consequences, and descriptions of reasonable alternatives because it would provide a detailed record to aid the court in its decision making.[44] Contrary to the plaintiffs' arguments, the court found that the EIS complied with NEPA.[45]

1. Statement of Purpose-and-Need

Plaintiffs argued the scope of the Project's purpose-and-need statement was too narrow, and thus did not comply with NEPA.[46] The court found that the EIS's purpose and need statement was adequately broad.[47] The court found the purpose-and-need statement reflected the agency's immediate objectives and broader policy goals when choosing between the alternatives.[48] The court also held the statement was consistent with the agency's duties to consider federal policies when

40. Western Watersheds Project v. Matejko, 468 F.3d 1099, 1108 (9th Cir. 2006); *see also* Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005) *overruled on other grounds by* National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664 (2007).

41. 5 U.S.C. § 706(2)(a).

42. The Wilderness Soc'y v. U.S. Fish and Wildlife Service, 353 F.3d 1051, 1555 (9th Cir. 2003).

43. Anderson v. Evans, 371 F.3d 475, 480 (9th Cir. 2002).

44. *See generally* Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 580-83 (9th Cir. 2016).

45. *See id.*

46. *Id.* at 579.

47. *See id.* at 580.

48. *Id.*

approving or denying a right-of-way request, and the statement provided a reasonable explanation of the project goals.[49]

2. Project Alternatives

Under the "rule of reason" review adopted by the Ninth Circuit, the court found the BLM's EIS contained a thorough discussion of probable environmental impacts from the proposed action, and adequately explained its reasons for not adopting the project alternatives.[50] The court also held that, despite plaintiffs' challenges, the BLM did consider reasonable and feasible alternatives, including the "distributed-generation" alternative, which called for the use of rooftop solar panels.[51] The court concluded that an agency need not bend over backwards to consider "'remote and speculative'" alternatives, and here the BLM did in fact evaluate all reasonable and feasible alternatives.[52] The court found that it was within the BLM's expertise to dismiss the "distributed-generation" alternative, which called for the implantation and use of rooftop solar panels.[53] Specifically, the court found that the BLM thoroughly reviewed the technicalities of implementing the "distributed-generation" and properly determined it was not a feasible alternative in that it did not meet the BLM's policy goals, nor was it cost effective.[54]

3. Mitigation Measures

The court also dismissed the plaintiffs' challenge that the BLM did not provide for adequate mitigation measures.[55] The court concluded the agency did in fact draft "a comprehensive set of mitigation measures" that relied on field studies and scientific research.[56] Additionally, the court rejected plaintiffs' argument that BLM did not provide "sufficient detail" of its mitigation measures because, as the court concluded, the BLM's creation and incorporation of the lengthy Protection Plan provided ample detail of its proposed mitigation measures.[57]

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49. *Id.*

50. *Id.* (quoting City of Carmel-By-The-Sea v. U.S. Dep't. of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997)).

51. *Id.* at 580-81.

52. *Id.* (quoting Westlands Water Dist. v. U.S. Dep't. of the Interior, 367 F.3d 853, 868 (9th Cir. 2004)).

53. *Id.* at 581.

54. *Id.*

55. *See id.* at 581-82.

56. *Id.*

57. *Id.*

4. "Hard Look" at Environmental Impacts

Plaintiffs raised several substantive challenges to BLM's approval of the right-of-way grant.[58] The court, while separately analyzing each of the four substantive claims, generally held plaintiffs' substantive challenges were "unavailing," and could even create a situation where the court "substitutes its judgment for that of the agency," which is improper judicial review.[59]

a. Avian Impacts

Plaintiffs argued the EIS failed to account for the effects the projects have on birds at all life stages because it only accounted for the nesting stage and did not account for nighttime migratory-bird surveys.[60] The court held that the BLM's EIS analysis of the bird species that could be potentially affected by the Project "is reasonable and satisfies NEPA's 'hard look' requirement."[61] Specifically, the court found it was within the agency's reasonable discretion to provide less analysis for noise effects on migratory birds because it listed a dozen mitigating measures to reduce this specific impact.[62] The court also held it was within the agency's discretion to not conduct a nighttime migratory-bird survey, because in the EIS, the BLM showed that they relied on surveys and scientific literature that provided a reason for not conducting a nighttime migratory-bird survey.[63]

b. Inaudible Noise and Electromagnetic Fields and Stray Voltage

Plaintiffs also alleged the EIS did not take into account the effect inaudible noise had on humans and the adverse health effects of electromagnetic fields and stray voltage.[64] The court again held that the BLM properly considered these effects and concluded that the BLM's determination that the Project would create minimal risk was within their reasonable discretion.[65]

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58. *See generally id.* at 582-85.
59. *Id.* at 582-83.
60. *Id.* at 583.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 583-84.
65. *Id.*

c. Green-House Gas Emissions

Finally, plaintiffs challenged the BLM's compliance under NEPA because they argued the EIS failed to take a "hard look" at the impact of the Project on green-house gas emissions and global warming.[66] Here, the court rejected plaintiffs' argument and held the EIS did take a "hard look" at the impact of the Project on green-house gas emissions.[67] The court also held the defendant's creation of a new source of renewable energy that would potentially decrease overall emissions in California "simply by virtue" is enough to show the defendants took a "hard look" at the impacts the project would have on green-house gas emissions and thus does not require additional evidence and analysis beyond what was already provided in the EIS.[68] As for the plaintiffs' contention that BLM failed to take into account the emissions the Project would generate, the court held the BLM reasonably concluded that this was out of Tule's control and would be too speculative, and that decision was well within their discretion.[69]

B. Liability Under MBTA, Eagle Act, and APA

Another argument the plaintiffs presented to the court is that the BLM violated the MBTA, the Eagle Act, and the APA by granting Tule's right-of-way request.[70] Specifically, plaintiffs argued that the BLM violated the MBTA and the Eagle Act because Tule's wind-turbines that would be created as a result of the BLM's right-of-way grant would lead to the unlawful "take" of migratory birds and eagles without a FWS permit.[71] To support their argument that the BLM violated the MBTA, plaintiffs relied on a D.C. Circuit case, *Humane Soc'y of the United States v. Glickman*, which held an agency liable under the MBTA for permitting the killing of migratory birds without a FWS permit.[72] In *Glickman*, the District of Columbia Circuit held the United States Department of Agriculture violated the MBTA because the agency itself implemented the "Integrated Goose Management Program" that called for the killing of Canada Geese in certain circumstances.[73] Plaintiffs argued that even if the BLM is not considered liable under the MBTA,

66. *Id.* at 579.
67. *Id.* at 584.
68. *Id.*
69. *Id.* at 584-85.
70. *Id.* at 585.
71. *Id.*
72. *Id.*; Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 888 (D.C. Cir. 2000).
73. *Glickman*, 217 F.3d at 884.

permitting the Tule right-of-way grant could potentially lead to the taking of migratory birds, which is contrary to the MBTA and thus unlawful under the APA.[74] The court rejected these arguments.[75]

First, the court held the MBTA does not account for "attenuated secondary liability" on regulatory agencies "whose regulatory acts do not directly or proximately cause the 'take' of migratory birds, within the meaning of [the act]."[76] The court explained the BLM did not "take" migratory birds in granting the right-of-way permit because it was only authorizing a right-of-way grant for the construction and operation of a wind-energy plant, and it did not authorize Tule to "'take' migratory birds without a permit, within the meaning of the MBTA."[77] The court rejected plaintiffs' argument that *Glickman* is parallel to this scenario, because as the court reasons, the agency in *Glickman* "itself was implicated in the killing of migratory birds without a permit, in violation of the MBTA" and here, the BLM "was many steps removed in the causal chain" from the taking of any migratory birds potentially caused by wind-turbine collisions, and thus did not violate MBTA itself.[78]

The court concluded the Eagle Act, like the MBTA, does not impose liability on the BLM in the present situation, because the causal connection of any incidental taking of the eagles is too far removed from the BLM's granting of a right-of-way permit to Tule.[79] The court held that "in the narrow circumstances of the case" the BLM itself did not act in a way "that would directly or proximately result in the incidental take of eagles by it or Tule."[80]

The court also rejected plaintiffs' argument that the BLM's right-of-way grant is "contrary to law" within the meaning of the APA because it permitted actions by Tule that would lead to migratory-bird deaths, which is contrary to the MBTA.[81] Here, the court maintained that the BLM was acting within its regulatory authority in permitting the Tule right-of-way grant and is too removed from any potential violation of the MBTA for its action to be considered contrary to MBTA.[82] The court made it clear that the BLM merely approved a right-of-way permit, and did not "sanction or authorize the taking of migratory birds without a

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74. *Protect Our Cmtys. Found.*, 825 F.3d at 586.
75. *See generally id.* at 585-88.
76. *Id.* at 585.
77. *Id.*
78. *Id.* at 586; *see generally Glickman*, 217 F.3d at 882-88.
79. *Protect Our Cmtys. Found.*, 825 F.3d at 587.
80. *Id.* at 588.
81. *Id.* at 586.
82. *Id.* at 586-87.

permit."[83] For additional support of this conclusion, the court highlighted the BLM's inclusion of expressed conditions within the right-of-way permit that pertain to the MBTA and the Eagle Act.[84]

In an effort to explain the difference between agency action that was contrary to law and agency action that was too far removed to be considered contrary to law, the court mentioned *Anderson v. Evans* and *Wilderness Society v. U.S. Fish and Wildlife Service*.[85] In *Anderson*, the agency action was found contrary to NEPA because it relied on an environmental assessment and did not create an EIS despite meeting the criteria for needing an EIS, and that led to the killing of five gray whales.[86] In *Wilderness Society*, the Ninth Circuit found the FWS acted contrary to law when it "issued a permit allowing a third party to operate a 'commercial enterprise'" because it misconstrued the governing federal statute.[87] The court concluded that unlike the agencies in *Anderson* and *Wilderness Society*, the BLM here "has not misconstrued the requirements of the MBTA; nor has it encouraged or ratified unlawful acts taken by third parties in violation of the MBTA."[88] Instead, the court found the BLM acted reasonably in permitting the Tule right-of-way grant, and this action is too far removed from the potential of any taking of migratory birds or eagles by the Tule wind-turbines.[89]

IV. ANALYSIS

In deciding that the BLM did not violate the MBTA, the Eagle Act, or the APA, the court made two legal determinations.[90] First, the court silently asserted itself on one side of the circuit split on whether the MBTA applies to federal agencies. The court did not mention the circuit split in their decision.[91] Nor did the court discuss whether they agree that the MBTA applies to agencies.[92] Instead, the court concluded "that agencies may be held liable for violations of the MBTA when they *themselves* engage in the taking of protected birds" and thus concluded the MBTA applies to federal agencies.[93] Whether they intended to take a

83. *Id.* at 587.
84. *Id.*
85. *Id.*
86. Anderson v. Evans, 371 F.3d 475, 480 (9th Cir. 2004).
87. *See* Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1055 (9th Cir. 2003); *see also Protect Our Cmtys. Found.*, 825 F.3d at 587.
88. *Protect Our Cmtys. Found.*, 825 F.3d at 587.
89. *Id.* at 585-88.
90. *Id.*
91. *See generally id.*
92. *See generally id.*
93. *Id.* at 585, 588.

stance, this conclusion puts the Ninth Circuit on the D.C. Circuit's side of the split.

However, the Ninth Circuit need not worry that they inadvertently made this conclusion, because this is the correct interpretation of the MBTA. Although agencies are not included in the list of types of individuals who would be considered criminally liable under the Act in § 707(a)[94], it would be, as the D.C. Circuit states, "odd" if Congress did not consider agency action that permitted the taking of any migratory birds unlawful under § 703(a), because the Act holds nations accountable, which logically includes the federal agencies given power by those nations.[95] Additionally, for nearly eighty years from the time the Act was adopted, FWS interpreted the Act to include enforcement against federal agencies.[96] The Department of the Interior even stated that the FWS change in interpretation was not a reflection of a policy change, nor a "filling in the gaps" of the statute.[97] Lastly, the Supreme Court has held in dictum that the MBTA applies to federal agencies.[98] In determining whether a change to the Northern Timber Compromise was constitutional, the Court stated that agencies have obligations to manage their lands to neither kill nor take the northern spotted owl within the meaning of the MBTA.[99] Although the Court has not addressed this issue squarely, it is evident the Supreme Court has interpreted and will interpret the MBTA to apply to agencies. Thus, whether it was intentional or not, the Ninth Circuit put itself on the legally accurate side of this circuit split.

Second, in holding that a violation of the MBTA and the Eagle Act requires an action that directly or proximately violates the Acts, the court drew a line in the sand.[100] The action in question was not the construction and operation of the wind-turbines; the action in question was the granting of a right-of-way permit. As the Ninth Circuit held, the BLM did not "take" or encourage the taking of any migratory birds or eagles by granting a right-of-way permit, and therefore it cannot be in violation of the MBTA, the Eagle Act, or the APA.[101] The BLM was neither encouraging nor permitting the "take" of any migratory birds or eagles in

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94. 16 U.S.C. § 707(a) (2012).

95. 16 U.S.C. § 703(a) (2012); Humane Soc'y of the U.S. v. Glickman, 217 F.3d 882, 887 (D.C. Cir. 2000).

96. *See Glickman*, 217 F.3d at 888.

97. *Glickman*, 217 F.3d at 887.

98. Robertson v. Seattle Audubon Soc'y., 503 U.S. 429, 438 (1992).

99. *Id.* at 438-39.

100. Protect Our Cmtys. Found. v. Jewell, 825 F.3d 571, 588 (9th Cir. 2016).

101. *Id.*

granting this permit; thus it was not contrary to the MBTA under the APA. Under this ruling, if there is a clear causal connection that agency action violates the MBTA or the Eagle Act, then the agency in question would no doubt be criminally liable under the Acts; but if there is not a clear causal connection, then there can be no enforcement under the Acts.

In deciding the BLM did not violate NEPA by granting the right-of-way permit, the Ninth Circuit remained consistent with prior jurisprudence that calls for deference to agency discretion when reviewing high technical aspects of an EIS. Specifically, the court gave the BLM deference in its review of the EIS, the purpose-and-need statement, project alternatives, and mitigation measures.[102] The court is not a panel of scientists and should not be expected to judge the highly technical details of whether a migratory bird nighttime survey was appropriate. By allowing for agency discretion, the court was exercising its proper role.

Despite deferring to agency discretion in its review, the court mistakenly stated it would be applying a more stringent review. The court incorrectly stated "a reviewing court will take a 'hard look' at the EIS to determine whether it 'contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'"[103] This is not correct. The court's role is to determine *whether the agency has taken a* "hard look" at the significant impacts its proposed project has on the environment.[104] If the court had applied this review, it would be contrary to both Ninth Circuit's and Supreme Court's prior jurisprudence that established it is not the role of the court to "impose upon the agency [our] notion of which procedures are best or most likely to further some vague, undefined public good."[105] The court, however, did not apply this stringent review. Instead, the court repeatedly granted deference to the BLM's determinations regarding what surveys to conduct in creating the EIS and the BLM's ultimate determinations on the effects the project will have on the environment.[106] Because the court did not take a "hard look" at the BLM's EIS, the court's assertion that it is their role to take a "hard look" at an EIS was a harmless error.

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102. *Id.* at 579-85.

103. *Id.* at 579 (quoting Churchill Cty. v. Norton, 276 F.3d 1060, 1072 (9th Cir. 2001)).

104. *Churchill Cty.*, 276 F.3d at 1072.

105. *Id.* (*quoting* Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 549 (1978)).

106. *Protect Our Cmtys. Found.*, 825 F.3d at 579-85.

V. CONCLUSION

Throughout its analysis, the Ninth Circuit reviewed the facts, challenges, and arguments in a manner consistent with prior jurisprudence. Although the court mistakenly stated it would be applying a stringent review of the BLM's EIS, it followed prior jurisprudence and deferred to agency discretion. In deciding that the MBTA applies to agencies only when they themselves violate the Act, the court not only drew a line in the sand for determining what agency action violates the Act, but also silently asserted itself on the D.C. Circuit's side of the split on whether the MBTA applies to agencies. Despite being challenged to decide between two environmentalist objectives, the court maintained an objective review and ultimately reached the correct legal conclusion.

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