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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, et al. *Petitioner*, v. UNITED STATES DEPARTMENT OF THE INTERIOR; et al. *Respondents.*	)	Civil Case No. 15-CV-43-S **RESPONDENTS' MERITS BRIEF IN RESPONSE TO THE UTE TRIBE OF THE UINTAH AND OURAY RESERVATION'S MERITS BRIEF**

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I. INTRODUCTION

On March 26, 2015, the Bureau of Land Management ("BLM") issued its Final Rule on Hydraulic Fracturing on Federal and Indian Lands ("Rule"), 80 Fed. Reg. 16,128, 16,128-222 (Mar. 26, 2015). The Rule amended existing onshore oil and gas regulations that currently apply to oil and gas operations on all federal and Indian lands, except for lands specifically exempted by statute (none of which are at issue in this case). The Rule does not affect leasing on Indian lands, surface permitting on Indian lands, or royalty collection from oil and gas operations on Indian lands. Nor does the Rule amend the Bureau of Indian Affairs' ("BIA") leasing regulations, which continue to apply concurrently with BLM operating regulations on Indian lands. The Rule applies to well permitting and operations and was developed to address "the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology." *Id.* at 16,128.

The Rule fits squarely within the Department of the Interior's ("Department") statutory authority and jurisdiction. The Secretary of the Interior ("Secretary") clearly has authority over oil and gas operations on Indian lands and unquestionably delegated that authority to promulgate the Rule for Indian lands. The Indian Mineral Leasing Act ("IMLA") and Indian Mineral Development Act ("IMDA") grant the Secretary broad regulatory jurisdiction over oil and gas operations on Indian land; authority that was invoked as a basis for the Rule. 80 Fed. Reg. at 16,217. Contrary to Petitioner's claims, BLM did not base its authority to promulgate the Rule exclusively on the Federal Land Policy and Management Act. BLM's exercise of regulatory jurisdiction over hydraulic fracturing on Indian lands is supported by statute, is reasonable, and is entitled to substantial deference by this Court.

The Rule is consistent with, not in derogation of, the Secretary's statutory trust

obligations. To establish that the Rule should be vacated as inconsistent with the Secretary's trust obligations, Petitioner must show that the Rule is inconsistent with a specific statutory or regulatory trust obligation. Petitioner cannot rest on an argument that the Rule is inconsistent with the general trust relationship or a common law trust obligation.

Because the Rule has nothing to do with leasing of Indian lands for mineral development—it deals with operations *after* a lease is secured—Petitioner's arguments about alleged leasing obligations, even if accepted as true, have no bearing on the validity of the Rule. The Secretary considered the costs associated with the Rule, disclosed those costs to the public, and concluded that the costs were reasonable in light of the need for the rule and the fact that "no law requires the BLM to wait for a significant pollution event before promulgating common-sense preventative regulations." 80 Fed. Reg. at 16,189.

Finally, the Secretary engaged in robust tribal consultation before publishing the final Rule. The Department held four regional consultation meetings, to which over 175 tribal entities were invited, and additional regional consultation meetings, attended by eighty-one tribal members representing twenty-seven tribes. BLM engaged in government-to-government consultation with Petitioner, taking into account its concerns and issues. BLM fully complied with its tribal consultation requirements under various Executive Orders. Petitioner's dissatisfaction with the outcome of those tribal consultations is not a basis to vacate the Rule. Rather, the Court should find that Petitioner fails to state any basis for setting aside or permanently enjoining the BL Rule or any of its provisions.

II. STANDARD OF REVIEW

Petitioner brings this suit challenging the Rule under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, first arguing that BLM lacked the authority to promulgate the Rule,

and second, even if it had the authority, the Rule is arbitrary and capricious. Under the APA, a reviewing court can set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C).

In determining whether final agency action is in excess of an agency's authority, 5 U.S.C. § 706 (2)(C), deference must be accorded to the agency's interpretation of the statutes it is entrusted by Congress to administer, *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013), and its interpretation of the regulations it has promulgated to implement those statutes, *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The issue here is whether the Department's interpretation of IMLA, IMDA, and its own regulations is "based on a permissible construction" of the statute or regulation. *City of Arlington*, 133 S. Ct. at 1874-75 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*")); *Auer*, 519 U.S. at 461.

This standard of review is not changed because Petitioner alleges a trust responsibility as part of its claims. Ute Indian Tribe of the Uintah & Ouray Reservation Merits Br. 4, ECF No. 193 ("Br.") (citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1972)). Although *Chevron* deference can be "trumped by the requirement that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit[,]" *Chevron* deference does not disappear from the court's review of an agency's interpretation of the statutes it is entrusted to administer for the benefit of Indians. *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009) (quotation omitted). Rather, "[w]here Congress has entrusted to the agency the duty of applying, and therefore interpreting, a statutory duty owed to the Indians, a court cannot ignore the responsibility of the agency for careful stewardship of limited government resources" and the Court still applies a muted deference. *Id.* "Despite the

imposition of fiduciary duties, federal officials retain a substantial amount of discretion to order their priorities." *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 892 F. Supp. 2d 285, 296-97 (D.D.C. 2012) (quoting *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001)).

An agency's decision may be arbitrary or capricious if one or more of the following applies: (1) its explanation "runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise[;]" (2) the agency entirely failed to consider an important aspect of the problem or issue; (3) the agency relied on factors which Congress did not intend the agency to consider; or (4) the decision otherwise constitutes a "clear error of judgment." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This standard of review is highly deferential to the agency; a court need not find that the agency's decision is "the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance in judicial proceedings." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983) (quotation marks and citations omitted).

Agency factual conclusions need be supported only by "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Andalex Res., Inc. v. Mine Safety & Health Admin.*, 792 F.3d 1252, 1257 (10th Cir. 2015) (quoting *Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007)). Substantial evidence means enough evidence "to justify, if the trial were to a jury, a refusal to direct a verdict." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). The standard is even more deferential than the "clearly erroneous" standard for appellate review of trial court findings.

Dickinson v. Zurko, 527 U.S. 150, 162, 164 (1999).[1]

Petitioner, as the party challenging the agency action, bears the burden of proof. *Morris v. U.S. NRC*, 598 F.3d 677, 691 (10th Cir. 2010). In assessing the merits of Petitioner's challenge, the Court should begin with the presumption that Respondents' actions were valid. *Id.* If the agency decision has some rational basis, the Court is bound to uphold it. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

III. STATUTORY AND REGULATORY BACKGROUND

A. Overview of Mineral Development on Indian Land.

In general,[2] oil and gas leasing on tribal lands is primarily done under the authority of IMLA or IMDA.[3] These statutes each provide authority for mineral development on tribal lands,

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[1] To the extent Petitioner relies upon extra-record evidence (*see, e.g.*, Br. at 8 n.4) the Court should not consider this evidence and should strike those citations from Petitioner's brief. *See N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d 1160, 1173 (D. Wyo. 2015) (court limited review to administrative record and denied use of extra-record evidence).

[2] The primary authorities for mineral leasing of Petitioner's lands are IMLA and IMDA. However, Congress has enacted some tribe-specific statutory provisions to govern or to exempt oil and gas leasing and operations on certain tribes' lands. *See, e.g.*, Act of June 28, 1906, Pub. L. No. 59-321, 34 Stat. 539; 25 C.F.R. Part 226 (Osage mineral leasing). Also, lands held in trust or restricted fee for individual Indians are leased and regulated under 25 U.S.C. 396; 25 C.F.R. Part 212. No individual allottee has petitioned for judicial review of BLM's final Rule.

[3] In addition, Congress enacted the Indian Tribal Energy Development and Self-Determination Act in 2005 as part of the Energy Policy Act of 2005, *see* 25 U.S.C. §§ 3501-3506; Pub. L. No. 109-58, 119 Stat. 594 (2005). That Act authorizes Indian tribes, at their option, to enter into tribal energy resource agreements ("TERAs") with the Department. *Id.* § 3504(e). The Secretary is mandated to approve a TERA if the proposed agreement complies with statutory requirements of the Act, including that the tribe demonstrate "sufficient capacity to regulate the development" of the tribal resources. *Id.* § 3504(e)(2)(B)–(D). Once a tribe has an approved TERA, it is authorized to enter into leases and business agreements for energy resource development without the approval of the Secretary. No tribe has yet entered into a TERA with the Department.

and each requires Secretarial approval of the lease or other document authorizing exploration and development of the resources. 25 U.S.C. § 396a; 25 U.S.C. § 2102. Under these two statutory authorities, Petitioner's lands have been leased for oil and gas development, with some leases issued under IMLA and others in the form of IMDA minerals agreements. As discussed below, BIA has promulgated separate sets of regulations to implement IMLA and IMDA, *see* 25 C.F.R. Part 211 (implementing IMLA) and 25 C.F.R. Part 225 (implementing IMDA), while BLM has implemented one set of regulations applicable to all oil and gas development on federal and Indian land. *See, e.g.*, 43 C.F.R. § 3160.0-1.

Regardless of whether the mineral development occurs under the authority of IMLA or IMDA, oil and gas leasing and operations on tribal land have long involved several bureaus and offices within the Department, and the various bureaus' regulations acknowledge that allocation of responsibilities. BIA is responsible for leasing and surface permitting. *See, e.g.*, 25 C.F.R. §§ 211.20 (IMLA), 225.22 (IMDA), 169.5 (application for right-of-way), amended by 81 FR 14976-01; 169.25 (oil and gas pipelines, including pumping stations and tank sites), amended by 81 FR 14976-01; 25 C.F.R. Part 162, Subpart D (business leases). BLM is responsible for approving applications for permits to drill and regulating certain other operations. *See* 25 C.F.R. §§ 211.4, 211.44, 211.48 (IMLA); *id.* §§ 225.4, 225.32 (IMDA). BLM requires lessees and operators on Indian land to comply with onshore operating regulations found at 43 C.F.R. Part 3160 and its onshore orders. *See* 43 C.F.R. §§ 3160.0-1 and 3160.0-3 (BLM regulations in 43 C.F.R. Part 3160 apply to restricted Indian lands,[4] pursuant to authority in both IMLA and

[4] "Restricted land or land in restricted status means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations." 25 C.F.R. § 151.2(e).

IMDA); *id.* § 3164.1(b) (onshore oil and gas orders are binding on owners and operators on federal and restricted Indian oil and gas leases). Once wells are drilled and oil and gas are produced in paying quantities, the Office of Natural Resources Revenue ("ONRR") is responsible for royalty collection and enforcement of royalty obligations. *See* 25 C.F.R. §§ 211.6 and 211.40 (IMLA); *id.* §§ 225.6 and 225.31 (IMDA).[5] Reclamation and remediation efforts during and upon conclusion of the oil and gas operation are overseen by both BIA and BLM, either by operation of IMLA regulations, *see* 25 C.F.R. § 211.51, or pursuant to the approved terms of the IMDA minerals agreement, *see* 25 C.F.R. § 225.21(b)(17).[6]

B. IMLA.

IMLA, enacted in 1938, *see* Act of May 12, 1938, 52 Stat. 347, is a leasing statute that permits the leasing of tribal lands for mining purposes, including oil and gas extraction. *See* 25 U.S.C. § 396a. IMLA leases must be approved by the Secretary and have "terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." *Id.* IMLA also requires tribal mineral leases to be advertised and offered at public auction. 25 U.S.C. § 396b. But the auction provision includes an exception that allows tribes to lease without auction:

> *Provided*, that the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under [the Indian Reorganization Act of 1934 ("IRA")], to *lease* lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any

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[5] ONRR is a successor office to the Minerals Management Service ("MMS") for purposes of royalty collection and related tasks.

[6] This division of responsibility is reflected in the Department's *Onshore Energy and Mineral Lease Management Interagency Standard Operating Procedures*, available at http://www.blm.gov/style/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/oil_and_gas.Par.5734.File.dat/Interagency_SOP.pdf (last visited Mar. 30, 2016). These standard operating procedures replaced an earlier Memorandum of Understanding (the "Tripartite Agreement"), first promulgated in 1991, that set out the responsibilities among BIA, BLM and MMS. *Id.* at 1 (introduction).

> Indian tribe pursuant to the [IRA].

25 U.S.C. § 396 (emphasis added). The implementing regulations reflect this exception by permitting Indian tribes to lease mineral interests under IMLA by competitive bid or by private negotiation. *See* 25 C.F.R. § 211.20(b).

In addition to providing for leasing, IMLA addresses operations in a separate statutory provision. It requires all operations to be subject to the regulations promulgated by the Secretary:

> All *operations* under any oil, gas, or other mineral lease issued pursuant to the terms of sections 396a to 396g of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior.

25 U.S.C. § 396d (emphasis added). This statutory requirement is reflected in BIA's implementing regulations for IMLA, which require that "written permission must be secured from the Secretary before any operations are started on the leased premises, in accordance with applicable [BLM] rules and regulations . . . and Orders or Notices to Lessees (NTLs) issued thereunder." *See* 25 C.F.R. § 211.48(b).[7]

BIA's implementing regulations for IMLA are found at 25 C.F.R. Part 211 and establish a number of lease terms. Rent must be a minimum of $2 per acre per year. 25 C.F.R. § 211.41(a). Royalties must be a minimum of 16 2/3 percent, "unless a lower royalty rate is agreed to by the Indian mineral owner and is found to be in the best interest of the Indian mineral owner." *Id.* § 211.41(b). Other lease terms are also specified by regulation. *See, e.g., id.* §§ 211.24 (bond requirements), 211.28 (unitization and communitization agreements and well

[7] In addition to requiring compliance with BLM regulations, this provision also requires compliance with other bureaus' regulations when other mineral leasing is involved, *e.g.*, coal leasing.

spacing), and 211.51 (surrender of leases).

In sum, the IMLA permits leasing of tribal lands for oil and gas development. IMLA and its implementing regulations set forth many required terms of IMLA leases. Most importantly for purposes of this case, the IMLA directs that all oil and gas operations conducted pursuant to IMLA leases are subject to the Department's operational regulations.

C. IMDA.

As discussed above, Indian tribes also have the option to enter into minerals agreements under IMDA. 25 U.S.C. § 2102. Specifically, tribes are permitted,

> subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, [to] enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, or any amendment, supplement or other modification of such agreement (hereinafter referred to as a "Minerals Agreement") providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources (hereinafter referred to as "mineral resources") in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.

25 U.S.C. § 2102(a).

IMDA "was enacted to provide Indian tribes with flexibility in the development and sale of mineral resources[,]" *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1458 (9th Cir. 1986), by authorizing tribes to enter into "minerals agreements" with developers, such as joint-venture and product-sharing agreements, 25 U.S.C. § 2102. IMDA agreements are not subject to public auction and competitive bidding, and Indian tribes have greater flexibility to develop their own contract provisions such as initial term, royalties, bonding requirements, and the like. 25 C.F.R. § 225.21. IMDA minerals agreements are subject to Secretarial approval, 25 U.S.C. § 2103(b), and the Secretary retains "a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals

Agreement by any other party to such agreement," *id.* § 2103(e). IMDA agreements, like IMLA leases, are subject to regulation by the Secretary. 25 U.S.C. § 2107. As part of this regulatory system, IMDA lessees, like IMLA lessees, must obtain BLM's approval of an application for permit to drill before commencing operations, 25 C.F.R. § 225.32, and IMDA agreements are subject to BLM operational regulations, 25 C.F.R. § 225.4.

IV. LITIGATION BACKGROUND

On March 20, 2015, the Independent Petroleum Association of America and Western Energy Alliance ("IPAA") filed a petition for review of the Rule. On March 26, 2015, the State of Wyoming filed its petition for review. These cases were subsequently consolidated, and the States of Colorado, North Dakota, Utah, and the Ute Tribe of the Uintah and Ouray Reservation intervened as Petitioners. The Sierra Club, Earthworks, Western Resource Advocates, Conservation Colorado Education Fund, The Wilderness Society, and Southern Utah Wilderness Alliance intervened as Respondents. Petitioners filed four motions for preliminary injunction, and after a hearing and supplemental briefing with citations to the administrative record, the Court on September 30, 2015, issued an Order preliminarily enjoining the Rule pending resolution of this matter on the merits (ECF Nos. 119; 130). That Order is currently under appeal before the Tenth Circuit Court of Appeals by Respondent-Intervenors and Federal Respondents (*Wyoming v. Dep't of Interior*, No. 15-8126 (10th Cir. Filed Nov. 27, 2015); *Wyoming v. Jewell*, No. 15-8134 (10th Cir. Filed Dec. 15, 2015).

On March 4, 2016, Petitioners filed merits briefs challenging the Rule and several of its provisions. The briefs filed by IPAA and the states are addressed separately by Federal Defendants in a consolidated brief. This brief responds to only the merits brief filed by the Ute Tribe of the Uintah and Ouray Reservation.

V. ARGUMENT

The Rule requires operators on federal and Indian lands to follow best practices for hydraulic fracturing. Petitioner seeks to have the Rule permanently enjoined, first arguing that BLM, the agency responsible for overseeing oil and gas operations on federal and Indian lands, lacks the delegated authority to apply the Rule to Indian lands. Rather, Petitioner asserts that BIA is the only agency that can regulate Indian lands. Br. at 27-31.

Second, Petitioner argues that even if BLM had the authority to issue the Rule, the Secretary acted arbitrarily and capriciously in applying the Rule to Indian lands because the Rule is contrary to the Federal trust obligation to tribes. *Id.* at 5-10. Petitioner argues that leasing must be in the Tribe's best interests, which consists of a duty to maximize lease revenues. *Id.* at 9. Petitioner asserts that the Rule is not in its best interests because the Secretary failed to consider the Rule's socio-economic impacts, such as its limitation on tribal opportunities, its deterrent effect for operators developing tribal mineral resources, and the resulting loss of revenue for the Tribe. Petitioner also argues that the Secretary has not shown an environmental need for the Rule. Finally, Petitioner argues that BLM failed to engage in adequate tribal consultation while developing the Rule. As Respondent will show, nether of Petitioner's arguments have any support.

A. BLM has Delegated Authority to Promulgate the Rule, and BIA has made the Rule Applicable to Indian Lands in Its Regulations.

The Secretary and, by delegation, BLM are vested with statutory authority to regulate oil and gas operations, including hydraulic fracturing, on Indian lands. Petitioner's argument that BLM lacks this authority because Congress excluded Indian lands from the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701–1787, Br. at 27, is incorrect. First, BLM did not rely on FLPMA as authority for applying the Rule to Indian lands. Second,

BLM regulations, including the Rule, apply both through BIA's regulations and by Secretarial delegation directly.

Courts analyze agencies' implementation of their statutory authorities in the two-step process specified by the Supreme Court in *Chevron*, 467 U.S. at 842-44. At *Chevron* "step one," this Court must determine whether Congress has "directly spoken to the precise question at issue[,]" or instead has delegated "authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron*, 467 U.S. at 842-44. To make that determination, this Court employs traditional tools of construction, including "the statute's text, structure, purpose, history, and relationship to other statutes." *Hackwell v. United States*, 491 F.3d 1229, 1233 (10th Cir. 2007) (citation omitted). If the statute is "silent or ambiguous with respect to the specific issue," the court proceeds to "step two," and the question "is whether the agency's answer is based on a permissible construction of the statute." *City of Arlington*, 133 S. Ct. at 1868. Here, Petitioner challenges whether the IMLA and IMDA provide broad substantive authority and discretion as to which bureau exercises the Secretary's authority.

BLM is not precluded from being the arm of the Secretary to regulate oil and gas operations on Indian lands. The IMLA and the IMDA give the Secretary (not any specific bureau) regulatory authority, and Congress did not further specify or limit which bureau within the Department could carry out the Secretary's regulatory authority. Moreover, FLPMA expressly authorizes the Secretary to delegate to the Director of the BLM "such duties as the Secretary may prescribe with respect to the management of lands and resources under [her] jurisdiction according to the applicable provisions of this Act and any other applicable law." 43 U.S.C. § 1731(a); see also 80 Fed. Reg. at 16,184, 16,211. Thus, FLPMA authorizes BLM to implement parts of the Secretary's duties that come from other statutes and apply to lands other

than "public lands." *Id.* Under Petitioner's interpretation, section 1731(a) would only allow the Secretary to delegate to the Director duties already under the Director's jurisdiction, which would render the sentence meaningless.

The IMLA authorizes the Secretary to promulgate regulations governing "[a]ll operations under any oil, gas, or other mineral lease . . . affecting restricted Indian lands . . . ." 25 U.S.C. § 396d. Indeed, in the IMLA, Congress specifically subjected all oil and gas operations on Indian lands to the Secretary's regulatory jurisdiction. The Secretary, acting through BIA, promulgated regulations that recognize that BLM's operating regulations apply to oil and gas leases and drilling permits issued under the IMLA. 25 C.F.R. 211.4.

Similarly, Congress directed the Secretary to promulgate rules and regulations implementing the IMDA. 25 U.S.C. § 2107. *See also* 25 C.F.R. § 225.4 (BIA regulations providing that BLM operational regulations apply to minerals agreements approved under this part); 25 C.F.R. § 225.1(c) ("The regulations of the [BLM], the Office of Surface Mining Reclamation and Enforcement, and the [MMS] that are referenced in §§ 225.4, 225.5, and 225.6 are supplemental to these regulations, and apply to minerals agreements for development of Indian mineral resources unless specifically stated otherwise in this part or in other Federal regulations."). By way of these BIA regulations, the Secretary made clear that BLM's operating regulations were intended to apply to IMDA minerals agreements. BLM explicitly relied upon the applicable provisions of the IMLA and the IMDA to promulgate the Rule for Indian lands, and not the FLPMA as Petitioner asserts. 80 Fed. Reg. at 16,137, 16,184. *See also*, 43 C.F.R. 3160.0-3 (2015).

"No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within

the bounds of its statutory authority." *City of Arlington*, 133 S. Ct. at 1868 (emphasis omitted). Here, the Department, through regulations promulgated by BIA decades ago,[8] determined that BLM has regulatory jurisdiction over well operations on Indian lands. That interpretation is entitled to substantial deference by this Court as Petitioner has not established that "the statutory text" of the IMLA or IMDA "forecloses the agency's assertion of authority[.]" *Id.* at 1870-71.

BIA, pursuant to its delegated authority, *see* 209 DM ([Interior] Departmental Manual) 8, issued regulations pursuant to the IMLA and the IMDA. 25 C.F.R. Parts 211, 212, 225. Notably, BIA has lawfully incorporated BLM's Onshore Oil and Gas Operations regulations (43 C.F.R. Part 3160) into its regulations. 25 C.F.R. §§ 211.4, 225.4. The foregoing demonstrates that BLM's authority can and does extend to Indian lands. *See* Br. at 28. If Petitioner's argument that BLM cannot exercise authority to apply its rules to Indian lands were true, *id.*, then the plethora of BLM regulations that currently apply to oil and gas operators on Indian lands would be *ultra vires* and would also have to fall. Such an absurd result is wholly unsupported by the plain language of the IMLA, the IMDA, and FLPMA, and finds no support in precedent.

When Congress enacts a statutory scheme, and therein directs an agency to devise an appropriate regulatory framework to carryout statutory dictates, the agency would not be expected to approach the matter as though it were writing on a blank slate. Rather, the agency would be expected to make choices that are logically consistent with, and promote the effective implementation of, the statute. Because BLM has nationwide experience in regulating well construction and operation activities, it is quite reasonable for the Secretary and BIA to call upon

[8] For example, 25 C.F.R. Parts 211 and 212 were last updated in 1996. Leasing of Tribal Lands for Mineral Dev. & Leasing of Allotted Lands for Mineral Dev., 61 Fed. Reg. 35,634 (July 8, 1996).

BLM's expertise to regulate and oversee drilling activities on Indian land.[9]

Although FLPMA does not apply to Indian lands, 43 U.S.C. § 1702(e)(2), the IMLA and IMDA certainly do. Hydraulic fracturing is unquestionably an oil and gas "operation[]," 25 U.S.C. § 396d, performed on Indian land pursuant to IMLA or IMDA leases. Those acts give regulatory authority to the Secretary. 25 U.S.C. §§ 396d, 2107. Congress has not precluded the Secretary from delegating responsibility to BIA *or* BLM for regulating Indian lands under those acts, and nothing in the plain language of the acts precludes BIA from asking BLM to regulate well operations on Indian lands. Indeed, the Secretary has for decades charged BLM with regulating oil and gas operations on Indian lands, and BLM applies its oil and gas regulations (including the challenged rule) to Indian lands. 25 C.F.R. § 211.4 (IMLA); 25 C.F.R. § 225.4 (IMDA). Both statutes speak specifically to regulation of oil and gas operations. Here, Congress vested the Secretary with broad statutory authority to regulate oil and gas activities on Indian lands, and the Rule is in furtherance of, and consistent with, that regulatory authority.

Thus, Petitioner's argument that BLM lacks regulatory jurisdiction over Indian lands, Br. at 28-29, must fail. Both the IMLA and the IMDA afford the Secretary broad regulatory jurisdiction over oil and gas operations on Indian lands, which includes the authority to regulate hydraulic fracturing on Indian lands.

B. BLM's Interpretation of Its Statutory Authority is Permissible and Entitled to Deference.

At *Chevron* step two, the sole question is whether BLM's conclusion that it has authority over hydraulic fracturing operations on Indian lands "is based on a permissible construction" of

[9] The division of labor between BIA and BLM makes all the more sense considering that leasing and surface management of Indian lands requires special knowledge of tribal goals and culture, but the regulation of drilling and production activities depend on geology and engineering. These are the respective areas of agency expertise at the BIA and the BLM.

the relevant statutes. *Chevron*, 467 U.S. at 843. An agency interpretation of an express delegation is permissible if it is not "arbitrary, capricious, or manifestly contrary to the statute." *United States v. Power Eng'g Co.*, 303 F.3d 1232, 1236–37 (10th Cir. 2002) (quoting *Chevron*, 467 U.S. at 843-44). The Court must uphold the agency's interpretation if it is a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . ." *Chevron*, 467 U.S. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961). In making that determination, the Court considers "the text, the structure, and the underlying purpose" of the statute. *Midwest Crane & Rigging, Inc. v. Fed. Motor Carrier Safety Admin.*, 603 F.3d 837, 840 (10th Cir. 2010) (citation omitted).

BLM's conclusion is permissible for many of the reasons already discussed. The Rule's preamble repeatedly emphasizes BLM's statutory responsibility to act as "steward for the public lands and trustee for Indian lands." 80 Fed. Reg. at 16,132; *see also id.* at 16,137, 16,176, 16,178–79. That is entirely consistent with the role Congress expected the Department to play under the Indian mineral statutes. The Secretary has trust responsibilities over Indian lands and has delegated to BLM the authority to oversee oil and gas operations on Indian mineral leases. BLM acts as "the Secretary's regulator for operations on oil and gas leases on both public and Indian lands." 80 Fed. Reg. at 16,137. As with all the other provisions of 43 C.F.R. Part 3160, the Rule protects trust resources to the same extent that it protects resources in or on Federal lands. 80 Fed. Reg. at 16,184.

BLM made a reasonable accommodation between its responsibilities to tribes under the mineral leasing statutes and policies promoting tribal self-governance. BLM recognized that some tribes have been proactive in regulating hydraulic fracturing on their lands. 80 Fed. Reg. at 16,185. As such, the Rule does not preempt more stringent tribal regulations. In addition to the

Rule, tribal law would apply to leases of tribal and individually owned Indian land. *Id.* Furthermore, the Rule allows tribes that have rules in place to seek a variance. The variance provision of the Rule allows BLM, in cooperation with a tribe, to issue a variance that would apply to all wells within that tribe's lands or to a subset, if the provisions of the tribe rule meet or exceed those set by the Rule.

The Indian mineral leasing statutes described above do not authorize tribes to opt-out of the Secretary's regulations and do not authorize tribal primacy. *Id.* Therefore, BLM cannot terminate the Secretary's trust responsibilities for hydraulic fracturing operations if a tribe were to opt-out of having the BLM's regulations apply in that tribe's lands. The variance provision is a way to address the Secretary's trust responsibilities because it assures that Indian lands receive the same substantive protection as Federal lands, and promotes tribal sovereignty by facilitating coordination to achieve the goals of both sovereigns. *Id.*

BLM explained that its preexisting regulations have the same aim as the Rule, 80 Fed. Reg. at 16,134–36, and BLM was revising its 1982 hydraulic fracturing rule to address the technique's vastly expanded use and ensure that operators follow modern best practices, *id.* at 16,137; *see also id.* at 16,128–29, 16,131, 16,155, 16,176–77, 16,183, 16,187–89, 16,197–99. BLM and its predecessors have consistently asserted authority to protect groundwater from oil and gas operations. Although "neither antiquity nor contemporaneity with the statute is a condition of validity" for an agency interpretation, those "that are of long standing come before [the court] with a certain credential of reasonableness, since it is rare that error would long persist." *Smiley v. Citibank*, 517 U.S. 735, 740 (1996).

In sum, Petitioner is wrong that BLM lacked authority to revise its existing hydraulic fracturing rule and apply it to Indian lands. BLM permissibly concluded that it may reasonably

seek to prevent the contamination of groundwater from oil and gas operations on Indian lands. BLM has been delegated the authority to oversee oil and gas operations on Indian lands contemporaneously and consistently under the Indian minerals statutes. No court has ever entered a final order holding that BLM lacks that authority. Therefore, Petitioner's legal-authority arguments should be rejected.

C. The IMLA and IMDA do not Impose Different Standards on BLM for Regulating Hydraulic Fracturing on Indian lands and the Rule does not Breach Respondents' Trust Responsibilities.

Congress has vested the Department with broad discretion to assess the purpose and need for regulations under the IMLA and IMDA. *See Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 588 (10th Cir. 1992). The BIA, by adopting BLM regulations, may lawfully base regulatory decisions for Indian lands on principles of sustained productivity, multiple-purpose development, environmental protection, and avoidance of undue degradation. Congress has not mandated that the Department apply different standards for regulating hydraulic fracturing on federal and Indian land.

Although the relationship between the United States and Indian tribes has been described as a trust, "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S. Ct. 2313, 2323 (2011) (citing *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 542 (1980) and *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 224 (1983)). Indian tribes cannot simply rely upon "inherent" or common law duties imposed on a private trustee to state a claim against the United States or its agencies; instead, tribes must point to specific statutes and regulations that "establish [the] fiduciary

relationship and define the contours of the United States' fiduciary responsibilities." *Jicarilla Apache Nation*, 564 U.S. at 2325 (quoting *Mitchell II*, 463 U.S. at 224). "When 'the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.'" *Id.* at 2325 (quoting *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 302 (2009)).

Thus, to establish that the Secretary has failed to comply with her trust responsibilities in promulgating the Rule, *see* Br. at 5-6, 10-14, Petitioner must point to a "a specific, applicable, trust-creating statute or regulation[,]" *Navajo II*, 556 U.S. at 302, that: (1) enumerates standards that the Secretary was required to consider in promulgating the Rule, but did not, *see* 5 U.S.C. § 706(2)(A); or (2) precludes the Secretary from regulating hydraulic fracturing, *id.* § 706(2)(C). Petitioner has done neither, as neither exist.

Petitioner's trust argument boils down to its belief that any regulations that may adversely impact the tribe's economic interests are a breach of trust. Br. at 9-11. But that is not the law. "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." *Jicarilla*, 131 S. Ct. at 2318.[10] Many statutes govern Indian property and economic activity on Indian lands but do not give rise to a claim for breach of trust against the government, either at law or in equity. *See El Paso Nat. Gas Co. v. United States*, 750 F.3d 863,

[10] The Supreme Court has long recognized that the United States has a distinctly sovereign interest in the administration of acts of Congress concerning tribal property, including property it holds in trust for tribes. *See, e.g.*, *United States v. Candelaria*, 271 U.S. 432, 443-44 (1926); *United States v. Minnesota*, 270 U.S. 181, 194 (1926); *Heckman v. United States*, 224 U.S. 413, 437-38 (1912).

896-99 (D.C. Cir. 2014) (Hopi-Navajo Settlement Act, Indian Agricultural Act, Indian Dump Cleanup Act, and Mill Tailings Act do not "create a conventional fiduciary relationship that is enforceable as a breach of trust either under the APA or as a separate cause of action implied from the nature of the trust relationship"). Petitioner has failed to establish as a matter of law that the general trust relationship between the government and Indian tribes constrains, limits, or modifies the Secretary's authority under the IMLA or IMDA to regulate hydraulic fracturing on Indian lands. Nor has Petitioner pointed to any specific statute or regulation that precludes the Secretary from regulating hydraulic fracturing on Indian land.

The Supreme Court has specifically addressed the IMLA and the IMDA, which Petitioner incorrectly argues imposes the "duty to maximize lease revenues" upon the Secretary and to elevate tribal sovereignty and self-determination over all other factors motivating the Rule (including environmental protection and public disclosure of fracturing chemicals). *See* Br. at 7. The language of the regulations also contradicts Petitioner's assertion. As cited by Petitioner, the regulations state that:

> *In the best interest of the Indian mineral owner* refers to the standards to be applied by the Secretary in considering whether to take an administrative action affecting the interests of an Indian mineral owner. In considering whether it is "in the best interest of the Indian mineral owner" to take a certain action (such as approval of a lease, permit, unitization or communitization agreement), the Secretary shall consider any relevant factor, including, but not limited to: economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasability of land concerned; need for change in the terms of the existing lease; marketability; *and potential environmental, social, and cultural effects*.

Br. at 10 (quoting 25 C.F.R. §§ 211.3, 225.3 (emphasis added); *see also* 25 C.F.R. § 225.22(c) (approval of a minerals agreement if in best interests of Indian mineral owner)). As per the regulations, the Secretary, in considering the best interests of an Indian mineral owner, takes into account more than just seeking to maximize lease revenues. In addition to the economic

considerations of the financial effect on the mineral owner, the Secretary "shall" consider the potential environmental effects of the lease. *Id.* Thus, the Secretary was justified in her consideration of other relevant factors beyond economics in promulgating the Rule, including her consideration of environmental effects.

While the IMLA was designed "to provide Indian tribes with a profitable source of revenue[,]" Congress was also concerned with other factors, including achieving parity between mineral leasing on Indian land with mineral leasing on other federal land. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 179 (1989). Accordingly, the Supreme Court has held that "we find no solid basis in the IMLA, its regulations, or lofty statements in legislative history for a legally enforceable command that the Secretary disapprove [mineral leases] unless they survive 'an independent market study,' . . . or satisfy some other extratextual criterion of tribal profitability." *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 511 n.16 (2003) (finding that the IMLA and regulations did not establish a trust relationship). This Supreme Court decision forecloses Petitioner's breach of trust claims.

Petitioner's breach of trust arguments are unfounded, and the Secretary should be afforded great deference in balancing both the interests of her tribal beneficiaries and environmental protection in developing the Rule.

D. The Secretary Properly Considered the Economic Impacts of the Rule.

Petitioner also seeks to vacate the Rule on grounds that BLM allegedly did not consider the Rule's economic impact on Indian lands such as harm to tribal businesses, impact to revenue sources, and impact on operators' decisions to develop Indian lands. Br. at 14. Petitioner also contends that BLM lacks the staff to implement the Rule, that the Rule will cause delays for operators waiting for BLM to approve their Applications for Permits to Drill ("APD") and

Notices of Intent ("NOI"), and that these delays and costs will deter operators from investing in Indian lands, thus diminishing mineral lease royalties, tax revenues, and employment. *Id.*

However, neither the IMLA nor the IMDA requires the Secretary to perform a detailed "socio-economic" analysis of rules regulating hydraulic fracturing specific to Indian lands. BLM assessed the costs and benefits of the Rule through its Regulatory Impact Analysis for final Rule, DOIAR0100583–84, thoroughly reviewing field practices, and existing federal and state regulations. In response to comments, BLM modified the Rule to minimize cost burdens. It maintained certain requirements only because they were essential to accomplish the purposes of the Rule. BLM reasonably concluded that the Rule would not deter investment in leases on Federal or Indian lands because "[t]he estimated per-operation compliance costs of about $11,400 represent about 0.13 to 0.21 percent of the cost of drilling a well." DOIAR0100606. And, in those cases where fluid volumes exceed a certain threshold, BLM estimated that "the compliance with the storage tank requirement could cost an operator $74,400 (representing approximately 0.8 to 1.4 percent of the cost of drilling a well)." DOIAR0100606. BLM studied the Rule's likely impact on Indian lands and concluded that it "would impact 670 hydraulic fracturing operations per year in the near-term future and that the rule poses an incremental cost of about $10 million per year." DOIAR0100604-05. BLM acknowledged that "'[t]he highest total costs are associated with operations in," reservations such as Petitioner's "due to the volume of activity within those reservations." *Id.* BLM appropriately considered and evaluated the economic impact of the Rule and, accordingly, its decision warrants deference.

Courts review an agency's assessment of a regulation's costs deferentially so long as the cost analysis is reasonable. While "[t]he Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and

necessary[,]" "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015). "[C]ost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency[.]" *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1440 (D.C. Cir. 1983); *see also Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (Courts "review such a cost-benefit analysis deferentially.") A reviewing court's role is to "ensure that an agency has at least understood the relevant factors to be considered and has provided an adequate explanation of its reasoning process." *Office of Commc'n of United Church of Christ*, 707 F.2d at 1440.

"[I]n view of the complex nature of economic analysis typical in the regulation promulgation process, [Petitioner's] burden to show error is high." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002). "[C]ourts of review should be mindful of the many problems inherent in an undertaking of this nature and uphold a reasonable effort made by the Agency." *FMC Corp. v. Train*, 539 F.2d 973, 979 (4th Cir. 1976).

1. Overview of BLM's Cost Analysis Process.

BLM's cost analysis was serious, careful, and comprehensive. First, BLM reviewed each requirement of the Rule and assessed whether the requirement would pose an additional cost to operators. Because so many of the Rule's requirements cohere with industry guidance and state regulations, BLM found that few requirements pose an additional cost for most operators. BLM explained that "[m]any of the requirements are currently conducted by operators as a matter of standard industry practice or in compliance with existing state regulations or other BLM regulations (including Onshore Oil and Gas Orders No. 1 and No. 2). We measure the incremental burden to operators against that baseline." DOIAR0100526.

BLM considered the Rule's benefits, but concluded that "[w]e are unable to estimate the incremental benefits of the rule because we are unable to ascribe incremental benefits to the particular provisions of the rule." DOIAR0100604−05. BLM also acknowledged the primary sources of uncertainty, including the "[n]umber of hydraulic fracturing operations on Federal and Indian lands occurring in the future." DOIAR0100604−05. BLM considered the administrative costs associated with the Rule, both for operators and for BLM, and considered its ability, both in terms of time and expertise, to process the permits. Finally, BLM concluded that the Rule's minimal cost, as compared to the cost of drilling a well for hydraulic fracturing, showed that the Rule would not impact operators' investment decisions, including whether to drill on Indian lands. 80 Fed. Reg. 16,212.

2. BLM's Efforts to Reduce Costs.

Although Petitioner argues that the Rule will deter operators from developing tribal minerals, Br. at 15, BLM, in response to comments, took several steps to reduce the Rule's costs both for well operators and BLM to avoid any disproportionate effects on tribes. 80 Fed. Reg. 16,211. It removed a general requirement to run a cement evaluation log on surface casings; allowed operators to submit chemical data through FracFocus; provided a mechanism to submit a request for approval for multiple hydraulic fracturing wells in one master hydraulic fracturing plan; clarified that isolating and protecting usable water means 200 feet of competent cement between the fractured zone and the lowest usable water zone; and clarified that the Rule does not require expensive modeling of fissure propagation. *Id.* at 16210-11.

BLM also incorporated operation-specific and tribal variances into the Rule to provide another cost-reduction mechanism. BLM's cost analysis found that "[t]he variances should result in some reduction in the costs of compliance with some requirements for specific

operations, or for all operators within an area subject to a State-wide or tribe-wide variance, without compromising the protections of the final rule for usable water." DOIAR0100549. It explained that, "[f]rom an efficiency standpoint, variances are important because they allow operators to use technology, innovations, or other improvements to meet requirements in a more efficient or cost effective manner." DOIAR0100552.

BLM carefully considered the time required to submit APDs under this Rule and rationally concluded that delays will be minimal because operators already have this information. BLM acknowledged that "[t]he application requirement is new and poses an incremental administrative burden to the operator and for the BLM to review." DOIAR0100582. It noted, however, that "[t]he information required in the application should be readily available or known to the operator. The information should not require any additional information gathering."[11] DOIAR0100582. BLM also noted that operators are already subject to permit application requirements that require similar types of information. "Existing section 3162.3-1 and Onshore Order 1 require an operator to get approval from the BLM prior to drilling a well," including submitting "a completed Form 3160-3, Application for Permit to Drill or Re-Enter, a well plat, a drilling plan, a surface use plan, bonding information, and an operator certification." DOIAR0100567. "If the data required by a state is the same as the data required by this rule, it is permissible for the operator to attach it to the APD or NOI required for Federal and Indian lands,

[11] *See also* 80 Fed. Reg. at 16,148 ("Operators planning to conduct hydraulic fracturing should already possess that information [required in the application] because hydraulic fracturing is a complex operation and would only be conducted pursuant to a plan for performance."); *Id.* at 16,189 ("Monitoring reports of cement jobs are common in the industry and the operator should be able to provide such documentation to the BLM without any burden even for wells drilled prior to this rule."); *Id.* at 16,187 ("Operators would not undertake the expense of hydraulically fracturing a well without an estimation or calculation of the propagation of the fissures. The final rule does not require additional modeling.").

thus substantially reducing the reporting burden for operators." 80 Fed. Reg. at 16,154−55. Moreover, "[a] master hydraulic fracturing plan will allow for efficiencies in submission and review." DOIAR0100582. In short, BLM rationally found that the Rule imposes a minimal time burden upon operators because operators already submit drilling applications, they already have or have easy access to the required information, and, in some circumstances, operators can submit a master hydraulic fracturing plan to save time.

Other commenters suggested that BLM lacked the staffing, the budget, and the expertise to evaluate fracturing proposals. BLM considered those comments and concluded that it disagreed because "BLM employs qualified and experienced petroleum engineers and geologists" and "[] understands the time-sensitive nature of oil and gas drilling and well completion activities[.]" 80 Fed. Reg. at 16,177. BLM explained that "the additional information that would be required by this rule would be reviewed in conjunction with the APD and within the normal APD processing timeframe," and acknowledged that "[i]f an operator submits a request in an NOI, however, further processing time should be expected." *Id.* BLM noted that "the revisions made from the supplemental rule to final rule would reduce the amount of staff time required to implement the rule and limit any permitting delays." 80 Fed. Reg. at 16177. BLM estimated that its processing time would increase by an average of only four hours per application. *E.g.*, 80 Fed. Reg. at 16,196. It also noted that the option for submitting a master hydraulic fracturing plan save time and BLM "expect[s] there to be fewer applications than the number of hydraulic fracturing operations, because of the option to make one submission for a group of wells." DOIAR0100582. BLM thus thoroughly considered concerns about processing time at the agency.

BLM also acknowledged the staffing burdens associated with the Rule. BLM calculated

that "[t]he review of information associated with the application, subsequent report, remedial action report (when applicable), and variance request (when applicable) will pose an additional workload to the BLM of about 25,400 hours per year" and will require "about 13.80 staffed positions." 80 Fed. Reg. at 16,207. This analysis shows that BLM carefully considered the time required to process applications under the rule and candidly acknowledged that the Rule would require 13.8 staffed positions.[12] BLM also acknowledged that the Rule "may place an additional burden on inspectors monitoring compliance."[13] DOIAR0100613.

In addition to concerns about costs and operator interest in developing tribal minerals, Petitioner also expresses concern about the impact of the Rule on its ability to regulate tribal lands. However, just as the Rule does not displace the police powers of the States, the Rule does not displace Petitioner's ability to regulate oil and gas operations on its lands. Tribal regulations still apply to oil and gas operations on Petitioner's lands. Additionally, the Rule contemplates tribal variances where appropriate. 43 C.F.R. § 3162.3-3(k)(2). Nothing prohibits Petitioner from discussing with BLM one or more variances based on Petitioner's regulatory program. Petitioner may disagree with this regulation, but BLM satisfied the APA by carefully, candidly, and comprehensively considering the costs and impacts associated with the Rule as part of its

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[12] To place this 13.8 number into context, Federal Respondents note that the BLM budgeted for 344 "full-time equivalent" ("FTE") employees to process APDs in fiscal year 2015 and 471 FTEs to process APDs in fiscal year 2016. BLM's Budget Justification, pp. VII-99 – 100, https://www.doi.gov/sites/doi.gov/files/uploads/FY2017_BLM_Budget_Justification.pdf.

[13] Petitioner asserts that BLM failed to consider comments that staffing is inadequate in its Vernal, UT field office, the BLM office that processes APDs for Petitioner's lands. Br. at 15 n.16. But the rulemaking process is separate from the appropriations process. BLM had no obligation to obtain funding or begin hiring staff during the rulemaking process. Petitioner cannot credibly argue that BLM failed to consider the Rule's impact on staffing and workload at BLM, or that the rule is arbitrary and capricious because Congress and the Executive might or might not provide BLM resources adequate to implement the Rule in the future.

rulemaking process.

E. The Secretary Appropriately Consulted with Potentially Affected Tribes.

Petitioner argues that the Rule is arbitrary and capricious because the Secretary failed to engage in appropriate tribal consultation when promulgating the Rule. This contention is not supported by the record. As explained below, the Secretary engaged in robust consultation before publishing the final Rule.

Petitioner bases its consultation argument on BLM's consultation policy and Executive Order 13175. Br. at 22, 24-25. As an initial matter, BLM's tribal-consultation policy is not legally enforceable against BLM. To have the force and effect of law, an agency pronouncement must "(1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071-72 (9th Cir. 2010) (quoting *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982)). To satisfy the first requirement, the rule must be "legislative in nature, affecting individual rights and obligations[.]" *Id.* To satisfy the second, the rule "must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id.*; *accord Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006).

The consultation policy appears in the Department's *Department Manual*, 512 DM 5 at 5.4- 5.5 (2015),[14] and effectuates Executive Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). The policy was not promulgated under a specific statutory grant of authority. *See* 512

[14] Available at http://elips.doi.gov/elips/0/fol/4060/Row1.aspx.

DM 5.3 (citing only Executive Order 13,175). Moreover, the Department did not publish the draft policy in the Federal Register. This shows that the Department "did not intend to announce substantive rules enforceable by third parties in federal court." *River Runners*, 593 F.3d at 1072; *see also Wilderness Soc'y*, 434 F.3d at 596.[15]

The policy instead contains internal agency procedures and practices concerning tribal consultation. *See* 512 DM 5.4-5.5. Indeed, Executive Order 13,175 expressly states that it is "not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party . . . ." 65 Fed. Reg. at 67,252.[16] An executive order is not legally enforceable if it expressly "precludes judicial review." *City of Albuquerque v. U.S. Dep't of the Interior*, 379 F.3d 901, 913-15 (10th Cir. 2004); *see also City of Carmel-by-the-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997); *N. Arapaho Tribe v. Burwell*, 118 F. Supp. 3d 1264, 1281 (D. Wyo. 2015) (holding that "Executive Order 13175 does not provide any right enforceable in [a] judicial action" against an agency), *appeal filed*, No. 15-8099 (10th Cir. Aug. 28, 2015).

Even if the Court were to consider the merits of Petitioner's tribal consultation claim, Petitioner's claim still fails because BLM engaged in a consultation process that ensured

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[15] Petitioner's cite to *Hymas v. United States*, 117 Fed. Cl. 466, 502 (2014) for support that the Departmental Manual is binding authority is unpersuasive. The Federal Circuit vacated and remanded that decision, finding that because the court did not have jurisdiction, it need not address the APA claim. 810 F.3d 1312 (2016).

[16] *See also* Dep't of the Interior *Policy on Consultation with Indian Tribes*, at 14, https://www.doi.gov/tribes/Tribal-Consultation-Policy (containing similar disclaimer that it is not judicially enforceable).

meaningful and timely input when promulgating the Rule.[17] Tribal consultation was an important part of BLM's rulemaking effort and BLM was committed that tribal leaders play a significant role in working together with BLM to develop resources on Indian lands in a safe and responsible way. Petitioner argues that the record is deficient in describing the consultation process. Br. at 21 n.27. As discussed below, the record provides ample evidence of BLM's meaningful consultation efforts with tribes and how the information derived from the process was relayed to agency decision-makers.[18] *Id.* The record shows that BLM met with tribes, including Petitioner, and carefully considered their input during the rulemaking process.

In November of 2010, then-Secretary Salazar hosted a forum on hydraulic fracturing on public and tribal lands. DOIAR0003324, 3354. BLM subsequently hosted a series of regional public meetings to further discuss the issue. *Id.* On December 1, 2011, the Department announced its formalized Tribal Consultation Policy. At that same time, months prior to publishing the initial and supplemental proposed rules in the Federal Register, BLM began its consultations initial outreach, communication, and information sharing with tribal governments, including scheduling four regional tribal consultation meetings for January 2012. 80 Fed. Reg. at 16,132; 77 Fed. Reg. 27,691, 27,693 (May 11, 2012) (initial proposed rule); 78 Fed. Reg. 31,

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[17] Although Petitioner challenges the Rule, several tribes supported the rule or thought that the rule should be more environmentally protective. (*See*, *e.g.*, DOIAR0049636, 56784, 57197, 62992-63002).

[18] Petitioner seems to assert that the consultation process was not meaningful because those making the ultimate decisions did not meet with the tribe. Br. at 21 n.27. While consultation does not require access to the ultimate decision-maker, as the record demonstrates, Petitioner's issues and concerns were shared with decision-makers at the agency. *Ctr. for Biological Diversity v. Salazar*, No. 10-2130-PHX-DGC, 2011 WL 6000497, *12 (Nov. 30, 2011 D. Ariz.) (finding consultation does not require access to the ultimate decision-maker or an intermediary, but even if it did, found access to intermediaries was adequate where staff from regional office met with tribe and transmitted information to staff in DC).

636, 31,639-40 (May 24, 2013) (supplemental proposed rule). (DOIAR0014218, 22597-99, 26578-85, 52201). The consultation meetings were held in the oil and gas producing regions of the West where there is significant development of tribal oil and gas resources. Nearly 180 tribal leaders from all tribes that were receiving oil and gas royalties and all tribes that may have had ancestral surface use were invited to attend these January 2012 consultations, which were held in Tulsa, OK; Billings, MT; Salt Lake City, UT; and Farmington, NM. 80 Fed. Reg. 13,132, 16,184; DOIAR0034435.

In the January 2012 consultation meetings, BLM provided tribal representatives with a discussion pre-proposal draft. DOIAR0034436. BLM asked the tribal leaders for their views on how a hydraulic fracturing rule proposal might affect Indian activities, practices, or beliefs, if such a rule were to be applied to particular locations on Indian and public lands. *Id.* The parties discussed a variety of issues, including applicability of tribal laws, identifying and protecting potential water sources, inspection and enforcement, wellbore integrity, and water management, among others. *Id.*

After the January 2012 consultation meetings, additional individual meetings with tribal representatives took place. DOIAR0034436. BLM incorporated the feedback it received from the meetings with tribes into the draft rule that was published in the Federal Register on May 11, 2017. DOIAR0034436. After publication of the initial rule, BLM mailed 178 letters to tribal leaders inviting them to continue consultation on the proposed initial rule at upcoming regional meetings. DOIAR0023602, 34436. BLM staff then followed up on the correspondence by making calls to each tribal leader (or representative) as additional notification about the upcoming meetings and to also determine their interest in having individual Government-to-Government consultation. *Id.*; *see, e.g.*, DOIAR52183 (Excel spreadsheet of Tribal Consultation

Report July 2012 for California offices detailing letters, calls, emails, and meetings with tribes).

In June 2012, after publication of the initial proposed rule on May 11, 2012, BLM held additional tribal consultation meetings in Farmington, NM; Tulsa, OK; Billings, MT; and Salt Lake City, Utah, near Petitioner's reservation. 80 Fed. Reg. 16, 132, 16,184; DOIAR0023602. The purpose of these meetings was to build upon the January 2012 meetings and they were part of BLM's outreach program to tribal stakeholders to provide an additional opportunity to seek tribal views regarding the initial proposed rule, answer questions, and obtain feedback.[19] *Id.* "Eighty-one tribal members representing 27 tribes attended the meetings." 80 Fed. Reg. 16,184. Copies of the proposed rule were provided at the meetings and served as a basis for discussion and substantive dialogue about the hydraulic fracturing rulemaking process. DOIAR0023602. BLM engaged in substantive discussion of the proposed rule with tribal leaders. *Id.*, 80 Fed. Reg. 16,184-85. As the foregoing demonstrates, significant time was allotted to consult and discuss tribal concerns. DOIAR0023603.

Thereafter, BLM engaged in additional tribal consultations with individual tribes, *id.*, including in-person consultations with Petitioner. DOIAR0034423-580 (transcript of BLM Tribal Consultation Meeting); *see also* DOIAR0023694-699 (memorandum summarizing steps taken for, attendance at, and issues raised at further tribal consultation sessions held in February through June 2012 with respect to the Rule); DOIAR0024889-25030 (transcript of June 14, 2012, tribal consultation meeting regarding the Rule in Billings. MT). BLM met with Petitioner's representatives on June 5, 2012, in Salt Lake City. DOIAR0034423-580. Attending

[19] Other officials of the Department assisted in BLM's tribal outreach. On June 18, 2012, the Deputy Secretary for the Department of the Interior gave the keynote address at the National Congress of American Indians' (NCAI) Mid Year Conference to discuss the Department's consultation policy and BLM's consultation for the Rule. DOIAR0023558. BLM also held consultations at the conference on this date. 80 Fed. Reg. 16,132.

for BLM were three officials from Washington, DC and six BLM state and field managers. At the meeting, BLM provided a background presentation on hydraulic fracturing and then the parties discussed Petitioner's concerns and issues with the initial proposed rule. DOIAR0034455-577. In addition to this meeting in Salt Lake City, on June 27, 2012, BLM representatives attended the Ute Energy Expo to provide a presentation on hydraulic fracturing. DOIAR0024769-70, 25369-71, 23877-78, 23551-52. BLM then met with Ute's Business Committee on the Uintah and Ouray Reservation for consultation. *Id.*

Following internal review and continuing tribal consultations, BLM published the supplemental proposed rule in 2013. Afterward, BLM continued its consultation with tribes and held additional tribal consultation meetings. 80 Fed. Reg. at 16,132; *see also* DOIAR0042097-98 (notes from March 5, 2013, EO 12866 listening session with the Ute Tribe and Coalition of Large Tribes); DOIAR0049740 (notes from June 10, 2013, meeting with the Coalition of Large Tribes in Albuquerque, NM, of which Petitioner is a member); DOIAR0050425-548 (transcript of June 18, 2013, tribal consultation meeting in Dickinson, ND on the Rule); DOIAR0053662-794 (transcript of June 20, 2013, tribal consultation meeting in Farmington, NM regarding the Rule); DOIAR0051842-43 (notes from June 24, 2013, tribal meeting in Norman, OK on the Rule); DOIAR0052181 (Discussion of 2013 consultation for CA offices).[20] Again, after these consultations, BLM engaged in additional consultations with individual tribes. DOIAR0052181. In March 2014, BLM held another tribal consultation meeting in Denver, Colorado. 80 Fed. Reg. 16,132. The BLM subsequently held several consultation meetings with individual tribes in

[20] BLM made changes to the proposed rule as a result of its consultations. One change was the re-drafting of section 3162.3-3(k) to clarify that tribal variances are separate from variances for a specific operator. 80 Fed. Reg. 16,132. BLM also made a requirement that operators certify to BLM that operations on Indian lands comply with applicable tribal laws. *Id.*

2014-2015. 80 Fed. Reg. 16,132; DOIAR0075037-41 (meeting notes from March 18 2014, Tribal Hydraulic Fracturing Outreach Meeting).

BLM demonstrated that it "understands the importance of tribal sovereignty and self-determination, and seeks to continuously improve its communications and government-to-government relations with tribes." 80 Fed. Reg. 16,132. BLM followed "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." 65 Fed. Reg. at 67,250. Throughout the rulemaking process, BLM provided tribes early and meaningful opportunities to consult. BLM's policy requires nothing more. 512 DM 5.4-5.5. Although Petitioner argues that BLM should have initiated consultation before beginning to draft the rule and made more changes in response to tribal concerns, Br. at 25, those arguments do not identify a statutorily supported ground for enjoining the Rule. Consultation is not the same as agreeing with those who are consulted; the consulted have to be heard even if the advice is not accepted. *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1103 (9th Cir. 1986) (finding no APA violation where BIA met with tribe, which objected to proposed decision, which Secretary made final). Here, the record demonstrates that BLM followed agency protocol and engaged in open and candid consultation years prior to formalizing the Rule. The Court cannot "overturn an agency decision for failure to provide additional procedure" beyond that required by statute or regulation. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1239, 1239 (10th Cir. 2011) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)).

F. Petitioner's Request for a Permanent Injunction Should be Denied.

Petitioner has failed to meet its burden to show it is entitled to permanent injunctive relief. As the Supreme Court has repeatedly held, "an injunction is a drastic and extraordinary

remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 142 (2010); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982). Plaintiffs seeking a permanent injunction are required to demonstrate: that they've suffered an irreparable injury, that available remedies at law are inadequate, that the balance of hardships weighs in their favor, and that a permanent injunction is in the public's interest. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Monsanto*, 561 U.S. at 141. The proper inquiry is not "to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue under the traditional four-factor test . . . ." *Id.* at 158 (emphasis omitted). Here, Petitioner has not demonstrated that its suffered an irreparable injury, that available remedies at law are inadequate, that the balance of harms weighs in their favor, and, most importantly, that a permanent injunction is in the public's interest.

If the Court, however, were to find that BLM lacked authority or that certain provisions of the Rule were arbitrary and capricious, any remedy the Court issues must be narrowly tailored to address specific legal violations. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289 (11th Cir. 2015). If, for example, the Court determines that BLM did not adequately consider costs, the Rule should remain in effect while BLM reconsiders costs on remand. Although Petitioner requests that the Court permanently enjoin the Rule, it wholly fails to demonstrate the necessity of a permanent injunction. If the Court finds legal violations with specific Rule provisions, then the parties will need to brief the severability of those specific provisions.

VI. CONCLUSION

BLM is responsible for overseeing responsible energy development on public and tribal lands, in order to ensure that the American public and tribal mineral owners, respectively,

receive a fair return from the use of these resources. The Rule is an important component of that responsibility and represents a culmination of BLM's efforts, working with Tribes, States, and operators, to address the increased use and complexity of hydraulic fracturing to ensure that those operations are undertaken in a way that is both environmentally responsible and results in a fair return to the Indian mineral owners. The Rule establishes strong nationwide performance standards for operations on public and tribal lands, and strengthens oversight while also recognizing state and tribal authority. The Rule does all these things while not imposing undue costs or delays on operators. BLM had the authority to promulgate this Rule on Indian lands and did so in a manner consistent with applicable Indian mineral statutes. BLM engaged in direct and constant tribal consultations, listening to tribal issues and concerns, and addressing those concerns throughout the rulemaking process.

The Rule is presumed to be valid; Petitioner has shown no reason for the Court to deviate from this presumption or to vacate or enjoin the Rule. Rather, the Court should uphold the Rule and find that it was not arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The Rule was based upon consideration of the relevant factors and is entitled to substantial deference. The Court should deny Petitioner's request for declaratory and injunctive relief and immediately dissolve the preliminary injunction. Respondents further request any other relief as may be just.

Respectfully submitted this 4th day of April, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B), as applied under Local Rule 83.6(c). This brief comprises a total of 11,524 words (excluding the caption, table of contents, table of authorities, signatures, and certificates of counsel), as determined in reliance on the word-processing system used to prepare the brief.

/s/ Jody H. Schwarz
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2016, a copy of the foregoing **Respondents' Merits Brief in Response to the Ute Tribe of the Uintah and Ouray Reservation's Merits Brief** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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