

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NULANKEYUTMONEN
NKIHTAQMIKON,
David Moses Bridges
Vera J. Francis,
Hilda Lewis,
Deanna Francis,
Reginald Joseph Stanley, and
Mary Bassett

Civil No. _____

COMPLAINT FOR
DECLARATORY
AND INJUNCTIVE RELIEF

Plaintiffs,

vs.

Robert K. Impson, Acting Regional
Director, Eastern Region, Bureau of
Indian Affairs,
and
Gale Norton, Secretary of the Interior,
United States Department of the Interior

Defendants.

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. Plaintiffs seek a declaration from this Court that the Bureau of Indian Affairs (BIA), through its decision to approve a ground lease between the Passamaquoddy Tribe at Pleasant Point, ME and Quoddy Bay, LLC on June 1, 2005, for the purposes of constructing a liquefied natural gas (LNG) facility on sacred tribal grounds known as Split Rock, violated the National Environmental Policy Act, 42 U.S.C. § 4321, (NEPA), the Indian Long Term Leasing Act, 25 U.S.C. § 415(a), the National Historic Preservation Act, 16 U.S.C. § 470 (NHPA), and the Administrative Procedure Act, 5 U.S.C. §§ 702, 706 (2)(A),(D) (APA). Plaintiffs also seek injunctive relief that will set aside the BIA's approval of the lease and

order the BIA to fully comply with all of its statutory and legal duties before making any future lease approval decision.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. § 1331. Review is authorized under the APA 5 U.S.C. §§ 702, 706(2)(A),(D). Claims arise under the National Environmental Protection Act, the Indian Long-Term Leasing Act, the Indian Trust Obligation Doctrine, and the National Historic Preservation Act.

3. Relief is authorized under the Declaratory Judgment Act 28 U.S.C. §§ 2201 and 2202, as well as 5 U.S.C. §§ 702, 706(2)(A),(D).

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). Plaintiffs are residents of Maine and Defendants are subject to nationwide service of process.

PARTIES

Plaintiffs

5. Plaintiff Nulankeyutmonen Nkihtaqmikon (Hereafter, “We Protect the Homeland”) is a group of private citizens who are residents of the Pleasant Point Passamaquoddy Reservation in Maine. We Protect the Homeland was formed for the purpose of opposing construction of the Quoddy Bay LNG terminal on the Pleasant Point Reservation. We Protect the Homeland is adversely affected by the BIA’s approval of the ground lease because it will fundamentally and permanently transform the Split Rock site from a natural beach area with historical, cultural, religious, and recreational significance, to an industrial zone that will not be accessible to the members of the group.

6. We Protect the Homeland has traditionally accessed the Split Rock site for its religious, cultural, and natural resources. In particular, the Split Rock site is used for the Full Moon Ceremony, Canoe Launching Ceremony, weddings, baptisms, community gatherings, such as the annual Indian Day festival, and for physical and spiritual retreat.

7. Plaintiff David Moses Bridges is a member of the Passamaquoddy Tribe and resides at 3 Soctomah Lane, Sipayik, ME on the Pleasant Point Reservation. Mr. Bridges' house is located approximately eight-tenths of a mile northeast from the Split Rock site. Mr. Bridges regularly uses the Split Rock site for a variety of purposes including for fishing, recreation, and ceremonial purposes.

8. Plaintiff Bridges is concerned that Defendants' decision to approve the siting of a major industrial facility at Split Rock without performing any environmental analysis threatens his use and enjoyment of Split Rock for tribal ceremonies and other uses. In particular, Mr. Bridges is concerned that Split Rock will no longer be available for the Canoe Launching ceremony. Mr. Bridges hand-carves canoes from birch wood, each one taking up to one year. The tribe gathers at Split Rock for the ceremonial first launch of the canoe. The last such ceremony was held at Split Rock on September 24, 2005.

9. Plaintiff Vera J. Francis is a Passamaquoddy tribal member and resides at 114 Thunder Road, Sipayik, ME on the Pleasant Point Reservation. Ms. Francis has used and enjoyed the Split Rock site all her life and will continue to do so as long as she is allowed access. She spent days as a child at the Split Rock site learning about her culture and nature from her grandmother. Ms. Francis enjoys spending time with her grandchildren at Split Rock, teaching them the same lessons she learned from her grandmother. Ms. Francis attends the monthly Full Moon Ceremonies held at the Split Rock site. The lease approval threatens to deprive Plaintiff Francis of her use and enjoyment of the Split Rock site by converting an area currently open to public use by tribal members into an industrial zone with restricted access. Additionally, Ms. Francis is concerned about the impacts of the LNG terminal and ship traffic on the Harbor Porpoise, as she has a deep cultural and spiritual connection to this animal.

10. Plaintiff Hilda Lewis is a Passamaquoddy tribal member and an elected member of the Pleasant Point Tribal Council. Ms. Lewis was born and raised on the Pleasant Point

Reservation, and currently resides at 6 Soctomah Lane in Sipayik, ME. Her house is eight-tenths of a mile from the Split Rock site and overlooks Passamaquoddy Bay.

11. Ms. Lewis voted against signing the ground lease and objected to the Pleasant Point Tribal Council's decision to waive the requirements for a fair market value appraisal. Ms. Lewis is concerned that the Tribal Council was not fully informed when it signed the lease, and acted in haste by waiving the fair market value appraisal. She is concerned that Defendant Impson made no effort to ascertain what was in the best interests of the tribe, and rejected her request that the BIA conduct an independent review of the lease and the process that led to its approval by the Pleasant Point Tribal Council.

12. Ms. Lewis expressed her specific concerns to Defendant Impson, by telephone conversation on June 1, 2005, and by letter dated June 10, 2005, about the (1) waiver of a fair market value appraisal, (2) the lack of time that Tribal Council members had to review the lease before voting to approve it, and (3) the conflict of interests posed by attorney Robert Williams, an attorney retained by the Pleasant Point Tribal Council but paid by Quoddy Bay, LLC, who recommended approving the lease and appraisal waiver.

13. Ms. Lewis also considers the Split Rock site to be sacred and is concerned that the Quoddy Bay, LLC lease commits the site to an industrial use that is totally incompatible with its historic uses.

14. Plaintiff Deanna Francis is a tribal elder of the Passamaquoddy Tribe, a lifelong resident of the Pleasant Point Reservation, who resides on the tribe's ceremonial grounds. She leads many of the tribe's ceremonies, including the monthly Moon Ceremony, Whale ceremonies, and Tobacco Burnings at Split Rock, and she blesses tribal rituals such as weddings and naming rites. She fears that the BIA's lease approval to Quoddy Bay, LLC will permanently change the character of the Split Rock site from a spiritual and pristine area to an industrial zone and eliminate the opportunity to conduct the many ceremonies that have traditionally taken place there.

15. Plaintiff Reginald Joseph Stanley is a lifelong Passamaquoddy tribal member and resides in a residential trailer home at 384 County Road, 250 feet northeast from the Split Rock site. He has lived at that location for 18 years. His home is located within the operational zone of the proposed LNG facility, as set forth in the current lease agreement, and he is concerned that he will be forced to move as a result of the land rights granted to Quoddy Bay, LLC.

16. Pleasant Point Tribal Council members have acknowledged that Mr. Stanley's home is located within the proposed LNG site area. Quoddy Bay, LLC has identified Mr. Stanley's home as an "[e]xisting trailer to be removed" in their application to Maine's Bureau of Land and Parks for a Submerged Lands Lease Option.

17. Mr. Stanley is also concerned that the lease to Quoddy Bay, LLC will deprive him of his use and enjoyment of the Split Rock site for spiritual and recreational purposes, including access to his communal sweat lodge and the recreational horseshoe pits adjacent to the site. Mr. Stanley has a deep spiritual connection to his land because of its proximity to the water and Split Rock and he would like to "live out his life here" without being forced to relocate.

18. Plaintiff Mary Basset is a member of the Passamaquoddy Tribe and resides at 2 Bayview Drive, Sipayik, ME on the Pleasant Point Reservation, approximately one-half mile from the Split Rock site. Ms. Basset lives alone and has lived in the same "spot" for almost 45 years. She is concerned that access to her house may be threatened because of its proximity to an area off-limits to public access known in the current lease agreement as the "Administrative Use Zone," an area proposed to contain office and similar structures and subject to expansion. Ms. Basset also spends ample time at the Split Rock site. She used to take her children to Split Rock, and then her grandchildren, and now she enjoys the area with her great-grandchildren. She treasures Split Rock for its spiritual properties, as it is a spiritual site for meditation and reflection, and a wonderful place to go "enjoy and be a part of the earth."

Defendants

19. Defendant Robert K. Impson is the Acting Regional Director of the Eastern Region of the Bureau of Indian Affairs. Mr. Impson is the BIA official who approved the Quoddy Bay lease. Mr. Impson is sued in his official capacity

20. Defendant Gale Norton is the Secretary of the Interior of the United States Department of the Interior and is the official ultimately responsible for compliance with the laws governing BIA's actions in this case. Secretary Norton is sued in her official capacity.

STATUTORY AND REGULATORY BACKGROUND

National Environmental Protection Act

21. Section 102(2) of the National Environmental Protection Act (NEPA) requires that an Environmental Impact Statement (EIS) be prepared for all proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C.S. § 4332(2)(C).

22. NEPA established the Council of Environmental Quality (CEQ) in the Executive Office of the President. The CEQ promulgated the Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. Parts 1500-1508).

23. CEQ regulations require Federal agencies to adopt procedures to implement the regulations in agency programs. The Implementing procedures of the Department of the Interior (DOI) are in 516 DM (Departmental Manual) 1-7. These procedures apply to all bureaus within the DOI. Departmental Manual 516 DM 1.2.

24. The BIA has the responsibility for compliance with NEPA and CEQ regulations. Departmental Manual 516 DM 10.

25. The DOI's Department [NEPA] Manual states that Bureaus "shall initiate [NEPA] early . . . when the bureau initiates action on a project requiring NEPA analyses and documentation." Departmental Manual 516 DM 2.2.

26. The CEQ regulations allow an agency to prepare an Environmental Assessment (EA), in order to determine whether an EIS is required. 40 C.F.R. § 1501.4(a)-(b).
27. The EA is to be a “concise public document” that “[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1508.9(a).
28. The CEQ regulations also allow an agency to adopt criteria for classes of action “[w]hich normally do not require either an environmental impact statement or an environmental assessment,” known as Categorical Exclusions. 40 C.F.R. § 1507.3(b)(2)(ii).
29. The CEQ regulations define Categorical Exclusions as a “group of actions that would have no significant individual or cumulative effect on the quality of the human environment and, for which in the absence of extraordinary circumstances, neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4.
30. Under the BIA regulations, Categorical Exclusions are “single, independent actions not associated with a larger, existing or proposed, complex or facility. If cases occur that involve larger complexes or facilities, an EA or supplement should be accomplished.” Departmental Manual 516 DM 10.5.
31. The BIA’s regulations further specify that Categorical Exclusions only apply “where no change in land use is planned” for all approvals and other transfers of interests in land. Departmental Manual 516 DM 10.5(I).
32. Finally, even where an action might qualify for a Categorical Exclusion, an EA must be done “for individual actions within these CX [categorical exclusions] if any of the extraordinary circumstances listed in 516 DM 2, Appendix 2, apply.” Departmental Manual 516 DM 2, Appendix 1.
33. Appendix 2 of 516 DM 2 provides that “[e]xtraordinary circumstances exist for individual actions within CXs which may:

- 2.1 Have significant impacts on public health or safety.
- 2.4 Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
- 2.6 Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
- 2.7 Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office.
- 2.8 Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.
- 2.9 Violate a Federal law, or State, local, or tribal law or requirement imposed for the protection of the environment.
- 2.11 Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (Executive Order 13007)."

34. All of these "extraordinary circumstances" are present in the instant case.

The Indian Long Term Leasing Act

35. The Indian Long-Term Leasing Act requires that, "[p]rior to approval of any lease . . . pursuant to this section, the Secretary of Interior shall first satisfy [her]self that adequate consideration has been given to the relationship between the use of the leased lands with the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; . . . and the effect on the environment of the uses to which the leased lands will be subject." 25 U.S.C. § 415(a).

36. The BIA has established implementing procedures to "identify the conditions and authorities under which certain interests in Indian land may be leased" and to "describe

the policies and procedures that will be applied in the administration and enforcement of various types of leases.” 25 C.F.R. § 162.100(a)(1)(4).

37. Courts have held that 25 U.S.C. § 415(a) and 25 C.F.R. Part 162 impose a fiduciary obligation on the Secretary of the Interior in the commercial leasing context.

38. These fiduciary duties may only be exercised by the Secretary of Interior or an authorized representative. 25 C.F.R. Part 162.

39. The general purpose of the Leasing Act is to preserve tribal resources, and to ensure that the lease, being of long duration, is not harmful to the Indian allottees’ financial interests. Brown v. U.S., 86 F.3d 1554, 1563; 25 C.F.R. Part 162.

40. In effecting these purposes the Secretary of Interior is required, at a minimum, to provide written approval of the lease agreement between the Passamaquoddy Tribe and Quoddy Bay, LLC. 25 C.F.R. § 162.604(a).

41. The BIA is required to ensure that the Tribal Council’s approval of the lease was in accordance with legal requirements, in the best interests of the tribe, and consistent with the tribal members’ wishes. 25 C.F.R. § 162.107(a).

42. The BIA has a fiduciary duty to ensure that “no lease shall be approved or granted at less than present fair annual rental.” 25 C.F.R. §§ 162.107(a), 162.604(b). Fair annual rental “means the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market.” 25 C.F.R. § 162.101.

43. In assessing a fair annual rental, the BIA has a fiduciary duty under its Trust Obligation to perform a fair market value appraisal to ensure that the negotiated rent amount is at least equal to the fair market value of the leased land.

44. The BIA’s Trust Obligation to execute a fair market value appraisal derive from the Office of Special Trustee, Office of Appraisal Services, BIA Appraisal Handbook, and Trust Management Plan of the DOI.

45. The BIA’s appraisal handbook, revised in October 1998, states that “the

policies it contains apply to all real estate transactions and makes no exception for leases, and Bureau officials have said they believe that fair annual rental can be determined only through an appraisal. In effect, fair annual rental has come to mean no less than 'fair market rental' as estimated in an appraisal." U.S. General Accounting Office, "Rent Appraisals of Indian Land."

46. "Trust beneficiaries are entitled by law to an accurate valuation of Trust lands, conducted using methods and techniques that conform to the Uniform Standards of Professional Appraisal Practice (USPAP), and the Uniform Appraisal Standards for Federal Land Acquisitions (USFLA) where applicable." Real Estate Services Handbook, Bureau of Indian Affairs, Department of the Interior (Oct. 1998).

The National Historic Preservation Act

47. The National Historic Preservation Act (NHPA) requires that federal agencies take into account the effect of any undertaking licensed or approved by the federal government on any site or object that is included or is eligible for inclusion in the National Register. 16 U.S.C. § 470.

48. According to the definitional section of NHPA, "undertaking" 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).

49. Properties of traditional religious and 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).

50. Under the regulations promulgated by the Advisory Council on Historic Preservation, the BIA "shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2).

51. Consultation must be done through the State Historic Preservation Officer (SHPO) or, where the tribe has assumed section 106 responsibilities, with the Tribal Historic Preservation Officer (THPO). 36 C.F.R. § 800.3(c)(1).

52. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, “consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO.” 36 C.F.R. § 800.3(d).

53. The BIA has a duty to determine the potential adverse effects of the undertaking, using the criteria specified in the regulations promulgated by the Advisory Council on Historic Preservation. 36 C.F.R. § 800.5(a).

54. Adverse effects 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).

The Administrative Procedure Act.

55. The Administrative Procedure Act (APA) provides for judicial review of final agency actions, such as the BIA’s approval of the Quoddy Bay, LLC ground lease. Agency actions, findings or conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or made “without observance of procedure required by law” are unlawful and must be overturned by a district court. 5 U.S.C. § 706(2)(A),(D).

56. The BIA is a federal agency subject to the APA.

57. The BIA’s approval of the Quoddy Bay, LLC ground lease is a “final agency action” within the meaning of section 706(2)(A) of the APA.

58. Plaintiffs derive cultural, spiritual, recreational, and aesthetic benefit and enjoyment from their use of the Split Rock site. The actions by Defendants will adversely affect the Plaintiffs’ opportunities to use the site for these purposes, therefore granting

them a right of review within the meaning of the APA, 5 U.S.C. § 702.

59. The interests of Plaintiffs are, and will continue to be, adversely affected by the Defendants' violation of NEPA, the Indian Long Term Leasing Act, NHPA, and the APA, because Defendants' violations have authorized the conversion of the Split Rock site from a natural beach area with historical, cultural, religious, and recreational significance to an industrial zone.

Passamaquoddy Tribal Governance

60. The Passamaquoddy Tribe is a federally recognized tribe.

61. The Passamaquoddy Tribe has about 2,500 members, with about half living on the Reservation and the other half living off the Reservation.

62. The Passamaquoddy Reservation consists of two distinct reservation areas.

63. One is Indian Township, which consists of 23,000 acres and has an approximate population of 550 persons.

64. The other is Sipayik, or Pleasant Point, where the LNG project is proposed, and which consists of 225 acres, with an approximate population of 560 persons.

65. Tribal laws and ordinances are governed by the Resolutions issued by the Joint Tribal Council of Indian Township and Pleasant Point.

66. The Resolution of the Joint Tribal Council of the Passamaquoddy Tribe of June 12, 1996 established the rights and authorities of each reservation and held that "the lands and other property belonging to the Passamaquoddy Tribe [may] not be managed, used, alienated or in any way encumbered except by this Joint Tribal Council or by the people of the Passamaquoddy Tribe acting in concert." Resolution #6-12-96-3.

67. The Resolution of Indian Township of March 22, 2005, affirmed the Joint Tribal Council's exclusive authority to oversee the natural resources of the whole Passamaquoddy Tribe, including the ocean and its resources, and held that "the Indian Township Tribal government does assert its right to have a vote in any activity infringing

on our rights in these waters and does not support this LNG project until the voters of Indian Township have had a chance to vote on this issue.” Resolution #05-03-22-2.

FACTS

Split Rock Site

68. The proposed LNG facility site, Split Rock, is considered sacred by members of the Passamaquoddy Tribe. It is used by the tribe for ceremonies, such as the Full Moon Ceremony, Whale Ceremony, Canoe Launching Ceremony, and wedding and baptism ceremonies. Split Rock is important for many reasons, including recreation, tribal culture, history, and religion. Members describe Split Rock as a natural phenomenon which was created by the Great Father and the action of Mother Earth. Split Rock has also been described as a place of peace and tranquility, where one can sit and watch the ebb and flow of the tide.

69. Plaintiffs’ use and enjoyment of Split Rock is threatened by the approval of the ground lease. The lease is the sine qua non for the LNG project: but for the lease, the project could not move forward. The lease represents a “change in land use” within the meaning of the BIA’s regulations. Departmental Manual 516 DM 10.5(I).

70. The entire Split Rock area is three-fourths of an acre, and is used as a community area where members gather with their families, for ceremonies, but also to play horseshoes, swim, canoe, clam and fish, and to gather periwinkles and sweet grass. The area of Split Rock also houses “Grandmother’s Bed,” a place where tribal children and adults go to seek refuge and enlightenment and which is considered a natural sanctuary.

71. The Passamaquoddy Bay area is home to many species of marine life, including Sardines, Flounder, and different species of whale, porpoise, and birds. Most notably, five endangered species are found in the Passamaquoddy Bay area: the Right Whale, Humpback Whale, Fin Whale, the Atlantic Salmon, and the Shortnose Sturgeon. The Bay is also home to non-endangered marine life, such as Pollock, the Harbor Seal, and the

Harbor Porpoise, which are very important to the Passamaquoddy religious tradition and culture.

72. Passamaquoddy Bay and its rich biological diversity are threatened by the approval of the ground lease and the proposed LNG terminal because of the major change in the use of harbor waters for industrial purposes.

The Proposed Quoddy Bay LNG Terminal

73. The proposed Quoddy Bay terminal is a LNG import terminal which will receive shipments of LNG from large LNG tankers. The LNG will be transported from this terminal to distribution pipelines used to supply natural gas throughout the Northeast.

74. The ground lease agreement authorizes a three-quarter mile-long pier with a cryogenic pipeline that will bring gas ashore, regasifiers/vaporizers located on the pier or adjacent land to convert the LNG to its gaseous state using heated water, a dock to berth the LNG tankers, pumps to push the natural gas into an underground natural gas pipeline, and the possibility of a power plant to provide electricity for the facility, and administrative buildings. In addition, the ground lease agreement authorizes either specially designed nickel-steel storage tanks measuring as large as 110 feet tall and 200 feet wide, or keeping one LNG vessel docked at the pier at all times, for the purpose of storing the LNG before it is transferred via the LNG pipeline.

75. There are two types of LNG Vessels, Membrane and Spherical. Both types of LNG Vessels are over one-thousand feet long and hold anywhere from 125,000-138,000 cubic meters of LNG.

76. As described in the ground lease agreement, the planned site may include approximately fifteen acres. In addition, the ground lease authorizes both an "Exclusion Zone" and an "Administrative Use Zone" in that area which will be off limits to the Passamaquoddy Tribe for public access.

77. The Exclusion Zone is contained within the operations premises, and describes the area in which safety and security considerations prevent anyone from accessing this

area. The boundary of the Exclusion Zone, also the operations premises, extends 1550 feet to the north, abutting property owned by the Passamaquoddy Tribe and which is used for residential purposes (including homes, a school, and church), and 700 feet to the south, an area of sparse development. The lease authorizes expansion of the Exclusion Zone as elected by Quoddy Bay, LLC.

78. The Administrative Use Zone describes the area used for office, administrative, storage, or similar ancillary functions which do not include major components of the LNG Project. The northerly boundary of the Administrative Use Zone is a line running one hundred feet from any house existing on the Pleasant Point Reservation.

79. Tribal members are concerned not only that they will be denied access to Split Rock, but also that they will be denied access to their homes and public areas. Under the approved lease, Quoddy Bay, LLC's elective rights to expand the operations premises, and Exclusion Zone, threatens Plaintiffs' access to the residential property abutting the operations premises.

80. As a result of the BIA's approval of the ground lease, Quoddy Bay, LLC has already made a formal application to the State of Maine for "a Submerged Lands Lease Option" permit in connection with its LNG Import Facility on the Pleasant Point Reservation and they have announced plans to push forward with all necessary permits from state and federal agencies.

81. In the Submerged Lands Lease Option application, Quoddy Bay, LLC has begun outlining its plans to remove structures from the Split Rock site and transform its use from a natural beach area of recreational, cultural, and religious significance into an industrial zone. In describing the "present use of the subject property" on which the LNG project will be constructed, Quoddy Bay, LLC identified for removal a trailer residence currently occupied by Plaintiff Reginald Joseph Stanley and horseshoe pits used for recreation by Plaintiffs.

Ground Lease Approval

82. On May 19, 2005, the Pleasant Point Tribal Council approved the ground lease agreement with Quoddy Bay, LLC, authorizing them to begin all necessary phases for the construction of a LNG Import Terminal at Split Rock.

83. However, the Pleasant Point Tribal Council's decision did not express the will of the entire Passamaquoddy Tribe because a referendum which purported to authorize approval of the proposed LNG facility on reservation land was not based on the fully informed, complete participation of all Passamaquoddy tribal members.

84. On August 17, 2004, a referendum was held, requesting approval to build a LNG facility on the reservation from the voting Pleasant Point Passamaquoddy tribal members. The Referendum was billed as a non-binding referendum and the ballot stated simply, "Should the Sipayik Members of the Passamaquoddy Tribe host an LNG (Liquefied Natural Gas) Facility at Pleasant Point?" with a box to check "Yes" or "No".

85. The Referendum was announced three weeks prior to the vote, despite a 90 day notice requirement. The vote was scheduled during peak working hours of blueberry farming, which prevented many Passamaquoddy blueberry workers from voting.

86. The Referendum was based on a different proposed site at Gleason's Cove, a 42 acre marsh site several miles from the homes and residences of the Pleasant Point Reservation and which is not used for recreational, religious, cultural or historic purposes.

87. The Referendum also excluded certain voting members of the Passamaquoddy Tribe because the Pleasant Point Tribal Council did not recognize the voting standing of tribal members who were attending schools off the reservation, or they lived outside the 50 mile service area, and because absentee ballots were not accepted.

88. On May 5, 2005, a public meeting was scheduled to discuss the lease agreement for the newly selected site at Split Rock.

89. At this meeting, an eighty-plus page document was passed out to the Pleasant Point Tribal Council but was taken back by the Pleasant Point tribal attorney Craig Francis, to be shredded and “to make some revisions.”
90. On May 19, 2005, a meeting was held to vote on the land lease with Quoddy Bay, LLC and by a vote of 4-3, the Pleasant Point Tribal Council approved the ground lease agreement.
91. At this meeting, the final version of the ground lease agreement was distributed to Pleasant Point Tribal Council members fifteen minutes before the meeting to vote, which did not provide adequate time to review the revised document.
92. Additionally, the Pleasant Point Tribal Council did not permit tribal members to read the lease, including Plaintiff Vera Francis who requested to review the document.
93. Many of the tribal members were unaware that the actual site for the LNG facility approved on May 19, 2005 was at Split Rock, instead of the original Gleason Cove site proposed by the August 17, 2004 Referendum.
94. On May 31, 2005, the Pleasant Point Tribal Council approved a waiver of a fair market value appraisal of the leased land.
95. The appraisal waiver was supported by Robert Williams, an attorney retained by the Pleasant Point Tribal Council to aid in the lease approval process and paid by Quoddy Bay, LLC. The Tribal Council relied on his advice, in spite of objections by tribal members, including Council Member Plaintiff Hilda Lewis.
96. The Pleasant Point Tribal Council did not consult with, or receive approval from, Indian Township when it approved the ground lease agreement with Quoddy Bay, LLC or when it waived the fair market value appraisal.
97. On June 1, 2005, Defendant Impson approved the lease between the Passamaquoddy Tribe and Quoddy Bay, LLC.
98. On June 1, 2005, Plaintiff Hilda Lewis spoke with Defendant Impson by telephone and expressed concerns about the waiver of a fair market value appraisal and

the lack of time that Pleasant Point Tribal Council members had to review the lease before voting to approve it. Mr. Impson responded by stating "I have 3 people looking at it [lease] but there's nothing I can do about internal tribal matters."

99. On June 10, 2005, Ms. Lewis wrote a letter to Defendant Impson, documenting her specific concerns about the lease approval process, including: (1) the waiver of a fair market value appraisal, (2) the lack of time that Pleasant Point Tribal Council members had to review the lease before voting to approve it, and (3) the conflict of interests posed by attorney Robert Williams, an attorney retained by the Pleasant Point Tribal Council but paid by Quoddy Bay, LLC, who recommended approving the lease and appraisal waiver.

100. By letter dated July 25, 2005, Mr. Franklin Keel of the Eastern Region of the BIA responded by stating "[o]ur review of proposed leases is to ensure they satisfy legal requirements, as guided by federal law and the regulations" and "we must necessarily rely on the actions of the Tribal Council to express the will of the tribe."

101. Defendants did not execute a fair market value appraisal of the leased land to ensure a fair annual rental, as required by the BIA's regulations in 25 C.F.R. §§ 162.107(a), 162.604(b), prior to approving the lease.

102. Defendants did not prepare an Environmental Assessment or any other environmental documents prior to approving the lease.

103. Defendants did not issue any written decision of the approval of the lease, as required by 25 C.F.R. § 162.604(a).

104. Defendants allowed no opportunity for public comment or input from affected parties prior to approving the lease.

105. Defendants did not consult with Indian Township to confirm whether the Pleasant Point Tribal Council even had authority to grant the lease for the entire Passamaquoddy Tribe prior to approving the lease.

106. Defendants gave no consideration to the historic, religious, and cultural significance of Split Rock prior to approving the lease.

107. As a result of Defendants' approval of the lease, the lessee, Quoddy Bay, LLC has begun surveying work and other preparations for development of the project.

CLAIMS

COUNT 1: VIOLATION OF NEPA

108. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 107 above.

109. The BIA's NEPA handbook requires that an Environmental Assessment (EA) must be completed for all actions which are not categorically excluded or which are listed as exceptions to the Departmental Categorical Exclusions in 516 DM 2, Appendix 2.

Departmental Manual 516 DM 10.5

110. The BIA breached its duty under NEPA by issuing a Categorical Exclusion for the lease approval because the BIA's departmental rules prohibit a Categorical Exclusion for any "change in land use" or in cases that involve larger complexes or facilities. 516 DM 10.5.

111. The ground lease approval constitutes a change in land use because prior to lease approval, the Split Rock site has been used for aesthetic, cultural and recreational purposes for time immemorial; now the land will be used for industrial purposes involving complex LNG facilities.

112. The BIA breached its duty under NEPA by issuing a Categorical Exclusion for the lease approval because the effects of the ground lease constitute extraordinary circumstances that preclude it from categorical exemption under Appendix 2 of the BIA's Departmental Manual.

113. The ground lease agreement will:

- Have significant impacts on public health or safety because of the high risks posed by LNG terminals, including risk of leaks, spills, fires, and explosions;
- Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks because of the uncertainty surrounding the new LNG technology;
- Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects because the BIA's decision has set in motion a chain of events that will affect the environment, such as Quoddy Bay, LLC's application for a Submerged Lands Lease Option;
- Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office because Split Rock is a property of cultural and religious significance to the Passamaquoddy Tribe;
- Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species because of the endangered species inhabiting the Passamaquoddy Bay;
- Violate a Federal law, or State, local, or tribal law or requirement imposed for the protection of the environment because the BIA did not consider the wishes of Indian Township, in violation of Indian Township's Resolution to protect ocean and natural resources;
- Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites because the BIA's decision will allow Quoddy Bay, LLC to limit Plaintiffs access to Split Rock for ceremonial and religious use.

**COUNT 2: VIOLATION OF THE INDIAN LONG-TERM LEASING ACT AND
TRUST OBLIGATION**

114. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 113 above.

115. The Indian Long-Term Leasing Act, 25 U.S.C. § 415(a) (Leasing Act), requires that, “[p]rior to approval of any lease . . . pursuant to this section, the Secretary of Interior shall first satisfy [her]self that adequate consideration has been given to the relationship between the use of the leased lands with the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; . . . and the effect on the environment of the uses to which the leased lands will be subject.”

116. Defendants violated the Leasing Act because they did not consider the impacts of the LNG facility proposed by Quoddy Bay, LLC under the approved lease upon neighboring lands, the height, quality or safety of the proposed facility, nor upon the environment.

117. Defendants violated the Leasing Act because they did not consider the primary purposes of protecting tribal resources and ensuring that the lease, being of duration for fifty years, was in the best interests of the Passamaquoddy Tribe as a whole.

118. Defendants violated 25 C.F.R. § 162.107(a) by failing to ensure that the Pleasant Point Tribal Council acted in accordance with all legal requirements and in the best interests of the entire Passamaquoddy Tribe, and in accordance with all tribal members’ wishes because Defendants did not consider the wishes of Indian Township and they relied on a referendum vote that excluded members of the tribe and was based on erroneous information about the site.

119. Defendants violated 25 C.F.R. §§ 162.107(a), 162.604(b) by failing to ensure that the tribal land was leased at a fair annual rental.

120. Defendants violated their Trust Obligation to determine a fair annual rental under 25 C.F.R. Part 162 by failing to do a fair market value appraisal in conformance with the BIA's Appraisal Handbook.

COUNT 3: VIOLATION OF NHPA

121. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 120 above.

122. In carrying out its responsibilities under section 470f of the NHPA, the BIA has a duty to consult with the Passamaquoddy Tribe regarding the religious and cultural significance of Split Rock. 16 U.S.C. § 470(d)(6)(B).

123. The BIA breached its duty under section 470a(d)(6) of the NHPA by failing to consult with the tribe before approving the ground lease on a site of religious and cultural significance to the Passamaquoddy Tribe and which is eligible for listing on the National Registry of Historic Places.

124. The BIA breached its duty under 36 C.F.R. § 800.4(b) by failing to make reasonable and good faith efforts to determine if Split Rock had any cultural or religious significance which would prompt eligibility as a historic site under the NHPA.

125. The BIA breached its duty under 36 C.F.R. § 800.5(a) to consider the adverse effects on Split Rock by approving the lease of Split Rock without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of Split Rock's historic significance.

COUNT 4: VIOLATION OF THE APA

126. Plaintiffs repeat and incorporate by reference the allegations contained in paragraphs 1 through 125 above.

127. Due to Defendants' failure to comply with NEPA, the Indian Long-term Leasing Act and NHPA, Plaintiffs have suffered legal wrongs because of agency action, and are adversely affected and aggrieved by agency action within the meaning of the APA, 5 U.S.C. § 702.

128. Defendants' failure to comply with NEPA, the Indian Long-term Leasing Act and NHPA, is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "without observance of procedure required by law" within the meaning of the APA, 5 U.S.C. § 706(2)(A),(D), and should therefore be declared unlawful and set aside by this Court.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

129. Declare that Defendants' approval of the ground lease agreement of the Split Rock site to Quoddy Bay, LLC for the construction of a LNG terminal without completing an Environmental Assessment, violates NEPA; that Defendants' approval of the ground lease agreement without ensuring a fair annual rental violates the Indian Long-Term Leasing Act; and that Defendants' failure to consult with the tribe regarding the historical and cultural significance of Split Rock violates the NHPA; and consequently, the lease approval must be set aside.

130. Grant Plaintiffs injunctive relief, setting aside Defendants' approval of the ground lease, which allows Quoddy Bay, LLC to prevent Plaintiffs from accessing the Split Rock site for cultural and recreational purposes in the same manner as permitted before the approval of the lease.

131. Issue an order pursuant to the APA, 5 U.S.C. § 706(2)(A),(D), setting aside the approval of the ground lease to Quoddy Bay, LLC, until Defendants have complied with NEPA, the Indian Long-Term Leasing Act, the NHPA and the APA by taking the following actions:

1. Completion of an EA pursuant to NEPA and in full compliance with CEQ regulations and the BIA's Handbook;

2. Completion of a fair market value appraisal of the leased land to assess a fair annual rental pursuant to the BIA's leasing regulations; and
 3. Consulting with the Passamaquoddy Tribe pursuant to the provisions in the NHPA.
132. Allow Plaintiffs to recover the costs of this action, including Attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
 133. Grant such other relief as the Court deems just and proper.

DATED this ____ day of November 2005,

Respectfully Submitted,

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