IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

WESTERN ENERGY ALLIANCE Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	)))))))))	Case No. 16-cv-00050-DLH-CSM

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The Western Energy Alliance ("WEA"), an organization claiming to represent several hundred companies involved in exploration, production, and transportation of oil and natural gas, seeks to preliminarily and permanently enjoin the United States Department of the Interior ("Interior" or "DOI") and the Bureau of Indian Affairs ("BIA") from implementing the regulations amending 25 C.F.R. Part 169 promulgated as *Rights of Way on Indian Land*, 80 Fed. Reg. 72,492 (Nov. 19, 2015) ("Final Rule" or "FR"). However, neither WEA nor its members will be injured by the Final Rule, and WEA's *Motion for a Temporary Restraining Order and Preliminary Injunction to Stay Implimentation [sic] of Final Rule* [Doc. 3] ("PI Motion")[1] falls far short of standards for obtaining the extraordinary relief of a preliminary injunction. Further, the subject matter of Plaintiff's *Complaint* [Doc. 1] is not justiciable under Article III of the United States Constitution.

II. BACKGROUND

A. STATUTORY AND REGULATORY CONTEXT

1. The 1948 Act

In 1948, Congress enacted legislation "to simplify and facilitate [the] process of granting rights-of-way across Indian lands." *Nebraska Pub. Power Dist. v. 100.95 Acres of Land in Thurston et al.*, 719 F.2d 956, 959 (8th Cir. 1983) (discussing enactment of an *Act to empower the Secretary of the Interior to grant rights-of-way for various purposes across lands of individual Indians or Indian tribes, communities, bands or nations*, 62 Stat. 17 (1948), codified at 25 U.S.C. §§ 323-328 ("1948 Act")). "Prior to 1948, access across Indian lands was governed

[1] On March 15, 2016, upon adopting the joint stipulation [Doc. 12] filed by the parties March 14, 2016, the Court, on March 15, 2016, denied WEA's request for a temporary restraining order as moot. [Doc. 13.]

by an amalgam of special purpose access statutes dating back as far as 1875 . . . this statutory scheme . . . created an unnecessarily complicated method for obtaining rights-of-way." *Nebraska Pub. Power Dist.*, 719 F.2d at 958-59. *See also H.R. 73-3322: Rights of Way Through Restricted Indian Land*, at 8-11 (1947) (statement of Rep. George Schwabe discussing the administrative burden imposed by the "hodge podge" of prior right-of-way statutes; the financial cost to the tribe, including delayed compensation; and the dissatisfaction of both the tribe and the grantee under this system).

Congress first considered these problems in connection with proposed legislation addressing rights-of-way across tribal and individual Indian lands of the Osage Nation. *Nebraska Pub. Power Dist.*, 719 F.2d at 959. Due to the nationwide problem posed by this "hodge podge" of right-of-way statutes, however, Interior urged Congress to enact legislation that would apply to all reservations across the United States. *Id.*; *see also* S. Rep. No. 80-823 at 3-4 (1948) (Interior "strongly urge[d] enactment of the proposed legislation" as it would "go a long way to satisfy the need for simplification and uniformity in the administration of Indian law."). The legislation, at the suggestion of Interior, included a provision stating that prior right-of-way statutes were not repealed by the 1948 Act, the purpose of which was to "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new." *Nebraska Pub. Power Dist.*, 719 F.2d at 959 (quoting Letter from Oscar L. Chapman, Under Secretary of the Interior, to Arthur H. Vandenberg, President pro tempore of the Senate, H.R. Rep. No. 80-739 (1947), *reprinted in* 1948 U.S. Code Cong. Serv. 1036).[2]

[2] *See, e.g.*, *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1057-59 (9th Cir. 1988) (holding that DOI had the discretion to grant a pipeline right-of-way pursuant to either the 1948 Act or the earlier, use-specific statute that preceded it, and was not required to invoke the earlier statute even though that statute expressly limited the duration of pipeline rights-of-way to a term shorter than the one contemplated under the 1948 Act).

Congress adopted Interior's recommendation and enacted the 1948 Act with the language put forward by the agency. S. Rep. No. 80-823 at 1. The 1948 Act delegates broad authority to the Secretary to "grant rights-of-way for all purposes, subject to such conditions as he may prescribe" over lands held in trust for Indian tribes or individual Indians, as well as over lands held in fee by Indian tribes or individual Indians that are subject to restrictions on alienation. 25 U.S.C. § 323. The 1948 Act conditions the right-of-way grant on consent from landowners, providing certain exceptions related to individual Indian landowners, *id.* § 324; requires that the landowner receive just compensation for the grant, *id.* § 325; does not repeal prior rights-of-way statutes, *id.* § 326; and authorizes the Secretary to promulgate regulations to carry out the broad authority delegated by the Act, *id.* § 328.

2. Interior Regulations Implementing the 1948 Act

After first promulgating regulations to implement the 1948 Act in 1951, 16 Fed. Reg. 8,578 (Aug. 25, 1951), Interior worked to revise them in 1967 to remove "archaic" requirements; reduce costs on all parties engaged in the right-of-way issuance process; reorganize the regulations for clarity; and remove provisions that were advisory, rather than regulatory, in nature, 32 Fed. Reg. 5,512 (Apr. 4, 1967) (discussing justification for the proposed regulatory changes). After considering comments on the proposed changes submitted by tribal and individual Indian landowners as well as industry representatives, DOI issued final revised regulations that scaled back its modernization effort. 33 Fed. Reg. 19,803, 19,804 (Dec. 27, 1968) ("the proposed regulations [were] materially changed and . . . many of the provisions of [the] existing regulations [were] retained" in the final rule). With the exception of relatively minor modifications to the regulations in 1980, 45 Fed. Reg. 45,909 (July 8, 1980), these 1968

regulations have governed Interior's process for granting rights-of-way through to the present day. 80 Fed. Reg. 72,492 (Nov. 19, 2015).

3. Reasons for Revising the Regulations

After nearly fifty years, the 1968 regulations have proven to be outdated in a number of material respects. The archaic aspects of the current rule operate to diminish the role of the tribal or individual Indian landowner in the right-of-way granting process, despite the strong policy support for tribal self-determination and the federal trust responsibility owed to tribal and individual Indian landowners. *See* Declaration of Sharlene M. Round Face ¶¶ 7-16 ("Round Face Declaration"), *attached as* Exhibit A. For example, in the modern era deposits to landowners are not placed in a special deposit account, nor are maps provided "on tracing linen in triplicate." *Id.* ¶ 7. And despite more modern and accurate methods of valuation readily available to the public, one of the pre-1948 statutes used as authority for the current rule contemplates that valuation will be determined "by a board of three referees appointed by the Secretary and paid $4.00 per day." *Id.* ¶ 8.

In addition, the current rule does not reflect the active role that tribal and individual Indian landowners take in the negotiations concerning right-of-way grants, or the conditions tribes often place on their consent to a right-of-way, including the retention of tribal jurisdiction over the land, persons, and activities within the right-of-way following the grant. *Id.* ¶ 17 (discussing examples of rights-of-way granted under the current rule which include provisions for tribes to retain jurisdiction). The current rule's silence concerning mortgages, assignments, or amendments to existing rights-of-way means that the landowner is not kept apprised concerning the parties who are in control of the right-of-way or provided notice of any potential changes to the use of the right-of-way. *Id.* ¶ 11-12. *See also* Final Rule Preamble ("Preamble"), at 72,502.

Any landowner would want to be so informed, but the current rule leaves many landowners without meaningful information about the use or changing ownership of the right-of-way grant. Likewise, the absence of timelines and notice requirements mean that landowners and applicants are in the dark about the status of applications and developments affecting Indian land. Round Face Declaration ¶ 10.

4. What the Final Rule does

The Final Rule seeks both to remove archaic, unworkable provisions from the regulations, and to recognize the important role landowners already play in the right-of-way granting process. Preamble, at 72,492. Consistent with the United States' trust responsibility to Indian tribes and individual Indians, and the government-to-government relationship with Indian tribes, the Final Rule supports landowner control over, and provides more notice to landowners regarding actions impacting, their land. *Id*. It also clarifies and streamlines processes for BIA review of right-of-way documents, providing landowners and applicants with important information and status updates, while also eliminating the extra burden of obtaining BIA permission to survey. *Id*. at 72,492, 72,517; Round Face Declaration ¶¶ 10-11, 14. In addition, where the current rule is silent, the Final Rule now addresses issues of critical importance that frequently arise in the right-of-way context, including changes of ownership, changes in use, "piggy-backing," and how a landowner can take action when a grantee violates a right-of-way grant. *E.g.*, FR §§ 169.7, 169.127, 169.403; Round Face Declaration ¶ 12.

5. BIA's Preparations for Implementing the Final Rule

WEA's assertion, PI Mem., at 35-36, that BIA is not prepared to implement the Final Rule is mistaken. Ms. Sharlene Round Face is responsible for leading BIA's efforts to prepare for and implement the Final Rule. Round Face Declaration ¶ 5. The effective date of the Final

Rule was extended from December 21, 2015 to March 21, 2016 to facilitate a smooth implementation process. *Id*. at ¶ 4.

To ensure BIA's readiness to implement the Final Rule, Ms. Round Face has formed a workgroup of BIA subject matter experts from across the country to assist in implementing the Final Rule. *Id.* ¶ 17. This workgroup has already been developing guidance documents and templates, which are available on the BIA website, for use in connection with the Final Rule. *Id*. ¶ 22 . In addition, BIA has been working through internal technical issues, such as changes to BIA's record-keeping systems, to ensure a smooth transition to the Final Rule when it goes into effect. *Id*. ¶¶ 17, 22. Ms. Round Face formalized these efforts into a "ROW Regulations Implementation Plan" such that they could be tracked and resolved as BIA prepares to issue rights-of-way pursuant to the Final Rule. *Id*. ¶ 18.

Ms. Round Face organized two trainings regarding the Final Rule, the first for BIA employees and representatives from tribes that perform realty functions associated with rights-of-way, and the second for the public, especially rights-of-way grantees, potential grantees, and landowners. *Id*. ¶¶ 19-20. Lengthy PowerPoint presentations were developed for each of the training sessions and presenters answered questions during the training. *Id*. Ms. Round Face states that for those participants who were unable to dial-in to the trainings, the materials presented were posted at the BIA website, and she has volunteered to field questions from agency personnel regarding implementation of the Final Rule. *Id*. ¶¶ 19-21. Answers to frequently asked questions are also on the BIA website. *Id*. ¶ 23. Based on her personal knowledge and involvement regarding BIA's implementation process, Ms. Round Face has stated that BIA is prepared to implement the Final Rule when it goes into effect. *Id*. ¶ 24.

B. CASE LAW ADDRESSING TRIBAL JURISDICTION IN THE RIGHT-OF-WAY CONTEXT

While federally recognized Indian tribes are subject to the plenary control of Congress, "unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). And, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997) (quoting *Montana v. United States*, 450 U.S. 544, 565-66 (1981)). Indian tribes therefore "retain considerable control over nonmember conduct on tribal land." *Strate*, 520 U.S. at 454.[3] Nevertheless, unless a treaty or statute provides otherwise, a tribe's inherent authority to regulate conduct generally does not extend to nonmembers on fee land within a reservation absent the existence, express or implied, of a consensual relationship between the tribe and the nonmember and a nexus between such relationship and the exercise of tribal authority; or if the nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. Except in the narrow law enforcement context presented in *Nevada v. Hicks*, 533 U.S. 353 (2001),[4] the United States Supreme Court has not applied *Montana* to evaluate a tribe's jurisdiction over nonmember conduct on trust or restricted lands.[5]

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[3] As discussed *infra*, at 24-25, the Final Rule does not mandate tribal jurisdiction or taxation authority, but rather permits such, consistent with applicable federal law.

[4] While *Hicks* stated that land ownership "is only one factor to consider" when evaluating a tribe's jurisdiction over nonmembers, it further acknowledged that "[i]t may sometimes be a dispositive factor." 533 U.S. at 360. Ultimately, the *Hicks* Court concluded that "tribal authority to regulate state officers in executing [search warrants] related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations" and thus the tribe lacked jurisdiction over such officers. *Id.* at 364.

[5] *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332-34 (2008) (concluding that tribe lacked authority to regulate sales of non-Indian fee land); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (evaluating tribe's authority to tax nonmember

In *Strate*, the Court engaged in particularized, factual inquiry to conclude that the land specifically at issue in that case was "equivalent, for nonmember governance purposes, to alienated non-Indian land" before applying the *Montana* exceptions to the question of the Three Affiliated Tribes' adjudicatory jurisdiction. 520 U.S. at 454-56. The Court considered whether the tribal court could hear a tort claim filed by one nonmember against another, stemming from a traffic accident on a right-of-way crossing the Tribes' Reservation. *Id.* at 443-44. Relevant to this dispute, the lands at issue in *Strate* were part of a right-of-way granted, pursuant to the 1948 Act, to the State of Nebraska for incorporation into a public highway. *Id*. at 454-55. The Court did *not* hold that all rights-of-way granted pursuant to the 1948 Act were the equivalent of alienated fee land. Instead, the Court considered the facts of the "*particular* matter" before it, *id.* at 454 (emphasis added), to conclude that because the lands were part of the State's highway, which was open to the public "and traffic on it is subject to the State's control"; the "Tribes have consented to, and received payment for" the right-of-way and "retained no gatekeeping right" in the grant; and because the Tribes could not "assert a landowner's right to occupy and exclude" nonmembers from the lands while it remained part of the highway, the lands were the functional equivalent of fee land for tribal jurisdiction purposes. *Id.* at 455-56.

The United States Court of Appeals for the Eighth Circuit has considered tribal jurisdiction in the context of a right-of-way, and in so doing, applied the same approach taken by the Supreme Court in *Strate*. In *Nord v. Kelly*, 520 F.3d 848 (8th Cir. 2008), the Eighth Circuit,

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activity on non-Indian fee land); *South Dakota v. Bourland*, 508 U.S. 679, 697-98 (1993) (extending *Montana* exceptions to consider tribe's authority over ceded fee lands); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 420-30 (1989) (applying *Montana* factors to evaluate tribe's regulatory jurisdiction over fee lands within the reservation); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (concluding that tribe retained inherent sovereign authority to tax nonmembers within its reservation).

like the Court in *Strate*, had to consider whether a tribal court had jurisdiction to hear a case brought against a nonmember stemming from a traffic accident on a right-of-way crossing the reservation. *Id*. at 850-51. The *Nord* court noted that *Hicks* said land ownership "is only one factor to consider" in evaluating tribal jurisdiction, but "may sometimes be a dispositive factor." *Id.* at 853 (quoting *Hicks*, 533 U.S. at 360).[6] *Nord* then looked to the facts of the case before it and agreed with the district court that they were "on all fours with *Strate*." 520 F.3d at 853. In its appeal, the tribe argued that the district court had imposed a "categorical application of *Strate*" to extend *Montana* to the jurisdiction analysis. *Id.* at 854. The appellate court rejected this characterization, stating that "the district court properly considered, and gave effect to, the relevant public records and pertinent regulations that established the federally granted right-of-way" before concluding that the lands were the equivalent of fee land for tribal jurisdiction purposes. *Id.* The appellate court noted the record before it indicated that the tribe had consented to the right-of-way and received just compensation for it, that the right-of-way was for a public highway subject to state control, and that "the easement included no reservation of tribal dominion or control over the right-of-way" and, on that basis, concluded that, as in *Strate*, the land was equivalent to non-Indian fee land for tribal jurisdiction purposes. *Id.* at 855.[7]

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[6] *Nord* did not conclude that *Hicks* rendered the factual analysis set forth in *Strate* inapplicable. *Id.* at 853. In *Reservation Tel. Co-op v. Henry*, 278 F. Supp. 2d 1015 (D.N.D. 2003), which preceded *Nord*, this Court concluded that *Hicks* held that *Montana* applied regardless of the ownership status of the lands. Nonetheless, and consistent with both *Strate* and the subsequent decision in *Nord*, this Court found that the *Strate* factual analysis applied in the context of evaluating whether a right-of-way granted pursuant to the 1948 Act should be considered the equivalent of non-Indian fee land for tribal jurisdiction purposes. *Id*. at 1022 ("The rights-of-way in this dispute . . . are on either non-Indian land or the 'functional equivalent' of non-Indian land as recognized under" *Strate*).

[7] The Ninth Circuit has taken a similar, if not identical, approach. *See Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944, 949-50 (9th Cir. 2000) (concluding *Montana* applied to evaluate the tribe's jurisdiction after finding that three of the *Strate* factors were present); *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1063-64 (9th Cir. 2000) (in light of the factual

Outside of the right-of-way context, some courts have extended the reach of the *Montana* exceptions to apply to authority to regulate nonmember conduct on trust or restricted land, *e.g.*, *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010) (applying *Montana*-exception analysis to "both Indian and non-Indian land" in the context of whether a tribe could assert jurisdiction over a process server who entered tribal lands), *cert. denied*, 562 U.S. 1179 (2011); *but see Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (holding that "tribe's status as landowner is enough to support regulatory jurisdiction without considering *Montana*" where nonmember's activity "occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play"). But despite the extension of *Montana* in these factually distinct cases, in the context of rights-of-way, including those granted pursuant to the 1948 Act, courts have applied *Montana only after* determining that the facts of the case are sufficiently similar to *Strate* to warrant the conclusion that the lands are the functional equivalent of fee lands. If that fee-comparable land status is found, courts then consider whether, given the facts of the particular case, either or both of the *Montana* exceptions warrant the assertion of tribal jurisdiction. *E.g.*, *Nord*; *Burlington Northern Santa Fe R.R. Co. v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 772-75 (9th Cir. 2003) (comparing the nature of the right-of-way grant to that in *Strate* to conclude that no consensual relationship existed between the grantee and the tribe, but remanding the dispute to tribal court for further discovery on the applicability of *Montana*'s

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similarities between the nature of the right-of-way grant in *Strate* and the railroad right-of-way at issue, including the fact that the tribe did not retain jurisdiction over the lands in question, the right-of-way was the equivalent of alienated fee land for *Montana* purposes); *Wilson v. Marchington*, 127 F.3d 805, 812-15 (9th Cir. 1997) (comparing facts against those in *Strate* to conclude that *Montana* applied).

second exception); *Adams*, 219 F.3d at 951 (concluding that a consensual relationship did not arise between the grantee and the tribe to warrant the imposition of a property tax, but that the grantee's "voluntary provision of electrical services on the Reservation," established a consensual relationship for other taxation purposes). However, as discussed *supra*, at 7, only in *Hicks* has the Court actually extended the reach of *Montana* to apply on trust or restricted lands, rather than fee lands or their functional equivalent.[8]

Moreover, cases addressing tribal authority to tax nonmembers demonstrate that land ownership is pivotal to the analysis, and a tribe's authority to tax nonmembers on trust and restricted lands is well established. *See, e.g.*, *Atkinson*, 532 U.S. at 652-53. A tribe's authority to tax nonmembers on non-Indian fee lands is subject to a *Montana* analysis, and under that framework a consensual relationship can exist between a right-of-way grantee and a tribe. *Adams*, 219 F.3d at 951.

III. STANDARD OF REVIEW

A. ADMINISTRATIVE PROCEDURE ACT

WEA seeks judicial review of the Final Rule under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Under the APA, review is limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Although this inquiry is thorough, the standard of review is narrow and highly deferential to the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S.

[8] *Plains Commerce*, quoting *Atkinson*, reiterated "*Montana's* 'general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" 554 U.S. at 330, and quoting Justice Souter's concurring opinion in *Hicks*, stated that the "status of the land is relevant 'insofar as it bears on the application of . . . *Montana's* exceptions to [this] case,'" *id.* at 331 (brackets in original), but did not hold that *Montana* extends to trust or restricted lands.

99, 105 (1977). Courts are not free to substitute their judgment for the agency's discretion or overturn the agency's decision solely because they would have reached a different outcome. *Overton Park*, 401 U.S. at 416; *Sierra Club v. Kimball*, 623 F.3d 549, 558-59 (8th Cir. 2010); *Cent. S.D. Coop. Grazing Dist. v. Sec'y of U.S. Dep't of Ag.*, 266 F.3d 889, 895 (8th Cir. 2001). The Court's review is limited to the administrative record before the agency at the time that it took the challenged action:

> It is a basic principle of administrative law that review of administrative decisions is "ordinarily limited to consideration of the decision of the agency ... and of the evidence on which it was based." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963). . . . In reviewing agency action under the "abuse of discretion" standard specified in the APA, 5 U.S.C. § 706(2)(A), "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam).

Robinette v. Comm'r of I.R.S., 439 F.3d 455, 459 (8th Cir. 2006).

B. FACIAL CHALLENGES TO REGULATIONS

Rather than awaiting the application of the Final Rule to a specific decision, WEA has opted to challenge the rule on its face. To prevail in such a challenge, WEA carries the heavy burden of "establish[ing] that no set of circumstances exists under which the regulation would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (citation omitted). *See also United States v. Salerno*, 481 U.S. 739, 745 (1987) (a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [rule] would be valid"); *Babbitt v. Sweet Home*, 515 U.S. 687, 709 (1995) (O'Connor, J., concurring) ("there is no need to strike a regulation on a facial challenge out of concern that it is susceptible of erroneous application"); *Anderson v. Edwards*, 514 U.S. 143, 156 n.6 (1995) (plaintiffs "could not sustain their burden [of showing regulation facially invalid] even if they showed that a possible application of the rule . . . violated federal law"); *INS v. Nat'l Ctr. for*

Immigrants' Rights, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid as applied in [some] cases, however, does not mean that the regulation is facially invalid because it is without statutory authority."); *Sherbrooke Turf Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003) (a facial challenge to regulations requires a careful look at whether they may be "applied under *any* set of factual circumstances") (emphasis in original).

C. PRELIMINARY INJUNCTION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (emphasis in original; citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), *see also Dataphase Sys., Inc. v. C L Sys.*, Inc., 640 F.2d 109, 113 (8th Cir. 1981) ("Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.").

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2013). A mere possibility of irreparable harm is insufficient to meet the requirement for "injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*,

555 U.S. at 22. In *Summers v. Earth Island Institute*, 555 U.S. 488, 492-93 (2009), Justice Scalia, writing for the Court, traced the importance of this requirement to its roots in Article III of the Constitution, which restricts the judicial power to "Cases" and "Controversies." He then stated:

> [t]o seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Id. at 493; *Conners v. Gusano's Chicago Style Pizzeria*, 779 F.3d 835, 840 (8th Cir. 2015) (quoting *Summers*). In *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1147 (2013), the Court emphasized that, for Article III purposes "threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." (Emphasis in original, citations and internal quotations omitted.) *See also Iowa Util. Bd. v FCC*, 109 F.3d 418, 425 (8th Cir. 1996) ("In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."). [9]

[9] Furthermore, preliminary injunctions must be narrowly tailored and injunctive relief should be "no more burdensome to the defendant than necessary" to provide relief to the plaintiff. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In that regard, courts generally lack authority to issue nationwide injunctions, as to do so not only exceeds what is necessary to provide plaintiffs with relief, but also deprives the Supreme Court of the "benefit it receives from permitting several of the courts of appeals to explore" an important question of law. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Similarly, broader injunctions extending beyond the plaintiff are neither compelled nor justified by the APA. *See, e.g.*, *Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001) (modifying district court injunction on appeal to apply only to enforcement of regulation against the plaintiff, explaining that the broader injunction issued by the district court (which barred the agency from enforcing the regulation against non-parties as well) was inappropriate because, *inter alia*, it would prevent the government from relitigating the issue in other circuits).

IV. ARGUMENT

A. THE FINAL RULE DOES NOT POSE A THREAT OF IRREPARABLE HARM TO WEA.

1. WEA fails to allege the Final Rule will cause any concrete and particularized harm to itself or its members.

To the extent WEA has alleged any injury at all as a consequence of the Final Rule, the allegations are sufficient neither to warrant injunctive relief nor to establish that the Complaint presents a justiciable case or controversy. The First through Fourth "Claims for Relief" in the Complaint, considered either separately or through incorporation of prior allegations, make no reference whatsoever to any harm or injury to WEA or its members as a consequence of the Final Rule. The first mention of harm or injury in the Complaint is in Paragraph 50, which vaguely alleges "immediate and irreparable harm" arising from (1) "the Agencies' inability to handle the administrative burden attendant with implementation of the Final Rule," (2) "the Final Rule's impact on property rights," and (3) "resulting economic damages that that [sic] are unrecoverable due to sovereign immunity." None of these allegations describes a "concrete and particularized" injury that is "actual and imminent, not conjectural or hypothetical." *Summers*, 555 U.S. at 493.

WEA's PI Motion, at 3, appears to indicate that the "economic damages" alleged in Paragraph 50 of the Complaint may have something to do with "taxation by tribes of non-Indians and non-Indian property within rights-of-way" but otherwise sheds no light on the injury the Court is asked to remedy. The *Declaration of Kathleen Sgamma in Support of Motion for Temporary Restraining Order and Preliminary Injunction to Stay Implimentation [sic] of Final Rule* attached to the PI Motion [Doc. 3-1] ("Sgamma Declaration"), at 3, overtly speculates that the Final Rule "*could* decrease both the overall number of rights-of-way on Indian lands and the monetary benefits flowing to Indian beneficial owners" (emphasis added), but, at Paragraph 9,

asserts that there are three ways the Final Rule will allegedly cause immediate and irreparable harm to WEA's members:

> a. The Final Rule alters property rights;
> b. The Final Rule will subject Alliance members with existing federally granted rights-of-way to new unlawful fiscal requirements that cannot subsequently be recovered from entities protected by sovereign immunity; and
> c. BIA's failure to develop internal guidance documents and conduct internal training sessions has rendered BIA unprepared and unable to implement the Final Rule's new procedures and requirements by the Final Rule's effective date, March 21, 2015 [sic].[10]

Whatever harm can be inferred from the Declaration, it is not "actual and imminent," but rather is apparently contingent on future action by BIA to "develop internal guidance documents and conduct internal training sessions." Such contingent harm is hardly "certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Util. Bd.*, 109 F.3d at 425; *see also Chlorine Inst., Inc. v. Soo Line R.R.*, 792 F.3d 903, 915 (8th Cir. 2015) ("Merely demonstrating the 'possibility of harm' is not enough."); *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986) (affidavits containing "[b]are allegations of what is likely to occur" were insufficient to support injunction). In any event, as discussed in further detail *infra* at 19-26, WEA's non-specific claims about property rights and "fiscal requirements" do not pass muster as grounds for the extraordinary relief they now seek. None of the categories of harm alleged by WEA survive scrutiny under the standards for injunctive relief or, indeed, justiciability.

[10] Paradoxically, in the next paragraph, the Declaration asserts that if the Final Rule is not implemented, WEA's members will suffer none of the harms described in Paragraph 9. Since Paragraph 9 itself asserts that BIA will be "unprepared and unable to implement the Final Rule's new procedures and requirements by the Final Rule's effective date" it logically follows that the Declaration asserts the WEA's members will suffer no harm on the effective date.

2. WEA lacks standing to assert a NEPA claim and here is no "presumption" of irreparable harm under NEPA.

WEA's *Memorandum in Support of Motion for a Temporary Restraining Order and Preliminary Injunction to Stay Implimentation [sic] of Final Rule* [Doc. 6] ("PI Mem."), at 30-33, asserts that Defendants failed to comply with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h (2016) ("NEPA") in promulgating the Final Rule. The lack of merit to that claim is addressed *infra*, at 41. However, WEA also has no standing to assert a NEPA Claim in any event and has wholly failed to show that any violation of NEPA threatens WEA with irreparable harm warranting injunctive relief.

WEA's PI Mem., at 33, makes a near-frivolous assertion that WEA is entitled to "a presumption of irreparable harm" based on its allegation that the Final Rule has been promulgated in violation of NEPA. The authorities WEA cites in support of this extraordinary claim are actually to the contrary. It is true that *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002), says "harm *to the environment* may be presumed when an agency fails to comply with the required NEPA procedure." (Emphasis added.) However, the very next sentence of the opinion states: "Plaintiffs must still make a specific showing that the environmental harm results in irreparable injury to their specific environmental interests." Likewise, *Southern Utah Wilderness Alliance v. Thompson*, 811 F. Supp. 635, 641 (D. Utah 1993), discussed a presumption in favor of injunctive relief only after finding that the plaintiff in that action had established standing by showing it had been "'adversely affected or aggrieved by action within the meaning of the relevant statute.'" *Id*. at 640 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)).

Here, WEA has no standing to assert a NEPA claim. WEA has not alleged that it, or its members, have any *environmental* interests that have been injured by the Final Rule. Instead,

WEA asserts that its members will suffer "alteration of property rights," be subjected to taxation, and somehow be at the whim of an agency that is "unprepared." PI Mem., at 33-34. These purported injuries are purely economic, and therefore not within the "zone of interests" that NEPA was designed to protect. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) ("[A] statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'") (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Where "plaintiffs' interests[] do not fall within th[e] zone of interests their claim will be dismissed with prejudice." *Permapost Products v. McHugh*, 55 F. Supp. 3d 14, 25 (D.D.C. 2014). In *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976), the Eighth Circuit made clear that economic interests are "clearly not within the zone of interests to be protected by [NEPA]." *See also Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1038 (8th Cir. 2002) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." (itation omitted)).

There are limited circumstances in which the Eighth Circuit has considered allegations of economic harm as the predicate for a NEPA claim, but only when a plaintiff's cause of action was based upon a specific provision of NEPA which required the agency at issue to consider economic interests. *Cent. S.D. Coop. Grazing Dist.*, 266 F.3d at 895; *but see Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 942 (9th Cir. 2005) (disagreeing with *Central South Dakota* and the Eight Circuit's consideration of economic interests). Here, WEA fails to cite to any specific provision of NEPA which required the BIA to consider economic interests through a NEPA analysis prior to promulgating the Final Rule, and there is no such provision.

The Supreme Court precedent is clear that when preliminary injunctive relief is considered courts must examine harm to the *moving party*, not to the environment generally.

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 541-42 (1987). Even if WEA's filings can be read to express an interest in the environment, a mere interest in environmental protection, no matter how genuine, is not sufficient for standing, much less for the exacting prerequisites for a finding of irreparable harm. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'"). WEA has not shown, or alleged, that any failure by BIA to comply with NEPA in promulgating the Final Rule has caused injury to WEA or WEA's members. Accordingly, far from entitling WEA to a "presumption of irreparable harm," PI Mem., at 33, WEA's NEPA claims are not justiciable.

3. WEA has not shown the Final Rule will deprive WEA or its members of any property right.

WEA's PI Mem., at 34, cites *O'Hagan v. United States*, 86 F.3d 776 (8th Cir. 1996), for the proposition that deprivation of a property right can be considered irreparable injury, but the PI Mem. fails to show that the Final Rule will cause any such deprivation of an existing property right owned by WEA or its members. To the extent WEA provides any specificity at all in its allegations concerning property rights, they either concern <u>future</u> rights-of-way which WEA's members may or may not be granted, or complain about a characteristic of federally-granted rights-of-way that is not altered by the Final Rule.

a) The Final Rule does not permit any existing federally-approved right-of-way to be terminated without the involvement or consent of the grantor.

WEA asserts that the Final Rule "implicates property rights" by "permitting the federally-approved rights-of-way to be terminated without the involvement or consent of the grantor, the United States." PI Mem., at 34. It is true that FR § 169.403(a) will allow the applicant and Indian

landowner for future rights-of-way to "negotiate remedies for a violation, abandonment, or non-use." Such negotiated remedies may "provide one or both parties with the power to terminate the grant . . . ." *Id*. However, this provision, on its face, is inapplicable to any existing right-of-way; it will, by its terms, only apply to future rights-of-way, only if the grantee agrees to such negotiated remedy, and only if the Secretary actually grants the right-of-way. Nothing in the Final Rule compels WEA or its members to agree to such a provision and, most importantly, no such right-of-way grant is before this Court. WEA cannot possibly be irreparably harmed by hypothetical future grants, which can only be created if all parties to them consent to their terms and the Secretary grants the right-of-way. Under both the current rule and the Final Rule, the Secretary has the discretion to deny a right-of-way, if it does not comply with regulatory requirements or is not in the best interest of the Indian landowners. Accordingly, WEA's allegations about such grants can provide no grounds for injunctive relief. Any decision this court might make concerning such a future grant would be inherently advisory. "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy" and "a federal court [lacks] the power to render advisory opinions." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (internal quotation marks omitted, brackets in original); *Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005) ("One kind of advisory opinion is an opinion advising what the law would be upon a hypothetical state of facts.") (internal quotation marks and citation omitted).

Nothing in the Final Rule permits any existing right-of-way issued to WEA's members to be terminated without the involvement or consent of the grantor. WEA's unsubstantiated allegation to the contrary does not establish that WEA faces a threat of irreparable harm that is either sufficient to warrant the drastic remedy of a preliminary injunction, or even justiciable.

b) The Final Rule does not alter the nature of the interest conveyed by any existing right-of-way grant.

The first sentence of FR § 169.10 states: "A right-of-way is a non-possessory interest in land, and title does not pass to the grantee." WEA's PI Mem., at 20, asserts that this statement in the Final Rule is "directly contrary to federal case law" and, at 34, that it alters "the nature of the interest conveyed by rights-of-way." To the contrary, it is black letter law that "[r]ights-of-way are typically easements that do not convey fee title and may be limited to a specific use or purpose." *United States v. Jackson*, 697 F.3d 670, 676 (8th Cir. 2012); 7-60 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 60.02(c) (2015) ("The right in land held by an easement owner differs from the fee interest or even the leasehold interest in that it is a 'use' interest, but not a 'possessory' interest in land."). Moreover, the Final Rule in this regard is entirely consistent with all iterations of the right-of-way regulations, beginning in 1951 forward, in which Interior consistently stated that rights-of-way granted pursuant to the regulations were "in the nature of easements" that had a defined term as set forth in the granting document. *See* 16 Fed. Reg. at 8,580; 33 Fed. Reg. at 19,807. *See also* BUREAU OF INDIAN AFFAIRS, PROCEDURAL HANDBOOK: GRANTS OF EASEMENT FOR RIGHT-OF-WAY ON INDIAN LANDS § 1.2 (2006) ("The [right-of-way] creates a non-possessory interest in the land which is a right to use or the right to restrict use of the property for a particular purpose. A 'grant of easement' for [a right-of-way] defines the type, extent, use, purpose, width, length, and duration of the [right-of-way. Title to the property remains with the landowner, however a granted [right-of-way] encumbers the title."). Accordingly, the first sentence of FR § 169.10 manifestly does not alter the nature of the interest conveyed by rights-of-way as WEA has asserted, but rather is consistent both with caselaw and with previous iterations of the right-of-way rules. Defendants agree with WEA that "rights-of-way granted to non-Indians transfer substantial real property interests to non-Indians." PI Mem.,

at 21. However, it remains the case, as stated by FR § 169.10, that those substantial real property interests are "non-possessory" and that "title does not pass to the grantee." The Final Rule's statement of that fact does not alter any property right held by WEA's members, and therefore does not injure them at all, much less irreparably.

WEA also complains about the remainder of FR § 169.10, which it quotes at length, PI Mem., at 21, then in part and with a typographical omission ("Secretary's grant of a right-of-way will clarify that it does [not] diminish . . ."), (PI Mem., at 23-24), and yet again with errors ("Secretary's grant of a right-of-way [will clarify that it] does not diminish . . ."), PI Mem., at 27. The last omission is perhaps the most telling with respect to WEA's claim of irreparable harm, because it is evident throughout the PI Mem. that WEA is misquoting the Final Rule in an attempt to read the word "will" out of FR § 169.10.

While the first sentence of the Section simply states the long-standing legal character of an easement, the remainder of the section is, by its literal terms, prospective: it states a set of requirements for the wording of future right-of-way grants. It does not apply to any existing right-of-way grants, including any that may have been held by WEA's members when this action commenced.

Consequently, WEA is complaining about possible future right-of-way grants. Neither WEA nor its members have any present right, title, or interest in such hypothetical grants, and whether they ever will is contingent on future decisions they, and the Indian landowners and the Secretary, must make. For the reasons discussed *supra*, at 20-20, WEA's claim of injury based on such conjecture is neither grounds for injunctive relief nor justiciable. *Summers*, 555 U.S. at

493; *Clapper*, 133 S. Ct. at 1147 ("[A]llegations of *possible* future injury are not sufficient" for Article III purposes.).[11]

c) The Final Rule does not change any property interest with respect to the ability to assign or mortgage.

WEA asserts that, under the current rule, "rights-of-way are freely assignable and may be mortgaged without additional consents or approvals," PI Mem., at 29, and claims it suffers irreparable harm because the Final Rule "prevents" such assignment or mortgaging of rights-of-way without additional consents or approvals. However, WEA provides neither evidence, by means of declaration or affidavit, nor any legal authority whatsoever to support its claim that rights-of-way may currently be mortgaged without BIA's approval. In addition, the only support that WEA provides for its claim that rights-of-way on Indian lands are "freely assignable" is *City of Elko, Nevada v. Acting Phoenix Area Director*, 18 IBIA 54 (1989). That case involved a right-of-way expressly granted to the State of Nevada "and unto its successors and assigns." *Id.* at 61. The decision of the Interior Board of Indian Appeals ("IBIA") clearly turned on the express terms of the grant and in no way stands for the general proposition that all right-of-way grants are "freely assignable." In addition, the Preamble expressly notes that, if a right-of-way grant includes language granting to the grantee and the grantee's assignees, then "the grant would contain explicit language allowing the grant to be freely assigned without landowner consent or BIA approval, and that explicit language would govern" instead of the Final Rule's requirements. Preamble, at 72,502. Accordingly, WEA has failed to show that the Final Rule's

[11] Plaintiff's fears that the terms of the Final Rule will subject its members to tribal jurisdiction or taxes contrary to federal law are further addressed *infra* at 26.

provisions concerning assignments and mortgages have altered in any respect an existing property right.[12]

Moreover, FR § 169.207(b) allows for assignment without BIA approval when "[t]he original right-of-way grant expressly allows for assignment without BIA approval." *See also* Preamble at 72,526 ("The final rule allows the landowners to negotiate for a grant that expressly allows for assignments and mortgages without further consent."). In consequence, even as to future rights-of-way, WEA's members remain free to negotiate the ability to assign or mortgage their interests without needing additional consent. *Id*. at 72,525 ("If assignability is important to the grantee, the grantee should negotiate and pay for this right.").

WEA has wholly failed to show that the Final Rule's provisions concerning assignments and mortgages have caused WEA or its membership irreparable, or even justiciable, harm.

d) The Final Rule neither imposes, nor subjects WEA's members to, tribal jurisdiction.

WEA asserts that the Final Rule "purport[s] to authorize tribal jurisdiction," PI Mem., at 21, is an "attempt to expand tribal jurisdiction," *id*. at 23, and "would authorize new taxation powers," *id*. at 27. On its face, the Final Rule does no such thing.

WEA bases these claims on the language of FR §§ 169.10 and 169.11(b), but carelessly reads those provisions. Judging by the arguments asserted in the PI Mem., WEA would have this Court believe that FR § 169.10 says: "The Secretary's grant of a right-of-way provides an Indian tribe with (a) jurisdiction over the land subject to, and any person or activity within, the right-of-

[12] FR § 169.7(d), does add a requirement that assignments completed before December 21, 2015 be reported to BIA, which the Preamble explains is "to ensure BIA is aware of the identity of the legal occupant of the Indian Land in furtherance of meeting its trust responsibilities to protect the Indian land from, for example, trespass." Preamble at 72,502. Plaintiff does not allege that this new recording requirement impairs any property right or otherwise causes irreparable harm.

way; (b) the power to tax the land, any improvements on the land, or any person or activity within, the right-of-way; (c) authority to enforce tribal law or general or particular application on the land subject to and within theright-of-way; and (d) inherent sovereign power to exercise civil jurisdiction over non-members on Indian land." And WEA would have the Court believe that FR §169.11(b) says "Improvements, activities, and right-of-way interests are subject to taxation by the Indian tribe with jurisdiction." A simple reading of the actual sections in the Final Rule, however, proves they say nothing like WEA's implied characterizations.

First, as discussed *supra*, at 22, except to the extent it simply states the common law character of easements as long applied by BIA to rights-of-way, FR §169.10 is overtly prospective: it says what the Secretary's grant of a right-of-way will do, and therefore does not purport to alter any existing right-of-way that may have been granted to WEA's members. In addition, the real FR § 169.10 does not purport to affirmatively establish anything concerning tribal jurisdiction or taxation powers. Instead, the section refers to such matters in the negative: "will clarify that it does not diminish to any extent" the enumerated powers. Likewise, FR § 169.11(b) does not in fact say that right-of-way interests are subject to tribal taxation, but rather says only that the interests may be subject to such taxation. The language in both sections is permissive, not mandatory. In other words, these provisions simply mean that, in the future, something other than the text of a right-of-way grant must be considered to determine whether tribal jurisdiction or taxation powers apply to a right-of-way.

Accordingly, these provisions are entirely consistent with any existing federal law and are an appropriate response to cases, such as those discussed *supra* at 7-11, that have considered the terms of specific right-of-way grants as a relevant factor in determinations about tribal jurisdiction. Moreover, because they are clearly permissive in effect, not mandatory, and

otherwise merely state common law, they can cause no present injury to WEA's members. The possibility that the provisions will permit such injury is contingent on other factors and is at best a "conjectural or hypothetical" threat and therefore provides grounds neither for injunctive relief nor an exercise of the judicial power under Article III. *Summers*, 555 U.S. at 493.

4. WEA has not shown the Final Rule will cause WEA or its members unrecoverable economic losses.

WEA's PI Mem., at 34, argues that "sovereign immunity will likely prevent [WEA's] members from recovering economic damages from tribes that exercise the new taxation powers or right-of-way termination powers seemingly permitted by the [Final] Rule." (Emphasis added.) This assertion is, on its face, obviously speculative. It does not even claim that the allegedly new taxation or termination powers are permitted by the Final Rule, but only that they are "seemingly permitted." The assertion is not plausibly a claim of "concrete and particularized" and "actual and imminent" harm. *Summers*, 555 U.S. at 493. Further, as demonstrated in the discussion *supra*, at 19 - 21, FR § 169.403 does not permit "termination powers" *unless the grantee agrees to them*. WEA is not entitled to an injunction to prevent "injury" caused by its members' own future agreements.

5. WEA has not shown that BIA's alleged lack of preparation to implement the Final Rule will cause irreparable harm.

As shown *supra*, at 5, and in the Round Face Declaration, BIA is in fact prepared to implement the Final Rule. WEA's claim that it will be irreparably harmed when the regulations go into effect, while at the same time is irreparably harmed BIA's alleged inability to implement the regulations, is facially nonsensical. Further, WEA supports this claim only with the "[b]are allegations of what is likely to occur," *Packard Elevator*, 782 F.2d at 115, contained in Paragraph 9(c). of the Sgamma Declaration, which does not meet their burden. Lastly, the

injunctive relief WEA seeks will not "prevent or redress the injury," *Summers*, 555 U.S at 493. Even assuming the truth of WEA's unsupported claim that its members will on the Final Rule's effective date be "unable to conduct business on . . . rights of way or acquire new rights-of-way with any degree of certainty or knowledge," PI Mem., at 36, WEA has not shown that its members will have any more "certainty or knowledge" if the Final Rule's implementation is enjoined *pendente lite*. Accordingly, WEA's bald assertions concerning BIA's preparations for implementation of the Final Rule cannot provide grounds for preliminary injunctive relief.

B. WEA IS NOT LIKELY TO SUCCEED ON THE MERITS.

1. The Final Rule does not exceed the Secretary's authority or contravene Federal law.

a) The Final Rule does not alter property rights.

As discussed *supra*, at 21-23, it is black letter law that "[r]ights of way are typically easements that do not convey fee title and may be limited to a specific use or purpose." *Jackson*, 697 F3d at 676. All iterations of Interior's regulations implementing the 1948 Act have reflected this. Thus it cannot be, as WEA suggests, PI Mem., at 20, that the Final Rule somehow alters property interests, when it simply contains language stating the long-held and established rule concerning the nature of a right-of-way grant.

The Final Rule contains a provision allowing for negotiated remedies. FR § 169.403. WEA objects, PI Mem., at 14-17, to one aspect of this provision that contemplates that a tribal landowner can negotiate the right to terminate a right-of-way grant without Secretary consent, concluding that such provision is unlawful. WEA's reliance on *Yavapai Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983), as supporting its view that the federal courts have prohibited the types of negotiated remedies contemplated by FR § 169.403 is misplaced. *Yavapai* concerned a surface lease granted pursuant to 25 U.S.C. § 415 and implementing regulations,

since replaced, that were silent regarding termination without the consent of the Secretary. *Yavapai,* 707 F.2d at 1073. The court considered whether the provision of the lease, which allowed termination by the Tribe without Secretarial approval, was valid in light of those regulations. *Id*. at 1074-75. The court concluded, after considering the rationale for the Secretarial consent requirement balanced against the interests of the Tribe, that Secretarial consent was required. Nevertheless, the court expressly contemplated that the Secretary could change the regulations going forward to allow for unilateral termination by the Tribe, despite the absence of express language in 25 U.S.C. § 415 addressing termination by the landowner. *Yavapai,* 707 F.2d at 1074-75 ("the Secretary could abandon his position [that Secretarial consent is required] by changing the regulation to recognize to the extent desired the unilateral power of a tribe to terminate a commercial lease.").[13] Here, BIA has included such a provision.[14] It is entirely within the control of WEA's membership to decide whether they accept any of the negotiated remedy terms contemplated by FR § 169.403; thus, WEA's dissatisfaction with the provision cannot establish a basis for injunctive, or any other, relief.

b) The Final Rule does not expand tribal jurisdiction.

The Final Rule confirms that "rights-of-way approved under [the Final Rule] . . . [a]re subject to all applicable Federal laws." FR § 169.9. The Final Rule further states the black-letter

[13] Likewise, cases that applied the regulations in place at the time and never held that a regulatory provision like FR § 169.409 could not be lawfully promulgated do not advance WEA's argument. *See Brown v. United States,* 86 F.3d 1554 (Fed. Cir. 1996) (citing *Yavapai* for the proposition that Secretary's approval required, under regulations in place at the time, to cancel a lease); *Kuykendall v. Phoenix Area Dir.*, 8 IBIA 76 (1980); *Whatcom County Park Board v. Portland Area Dir.*, 6 IBIA 196 (1977).

[14] Subsequent to all of the cases cited by WEA, BIA in 2001 promulgated a negotiated remedies provision in the surface lease regulations allowing for cancellation by a tribal landowner. *See* 66 Fed. Reg. 7,068, 7,083 (Jan. 22, 2001) (discussing the need for the negotiated remedies provision).

law that "[a] right-of-way is a non-possessory interest in land, and title does not pass to the grantee." FR § 169.10. Consistent with the nature of such grant under federal law, the Final Rule provides that a "grant of a right-of-way will clarify that it does not diminish to any extent," with respect to that right-of-way (a) the Indian tribe's jurisdiction; (b) the Indian tribe's taxation authority; (c) the enforceability of tribal law; (d) "the Indian tribe's inherent sovereign power to exercise civil jurisdiction over non-members on Indian land;" or (e) the "Indian country" character of the land, as that term is defined in 18 U.S.C. § 1151. FR § 169.10. The Final Rule also expresses the strong Federal and tribal interests present in the context of granting rights-of-way across Indian lands, especially in the context of taxation. FR § 169.11; *see also* Preamble, at 72,505-07.

WEA mischaracterizes both the Final Rule and numerous cases to argue that tribal jurisdiction over a right-of-way granted pursuant to the 1948 Act is legally prohibited, and that the Final Rule violates this imaginary prohibition. Neither of these claims is true. As discussed *supra*, at 24-26, the actual language of the Final Rule permits, but does not mandate, whatever tribal jurisdiction and taxation powers may be consistent with federal law. Accordingly, WEA's claim that the Final Rule somehow seeks to dramatically expand tribal jurisdiction beyond limits imposed by other federal law is based on a distortion of the Final Rule's text. Furthermore, WEA's position depends entirely on the sweeping assertion that there are categorical judicial rules holding that tribes absolutely cannot exercise jurisdiction. They are mistaken.

Federal courts have not, as WEA suggests, issued broad pronouncements that have completely divested all Indian tribes of all jurisdiction in all rights-of-way that may ever be issued under the 1948 Act. The Supreme Court most recently reiterated that tribes "retain sovereign interests in activities that occur on land owned and controlled by the tribe," *Plains*

Commerce, 544 U.S. at 327, and thus they retain the "inherent sovereign authority to set conditions on entry" and otherwise "superintend tribal land," *id*. at 336-37. The Court's decision in *Strate* is entirely consistent with this framework, as *Strate* did not conclude that the language of the 1948 Act operated to convert all rights-of-way granted pursuant to the Act to the equivalent of alienated fee land for tribal governance purposes. Instead, the Court evaluated the factual circumstances surrounding the particular grant, including whether the tribal landowner placed any conditions on its consent to the grant, before concluding that *Montana* applied to evaluate tribal court jurisdiction. 520 U.S. at 454-56.

Moreover, in contrast to WEA's claims that the Final Rule "confers jurisdiction" on Indian tribes and "authorizes new taxation powers," PI Mem., at 11, 23-29, the Final Rule instead accepts the state of federal law as it is, explaining that the act of granting a right-of-way pursuant to the Final Rule, by itself, does not have the effect of diminishing tribal jurisdiction. FR § 169.10. This uncontroversial proposition is entirely consistent with federal case law, which as discussed below, has approached the question of tribal jurisdiction over rights-of-way not by imposing categorical rules barring its application, but by examining the particular factual circumstances surrounding the right-of-way grant. Thus, despite WEA's arguments to the contrary, it is not a foregone conclusion that rights-of-way granted pursuant to the 1948 Act are akin to alienated fee land in all circumstances; or that grantees and landowners are foreclosed from entering into consensual relationships for *Montana* purposes; or that the Tribe is categorically barred from ever taxing grantees within a right-of-way grant.

(1) This Court cannot determine whether *Montana* applies in the context of a facial challenge.

There is no judicially-created categorical rule holding that any and all rights-of-way that may ever be granted pursuant to the 1948 Act are the equivalent of alienated fee land for tribal

jurisdiction purposes. The Court in *Strate* did not so hold. 520 U.S. at 454-56 (looking to the particular facts surrounding the right-of-way grant at issue, including the language of the grant and any condition the Tribes placed on their consent, to determine whether, for tribal jurisdiction purposes, *Montana* was applicable at all).[15] Courts in this Circuit have consistently applied *Strate*'s approach when considering tribal jurisdiction in this context. *See Nord*, 520 F.3d at 853-56 (using the same fact-specific analysis employed by *Strate* to determine whether, for tribal jurisdiction purposes, the right-of-way at issue in that case was the equivalent of fee land such that *Montana* could apply); *Henry*, 278 F. Supp. 2d at 1018-21 (same).

The decisions relied upon by WEA, even if they were applicable to its facial challenge to the Final Rule, do not compel a deviation from *Strate*. First, the Court in *Hicks* did not adopt a bright-line rule that *Montana* applies to all assertions of tribal jurisdiction over nonmembers, regardless of land ownership. 533 U.S. at 360. Instead, the majority opinion concluded that land ownership "is only one factor to consider" when evaluating a tribe's jurisdiction over nonmembers, nevertheless acknowledging that it "may sometimes be a dispositive factor." *Id. See also Nord*, 520 F.3d at 853. WEA's reliance on cases addressing whether either of the *Montana* exceptions applied to allow a tribe to tax a nonmember on land that was indisputably fee land,[16] whether a tribe had authority to regulate the sales of fee lands by nonmembers,[17] or

[15] WEA in effect argues that the 1948 Act abrogated the rights of Indians as landholders. Nothing in the Act, however, constituted an abrogation of tribal authority. *See United States v. Dion*, 476 U.S. 734, 739-40 (1986) (Congressional intent to abrogate Indian treaty rights must be unequivocal). In fact, the 1948 Act expressly provided that rights-of-way could not be granted without tribal consent, giving Indian tribes complete veto authority over a right-of-way grant. And as a matter of logic, if tribal consent is required, the tribe also has the lesser included authority to condition the terms of the right-of-way grant. The Court's analysis in *Strate*, by looking to the specific terms of the grant, confirms the authority of Indian tribes to so condition right-of-way grants.

[16] *Atkinson*, 532 U.S. at 659.

[17] *Plains Commerce*, 554 U.S. at 330-31.

whether a tribal court has jurisdiction to condemn individual Indian trust allotments for the purpose of establishing a right-of-way,[18] do not address the question presented in *Strate*: whether the right-of-way is the functional equivalent of fee land, warranting the application of *Montana*.[19]

(2) This Court Cannot Determine whether either of the *Montana* exceptions apply in the context of a facial challenge.

Even if a particular right-of-way is considered, like the one in *Strate*, to be the equivalent of alienated fee land for tribal jurisdiction purposes, there is no judicially-created categorical rule that holds that a tribe and a grantee may never form a consensual relationship. In *Strate*, after concluding that *Montana* applied to the Court's evaluation of the tribe's jurisdiction, the Court did not hold that neither of *Montana*'s exceptions could ever apply in the context of a right-of-way. Instead, the Court compared the facts of other cases where *Montana*'s exceptions permitted the assertion of tribal jurisdiction against the facts before it (a "run-of-the-mill highway accident" involving "strangers" to the tribe) to conclude that the tribal court lacked jurisdiction. *Strate*, 520 U.S. at 457-59.

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[18] *Fredericks v. Mandel*, 650 F.2d 144, 147 (8th Cir. 1981) (concluding that the United States was a necessary party to any condemnation action involving land it holds in trust for an Indian, and thus, the dispute must be brought in federal court; and that, under the regulations in place at the time, the tribe needed to apply for a right-of-way with the Secretary to enable one tribal member to cross another's trust allotment). *See also Houle v. Cent. Power Elec. Coop., Inc.*, 2011 U.S. Dist. LEXIS 41955, *16, *100-104 (D.N.D. Mar. 24, 2011) (concluding, in light of *Mandel*, and because 25 C.F.R. Part 169 did not require tribal consent to grant rights-of-way across individual Indian lands, that the tribal court lacked jurisdiction to effectuate a "*de facto* condemnation" of individual Indian trust property).

[19] WEA's assertion, PI Mem., at 16, that the negotiated remedies provision in FR § 169.403 supports their claim that "rights-of-way are considered non-Indian property for governance purposes," lacks explanation and is without merit in any event. As set forth above, whether a particular right-of-way grant is the functional equivalent of alienated fee land for tribal jurisdiction purposes is a factual inquiry that cannot be made in the abstract or through a citation to a provision of the Final Rule that does not address the issue at all.

It is true that cases evaluating facts substantially similar to those considered in *Strate* have concluded that neither of the *Montana* exceptions permitted a tribe to assert jurisdiction.[20] These cases do not announce, as WEA suggests, that neither of the *Montana* exceptions could ever apply to allow a tribe to assert any jurisdiction whatsoever over a grantee.[21] Nor do they prohibit the grantee and a tribe from forming a consensual relationship under *Montana*'s first exception.[22] Indeed, a district court in the Ninth Circuit held that a grantee's activities within the right-of-way (sale of electricity to individual tribal members, made possible by the right-of-way) "constituted a 'consensual relationship' as defined by *Montana*." *Big Horn County Elec. Coop. v. Adams*, 53 F. Supp. 2d 1047, 1051-52 (D. Mont. 1999). *See also Adams*, 219 F.3d at 951 (concluding that while the right-of-way grant, by itself, did not establish a consensual

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[20] *Nord*, 520 F.3d at 853-56; *Henry*, 278 F. Supp. 2d at 1023 (*Montana*'s first exception "has no application to the *facts of this case*") (emphasis added); *Burlington Northern* 323 F.3d at 772-75 (comparing the nature of the right-of-way grant to that in *Adams* to conclude that no consensual relationship existed between the grantee and the tribe, but remanding the dispute to tribal court for further discovery on the applicability of *Montana*'s second exception); *Adams*, 219 F.3d at 951. *See also Red Wolf*, 196 F.3d at 1064-66 (concluding that tribal consent, by itself, was insufficient to establish a consensual relationship, after evaluating several facts similar to those in *Strate*, including the lack of language retaining tribal jurisdiction).

[21] WEA cites to *Plains Commerce* for the proposition that a tribe could never invoke *Montana*'s second exception with regard to fee land. PI Mem., at 28. The Court in *Plains Commerce* did not issue such a pronouncement. The Court evaluated whether the tribe had authority to regulate sales of fee lands by nonmembers, 554 U.S. at 330-31, not whether a tribe could assert jurisdiction over a right-of-way grantee under *Montana*'s second exception. Courts that have considered that question have either, based on the facts of the case, extended the rationale of *Strate*, e.g., *Nord*, 520 F.3d at 856-57 (concluding that a "run-of-the-mill" traffic accident does not fall within *Montana*'s exceptions) or required factual development on the question. *See Burlington Northern*, 323 F.3d at 772-74 (while concluding that tribe lacked jurisdiction to impose a property tax on the grantee, court remanded the case for further discovery on whether the second exception applied to warrant the assertion of tribal jurisdiction over grantee's activities).

[22] Similarly, citations to *City of Elko v. Acting Phoenix Area Dir.*, 18 IBIA 54 (1989) and BIA's current handbook concerning the right-of-way regulations, PI Mem., at 26, that contemplate the assignability of grants depending on the language of the consent, do not provide a basis to assert that a consensual relationship between the grantee and the tribe for *Montana* purposes is entirely foreclosed for all rights-of-way that may ever be granted under the 1948 Act.

relationship to justify assessment of a tribal utility tax, "[t]he district court correctly concluded that Big Horn formed a consensual relationship with the Tribe because [it] entered into contracts with tribal members for the provision of electrical services."). Thus, unless the facts of a particular situation are indistinguishable from *Strate*, whether either of the *Montana* exceptions apply to permit tribal jurisdiction over a grantee is a factual inquiry that cannot be done in the context of a facial challenge to the Final Rule.

Nothing in the cases relied upon by WEA preclude the language of the Final Rule or the Preamble. Rather than "dictating" a consensual relationship between the grantee and the Tribe, PI Mem., at 24, the Preamble reflects BIA's informed view, as the agency authorized by Congress to administer the 1948 Act. BIA's interpretation of the Act and the applicable jurisprudence is both straight-forward and consistent with federal law: should *Montana* apply, a consensual relationship may exist. Moreover, Plaintiff's emphasis on the Preamble's statement that tribes are in "a consensual relationship with a right-of-way grantee on tribal trust or restricted land," Preamble, at 72,504, rather than on the language in the Rule itself, is misplaced. The Preamble represents BIA's authoritative and contemporaneous interpretation of its own regulation and was itself the product of the same notice-and-comment rulemaking. Accordingly, it is entitled to deference. *Am. Fed'n of Govt. Employees v. Gates*, 486 F.3d 1316, 1328 (D.C. Cir. 2007) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984), in deferring to agency's reasonable interpretation as articulated in preamble). But "language in the preamble of a regulation is not controlling over the language of the regulation itself." *Entergy Services, Inc. v. F.E.R.C.*, 375 F.3d 1204, 1209 (D.C. Cir. 2004). And the Final Rule does not invite tribes to interfere with valid rights-of-way, PI Mem., at 23; instead, it presumes that grantees will comply with all of the conditions imposed on them in connection with the right-of-way grant and

corresponding tribal consent, just as grantees are required to do under the current rule. *See* Round Face Declaration, ¶ 17 (discussing tribes' retention of jurisdiction as a condition on multiple existing rights-of-way granted under the current rule). The Final Rule and its Preamble appropriately considered the application of *Montana* by federal courts and appropriately concluded that tribal jurisdiction under *Montana* is not foreclosed.

(3) This Court cannot evaluate Tribal taxation authority in the abstract.

There is no judicially-created categorical rule that holds that a tribe may never tax a nonmember's activities and conduct in a right-of-way. When courts evaluate a tribe's authority to tax, land ownership is pivotal to the analysis, and a tribe's authority to tax nonmembers on trust and restricted lands is beyond dispute. *Atkinson*, 532 U.S. at 653. On the other hand, a tribe's authority to tax nonmembers on non-Indian fee lands is subject to a *Montana* analysis, *id.* at 654, and is not categorically foreclosed as Plaintiff suggests. *See, e.g., Adams*, 219 F.3d at 951. *Adams* concluded, after evaluating the factual circumstances of the case consistent with *Strate*, that under *Montana* a tribe possessed authority to tax the activities of a right-of-way grantee. *Id.* at 949-50. *Adams* demonstrates that federal law does not categorically foreclose the potential for a grantee and a tribe to form a consensual relationship under *Montana*'s first exception, including in the context of a right-of-way grant (depending, of course, on the factual circumstances relevant to that particular grant). Thus, Interior's statement in the Preamble that a consensual relationship can be established in the context of a right-of-way grant is appropriate and entitled to deference.

It may be expedient for WEA to claim that all rights-of-way granted pursuant to the 1948 Act are the equivalent of alienated fee land for which a consensual relationship between the grantee and the landowner can never be formed, and thus that the interests of, and conditions that

landowner places on, consent can be readily cast aside as irrelevant to the issuance of the grant altogether. However, neither the 1948 Act, the current or Final Rule, or applicable case law support such an extraordinary conclusion. At bottom, whether an Indian tribe can assert jurisdiction over a grantee with regard to a right-of-way that may be issued pursuant to the Final Rule is a highly-factual, particularized inquiry. That inquiry cannot be resolved in the abstract or in a speculative manner through a facial challenge to the Final Rule. The Court should reject Plaintiff's efforts to claim otherwise.

c) The BIA properly chose to invoke the authority of the 1948 Act.

WEA is correct that there are a host of other statutes authorizing the Secretary to grant rights-of-way, and that none of them were repealed by the 1948 Act. This was not, as WEA asserts, PI Mem., at 17-19, to require that the Secretary use all applicable statutes to grant a right-of-way, and manage to fit them all together. (For example, 25 U.S.C. § 311 does not require tribal consent for a right-of-way, whereas the 1948 Act does.)[23] Rather, as noted in the

[23] WEA's reliance, PI Mem., at 18-19, on *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); *Terran ex rel. Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302 (Fed. Cir. 1999) and *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007) is misplaced. In each case, the issue before the court was not whether, if dueling statutes provided authority to an agency, the agency must give effect to either or both. Instead, in *Massachusetts*, the Court concluded that EPA's authority to regulate carbon dioxide emissions overlapped, and was not precluded by, similar authority delegated to the Department of Transportation. 549 U.S. at 532. In *Terran*, the court considered, and rejected, the argument that a regulation amending a list of vaccines and injuries included in the enacted legislation violated the Presentment Clause of the Constitution, and in that context, stated that agencies cannot "enact, amend, or repeal statutes." 195 F.3d at 1312. Lastly, in *Texas*, the court concluded that the text of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, did not support certain regulations at issue in that case, and that the Secretary could not rely on other, earlier statutes conferring broad authority to the Secretary in the area of Indian Affairs (25 U.S.C. §§ 2, 9). These cases address the scope of agency authority, to be sure, but none address the proposition put forward by WEA that the applicability of a later-enacted statute meant to be comprehensive must nevertheless be given limited effect by the agency because the earlier statutes were not repealed. If anything, the cases go the other way. *E.g.*, *Blackfeet Tribe*, 838 F.2d at 1057-59 (rejecting tribe's effort to invalidate the grant on the basis that the grant should

Preamble, Congress intended for the Secretary to transition from grants under those specific authorities to a uniform system. *See* S. Rep. No. 80-823 (1948), at 4, *cited in* Preamble, at 72,494. BIA is not purporting to repeal any of those authorities. Under all of them, BIA is the grantor of the right-of-way. BIA is choosing, in the Final Rule, to grant all future rights-of-way under the 1948 Act, thereby creating the uniform system that Congress envisioned.[24] The Final Rule recognizes that there are existing rights-of-way under other statutory authorities, and provides for the provisions of those statutes to take precedence over the regulations in appropriate circumstances. *See*, *e.g.*, FR § 169.7(b).

WEA alleges, PI Mem., at 9-10, that the inclusion in the Final Rule of provisions similar to those found in the leasing regulations, 25 C.F.R. Part 162, is improper because those regulations were "promulgated, in part, to implement" the American Indian Agricultural Management Act ("AIARMA"), 25 U.S.C. § 3701 *et seq.* WEA notes that AIARMA, unlike the 1948 Act, requires that "the Secretary comply with tribal law." PI Mem., at 9-10. This purported distinction is incorrect, and AIARMA in no way limits BIA's authority here. First, the leasing regulations implement a host of statutes, most importantly and extensively, the Indian Long-Term Leasing Act, 25 U.S.C. § 415, none of which (except AIARMA) require that the Secretary comply with tribal law. Second, while WEA is correct that the 1948 Act does not say anything about compliance with tribal law or deference to tribes, it does say that "the Secretary is authorized to prescribe any necessary regulations for the purpose of administering the provisions" of the Act. 25 U.S.C. § 328. One of the signature provisions of those regulations has

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have reflected the duration limitation imposed by the earlier statute, rather than the duration permissible under the 1948 Act, in part because the statutes could be read together and the tribe had consented to the longer term).

[24] *See* discussion concerning the enactment of the 1948 Act, *supra* at 1-4.

always been the incorporation of any conditions on the Indian landowner consent, notably without limitation on what those conditions contain. *See* 25 C.F.R. § 169.15 (current regulations) (requiring grant to incorporate all conditions placed on consent); FR § 169.125(a) (same). Third, to the extent that the Final Rule can be characterized as deferring to the tribe, it does so, as noted in the Preamble, to "[support] tribal self-determination and self-governance." Preamble, at 72,492. Fourth, BIA fully recognizes that the Secretary is the grantor of rights-of-way, unlike leases. That is why the Preamble contains the following explanation for this provision:

> The termination is, in essence, a withdrawal of the landowners' continued consent, which is required by statute. Further, because the Secretary grants rights-of-way subject to such conditions as he may prescribe, the Secretary may approve of a grant with a condition allowing a tribe unilaterally to terminate a grant.

Preamble, at 72,529.

BIA properly chose to adopt regulations that rely on the 1948 Act, and in so doing, accounted for provisions in particular statutes that could supersede the Final Rule. None of the cases WEA cites prohibit BIA from enacting regulations reflective of the comprehensive scheme Congress envisioned when enacting the 1948 Act, including a negotiated remedies provision that a grantee and a tribe are free to accept or not as part of a future right-of-way grant.

d) The Final Rule comports with authorities governing trespass actions.

WEA argues, PI Mem., 10-14, that through the Final Rule, BIA "grant[s] itself" authority to impose sanctions or otherwise prosecute trespass on all Indian lands, and that such assertion forms a basis to invalidate the Final Rule. To the contrary, the Final Rule reflects the fact that trespass claims on Indian land are governed both by federal common law and by federal statute. Thus, DOI can not only bring the kinds of administrative actions WEA acknowledges, PI Mem., 12-13, it can also work with the Department of Justice to bring federal common law claims

against a trespasser. *See County of Oneida v. Oneida Indian Nations*, 470 U.S. 226, 235-36 (1985) (federal common law recognizes a variety of causes of actions to protect Indian lands from trespass); *see also, e.g., United States v. Pend Oreille PUD No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994) ("The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands from trespass"); *Houle*, 2011 U.S. Dist. LEXIS 41955, *9 n.1 (D.N.D. Mar. 24, 2011) citing *United States v. Milner*, 583 F.3d 1174, 1182 (9th Cir. 2009) ("Federal common law governs an action for trespass on Indian lands")); 28 U.S.C. § 2415(b) (authorizing the United States to bring an action for trespass to allotted Indian trust lands within six years and 90 days after the right of action accrues). The Final Rule is therefore consistent with DOI's authority to address instances of trespass.

In any event, there is no actual or threatened trespass action before this Court in this case and any decision the Court could render on the subject would be purely advisory. WEA's arguments concerning trespass are not justiciable and should be rejected.

2. The Secretary provided a thorough and adequate explanation for the Final Rule.

WEA's assertion that the Rule is a "significant departure from prior policies," Complaint ¶¶ 41-42, for which there was "no explanation or justification" is wrong both factually and legally. Both the proposed and Final Rule explained the problems with the existing regulatory scheme, 79 Fed. Reg. 34,455 (June 17, 2014); Preamble, 72,492, and commenters welcomed changes to the regulations to bring them into the modern era. *See* Declaration of Elizabeth K. Appel ("Appel Declaration") ¶14, attached as Exhibit B. BIA carefully considered written and verbal comments, responded to them, and engaged in public outreach and training regarding implementation of the Final Rule. *Id.* ¶¶ 15, 16. WEA's broad assertion that "no explanation or justification" was provided is also belied by the nearly 60-page Preamble and accompanying

guidance documents issued in connection with the Final Rule. Preamble, at 72,492-549; Round Face Declaration ¶¶ 17-29. And, as previously discussed in this opposition brief, WEA's claims that the Rule is at variance with federal law are simply incorrect.

Moreover, WEA's contention that the Final Rule is arbitrary and capricious because BIA allegedly is precluded from promulgating a rule that varies from past decisions of the IBIA, PI Mem., at 29, disregards the bedrock principle of administrative law that an agency is entitled to change its mind. This is true regardless of whether the agency position or interpretation being modified was set forth in an advisory opinion or in a final agency action. *See, e.g., Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012) (upholding amendment to formal rule); *Nat'l Home Equity Mortgage Ass'n v. Office of Thrift Supervision*, 373 F.3d 1355, 1360 (D.C. Cir. 2004) ("An agency's interpretation of a statute is entitled to no less deference, however, simply because it has changed over time."). The Supreme Court in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), stressed that an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one." Remarkably absent from the WEA's brief is any attempt to address the extensive case law in this area. *See also Good Samaritan Hospital v. Shalala*, 508 U.S. 402 (1993); *Nat'l Cable & Telecommc'ns. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Moreover, nowhere in the 1948 Act did Congress forbid the agency from changing its mind or from re-evaluating a previous interpretation of an ambiguous statutory provision. An agency is entitled to change its mind unless that authority is unambiguously foreclosed. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013). Furthermore, to the extent that the IBIA has ruled differently in the past on an issue addressed in the Rule, the IBIA is bound by duly promulgated regulations, not the other way around. *See, e.g., Estate of Frances Marie Ortega*, 51

IBIA 29 (2009) (IBIA "is bound by duly promulgated regulations"); *South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84, 103 n.18 (2009) (IBIA "has no authority to waive or ignore a duly promulgated regulation"); *San Carlos Apache Tribe v. Western Regional Director*, 41 IBIA 210, 220 (2005) (same). The IBIA ruling relied upon by WEA, *Lowe v. Acting Eastern Okla. Reg. Dir.*, 48 IBIA 155 (2008), concerned the *res judicata* effect of a claimant's failure to appeal an administrative decision, and is wholly inapplicable here. Thus, BIA was entitled to change its positions and its interpretation of the 1948 Act. WEA cannot carry its burden in proving otherwise.

3. The Secretary complied with NEPA.

As demonstrated *supra* at 17-19, WEA has no standing to bring a NEPA claim. However, even if WEA has standing, the claim it asserts has no merit.

WEA incorrectly asserts that BIA made a finding that the Final Rule was "exempt" from NEPA. PI Mem., at 30-33. To the contrary, BIA made a determination that NEPA was satisfied by application of a categorical exclusion ("CE"). CEs are "categor[ies] of actions which do not individually or cumulatively have a significant effect on the human environment and . . . for which, therefore, neither an environmental assessment nor an environmental impact statement is required..." 40 C.F.R. § 1508.4. In adopting its CEs, Interior, with the concurrence of the Council on Environmental Quality, determined that regulations whose effects are "too broad, speculative, or conjectural to lend themselves to meaningful analysis" are categorically excluded and, thus, do not require preparation of an EA or EIS. 43 C.F.R. § 46.210(i).[25] This CE was applied to the Final Rule. Preamble, at 72,534. In addition, Interior found that no "extraordinary circumstance"

[25] The Preamble to the Final Rule incorrectly cited 43 CFR § 46.210(j).

exists under which an action otherwise covered by a CE will require additional NEPA analysis. 43 C.F.R. §§ 46.205(c), 46.215.

The BIA's use of a CE must be reviewed under a deferential arbitrary and capricious standard. *Friends of Richards-Gebaur Airport v. Fed. Aviation Admin.*, 251 F.3d 1178, 1187 (8th Cir. 2001). Because a CE by definition has been predetermined not to involve significant impacts absent extraordinary circumstances, no "hard look" test or other more searching review is required. *See National Trust for Historic Preservation in U.S. v. Dole*, 828 F.2d 776, 781 (D.C. Cir. 1987). Here, WEA has not met its burden of showing that the agency was arbitrary or capricious in finding that a CE applied to the Rule, and that no exceptions were applicable. WEA, without explanation, broadly complains that the determination that a CE was applicable was an "assertion" made "without any substantiation or explanation." PI Mem., at 32. To the contrary, the finding that the CE was applicable was reasonable, as the Final Rule applies to a variety of rights-of-way in a number of potential, fact-specific contexts, and NEPA analysis of every conceivable application of the Final Rule would be "too broad, speculative, or conjectural."

At the time of promulgation of the Final Rule, BIA could not know what Indian land will be crossed by rights-of-way, how large the rights-of-way will be, the nature of the affected environment, and what mitigation measures will be appropriate. Not only are the impacts "broad, speculative, or conjectural," the very existence of applications for rights-of-way (and therefore the need for federal actions) is speculative.[26]

[26] Plaintiff admits as much. "As a result of the Rule, rights-of-way applicants are likely to relocate or, at a minimum, side-step rights-of-way over Indian lands, thereby creating significant impacts on the surrounding environment." PI Mem., at 31. These alleged "impacts" would seemingly require that BIA not only figure out where rights-of-way would be, but also where they would not, based on the unknowable intent of unspecified and largely unknowable

Interior's regulation states that a CE is applicable unless there is a finding that one of the extraordinary circumstances listed in 43 C.F.R. § 46.215 exists. This provision allows bureau heads to require further NEPA review if they conclude that such an assessment is necessary. It is a shield for the agency against anyone claiming that an EIS or EA analysis is never allowed for an action that is categorically excluded. It cannot, however, be used as a sword by litigants trying to force an agency to engage in NEPA review for actions predetermined not to require further NEPA analysis.

The only issue remaining is whether the decision not to find that the CE should be waived because of an extraordinary circumstance is reviewable by this court, and if so, what standard of review is applicable. BIA's decision not to find an extraordinary circumstance is an agency judgment of a factual matter as well as an interpretation of its own regulation. It is entitled to great deference. *See Chevron*, 467 U.S. at 865. Specifically, an agency's interpretation of the scope of its own CE is given controlling weight unless it is plainly erroneous or inconsistent with the regulation itself. *Back Country Horsemen of Am. v. Johanns*, 424 F. Supp. 2d 89, 99 (D.D.C. 2006). Here, BIA's decision not to override its own categorical exclusion through a finding of extraordinary circumstances should be given at least the same amount of deference.

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applicants. Further, as discussed above, the "impacts" alleged would only occur, if at all, on future rights-of-way, not any current ones, so they are not ripe for analysis. Finally, even if the alleged "impacts" should be analyzed, NEPA does not require such analysis. The scope of BIA's NEPA review is limited to impacts of actions within its jurisdiction (trust and restricted Indian land), not actions on neighboring lands. *Sierra Club v. United States Army Corps of Eng'rs,* 803 F.3d 31 (D.C. Cir. 2015). Also, impacts such as relocation and loss of property interests do not have a sufficient causal connection to impacts on the physical environment to require analysis in a NEPA review. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

4. WEA's facial challenge is not justiciable.

Article III of the Constitution limits federal court jurisdiction to "Cases" and "Controversies." Effectuated by a cluster of overlapping doctrines—including standing and ripeness—the case-or-controversy requirement serves both to maintain the separation of powers and to ensure that legal issues "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll.* v. *Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *See also Clapper*, 133 S. Ct. at 1146.

WEA's challenge presents precisely the sort of review—untethered to a concrete factual context—that the case or controversy requirement seeks to avoid. WEA apparently fears that the Final Rule will deprive it members of property rights they currently own, but has not provided a single example in which that consequence is even possible.

a) WEA lacks standing to challenge the Final Rule.

To establish Article III standing, WEA must show that "application of the [Final Rule] by the Government will affect [*it*]" in a way that threatens an "'injury in fact' that is concrete and particularized." *Summers*, 555 U.S. at 494. This injury "must be actual and imminent, not conjectural or hypothetical." *Id.* at 493. Indeed, the Supreme Court has recently stressed that an injury must be "'*certainly* impending' to constitute injury in fact"—"'[a]llegations of *possible* future injury' are not sufficient.'" *Clapper*, 133 S. Ct. at 1147 (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). In addition to an injury in fact, WEA must also demonstrate that the injury is fairly traceable to the challenged action and that it is likely that a favorable judicial decision will prevent or redress the injury. *Summers,* 555 U.S. at 493. Where, as is the case here, a plaintiff is not the object of the government action it wishes to

challenge, standing is "'substantially more difficult' to establish." *Id.* at 493 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)).

WEA's PI Motion and PI Mem. fail to show, and the Complaint fails to allege, that any existing property right will be harmed by implementation of the final rule. And nothing in the Final Rule compels any of WEA's members to enter any right-of-way agreement that provides for termination by a tribe without Secretarial approval.

b) The Complaint does not allege a controversy that is ripe for judicial resolution.

Drawing "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 n.18 (1993), the ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S 136, 148-49 (1967)). To determine whether an agency action is ripe, courts consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149. Except when a special statutory provision authorizes direct review, or where the regulation requires immediate adjustment of conduct under threat of serious penalties, a regulation is presumed not to be ripe until it has been applied in a manner that threatens concrete harm to a plaintiff's interests. *Lujan*, 497 U.S. at 891.

All of the "harms" alleged by WEA concern "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Thomas v. Union Carbide Agric. Prods.*

Co., 473 U.S. 568, 580-81 (1985) (quoting 13A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532 (1984)). Accordingly, WEA's claims are not ripe.

5. The Court lacks subject-matter jurisdiction.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983); *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1117 (9th Cir. 2003) (citing *Mitchell*). A waiver of sovereign immunity must be unequivocally expressed and must be strictly construed in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). WEA cites 5 U.S.C. § 702 as a purported waiver of sovereign immunity. Complaint, ¶ 12. However, that provision of the APA provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (Emphasis added.) For all the reasons discussed, *supra* at 15-27, WEA cannot yet show that it has suffered any legal wrong or adverse effect such as has been recognized by courts interpreting the APA. Accordingly, there has been no waiver of the United States' sovereign immunity, and this Court lacks jurisdiction over the subject matter of WEA's Complaint.

C. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST TIP STRONGLY AGAINST GRANTING PLAINTIFF'S PROPOSED INJUNCTION.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted). "In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Village of Gambell*, 480 U.S. at 542. These factors—

balance of harms and the public interest—"merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Moreover, granting preliminary relief is only proper if the moving party establishes that entry of an injunction would serve the public interest. *Dataphase*, 640 F.2d at 113.

As shown above, the only harms asserted by WEA are premised on misconceptions about the 1948 Act, the applicable jurisprudence, and the actual language of the Final Rule. Given these circumstances, the balance of public and private equities clearly weighs against granting any preliminary relief. Further, where WEA makes no showing of success on the merits or irreparable harm, other national and tribal interests are properly considered. The Final Rule furthers the objectives of the Act and responds to the unmistakable need to "modernize the rights-of-way approval process while better supporting Tribal self-determination." Preamble, at 72,492. It "clarifies the processes and requirements for landowner consent and BIA approval" and explicitly "allows the parties to negotiate." *Id*. at 72,533. It provides for a "blanket exemption for assignments that are the result of a corporate merger, acquisition, or transfer by operation of law." *Id*. It "minimizes BIA interference with the market by providing that BIA will defer to tribes' negotiated compensation values, allowing more flexibility…." *Id*. And it "relaxes requirements for utility cooperatives…to encourage them to develop Indian land." *Id*.

Likewise, the Final Rule provides for more direct negotiation between the potential grantee and the Indian landowner. For example, under the current regulations, BIA must issue a Permission to Survey, 25 C.F.R. § 169.4, whereas the Final Rule leaves that role to the Indian landowner, with no involvement by BIA, except in certain, very limited circumstances, FR § 169.101(b). Similarly, the current regulations require that compensation will be at fair market value and set maximum terms for the duration of rights-of-way. 25 C.F.R. §§ 169.12, 169.25,

169.26, and 169.27. The Final Rule instead provides for BIA to defer to a tribe's determination of compensation, FR § 169.110, and allows Indian landowners to negotiate the term of the right-of-way, *id*. at § 169.201. There are also several new provisions that provide for tribal authority, sometimes coextensive with BIA, over tribal preference in employment, *id.* at § 169.126; bonding, insurance, or other security (including the necessity for, and release of, security), *id*. at §§ 169.203-204; and enforcement, *e.g.*, *id.* at §§ 169.403 and 148.413. Finally, in addition to recognizing the application of tribal law and jurisdiction, *id*. at §§ 169.9-10, the Final Rule explicitly allows for the Indian landowner to negotiate remedies, *id*.at §169.403, and agreements containing conditions for consent, *id*. at § 169.107. Taken together, these examples and other provisions of the Final Rule change the role of the Indian landowner from an interested bystander to a full consensual partner in the right-of-way transaction.

Granting a preliminary injunction would harm BIA, tribes, rights-of-way grantees, and the public interest by halting the implementation of a Final Rule that would update nearly 50-year-old regulatory provisions and streamline and improve the administrative rights-of-way process. WEA has failed to meet its heavy burden of establishing that an injunction would serve the public interest.

V. Conclusion

For the foregoing reasons, WEA fails to meet any of the prerequisites for the extraordinary and drastic remedy sought by its PI Motion. Indeed, WEA has failed to establish that this Court has jurisdiction over the subject matter of the Complaint or that the Complaint raises a justiciable case or controversy under Article III of the Constitution. The Defendants respectfully ask that the PI Motion be denied.

Dated this 28th day of March, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2016, I filed the forgoing *Defendants' Opposition To Motion For Preliminary Injunction* electronically with the Clerk of Court through ECF, which caused ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

_____/s/_____
Bradley S. Bridgewater