Appeal No. 06-2733

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NULANKEYUTMONEN NKIHTAQMIKON, DAVID MOSES BRIDGES, VERA J. FRANCIS, HILDA LEWIS, DEANNA FRANCIS, REGINALD JOSEPH STANLEY, MARY BASSETT,

Plaintiffs - Appellants,

v.

ROBERT K. IMPSON, Acting Regional Director, Eastern Region, Bureau of Indian Affairs,
GALE NORTON, Secretary of the Interior, United States Department of the Interior,

Defendants - Appellees.

On Appeal from the United States District Court for the District of Maine
Honorable John A. Woodcock, Jr., District Judge
Civil Action No. 05-168-B-W

BRIEF OF THE APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Nulankeyutmonen Nkihtaqmikon states that it is a not-for-profit corporation and has no parent companies, subsidiaries, or affiliates who have issued shares to the public.

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case involves claims arising under four federal statutes and the Indian Trust Obligation in connection with the Bureau of Indian Affairs' (BIA) approval of a long-term industrial lease of tribal lands on Passamaquoddy Bay. The controversy involves the proposed construction of a liquefied natural gas terminal at Split Rock, a site with great historic, cultural and spiritual significance for members of the Passamaquoddy Tribe. Oral argument will assist the court in clarifying the complex issues raised including a question of first impression in this Circuit regarding the construction of a long-term lease under the Indian Leasing Act. Additionally, oral argument would afford the students in the Environmental and Natural Resources Law Clinic of Vermont Law School, who have worked on this case, with a valuable learning opportunity.

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JURISDICTIONAL STATEMENT

The Maine district court properly asserted jurisdiction over Appellants' federal law claims under 28 U.S.C. § 1331. Appellants filed a timely appeal on December 8, 2006 from the district court's final order dated November 16, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in dismissing Appellants' complaint for lack of ripeness and standing because the court determined that BIA's approval of a fifty year industrial lease of tribal land was not a "final and irrevocable" decision.

2. Whether the district court erred in finding that Appellants do not have a claim under the United States Indian Trust Obligation because the court determined that BIA was not under any specific fiduciary duty.

3. Whether the district court erred in finding that Appellants do not have a claim under the Indian Long-Term Leasing Act because the court determined that the Leasing Act does not protect their interests.

STATEMENT OF THE CASE

Appellants Nulankeyutmonen Nkihtaqmikon[1] (NN) appeal from a final order of the federal district court for the District of Maine granting Appellees' motion to dismiss.

[1] translated into English from Passamaquoddy as "We Protect the Homeland" and pronounced phonetically: 'Nu-lahnk-kay-yoot-mah-nin' 'Nee-kaht-mee-kahn' and hereafter referred to as NN.

NN seeks the invalidation of the BIA's final decision on June 1, 2005 approving a fifty year ground lease authorizing the construction and operation of a liquefied natural gas (LNG) terminal on sacred tribal grounds known as Split Rock (Quoddy Bay lease).

The BIA's decision to approve the Quoddy Bay lease violated the following statutes: (1) the National Environmental Policy Act (NEPA); (2) the National Historic Preservation Act (NHPA); (3) the Indian Long-term Leasing Act (Leasing Act);(4) the Administrative Procedure Act (APA); and (5) as a result of ignoring these statutes, the United States Indian Trust Obligation.

BIA also violated the consultation requirement of the Endangered Species Act (ESA). These claims were brought in two separate complaints which were consolidated.

The United States moved to dismiss NN's complaint for lack of subject matter jurisdiction, claiming that NN's NEPA and NHPA claims were not ripe and that NN lacked standing for all claims.

The district court granted the government's motion. The court found that BIA's lease approval decision was not "final and irrevocable," but was instead limited solely to "site investigation purposes." The court also found that approval was contingent and revocable upon completion of the Federal Energy Regulatory Commission (FERC) LNG permitting process. Based on these findings, the court concluded that NN's harm was speculative and so concluded

that NN lacked standing and that NN's claims were not ripe. Appendix 50, 62-65.

With regard to the Indian Leasing Act and Trust Obligation claims, the court held that individual tribal members do not have a right of action under the Leasing Act because they are not within the statute's zone of interests. Appendix 69. The court also found that NN could not bring its Trust Obligation claim because the BIA was not under any specific fiduciary duty. Appendix 72.

STATEMENT OF FACTS

We Protect the Homeland (NN) is a nonprofit organization comprised of individual tribal members of the Passamaquoddy Tribe, including Appellants, who reside on the Tribe's reservation in Pleasant Point, Maine. Formed "in response to a proposal to construct a liquefied natural gas (LNG) terminal on tribal lands and ancestral waters, NN is committed to preserving the vestiges of our ancestral homeland and lifeways, sacred tribal lands and the freedoms of access and religious practice associated with these sites, including the ancestral waters and the beings that inhabit them." Appendix 25.

Split Rock is a small, undeveloped beach area on the shore of Passamaquoddy Bay. Appendix 13. Since time immemorial, Split Rock has been used for many reasons, including religious and cultural ceremonies, weddings, baptisms, and naming rituals, fishing, swimming and recreation, gathering periwinkles, clams, and sweet grass,

and for physical and spiritual retreat. Id. Members of NN continue to use and enjoy Split Rock; it is the Tribe's only remaining open community space. Appendix 13, 31.

"The waters of the Bay of Fundy and the Gulf of Maine are the ancestral and historic homeland of the Passamaquoddy people." Appendix 25. "The Passamaquoddy Tribe historically and presently maintains a direct association with the animals and fishes of our homeland." Id. "Split Rock is the only access to Passamaquoddy Bay." Appendix 31.

Split Rock is no longer protected as an undeveloped sacred site. On June 1, 2005 the BIA approved a fifty year ground lease agreement which grants an industrial developer, Quoddy Bay, LLC, the exclusive right to occupy and use Split Rock "for the development, construction, operation . . . of the LNG project and all reasonable and necessary uses which are related thereto." Appendix 101 (Quoddy Bay lease). The BIA approved the lease on a single page marked "Approved: Secretary of Interior," with the signature of the Secretary's delegated authority Franklin Keel, Director of the Eastern Region of BIA, below the caption. Appendix 172. Contemporaneously, the BIA also prepared a document known as the Categorical Exclusion Checklist (CE Checklist), dated June 1, 2005. Appendix 181. This document is part of the BIA's NEPA regulations and is to be used only for "single, independent actions not

associated with a larger, existing or proposed, complex or facility." Appendix 7.

The Quoddy Bay lease states: "WHEREAS this Lease is subject to approval by the Secretary of Interior in accordance with 25 U.S.C. § 415 and is intended to be effective upon such approval by the Secretary of Interior." Appendix 86. Other than the preceding language, there are no other requirements regarding the BIA's approval for the lease to be effective. Other than the BIA's signature, there are no other terms in the lease regarding the BIA's approval.

Members of NN are "personally affected by the BIA's decision to allow Split Rock and the surrounding waters to be transformed into a LNG facility." Appendix 31. They are "concerned that our values and Passamaquoddy lifeways, stories, and unique religious beliefs are in jeopardy, as many of our stories and cultural underpinnings are literally embedded in the geological and natural formations which line the entire Passamaquoddy Bay and its coastline." Appendix 29.

SUMMARY OF THE ARGUMENT

The district court erred when it ruled that the BIA's June 1, 2005 lease approval decision was not final. Such a construction is unsupported by the plain terms of the Quoddy Bay lease, is inconsistent with BIA's established practice of issuing "limited" lease approvals, and is contrary to established principles of contract

construction. Applying proper standards of construction, BIA's lease approval is clearly a final agency action subject to the procedural requirements of the Indian Leasing Act, NEPA, NHPA, and the ESA. It is undisputed that BIA has not complied with any of these requirements.

Further, even if the lease was ambiguous, the district court failed to interpret it in the light most favorable to NN, as required on a motion to dismiss. Rather, the district court gave BIA the benefit of every inference and gave undue weight to BIA's self-serving "checklist," which contradicted the plain terms of the lease itself.

Accordingly, NN has standing because it has suffered procedural injury and NN's claims are ripe because they raise pure questions of law and the balance of hardships favors hearing the claims now as opposed to later when substantial sums will have been sunk into the Quoddy Bay project. Finally, the BIA has a specific fiduciary duty as codified in the Indian Leasing Act and this duty is enforceable by NN.

ARGUMENT

I. STANDARD OF REVIEW

This Court must "review the lower court's dismissal order de novo, accepting the plaintiffs' well-pleaded facts as true and indulging all reasonable inferences [in] their [favor]." McCloskey v. Mueller, 446 F.3d 262, 266 (1st Cir. 2006). It is critical that NN receive the benefit of all reasonable inferences because the key issue is the

interpretation of the Quoddy Bay lease agreement. The district court drew the wrong inferences and committed clear error when it accepted the BIA's interpretation of the Quoddy Bay lease over the plain language of the lease itself. See Aldridge v. A.T. Cross Corp., 284 F.3d 72, 79 (1st Cir. 2002) ("It was here that the district court erred. The district court did not 'give plaintiff [] the benefit of all reasonable inferences' as it should have on a motion to dismiss, . . . but appears to have drawn inferences in the defendant's favor. We take the plaintiff's allegations to be true and draw inferences in the plaintiff's favor.") (internal citation omitted).

II. THE DISTRICT COURT ERRED IN RULING THAT BIA'S LEASE APPROVAL WAS "CONDITIONAL"

A. BIA's June 1, 2005 Lease Approval Decision Was the Agency's Final Approval Under the Indian Leasing Act, 25 U.S.C. § 415

1. On Its Face the Lease is a Final, Binding, Unambiguous Fifty Year Contract That Commits Split Rock to the Quoddy Bay Project.

The Indian Long-Term Leasing Act, 25 U.S.C. § 415 (Leasing Act), requires all long-term commercial leases to have "a valid approval from the Department in order for the lease contract to have legal effect." Sangre De Cristo Dev. Co. v. United States, 932 F.2d 891, 895 (10th Cir. 1991). In plain terms, on the first page of the eighty-six page contract, the Quoddy Bay lease states: "WHEREAS this Lease is subject to approval by the Secretary of Interior in accordance with 25 U.S.C. § 415 and is intended to be

effective upon such approval by the Secretary of Interior." (emphasis added). The Secretary approved the Quoddy Bay lease through the single signature of Franklin Keel, Director of the Eastern Region of BIA. A signature by a delegated authority satisfies the requirement that "[a]ll leases . . . shall be in the form approved by the Secretary and subject to his written approval." 25 C.F.R. § 162.604; see also Sangre De Cristo, 932 F.2d at 895-96 (repeatedly referencing "the United States' signature" and "the United States sign[ing] the lease as trustee for the Pueblo" in regards to the BIA's approval under 25 U.S.C. § 415.).

Thus, when the BIA signed the lease on June 1, 2005, the entire Quoddy Bay lease became effective and binding. Brown v. United States, 86 F.3d 1554, 1562 (D.C. Cir. 1996) (Secretarial approval "is a necessary prerequisite to the execution of a valid and binding lease."). Quoddy Bay, LLC now has all of the rights prescribed in the lease, including the right to construct and operate a LNG terminal for fifty years on the sacred Split Rock site after obtaining all necessary permits. These rights are fully vested now. Because the plain terms of the lease do not require any further approvals from the BIA to finalize it, the only reasonable inference is that the BIA's signature was its full and final execution of the entire lease agreement.

2. The Inference That BIA Only Meant to Conditionally Approve This Lease Contradicts BIA's Normal Practice in Other Leasing Situations.

In addition to requiring approval from the Secretary, the Quoddy Bay lease is "subject only to the inclusion . . . of 'such terms and regulations as may be prescribed by the Secretary of the Interior.'" Yavapai-Prescott Indian Tribe v. Watt, 528 F. Supp. 695, 698 (D. Ariz. 1981) (quoting 25 U.S.C. § 415). Under the Leasing Act, any limits or conditions that the BIA wishes to impose on the Quoddy Bay lease must be in the form of "terms" in the lease "as prescribed by the Secretary." This is exactly the BIA's practice in other similar leasing situations.

For example, in Bullcreek v. U.S. Dep't of Interior, 426 F. Supp. 2d 1221 (C.D. Utah 2006), a tribe had signed a long-term ground lease agreement to store spent nuclear fuel on the reservation. Id. at 1223. The BIA included express terms in the lease modifying its approval, stating: "the Secretary is prepared to approve this lease but for the completion of the environmental analysis under the National Environmental Policy Act ('NEPA'), then the Secretary will conditionally approve this Lease subject only to the following conditions, and the L.L.C. may not commence construction of the Facility under this Lease unless and until such conditions are met." Appendix 75 (emphasis added). The Bullcreek Lease went on to specify four conditions which had to be met before the Secretary would issue a final approval under the Leasing Act, 25

U.S.C. § 415. Appendix 76. In holding that BIA's lease approval decision was not yet ripe for challenge, the court relied exclusively upon the fact that BIA had not issued a final approval under 25 U.S.C. § 415, because of the conditions in the lease. Bullcreek, 426 F. Supp. 2d at 1228.

Contrary to the express terms included in the Bullcreek lease, the BIA did not include any limiting or conditioning terms in the Quoddy Bay lease. Unlike Bullcreek, the Quoddy Bay lease does not state that construction of the LNG facility cannot begin until BIA gives a subsequent approval. In the absence of such terms, the district court committed clear error by holding that BIA "has not [approved] proposed construction" of the LNG terminal. Appendix 58. Unlike Bullcreek, the Quoddy Bay lease does not state that BIA will undertake a further review of the lease, including the explicit requirement for certification by the Secretary of Interior, before its approval becomes final under 25 U.S.C. § 415. In the absence of any right of future review and final certification, the district court committed clear error by holding that "the lease approval process is not yet complete." Appendix 49.

3. BIA Admits That Its June 1, 2005 Approval Decision Was a "Final Agency Action."

The district court's finding that BIA's approval was "limited in scope" and "not yet complete" is further contradicted by the BIA's own statements on the record.

Appendix 49, 66. In oral argument before the district court, counsel for NN stated that: "BIA's lease approval is a final agency action under Section 415 of the Leasing Act. The government doesn't really contest that it's not a final agency action. They've never raised that defense." Appendix 213. The court proceeded:

- THE COURT: Do you agree with that? [. . .]
- [BIA]: It's a final agency action with built-in contingencies.
- THE COURT: So the answer is yes? [. . .]
- [BIA]: Yes, sir.

Appendix 213-14.

This elliptical response is classic post-hoc rationalization by the agency's counsel. Yes, the action is final, but no, Appellants are not entitled to challenge it. Significantly, however, BIA failed to explain why, unlike its customary practice as in the Bullcreek case, the BIA did not "build" these "contingencies" into the terms of the lease.

Of course, all industrial lease agreements, especially ones as complex as this one, have "built-in contingencies." Leases never authorize everything; permits for construction and operation of major industrial facilities must always be obtained. For instance, the lease requires Quoddy Bay, LLC to obtain numerous state and federal permits, to pay the Tribe certain fees, to enter into tax agreements, and so

forth. Appendix 103-04. The failure of any one of these is a contingency which could result in the LNG terminal not being built; however, the mere existence of such contingencies cannot mean that the lease is not a final binding contract, else the lease becomes meaningless.

Similarly, BIA's argument that it only approved a "portion of the ground lease agreement" is a non-sequitur. Appendix 46. Just as leases are always contingent on permits, industrial leases are logically broken into phases with each subsequent phase conditioned upon successful completion of the preceding one. The Quoddy Bay lease is similar to most long-term projects. It contains a Permitting Period, Construction Period, and Operations Period. Appendix 107-08. Simply because the lease contains separate phases however does not mean that BIA's approval is also partitioned.

Therefore, there can be only one conclusion from the plain terms of the lease agreement, the BIA's past practices, and BIA's own statements: the June 1, 2005 approval was a final agency action approving the entire Quoddy Bay lease. This reasonable interpretation must be favored over the government's. Cooperman v. Individual Inc., 171 F.3d 43, 46 (1st Cir. 1999).

B. The District Court Failed to Apply the Proper Standards For Interpretation of Contracts

The Quoddy Bay lease is a contract. See e.g., Hawley Lake Homeowners' Ass'n v. Deputy Assistant Sec'y, 13 IBIA 276, 289 (1985) (discussing the BIA's role in monitoring

leases under the Leasing Act "is to ensure that the lessees, whether Indian or non-Indian, fulfill their contractual obligations.") (emphasis added). Accordingly, the Quoddy Bay lease must be interpreted under general rules of contract law. Brown v. United States, 42 Fed. Cl. 538, 549 (1998). In Brown, Indian-lessors claimed that they were unaware as to the meaning of certain accounting terms in a commercial lease approved by the BIA under the Indian Leasing Act, 25 U.S.C. § 415. The court rejected any special rules of interpretation and, citing Williston on Contracts, applied "[t]he general rule of contract law." Finally, because the reviewing court is the federal district of Maine, Maine contract law applies. In re Bank of New England Corp., 364 F.3d 355, 363 (1st Cir. 2004).

1. The District Court Improperly Considered Extrinsic Evidence That Purports to Contradict the Plain Terms of the Lease.

Under fundamental contract law, "[t]he interpretation of an unambiguous writing must be determined from the plain meaning of the language used and from the four corners of the instrument without resort to extrinsic evidence." Portland Valve, Inc. v. Rockwood Systems Corp., 460 A.2d 1383, 1387 (Me. 1983). Here, the Quoddy Bay lease unambiguously proves that it is a fully executed and binding agreement as a result of the BIA's June 1, 2005 signature. First, the lease plainly states that it "is intended to be effective upon such approval by the Secretary of the Interior." Appendix 86. According to the

"generally prevailing meaning" of the key words "effective"[2] and "approval,"[3] the Quoddy Bay lease is a final agreement. Guilford Transp. Indus. v. Public Utilities Comm'n, 746 A.2d 910, 914 (Me. 2000) (quoting Restatement (2d.) of Contracts § 202(3)(a) (1981) and citing dictionary definitions). Further, nothing within the four corners of the lease limits or conditions the June 1, 2005 approval.

Because the Quoddy Bay lease is unambiguous on its face, the district court erred by relying on an extrinsic document known as the Categorical Exclusion Checklist (CE Checklist) to interpret the Quoddy Bay lease. Appendix 57. The CE Checklist is literally a two-page "checklist" of questions prepared by the BIA on June 1, 2005. It is not incorporated into the Quoddy Bay contract. Indeed, the checklist only came to light in the course of the litigation. Extrinsic evidence such as the CE Checklist may only be considered if there is ambiguity in the contract language. Portland Valve, 460 A.2d at 1387. Ambiguity may be found where the language is "susceptible to two different and reasonable interpretations, keeping in mind that the mere fact the parties disagree as to the meaning of contract language, 'does not necessitate a conclusion that the language is ambiguous.'" Sanford Hous.

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[2] Operative; in effect: "The law is effective immediately." AMERICAN HERITAGE DICTIONARY (4th ed. 2000).

[3] To give formal or official sanction to; Ratify: "Congress approved the proposed budget." Id.

Auth. v. Perkins Propance, Inc., 2004 Me. Super. LEXIS 203 (quoting Corbin on Contracts, § 24.7 (Rev. ed. 1998)). In this case, the Quoddy Bay lease is not ambiguous. It plainly states that it is effective upon BIA's approval and BIA signed it.

Even if the lease was ambiguous, "[t]he parol evidence rule operates to exclude from judicial consideration extrinsic evidence offered to alter, augment, or contradict the unambiguous language of an integrated written agreement." Handy Boat Service, Inc. v. Professional Services Inc., 711 A.2d 1306, 1308-09 (Me. 1998). The rule first requires a finding that the contract is "integrated," which simply means that the contract is intended to be the complete agreement and typically includes what is known as an "integration clause." See Farley Inv. Co. v. Webb, 617 A.2d 1008, 1010 (Me 1992) (where a typical integration clause states: "[t]his instrument . . . sets forth the entire agreement between the parties."). Here, the Quoddy Bay lease contains just such an explicit integration clause. Appendix 167. Therefore, the district court improperly relied on the CE Checklist as evidence of the BIA's intent because it alters and contradicts the plain meaning of the lease agreement itself, which clearly intends to be a final and binding contract. Handy Boat Service, 711 A.2d at 1309.

2. Other Contemporaneous Documents Recently Disclosed by BIA Make Clear That the Parties to the Lease Requested and Obtained an Unconditional Approval of the Lease.

Once the reviewing court looks outside the four corners of the agreement, it must consider "all relevant [extrinsic] evidence if it depend[s] . . . on a choice among reasonable inferences to be drawn from extrinsic evidence." Restatement (Second) of Contracts, § 209 (1990) (emphasis added). Here, the district court improperly considered only the extrinsic evidence selectively submitted by the BIA. But there is a relevant document contemporaneous with the BIA's lease approval decision on June 1, 2005, which was part of BIA's administrative record but which was omitted from the record that BIA submitted to the district court. As detailed further in Appellants' Motion to Supplement the Record, submitted with this brief, BIA was asked to provide a final approval for a long-term lease because that was what the parties said was needed to make the project financially viable. There is nothing in the record indicating that BIA disagreed with this request. Accordingly, the only reasonable inference is that the BIA did exactly what the real parties in interest requested of it. See Foster v. Foster, 609 A.2d 1171, 1172 (Me. 1992) ("It is well established that a contract is to be interpreted to give effect to the intention of the parties as reflected in the written instrument, construed in respect to the subject matter, motive and purpose of making the agreement, and the object to be accomplished.").

3. BIA's Interpretation That Its June 1, 2005 Approval is Conditional Renders the Contract Meaningless and is an Impermissible Post-Hoc Rationalization.

Another cornerstone of contract law is the axiom that "[a]n interpretation that would render any particular provision in the contract meaningless should be avoided." Crowe v. Bolduc, 334 F.3d 124, 136 (1st Cir. 2003). In this case BIA's interpretation that its approval is not yet final would nullify the chief purpose of the lease, which is to grant Quoddy Bay, LLC enforceable land use rights to pursue LNG development on Split Rock. Without BIA's final approval, Quoddy Bay, LLC has no such rights and the entire lease agreement becomes meaningless. Brown, 86 F.3d at 1562; see also Sangre De Cristo, 932 F.2d at 894 (discussing the case of Gray v. Johnson, 395 F.2d 533, 537 (10th Cir. 1968) "where the lessee never acquired a vested interest in the lease" because the BIA's approval was invalid.). The lease itself and basic contract law does not support such a construction.

Further, BIA's interpretation of the lease must be based in the document itself. See Federal Power Comm'n v. Texaco Inc., 417 U.S. 380, 397 (1974). In Texaco, the Federal Power Commission issued an order regarding rate regulations but did not include clear language ensuring that the rates would be reviewed as required by the statute. Id. at 380. The Supreme Court rejected the agency's explanation that it "always intended" to review the rates even if not expressly stated in its order,

holding that "[h]ad the order unambiguously provided what the Commission now asserts it was intended to provide, we would have a far different case to decide. But as it is, we cannot 'accept appellate counsel's post hoc rationalizations for agency action'; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" Id. at 397 (citations omitted).

Here, the operative document is the Quoddy Bay lease and it does not contain any language that supports BIA's position that the June 1, 2005 approval was limited or conditional in any way. To the contrary, the reasonable inference from the lack of such language supports NN's interpretation that the agreement was intended to be final. In re Raytheon Sec. Litig., 157 F. Supp. 2d 131, 147 (D. Mass. 2001) ("The plaintiff's interpretation of the [] documents is at least as plausible as the interpretation offered by the defendants. It therefore would be improper at the motion to dismiss phase--where the Court must take all of the plaintiff's well-pleaded allegations as true--to prefer the defendants' explanation of the [] documents over that of the plaintiff."); see also Rosen v. Textron, Inc., 321 F. Supp. 2d 308, 324-25 (D. R.I. 2004).

III. THE DISTRICT COURT ERRED IN RULING THAT NN LACKED STANDING[4]

A. NN Has Standing Under NEPA, NHPA, and ESA[5]

1. A Final Lease Approval Under the Indian Leasing Act Triggers All of the Mandatory Duties Asserted by NN Under NEPA, NHPA, and ESA.

Having established that BIA's June 1, 2005 decision was a final lease approval under the Leasing Act, it necessarily follows that BIA was required to comply with NEPA, NHPA, and ESA before taking such an action. See 25 C.F.R. § 162.109(a) ("[l]eases granted or approved under this part will be subject to federal laws of general applicability and any specific federal statutory requirements that are not incorporated in these regulations."); Davis v. Morton, 469 F.2d 593, 597 (10th Cir. 1972) (BIA lease approvals are a "major federal action" under NEPA); 16 U.S.C. § 470w(7) (federal approvals are an "undertaking" triggering NHPA consultation requirements); 50 C.F.R. § 402.02(c) (granting of leases is an "action" which may affect endangered species under ESA).

Since BIA did not comply with any of these procedural mandates, Appellants' standing must be evaluated under the procedural injury test laid down in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (Lujan).

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[4] Because the Supreme Court has held that standing is "the first and fundamental question" before resolving disputes over jurisdiction, standing will be discussed first, followed by ripeness. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998).

[5] Standing under the Indian Long-Term Leasing Act and Trust Obligation will be discussed infra under part V and VI.

2. NN Clearly Meets the "Procedural Injury" Test of Lujan.

In Lujan, Justice Scalia stated that a plaintiff alleging a procedural violation of federal law need only show, "(1) that he or she is a 'person who has been accorded a procedural right to protect [his or her] concrete interests' . . . and (2) that the plaintiff has 'some threatened concrete interest . . . that is the ultimate basis of [his or her] standing.'" Id. at 573 n.7.

Here, the district found that NN satisfies the first prong. Appendix 54-55 (noting that NN has set forth procedural violations and has concrete interests at stake). NN also satisfies the second prong because the BIA's lease approval, considered final, creates an "increased risk of actual, threatened, or imminent" harm to NN's interests of maintaining the aesthetic, ecological, and cultural integrity of the Split Rock site. Sierra Club v. U.S Dep't of Energy, 287 F.3d 1256, 1265 (10th Cir. 2002).

This risk exists now because BIA's approval was the first "necessary prerequisite" to the construction and operation of the LNG terminal. See TOMAC v. Norton, 193 F. Supp. 2d 182, 187-188 (D.D.C. 2002) aff'd 433 F.3d 852 (D.C. Cir. 2006). NN need not show "with certainty, or even with a substantial probability," that the LNG terminal will actually be constructed; the mere added risk resulting from BIA's approval is sufficient. Sierra Club, 287 F.3d at 1265; see also Conner v. Burford, 605 F. Supp. 107, 108 (D.

Mont. 1985) aff'd in part, rev'd in part 836 F.2d 1521 (9th Cir. 1988).

3. NN Clearly Meets the "Reasonable Concern" Test of Laidlaw.

Additionallly, NN meets the "reasonable concern" test articulated by Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183 (2000). As the district court already found, NN has concrete interests: Reginald Stanley's home is "literally right next to [the LNG site]," Appendix 227-28; Mary Bassett goes to Split Rock with her great-grandchildren "to enjoy and be a part of the earth," and David Moses Bridges regularly uses Split Rock for "fishing, recreational, and ceremonial purposes."

NN now has reasonable concerns that these traditional uses of Split Rock, a site of natural beauty and spiritual significance for the entire Passamaquoddy Tribe since time immemorial, will be permanently impaired because BIA's approval essentially "zoned" Split Rock for industrial use by granting Quoddy Bay, LLC legal rights to pursue a LNG terminal.

The district court thus erred in finding that the procedural requirements of the ESA (and NEPA and NHPA) were not triggered because there is no current denial of access to Split Rock and there is "no immediate impact upon the marine species." Appendix 66. Under Laidlaw, it is sufficient that plaintiffs have a reasonable concern that these effects will occur, and that BIA's approval of the lease has caused plaintiffs to alter their behavior with

respect to their use of and relationship to Split Rock. Laidlaw, 528 U.S. at 184.

4. NN Clearly Meets the "Risk of Uninformed Choice" Test of Marsh.

In Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989), the First Circuit upheld the rule in Massachusetts v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) that NEPA is designed to "minimize the risk of uninformed choice." In Watt, the government argued that its granting of oil leases was not reviewable under NEPA because there was no irreparable harm since the lease buyers could not begin drilling without further government approvals. Marsh, 872 F.2d at 499. In rejecting this argument, the First Circuit held that NEPA requires "government officials [to] notice environmental considerations and take them into account ... before they commit themselves to a course of action." Watt, 716 F.2d at 952 (emphasis original).

Similar to the lease issues in Watt, NN does not have to wait until Quoddy Bay obtains FERC approval before bringing its claims. In fact, it is precisely because Quoddy Bay, LLC is already pursuing its FERC permit that NN has been harmed. The BIA's June 1, 2005 was the first step "in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." Id.

Even if BIA could review the lease after the FERC permit, it is unrealistic to assume that BIA will be able to objectively evaluate the merits of the project once substantial sums and resources have been invested and a

license to construct has been issued. This is the kind of commitment that, as a practical matter, BIA will not be able to ignore -- "even if new, or more thorough, NEPA statements are prepared and the [BIA] is told to 'redecide.'" Id. at 953.

IV. THE DISTRICT COURT ERRED IN RULING THAT NN'S CLAIMS WERE NOT RIPE

Whether BIA's June 1, 2005 approval is ripe for review requires evaluation of "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). These "question[s] of law [are] reviewable de novo." Ernst & Young v. Depositors Economic Prot. Corp., 45 F.3d 530, 534 (1st Cir. 1995).

A. As a Final Approval, BIA's June 1, 2005 Decision is Ripe for Judicial Review Now

The district court expressly held that "[h]ad the BIA given a final, irrevocable stamp of approval on the ground lease . . . NN would have a ripe claim." Appendix 50. Having demonstrated above that BIA's approval was indeed final it necessarily follows that NN's claims are ripe.

1. BIA's June 1, 2005 Lease Approval is a Final Agency Action With Immediate Legal Consequences.

As established above, BIA admitted that its June 1, 2005 approval was a final agency action, albeit with "built-in contingencies." Notwithstanding this self-serving disclaimer, BIA's decision is final under Abbott

Labs because the Quoddy Bay lease is now binding, requiring compliance with its terms. 387 U.S. at 152.

The most immediate of these legal effects is the transfer of rights to use and occupy Split Rock to an industrial developer. No longer the Tribe's communal space of recreational and spiritual retreat, the Tribe is now bound to restrict Split Rock solely for Quoddy Bay, LLC's own industrial uses for the next fifty years:

> During the term and to the extent permitted by law, Landlord shall not permit, and shall use best efforts to ensure that the Tribe does not permit, anyone using, controlling, or occupying Landlord's Parcel (other than Tenant or its permitted assignees) to engage in any activity which materially interferes or competes commercially with Tenant's use of the Premises for the Permitted use.

Appendix 103 (emphasis added).

2. NN's Claims Are Fit For Review Because They Raise Purely Legal Questions.

Whether BIA was required to comply with NEPA, NHPA, and the ESA when it issued its June 1, 2005 approval is a question of pure law, and thus "presumptively reviewable." Nat'l Wildlife Fed'n v. Brownlee, 402 F. Supp. 2d 1, 8 (D. D.C. 2005). In Brownlee, the court found that claims for failure to abide by NEPA and the ESA were ripe for review because "[t]he claims here are a combination of purely legal procedural challenges." Id.

Similarly, NN's claims are purely legal challenges. NN has already established a prima facie case that BIA's lease approval under the Leasing Act, considered final, triggers mandatory compliance with NEPA, NHPA, and ESA.

Therefore, BIA's failure to do so is a legal question fit for review now, "for the claim can never get riper." Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 737 (1998).

The First Circuit has also noted that "courts sometimes exhibit a greater willingness to decide cases that turn on legal issues not likely to be significantly affected by further factual development." Ernst & Young, 45 F.3d at 536. Here, regardless of the results of the FERC permitting process, these are not further factual developments which would aid the court in deciding the purely legal issue of whether the BIA violated NEPA, NHPA, and the ESA when it approved the Quoddy Bay lease.

3. The Balance of Hardships Favor Review Now.

The First Circuit has "acknowledged the possibility that there may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness (such as a degree of imprecision in the factual circumstances surrounding the case), or vice versa." Ernst & Young, 45 F.3d at 535 (emphasis added).

Here, the sliding scale favors immediate review. "Where . . . there are no significant agency or judicial interests militating in favor of delay, [lack of] hardship cannot tip the balance against judicial review." Nat'l Assn of Home Builders v. U.S. Army Corps of Engineers, 440 F.3d 459, 465 (D.C. Cir. 2006). The BIA has no

"institutional interest in postponing review." Id.; see also Natural Resources Defense Council, Inc. v. U.S. EPA, 859 F.2d 156, 167 (D.C. Cir. 1988). In NRDC, environmental groups challenged EPA's Clean Water Act permitting scheme. The court found that "there was no 'compelling' judicial interest in deferring review . . . [and that] 'mechanical application' of the hardship element of Abbott Laboratories 'could work mischief in such a situation,' causing postponement of review even where all the institutional interests sought to be served by the doctrine . . . militated in favor of early review."). Id. at 191.

In fact, the BIA, and all parties, have interests to decide now whether BIA's lease approval was lawful because "not just any Departmental approval w[ill] suffice -- the approval must have been a valid approval." Sangre De Cristo, 932 F.2d at 894. In Sangre, the court found that

> the [BIA] was 'without authority to grant the lease since no environmental impact study was conducted prior to approval of the lease as required by NEPA.' Because we read 25 U.S.C. § 415(a) as requiring a valid approval from the Department in order for the lease contract to have legal effect, the invalid lease contract between Sangre and the Pueblo vested no property interest in Sangre.

Id. at 894-95. The court relied on another similar case, Gray, 395 F.2d at 537, "where we held that when the BIA approved a lease that was contrary to regulations and not in the best interest of the Indian lessors, the lessee never acquired a vested interest in the lease." Id.

Similarly, if BIA's approval was never valid, the project cannot go forward. These questions should be resolved now before the parties expend time and money in the FERC permitting process. See Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1238 (10th Cir. 2004); see also Jones v. District of Columbia Redevelopment Land Agency, 499 F.2d 502, 511 (D.C. Cir. 1974).

V. THE DISTRICT COURT ERRED IN RULING THAT BIA DID NOT HAVE A SPECIFIC TRUST OBLIGATION

A. NN Has a Claim Under the Indian Trust Obligation Because The Indian Leasing Act Imposes a Duty on BIA to Act as a Fiduciary and in the Best Interests of the Tribe

The United States Indian Trust Obligation "has emerged from treaties, federal statutes, and Supreme Court jurisprudence" to acknowledge the United States' duty to protect tribal rights.[6] "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) (quotation omitted).

While it is true that there is no "generalized claim of violation of a fiduciary duty, which is not tethered to any statute or regulation," (Appendix 72), in this case the district court erred because the Indian Leasing Act is a codification of the trust duty, Brown, 86 F.3d at 1563, and "the scope of such fiduciary relationship 'is established

[6] See e.g., Tsosie, Rebecca, THE CONFLICT BETWEEN THE "PUBLIC TRUST" AND THE "INDIAN TRUST" DOCTRINES: FEDERAL PUBLIC LAND POLICY AND NATIVE NATIONS, 39 Tulsa L. Rev. 271, 274 (2003).

by the regulation[s] that control this type of leasing,' . . . [which] define the contours of the United States' fiduciary responsibilities.'" Brown, 42 Fed. Cl. at 551 (emphasis original and citations omitted).

B. BIA Cannot Satisfy its Mandatory Trust Obligation After it Approves the Quoddy Bay Lease

The district court erred by determining that BIA is "going to approve the lease on a contingent basis . . . and continue . . . as a fiduciary, to monitor the progress of this [lease project] . . . and to ensure that our special relationship with the tribe is accounted for during the course of this process." Appendix 218. This is exactly antithetical to the mandate and purpose of the Indian Leasing Act. Brown, 42 Fed. Cl. at 552. In Brown, individual American Indians alleged that BIA failed to oversee and manage a long-term commercial lease in violation of the trust duty. Id. at 542. In finding that the plaintiffs could not state a claim, the Court held that BIA must comply with its strict fiduciary duties only at the lease approval stage: "[t]his statute places a duty on the Secretary to 'adequately consider[]' the enumerated factors before approving a long-term lease, but it says absolutely nothing about the Secretary's duties during the course of the lease with specific reference to ensuring ongoing or perpetual compliance with the lease in operation." Id. at 552 (emphasis original).

Similarly, BIA cannot fulfill its special relationship with the Tribe and its members by cooperating in the FERC

permitting process. BIA can only do this at the approval stage -- June 1, 2005, and that time has passed.

VI. THE DISTRICT COURT ERRED IN RULING THAT NN IS NOT WITHIN THE ZONE OF INTERESTS OF THE INDIAN LEASING ACT

A. NN's Leasing Act Claim is Presumed Subject to Review Under the APA

Because BIA's lease approval decision was a final agency action, under the APA "judicial review [of NN's Leasing Act and Trust Obligation claims] is presumed." Faucher v. Federal Election Comm'n, 743 F. Supp. 64, 68 (D. Me. 1990); see also 5 U.S.C. § 706(2)(A). Therefore, NN need only show that it is within the zone of interests protected by the Indian Leasing Act. Weber v. Cranston Sch. Comm'n, 212 F.3d 41, 51 (1st Cir. 2000). NN easily meets this test.

B. NN is Within the Zone of Interests of the Leasing Act Because They Are Trust Beneficiaries

As individual trust beneficiaries, it is undisputed that NN has a right to sue BIA for its failure to adequately protect trust resources when it committed the sacred Split Rock site to industrial development without any of the considerations required by law. United States v. Mitchell, 463 U.S. 206, 226 (1983) ("[t]he existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee.").

In this case, BIA did absolutely nothing to fulfill any of its trust obligations. Appendix 21-22. Because the

Leasing Act is a codification of the Trust Obligation, where "BIA engages in injurious conduct toward the intended statutory beneficiaries," the BIA's fiduciary duties are enforceable by individual tribal members. Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1100 (8th Cir. 1989) (emphasis added).

C. NN is Within the Zone of Interests of the Leasing Act Because They Raise Environmental Concerns

NN is within the zone of interests of the Indian Leasing Act because Congress amended the Act in 1970 to broaden the zone of interests to include, among others, environmental concerns. See 25 U.S.C § 415(a), at Addendum 76. The district court erred by considering only the literal words of the Leasing Act as used in the original 1955 enactment, which discussed leasing of tribal lands by "Indian landowners," and thus found that NN is not within the zone of interests since they are not literal property owners of Split Rock. Appendix 69. However, as this Court has held: "we cannot end our inquiry with the 'ordinary' or 'natural' meaning of the statute's terms, we consider the relevant legislative history in an effort to give effect to the intentions of the statute's drafters." Penobscot Indian Nation v. Key Bank, 112 F.3d 538, 548 (1st Cir. 1997).

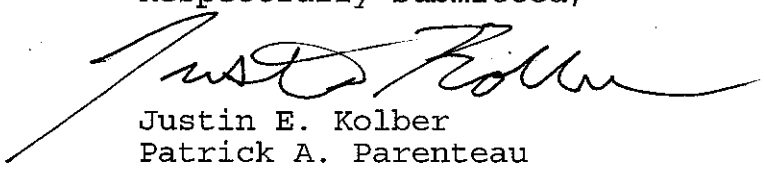
Congress amended the Leasing Act in 1970 because of concerns "that investments made on the basis of such long-term leases may include construction and development without regard to the environmental impact nor appropriate

machinery for prevention of pollution." S. Rep. 91-832, 1970 U.S.C.C.A.N. 3243, 3245 (emphasis added). Therefore, this Court should construe Congress' objectives in the 1970 amendment as broadening the zone of interests sought to be protected by the Leasing Act to include the kinds of concerns raised by NN, regardless of the technical meaning of the word "landowner" as used in 1955. Penobscot Indian Nation, 112 F.3d at 548 ("The Supreme Court has made it clear that 'Indian law[] cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [such law];'" see also Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the district court's order be reversed.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. Exclusive of the corporate disclosure statement, table of contents, table of authorities, statement with respect to oral argument, certificate of compliance, certificate of service and addendum, this brief contains 891 lines as counted by Word.

2. This brief has been prepared using 12 point Courier, monospaced typeface.

Date 2/12/07

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CERTIFICATE OF SERVICE

I, Justin E. Kolber, Esquire, hereby certify that on February 12, 2007, I served the Brief of the Appellants on the following party by placing the required number of copies in the U.S. mail to:

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