THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MANDAN, HIDATSA AND ARIKARA NATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; David Bernhardt, in his official capacity as Secretary of the Interior, Defendants, and SLAWSON EXPLORATION COMPANY, INC., Intervenor-Defendant.	Case No. 1:19-cv-00037-DLH-CRH

PLAINTIFF MHA NATION'S OPPOSITION TO FEDERAL DEFENDANTS AND SLAWSON MOTIONS FOR SUMMARY JUDGMENT; REPLY IN SUPPORT OF NATION'S MOTION FOR SUMMARY JUDGMENT

ARGUMENT

I. MHA Nation has jurisdiction over the project under *Montana*.

Both BLM and Slawson seek to demonstrate that the Tribe does not have authority to regulate the project under the second *Montana* exception. Under the second exception, the Supreme Court has held that an Indian tribe may exercise civil regulatory authority, including authority related to land use, "over the *conduct* of non-Indians on fee lands within its reservation when that 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 566 (emphasis added). The Tribe has shown that the regulatory jurisdiction at issue in this case satisfies the second *Montana* exception.

BLM and Slawson's argument on the *Montana* exception is completely dependent upon their incorrect assertion, made without any case citation or case support, that under *Montana*, the Tribe has the burden to show, and has failed to show, that the that the difference between a well 600 feet from shore and 1000 feet from shore "would have a 'direct effect' on the Tribe's 'political integrity, economic security, and health and welfare.'" *ECF 81 at 16; ECF 80 at 15.* BLM goes so far as to allege that the Nation's 1,000-foot setback is "an arbitrary figure, as oppose to rooted in scientific evidence." ECF 81 at 16. This line of attack misses the mark for multiple independent reasons.

First, Defendants are intentionally mis-framing the legal issue presented. The legal issue presented is whether the *conduct* at issue–drilling and operation of an oil well near the Missouri River--threatens the economic security and the health and welfare of the Tribe. *Montana*, 450 U.S. at 566.

Defendants cannot dispute that the conduct poses a sufficient threat under the *Montana* case law. In fact, as discussed below, the multiple federal agencies recognize that citing wells too close to the river poses a substantial risk, and the administrative record in this case shows the same. Parties can disagree regarding how close wells could safely be sited, but there is no dispute that a line must be drawn somewhere. *See, e.g.*, ECF 80 at 20. The record also shows the Tribe's overwhelming interest in avoiding an oil spill into the Missouri River. Therefore, under that *Montana* case law, the Tribe has the authority to regulate that conduct, including the authority to determine the distance of the setback, the grounds for waiver, the process for waiver, and related issues.

Because they cannot dispute tribal authority to regulate under the existing Montana case law, Defendants make their truly unprecedented argument that Montana requires this Court to focus on the difference in the threat to the Tribe between wells 600 feet and 1000 feet from the river. This Court must reject that argument, and that, by itself, requires this Court to vacate and remand this matter. For example, in *New Mexico v. Mescalero Apache Tribe*, _____, the State of New Mexico and the Tribe both had laws regulating hunting and fishing, and the Tribe asserted authority to impose its regulations against non-members. In ruling that the Tribe had the authority to impose its regulations, the Supreme Court did not analyze the marginal difference between the tribal and state regulations. It did not, for example, consider whether the Tribe had sufficient interest for a smaller bag limit than the State imposed. Instead, the Supreme Court considered whether the Tribe had a sufficient interest in regulating hunting and fishing. It concluded the Tribe had that authority, and therefore the governmental decision on regulation were within the Tribe's authority.

The Tribe is particularly disappointed that the United States Department of the Interior argues that tribal jurisdiction is based upon the marginal difference. The federal argument is contrary to the core of the established law, binding on this Court that tribes are governments, and that federal laws and policies require the United States to treat tribes as governments. E.g. _____ Governments regulate through laws, and laws necessarily draw lines in the sand. The issue is whether the Tribe, as a government, has the authority to draw that line and to require that any well inside that line requires a waiver. It is not, as the United States asserts, whether the behavior of an entity like Slawson, is "too far" across that line. Similarly, states and tribes adopt speed limits on their roads, and to obtain a conviction for speeding, a state only needs to show that the driver was over the speed limit. The United States would never even assert that a state is required to show that a speeder was going so far over the limit that, under the specific facts of the case, the speeder was creating a risk of harm to himself or others.

If a legislature were to have to prove to a court its regulatory line is the right line under the specific facts of a case, the legislature no longer has regulatory power; and the Court takes on the role of regulation on a case-by-case basis. If this Court takes up the United States' unsupported interpretation of the *Montana* test, the Court may then have to decide whether the Tribe has authority if the next well is only 400 feet away; or 300 feet away; or 250 feet, or in the water. Etc.

Slawson does not like that the Tribe, like numerous federal agencies, drew a line 1000 feet from shore, inside of which an oil company would need to apply for a waiver. Slawson was informed that waivers were liberally granted, but Slawson chose not to even apply for a waiver. Defendant federal department, oddly, supports Slawson and asserts that 1000 foot setbacks are arbitrary. This brings us to the second flaw in Defendants' *Montana* argument.

What the BLM fails to recognize with its allegation that a 1000-foot setback is "arbitrary" is that BLM, along with the Army Corps of Engineers, the Bureau of Indian Affairs, and the Fish and Wildlife Service have all established the same set-back requirement. Simply put, the MHA Nation's set-back can only be labeled arbitrary and not rooted in science if those same allegations are levied against every federal policy which similarly establishes a 1,000 foot-setback from Lake Sakakawea for oil and gas development. Neither BLM nor Slawson makes that argument. This is because as Slawson stated, as with the other federal agencies the "BLM is well aware of risks associated with drilling, which is squarely within its area of expertise." ECF 80 at 20. Using that expertise, BLM along with three other federal agencies looked at the scientific evidence and determined that a 1,000-foot setback was necessary to protect the waters of Lake Sakakawea from oil and gas development. Thus, even assuming arguendo the federal policies were not applicable to the project *per se*, they still represent the minimum setbacks for Lake Sakakawea as determined based on science and the expertise of four separate federal agencies.

Moreover, because it does not and cannot challenge the scientific basis for its *own* 1,000-foot setback, it is actually BLM who had the duty to clearly demonstrate why this Project was an exception to this rule and did not require a 1,000-foot setback. As will be discussed in more detail in Section ____ *infra*, instead of providing that evidence BLM falsely and without further explanation claimed "[t]he proposed project conforms to the management of resources described within the [RMP's] Oil and Gas Lease Stipulations…" AR006378. Because BLM and Slawson have failed to identify any evidence that shows the BLM considered the environmental protection provided by a 1,000-foot setback as opposed to a 600-foot setback, it is the 1,000-foot setback which enjoys a more scientific basis for protecting Lake Sakakewa. The BLM should not enjoy

deference when it arbitrarily, and without explanation, determined the 600-foot setback was adequate in contradiction to its own policies and the policies of three other federal agencies.

BLM and Slawson's assertion that the Nation has not carried its burden under *Montana* also conveniently ignores the basic, and undisputed principle of oil spill mitigation which is contained in the administrative record: a greater distance between a project and a body of water allows for a larger response time, and thus reduces the likelihood of a spill reaching said water. *E.g.* AR-002498 ("If an aerial release occurs and the prevailing winds are N/NW the greater distance…helps to alleviate some of the risk. Also, should a non-aerial release occur the greater distance would allow for more response time to the incident."); AR-005838 (The threat of oil reaching Lake Sakakawea "may be possible, depending on the distance from the lake and the magnitude of the accompanying precipitation event.").

In addition to the evidence in the record linking the distance of the Project from Lake Sakakawea to the response time to an incident, the setbacks in the federal policies represent a consensus that providing a 1,000 feet between an oil well and Lake Sakakawea is necessary to provide an adequate response time in case of a spill or leak. This is particularly true for situations like the one here, where the operator had admitted that a major discharge may not be detected for up to 24 hours. AR5842.

The relationship between the setback of a project and the corresponding response time is also particularly relevant to this case due to the fact the Nation is not listed as an entity which will be provided notice if and when an oil spill or blowout occurs or reaches Lake Sakakawea. Instead, according to Slawson's Oil Spill Contingency Plan, which is applicable to all current and future Slawson facilities on the Van Hook Arm, the company will contact governmental entities at every level *except for* the Nation. See AR5843, 5837 (establishing the company will contact the National

Response Center, North Dakota Authorities, and the City of Parshall in the event of a spill or blowout, but not the Nation.) Requiring a 1,000-foot setback is thus not only in line with the expertise of four federal agencies, in the context of the Project it is the only way by which the Nation could increase the possibility that it would become aware of an oil spill or blowout in time to respond before it reaches the waters of Lake Sakakawea and degrades the Tribe's drinking water supply, reserved water rights, and cultural identity.

BLM and Slawson next attempt to discredit the Tribe's citation to *Montana v. United States Environmental Protection Agency*, 137 F.3d 1135 (9th Cir. 1998). For its part, Slawson resorts to mischaracterizing the citation, suggesting the Nation asserts the case stands for the presumption that tribal regulations protecting water quality are "*de facto* valid." ECF 80 at 16. This distortion allows Slawson to avoid addressing what the Nation actually argued, and what federal courts have held. It is not that such regulations are "*de facto* valid" under *Montana*, but that "tribes will normally be able to demonstrate that the impacts of regulated activities are serious and substantial [in satisfaction of *Montana's* second exception] due to the relationship between water quality and human health and welfare. *Montana v. United States Environmental Protection Agency*, 137 F.3d 1135, 1139 (9th Cir. 1998); *See also, Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) ("Regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources…Its regulation is an important sovereign power.").

BLM does not engage in Slawson's sophistry. Instead, it disagreed with the holdings in favor of the EPA in that case, but it presents that disagreement under the pretense of an attempt to distinguish the case from the facts presented here. ECF 81 at 17-18. BLM's first attempt is based on the premise that *Montana v. EPA* involved an agency decision to approve a tribe's regulatory authority, and there was not similar agency decision regarding tribal authority here. BLM next

argues that *Montana v. EPA* is inapplicable because the EPA made case-specific determinations. Taken together, these two arguments infer that in contrast to the EPA, here BLM did not make a case-specific determination as to the Nation's regulatory authority over the Project. The only thing this is an indication of is the arbitrariness of BLM's action due to its abject failure to make a specific determination on the Tribe's jurisdiction.

The third argument, which is also asserted by Slawson, is grounded on the fact that the assertion of tribal jurisdiction at issue in *Montana v. EPA* was authorized by Congress in the Clean Water Act while there is no corresponding congressional authorization here. This argument does not hold water for the simple fact that there is no legal basis to support the position that a tribe can only assert jurisdiction under a *Montana* exception when expressly authorized by Congress. Instead, the *Montana* exceptions are based upon a tribe's inherent authority. *Montana v. United States*, 450 U.S. at 566. ("A tribe may also retain *inherent power* to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

Finally, BLM is again joined by Slawson in alleging the case is inapposite because it dealt with a tribe's environmental program governing discharges of pollutants into water and had a nexus between regulated activity and potential impact on the tribe's health and welfare. This argument seems to be made in a world where no one was aware of the purpose of the Nation's setback; and where no one is aware that oil wells are known to have blowouts which spread oil far from the well pad. The nexus between the Tribe's regulation and the potential impact on the Tribe's health and welfare is obvious and is replete in the record. Perhaps the only thing surprising is that BLM would parrot Slawson's argument on this issue. It was clearly understood by all the

parties that the setback/waiver application process was enacted to protect the MHA Nation's water quality and natural resources, including the Grandfather Missouri and Lake Sakakawea, from discharges of pollutants from oil and gas development. AR009974; 002551; 010970; 010977-80.

The nexus between the regulated activity and the potential impact on the Nation's welfare is further obscured by BLM and Slawson's failure to address why the setback was instituted in 2012. The MHA Nation is intimately familiar with the inherent risks associated with oil and gas development. Located in the heart of the Williston Basin, oil and gas wells on the Reservation account for upwards of twenty percent (20%) of North Dakota's daily oil production. The Nation instituted its set-back law in direct response to blowouts and spills on its reservations. Notably, such a blowout occurred at Slawson owned and operated oil and gas well, which as with the Project was located on the Van Hook Arm of Lake Sakakawea on the Fort Berthold Reservation. Slawson turns logic on its head when it asserts that a "lack of serious consequences" from Slawson's own numerous spills, including a 2012 that spewed oil 1000 feet from the well pad supports its self-serving argument that there is no need for a 1000-foot setback.

Setting aside the hubris it takes for a company to allege that the spilling 800 barrels of oil and 400 barrels of brine on the ancestral homelands of the MHA Nation did not carry "serious consequences," this line of attack misses the point. The blowout at the Slawson facility in 2012 spewed 1,000 gallons "gas, oil and saltwater 50 feet into the air *1,000 feet from the well*." AR6501. Slawson's vacuous attempts to undermine the seriousness of oil and gas development spills of any magnitude does not hide the fact that its own track record clearly supports what the Nation asserts, oil and gas facilities on the Van Hook Arm require a 1,000-foot setback from Lake Sakakawea to protect its water resources. The spill was 1000 feet. That supports a 1000-foot setback from the River, the Tribe's drinking water and the Tribe's lifeblood.

In a last ditch effort to ignore the scientifically based reasoning of *Montana v. EPA*, Slawson argues the case is inapplicable simply because it predates the decision in *Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008)*. Because *Plains Commerce* did not overturn or impact the reasoning from *Montana v. EPA* or impose novel restrictions on the second *Montana* exception, this argument is also unavailing.

Following their respective efforts to distinguish *Montana v. EPA*, both the BLM and Slawson attempt to provide case law which they argue is more analogues to this case. For its part, BLM cites to *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019). There, a tribe asserted regulatory authority of a retired phosphorus plant on fee land within its Reservation. The Ninth Circuit determined the second *Montana* exception was satisfied based on evidence in the record, including the conclusions of the EPA, that the conduct the tribe sought to regulate did indeed have an effect on the tribe. *FMC Corp.*, 942 F.3d at 935. This argument again only works if the Tribe's setback ordinance is viewed in a vacuum, without consideration given to the fact it mirrors the setback requirement considered and established by four separate federal agencies for Lake Sakakawea. Thus as with *FMC Corp*., the record establishes the conclusions of the federal agencies - here the BLM, Army Corps, BIA, and FWS – that the development of oil and gas on the Fort Berthold Reservation does effect Lake Sakakawea, and thus the Nation.

Slawson in turn points to *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1306-07 (9th Cir. 2013). There, the court struck down a tribe's assertion of regulatory jurisdiction over the land use of a non-member seeking to build a single family residence on fee land within the Reservation. Beyond the obvious absurdity of analogizing the development of eight commercial oil wells on the banks of the Missouri River to that of constructing a single family residence, Slawson's comparison falls flat when looking at the factors relied on by the

court. First, the court found the tribe's argument regarding the prevention of environmental harms unpersuasive because the reservation had "long experienced groundwater contamination." *Id*. at 1306. Applied here the waters of Lake Sakakawea and the Missouri River do not have a long experience of contamination from oil development and the Nation's setback seeks to keep it that way.

The court in *Evans* separately discusses the inadequacy of the tribe's general concerns of waste disposal and fire hazard which did not focus on the specific project of building a single family residence. It bears repeating that the Nation enacted its setback ordinance in direct response blowouts and spills on its Reservation. Thus, the setback which the Nation asserts over the Project is unquestionably focused on projects such as Slawson's and is based on firsthand experience of the potential effects a spill or blowout could have on the Nation's well-being. The fact that four federal agencies have determined oil and gas development poses a risk requiring a 1,000-foot setback from Lake Sakakawea is evidence that across the federal government agencies unanimously share the Nation's well-founded concern.

It is undisputed that the waters of Lake Sakakawea and the Missouri River are at the heart of the MHA Nation's religious and cultural identity and are relied on for the MHA Nation's sustenance and economic livelihood. The Nation's ability to protect the health, welfare and economy of its people depends on a safe supply of water from Lake Sakakawea. If the Nation, sharing the same concern and scientifically based land use regulation as four separate federal agencies, is unable to control the permitting of commercial oil wells within 600 feet of the Lake, it would be a "direct attack on the heart of tribal sovereignty." *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 939 (8th Cir. 2010). The Nation

has the authority to draw the regulatory line. It drew the line where multiple federal agencies also drew the line. The Agency decision therefore must be vacated and this matter remanded.

II. The BLM had a duty to consider and apply the Tribe's Law.

In an underhanded attempt to dispose of the Nation's clear jurisdiction under the second *Montana* exception, BLM seemingly argues that the Nation is not itself seeking to assert regulatory authority over Slawson, but seeking to force BLM to assert the Nation's jurisdiction. ECF 81 at 14. Based on this truly bizarre assertion, BLM claims the Court should not even address one of the central issues in this case, whether the Nation had the authority to regulate the Project. However, the record makes clear the BLM was aware of both the MHA Nation's set-back law and its assertion of jurisdiction over the Project, with BLM employees repeatedly expressing concerns regarding the approval of the permits without complying with the tribal law. AR-10959; 10962; 2155. As Slawson asserts, the MHA Nation and Slawson had presented the BLM with contrary opinions regarding the applicability of the Nation's setback ordinance. ECF 80 at 25.

The Nation does not argue that its jurisdiction over the Project was contingent on the BLM asserting it. The Nation does asserts, correctly, that the BLM's failure make a determination as to whether the MHA Nation had jurisdiction over the Project in the Environmental Assessment, Decision Record, and FONSI is *prima facie* evidence of the documents were arbitrary and capricious. In issuing its decision, the BLM ignored and violated its duties to the MHA Nation, and as a result, failed to consider potential the MHA Nation's jurisdiction in violation of the APA. As the Tribe discussed in its opening brief, the BLM's duties arise from it trust responsibilities, from tribal authority to protect water on the Reservation, and from the process established under the Indian Reorganization Act, and the Secretary's decision to approve the Tribe's constitution under that Act. The BLM's refusal to decide is separate and distinct from the issue of whether the

Nation actually has jurisdiction over the project, and it provides an additional ground to invalidate BLM's decision.

The BLM's primary response is that it has no trust duty to the MHA Nation beyond what is prescribed by Congress in statutes.[1] The United States argument is plainly wrong, and there are only two possibilities regarding that argument. One possibility is that the United States knows that its argument is wrong, but it is willing to make the argument anyway in the hope the Court will affirm the underlying decision. The other, and worse, possibility, is that the United States does not know that its denial of trust responsibility is wrong and is an affront to decades of federal law and policy and an affront to tribes.

BLM cites *United States v. Jicarilla Apache Nation,* for the proposition that the United States' trust duties to Indian tribes are exclusively defined by federal statute. ECF 81 at 11. This simplistic analysis fails to account for two things.

First, this argument is undercut by the Court in *Jicarilla* itself, which made clear that it was not holding that the federal trust relationship does not and cannot arise out of common law, rather, that once a statute imposes trust duties "the common law *could* play a role." *Jicarilla*, at 177, (citing *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003)). In fact, the Supreme Court has never held that an Indian tribe bringing a claim under the APA can secure non-monetary relief only by pointing to a federal statute or regulation imposing a fiduciary duty on the government. *See Jicarilla* 131 S. Ct. 2313, 2339 (2011) (Sotomayor, J., dissenting) ("We have never held that

[1] The BLM makes additional arguments regarding the Tribe's constitution and laws and federal supremacy which would only be material if BLM had decided that the Tribe's setback law did not apply. That is, BLM argues as if it had decided that the Tribe's setback law did not apply, and argues that its decision that the Tribe's set back laws did not apply should be affirmed. As noted, BLM did not decide, and therefore those arguments are of no merit. Many of those argument would also have been wrong even if the BLM had decided.

all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation.").

Second, both *Jicarilla* and *Navajo Nation* analyze actions brought under the Tucker Act, which confers jurisdiction to the Court of Federal Claims to hear monetary claims brought by Indian tribes against the Federal government. 28 U.S.C. § 1505. Because of its limited jurisdictional provisions, facets of the Supreme Court's Tucker Act jurisprudence are unique to the Act and accordingly not binding on trust claims brought outside of it, namely those claims seeking non-monetary relief under the APA or otherwise. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.05[3][c]. In juxtaposition to the restricted jurisdiction of the Tucker Act, in suits for non-monetary relief brought under the APA or federal question jurisdiction, claims need not be premised on a statute or some other source of express law which establishes a fiduciary trust relationship. As a result, claims seeking equitable or injunctive relief and claims seeking monetary damages face two distinct jurisdictional analyses. A number of federal courts have properly applied the jurisdictional requirements to tribal claims seeking equitable relief for breach of trust.

For example, the Klamath Tribe was successful in halting timber sales planned by the U.S. Forest Service on forest lands that supported treaty deer herds. *Klamath Tribes*, 1996 WL 924509 at **7-10 (D. Or. 1996). In that case, the court ruled that the government had a "substantive duty to protect 'to the fullest extent possible' the Tribes' treaty rights, and the resources on which those rights depend." *Id.* at *8 (quoting *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973)). The court *Northern Cheyenne Tribe v. Hodel* likewise rejected the BLM's proposal to lease federal lands for coal development just outside the Northern Cheyenne reservation based on a trust responsibility arising out of common law. 12 Indian L. Rptr. 3065,

3071 (D. Mont. 1985), *rev'd on other grounds*, 851 F.2d 1152 (9th Cir. 1988). The court stated: "[A] federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation." *Id.* at 3071. *See also id.* at 3074 ("the special relationship historically existing between the United States and the Northern Cheyenne Tribe obligated the Secretary to consider carefully potential impacts to the Tribe…"). Moreover, the court rejected the federal government's contention that the national interest in developing coal overshadowed the trust duty towards the tribe:

> The Secretary's conflicting responsibilities . . . do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.

Id.

There are also cases where federal agencies themselves have set a greater standard to protect Indian interests in fulfillment of their trust responsibility, which the courts have upheld under authority of the trust doctrine. In *Northwest Sea Farms v. U.S. Army Corps of Engineers*, the court upheld the Corps' refusal of a permit for a fish farm because such an activity could interfere with the treaty fisheries of the Lummi Nation and Nooksack Tribes. 931 F. Supp. 1515, 1521-22 (W.D. Wash. 1996). The court held the agency could deny a permit that conflicted with the public interest, which the Corps had construed to include the protection of treaty rights. *Id.* at 1518.

Similarly, in *Parravano v. Babbitt* the Ninth Circuit upheld an emergency regulation issued by the Department of Commerce to curtail non-Indian fishing in order to protect the salmon runs for the Hoopa Valley and Yurok Tribes. 70 F.3d at 539, 547-48 (9th Cir. 1995). The court found that the government's common law trust duty to protect tribal fisheries amounted to "any other applicable law" which the Secretary of Commerce must take into consideration when establishing

fishery standards. *Id.* These cases form a clear line of cases under the trust doctrine, and accept common law assertions of trust responsibility within the context of claims seeking non-monetary relief under status other than the Tucker Act.

Both BLM and Slawson ignore the different contexts in which the federal trust relationship is asserted, with BLM applying the Tucker Act restrictions to the Nation's claims which are brought under the APA by alleging the Nation must identify a statute to show the BLM was required to consider and enforce the MHA's jurisdiction in taking action to approve the Project. The approach is erroneous, and the misapplication of the trust doctrine blurs the distinct jurisdictional requirements between the two types of trust enforcement, those bringing claims damages brought under the Indian Tucker Act and those seeking equitable relief brought under the APA. No matter how hard it tires, the BLM cannot parse away what the Acting State Director noted, "[t]he BLM has a trust obligation to protect trust resources within the Reservation boundaries. This obligation includes considering the environmental impacts on the trust resource and ways to mitigate those impacts." AR2449.

III. BLM failed to make a determination.

As the Tribe discussed in its opening brief, the record in this case show that BLM knew it had a duty to consider the Nation's jurisdiction to assert its setback, but that instead of engaging in a considered factual analysis to assess the MHA Nation's authority BLM abdicated its duties as a trustee by including a bureaucratically convenient "condition of approval" passing on its responsibility to consider, apply, and comply with tribal law. Slawson attempts to defeat the Tribe's argument by denying the facts that are in the record, in black and white.

Slawson does not attempt to confront the numerous citations to the administrative record that show despite an express acknowledgment that it was the agency charged with considering and

enforcing the Nation's set-back law, the BLM skirted its responsibilities by failing to make a decision as to the Tribe's regulatory authority over the project in the EA, FONSI, or DR. This is because they unassailably establish BLM opted to adopt a meaningless condition of approval to avoid analyzing the MHA Nation's jurisdiction over the project. By failing to make a definitive determination as to the extent of the MHA Nation's jurisdiction, the BLM neglected to consider an important aspect of the impacts of its action, and was therefore neither logical nor rational.

Slawson also asserts that BLM's failure was not an important aspect of the decision, but that argument fails for two reasons. First, the issue of tribal authority was part and parcel of the Nation's broader *Montana* argument asserted at every point in this dispute. Second, Slawson ignores the fact that the Nation simply could not have made this specific line of argument until it was able to review the administrative record, which included internal communications revealing the extent and arbitrariness of BLM's consideration of the MHA Nation's regulatory jurisdiction over the Project. *E.g.* AR-006501 AR-10979 (discussing a "solution" to avoid analyzing the MHA Nation's jurisdiction over the project by including a Condition of Approval that simply required Slawson obtain any variances required by tribal law.).

IV. Instruction Memorandum 2009-078.

In its opening brief, the Tribe showed that the decision must be vacated and remanded because BLM erroneously applied the wrong analysis rubric under Instructional memorandum 2009-078. BLM simply applied the analysis applicable to the wrong "situation" under that memorandum. The record shows that the matter should have been analyzed under Situation 3; and the record shows that BLM erroneously analyzed under Situation 2

BLM and Slawson's arguments as to whether Situation 2 or Situation 3 applies does nothing to refute the clear evidence in the record which establishes that Slawson's own employees

definitely stated the project could not be moved further back from Lake Sakakawea due to, or *but for*, federal mineral. AR-002513 (Slawson's Environmental Manager discussing the proposed "location move to the north would be at our threshold due to a number of factors" including the loss of recovery and impact the move would have on the "Bandit *Federal* lateral."); AR-006402 (Discussing a rejected proposed action because it "would not meet the purpose and need of the project in that it would not permit the proponent to fully develop the minerals located on their [federal] lease due to the technical challenges of a longer directional drilling length.").

Conversely, there is no evidence in the record to support Slawson's baseless assentation that "even if Slawson were not accessing federal minerals, it still would have sited the pad in the same location to avoid stranding private minerals." ECF 80 at 28. If that were the case, there would be evidence of Slawson employees raising similar concerns as were discussed regarding the loss of recovery for the federal lease. BLM's argument that it properly determined the surface location was intended to access the entire spacing unit is similarly unpersuasive due to a lack of evidence cited to support that conclusion. ECF 81 at 19 (citing AR-6989).

As a last attempt to save its erroneous decision to apply Situation 2, BLM argues that the NEPA analysis in the EA was nonetheless enough to satisfy the requirements of Situation 3. ECF 81at 20. Slawson goes further by alleging that the distinctions in IM-2009-078 are meaningless and that BLM investigates Situation 2 and Situation 3 projects the same. ECF 80 at 29.

Slawson starts its defense of the EA's analysis by listing a number of potential impacts which were listed in the EA. While Slawson lists impacts which were analyzed by the EA, the Nation is more interested in the impacts the EA failed to consider. First, nothing in the EA and FONSI show that these approval documents took a "hard look" the MHA Nation's cultural

connection to the waters of the Missouri River or the MHA Nation's reserved waters rights. In fact, the EA is tragically void of any conversation discussing these issues.

No one could seriously dispute that the BLM would be violating its trust responsibility if it permitted commercial oil wells near Lake Sakakawea without considering such action's impact on the Nation's reserved water rights and the treaty protected uses to which that right is put to use. *See, United States v. Dion*, 476 U.S. 734, 738 (1986). This is because in order to ensure that its actions will not impair a tribe's rights, an agency must consider the scope and extent of the said rights, and any potential impacts its action may have on that right. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2017 WL 2573994, at *18 (D.D.C. June 14, 2017); *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 255-56 (D.D.C. 1973).

Under the trust responsibility and IM, the BLM was required to consider the impacts an oil spill would have on the Tribe, its Reservation, and its reserved water rights before deciding whether to approve the Project. Because the record is absent of any meaningful analysis of how an oil spill would affect the water rights of the Nation, its approval was unlawful. The failure to consider the effects of its actions on the Nation's reserved water rights constitutes action that is arbitrary, capricious, and contrary to law under the APA. It is not enough for the BLM to consider general impacts to "water" when these specific waters of Lake Sakakawea provide the economic, cultural, and environmental lifeblood for the Nation. ECF 81 at 20.

The EA's discussion of cumulative impacts is similarly inadequate. Specifically, the FONSI's determination that no environmental effects of the Project meet "the definition of significance in context or intensity is erroneous given its complete lack of consideration to the presidential value of the Project's EA. 40 C.F.R. § 1508.27(b); *California Coastal Com'n v. Norton*, 150 F.Supp.2d 1046 (N.D. Cal. 2001) (When determining whether an action of a federal

agency will significantly affect the environment, the factors that should be considered include whether the action establishes a precedent for further action with significant effects.) The purpose of requiring the consideration of an actions precedential value "is to avoid the thoughtless setting in motion of a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1162–63 (9th Cir.1998) (quoting *Sierra Club v. Marsh*, 769 F.2d 868, 879 (1st Cir.1985)).

In *Presidio*, the court determined that there were no precedential concerns where the proposed project was unique, and no similar or related projects were being contemplated. *Id*. Unlike *Presidio*, the proposed project is not unique: the BLM acknowledged that numerous times in the record. AR-010962 ("This is the first well pad of four new well pad locations that Slawson is proposing within ½ mile of the lake. Obviously how I handle this first case will set the precedent for future well locations."). AR-002143. (Showing that only two months after approving the Project's ADPs, the Slawson began "leaning" on BLM to process additional permits which would purportedly be subject reviews that are "minimal and tiered off the Torpedo EA.").

Because BLM's EA failed to consider the precedential effect the Project's EA would have on future projects near Lake Sakakawea despite being fully aware of it, the document does not provide sufficient information from which the agency could have made an informed decision. *Compare*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1211-1212 (9th Cir. 2004) ("By providing information about the likely community and commercial impacts…as well as placing these impacts in the context of regional land-use plans, the Park Service has taken the requisite 'hard look.') with *Anglers of Au Sable v. U.S. Forest Service*, 565 F. Supp. 2d 812, 832 (E.D. Mich. 2008) (Although each of the future wells would require individual EAs prior to approval, the Forest

Service has not assessed the extent to which approving the current proposal could affect those future decisions.")

Sensing that they cannot prevail on the merits, Defendants make multiple undeveloped, and at times contradictory, procedural arguments. Defendants now argue that that the Nation has waived its argument.[2] Without development, BLM claims that the Nation did not raise a NEPA claim in its Complaint or challenge the NEPA analysis before the agency. ECF 81 at 21. Slawson in turn asserts the Nation did not challenge the BLM's NEPA analysis before the State Director, and thus cannot assert it now. ECF 80 at 27. Those arguments are without merit.

Contrary to its own argument, Slawson admits that as part of the Tribe's argument IM and BLM's NEPA analysis the Nation argued in part that BLM failed to consider the Tribe's water intakes in the EA. ECF 80 at 31. This same argument was presented to the State Director. AR2445 ("BLM's EA and FONSI do not recognize or address effects of the Project on [Bureau of Reclamation's rural water projects that are dependent upon Lake Sakakawea and the Missouri River…Potential impacts to…the United States' responsibility to provide domestic water supplies should have been assessed."). As such, because the project's NEPA analysis was before the State Director the Nation has not waived this argument. The Nation challenged the Project's NEPA Analysis under the IM before Board, no objections were raised, and thus the Board found the Nation's was properly before it. AR8319. Plaintiff and BLM fail to cite any authority that would allow this Court to overrule the determination of the Board that the Nation's argument related to the Project's NEPA analysis and through the application of the IM, was properly presented and preserved by the MHA Nation.

[2] As BLM and Slawson admit, the Nation's argument regarding NEPA analysis is inextricably intertwined with its argument regarding IM 2009-078. ECF 80 at 29 ("Whatever the reason, here BLM's NEPA analysis was adequate even under the "Situation 3" standard."); ECF 81 at 19 ("The memorandum discusses three situations for the purpose of determining how to comply with federal laws such as NEPA.)".

V. BLM was Required to Apply Its North Dakota Resource Management Plan Set-back Requirements.

BLM begins its discussion of its North Dakota Resource Management Plan (RMP) by arguing that it properly determined policy "does not apply." ECF 81 at 22. However, this claim it at odds with the Project's EA, which specifically includes a provision discussing conformance with the "applicable" RMP:

> **1.3 CONFORMANCE WITH APPLICABLE RESOURCE MANAGEMENT PLAN**
>
> The BLM North Dakota Resource Management Plan addresses future management options for approximately 67,520 acres of public land and 4.8 million acres of federal mineral real estate administered by the BLM through its North Dakota Field Office in Dickinson, North Dakota (BLM 1987). The proposed project located is on private surface land within the boundary of the Fort Berthold Indian Reservation. The well bores would penetrate federal oil and gas leases that were issued by the BLM. The proposed project conforms to the management of resources described within the Oil and Gas Lease Stipulations for Montana and the Dakotas (BLM 1987: Appendix C).

AR006378. This shows that no matter what it claims now, at the time it was evaluating the Project BLM understood the RMP to provide "a single comprehensive land use plan *for all BLM resource management responsibilities in the state*." AR-007473 (emphasis added). Because the Project implicated BLM"s resource management responsibilities within the State of North Dakota by penetrating federal leases, BLM, in the EA at least, rightfully determined the RMP applied.

However, despite the correct determination as to the RMP's application, the EA's conclusory statement that the Project "conforms to the management of resources" described therein is not supported by the evidence in the record. AR006378 Appendix D-2 of the RMP provides the management stipulations referenced in the EA, including the stipulation that when oil and gas leases are proposed within 1,000 feet of water sources such as Lake Sakakawea, these leases "be strictly controlled, or if absolutely necessary, excluded." *Id.* (emphasis in original). By

failing to provide any reasoning or examples as to the strict controls that would in the EA did not provide enough information to support its decision. Because the EA found the RMP applicable, it cannot fail to give all its provisions due consideration.

BLM and Slawson both avoid addressing the EA's proper application but improper analysis of the RMP, instead arguing the EA was arbitrary and the RMP does not apply to the Project because the well pad "is located on fee land not administered by the BLM." ECF 81 at 22; ECF 80 at 32-33. Rather, because the federal minerals are located underneath Lake Sakakawea, for which the Army Corps of Engineers is the "management agency", BLM could not apply its own RMP. *Id*. As the permitting agency responsible for taking a "hard look" at the environmental impacts of the Project, BLM cannot be allowed to simply shift responsibility to the Corps.

First, this assertion is based on nothing other than BLM and Slawson's bald assertions. Nothing in the record shows that the Corps considered itself the managing agency. Second, the EA is similarly silent as to the alleged managing agency's management plan or lease stipulations included by the Army Corps in Slawson's lease. AR7551-7566. Additionally, it is hard to see how BLM and Slawson can argue the Army Corps should be considered a managing agency, when in the next breath both allege its policies were not necessary to consider when taking its hard look. ECF 80 at 34, ECF 81 at 23.

BLM and Slawson seek to obfuscate the issues with this argument. If the Army Corps was the managing agency, the EA, FONSI, and DR are arbitrary and capricious because they fail to consider the managing agencies' policies and stipulations on the Project. If the Army Corps was not the managing agency, then the EA, FONSI and DR are arbitrary and capricious because they fail to properly consider any apply the BLM's RMP. Slawson and BLM cannot be allowed to cover for the EA's inadequate consideration of federal policies through a game of back and forth.

The arguments related to the BIA and FWS's 1,000-foot setback is similarly misplaced because nothing in the record shows BLM's decision fails to mention, let alone address the Programmatic BA/BE or its reasoning for the setback, thus fails to consider the potential impacts of violating the 1,000-foot setback. BLM's failure to consider these impacts, and instead rely on FWS ESA concurrence, renders BLM's analysis inadequate and incomplete, and therefore its decision to approve Slawson's APDs was arbitrary, capricious, and not in accordance with law.

VI. The Director abused their discretion / Certification of AR

In briefing regarding the administrative record, the Tribe discussed the Director's failure to maintain basic records, and the resultant inability of the Director's officer to state, under oath as required by law, the records that were before the director. Based upon that briefing, this Court ordered the director to re-certify the administrative record.

In response to that order, the Director submitted additional declaration. As the Tribe discussed in its opening brief, those additional declarations did not meet the requirement set by the law and by the Court. The reason they did not meet the requirement remains the same as the Tribe discussed in its prior brief regarding the administrative record—the Director's office does not have personal knowledge necessary to state which records were actually before the Director.

Defendants cannot argue otherwise, because it is in fact clear that no one can state, under oath, the records that were before the Director.

Because they cannot argue otherwise, Defendants' primary responsive argument is that the Court should reject the Tribe's argument because the Tribe's opening brief did not repeat the legal analysis from the Tribe's brief on the record, in which the Tribe discussed the requirement for a certification, under oath, of the documents that were before the Director. The Tribe's

opening brief incorporated that argument and this Court's order, and Defendant's procedural argument must be rejected.

BLM also asserts that the Director's office's certified guess regarding the records that had been in her office is good enough. They are wrong, again as the Tribe previously briefed. The law does not provide for a certified guess. It requires a certification under oath of the record that was actually before the Director. We do not know what was before the Director, and never will. That, by itself, requires vacation and remand.

VII. The Director abused her discretion. Abuse of Discretion.

In its opening brief, the Tribe showed that the Director abused her discretion by taking jurisdiction and prematurely deciding this matter. In response BLM and Slawson argue, contrary to the procedural history of this matter, that the OHA Director "[took] into account each of the MHA Nation's arguments" and affirmed BLM's decision and reasoning and ask the Court to take this bald assertion at face value. ECF 80 at 36. What Slawson and BLM fails to explain is how the Director could take into account the Nation's arguments which had not been briefed to the Director. Further, this assertion is not supported by the record, which shows in contrast to the considerable discussion on these non-merit issues, in affirming the BLM Field Office's DR/FONSI the Director's Decision failed to substantively address or analyze any of the merits of the MHA Nation's appeal.

BLM in part makes the Nation's argument for it, identifying that the Director did in fact use the Court's interlocutory order as "instructive guidance," in particular its determination regarding the MHA Nation's jurisdiction. ECF 81 at 28. Rather than support the Director's decision, this proves its arbitrariness because the District Court's analysis was focused on the standard for instituting injunctive relief, not merits of the case which had not been fully briefed.

CONCLUSION & PRAYER FOR RELIEF

For the forgoing reasons, the MHA Nation respectfully requests that this Court grant its summary judgement motion, order the BLM to prepare a full EIS that considers the MHA Nation's jurisdiction and water rights, and vacate the underling permits for Slawson's project.

Respectfully submitted this 12th day of May, 2020.

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__/s_____

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CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of May, 2020, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Jeffrey S. Rasmussen