

Ninth Circuit Upholds BIA Approval of Southern California Wind Energy Project

The [U.S. Court of Appeals for the Ninth Circuit has upheld](#) the approval of a utility-scale wind facility in California, rejecting claims that the Bureau of Indian Affairs violated the National Environmental Policy Act and the Bald and Golden Eagle Protection Act in approving the project.

The project proponent (Tule Wind, LLC) sought approval to construct 85 wind turbines in an area east of San Diego. The project was split into two phases. Phase I involved 65 turbines on federal land, requiring approval from the Bureau of Land Management, while phase II consisted of 20 turbines on the Ewiiapaayp Indian Reservation, requiring approval by the BIA of Tule's lease with the tribe. BLM prepared an environmental impact statement that covered both project phases. The BIA then approved the lease for phase II in a record of decision that relied on the EIS prepared by BLM.

The plaintiffs unsuccessfully challenged the BIA's approval on the following grounds:

- **Alternatives.** The plaintiffs argued that the BIA should have considered a phase II alternative involving fewer turbines. In rejecting this argument, the court emphasized that phase II was not an isolated project, and that the EIS prepared by BLM for the project as a whole analyzed a sufficient range of alternatives, including using fewer turbines. The court reaffirmed that an EIS must evaluate a reasonable range of alternatives, "not every possible alternative." The court also reaffirmed that the range of reasonable alternatives is dictated by the stated goal of the project.
- **Supplemental EIS.** The plaintiffs claimed that a supplemental EIS was needed in light of new information arising after the EIS was published. In rejecting this claim, the court explained that NEPA does not require a supplemental EIS every time new information comes to light; rather, supplementation is required only if the new information shows that the project will have a significant environmental impact that the EIS did not consider. Here, the various new pieces of information identified by the plaintiffs were insufficient to require supplemental NEPA review.
- **Eagle Take Permit.** In addition to their NEPA claims, the plaintiffs challenged the BIA's project approval under the Bald and Golden Eagle Protection Act. Although the U.S. Fish & Wildlife Service recommended that the BIA condition its approval on Tule obtaining a take permit under the eagle act before commencing construction, the BIA only required Tule to apply for a permit before it began operation of the turbines. In rejecting the plaintiffs' claim, the court ruled it was sufficient that the BIA's approval made it clear that Tule must comply with any requirements under the eagle act and spelled out the consequences of noncompliance.

The court concluded by emphasizing that "the protections given by our environmental laws are not absolute." Accordingly, "NEPA doesn't control any substantive result but rather requires procedural protections to ensure that a 'hard look' was given to reasonable alternatives." Similarly, the eagle act "doesn't outlaw every killing of the eagle, just take without a permit." While the court recognized the concerns raised about the well-being of protected eagles, it was persuaded that those concerns can be addressed through the eagle act permitting process. The court thus allowed the project to proceed.

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