UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NULANKEYUTMONEN NKIHTAQMIKON, et al., Plaintiffs, vs. ROBERT K. IMPSON, Acting Regional Director, Eastern Region, Bureau of Indian Affairs, et al. Defendants.	Civil No. 05-cv-00168-JAW

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS AND INCORPORATED MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION

INTRODUCTION

Plaintiffs Nulankeyutmonen Nkihtaqmikon ("We Protect the Homeland") and individual tribal members have filed a complaint alleging that the Bureau of Indian Affairs ("BIA") violated the United States' Indian Trust Obligation as well as the following statutes: (1) the National Environmental Policy Act ("NEPA"); (2) the National Historic Preservation Act ("NHPA"); (3) the Indian Long-Term Leasing Act; and (4) the Administrative Procedure Act ("APA") when it approved a fifty year ground lease authorizing construction and operation of a liquefied natural gas (LNG) facility on sacred tribal grounds known as Split Rock.

The United States moves to dismiss Plaintiffs' complaint on the grounds that Plaintiffs' NEPA and NHPA claims are not yet ripe and that Plaintiffs lack standing for

all claims. For the reasons cited below, the United States' Motion to Dismiss ("Defs.' Motion") should be denied.

STATEMENT OF THE CASE

Plaintiffs David Moses Bridges, Vera J. Francis, Reginald Joseph Stanley, and other members of We Protect the Homeland live on, or immediately adjacent to, the Split Rock site. We Protect the Homeland was formed to protect sacred tribal land and the surrounding environment because of concerns about the impacts associated with the commitment of Split Rock for industrial development. Decl. of David Bridges at ¶ 2 ("Bridges Decl."). Under grant by lease, as approved by the BIA, the land is now committed to an industrial developer (Quoddy Bay, LLC) for fifty years for the purposes of constructing and operating a LNG facility.

Plaintiffs are directly affected by the BIA's transfer of pristine and sacred tribal land to an industrial developer. Split Rock is a small, three-quarter acre beach area abutting Passamaquoddy Bay. To the Passamaquoddy people, Split Rock signifies the rock created by the Great Father and action of Mother Earth. Decl. of Deanna Francis at ¶ 11 ("D. Francis Decl."). Plaintiff Stanley lives on the site, 250 feet from the rock. Decl. of Reginald Stanley at ¶ 2 ("Stanley Decl."). Plaintiff Bassett is a mere half mile away. Decl. of Mary Bassett at ¶ 2 ("Bassett Decl."). Plaintiff Bridges is less than a mile away. Bridges Decl. ¶ 2. Plaintiffs and other members of We Protect the Homeland walk along the natural Bay area to Split Rock to conduct traditional tribal rituals such as the Full Moon ceremony and Canoe Launching ceremony. Decl. of Vera Francis at ¶¶ 8-9 ("V. Francis Decl.").

As a result of the lease approved by the BIA, the right to occupy this sacred land is now transferred to an industrial developer for the next fifty years. The BIA approved the lease on June 1, 2005 relying upon an exception to the NEPA process referred to as a "Categorical Exclusion." Categorical exclusions allow the BIA to forego detailed NEPA analysis, but only for "single, independent actions not associated with a larger complex or facility" and for land transfers "where no change in land use is planned." Department Manual 516 DM 10.5 & 10.5(I). Prior to approval, the BIA did not prepare a NEPA Environmental Assessment (EA); nor did it consult with tribal members; nor did it inquire into the cultural, religious, or historic significance of Split Rock. The BIA provided no opportunity for public comment or input from affected parties before making its decision. The BIA did not prepare a fair market value appraisal but instead relied on the fact that the Pleasant Point Tribal Council negotiated an appraisal waiver a day before submitting the lease for the BIA's approval.

The BIA approved the lease as submitted by the Passamaquoddy Tribe Pleasant Point Tribal Council. The lease, as submitted, was marked by serious flaws during the Tribal Council process. The Tribal Council and tribal members did not have adequate time to consider the technical and complex eighty-plus page legal document because the final version was submitted fifteen minutes before the Council voted. Decl. of Hilda Lewis at ¶ 9 ("Lewis Decl."). The Tribal Council acted on the lease in the absence of independent legal advice because the developer, Quoddy Bay, LLC, paid an attorney to advise the tribe during the process. Lewis Decl. ¶ 12. The survey of the leased premises was inaccurate because the project was originally sited for Gleason Cove, a larger forty acre site not located on sacred tribal land. V. Francis Decl. ¶ 4. Input by tribal members

into the decision process was limited to members living on the reservation the day of the survey. Lewis Decl. ¶ 6. Defendant Impson was informed of these flaws by Plaintiffs and Tribal Council member Hilda Lewis. Lewis Decl. ¶ 13. The BIA did not independently review these issues but instead "rel[ied] on the actions of the Tribal Council." Lewis Decl. ¶ 16.

Plaintiffs initiated this action because of their concerns that in spite of the significant flaws in the Tribal Council's process and the obvious impacts of the project contemplated under the lease: (1) the BIA did not conduct its own review of the lease; (2) the BIA did not prepare its own fair market value appraisal; (3) the BIA did not conduct environmental, health and safety assessments; (4) the BIA did not provide prior opportunities for public comment; and (5) the BIA did not consult with any tribal members to hear their concerns. V. Francis Decl. ¶¶ 3, 12-15; Stanley Decl. ¶ 11. Due to their close proximity to the Split Rock site, Plaintiffs are also concerned because the lease allows for removal of their homes. Bassett Decl. ¶ 13; Stanley Decl. ¶ 13. Accordingly, Plaintiffs are concerned that the BIA has simply "rubber-stamped" an agreement that commits a pristine and natural beach area to industrial development, and has set in motion a chain of events that will fundamentally and permanently transform sacred tribal land and the surrounding environment. V. Francis Decl. ¶¶ 3, 14.

STANDARD OF REVIEW

A motion to dismiss is granted only if "no colorable hook exists upon which subject matter jurisdiction can be hung." Royal v. Leading Edge Products, Inc., 833 F.2d 1, 2 (1st Cir. 1987). The United States erroneously asserts that under a 12(b)(1) motion

to dismiss "[t]he court does not draw inferences favorable to the pleader." Defs.' Motion at 8. The United States does not, however, challenge Plaintiffs' factual allegations, only whether those facts are jurisdictionally sufficient. The First Circuit has clearly established that under a 12(b)(1) motion when the legal sufficiency of the facts are challenged, and not the facts themselves, then "the court must credit the plaintiff's well-pleaded factual allegations . . . draw all reasonable inferences from them in her favor, and dispose of the challenge accordingly." Valentin v. Hosp. Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001); Aversa v. United States, 99 F.3d 1200, 1209-10 (1st Cir. 1996). Further, the Supreme Court has stated, "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldon, 422 U.S. 490, 499-501 (1975).

INDIAN TRUST DOCTRINE AND STATUTORY FRAMEWORK

The Court should apply the high fiduciary standards of a trustee because of the unique trust relationship between the United States and Indians. "This special relationship can be viewed as both legal and moral in nature. In the broadest sense, it obligates the federal government to protect Indian citizens pursuant to its fiduciary duties." Dewakuku v. Cuomo, 107 F.Supp.2d 1117, 1126 (D. Ariz. 2000) (internal citations omitted); see also Assiniboine & Sioux Tribes of Ft. Peck Indian Reservation v. Bd. of Oil and Gas Conservation of the State of Montana, 792 F.2d 782, 794 (9th Cir. 1986). When reviewing federal agency action, the United States' fiduciary obligations also "mandate that special regard be given to the procedural rights of Indians by federal

administrative agencies." Dewakuku 107 F.Supp.2d at 1126 (citing HRI, Inc. v. Envtl. Prot. Agency, 198 F.3d 1224, 1245 (10th Cir. 2000)). Finally, "[i]n addition to a mandate found in a specific provision of a treaty, agreement, executive order, or statute, any action by the Government is subject to a general trust responsibility." Island Mountain Protectors, et al., 144 IBLA 168, 184 (1998) (citing United States v. Mitchell, 463 U.S. 206, 225 (1983)); see also Nance v. EPA, 645 F.2d 701, 710-11 (9th Cir. 1981); The Havasupai Tribe v. United States, 752 F. Supp. 1471, 1486 (D. Ariz. 1990), aff'd, 943 F.2d 32 (9th Cir. 1991), cert. denied, 503 U.S. 959 (1992); F. Cohen, Handbook of Federal Indian Law, Ch. 3, § C2c (1982 ed.) (emphasis added).

Therefore, Plaintiffs' NEPA, NHPA, and Indian Long-Term Leasing Act claims should be analyzed in light of the United States' trust obligations.

I. National Environmental Policy Act ("NEPA")

The BIA's action approving leases on tribal land constitutes "a major Federal action" and requires NEPA compliance. Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972). NEPA is a procedural statute that requires agencies to take into account environmental factors before making a decision or taking an action. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756-757 (2004). Specifically, NEPA requires an Environmental Impact Statement ("EIS") for all "major Federal actions." 42 U.S.C.S. § 4332(2)(C). An agency may prepare a more limited Environmental Assessment ("EA") to determine if an EIS is required. 40 C.F.R. § 1501.4(a)-(b). The BIA's departmental manual states that "Categorical Exclusions" from the EA requirement apply only to "single, independent actions not associated with a larger complex or facility" and these exclusions are applicable to land conveyances only "where no change in land use is

planned." Department Manual 516 DM 10.5 & 10.5(I). The BIA's NEPA duties are consonant with its trust duties. As noted in its departmental manual: trust obligations apply to Environmental Assessments and this type of documentation shall "[e]xplain how the decision will be consistent with the Department's trust responsibility." Department Manual 516 DM 2(4)(A)(2).

II. National Historic Preservation Act ("NHPA")

The NHPA is a "stop, look, and listen" statute that requires agencies to consult with any tribe that attaches religious or cultural significance to a historic property that may be affected by federal agency action. 16 U.S.C. § 470, *et seq.*; Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166-167 (1st Cir. 2003); 36 C.F.R. § 800.2(c)(2)(ii). Federal action is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including- (C) those requiring a Federal permit, license or approval." 16 U.S.C. § 470w(7). "Adverse effects" of an undertaking include the "transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance." 36 C.F.R. § 800.5(a)(2)(vii) (emphasis added). Therefore, "a federal agency . . . [must] make a reasonable and good faith effort to identify historic properties . . . determine whether those properties are eligible for the National Register . . . [and] assess the effects of the undertaking on the historic properties found." Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999); 36 C.F.R. §§ 800.4(b)-(c); 800.9(a); 36 C.F.R. § 60.4; 36 C.F.R. § 800.5. Properties of religious or cultural importance to an Indian tribe may be determined to be eligible for inclusion in the

National Register. 16 U.S.C. § 470a(d)(6)(A). Concurrent with the NHPA's express procedural duties to tribes, the United States must also adhere to its strict fiduciary duties. "While the trust responsibility created by environmental laws may be 'congruent' with other duties they impose, the enactment of those laws does not diminish the [Government]'s original trust responsibility or cause it to disappear." Island Mountain Protectors, 144 IBLA at 185.

III. Trust Obligation and Indian Long-Term Leasing Act

The Indian Trust Obligation requires the BIA to "protect the property rights of non-Indians from Indians; BIA has a trust responsibility to protect the tribe's natural resource base; and BIA has a duty to ensure that Indians deal fairly with non-Indians." Hawley Lake Homeowners' Ass'n v. Deputy Assistant Sec'y – Indian Affairs (Operations), 13 IBIA 276, 288 (1985). The Indian Long-Term Leasing Act requires independent and adequate consideration of leases. 25 U.S.C. § 415(a) ("Leasing Act"). The BIA's implementing regulations pursuant to the Leasing Act, codified as Part 162, requires the BIA to ensure that a lease is in accordance with all "Indian landowners'" wishes and best interests. 25 C.F.R. § 162.107(a). The United States' strict trust obligation applies to approval of commercial leases under the Leasing Act. "[B]y virtue of the control they place in the hands of the Secretary, section 415(a) and the implementing regulations of part 162 impose upon the government a fiduciary duty in the commercial leasing context." Brown v. United States, 86 F.3d 1554, 1563 (D.C. Cir. 1996). This duty is judged by the "most exacting" fiduciary standards. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (noting that the United States "has charged itself with moral obligations of the highest responsibility and trust.").

ARGUMENT

I. Plaintiffs Have Standing

Plaintiffs have standing for their claims under NEPA, NHPA, and the Indian Long-Term Leasing Act because they live within, or immediately next to, a site now leased for industrial development. Plaintiffs' concrete interests to use and enjoy Split Rock are directly threatened by the BIA's approval of a ground lease authorizing construction and operation of a massive LNG facility. Standing exists when a plaintiff can show: (1) "an injury in fact," (2) that is "fairly traceable to the challenged action of the defendant," and (3) which is likely redressable "by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Osediacz v. City of Cranston, 414 F.3d 136, 139 (1st Cir. 2005); Sullivan v. City of Augusta, 310 F. Supp. 2d 348, 352 (D. Me. 2004). It is well established that, "[i]t is sufficient for the case to proceed if at least one petitioner has standing." Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 55 (1st Cir. 2001).

A. Plaintiffs Have a Clear Injury-in-Fact.

Taking all facts and material allegations as true, and drawing all reasonable inferences in Plaintiffs' favor, the Court should find that Plaintiffs are injured by the BIA's lease approval, conducted without NEPA and NHPA compliance, because: (1) Plaintiffs have a geographic nexus to the proposed project site, (2) Plaintiffs' concrete interests to use and enjoy the Split Rock site are now at increased risk, and (3) Plaintiffs were not given the opportunity for public participation as required by the procedural mandates of NEPA and NHPA.

First, Plaintiffs' geographic nexus to the Split Rock site, now leased for industrial development, establishes injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 572, n.7 (1992). In Lujan, a controlling case on standing, Justice Scalia writing for the majority firmly established that a plaintiff with a geographic nexus to a challenged project site has standing in a procedural injury suit:

> [O]ne living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement . . . even though the dam will not be completed for many years.

Id. The Lujan Court distinguished between plaintiffs residing "next door" to a site for a proposed facility, who clearly had standing, and those plaintiffs "at the other end of the country," who clearly did not have standing. Id. Plaintiffs in this case are literally next door to the proposed LNG terminal site, therefore qualifying for standing under Lujan. In fact, Plaintiff Reginald Stanley's home is physically on the site where the LNG terminal will be constructed - 250 feet from Split Rock. Plaintiffs Mary Bassett, David Bridges, and Hilda Lewis live within a mile of the leased Split Rock site. Their homes are actually threatened by the BIA's lease approval because the lease allows for the developer, Quoddy Bay, LLC, to relocate certain "structures." Plaintiffs thus have standing to challenge the BIA's approval of the fifty year ground lease because they live on or right next door to the proposed project area.

The First Circuit has also held that adjacent land owners, like Plaintiffs, with a geographic nexus to a proposed project site have standing in procedural injury suits. Dubois v. U.S. Dep't of Agriculture, 102 F.3d 1273, 1283 (1st Cir. 1993). In Dubois, the First Circuit found a plaintiff had standing because he visited the site to be affected by the challenged project once a year. Id**.** Here, Plaintiffs not only visit the now-leased Split

Rock site throughout the year to participate in religious and cultural ceremonies, but they actually live in the geographic area affected by the LNG ground lease.

Next, because of their intimate geographic nexus to the leased Split Rock site, Plaintiffs' particularized interests are now substantially threatened by the commitment of sacred tribal grounds to an industrial zone. The mere increased risk to Plaintiff's concrete interests to use and enjoy the Split Rock site is sufficient to establish injury, despite whether the LNG terminal will ever be constructed. TOMAC v. Norton, 193 F.Supp.2d 182, 188, n.1 (D.D.C. 2002) aff'd 433 F.3d 852, 860 (D.C. Cir. 2006). In TOMAC, community residents living adjacent to a proposed casino site had standing because their "interests in viewing local wildlife, walking in their neighborhood, and enjoying their own properties . . . are at risk of injury from a 24-hour-a-day casino attracting 4.5 million customers per year," even though the casino had not yet been built. Id. at 187. Similarly, Plaintiffs' interests in enjoying their properties, walking in their neighborhood, and conducting cultural and religious ceremonies, are at a substantially increased risk due to proposed construction of an industrial LNG terminal, regardless of when, how, or if, the LNG terminal is constructed.

Further, Plaintiffs are injured by the BIA's failure to comply with NEPA and NHPA because those are procedural statutes designed to protect precisely the interests asserted by Plaintiffs as adjacent landowners. Lujan, 504 U.S. at 572, n.8. NEPA and NHPA require informed decisionmaking before the BIA approves a fifty year industrial lease. NEPA firmly "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490

U.S. 332, 369 (1989). NHPA explicitly requires agencies to “stop, look, and listen” by consulting with any tribe that attaches religious or cultural significance to a historic property that may be affected by federal agency action. 16 U.S.C. § 470a(d)(6); see Narragansett Indian Tribe, 334 F.3d at166-67; 36 C.F.R. § 800.2(c)(2)(ii).

Given NEPA and NHPA’s clear procedural requirements, the BIA’s approval of the LNG ground lease without consulting or involving any members of the tribal community or the broader public is nothing short of shocking. The BIA conducted no Environmental Assessment (“EA”) and provided no public participation opportunities. Had the BIA followed these duties, it would have been alerted to the impacts of the lease approval on Plaintiffs’ interests in the Split Rock site. The BIA then could have made a more informed decision regarding the lease and taken measures to mitigate or minimize the impacts of the lease on Plaintiffs and the surrounding environment.

Contrary to the United States’ assertions, the BIA cannot avoid NEPA’s procedural requirements and then remedy those violations by later participation in other agencies’ NEPA processes. Defs.’ Motion at 14. Reliance on a post-decisional analysis renders pointless the very existence of NEPA as a procedural statute. An agency’s NEPA duties attach at the moment the agency makes a decision constituting a major Federal action, not after that decision. Strycker’s Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980); Davis, 469 F.2d at 596 (holding that BIA lease approvals are “major federal actions” subject to NEPA). The injury to Plaintiffs thus occurs at the moment the BIA’s failure to comply takes place. Sierra Club v. United States Dep’t of Energy, 287 F.3d 1256, 1264 (10th Cir. 2002).

B. Plaintiffs' Injury is Fairly Traceable to the BIA's Violation of Required Procedures and is Redressable by this Court.

Evaluating the second and third prongs of the test for standing, the Court should conclude that Plaintiffs' injury is "fairly traceable" to the BIA's failure to follow NEPA and NHPA procedures in approving the Split Rock lease and that Plaintiffs' injury is redressable by the Court. This conclusion is reinforced by the fact that courts apply a lower standard of review for procedural rights. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." Lujan, 504 U.S. at 572, n.7; Dubois, 102 F.3d at 1281.

In TOMAC, the D.C. District Court held that the BIA's action taking land into trust to permit future construction of a casino by a third party was traceable to plaintiffs' injuries. TOMAC, 193 F.Supp.2d at 187-88. The court found the BIA's action traceable because it was a "necessary prerequisite" to the building of the casino. Id. The future construction of the casino by an independent party was dependent on the BIA action. Id. Similarly, the BIA's final lease approval action is a necessary prerequisite to the construction of a major, industrial LNG facility. Without the BIA's approval, the LNG facility cannot be built. The lease approval has set in motion a chain of events, leading to the ultimate construction of an industrial LNG terminal that will significantly, and adversely, impact Plaintiffs. As the First Circuit has stated regarding other lease actions that violated NEPA, "[e]ach of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989) (quoting Massachusetts v. Watt, 716 F.2d 946, 952-53 (1st Cir. 1983)).

The United States erroneously asserts that Plaintiffs' injuries are not tied to the BIA's action because "the BIA . . . has yet to approve the ultimate construction and operation of a Liquefied Natural Gas facility." Defs.' Motion at 14. Plaintiffs are not required, however, to show that that the LNG terminal will definitely be constructed, or that once constructed the LNG terminal will harm their interests. Sierra Club v. U.S. Dep't of Energy, 287 F.3d at 1265. Rather, Plaintiffs are only required to demonstrate that the BIA violated NEPA and NHPA procedures in the lease approval action. The United States further ignores the fact that nowhere in the lease is there any mention of future involvement or authority on the part of the BIA. The BIA's procedural violations are traceable to Plaintiffs' injuries because the BIA's lease approval action was Plaintiffs' only opportunity to communicate to the BIA the significant effect that the Split Rock lease will have on their neighborhood.

Plaintiffs' injuries can be redressed by an order from this Court that the BIA perform an EA under NEPA and consult with the tribe under NHPA. Both NEPA and NHPA require that the BIA consider the impacts of its decisions on the environment and historically significant properties before those decisions are made. "It is far easier to influence an initial choice than to change a mind already made up." Marsh, 872 F.2d at 500 (quoting Watt, 716 F.2d at 952). The BIA made exactly the kind of uninformed decision that NEPA and NHPA aim to prevent when it approved the fifty year industrial lease without NEPA environmental analysis or NHPA public participation. See Sierra Club v. U.S. Dep't of Energy, 287 F.3d at 1265. Absent an order from this Court setting aside the BIA's lease approval, Plaintiffs will have no opportunity to voice their concerns

to the BIA about how this LNG terminal will impact their neighborhood and the historic Split Rock site that is of significant cultural and religious importance to their tribe.

In conclusion, the BIA is unquestionably required to comply with NEPA and NHPA when it approved the fifty year ground lease of the Split Rock site. Given Plaintiffs' geographic nexus to the leased site, and the injury they have suffered as the result of the BIA's complete and utter failure to follow these statutorily required procedures or to satisfy its trust obligations, Plaintiffs clearly have standing.

II. Plaintiffs' Claims are Ripe for Adjudication

The BIA's approval of the ground lease authorizing construction and operation of a LNG terminal, without any review under NEPA and NHPA, constitutes an actual and concrete controversy ripe for review. In determining whether Plaintiffs' claims are ripe, the Court's resolution turns on: the fitness of the issues for judicial decision, and the hardship to the parties of withholding court consideration. Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998).

A. Plaintiffs' Claims are Fit for Judicial Review.

With regard to the first prong of the ripeness analysis, there can be little dispute that Plaintiffs' claims are fit for review. Claims are fit for review if the agency action is final, and the issue presented is "purely legal." Assiniboine & Sioux Tribes of Fort Peck Indian Reservation, 792 F.2d at 789. The United States does not dispute that the BIA's lease approval is a final agency action nor could it. See Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1306-07 (D.D.C. 1986). Further, the issue of whether the BIA has an obligation to comply with NEPA and NHPA is purely a legal issue, not requiring any resolution of factual or abstract disagreements.

Plaintiffs' claims are fit for review now. NEPA and NHPA require procedural compliance at the time of the BIA's lease approval. Davis, 496 F.2d at 598; see also 16 U.S.C. § 470, *et seq*. As alleged in Plaintiffs' complaint, the BIA failed to comply with these required procedural duties when it committed the Split Rock site to industrial development for fifty years. Plaintiffs' claims are thus overdue: the BIA's failure should be reviewed "at the time the failure takes place, for the claim can never get riper." Ohio Forestry Ass'n., 523 U.S. at 737. It is critical to the Court's analysis that Plaintiffs' claims are based on procedural violations. Plaintiffs are harmed now by the BIA's uninformed and irreversible decision. This procedural injury has already occurred. See Sierra Club v. U.S. Dep't of Energy, 287 F.3d at 1264.

Further, the BIA's lease approval has the status of law with immediate legal effect. Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967). The BIA's commitment of Split Rock to an industrial developer has immediate legal effect because Quoddy Bay, LLC now holds land use rights under the lease to construct a LNG terminal. This right to occupy the land is a necessary precondition to development under the Federal Energy and Regulatory Commission's (FERC) regulations. See 18 C.F.R. § 4.41(h)(4)(i)-(ii). Also, Plaintiffs' legal rights under NEPA and NHPA to voice their concerns are now foreclosed. The BIA's final lease approval shut the door on Plaintiffs' participation in a process that directly affects them. The lease does not contain a provision for the BIA to reconsider the approval, nor does the BIA argue that it has such a right.

The "contingency" cited by the United States that FERC may later reject Quoddy Bay, LLC's permit does not render a review of the BIA's decision unripe for review.

Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1238 (10th Cir. 2004) (stating "the possibility that the NRC may deny [the project developer's] license application or that the Department of the Interior may rescind its conditional approval of the Skull Valley Band's lease--do not render the case unfit for judicial review."); see also Genl. Electric v. Envtl. Prot. Agency, 290 F.3d 377, 380 (D.C. Cir. 2002). Here, the BIA's lease approval has set in motion a chain of events that may lead to the construction of a project highly destructive to the environment, culture, and spiritual practices of the Passamaquoddy people. The fact that the project may not receive later required licensure is not a basis for finding that the BIA's decision is unfit for review.

B. Plaintiffs Will Suffer Continued Hardship with Delayed Judicial Review.

By granting Plaintiffs' request for relief, the Court can alleviate the hardship suffered by Plaintiffs as a result of the fear and uncertainty generated by the BIA's approval of the lease. See Thomas v. Union Carbide Agric Prods. Co., 473 U.S. 568, 581 (1985) (holding that uncertainty is a sufficient hardship). Plaintiffs' hardship is significant. As noted above, procedural injuries exist now. The only alternative to judicial review is for Plaintiffs to challenge the lease after a fifty-year waiting period. The BIA has no option to review its own approval or stop the LNG project if approved by FERC. See Am. Petroleum Inst. v. Knecht, 456 F. Supp. 889, 899 (C.D. Cal. 1978), aff'd 609 F.2d 1306 (9th Cir. 1979) ("[N]othing remains to be done by the agency Vis-à-vis [agency] approval. If the propriety of that approval is not ripe for judicial review at this time, it will never be ripe.").

Further, it is well-settled that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is

enough." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979) (citations omitted). Here, the impending injury is sufficient because the BIA's lease approval is the "but-for" trigger of a massive industrial project that will have serious risks to environmental, health, and public safety concerns, as well as impacts on Plaintiffs' religious and cultural practices. In a similar case, a group of plaintiffs successfully challenged an agency action that made feasible the future construction of a nuclear power plant because it was the "but-for" trigger of possible future injuries (risks of radiation exposure, thermal pollution, and nuclear accidents). Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 81 (1978). As in Duke Power, Plaintiffs are not precluded from seeking review merely because future steps are required before the LNG project irreversibly transforms the Split Rock site into an industrial zone.

Finally, the hardship to Plaintiffs of withholding judicial review is not mitigated by a potential future environmental analysis, as proposed by the United States. Defs.' Motion at 10-11. This argument suggests the kind of post-hoc rationalization that the Supreme Court has warned against. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) (warning courts to "critically review" agency explanations that come after making a decision to proceed because of the risk of "post-hoc rationalization.").

This Court should critically review the United States' assertion that subsequent environmental analysis will somehow cure the BIA's procedural violations, particularly since the BIA has no right to reverse the approval. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) ("NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.").

In Sierra Club v. Marsh, the First Circuit addressed the issue of postponing environmental analysis until after the project's approval and concluded that post-approval NEPA analysis is less protective of the environment and that NEPA procedural violations constitute real harm. Sierra Club v. Marsh, 872 F.2d at 503 ("the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation.").

The procedural violations in this case present an even stronger case of hardship to the Plaintiffs because of the BIA's unique trust responsibilities. Given the BIA's failure to meet its obligations to fully evaluate the impacts of the lease approval on the Tribe and the surrounding environment, this hardship will persist until and unless this Court sets the BIA's lease approval aside and requires the agency to comply with NEPA and NHPA.

III. Plaintiffs' Indian Long-Term Leasing Act and Trust Obligation Claim Should Not Be Dismissed

A. This Court has Jurisdiction Over Plaintiffs' Indian Long-Term Leasing Act Claim Under the APA.

As noted infra at page 23, Plaintiffs have a clear and unobstructed right to bring a claim under the APA in order to obtain relief from the Court for the BIA's failure to comply with the Indian Long-Term Leasing Act, 25 U.S.C. § 415 ("Leasing Act"), and its common-law Trust Obligation. Plaintiffs, a group of individual tribal members, are adversely affected by the BIA's lease approval because they must live with the consequences of the BIA's fifty year commitment of sacred tribal land to industrial development. As aggrieved individuals, Plaintiffs have standing because the BIA's approval is a final agency action subject to judicial review under section 702 of the APA. 5 U.S.C. § 702.

The United States makes an extraneous distinction between Indians as a tribe and Indians as individuals for purposes of this Court's reviewability. Defs.' Motion at 15-17. Review of the BIA's lease approval does not require an individual (or private) right of action. See N.A.A.C.P. v. Sec'y of HUD, 817 F.2d 149, 152 (1st Cir. 1982). The only potential barriers to Plaintiffs bringing this claim are two narrow exceptions to the general rule of reviewability that do not apply. Chrysler Corp. v. Brown, 441 U.S. 281, 317 (1979). First, the Leasing Act does not preclude judicial review. Goodface v. Grassrope, 708 F.2d 335, 338 (8th Cir. 1983). Second, the Leasing Act is reviewable by the standards contained therein and the Trust Doctrine's limit on the BIA's discretion. Kenai Oil & Gas, Inc. v. Dep't of Interior, 671 F.2d 383, 386 (10th Cir. 1981).

B. Plaintiffs Have a Cause of Action Under the Leasing Act.

In addition to being entitled to bring their Leasing Act claim pursuant to the APA, Plaintiffs can also establish that they have a direct cause of action under the Leasing Act. Plaintiffs can enforce violations of the Trust Obligation and Leasing Act because they are easily within the zone of interests thereof. City of Albuquerque v. United States Dep't of Interior, 379 F.3d 901, 916 (10th Cir. 2004); Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1037 (8th Cir. 2002).

1. Plaintiffs Are Within the Zone of Interests Protected by the Leasing Act.

"The trust obligation extends not only to Indian tribes as governmental units, but to individual tribal members as well." Dewakuku, 107 F.Supp.2d at 1126 (citing Morton v. Ruiz, 415 U.S. 199, 237-38 (1974)) (emphasis added). Plaintiffs are enforcing those statutory duties which were enacted solely for their protection and benefit. See San Xavier Dev. Auth. v. Charles, 237 F.3d 1149, 1153 (9th Cir. 2001). The language of the

statute does not preclude enforcement by individual Indians but speaks to "Indian lands," without distinguishing between individual tribal members or the tribe as a whole. See City of Albuquerque, 379 F.3d at 916. Congress intended that the Leasing Act protect both tribes and individual tribal members. As Congress stated in its committee report, "the Committee and the Department of the Interior have an obligation to protect the public interest and safety" and "access to the courts is also an important consideration for the occupants of the leased lands and cannot be excusably denied in this country." S. Rep. No. 91-832, 1970 U.S.C.C.A.N. 3243, 3245. To construe these statements as suggesting that only an entire Indian tribe could enforce these protections would lead to absurd results and would violate the principle that the Secretary has a duty to liberally construe the BIA's obligations to Indians. See Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972).

Plaintiffs do not, as the United States suggests, assert individual property interests in the Split Rock site. Defs.' Motion at 16. As members of a class protected by the Leasing Act, Plaintiffs do assert injury resulting from the BIA's failure to adequately protect tribal property and resources, an enforceable right. See e.g. Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1100 (8th Cir. 1989); Cobell v. Norton, 225 F.R.D. 41, 49 n.3 (D.D.C. 2004).

Finally, Plaintiffs need not show that the Leasing Act directly benefits them personally, only that Plaintiffs' interests are within the zone of interests protected by the Leasing Act. That test has been satisfied here. See Weber, 212 F.3d at 51; see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 155 (1970).

2. Plaintiffs Are Asserting Their Own Legally Protected Rights Based on Particularized Grievances.

As noted above, Plaintiffs' claims are based on the BIA's violation of duties owed to tribes and individual tribal members and not, as the United States suggests, on duties owed to third parties—Indian Township and the entire Passamaquoddy Tribe. Defs.' Motion at 15-17. Drawing all reasonable inferences from the complaint in Plaintiffs' favor, Plaintiffs' allegations demonstrate that the BIA simply rubber-stamped a fifty year industrial lease without adequate and independent review. This failure constitutes an injury to each and every member of the Passamaquoddy Tribe. In a similar case, the Ninth Circuit found that the Department of Interior ("DOI") violated its trust duties when the DOI failed to conduct an adequate and independent review of the validity of an agreement to place state oil and gas wells on tribal property. Assiniboine & Sioux Tribes, 792 F.2d 792, 794 (9th Cir. 1986). The court held: "[a]ccepting as true the Tribes' allegations that the Secretary conducts no independent review of the applications, we find it impossible to reconcile this alleged rote approval of State Board orders with the strict standard of conduct expected of a trustee." Id. The BIA is a trustee, not just for the Passamaquoddy Tribal Council, but for the entire Passamaquoddy Tribe and this Court should find that Plaintiffs, as members of the Passamaquoddy Tribe, are entitled to the benefit of this Court's jurisdiction.

As detailed in Plaintiffs' complaint and accompanying affidavits, the BIA willfully ignored flaws in the tribal lease approval process, which was marked by attorney conflicts, secret negotiations, withholding of the lease documents, and a flawed referendum. This court is the proper forum to resolve these particularized grievances.

The BIA cannot avoid its obligations by relying solely upon the Tribal Council's determination. See Pueblo of Santa Ana, 663 F. Supp. at 1306:

> Congress could not have mandated that the Secretary review all leases and contracts between Indian and non-Indian only to permit the tribes to avoid review when they deem provident. Congress' intent to insulate Indians and their land from exploitation by non-Indians, would be thwarted if review by the Department of Interior of contracts of this type could be so easily avoided.

Id. (internal citations omitted).

Finally, in a similar case involving NEPA, the Ninth Circuit in Cady v. Morton, 527 F.2d 786, 792 (9th Cir. 1975) considered the issue of limiting standing to the Tribe in its entirety, as the United States suggests. Defs.' Motion at 17. The Ninth Circuit disagreed, holding that this "would limit standing under the circumstances of this case to a group having a strong economic incentive to alter substantially the environment." Id. The Ninth Circuit concluded that "NEPA is not such a false promise." Id. Similarly, the Leasing Act and Trust Obligation are not such false promises.

IV. Plaintiffs' APA Claim Should Not Be Dismissed

Because Plaintiffs' allege violations of the BIA's statutory obligations under NEPA, NHPA, and the Leasing Act, which must be accepted as true, the BIA's lease approval is presumed subject to judicial review unless there is "persuasive reason" to believe that Congress has precluded review. Barlow v. Collins, 397 U.S. 159, 166-67 (1970). No such indication exists. The mere allegation of unlawful agency action under 706(2) is a presumed "legal wrong" justifying judicial review. Cousins v. Sec'y of United States Dep't of Transp., 880 F.2d 603, 609 (1st Cir. 1989). Therefore, Plaintiffs' APA claim should not be dismissed.

CONCLUSION

Based on the aforementioned, Plaintiffs respectfully request that this Court deny the United States' Motion to Dismiss.

Dated this 31st day of March 2006.

Respectfully submitted,

/s/ David K. Mears

David K. Mears
Patrick A. Parenteau
Environmental and Natural Resources Law Clinic
P.O. Box 300
South Royalton, VT 05068
(802) 831-1627
Fax: (802) 831-1631
dmears@vermontlaw.edu
pparenteau@vermontlaw.edu

Attorneys for Plaintiffs

Lynne Williams
P.O. Box 177
Glen Cove, ME 04846
lwilliams@earthlink.net

Of Counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2006, I electronically filed Plaintiffs' Opposition to Motion to Dismiss Pleading with the Clerk of Court using the CM/ECF system which will send notification of such filings to the following:

Sara E. Culley
United States Department of Justice
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0663
Tel: (202) 305-0466
Fax: (202) 305-0267
sara.culley@usdoj.gov

By:

/s/ David K. Mears

David K. Mears
Patrick A. Parenteau
Environmental and Natural Resources Law Clinic
P.O. Box 300
South Royalton, VT 05068
(802) 831-1627
Fax: (802) 831-1631
dmears@vermontlaw.edu
pparenteau@vermontlaw.edu

Attorneys for Plaintiffs

Lynne Williams
P.O. Box 177
Glen Cove, ME 04846
lwilliams@earthlink.net

Of Counsel