No. 14-55842 (consolidated with No. 14-55666)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PROTECT OUR COMMUNITIES FOUNDATION,

Plaintiff-Appellant,

v.

SALLY JEWELL, *et al*.,

Defendants-Appellees,

and

TULE WIND, LLC,

Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

APPELLANT'S PETITION FOR REHEARING EN BANC

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COUNSEL'S STATEMENT OF REASONS FOR REHEARING EN BANC

This appeal raises an issue of exceptional importance: whether a federal agency—here, the Bureau of Land Management ("BLM")—may authorize a project to be built on federal land, *knowing* that the project will kill migratory birds in violation of the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 ("MBTA"). In resolving that issue, the panel held that, even if it is inevitable that the BLM-authorized industrial wind power project at issue will kill birds protected by the MBTA, and BLM also knows that the recipient of the BLM right-of-way has no intention of obtaining an MBTA permit prior to the unlawful killing, the BLM decision authorizing the project is nonetheless "in accordance with law" within the meaning of the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA").

This ruling contravenes the Supreme Court's admonition that the APA "requires federal courts to set aside agency action that is 'not in accordance with law,' which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." *FCC v. NextWave Pers. Commc'ns.*, 537 U.S. 293, 300 (2003). The panel ruling also conflicts with other rulings from this Court setting aside federal agency authorizations of third party conduct on the grounds that those authorizations will result in violations of federal environmental

law. *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004) (holding that the National Marine Fisheries Service did not act "in accordance with law" when it authorized the hunting of gray whales by a Tribe that did not obtain permission to take whales in the manner required by the Marine Mammal Protection Act); *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1062 (9th Cir. 2003) (holding that the FWS did not act "in accordance with law" when it authorized a third party to engage in a commercial activity in a designated wilderness area in violation of the Wilderness Act).

The panel ruling should also be reheard en banc because it is in conflict with precedent from the D.C. Circuit. In *Humane Society of the U.S. v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000), that court held that the MBTA applies to federal agencies and that such agencies may be sued under the APA when they take action in contravention of the MBTA's permitting mechanism. *Id*. at 885. Moreover, in a recent decision issued after the panel ruling at issue, the D.C. Circuit resolved an issue concerning MBTA compliance in connection with another industrial wind power project, by holding the project proponent to its "unequivocal" commitment at oral argument that it would not construct the project without first obtaining an MBTA permit. *Pub. Emp. for Envt'l Resp. v. Hopper*, __F.3d__, No. 14-5301, 2016 WL 3606363, at *7 n.11 (D.C. Cir. July 5, 2016) ("*PEER*"). In sharp

contrast, as the D.C. Circuit noted, in this case the project developer ("Tule") has made no such commitment, *id.*; Tule has instead taken the position that it has no obligation to obtain an MBTA permit.

Finally, rehearing en banc is appropriate because the issue resolved by the panel has tremendous practical as well as legal significance. According to the Fish and Wildlife Service ("FWS"), which is BLM's sister agency within the Interior Department and administers the MBTA, bird populations are declining, as "sources of avian mortality"—including wind projects placed in migratory pathways—are "becoming more prevalent across the landscape." 80 Fed. Reg. 30032 (May 26, 2015). If, as the panel held, federal agencies may authorize harmful projects without first ensuring compliance with the MBTA's permitting requirement—which may affect project siting among other up-front measures for minimizing impacts—this will accelerate population declines, undermining the U.S.'s treaty obligations to prevent such harms.

BACKGROUND

A. The MBTA

The "International Convention for the Protection of Migratory Birds," 39 Stat. 1702 (1916), between the U.S. and Great Britain (on behalf of Canada) addressed "a national interest of very nearly the first magnitude." *Missouri v.*

Holland, 252 U.S. 416, 435 (1920). The treaty "recited that many species of birds in their annual migrations traversed many parts" of the U.S. but "were in danger of extermination through lack of adequate protection." *Id*. at 431.

Additional conventions for the protection of migratory birds were subsequently entered into with Mexico, Japan, and the former Soviet Union. These treaties "impose substantive obligations on the United States for the conservation of migratory birds and their habitats, and through the [MBTA], the United States has implemented these migratory bird conventions with respect to" the U.S. Exec. Order No. 13186, 66 Fed. Reg. 3853, 3853 (Jan. 10, 2001).

In enacting the MBTA, Congress intended to "prohibit[] the killing, capturing or selling of any of the migratory birds included in the terms of the treaty except as permitted by regulations" issued by the FWS. *Missouri*, 252 U.S. at 431. Toward that end, section 703 provides that:

> [u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . included in the terms of the conventions . . . .

16 U.S.C. § 703(a). As the D.C. Circuit reasoned in holding that the MBTA's prohibitions extend to federal agencies, "as legislation goes, § 703 contains broad and unqualified language—'at any time,' 'by any means,' 'in any manner,' 'any

migratory bird'"; the "one exception to the prohibition is in the opening clause—'[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter . . . .'" *Glickman*, 217 F.3d at 885.

Section 704 provides that, "in order to carry out the purposes of the conventions . . . the Secretary of the Interior is authorized and directed, from time to time . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow . . . killing . . . of any such bird . . . and to adopt suitable regulations permitting and governing the same . . . ." 16 U.S.C. § 704(a). Pursuant to that authority, the FWS has adopted permitting regulations that have been invoked to authorize various forms of "take" of migratory birds, including take associated with activities conducted and/or authorized by federal agencies that, while not *designed* to kill migratory birds, directly and foreseeably do so.

For example, one FWS regulation provides that "the Armed Forces may take migratory birds incidental to military readiness activities" provided that the military "cooperate[s] with the Service to develop and implement appropriate conservation measures to minimize or mitigate . . . significant adverse effects." 50 C.F.R. § 21.15(a)(1). Another FWS implementing regulation authorizes the issuance of permits for "special purpose activities related to migratory birds," 50

C.F.R. § 21.27, and the FWS has stated that one such justification may exist "whereby take of migratory birds *could result as an unintended consequence*" of an otherwise lawful activity. 72 Fed. Reg. at 8947 (emphasis added).

B. Industrial Wind Projects Foreseeably Kill Migratory Birds.

Large industrial-scale wind projects, such as the one at issue here, are inherently hazardous to birds protected by the MBTA. In 2009—when there were far fewer projects than there are today—the FWS "estimated that wind turbines cause[d] as many as 440,000 bird deaths per year." R. Kyle Evans, *Wind Turbines and Migratory Birds: Avoiding a Collision Between the Energy Sector and the Migratory Bird Treaty Act*, 15 N.C. J.L. & Tech. On. 32, 46 & n.86 (2014).

These projects involve enormous spinning turbines that occupy the same airspace used by migratory birds; the turbines can "attain incredibly high speeds at the blade tips, up to 180 mph, creating added difficulties for migrating birds attempting to navigate through or around" the turbines; and they are "often placed in wind corridors directly in the path of migratory birds." *Id*. at 47. For example, hawks and other "[r]aptors are especially susceptible to wind turbine collisions," since their flight behaviors bring them into direct conflict with turbines. *Id*. at 49.

Bird mortality from turbine collisions has been especially well-documented at projects in California. The "first large-scale wind energy development took

place in California," and studies of the Altamont and Tehachapi facilities have documented many hundreds of deaths of various migratory bird species over the years. ER-153-54. The "wind turbines located at Altamont Pass" alone "are estimated to kill '1,766 birds annually, including between 881 and 1330 raptors.'" Evans, *supra*, 15 N.C.J.L. & Tech. On. at 48 & n.95. "Avian mortality has also been documented at other California windplants," leading to estimates that "6,800 birds were killed annually at the San Gorgonio wind facility based on 38 dead birds found while monitoring nocturnal migrants." ER-154.

C. The Tule Project

As described by the panel, this case challenges a thirty-year "right-of-way grant by BLM that would permit Tule to construct and operate a wind energy facility on 12,360 acres of [public] land in the McCain Valley, 70 miles east of San Diego." Slip op. at 7. The project as approved consists of 62 turbines and could not be built on land administered by BLM without the agency's express authorization. *Id.*

The Administrative Record establishes that Tule, like other industrial wind projects, will *unavoidably* kill migratory birds protected by the MBTA. Millions of birds, including raptors and "nocturnal migrating songbirds," pass over Southern California every year. ER-142 (comments of Natural Resources Defense Council

and Audubon California). Accordingly, BLM's Environmental Impact Statement ("EIS") concluded that the project will have "unavoidable adverse impacts" on migratory birds, ER-126, and that a number of bird species that use the Tule site routinely fly at heights that will place them directly in the turbines' vast "rotor swept area" and hence on a collision course with the turbines. ER 127-28 (explaining that red-tailed hawks, turkey vultures, white-throated swifts, and ravens, among other species, had the "highest encounter rates"); *see also* ER-139 (comment by the California Department of Parks and Recreation that the "project would have adverse impacts to migratory birds protected under the [MBTA]" and that "[w]ind turbines have been well documented to cause mortality to a variety of migratory birds"); Supplemental Excerpts of Record ("SER")-732 (concession by Tule's consultant that the project's "greatest potential impact" on "avian species is direct mortality or injury from collisions with turbines").

In view of such impacts, the U.S. Environmental Protection Agency advised BLM that "[g]iven the known bird use and identified nesting birds in the vicinity, *several special status bird . . . species have a significant risk of mortality*" and that "EPA is concerned about potential impacts to sensitive wildlife species, since the proposed Project area supports a number of resident and migratory birds"; accordingly, EPA urged BLM to "specify" and "clarify how the Applicant *will*

comply with the Migratory Bird Treaty Act . . . ." ER-130-35 (emphasis added).

Yet although BLM expressly conditioned the right-of-way on Tule complying with *other* environmental permitting requirements[1], it did not do so with regard to the MBTA. Moreover, despite the fact that obtaining a permit is the "*one exception* to the prohibition" on take in section 703 of the MBTA, *Glickman*, 217 F.3d at 885 (emphasis added), BLM instead required Tule to implement an "Avian and Bat Protection Plan," which provides for "post-construction bird . . . *mortality monitoring and reporting*," SER-504 (emphasis added), i.e., it *presumes* that migratory birds *will* be killed when the project is operated as authorized. *See also* ER-147 (explaining that the "primary objectives of the post-construction baseline monitoring *are to estimate avian . . . mortality rates at the sites, and to determine whether the estimated mortality is lower, similar, or higher than the average mortality rates at other local, regional, and national projects*") (emphasis added); ER-148 (describing the "adaptive management" that will be based on a "report summarizing the number of species found as fatalities" and "the estimates of total fatalities for the Project").

[1] *See, e.g.*, SER-496 (requiring compliance with a "Biological Opinion" issued by the FWS—the mechanism for compliance with the Endangered Species Act); SER-408-09 (requiring compliance with the "404 permit process" administered by the Corps of Engineers for wetlands impacts); SER-407 (requiring compliance with the National Historic Preservation Act review process).

As acknowledged by the panel, the FWS specifically advised BLM "that the Protection Plan was *not a 'take permit,'*" as is required by the MBTA for any foreseeable killing of migratory birds. Slip op. at 8 (emphasis added). Yet although BLM could have specifically conditioned its right-of-way on Tule obtaining an MBTA permit, just as BLM did for permits required by other federal environmental statutes, BLM failed to do so. Nor did Tule make any commitment that it would obtain an MBTA permit before killing migratory birds through operation of a BLM-authorized project on public land.

D. Proceedings In The District Court And Before The Panel

In the district court and before the panel, Plaintiff Protect our Communities Foundation ("POC") advanced a straightforward legal claim: that when BLM authorized the project to be built and operated on federal land *knowing* that it would violate the MBTA's take prohibition when functioning as authorized by BLM—because the project will kill migratory birds without Tule first obtaining an MBTA permit—BLM's decision is "not in accordance with law" and is "without observance of procedure required by law," within the meaning of the APA. 5 U.S.C. §§ 706(2)(A), (D).

In response, BLM did *not* dispute that when industrial wind turbines foreseeably and directly kill migratory birds, as will occur here, that violates the

MBTA. Indeed, the government conceded that "MBTA liability *plainly extends to . . . activities that incidentally but directly take migratory birds such as wind-turbine operations*," regardless of whether that is the *purpose* of the activity that is inherently hazardous to birds. Answering Brief of Federal Defendants ("Fed. Br.") at 36-37 n.7.

Further, the government agreed with Plaintiffs that this Court's MBTA precedents—particularly *Seattle Audubon Society v. Evans*, 952 F.2d 927 (9th Cir. 1991) and *City of Sausalito v. O'Neill*, 386 F.3d 1186 (9th Cir. 1995)—are consistent with the proposition that the MBTA *does* apply to the direct take that inevitably results from industrial wind turbine operation, although the statute does not reach so far as to encompass indirect effects associated with the "mere allowance of habitat modification." Fed. Br. at 36 & n.7. Consequently, BLM's defense was that, regardless of whether Tule predictably will use its BLM right-of-way in a manner that kills birds in violation of the MBTA, *BLM itself* has no legal culpability for approving a project with such foreseeable impacts.

Tule took a different tack. Not only did the company make no commitment whatsoever during the BLM administrative proceedings to obtain an MBTA permit prior to project construction or operation, but Tule argued that it was under no obligation to obtain an MBTA permit regardless of the project's impact on

migratory birds because, even if entirely predictable, such an "incidental" impact is not the *purpose* of the project. *See* ECF No. 30-1 (Tule's summary judgment motion) in No. 3:13-cv-00575, at 42-43 ("There is no statutory or regulatory requirement that BLM must obtain or require Tule to obtain a permit for incidental take" of migratory birds.). Tule adhered to this position in the appellate proceedings, *see, e.g.*, ECF No. 34-1.

After the district court rejected POC's claim, the panel affirmed. In doing so, the panel recognized that "[t]hrough the APA's prohibition against unlawful agency action, a plaintiff may bring a civil suit to compel agency compliance with the MBTA." Slip op. at 24 (citing *City of Sausalito*). The panel further acknowledged that federal "agencies may be held liable for violations of the MBTA when they *themselves* engage in the taking of protected birds"—including, evidently, through the operation of an industrial wind turbine. Slip op. at 25 (citing *Glickman*). Yet because BLM issued a right-of-way to Tule to construct and operate the project at issue, rather than BLM doing so itself, the panel held that BLM's "purely regulatory action" is too "far removed" for BLM to be sued under the APA. *Id.*

Although Tule made it crystal-clear to BLM that it had no intention of obtaining an MBTA permit—and that it perceived no legal obligation to do so—

and despite the fact that BLM expressly conditioned the right-of-way on a monitoring "Plan" rather than an MBTA permit, the panel ruled that "[w]ithout *further* indication of [BLM's] involvement in the putative violation, we cannot hold the BLM complicit in future unlawful activity, separately committed by a grantee, through a mere failure to intervene at the permitting stage." Slip op. at 27 (emphasis added). Accordingly, under the panel's approach, even if it is "inevitabl[e]" that the BLM-authorized project will kill migratory birds in contravention of federal law, BLM's authorization does not fall afoul of the APA. *Id*. at 24 (emphasis added).

ARGUMENT

REHEARING EN BANC IS APPROPRIATE

I. THE PANEL RULING RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE AND CONFLICTS WITH CIRCUIT PRECEDENTS.

The panel holding that BLM may approve a major industrial project on federal land, while fully aware that the project will "inevitably" violate federal environmental law, raises an issue of exceptional importance and conflicts with other Circuit precedents. Indeed, in recognition of the Supreme Court's directive that the APA's prohibition on "agency action that is 'not in accordance with law'" encompasses "*any* law," *NextWave Pers. Commc'ns*, 537 U.S. at 300, this Court

has invalidated other agency authorizations that will foreseeably lead to third party violations of federal environmental law. *See, e.g.*, *Anderson*, 371 F.3d at 501; *Wilderness Soc'y.*, 353 F.3d at 1062.

The panel purported to distinguish such cases on the grounds that the "agencies in question acted unlawfully because they improperly exercised their regulatory authority to sanction conduct by third parties that was itself unlawful," whereas, "in contrast, the BLM 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." Slip op. at 28. This distinction is illusory. Once again, the record in this case demonstrates that BLM *knows* that operation of the industrial wind turbines it has authorized on BLM-administered lands will kill migratory birds, and that BLM also knows that Tule has no intention of obtaining an MBTA permit before such killing occurs. Moreover, rather than take the elementary step of conditioning the right-of-way on Tule obtaining an MBTA permit—as BLM did for many *other* required environmental permits—BLM instead required Tule to adopt a monitoring "Plan" that indisputably does *not* constitute an MBTA permit and thus does not further the purposes of the MBTA in the manner that Congress mandated. Thus, as in other Circuit precedents, BLM

has indeed "encouraged or ratified unlawful acts taken by third parties in violation of the MBTA." Slip op. at 28.[2]

II. THE PANEL RULING CONFLICTS WITH D.C. CIRCUIT PRECEDENT.

Rehearing is also appropriate because the panel ruling conflicts with the D.C. Circuit's ruling in *Glickman* that federal agencies are subject to suit under the APA for taking action in contravention of the MBTA. The panel found *Glickman* "distinguishable" on the grounds that "[i]n that case, the agency itself was implicated in the killing of migratory birds without a permit, in violation of the MBTA." Slip op. at 25. In fact, however, in *Glickman*, the defendant federal agency worked in tandem with a non-federal actor to carry out the project at issue,

[2] The panel held that "BLM has not sanctioned or encouraged an unlawful course of action by Tule" because the Record of Decision ("ROD") "indicates that its approval of the Project is expressly contingent on Tule's compliance with 'all applicable laws and regulations,' which in this case includes the MBTA . . . ." Slip op. at 27. However, neither the ROD, nor the right-of-way itself, including 110 enumerated "Stipulations," makes any specific reference to the MBTA, let alone requires Tule to obtain an MBTA permit prior to the killing of migratory birds. *See* SER-381, SER-490-535. The right-of-way is *instead* conditioned on "compliance with . . . the *Avian and Bat Protection Plan*," SER-504 (emphasis added), which, while anticipating "bird mortalities," SER-503, indisputably does not constitute an MBTA permit. BLM could have expressly conditioned the right-of-way on Tule's obtaining such a permit, as BLM did for other federal permitting requirements notwithstanding the generic language recited by the panel, but declined to do so.

see 217 F.3d at 884 (explaining that the USDA was working "in conjunction with Virginia state agencies" in carrying out the program).

That is functionally identical to the situation here. Indeed, elsewhere in its ruling, the panel stressed that BLM granted the right-of-way not merely in response to Tule's request but, crucially, also to carry out BLM's *own* "goal of approving up to 10,000 watts of renewable energy development on public lands by 2015." Slip op. at 14. Thus, just as the D.C. Circuit took appropriate steps to ensure MBTA compliance in *Glickman* and, more recently, in *PEER*—which also involved a federally authorized wind power project—BLM is more than sufficiently "complicit in future unlawful activity" for the agency to be required to ensure "Tule's future compliance with the MBTA" when Tule will operate an industrial wind project on federal land, with federal authorization, to further the federal government's own stated policy goals. *Id*. at 27.

Indeed, under the panel's anomalous ruling, if BLM were to further its policy objectives by building the project *itself*, then the agency could be sued under the APA for failing to clearly commit to obtaining an MBTA permit before killing migratory birds. Yet because BLM has instead given a right-of-way to Tule to engage in the very same conduct, then, under the panel ruling, BLM has no "affirmative duty" to ensure MBTA compliance. Slip op. at 27. This result makes

little legal or logical sense and, in tension with the D.C. Circuit's analysis, also creates a perverse incentive for federal agencies to circumvent the MBTA's protective permitting regime by having third parties carry out the agency's preferred actions.

III. THE PANEL RULING UNDERMINES THE CRITICAL CONSERVATION OBJECTIVES OF THE MBTA AND THE MULTIPLE TREATIES IT IMPLEMENTS.

Allowing BLM and other federal agencies to disregard the MBTA's permitting requirements when agencies authorize industrial wind and other projects to be built on federal land—as does the panel ruling—undermines a century-old "national interest of very nearly the first magnitude," i.e., the preservation of migratory bird populations. *Missouri*, 252 U.S. at 435. Indeed, just as migratory birds were "in danger of extermination through lack of adequate protection" when the MBTA was first enacted, *id*. at 431, the same holds true today, although the causes may have changed dramatically.

As recently explained by the FWS, "millions of birds are directly killed by interaction with human structures and activities," and the "cumulative impacts of these sources of mortality are contributing to continental-scale population declines for many species." 80 Fed. Reg. 30033. Accordingly, ensuring that MBTA permits are pursued for activities that are inherently hazardous to birds, such as the

operation of industrial wind turbines on federal lands, is vital to "reduce existing human-caused mortality of birds and help avoid future impacts . . . ." *Id.* The panel ruling, however, aggravates, rather than alleviates, the grave problem of plummeting bird populations, by allowing federally authorized projects to circumvent the MBTA's essential safeguards.

The panel's suggestion that BLM may "withdraw its right-of-way approval if it determines that Tule has failed to comply with these [MBTA] provisions"—which "substantially allayed" the panel's conceded "concerns of agency complicity in the instant case," Slip op. at 27—ignores both legal and practical reality. Having approved a major industrial operation with full knowledge that Tule has no intention of applying for an MBTA permit before killing migratory birds, it is inconceivable that BLM will "withdraw" its right-of-way when the energy project is functioning precisely as anticipated at the time the right-of-way was issued. Rather, the *only* time when MBTA compliance can be ensured—including, importantly, in the assessment of whether the project is *sited* in such a manner as to minimize impacts—is at the stage when the right-of-way is issued and subject to APA review.[3]

CONCLUSION

[3] Because the MBTA has no citizen suit provision, the APA is the exclusive legal vehicle by which the public can enforce the statute.

The panel's ruling that BLM acts in "accordance with law" and in "observance of procedure required by law" when it grants a right-of-way for a project that will inevitably kill migratory birds in the absence of an MBTA permit is contrary to Supreme Court and Circuit precedent; conflicts with D.C. Circuit rulings on the MBTA; and contravenes the compelling national interest in conserving migratory birds. Accordingly, the ruling should be reheard by the Court en banc.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points

or more, and contains 4,172 words.

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PROOF OF SERVICE

I hereby certify that on July 22, 2016, I electronically filed the foregoing rehearing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system, which includes the following counsel of record for Federal Defendants and Defendant-Intervenor:

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