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

Mandan, Hidatsa, and Arikara Nation Plaintiff, vs. United States Department of the Interior; Ryan Zinke, in his official capacity as Secretary of the Interior, Defendants, and Slawson Exploration Company, Inc, Intervenor-Defendant.	)	**REPORT AND RECOMMENDATION RE MOTIONS FOR SUMMARY JUDGMENT** Case No. 1:19-cv-0037

I. INTRODUCTION

In this action, plaintiff Mandan, Hidatsa, and Arikara Nation ("MHA Nation" or "Tribe") seeks review pursuant to the Administrative Practices Act ("APA"), 5 U.S.C. §§ 701–06, of a decision by defendant United States Department of the Interior ("DOI") acting through its Bureau of Land Management ("BLM"). The challenged decision is BLM's approval of eight applications to drill for oil and gas filed by intervenor-defendant Slawson Exploration Company, Inc. ("Slawson").

The agency record has been filed at Doc. Nos. 67 & 68. The references to it will be to the page numbers of the record. The exception is the few instances in which the page numbers were cut off in scanning. In those instances, the references will be to the page numbers of the docket entry.

Accompanying this Report and Recommendation is an Appendix containing several exhibits

that provide a visual understanding of what is at issue.

II. SUMMARY OF AGENCY RECORD AND DECISION

A. Slawson's "Torpedo Project"

In 2011, Slawson began the process of obtaining BLM approval for a drilling plan entitled the "Torpedo Project" or "Project." The Project involved construction of a well pad in close proximity to Lake Sakakawea—a large reservoir on the Missouri River, part of which lies within the Fort Berthold Indian Reservation. From this single onshore well pad, Slawson sought to drill, and has now drilled, multiple horizontal wells to develop oil and gas reserves located beneath Lake Sakakawea that cannot be reached by drilling vertical wells. (AR 2241, 6375).

The oil and gas reserves targeted by the Torpedo Project are a mixture of federal, State of North Dakota, and privately-owned minerals. None are tribally owned or a held by the federal government in trust for individual Indian allottees. (AR 2237, 6375, 8110–113). Appendix Ex. 1 is a map depicting the relative location of the variously-owned minerals along with the locations of the eleven horizontal wells that Slawson has drilled or may yet drill. (AR 8111). The map also depicts the spacing unit approved by the North Dakota Industrial Commission on May 25, 2012, for the Torpedo Project. (AR 2237).

Slawson needed BLM's approval because the federally-owned oil-and-gas reserves that are part of the Project are managed by BLM. Slawson had earlier obtained leases from BLM for these reserves but could not proceed to develop or access them without first obtaining BLM's approval of an application to drill ("APD") for each well. (AR 2411, 6375).

The well pad for the Project sits on a parcel of land located on the southern end of a peninsula that extends into a large bay of Lake Sakakawea known as the "Van Hook Arm." It is within the exterior boundaries of the Fort Berthold Reservation and is some five straight-line miles southeast

of New Town, North Dakota. Appendix Ex. 2 shows the location of the well pad relative to these points of interest, including the exterior boundary of Fort Berthold. It also shows other well locations in the area as of the date the exhibit was created.

The location ultimately decided upon for the well pad is approximately 600 feet (slightly over .1 miles) from the Lake at its nearest point measured to its surrounding fence line with the distance to the actual well heads and pumping equipment being slightly greater.[1] (AR 2241, 6421, 6499). This location is some 200-300 feet further from the Lake and on higher ground relative to the shoreline than the location initially proposed by Slawson. As discussed in more detail later, Slawson agreed during BLM's review of the APDs to move the well pad further to the north to lessen the noise and visual impacts on critical wildlife habitat along the shoreline as well as upon recreational users of nearby recreational facilities, particularly the highly-trafficked boat ramp situated immediately to the south. (AR 2241, 6375, 6384, 6403).

Appendix Ex. 3 shows the present location of the well pad relative to the shoreline, the boat ramp, and the Van Hook recreational area. Appendix Ex. 4 shows how the selected location for the well pad compares to that originally proposed by Slawson. Also, as indicated by these exhibits, the existing land use for the well pad location was agricultural. Located in the record at AR 6296–301 are photographs showing the location of well pad site prior to development. Located at AR 5232–41 are photographs of the well pad while it was being constructed.

In addition to the well pad from which the horizontal wells have been drilled, the Project also

[1] It is not entirely clear whether the starting point being used is the waterline of the Lake when the facilities were constructed, the ordinary high water mark, or the highest historical pool elevation for the Lake. Also, there is no exact distance from the fence line to the existing production facilities. At several points in the record, there is the suggestion that the distance from the Lake to the production facilities is approximately 800 feet. (AR 2411, 6499, 8976). But, it is not clear whether that figure includes the closest containment structures for any spillages or upsets that may occur or what the starting point is for the location of the Lake. Hence, for purposes of review here, the 600-foot distance will be used since it is the most conservative for purposes of the issues raised in this case.

includes a central tank battery, loading, and other operational facilities, which are situated on a separate "facilities pad." The facilities pad is located on a previously-existing well pad that is approximately .9 miles to the northeast of the well pad and more than .5 miles from Lake Sakakawea. Connecting the well pad and the facilities pad are several flow lines and a road for surface access to the well pad. Appendix Exs. 3 and 4 show the location of the facilities pad.

The primary reason for the separate facilities pad (as opposed to locating the tanks and other production-handling facilities at the well head as is more the norm) was to further lessen the noise and visual impacts (particularly that resulting from the truck traffic accessing the tank batteries) on critical wildlife habitat along the shoreline as well as upon recreational users of the Lake. (AR 3388, 6404). The additional setback from the Lake does, however, provide an additional buffer in the event a spillage or other failure at the production facilities, although that does not appear to be the primary reason for separate facilities pad as discussed later.

Slawson submitted eleven APDs to BLM for the Torpedo Project with the first being submitted in 2011 and the final two in June 2015. (AR 6375). Originally, Slawson hoped to drill thirteen wells but moving the well pad north to its present location reduced the number of wells it could drill down to eleven. Further, out of the eleven APDs submitted by Slawson, BLM has so far approved eight. The reason BLM did not approve the other three had to do with lease issues and not engineering or environmental concerns. (AR 6384, 6513, 8110–111).

The claims of error by the MHA Nation in this action all relate to the location of the well pad. The MHA Nation contends it is too close to Lake Sakakawea—presenting what it contends is an unacceptable risk to this critical water resource. The MHA Nation argues the well pad should have been setback further as required by its Tribal Ordinance or, in the alternative, at least 1000 feet, which it contends is a setback employed by BLM and other federal agencies to protect water

resources. The Tribe does not complain about the location of the facilities pad, nor does it contend BLM should not be allowed to recover oil and gas reserves underlying Lake Sakakawea by horizontal drilling—either generally or by the Torpedo Project.

B. BLM's review of the APDs for the Torpedo Project

Following Slawson's submission in 2011 of the first group of the eleven APDs it eventually submitted by 2015, BLM undertook an investigation and review that extended over some six years. What follows is a summary of that review.

1. Consultation with FWS and preparation of a detailed BA

Early on, BLM began consulting with the United States Fish and Wildlife Service ("FWS") to satisfy its obligations under the Endangered Species Act ("ESA") to consult with FWS and not take any action that would threaten endangered or protected species or critical habitat. During the initial consultations, FWS expressed concerns about Slawson's originally proposed well location in terms of its proximity to critical wildlife habitat along Lake Sakakawea's shoreline. The concerns expressed by FWS along with nearby recreational users resulted in Slawson making adjustments to the Project described in more detail later.

Also, to satisfy FWS and BLM's own obligations under the ESA, BLM commissioned the preparation of a detailed biological assessment ("BA") to assess whether the final design for the Project would be in compliance with the ESA. (AR 2244–2261, 2389, 2485, 2494–2520). Drafts of the BA are set forth in the record at AR 2263–384 and the final version dated April 16, 2016, at 2639–3064. The text of the BA is some 40 pages and attached are a number of appendices. Included within the appendices are Slawson's plans to prevent releases of contaminants as well as to control and mitigate any releases that might occur. (Id.).

Based on the EA and the design changes and mitigation measures agreed to by Slawson, the

FWS concluded in a letter dated June 3, 2016, that the "effects of the well pads are either insignificant or discountable" and concurred with BLM's "no effects" determinations with respect to the species and critical habitat that were identified as potentially being impacted. (AR 6934–35).

Notably, BLM's "no effects" determination and FWS's concurrence considered not only potential noise and visual impacts but also the possibility of accidently-released contaminants reaching the waters of Lake Sakakawea and its shoreline. (AR 2391–92, 3065–66). Relevant to the dispute in this case, the BA relied in part for its "no effects" determination upon a 2014 spill analysis made by the Bureau of Indian Affairs. The study was for a Programmatic Biological Assessment to assess the risks of release of pollutants to Lake Sakakawea from a well pad. The study examined 312 well pad incidents of released pollutants from wells on Fort Berthold between January 2009 and January 2014. A summary of the results of the study is set forth in the BA at AR 2668. The study itself is at AR 5088–92 and AR 10203–211. The results support the conclusion that a risk of an accidental release of pollutants leaving the well pad is small and the risk of pollutants (whether free flowing or as an aerial mist) traveling more than 500 feet in sufficient amounts to cause substantial environmental damage even smaller.[2] In fact, there is no mention of an actual incident where substantial environmental damage resulted, much less one to land beyond the immediate area of the well pad. And, while the study does suggest a 1,000 foot setback from Lake Sakakawea as an additional mitigation measure to protect sensitive areas that are critical habitat for endangered and protected species, the Programmatic Assessment's adoption of the prophylactic 1,000 foot setback does allow for variances on a case-by-case basis as discussed later.

[2] It appears that some of the releases considered in the study were from storage and handling facilities, which, in this case, are located on a separate facilities pad that is further setback from Lake Sakakawea. Hence, the percentage risks of a release from the well pad in this case may even be smaller.

The BA's "no effects" determination also took into account the project-specific measures developed by Slawson for protection against release of pollutants and containment if a release should occur, including specific design features (*e.g.*, use of a "closed-loop" drilling system and 2-foot clay berm around the well pad), a spill prevention and control plan, an oil spill contingency plan, and a stormwater pollution prevention plan. (AR 2656–59). In one of the documents that was considered and attached to the BA, Slawson reported it had completed 518 wells in the Williston Basin since 2004 and, out of those completions, there were three events of loss of well control with only one resulting in pollutants traveling off location. Slawson stated that the release beyond the well pad on the one occasion was quickly controlled and immediately cleaned up. While the date of the one incident was not given, it most likely was the December 2012 blowout that the MHA Nation points to in this case as discussed later. The document goes on to state that Slawson determined the cause of the one incident and has since made modifications to protect against a similar occurrence that include using a wellhead with double the psi rating, making an adjustment to better control well flowback, and employing additional master valves to provide more protection. (AR 3063).

2. Preparation of a detailed EA to satisfy BLM's NEPA obligations

In addition to the BA, BLM commissioned the preparation of an overall environmental assessment ("EA") to satisfy its obligations under the National Environmental Policy Act ("NEPA"). The process of preparing the EA began with the issuance of a notice of intent to prepare an EA and a thirty-day "scoping period." Upon a request made by a third party, the scoping period was extended an additional thirty days. During the scoping period, which extended from November 9, 2015 to January 9, 2016, the BLM solicited comments from the general public. It also reached out for comments and input to some 70 individuals and entities. These included: environmental and recreational organizations; the press; and various federal, state, and local agencies. (AR 6182,

6378–83). Following the scoping process, BLM prepared a preliminary EA for which it again sought input and comment, including making it available to the individuals, organizations and governmental entities that it had reached out to earlier. (AR 6183, 6383–84).

Along the way, BLM specifically reached out to the MHA Nation, including having several meetings with MHA Nation officials and sending out two letters to the Tribal Historic Preservation Officer for which no response was received. (AR 6383).

A number of interested persons and groups expressed concerns about the proximity of Slawson's proposed well pad location to Lake Sakakawea. These concerns included the risk of contaminant reaching Lake Sakakawea and fouling its waters and shoreline. There were also concerns about the noise and visual impacts, particularly to the nearby Van Hook recreational area and its marina that would be within several hundred feet of the well pad originally proposed by Slawson. (AR 6378–840).

As consequence of this feedback and the concerns expressed by FWS as outlined above, Slawson indicated it would be amenable to several adjustments to its original proposal that included:

- Moving the well pad approximately 200-300 feet to the north—further from Lake Sakakwea and on higher ground so it would be out of direct line-of-sight from the shore, incuding the marina. The primary reason for the move was to reduce the noise and visual impacts on critical habitat and recreational users of the marina. However, it also reduced the risk of a well drilling or operating failure resulting in contaminant reaching Lake Sakakawea.
- Moving the tank battery, truck-loading equipment, and other operating equipment to the separate facilities pad, which, as noted earlier, is just under a mile to the northeast of the well pad and over .5 miles from the Lake at its nearest point. This change was

made to reduce noise and visual impacts upon Lake Sakakawea and the nearby Van Hook recreational area, particularly that resulting from truck activity during the operational phase. However, moving these facilities also reduced the risk that a failure of any of these operational facilities would impact Lake Sakakawea.

- Adjustments to the drilling method and orientation of the wells on the well pad to reduce noise and lessen impacts on critical habitat.

(AR 6182–84). In addition, Slawson agreed to a number of design features directed toward protecting against spills as well as containing spills should they occur. It also committed to the implementation of operating plans for spill prevention and control as well as employment of best management practices. These were evaluated by BLM and later included as conditions to BLM's approval of the APDs as detailed later.

The product of BLM's environmental review process was its completion of an EA dated March 2017. The body of the EA is more than hundred pages in length and is set forth in the record at 6369–498 with an earlier May 2016 draft at AR 5254, et. seq. In addition to the body of the EA, there is attached another couple hundred pages of supporting documents. Copies of attached and other referenced documents include:

- Slawson Spill Prevention Plan for the Torpedo Project, which includes Slawson's Spill Prevention, Control, and Countermeasure ("SPCC") Plan (AR 5404–79).
- Slawson's Oil Spill Contingency Plan (AR 5480–5520).
- Slawson's Storm Water Pollution Plan (AR 5522–48).
- List of Consolidated Best Management Practices, Applicant-Committed Measures, and Mitigation Measures (AR 6362–68).

The EA considered five alternatives. Two were eliminated after brief consideration. One of

the eliminated alternatives was moving the well pad location approximately .5 miles further to the north of the present location. The discussion about this potential alternative noted some of the potential benefits. The EA then stated this option was excluded from further consideration 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 lease due to the technical challenges of a longer directional drilling length." (AR 6402). That is, due to the limits on the reach of the horizontal wells, moving the well pad back .5 mile from the Lake would result in some of the minerals at the outer reaches of the targeted area being stranded.

The second alternative that was considered but eliminated without further analysis involved the shifting of the flowlines east of a nearby cemetery. The brief discussion with respect to this option noted there was not enough room to construct all of the required flow lines along the alternative route and that Slawson had reached agreements with those directly impacted by its proposed route, which included it agreeing to certain mitigative measures. (AR 6402–03).

The remaining three alternatives considered by the EA were addressed in detail. The first was what BLM labeled "Alternative 1." This alternative considered Slawson's originally proposed well pad but with the adjustment for a separate facilities pad. "Alternative 2," which was also referred to as the "Preferred Alternative," considered moving the well pad approximately 200-300 feet to the north to the location where it ultimately was constructed and reducing the number of potential horizontal wells from thirteen to eleven as a consequence. Otherwise, it was the same as Alternative 1, including the separate facilities pad. The third alternative was a "No Action Alternative." (AR 6384–85, 6402–03).

In assessing the three remaining alternatives, the EA considered impacts of the Torpedo Project on the environment, including on water (both surface and underground), air quality, wildlife,

cultural resources, agriculture, vegetation, ecosystems, mineral development, recreation, transportation networks, housing, population, and income. (AR 6384–488). The EA also examined the cumulative impacts of the Project with other oil and gas development in the area along with what was anticipated to occur in the future. (AR 6476–88).

3. The EA's assessment of potential impacts to Lake Sakakawea

The EA addressed potential impacts to both surface and underground water resources. (AR 6417–26). But, since the MHA Nation has not expressed concern over the potential for contamination to underground water sources or the potential for contamination from the horizontal wells migrating thousands of feet upwards to the Lake, the focus here will be on the EA's treatment of the risk of a release of pollutants from the well pad reaching Lake Sakakawea.

The EA in Section 4.2 examined the potential impacts to surface water within .5 miles of both the well pad and the facilities pad. This included Lake Sakakawea and surface water drainages. (AR 6418–20). Relevant to complaints discussed later that the EA did not adequately consider Lake Sakakawea as an important resource, particularly for drinking water, the EA observed that uses of Lake Sakakawea and its watershed include agricultural, fishing and fish consumption, recreation, and "industrial/domestic." (AR 6420). Elsewhere, the EA described Lake Sakakawea as follows:

> Lake Sakakawea was created by the impoundment of the Missouri River and the closing of Garrison Dam in 1956. The lake is considered the premier water resource in the State of North Dakota, covering 307,000 acres in the cental portion of the state.

(AR 6435).

The EA concluded in Section 4.2.1 that Slawson's originally proposed well site ("Alternative 1") was not expected to adversely impact "surface water quality[,]" including Lake Sakakawea, resulting from project-related spills. It reached the same conclusion with respect to aquatic resources, wildlife, and critical wildlife habitat in Section 4.4 with the employment of restricted times for

drilling. (AR 6435–45). These conclusions were based upon : (1) the location of the well pad 400 feet from Lake Sakakawea (*i.e.* Slawson's originally proposed location); (2) the use of a closed-loop drilling system; (3) the design and containment features that would be employed, including a 2-foot tall berm around the well pad location; and (4) the operator's employment of the best management practices and spill prevention control measures. In separate sections, it discussed the mitigative measures, including: Sections 3.2.2 (well pad), 3.2.6 (drilling); 3.2.13.1 (best management practices); and 3.2.14 (spill prevention, control, and countermeasure plan). (AR 6398–6401). Finally, the EA stated that the same conclusion of no expected adverse impact to water quality and aquatic resources, wildlife, and critical wildlife habitat applied to the well pad location that was chosen (*i.e.*, "Alternative 2"), which is setback from the Lake another couple hundred feet. (AR 6421, 6445).

In addition to the discussions outlined above, the EA took into account as a supporting document the BA, which was included in the EA's appendices. Relevant here are the BA's consideration of the BIA's risk assessment of pollutant release impacting Lake Sakakawea. Also, the EA incorporates Slawson's Oil Spill Contingency Plan, which contained Slawson's own assessment of the risks of accidental releases reaching Lake Sakakawea along with its ability to control and mitigate such a release in the unlikely event they occur. (AR 5482–94). Further, the Oil Spill Contingency Plan contains Slawson's commitment of continued participation in the Sakakawea Area Spill Response, LLC ("SASR"). The SASR is an oil-spill-response organization formed by several oil and gas operators working in the area, including Slawson, to provide a first line of response in the unlikely event of a release of contaminant reaching Lake Sakakawea. The SASR has staged spill response equipment in close proximity to the Van Hook Arm Peninsula, so it readily available for deployment. The SASR also has available a cadre of personnel trained in handling releases who can be deployed. (AR 5485–86).

4. Engineering reviews and archaeological and historical assessments

In addition to the BA and EA, BLM's review of the Torpedo Project included engineering reviews of Slawson's proposed construction, drilling, operating, reclamation, and safety plans and procedures. (AR 0269–0274). BLM also secured an archaeological and historic property assessment for the Project, which concluded there would be no adverse impacts. (AR 2418–19, 2421–22).

5. Approval or no objection responses from federal and state agencies

In addition to the FWS, BLM reached out to the United States Army Corps of Engineers ("COE"). As discussed in more detail later, the COE is the relevant surface management agency for purposes of BLM's leasing of oil and gas reserves beneath the Lake bed given its jurisdiction over the waters overlying the targeted minerals. The COE signed off on the Project, concluding that certain of its "stipulations" (*i.e.* conditions), included in Slawson's federal leases on account of it being the surface management agency did not apply to the well pad location because it was located on privately-owned surface. It further concluded that neither a "Section 404" nor a "Section 10" permit was required given that the horizontal wells are drilled beneath the surface of the Lake. (AR 2242, 2456–58, 6379–80).

BLM also had contact with DOI's Bureau of Reclamation, which also has responsibilities with respect to Lake Sakakawea in terms of use of the water. In a letter dated July 1, 2016, the Bureau of Reclamation provided its comments on the Torpedo Project following its review of the draft EA. The letter noted the Bureau of Reclamation is the lead federal agency in the development of the Fort Berthold Rural Water System. It also noted the Bureau of Reclamation owns and funds six water intakes on the Missouri River for two Indian reservations, one of which is Fort Berthold and the other being the Standing Rock Sioux Indian Reservation, which is located downstream on the Missouri River and on a different reservoir system. It then listed the four intakes that supply water

for Fort Berthold's rural water system, *i.e.*, Four Bears, White Shield, Twin Buttes, and Mandaree. The letter further included maps showing the location of the rural water pipelines in the vicinity of the Torpedo Project. Relevant to what follows, the Bureau of Reclamation expressed no concern about a spillage or other upset in the operation of the Torpedo Project compromising the Lake as a source of the drinking water for the Fort Berthold Rural Water System.[3] (AR 2579–81).

BLM also had contact with relevant state agencies. While North Dakota State Game and Fish expressed concern about the location of the well pad and suggested that a setback of .5 miles be considered to protect wildlife (AR 2571), no objection was made, or concern of impact upon Lake Sakakawea expressed, by other state agencies, including the North Dakota Industrial Commission (which permits wells and approves spacing units), the North Dakota Water Commission, or the North Dakota Department of Health ("NDDOH"). (AR 2568, 2463–64, 6378–84). With respect to the NDDOH, the Chief of its Environmental Health Section in a letter dated June 16, 2016, advised the NDDOH had reviewed the Torpedo Project with respect to environmental impacts and concluded the impacts resulting from construction of the well pad would likely be minor and could be controlled with proper construction methods. Other than some comments with respect to construction methods, no other concerns or objections were raised. (AR 2463–64). At the time, the NDDOH was the primary state environmental agency. It has since been split into two agencies—a health agency and a successor environmental agency.

[3] At one point in the MHA Nation's briefing, it suggests that one of the intakes was within 600 feet of the well pad but cited nothing in the record evidencing this. (Doc. No. 75, p. 33). In fact, the maps included in the Bureau of Reclamation's letter do not show an intake in the area of the Torpedo Project–only onshore underground water service lines. Further, there is other record evidence indicating that the nearest intake is for the City Parshall—several miles to the southeast of the well pad location–and that other intakes are further distant and outside of the Van Hook arm of the Lake. (AR 2424, 2813, 10221).

6. MHA Nation's well setback requirements

On August 9, 2012, the MHA Nation passed Resolution No. 12-087-VJB, entitled "The Missouri River, Badlands and Sacred Sites Protection Act." This was after Slawson first submitted APDs for its Torpedo Project but well before BLM's completion of its EA and ultimate approval of the eight APDs. The Tribe's resolution required, among other things, that oil and gas wells within Fort Berthold and near the Missouri River utilize technology that allows multiple wells to be drilled from a single drilling pad and that well pads be set back one-half mile (2,640 feet) from the Missouri River. (AR 7406–08).

Several months after the passage of the August 2012 resolution, the MHA Nation passed Resolution No. 12-139-VJB amending the prior resolution in two respects. First, it clarified that the references in the earlier resolution to the Missouri River included Lake Sakakawea. Second, it permitted the Tribal Business Council to grant a variance from the setback requirement "when minerals would be stranded due to the setback provisions or where the applicant has made a clear showing that granting the variance would not cause an adverse environmental effect upon the Missouri River or the Little Missouri River." (AR 7410–11).

BLM officials met with MHA Nation officials, including the Tribal chairman, in October 2016 to discuss the Tribe's setback requirements and why the Tribe believed them to be necessary. The MHA Nation related to BLM their concerns about the proximity of the well pad to Lake Sakakawea and the need for the Tribe's Setback Law. The concerns discussed included environmental and water quality as well as the cultural importance ("sacred value") of the Lake to the Tribe. (AR 2426, 2132). Also discussed were the Tribe's concerns about Slawson's history of performance on the Reservation including past spills and a December 2012 well blowout as well as compliance and trespass issues. There was a discussion about the reasons Slawson had expressed

for not being able to move the well pad back further, *i.e.*, it would result in stranded minerals. Finally, the possibility of the Tribe granting a variance was also discussed. (AR 2423–34).

Several month later, on February 9, 2017, the MHA Nation passed Resolution 17–038-FWF. This resolution effectively imposed a minimum setback requirement of 1,000 feet by providing that in no event may a variance from the half-mile setback requirement be for a distance less than 1,000 feet. (AR 7414–15). With respect to what follows, the MHA Nation's resolutions collectively will be referred to as the Tribe's or Tribal "Setback Law."

On March 10, 2017, BLM advised the MHA Nation's Tribal Chairman by letter that it had decided to approve Slawson's APDs notwithstanding the fact the Torpedo Project was not in compliance with the Tribe's Resolution No. 17-038. (AR 2432). The reference to this specific resolution demonstrates BLM was aware of the most recent amendment to the Tribe's Setback Law when it approved Slawson's APDs.

7. Prior incidents at Slawson wells

Prior to BLM's field office approving Slawson's APDs, it was aware of Slawson's record of past environmental incidents, including a December 2012 well blowout incident that involved an aerial dispersion of pollutant up to 1,000 feet from the well pad. As noted above, this was a topic of discussion during the October meeting with MHA Nation officials. Further, there is an internal BLM working document for phrasing a public response if certain questions were raised about its approval of Slawson's APDs ("Internal BLM Communiction Plan"). Included was the following potential question and BLM's planned answer:

> **Q:** What happened in the December 2012 well blow out?
>
> **A:** A well owned by Slawon erupted, spewing gas, oil and saltwater 50 feet into the air 1,000 feet from the well. No fires were caused by the spill and no injuries happened as a result. It was cleaned up.

(AR 6501).

In addition, there is the Slawson document attached to the BA stating that only one well upset involved a release of pollutants that traveled beyond the well pad, that this was immediately remedied, and that design changes had been made to protected against a similar incident. Finally, there is a document in the record dated April 6, 2017, that sets forth prior incidents at Slawson wells that appears to have come from BLM's Automated Fluid Minerals Support System ("AFMSS"). (AR 5224–31). While this particular document is dated after the BLM North Dakota Field Office approved Slawson's APDs, the information would have been in BLM's system at the time of Field Office approval. But, in any event, this document was generated prior to the State Director upholding the Field Office's decision. In fact, it was likely generated as result of the MHA Nation's reference to past Slawson well incidents (including the December 2012 well blow out) in its request for State Director review as justification for at least a 1,000-foot setback. (AR 2445).[4]

What is notable with respect to the record evidence of prior Slawson Well incidents is the absence of evidence of a release of pollutants traveling beyond the well pad in large enough quantities that use of Lake Sakakawea for recreational and water supply purposes would have been

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[4] The MHA Nation's request for review also referenced an EPA December 2016 determination that Slawson had failed to adequately design, operate, and maintain vapor control systems on its storage tanks at approximately 170 oil and natural gas wells. As this court is aware from the suit filed by EPA against Slawson in this District on December 1, 2016, EPA and Slawson stipulated to the entry of a consent decree pursuant to which Slawson has been operating until it was lifted by the court in December 2020. USA v. Slawson Exploration Co., Inc. 1:16-cv-00413 (D.N.D. Order dated Dec. 20, 2020). While the MHA Nation referenced this lack of compliance, it has not asserted any claim in this case that the APDs should not have been granted because the oil storage tanks that are setback at the facilities pad have threatened the health and safety of person on Forth Berthold. Rather, the sole focus in this case has been upon the well pad and its proximity to Lake Sakakawea.

In the briefing here, Slawson takes affront to the MHA Nation's references to its prior history of well incidents and the EPA lawsuit just mentioned, contending that no claim has been made that BLM should have denied the APDs because it considered Slawson to be a poor operator. While that is true, Slawson itself has relied upon its record in the submissions of material it made to BLM, including the reference in the document discussed earlier. Further, it appears that part of MHA Nation's point here, including the reference to EPA's suit, is a comment on how much stock should be placed upon Slawson's commitment to employ best management practices. And, in that respect, Slawson must live with the record it has created for itself, putting aside whether it is good , bad, or average. That being said, BLM had all of this before it when it approved the APDs subject to the conditions it concluded were appropriate.

compromised if the incidents had occurred at the well pad constructed for the Torpedo Project.[5]

C. BLM Field Office's determination of "no significant impact" and approval of the APDs

On March 10, 2017, BLM's North Dakota Field Office issued a "Finding of No Significant Impact" ("FONSI") with respect to the Preferred Alternative for the Torpedo Project outlined in the EA. The FONSI, among other things, concluded:

- The Project would have beneficial impacts, including "the potential to bring additional oil and gas into the market place and increase revenue to federal and state and local governments, obtain scientific data of the local geology, and to increase the knowledge base of the mineral resources potential."
- The Preferred Alternative, as designed with its mitigation measures, "minimizes adverse impacts to public health and safety" and minimizes "potential impacts to Lake Sakakawea . . . ."
- The Project "is not unique or unusual" with "BLM and the State of North Dakota having approved similar actions in the same geographic area." In addition, "[t]here are no known predicted effects on the human environment that are considered to be highly uncertain or involve unique or unknown risks."
- The Project "would not establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration . . . [,] and any "future actions would be subject to the NEPA process."

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[5] The MHA Nation contends that the 2012 well blowout incident resulted in a release of 800 barrels of oil and 400 barrels of brine and that there was aerial dispersion of contaminated material that extended some 1,000 feet. It also references a June 2019 fire at a Slawson saltwater disposal facility that purportedly resulted in a release of 867 barrels of oil and 2,603 barrels of brine. (Doc. No. 75, p. 25). However, with respect to both instances, the MHA Nation presents no evidence of *how much* of the released contaminants traveled a significant distance from the well locations, *e.g.*, beyond 500 feet, for example.

- The Preferred Alternative satisfies the need for the development of the resources "by allowing the lessee to develop the mineral lease in an environmentally sound manner."
- The Project is in conformance with BLM's North Dakota Resource Management Plan, approved on April 22, 1988, as amended September 21, 2015.
- With the finding of no significant impact based upon the EA and its supporting documents, the Project "is not a major federal action significantly affecting the quality of the human environment, individually or cumulatively with other actions in the area."
- The Project "does not violate any known Federal, State, Local, or Tribal Law or requirement imposed for the protection of the environment." Further, it is "the responsibility of the operator to obtain all necessary permits, and to comply with all applicable federal, state, and tribal laws, rules, polices, regulations, and agreements."

(AR 6509–12).

Notably, the statement that the Project does not violate known laws for the protection of the environment, including tribal laws, was obviously not correct in the context it was used given the MHA Nations' Setback Law. However, it clear that BLM did not rely upon the accuracy of that statement in giving its approval to the eight APDs. This is because it was aware of the Tribes' position that Slawson's proposed well pad location was not in compliance its Setback Law and approved the APDs notwithstanding as demonstrated by the contemporaneous correspondence noted above.[6]

[6] The Decision Record, as discussed next, while stating it would be the responsibility operator to obtain all other necessary permits and comply with "applicable" federal, state, local or tribal laws and regulations, does not repeat

On the same date as the issuance of the FONSI, the North Dakota Field Office issued its "Decision Record" approving eight of the eleven APDs for Slawson's Torpedo Project premised upon its use of the Preferred Alternative. That is, the well pad being located approximately 200–300 feet further from Lake Sakakawea, a reduction of the maximum number of horizontal wells that could be drilled from thirteen down to eleven, and the use of a separate facilities pad located .9 miles from the well pad and more than half-mile from Lake Sakakawea. (AR 6377, 6513–21).

In relevant part, the Decision Record:

- referenced the concerns raised over "visual impacts, noise, flaring, wildlife concerns, potential impacts to the piping plover, potential for blowouts and spills, impacts to fisheries and water quality, H_2S leaks, impacts to recreation, increased traffic, impacts to the Van Hook resort, and potential for fires" and stated that the Project "has design features aimed at reducing impacts and addressing health and safety concerns[;]"
- noted the comment received from the North Dakota Department of Health relative to the well pad construction that "they believe the environmental impacts will be minor and can be controlled with appropriate construction methods[;]"
- noted that comments were received "regarding the applicability of tribal resolutions for setbacks from the lake. . . [;]"
- concluded that approval of the APDs is "in conformance with the North Dakota RMP as well as BLM's policy and regulations" and that it "follows Instructional Memorandum No. 2009-078 for APDs drilling into federal mineral estate from well pads on nonfederal surface and mineral estate locations[;]"

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the statement that the Project does not violate any known federal, state, local, or tribal laws.

- provided that "[i]t is the responsibility of the operator to obtain all necessary permits, and to comply with all applicable federal, state, and tribal laws, policies, regulations, and easements[;]"[7] and
- stated that the approval of the APDs was subject to attached "Conditions of Approval" consisting of six pages of detailed mitigation and safety measures.

(AR 6513–15).

The attached "Conditions of Approval" included:

- moving the drill pad from the originally proposed location to an increased distance from the Lake;
- placement of the production facilities at a separate production pad located approximately one mile to the northeast of the drill pad;
- use of a "closed-loop" drilling system;
- implementation by Slawson of its Stormwater Pollution Prevention Plan and employment of best management practices in the construction and operation of the facilities;
- construction of 24-inch berm for controlling runoff and additional berms as needed to hold 110% of the capacity of the largest tank plus one full day's production as well as construction of a 3-foot metal containment berm around the tank battery, and a

[7] The Tribe claims the North Dakota Field Office intended this statement as a permit condition and that may be. The Internal BLM Communication Plan referenced earlier states as one of the "talking points" that "BLM's decision requires Slawson to obtain any necessary permits and approvals prior to beginning development." (AR 6500). However, the actual language used is ambiguous in that regard. That is, it would be possible to read the relevant language as simply reinforcing that it was Slawson's responsibility to obtain any other necessary approvals but not as a condition in the sense that failure to do so would amount to a permit breach. Notable also is the fact that the attached conditions of approval do not include a requirement that Slawson obtain all other necessary permits.

diversion ditch; and

- use of an electrically operated drill rig to reduce noise and emissions.

(AR 6515–6521).

Prior to the North Dakota Field Office issuing the Decision Record, the question of whether Slawson needed to comply with the Tribe's Setback Law was discussed internally. It is clear from email exchanges about this topic there was uncertainty over this, with some believing Slawson might have to comply. The ultimate decision appears to have been to state only that it was Slawson's responsibility to comply with other governing laws, including tribal law, and leave the ultimate resolution of the question to others. The fact this was the strategy at the time is confirmed by the Internal BLM Communication Plan. (AR 6499–502).[8]

D. MHA Nation's appeal to the State Director and the State Director's affirmance

In a nine-page letter dated April 10, 2017, the MHA Nation requested review of BLM's Decision Record and FONSI by the State Director as well as a stay pending review. (AR 2438–46). The MHA Nation asserted the following specific claims of error paraphrased as follows:

1. the APDs violate the Tribe's Setback Law (including the contention that the Tribe has jurisdiction over Slawson's activities in this instance even if on private non-Indian fee land);
2. the APDs violate a 1,000-foot setback set forth in the programmatic biological

[8] Specifically, the Internal BLM Communication Plan stated that the response to the whether Slawson needed to obtain a variance from the MHA Nation prior to development was that it "is not up to the BLM to decide." (AR 6501). Also, the proposed answer to the question of what other permits Slawson might need was:

> A: Slawson has sole responsibility to obtain all necessary permits prior to constructing the well pad or drilling the 11 wells. The BLM's role pertains to the Applications for Permits to Drill on federal mineral leases.

(AR 6502).

assessment prepared by the Bureau of Indian Affairs ("BIA") to comply with its obligations under the Endangered Special Act for oil and gas drilling on Fort Berthold (which, as referenced earlier, was relied upon by the BA);

3. the APDs violate BIA's current oil and gas planning for Fort Berthold (essentially for the same reasons as addressed in the previous claim);

4. the APDs violate BLM's North Dakota Regional Management Plan including a purported 1,000-foot setback requirement;

5. the APDs violate the Army Corps of Engineers Oil and Gas Management Plan that purportedly required a .25-mile setback;

6. BLM should have required a greater setback given the requests made by North Dakota Game and Fish and local environmental groups and given Slawson's past well incidents; and

7. BLM's EA and FONSI did not recognize or address the effects of the Project upon the Bureau of Reclamation's rural water system that services Fort Berthold and whose water source is Lake Sakakawea.

(Id.). As discussed in detail later, the only claim that could be construed as a failure to comply with NEPA was the last one.

On April 24, 2017, BLM's Acting State Director (herein "State Director") issued a written decision affirming the Field Office's decision and denying the request for a stay pending further administrative appeal. (AR 2447–61). The decision of the State Director sets forth each of the errors claimed by the MHA Nation and the "BLM Response" to each claim. Then, in a section labeled "Conclusion," the decision states that the Field Office's approval of the FONSI and the eight APDs

is affirmed and the request for a stay denied.[9]

The State Director's reasons for rejecting the MHA Nation's claims of error will be addressed later as necessary. Suffice it to say at this point, there were some differences between the decision of the State Director and the Decision Record issued by the North Dakota Field Office. Most notable is the State Director's decision to address the question of whether the MHA Nation had jurisdiction to enforce its Setback Law rather than take the approach of the North Dakota Field Office and state only that it was Slawson's responsibility to comply with all other applicable laws.

E. Appeal to the IBLA and request for a stay, Slawson's commencement of drilling, and the IBLA order issuing a stay

The MHA Nation appealed the Acting State Director's decision affirming the approval of Slawson's APDs to DOI's Interior Board of Land Appeals ("IBLA") and sought a stay pending a decision on that appeal. (AR 9624-45). Relevant to what follows, the MHA Nation claimed in its notice of appeal, request for a stay, and statement of reasons most of the points of error it had raised with the State Director. However, it also expanded on the claims of error by including a claim that BLM had misapplied Instruction Memorandum 2009-078 and, as consequence, failed to comply with its obligations under NEPA in several respects. (AR 7111–136, 7275–98, 7585–606). Specifically, the MHA Nation contended NEPA was violated because of failures of the EA to discuss: the MHA Nation's jurisdiction (AR 7588, 7134); the Tribe's and federal agency setbacks (AR 7279, 7288–89, 7134); the precedent established by the approval of APDs with a well pad in close proximity to the Lake (AR 7290); the impacts on the Tribe's reserved water and fishing rights (AR 7290); the cultural and recreational importance of the Lake to the Tribe and the harmful impacts to the Lake (AR 7112,

[9] Although not explicitly stated, a reasonable construction of the decision is that the "BLM Response" to an alleged claim of error is the State Director's reason for rejecting the claim. This is the construction that has been afforded the decision by the parties in this case.

7134, 7281); and impacts on the Tribe's water system (AR 7126–27).

BLM opposed the MHA Nation's request for a stay and contested the points of error raised by the MHA Nation. So did Slawson after its request to intervene in the administrative appeal was approved. (AR 10662–64). As discussed in more detail later, Slawson also objected on procedural grounds to the new claims of error raised by the MHA Nation but not BLM. Then, when Slawson objected, the MHA Nation argued that it had in fact raised some of the claims and was not able to raise the remainder until after the State Director asserted in his response to several of the MHA Nation's claims BLM's reliance upon Instruction Memorandum 2009-078, "Situation 2." (AR 7134-35).

A voluminous number of documents were submitted by all three parties as part of the administrative appeal and have become a part of the record here without objection. Some of these documents are referred to later in connection with the specific points of error asserted by the MHA Nation, including the programmatic assessments and operating documents of the other federal agencies not specifically relied upon by the BA or EA. Also, another notable document is a list of other wells in the region and their distances to Lake Sakakawea. (AR 9502–-07). A review of the list indicates there are numerous wells with setbacks less than 1,000 feet from the Lake, with a number of the wells being approximately the same distance from the Lake as the well pad in this case, or less.[10] While not in table form and, perhaps, not including all of the wells set forth in the list, Appendix Ex. 2 (which comes from the EA) does show a number of other wells in the same close proximity to the Lake. As discussed later, this information is relevant to the MHA Nation's arguments of jurisdiction, whether approval of the APDs using a well pad with a setback of less than

[10] While the undersigned has not tallied up the number of wells within 1,000 feet of the Lake's boundary, BLM claims in its briefing the number is 128. (Doc. No. 81, p. 19).

1,000 feet was arbitrary and capricious, and the EA's purported failure to discuss the purported precedent established by BLM's approval of the APDs in this case in terms of amount of setback.

The MHA Nation's request for a stay delayed the State Director's decision from becoming effective but only for 45 days following the expiration of the period for filing a Notice of Appeal. 43 C.F.R. § 4.21. When no action was taken on the request for stay within this time period, Slawson commenced drilling. Several weeks later, on August 9, 2017, an IBLA ALJ issued an order granting a stay. (AR 6997–7007).

In the order granting the stay, the ALJ concluded the appeal involved several legal issues of first impression with respect to whether the MHA Nation possessed the authority to regulate the activity in question and whether BLM owed a trust responsibility to honor a 1,000-foot setback in any event. The ALJ also weighed the traditional factors applied in considering stay requests and concluded the MHA Nation had demonstrated that a stay was warranted. Included as part of the ALJ's analysis was what he termed the "potential affront to the MHA Nations sovereignty" if a stay was not granted. (Id.).

F. This court preliminarily enjoining enforcement of the IBLA's order

Following the IBLA's grant of a stay, Slawson commenced an action in this court seeking to enjoin the IBLA's stay order. In the proceedings before this court, BLM sided with Slawson, agreeing the IBLA's ALJ had erred and that the stay order should be enjoined. The MHA Nation was allowed to intervene; it then provided the opposition to the relief sought by Slawson.

On August 27, 2017, this court granted Slawson's motion for a temporary restraining. Later, on November 27, 2017, the court denied a motion to dismiss brought by the MHA Nation and granted Slawson a preliminary injunction enjoining enforcement of the IBLA's stay order. Slawson Exploration Co., Inc. v. United States Dep't of the Interior, No. 1:17-cv-166, 2017 WL 7038795 (Nov. 27, 2017) ("Slawson Exploration"). In so ruling, the court concluded there was a likelihood

of Slawson prevailing on the merits of its argument that "the MHA Nation does not have jurisdiction over Slawson or the BLM with regard to non-tribal land." The court also agreed with Slawson that "BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands." Id. at **8–9.

Later, following additional proceeding before the DOI that resulted in the IBLA's stay being lifted and BLM's decision to approve Slawson's APDs being affirmed, Slawson's case in this court was dismissed without prejudice.

G. OHA Director's assumption of jurisdiction and decision affirming BLM's approval of Slawson's APDs for the Torpedo Project

While the above proceedings were pending before this court, Slawson and BLM both requested that the Director of DOI's Office of Hearings and Appeals ("OHA") assume jurisdiction over the MHA Nation's administrative appeal. (AR 8326). On October 13, 2017, the OHA Director assumed jurisdiction pursuant to 43 C.F.R. § 4.5(b). (Id.). Then, on March 22, 2018, the OHA Director issued an order reversing the IBLA's stay order and affirming BLM's decision approving Slawson's eight APDs for the Torpedo Project. (AR 8326–49).

In her order, the OHA Director agreed with Slawson and BLM that the MHA Nation lacked jurisdiction over Slawson's drilling activity on non-Indian fee land and that BLM was not obligated to enforce or otherwise give effect to the Tribe's Setback Law. In reaching these conclusions, the OHA Director stated she was relying upon the legal precedent cited by Slawson and BLM as well as a 1982 decision by the Interior Board of Indian Appeals in Roger St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203 (1982). (AR 8327–3). She also placed substantial reliance upon what this court had concluded as a matter of law in granting Slawson a preliminary injunction, stating in part the following:

> My decision to affirm also takes into account, and is bolstered by, the related Federal court order granting the Pl. I believe that the subject matter at issue before the court, i.e., the threshold tribal jurisdiction issues, overlaps so substantially with those at issue in the merits portion of the MHA Nation's administrative appeal that the court's Pl Order serves as instructive guidance for me in reaching a merits decision on the MHA Nation's appeal. In the course of issuing both the TRO and PI, the court stated that Slawson has a "strong likelihood of success on its claims" that it was justified to begin drilling upon receiving BLM's approval of its permit applications, and after the IBLA did not issue a timely order granting the MHA Nation's stay petition. The court also found that Slawson fulfilled the requirement of addressing the "underlying merits" of the case, to the extent that Slawson asserted in its PI brief that the IBLA Stay Order erroneously amounted to allowing the MHA Nation to exercise "tribal regulation [of] non-Indians." Further, the court concluded that it agrees with Slawson's argument that the MHA Nation lacked authority to regulate BLM's decision in this case.[46] Similarly, the court expressly agreed with Slawson's argument that "BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands."

(AR8333–34) (footnotes omitted).

As for MHA Nation's remaining claims of error, the OHA Director summarily disposed of them in the following passage without a detailed point-by-point analysis:

> I have reviewed the filings and BLM's administrative record, and have taken into account each of the MHA Nation's arguments. Based on this review, I find that BLM complied with the various authorities governing its decision-making process, and, in particular, properly determined that the setback requirements cited by the MHA Nation did not serve as a bar to its decision. Thus, I find that the BLM decision has a "rational basis ... [that is] supported by facts in the record," and that the MHA Nation failed to meet its burden to show "that BLM committed an error of law or a material error in its factual analysis, or that BLM's decision is not supported by a record showing that BLM gave due consideration to all relevant factors and . . . [acted on the basis of] a rational connection between the facts found and the choice made." As a result, I affirm BLM's decision.

(AR8333) (footnote omitted). Earlier, in the context of concluding the IBLA had erred in granting a stay, the OHA Director also stated: (1) that BLM's responses to the MHA Nation's claims of error were supported by the Decision Record, the EA, and the other materials considered by BLM; and (2) the MHA Nation had not demonstrated otherwise, including failing to demonstrate that BLM's conclusion that the Torpedo Project was unlikely to imperil Lake Sakakawea as a source of water and as an economic and cultural resource was arbitrary and not supported by the record. (AR8327–29). Nowhere in her decision, however, did the OHA Director address the objection made by Slawson to

the new claims raised by the MHA Nation, much less conclude that they had been waived or procedurally defaulted.

III. SCOPE OF REVIEW

The APA "'sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts.'" Dep't of Homeland Security v. Regents of the Univ. of Cal., __ U.S. __, 140 S. Ct. 1891, 1905 (2020) (quoting Franklin v. Massachusetts, 505 U.S. 788, 796 (1992)). It requires reasoned decisionmaking and provides that agency action may be set aside if is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see Dep't Homeland Security, 140 S. Ct. at 1905.

This scope of review is narrow, however. As summarized by the Eighth Circuit:

> "An agency decision is arbitrary or capricious if: the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that 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." Nat'l Parks Conserv. Ass'n v. McCarthy, 816 F.3d 989, 994 (8th Cir. 2016) (quoting Lion Oil Co. v. EPA, 792 F.3d 978, 982 (8th Cir. 2015)). "Under this narrow standard, a court is not to substitute its judgment for that of the agency, yet the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made." Id. (internal quotation marks omitted) (quoting Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co. (State Farm), 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). Similarly, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Simmons v. Smith, 888 F.3d 994, 998 (8th Cir. 2018).

Finally, while a reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given," a decision that is not fully explained may, nevertheless, be upheld "if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc., 419 U.S. 281, 285–86 (1974) (citation omitted).

IV. DISCUSSION

What follows is a discussion of MHA's claims of why BLM's approval of Slawson's APDs was arbitrary, capricious, and otherwise not in accordance with the law as set forth in the briefing in this case as well as the Tribe's claims of procedural error and purported abuse of discretion on the part of the OHA Director.

For the most part, BLM's and Slawson's arguments in opposition are the same. In the discussion that follows, the focus will be upon those advanced by BLM with reference made to Slawson when its arguments are different or otherwise particularly material.

A. The MHA Nation's claim that BLM acted arbitrarily and capriciously in failing to give effect to the MHA Nation's setback law

1 Introduction

The MHA Nation contends that BLM acted arbitrarily, capriciously, and unlawfully in failing to give effect to its Setback law and approved Slawson's APDs notwithstanding. In support, the MHA Nation made two discrete arguments for why it has jurisdiction to regulate the location of oil wells in close proximity to Lake Sakakawea and why BLM was required to give effect to its Setback Law enacted as a valid exercise of its jurisdiction. The "jurisdiction-based arguments" will be dealt with in this section.

The MHA Nation also appears to argue that, putting aside whether it had jurisdiction, BLM acted arbitrarily and capriciously in not recognizing and giving effect to what it contends is a substantial threat in locating a well too close to Lake Sakakawea as recognized by its Setback Law and setback requirements employed by federal agencies, including BLM. This more general argument will be addressed in a separate section.

Before turning to the jurisdiction-based arguments, several preliminary points are in order

relevant to the claims to be considered here as well as others that follow. First, as described earlier, the Tribe's Setback Law prohibited all drilling operations within .5 miles (2,640 feet) of Lake Sakakawea unless a variance was obtained from the Tribal Business Council for a lesser setback, which could not be less than 1,000 feet. Hence, the MHA Nation's territorial claim of jurisdiction as it relates to oil drilling activity was .5 miles—not just 1,000 feet. In order for a non-Indian operator to get a variance to drill a well on non-Indian owned fee land within .5 miles of the Lake, it would have to submit to the jurisdiction of the Tribe acting through its Business Council. Presumably, the Tribe at that point was free to impose conditions and additional requirements upon its approval of variance if it decided to grant one.

Second, BLM did not have regulatory authority over the parcel upon which Slawson's well pad is located in terms of land use since it is situated on non-federal fee land. The "hook" that may have provided BLM some say with respect to the location of the well pad came from (1) Slawson needing BLM's approval for its horizontal well bores penetrating or developing federal minerals, and (2) the ability of BLM to withhold its approval if there was not compliance with its requirements and other federal laws governing what it can approve as well as, perhaps, when it has latitude to exercise its own judgment.

Third, the fact BLM lacked regulatory authority over the fee land upon which the well pad is located does not mean it was not subject to regulation. Slawson was required to comply with land use requirements imposed by the non-federal governmental entity or entities having jurisdiction over the non-federal fee land, including any reasonable well setback requirements. (AR 4130, 4134). The MHA Nation contends it was one of those non-federal governmental entities. But, even if BLM is correct that it is not, this still left the State of North Dakota and/or its political subdivisions free to impose restrictions on how close a well could be located to Lake Sakakawea—at least with respect

to the non-federal, non-Indian-owned fee land, such as where the well pad in this case is situated. And, to put a finer point on it, BLM's approval of the APDs would not amount to a "get-out-of-jail-free card" with respect to Slawson having to comply with any such requirements.

With this, the relevant questions with respect to the MHA Nation's jurisdiction-based claims are: First, whether the MHA Nation had regulatory jurisdiction over *Slawson* with respect to the well pad location—not whether it had jurisdiction over BLM.[11] Then, *if the Tribe did have regulatory jurisdiction over Slawson's activity on fee land*, whether BLM was required by *federal law or policy* to affirmatively give effect to the Tribe's Setback Law (either by denying the APDs until there was compliance or making compliance a condition of approval of the APDs) or whether it could simply approve the APDs if federal requirements were satisfied, with Slawson still having to comply with the Tribe's Setback law or obtain a variance.

. **2. MHA Nation's argument that DOI's approval of the MHA Nation's Constitution provided it with jurisdiction and established federal policy required BLM to give effect to valid tribal laws in exercise of that jurisdiction**

The MHA Nation contends that DOI's approval of an amendment to Article I of the MHA Nation's Amended Constitution in 1985 provided it with the requisite jurisdiction. In support, the MHA Nation pointed to the part of the Amended Article I that authorizes the Tribe to assert jurisdiction over all persons and lands within Fort Berthold, including fee lands. (AR ___; Doc. No. 68-2, p.149). It contends that DOI's approval of Amended Article I constituted an agreement by the

[11] The MHA Nation contends BLM decided the first question in its favor. It points to the internal BLM Field Office emails discussing whether the Tribe's Setback Law needed to be followed as discussed earlier. It contends the import of the email discussion was that the Field Office recognized the Tribal Setback Law needed to be complied with, but punted by approving the APDs subject to a condition that Slawson comply with all other "applicable" federal, state, local, or tribal law." The MHA Nation claims this was the error and that the APDs should not have been approved because of the lack of compliance with its Setback Law. The problem with this, however, is that State Director and then later the OHA Director rejected the MHA Nation's argument that it had jurisdiction over Slawson's well drilling activity on the fee land in question.

United States that MHA Nation's jurisdiction broadly extends to all lands and persons within Fort Berthold.

Then, in support of its argument of an established federal policy to honor and support the exercise of that authority, the MHA Nation points to two things. The first is a portion of a memorandum prepared by a BIA Associate Solicitor for the DOI prior to DOI's approval of the 1985 Amendment to Article I ("Solicitor's Memorandum"). The part relied upon opines that, in exercise of its jurisdiction as set forth in the Amended Article I, the MHA Nation would be able to enact ordinances that would not require DOI approval unless required by federal law. The second is the following statement made by the Secretary of DOI at the time of its initial approval of the Nation's Constitution in 1934: "All officers and employees of the Interior Department are ordered to abide by the provisions of said Constitution and Bylaws." (AR 7428). Cobbling these two things together, the MHA Nation contends that its Setback Law is a valid exercise of the broad jurisdiction agreed to by the DOI and that established DOI policy obligated BLM to give effect to the Setback law since BLM is a part of the DOI.

As pointed out by BLM, however, there are a number of flaws with these arguments. First, the scope of Amended Article I as approved by the DOI is not as great as the Tribe claims. The full text of Amended Article I reads:

> *The jurisdiction of the Three Affiliated Tribes of the Fort Berthold Reservation shall extend to all persons and all lands, including lands held in fee, within the exterior boundaries of the Fort Berthold Reservation* as defined by the Act of March 3, 1891, (26 Stat. 1032) to all lands added to the Fort Berthold Reservation by Executive Order of June 17, 1892; and to such other persons and lands as may hereafter come within the jurisdiction of the Three Affiliated Tribes, **except as otherwise provided by law**.

(AR ___; Doc. No. 68-2, p. 149) (italics and bold emphasis added). The MHA Nation's argument

points only to the italicized language and ignores what DOI construed at the time of its approval of Amended Article I to be a material qualifier as set forth in bold. That DOI considered the scope of the MHA Nation's jurisdiction to be limited as provided by federal law is made clear by the portion of the Solicitor's Memorandum that the MHA Nation did not quote from. In relevant part, the Solicitor's Memorandum also stated:

> The fact that the Fort Berthold Tribe asserts apparently all encompassing jurisdiction in the jurisdictional provision of its constitution does not mean that the tribe will have jurisdiction over non-Indians and non-Indian lands in all circumstances. It does mean, however, that the tribal government would be able to assert its authority in specific circumstances to the extent allowed by federal law. The present law in this area is briefly described in the Solicitor' s memorandum of March 25, 1985 (copy attached). As the Solicitor points out, federal law recognizes tribal authority over non- Indians and non-Indian property in some circumstances. Therefore, there is nothing ultra vires in the new Fort Berthold jurisdictional provision. That provision, and the entire constitution, should be viewed simply as a mechanism through which the tribe exercises its governmental powers. The tribal constitution, of course, does not "create" tribal powers. Rather, it describes the extent to which the tribal members have decided to vest their governing body with authority to exercise the already-existing sovereign powers of the tribe. The extent to which the tribe retains its original sovereign powers, including any powers over non-Indians, is controlled by federal law, rather than by tribal constitutions.

(AR ___, Doc. No. 68-2, pp. 152–53).

Second, DOI Secretary's statement at the time of approval of the MHA Nation's Constitution in 1934 ordering DOI officials to abide by its provisions is also of no help. According to the Solicitor's Memorandum, the original Article I conferred jurisdiction only over Indian trust and tribal lands. (Id.). Moreover, the Eighth Circuit has held that a similar direction given by the Secretary at the time of approval of another tribe's constitution was not an agreement "to be bound by all tribal ordinances enacted thereafter" and that only Congress could make such an agreement. Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett, 708 F.2d 326, 332 (8th Cir. 1983).

Finally, the Solicitor's Memorandum noted that DOI has approved constitutions for other tribes in both North Dakota and South Dakota that have language conferring jurisdiction similar to

amended Article I. Given the points set forth above, it not surprising that the MHA Nation has been unable to cite one case where a federal court has held that DOI's approval of a tribal constitution containing such language confers jurisdiction upon a tribe over non-Indians and non-Indian fee lands in all circumstances and for all purposes.

In summary, DOI's adoption of Amended Article I did not provide the MHA Nation with jurisdiction in this instance. Further, the referenced statement by the Secretary of DOI at the time of the adoption of the MHA Nation's original Constitution does not provide a basis for the Tribe's contention that BLM was required to affirmatively give effect to the Tribe's Setback Law, even if it had jurisdiction.

3. MHA Nation's argument that it has jurisdiction based upon its inherent sovereign power and that BLM was obligated to give effect to its Setback Law given the trust responsibility owed by the United States

The MHA Nation's alternative jurisdiction-based argument (and one with more force) is its contention that it has regulatory jurisdiction over the site of Slawson's well pad based on its inherent sovereign powers, even though Slawson is a non-Indian entity and the well pad is located on non-Indian owned fee land. In support, it relies upon Montana v. United States, 450 U.S. 544 (1981) ("Montana") and its "second exception," as discussed in more detail in a moment. The second part of its argument is that BLM was obligated as a matter of the trust responsibilities owed by the United States to the Tribe to affirmatively give effect to tribal laws that are a valid exercise of its jurisdiction or at least the one at issue in this case.

BLM disagrees with both parts of the MHA Nation's argument. It contends that Montana's second exception does not apply. It also contends there is nothing about the trust relationship between the United States and the MHA Nation that obligated BLM to give effect to the Tribe's

Setback Law in any event. BLM's position is that whatever trust obligations may have been owed were satisfied by its assessment and consideration of the environmental, economic, and cultural impacts that potentially might result from its approval of the APDs prior to making the decision to approve or deny.

In Montana, the Supreme Court adopted the general principle that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. This general principle (sometimes referred to as the "Montana rule") "restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians —what we have called 'non-Indian fee land.'" Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008) ("Plains Commerce") (quoting Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997)). The reasons for the current state of affairs have been detailed in prior Supreme Court precedent, including Montana and Plains Commerce, and need not be repeated here.

Montana, however, recognized two exceptions. The MHA Nation relies here upon the second. Montana's second exception provides that a tribe can "exercise civil authority over the conduct of non-Indians on fee land 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.

Since Montana, the Supreme Court has made clear that: (1) the Montana exceptions are "limited," (2) that "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid," and (3) "[t]he burden rests on the tribe to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on

non-Indian fee land." Plains Commerce, 554 U.S. at 330 (internal quotations and citing authority omitted). Also, the Supreme Court has made clear that the threshold for invocation of Montana's second exception is high and that the potential for some harm or damage to tribal interests is not enough. Rather, the potential for harm or damage must rise to the level of imperiling the subsistence of the tribal community. In Plains Commerce, the Court stated:

> The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S., at 566, 101 S.Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. Ibid. One commentator has noted that "th[e] elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n. 220.

Id. at 341.

The MHA Nation contends that well drilling and operation in close proximity to Lake Sakakawea (here approximately 600 feet) by its very nature threatens the Tribe's economic security and the health and welfare of its members. It points to record evidence which demonstrates that spills and other releases of contaminates do occur in the oil fields generally notwithstanding safety precautions. It also points to record evidence which, according to it, suggests Slawson's record in that regard is checkered, including the incident at one of Slawson's wells where oil spewed into the air and contaminant traveled some 1,000 feet. Finally, it points to regulations and policies of BLM and other federal agencies that employ a 1,000-foot or greater setback—at least in certain circumstances. The MHA Nation contends this supports not only the threat posed by oil field activity in very close proximity to Lake Sakakawea but also that some line-drawing is appropriate. That is, neither it nor BLM was required to address the precise degree of the threat in 100-foot increments—at least for oil recovery activity this close to Lake Sakakawea.

While the evidence MHA Nation relies upon may be sufficient to support the reasonableness

of a 1,000-foot setback enacted by the State of North Dakota or one of its political subdivisions on fee lands within Fort Berthold or by the MHA Nation on tribal and Indian trust land, it is not enough in this case to support a claim of jurisdiction pursuant to the second Montana exception. At best, the MHA Nation's evidence supports the *possibility* that, if there is an equipment or other failure resulting in a discharge of contaminants, *some amount* of contaminant *might* reach Lake Sakakawea. What the evidence does not demonstrate, however, is a substantial risk that, if some contaminant should find its way to the Lake, it would cause significant damage—much less that reaching catastrophic proportions or otherwise putting in peril the subsistence of the MHA Nation (*e.g.,* actually resulting in an inability to use the Lake for drinking water, fishing, or recreational purposes).

In Slawson, this court concluded with respect to project at issue here that the record evidence before the court at that time did not support the MHA Nation's claim of jurisdiction under the second Montana exception. While it appears neither BLM nor Slawson argues this conclusion is preclusive of a different determination now, nothing has changed in terms of the material facts and the conclusion this court previously reached is well-supported by Supreme Court precedent.[12]

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[12] The MHA Nation cites to other cases in addition to Montana to support its claim of jurisdiction. The cases are either inapposite or were taken into account by the Supreme Court in Plains Commerce when it set the bar as high as it did for invocation of Montana's second exception. Given the high bar, there is a dearth of cases in which courts have found the second exception applies. In fact, the only post-Plains Commerce case cited by the MHA Nation where the second exception has been invoked is the Ninth's Circuit's decision in FMC Corporation v. Shoshone-Bannock Tribes, 942 F.3d 916 (9th Cir. 2019), cert. denied, 2021 WL 78077 (Jan. 11, 2021). That case involved the storage of approximately 22 million tons of radioactive, carcinogenic, and poisonous phosphorous waste on fee land within the Bannock Fort Hall Reservation in Idaho. Among other things, EPA had determined that the stored waste in that case presented substantial health and environmental risks—both from airborne transmission of highly toxic and deadly fumes as well as contaminant fouling the land and ground waters—that would last for decades, if not longer, and had classified the storage areas as a Superfund Site. Id. at 919–29, 934–41. Based on the record before it, the Ninth Circuit agreed with the district court that the waste sites in question "pose a constant and deadly threat to the Tribes, a real risk of catastrophic consequences should containment fail." Id. at 939 (quoting the district court). And, with that, the Ninth Circuit concluded that the second Montana exception applied and that the tribes in that case had regulatory jurisdiction over the site even though it was on fee land and FMC Corporation is a non-Indian entity. Id. at 934–39. It also concluded for reasons not relevant here that first Montana exception also applied based upon FMC Corporation's prior dealings

In short, the MHA Nation has failed to demonstrate the applicability of Montana's second exception such as would enable it to enforce the Tribe's Setback Law with respect to the well pad at issue in this case. With that, the court need not address the second part of MHA Nation's argument of trust responsibility since the MHA Nation only offers that here as reason why the BLM was required give effect to the Tribe Setback Law presuming it applies.[13]

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with the Tribe relevant to the site. Id. at 932–34.

The threat posed to the tribes in FMC Corporation is at least an order of magnitude greater than presented by Slawson's well drilling and operations on the well pad in this case given: (1) the FONSI determination by BLM; (2) the lack of objections by other federal agencies having an interest in the protection of the Lake and is shore line (*i.e.* the FWS, COE, and the Bureau of Reclamation); (3) the lack of any objection by North Dakota's NDDOH, State Water Commission, and Industrial Commission; and (4) the past history of well drilling and operation in close proximity to the Lake over a period of years and the absence of evidence of any failures resulting in significant amounts of contaminant coming into contact with the Lake or its shoreline, much less that reaching catastrophic portions.

[13] BLM argues that whatever trust responsibilities it may owe do not extend to giving effect to the Tribe's Setback law. BLM further argues that, if the court agrees based on the authority it has cited, it need not reach the jurisdiction question. The undersigned is not so sure and does not recommend that as a course of action. The primary problem with not deciding the jurisdiction question is that, even assuming it to be true that BLM was not *required* to give effect to the Tribe's Setback Law, we do not know what BLM would have decided to do if it had concluded the Tribe had jurisdiction. One possibility may have been to approve the APDs but leave it up to Slawson to comply with other applicable laws. Another might have been to approve the APDs but impose an affirmative condition that other applicable laws, including tribal law, be complied with. Still another possibility might have been to deny the APDs absent Slawson demonstrating an ability to comply with other applicable laws including the Tribe's simply because of not wanting work to proceed only to have it later halted because of failure to comply with an applicable law. Still another possibility would be to deny the APDs as matter of a policy of affording respect to the Tribe as separate sovereign—which is different from BLM doing so because its trust responsibilities required it. As discussed earlier, the North Dakota Field office did not decide the jurisdiction question and stated only that Slawson was required to comply with other "applicable" laws—whether tribal, state, or local. Had the Acting Director and the OHA Director taken that course of action, then BLM's argument that this court need not address the jurisdiction question might have more appeal. However, this is not what happened.

B. The MHA Nation's claim that BLM was required to comply with various "federal setbacks" and failed to do so and its more general argument that BLM should have required at least a 1,000-foot setback given the rationale for the various setback requirements

1. Introduction

The MHA Nation contends that federal setback requirements of several federal agencies (including those employed by BLM itself) applied to the Torpedo Project and BLM acted arbitrarily and capriciously, if not also unlawfully, in failing to comply with them. The MHA Nation appears also to argue that, even if the federal setbacks as well as its own did not technically apply, the setbacks represent the best thinking of what is required to protect Lake Sakakawea and BLM acted arbitrarily and capriciously in not requiring at least a 1,000-foot setback.

BLM disagrees. It contends the purported federal setbacks relied upon by the MHA Nation do not apply by their terms to what BLM considered for approval in this case. Further, BLM points to the fact that, in each instance, the setbacks are not absolute and deviations are permitted when circumstances warrant. Finally, BLM contends that the record supports its conclusion that the 600-foot setback in this case is sufficient to protect Lake Sakakawea, particularly given the design and mitigation measures agreed to by Slawson and imposed by BLM as conditions on its approval of the APDs.

Considered first will be the federal setbacks that the MHA Nation argues BLM was required to comply with. This will be followed by a discussion of the MHA Nation's more general argument. However, before doing so, some discussion of BLM's role in the management of federal minerals pursuant to the General Leasing Act (30 U.S.C. § 216, et. seq.) and the Mineral Leasing Act of 1920 (30 U.S.C. § 181, et. seq.) is helpful here as well for the other claims that come later. This is because the scope of BLM's authority and what it is obligated to consider are dictated in part by

who owns the surface estate overlying the federal minerals.

In some instances, BLM owns the land overlying the federal minerals it administers. In that instance, BLM's control over the surface land use is at its zenith. In other instances, the surface overlying the federal minerals may be owned by non-federal surface owners (*e.g.*, private owners, the states, or state political subdivisions) creating what is referred to as "split estates." (AR 4134). In that instance, the BLM does not have direct regulatory control over the surface land use although it may be able to control, at least to some degree, the use of the surface by the imposition of conditions in its leases or when it approves APDs for the development of the underlying federal minerals.

A third situation is when another federal agency (*e.g.*, the Forest Service, BIA, Bureau of Reclamation, or U.S. Army Corps of Engineers) owns or has regulatory control over the surface. In that instance, the other federal agency is the "surface management agency" or "SMA" and BLM must consult with (and in some cases obtain the approval of) the SMA before leasing the federal minerals or approving APDs. See 43 C.F.R. § 3503.20. This, in turn, may require giving effect to the policies and requirements of the SMA. (AR 4129, 4132–34, 7544).

Finally, with the development of horizontal drilling, it is possible that the well pad used to develop federal minerals can be located on land where neither the surface nor the underlying minerals are federally owned. That is, only the horizontal portion of the well penetrates federally-owned mineral acreage. Further, with the ability to drill multiple horizontal wells from a single well pad, there are situations where, not only is the well pad located on land for which the federal government owns neither the surface nor the underlying minerals, the well pad is being used to develop both federal and non-federally owned minerals on lease acreage remote from the well pad.

This is the situation presented by Slawson's Torpedo Project. That is, the well pad is located on privately owned land (both surface and minerals) and is "off lease" in terms of the leased federal minerals being developed. Further, the well pad is being used to develop both federal and non-federal mineral acreage.

2. Claim BLM failed to give effect to the Bureau of Indian Affairs's setback requirements

One of the federal setback requirements that the MHA Nation contends applies to the Torpedo Project is set forth in the May 2014 "Programmatic Biological Assessment and Biological Evaluation for Fort Berthold Indian Reservation Oil and Gas Development" ("BA/BE") prepared for the U.S. Fish and Wildlife Service ("FWS") by the Bureau of Indian Affairs ("BIA"). A complete copy of the May 2014 BA/BE is set forth at AR 4983, et. seq. The record also contains excerpts at AR 7445–60. It is the same document that BLM's BA in this case relied on, in part, for other purposes as detailed earlier.

Before turning to the arguments of the parties, it helpful first to consider what the BA/BE is and why BIA prepared it.

As recited by BIA's BA/BE, the ESA requires that all federal agencies ensure that their actions will not jeopardize the existence of endangered or protected species and critical habitat. It also requires federal agencies to consult with the Secretary of DOI, acting through the FWS, for projects that potentially may have some impact on endangered or threatened species and critical habitat. (AR 4987).

BIA prepared the 2014 BA/BE to satisfy *in advance* most of what it was required to do under the ESA for the many permits it anticipated considering in connection with oil and gas development on Fort Berthold for the upcoming five-year period from 2014 through 2019. The BA/BE provides

that, if its provisions are followed, BIA's proposed action in approving a permit would likely be deemed to not adversely affect a listed species or critical habitat and only informal consultation with FWS would be required. This would lessen the burden on both BIA and FWS in that instance with the BA/BE providing in advance the bulk of the assessment and evaluation required. In other words, a detailed project-specific biological assessment and evaluation would not be necessary if the requirements and conditions of the BA/BE are followed. (AR 4987– 98).

One of the BIA BA/BE's general conservation and minimization measures for eliminating or reducing the potential for adverse impact on some or all of the listed species in section 2.10.2.4 is: "No drilling or production activities within the first 1,000 feet (305 meters) from Lake Sakakawea. HHWM (1,854 feet [565 meters] MSL)." There are similar 1,000-foot restrictions to lessen the potential for spills and migration habitat degradation in sensitive areas for specific species, including, for example, the whooping crane and piping plover. (AR 5017, 5019).

As best the undersigned can understand the MHA Nation's argument for why BLM was required to follow the BIA BA/BE's setbacks is: DOI (acting through BIA) intended that the BA/BE setbacks would apply to all DOI activity on Fort Berthold. Hence, BLM (a part of the DOI) was required to follow them.

Here, BLM's State Director correctly concluded BLM was not required to employ the BIA BA/BE's setback requirements. This is because the BIA BA/BE by its terms only applies when BIA is the permitting authority and that authority extends only to tribal lands and lands held in trust by the United States for Indian allottees. (AR 4987, 4995, 7446, 7449). In this instance, BIA was not the permitting authority because the none of the Project is located on land over which it has authority.

Further, and even more compelling with respect to the MHA Nation's more general argument, is that the 1,000 foot setbacks in the BIA BA/BE are not absolute and even BIA can deviate from

them. This is clear both from the terms of the BA/BE and FWS's concurrence with it.

First, there is nothing in the BA/BE that represents a statement or commitment that its requirements and conditions will be followed in all instances. Rather, fairly construed, it represents nothing more than an assessment and evaluation of likely impacts if it is followed and the hope it will satisfy both BIA's and FWS's obligations under the ESA in certain instances. Further, FWS's concurrence makes clear this was the purpose and intent of the BA/BE. In particular, FWS's concurrence stated: "Any project which does not comply with the conditions of the Programmatic BA/BE will be required to evaluate and determine impacts to the listed species requesting concurrence from the Service as necessary." (AR 7462–63).[14]

Finally, in satisfying its obligations under the ESA, including consultation with FWS, BLM in this case did not rely upon an advanced assessment and evaluation like BIA's BA/BE. Rather, it commissioned the project-specific BA discussed earlier, which concluded there likely would be no adverse impacts to endangered or threatened species or to critical habitat with the 600-foot setback in this particular instance. It then obtained FWS's concurrence after Slawson agreed to several modifications to the Torpedo Project as detailed earlier.

3. Claim BLM failed to give effect to setbacks required by its own "North Dakota Regional Management Plan"

The MHA Nation also contends that a 1,000-foot setback was required by BLM's "North Dakota Resource Management Plan" ("NDRMP"). Adopted in 1988, the NDRMP is BLM's guide for management of certain federally-owned mineral interests in North Dakota—oil, gas, and coal. Excerpts cited in the briefs to the NDRMP are located at AR 7472, et. seq. A somewhat more

[14] This is consistent with the 1,000-foot setback being a conservative number based on the purpose of BA/BE of giving an advance determination rather than reflecting what is necessarily required following a site-specific study.

complete copy starts at AR 6553 followed thereafter with the final and draft Environmental Impact Statements prepared for the NDRMP.

The MHA Nation appears to make two arguments for why the NDRMP required in this instance at least a 1,000-foot setback. The first is the Tribe's contention that a 1,000-foot setback is required by virtue of BLM's form "Oil and Gas Lease Stipulations" that are attached to the NDRMP as Appendix D-2. The second is that applying the more general requirements of the NDRMP would have resulted in the imposition of a setback requirement of at least that distance. These include, according to the MHA Nation, provisions requiring protection of Lake Sakakawea, consideration of cultural impacts, and meaningful consultations with the Tribe.

The State Director responded to these arguments by stating the NDRMP applies only to BLM's management of federal minerals where the surface over the federal minerals is owned by BLM or is non-federally owned (the "split estate" scenario) and does not apply where the surface is owned or controlled by another federal agency. The State Director stated that, in this instance, the U.S. Army of Corps of Engineers ("COE") is the SMA.

The State Director then went on to state that, where the well pad is on locations where neither the surface nor the underlying minerals are federally owned, BLM follows Instruction Memorandum 2009-078, and, more particularly "Situation 2," as described therein, when the location of the well pad is not determined by access to the federal minerals. (AR 2454–55). This Instruction Manual will be discussed in more detail later.

Unfortunately, the State Director did not discuss why both the FONSI and the Decision Record for the Torpedo Project state that approval of Slawson's APDs would be in conformance with the NDRMP. (AR 6509, 6513). Also, there is the fact that the BLM lease stipulations set forth

in an appendix to the NDRMP and relied upon by the MHA Nation for its claim of a 1,000 foot setback were included in at least one of Slawson's leases for the federal mineral acreage that is being developed by the Project. (AR 7561). Nevertheless, the State Director's conclusion that the NDRMP technically did not apply by its terms is supported by its language, including:

- "This document provides the management direction for all public lands and federal minerals in North Dakota for which the BLM is the sole management agency."
- "This RMP establishes management strategies for federal minerals located under BLM-administered surface and under private lands not situated within the administrative boundaries of other federal management agencies . . . ."

(AR 7473). This disposes of MHA Nation's more general arguments based upon the NDRMP.[15] However, the BLM lease stipulations relied upon by the MHA Nation for its argument of a 1,000-foot setback were included in one or more of the leases encompassing the federal minerals targeted by the Torpedo Project and appear to have independent force since Slawson took one or more of the leases subject to the stipulations.[16]

The BLM lease stipulations at issue are set forth at AR 7479 (Appendix D-2 to the NDRMP) and AR 7561 (Slawson Lease NDM9974). The following is the relevant language:

> CONTROLLED OR LIMITED SURFACE USE STIPULATION—This stipulation may be modified, consistent with land use documents, when specifically approved in writing by the

[15] That being said, the conclusion by the North Dakota Field Office that approval of the APDs was in general conformance with the NDRMP is supported by the record. The extensive BA and EA prepared for the Torpedo Project generally addressed what the MHA Nation contends should have been considered as detailed elsewhere. Further, apart from the BA and EA, BLM personnel consulted with tribal officials. These consultations included the October 2016 meeting discussed earlier that was specifically about the Tribe's Setback Law and why the Tribe considered it important, including potential environmental, water quality, and cultural impacts. (AR 2132, 2423–34).

[16] The undersigned suspects the BLM lease stipulations were included in one or more of the BLM leases involved in the Torpedo Project because of an operating policy or practice apart from the NDRMP. This may also be a reason why they appear in the NDRMP as an appendix.

> Bureau of Land Management (BLM) with concurrence of the SMA. Distances and/or time periods may be made less restrictive depending upon the actual onground conditions. The prospective lessee should contact the SMA for more specific locations and information regarding the restrictive nature of this stipulation.
>
> The lessee/operator is given notice that the lands *within this lease may include special areas* and that such areas may contain special values, may be needed for special purposes, or may require special attention to prevent damage to surface and/or other resources. Possible special areas are identified below. *Any surface use or occupancy within such special areas* will be strictly controlled, or if absolutely necessary, excluded. Use or occupancy will be restricted only when the BLM and/or the SMA demonstrates the restriction necessary for the protection of such special areas and existing or planned uses. Appropriate modifications to imposed restrictions will be made for maintenance and operations of producing oil and gas wells.
>
> After the SMA has been advised of *specific proposed use or occupancy of the leased lands*, and on request of the lessee/operator, the Agency will furnish further data on any special areas which may include:
>
> * * * *
>
> 500 feet, or when necessary, within the 25-year flood plain from reservoirs, lakes, and ponds and intermittent, ephemeral or small perennial streams; 1,000 feet, or when necessary, within the 100-year flood plain from larger perennial streams, rivers, and domestic water supplies.
>
> * * * *

(Id.) (italics added).

The MHA Nation contends that Lake Sakakawea is a "special area" within the meaning of BLM's lease stipulations by virtue of it being a larger body of water and a source of domestic water supply and that activity within 1,000 feet is prohibited in this instance. BLM disagrees, contending that its lease stipulations, by their terms, apply only to "on-lease" activities and not to what the lessees may do on off-lease non-federally owned property. In making that argument, BLM focuses upon the language of the stipulations set forth in italics above. This is a reasonable construction although, perhaps, not the only one.

Finally, and even more compelling, is BLM's argument that the Lease Stipulations do not *require* a 1,000-foot setback. That is, the lease stipulations do nothing more than put the lessee on

notice that BLM may require strict control of activities within specified distances of special areas and may prohibit the activity if BLM reasonably demonstrates prohibition is required for the protection of the special area. BLM contends here that, with Slawson's design and other agreed-to controls, the drilling and pumping activity on the well pad is being strictly controlled and that the prohibition is not necessary. This is supported by BLM's FONSI and the EA as outlined earlier.

In summary, there is no merit to MHA Nation's argument that the BLM was required to impose a 1,000-foot setback by virtue of its lease stipulations.

4. Claim that BLM failed to give effect to setbacks contained in the Corps of Engineers "Garrison Project—Lake Sakakawea Oil and Gas Management Plan"

The MHA Nation also points to the Army Corps of Engineers "Garrison Project–Lake Sakakawea Oil and Gas Management Plan" ("O&GMP") dated December 2013 as requiring a .25 mile setback. The MHA Nation contends the COE O&GMP applied here because the federal leases in this case were "COE leases." That is, while BLM issues the leases, COE is the SMA because it has control over Lake Sakakawea that overlies the leased acreage; hence its rules pertaining to surface uses apply.

The COE O&GMP is set forth at AR 7541–47. The language the MHA Nation points to is in Section 10.1 at AR 7546. Similar to the BLM lease stipulations quoted earlier, the relevant language recognizes there may be "special areas" within the surface controlled by COE where activities may need to be "strictly controlled or, if necessary, prohibited." One of the identified special areas is the area "[w]ithin 0.25 miles of surface water and/or riparian lands." The Plan provides for using COE lease stipulations employing comparable language to be able to exercise the necessary control.

In making its argument here, the MHA Nation recognized the COE O&GMP does allow for COE granting "exceptions." The MHA Nation contends, however, that, since the BLM obtained no exception from COE, it should have applied the .25 mile setback.

The State Director rejected the MHA Nation's arguments, concluding that the referenced provisions of the COE O&GMP do not apply to off-lease activity on private surface and the same was true for the actual COE stipulations included in Slawson's federal lease, which pre-dated the O&GMP. (AR 2456–580). This is a rational reading of the O&GMP as well as the COE lease stipulations included within Slawson's federal lease. Further, BLM did consult with COE prior to approving the APDs and COE lodged no objection, stating that "the Federal lease for this location pre-dates our Oil & Gas [Management] Plan, and the surface location is private, so our stips do not apply." (AR 7098). Finally, even if the COE O&GMP was applicable, there is the fact, as the MHA Nation concedes, that COE's setback requirements are not absolute and there can be exceptions when circumstances allow.

In short, there is nothing about the COE O&GMP that required employment of a 1,000-foot setback for the well pad at issue here.

5. The more general argument that BLM acted arbitrarily and capriciously in not requiring at least a 1,000-foot setback

Finally, there is the MHA Nation's more general argument that, even if the BLM was not required to apply the Tribe's and the referenced federal setbacks, it should have been guided by them, and that its approval of Slawson's APDs with a well pad setback of no more than 600 feet was arbitrary and capricious for that reason. While this argument has more force, it too fails because it cannot be concluded that BLM's approval of the APDs relying upon a well pad setback of 600 feet from the Lake *in this instance* was arbitrary and capricious for two reasons.

First, as already discussed, the purported federal setbacks relied upon by the MHA Nation are not absolute and deviations are permitted when circumstances warrant. Here, BLM concluded that the well pad with the 600-foot setback did not *in this instance* represent a substantial threat to the waters and shoreline of Lake Sakakawea. This conclusion is supported by the record evidence including:

- The BA's and EA's assessment of the potential impacts to Lake Sakakawea and the conclusions of likely no significant adverse impact.
- The mitigation measures that would be employed that BLM included as conditions to its approval of the APDs.
- The concurrence of FWS. Implicit in FWS' sign off was its conclusion that the setback ultimately provided for was sufficient to protect against contaminant from well drilling or operation reaching the Lake and the critical habitat along the shoreline.
- The lack of objection of COE, which had its own interests in protecting Lake Sakakawea.
- The lack of objection by the Bureau of Reclamation, which provided the funding for the Berthold Rural Water System.
- The lack of objection of the NDDOH, the North Dakota Industrial Commission, and the North Dakota Water Commission

Further, while the foregoing is sufficient to support BLM's conclusion, there is also the "the-dog-that-didn't-bark" evidence. This includes the large number of other wells that are as close or closer to Lake Sakakawea. Surely, if there had been an incident from any of these wells creating

significant environmental damage to the Lake, or it shoreline, the federal and state agencies would have been aware of it, including BLM. The same is true for the MHA Nation. And here, there is no such evidence.

Second is BLM's reason for approving the APDs with the 600-foot well pad setback instead of a greater distance. As discussed earlier, the reason was that a greater setback would result in certain of the oil and gas reserves targeted by the project being stranded.

Given these points, and putting aside consideration of what might also be Slawson's lease rights, the decision of which was more important— not stranding recoverable reserves or providing more distance as an additional prophylactic protection—was for the BLM to make consistent with its mission and not this court.[17]

C. The MHA Nation's claim that BLM misapplied Instruction Memorandum 2009-078 resulting in BLM's EA being deficient under NEPA

1. Introduction

As discussed earlier, the State Director stated BLM had followed Instruction Memorandum 2009-078 ("IM 2009-078"), and specifically "Situation 2," in responding to the claim BLM had failed to follow the NDRMP. Following the decision of the State Director denying the MHA Nation's claims of error and denying a stay, the MHA Nation argued for the first time in its appeal to the IBLA that BLM had misapplied IM 2009-078 by following Situation 2 rather than Situation 3 and repeats the argument in its briefing here. The MHA Nation claims that the result of BLM

[17] In concluding BLM did not act arbitrarily and capriciously in approving the APDs for wells using a well pad with only a 600-foot setback in this case, the court is not concluding a 1,000-foot setback would be unreasonable if, for example, the State of North Dakota had decided to adopt one for lands within its jurisdictional authority. The same may also be true if BLM had insisted upon a 1,000 setback as a condition of approval of the APDs targeting federal minerals. At one point in the briefing, the government attorneys suggest that 1,000-feet is simply an arbitrary number. In the undersigned's view, that is a step too far and an unnecessary one in this case. It is doubtful a government entity would have to justify the reasonableness of its setback in 100-foot increments if it is one of minimal distance, such as 1,000 feet. Further, this contention calls into question the rationality of the government's own setbacks.

applying the wrong Situation was that the EA was deficient in a number of respects resulting in a violation of BLM's obligations under NEPA.

As best the undersigned can determine, the MHA Nation contends in the briefing in this action that the EA was deficient because it failed to address: (1) the tribal and the federal setbacks and the reasons for them; (2) the cultural connection between the MHA Nation and Lake Sakakawea; (3) the precedent established by approving APDs for a well pad located so close to Lake Sakakawea; (4) additional alternative well pad locations; (5) the impacts on the Tribe's reserved water rights, and (6) the impacts upon Fort Berthold's rural water system. These arguments will collectively be referred to as the "NEPA arguments."

Notably, as detailed earlier, the MHA Nation did not raise the foregoing NEPA arguments in the very specific points of error it asserted when it sought State Director review, except for the last one. BLM and Slawson contend the MHA Nation waived its NEPA arguments by not having first asserted them to the State Director and then by not including them in the complaint in this action. They argue the IM 2009-078 claim is nothing more than an excuse (and not a good one at that) to raise the NEPA arguments that should have been made first to the State Director so BLM would have been alerted to the claimed deficiencies and had the opportunity to correct them. In the discussion that follows, the undersigned prefers the term "procedural default" and will use that rather than waiver.

In the alternative, BLM and Slawson contend: (1) that the State Director correctly concluded Situation 2 applied, so there was no IM 2009-078 error; (2) it does not make a difference whether Situation 2 or 3 applied because the EA satisfied BLM's NEPA obligations under both Situations; and (3) the MHA Nations' NEPA arguments lack merit in any event.

Finally, the undersigned will proceed with the way the MHA Nation advances its arguments although, at the end of the day, the bulk of its NEPA arguments have nothing to do with whether BLM applied Situation 2 or Situation 3 of IM 2009-078.

2. Instruction Memorandum 2009-078

IM 2009-078 provides guidance with respect to BLM's obligations under NEPA, the ESA, and the National Historic Preservation Act ("NHPA") when: (1) BLM's lessee is seeking to drill horizontal wells from a multi-well pad; (2) the multi-well pad is located on land where neither the surface nor the underlying mineral estate is federally owned; and (3) at least one of the horizontal wells will access federal minerals remote from the well pad. (AR 5244–51). The IM describes three situations when this might happen and provides guidance with respect to what BLM must do to comply with NEPA, ESA, and NHPA for each. The reason for distinguishing between the three situations is BLM's conclusions that the extent of federal involvement for each differs and this, in turn, impacts what BLM is required to do each in each situation to comply with NEPA, ESA, and NHPA. According to the IM, the goal is to do only that which is actually required in each situation and "eliminate unnecessary permitting and review requirements and inconsistences when the BLM has limited authority." (AR 5244–47).

The three situations outlined in IM 2009-078 are as follows:

- "Situation 1" is "when the operator submits an APD for drilling a new Federal well bore or horizontal leg into Federal minerals from an *existing multiple-well pad* constructed entirely on non-Federal surface and minerals, where no additional surface disturbance is planned*, and state and/or private wells have already been permitted by the state for that well pad*." (emphasis added).

- "Situation 2" is when a new multi-well pad is to be constructed entirely on non-federal surface and minerals and the location of the well pad is *not based* on the downhole location of the federal wells.
- "Situation 3" is when location of the well pad *is based* on the downhole location of the federal wells.

Generally speaking, the IM provides that the scope of what BLM must do to comply with NEPA, ESA, and the NHPA expands with each scenario, beginning with the first. Relevant here, the primary differences between the three Situations have to do with consideration of alternative well pad locations, the environmental impacts to the site of the well pad, and the extent to which the assessment needs to address the environmental impacts resulting from the non-federal wells. (AR 5245–47).

However, under all three alternatives, the environmental consequences of drilling and operating the wells targeting the federal minerals have to be considered. (AR 5246–47). As relevant to this case, this would include the potential for a failure or other upset in the drilling or operating the wells targeting the federal minerals resulting in contaminants reaching and despoiling waters of Lake Sakakawea and its shoreline.[18] Hence, for most of the MHA Nation's NEPA arguments, the

[18] In a footnote to its brief, Slawson appears to suggest that all that would need to be considered when the location of the well pad is not based on the location of the federal minerals are the"downhole impacts" that may result from the "federal" wells, citing to IM 2018-014 that subsequently replaced IM 2009-078. However, Slawson omits critical language from IM 2018-14 which makes clear that environmental impacts that may result from the drilling and operation of the federal wells needs to be considered. This would include here potential impacts to Lake Sakakawea resulting from a release of contaminants from the federal wells at the well pad. (IM 2018-014, available at www.blm.gov). In fact, since the drilling and operation of the federal wells is part of the federal action, not to consider these impacts would violate NEPA and be unlawful not withstanding what is put forth in an instruction memorandum. While IM 2009-078 is confusingly written and somewhat opaque (and not surprising has been replaced), it does state that "drilling the Federal well and producing from the Federal well is a Federal action. . ." for all three Situations (AR 5244) and that the "effects" of "drilling and operating" the federal wells must be considered in each instance. (AR 5246–47).

purported failure in applying Situation 2 as opposed to Situation 3 is a "red herring." Here, the MHA Nation is not complaining about the environmental impacts to the site of the well pad. Also, BLM did not distinguish between wells that target non-federal minerals from wells targeting federal minerals in doing its environmental assessment—most likely because Slawson sought APDs for all of the wells.

The only NEPA claim asserted by the MHA Nation that might *theoretically* be affected by IM 2009-078 is the extent to which alternative well pad locations needed to be addressed. BLM appears to have concluded that, under Situations 1 and 2 of IM 2009-078, there does not have to be a consideration of specific alternative well pad locations in making its NEPA assessment. The apparent reason under Situation 1 is that the well pad is already existing. So, in that Situation, what primarily needs to be considered to comply with NEPA are the environmental consequences of drilling and operating the wells targeting the federal minerals and, presumably, weigh those against the consequences of a "no action" alternative. (AR 5245–46).

The reason for not having to consider alternative locations for the well pad under Situation 2 appears to be the assumption that the well pad would be constructed at the proposed location to develop the non-federal minerals. The difference between Situation 1 and Situation 2 is BLM's conclusion that, since the well pad will be new, NEPA requires discussion of the potential environmental impacts that may result from the drilling and operation of the wells targeting the non-federal minerals but that discussion need not be as detailed as for the wells constituting the federal action. But again, BLM was required to consider the potential for contaminants reaching the waters of Lake Sakakawea and its shoreline for the federal wells that constitute the federal action. (AR 5246).

The guidance given under Situation 3 is that location of the well pad needs to be considered as part of the NEPA analysis, including consideration of alternative locations. Situation 3 does limit the NEPA analysis to a degree from what might be required if the well pad was constructed on land owned by the federal government or when the federal government owns the underlying minerals. However, those differences are not material to the NEPA arguments asserted by the MHA Nation in its briefing here and, for the most part, Situation 3 requires a comprehensive NEPA analysis. (AR 5247).

Finally, IM 2009-078 does not purport to add requirements for assessment and evaluation beyond what NEPA requires. As discussed later, NEPA's requirements for consideration of alternatives were more limited in this case because of BLM's finding of a likelihood of no significant environmental impact, *i.e.*, the FONSI. There is nothing in IM 2009-078 which changes that.

3. The procedural objections to consideration of the MHA Nation's NEPA arguments as well as its IM 2009-78 claim

In reviewing the proceedings below, it does appear that the only NEPA argument asserted in the request for State Director review was that the EA failed to mention the Fort Berthold's Rural Water System and discuss the potential impacts to it. (AR 2445). Further, it is clear the MHA Nation could have asserted the NEPA arguments it makes in its briefing now under the guise of its IM 2009-078 claim. This is because the Tribe had the EA, FONSI, and Decision Record when it made the very specific claims of error it did make in seeking State Director review. In other words, it had the ability to determine whether the EA was sufficient or not by reviewing these documents—just as it apparently did when it asserted the EA was deficient in failing to address the Fort Berthold's rural

water system and its Lake Sakakawea intakes.[19]

To put a finer point on it, the MHA Nation did not need to know whether BLM had applied Situation 2 or 3. Further, even if that was a concern, the IM-2009-078 was referenced in the Decision Record and the MHA Nation could have reviewed it and compared its guidance to what BLM did. Finally, not only did the MHA Nation not have to first know whether Situation 2 or 3 of IM 2009-078 applied, the reality is that the differences between the two have little to do with the Tribe's NEPA arguments—save the one with respect to whether there should have been a more robust consideration of alternative locations of the well pad..

In the briefing before the IBLA/OHA, Slawson objected to consideration of the IM 2009-078 claim and the purportedly embedded NEPA arguments because these arguments had not been presented to the State Director. (AR 8543). Given that the MHA Nation could have asserted these arguments when it sought State Director review, Slawson's contention that the MHA Nation procedurally defaulted upon these claims, save one, has merit given the requirements of 43 C.F.R. § 4.410(c). Coastal Petroleum Co., 190 IBLA 347, 356 (2017) (the IBLA does not consider issues raised for the first time on appeal, except in exceptional circumstances, citing the § 4.410(c) and the preamble to the rule); see also Department of Transp. v. Public Citizen, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration.'") (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978)); 43 C.F.R.§ 4.410(c).

[19] Further, this was not something that was suddenly sprung upon the MHA Nation with the decision of BLM's field office. It had been aware of the Project since the very beginning and BLM had earlier put out for review and comment a draft of the EA prior to its finalization in 2017.

Where things get muddled, however is that, while Slawson raised its hand and objected on this ground, BLM did not and simply responded on the merits. (AR 6974–95, 10687–711). Further, and more significantly, there is no mention of waiver or procedural default in the OHA Director's perfunctory treatment of the non-jurisdictional points of appeal. (AR 8333). The only mention of NEPA in the OHA Director's decision was in a recognition that the issues presented in the filings "were not simple and easily resolvable matters." This was followed by a statement outlining what BLM had been obligated to consider that included: "BLM's approval process was subject to the National Environmental Policy Act." (AR 8329).[20]

This confused state of affairs raises a number of questions that have not been addressed in the briefing here. That is: Did BLM waive its argument of procedural default at the administrative level by failing to lodge an objection to consideration of the NEPA arguments in its briefing before the IBLA/OHA and addressing the claims solely on the merits, as the MHA Nation argues? What impact does the fact that Slawson raised the issue, albeit as an intervenor, have? Did the OHA Director actually consider the NEPA and IM 2009-078 arguments, but, *sub silentio*, reject them in concluding BLM had not erred? Can this court rely upon procedural default at the administrative level as grounds for not considering the NEPA arguments when the OHA Director did not address the issue? What about the OHA Director's discretion to consider claims not previously raised under the rubric of "exceptional circumstances" and the MHA Nation's arguments in the appeal to the IBLA/OHA invoking that exception?[21]

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[20] While the IBLA ALJ did not get beyond consideration of whether a stay should be issued before the OHA Director took over the appeal, he likewise made no mention of any procedural default and stated the issues to be decided on appeal included whether BLM misapplied IM 2009-078 and otherwise failed to comply with its NEPA obligations. (AR 7004–06).

[21] The prohibition in 43 C.F.R. § 4.410(c) against raising issues for the first time in an appeal to the IBLA clearly is not jurisdictional. See E.P.A. v. EME Homer City Generation, L.P., 572 U.S. 489, 512 (U.S. 2014). Further,

BLM and Slawson also argue the MHA Nation has defaulted on its IM 2009-078 and NEPA arguments by failing to plead them in the complaint. (Doc. Nos. 80, p. 7; 81, p. 129). The only response made by the MHA Nation was to contend that the "multiple undeveloped, and at times contradictory, procedural arguments . . ." lacked merit, focusing upon its arguments for why the claims had properly been raised in the proceedings below. Apparently resting on its contention that the BLM and Slawson had failed to properly develop their arguments for waiver or procedural default, the MHA Nation made no attempt to point to where in the complaint it had plead it IM 2009-078 and NEPA arguments.

In reviewing the complaint, there is an argument to be made that the only substantive point of error actually plead is that set forth in paragraph 72, which is limited to the claim that BLM was required to give effect to the Tribe's Setback law. However, a more generous reading (and one that appears to have been made by BLM and Slawson) is that the complaint also asserts substantive claims for why BLM's approval of the APDs was arbitrary and capricious. Those being: BLM's non-compliance with the NDRMP (Paragraphs 28–32); BLM failing to give effect to the COE O&GMP's purported setback requirements (Paragraphs 33–36); BLM's failure to give effect to the BIA BA/BE's 1,000-foot setback (Paragraphs 37–40).

Nowhere in the complaint, however, is there a specific reference to IM 2009-078, NEPA, or a specific NEPA deficiency. The only possible oblique reference is in paragraph 71 to "substantial arguments before the Board [*i.e.*, the IBLA] and the OHA," but, arguably, that reference is in the context of the OHA Director's alleged procedural error in failing to address the arguments. Also, the

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for BLM to rely upon the rule here, it was obligated to pursue its argument during the administrative appeal. Cf. id. But, even if Slawson's objection was sufficient, there is still the problem of the OHA Director not having relied upon the procedural default specifically and arguably deciding all points raised by the MHA Nation on the merits, albeit summarily. Further, when the MHA Nation moved the OHA Director to reconsider her decision, neither BLM nor Slawson requested the OHA Director to address the claimed procedural default or otherwise clarify her decision.

MHA Nation did allege failure to comply with BLM's NDRMP, which is planning document that does appear to reflect both policy choices and NEPA requirements.

The court might very well be on solid ground in concluding that the MHA Nation waived or procedurally defaulted upon its IM 2009-078 and NEPA arguments by failing to specifically reference them in the complaint. On the other hand, (1) the court functions here as an initial appellate court, (2) the IM 2009-078 and NEPA arguments were made below (with one possible exception discussed later), (3) there is no issue of BLM and Slawson having not conducted the requisite discovery because of being misled by what is at issue since the parties agree the court is limited in this instance to the administrative record, and (4) it appears neither BLM nor Slawson can claim demonstrable prejudice at this level (nor have they attempted to do so) since the IM 2009-078 and NEPA arguments for the most part were briefed on the merits as part of the IBLA/OHA appeal and again here in the MHA Nation's opening brief. Even at this late date, the court may be hard pressed not to grant an amendment to the pleadings to conform to the arguments that have made in the briefing here and that were argued in the appeal to the IBLA/OHA given the lack of demonstrable prejudice.

In this case, the court need not wrangle with these difficult procedural questions. This is because the court is able to dispose of the case based upon BLM's and Slawson's alternative arguments that the IM 2009-078 claim and the NEPA arguments fail on the merits.

4. The State Director's conclusion that Situation 2 applied was not arbitrary or capricious

As already observed, the MHA Nation contends BLM erred when it considered Slawson's APDs under Situation 2 of IM 2009-078 when it should have done so under Situation 3 and that this led to BLM's NEPA review purportedly being deficient.

In reviewing the record, there is reason to believe that, while the State Director concluded the appropriate guidance was Situation 2, the BLM Field Office in doing the work did not distinguish between Situation 2 and 3 and in fact fulfilled all of the requirements of Situation 3 relevant to the Torpedo Project.[22] But putting that aside, the State Director's conclusion that the circumstances of the Torpedo Project fell within Situation 2 was not arbitrary or capricious based on the record here for the reasons discussed next. Further, as discussed later, the EA does appear to have gone beyond what Situation 2 might strictly have required and, in fact, satisfied Situation 3.

As noted above, Situation 3 applies when the location of the well pad on non-federally owned surface and minerals is based on the downhole location of the federal wells and Situation 2 applies when it is not. In contending that Situation 3 applied here and not Situation 2, the MHA Nation points to an email from one of Slawson's employees stating that a move to the north would increase the costs of drilling all of the wells and reduce recovery from the "Bandit Federal lateral." (AR 2513).[23] It also points to the locations of the federal mineral and non-federal minerals relative to the well pad and notes that the targeted federal minerals are closer. BLM and Slawson disagree.

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[22] This is because: (1) the Decision Record referred generally to IM 2009-078 and stated that BLM was responsible for considering the "direct, indirect, and cumulative effects of the construction and operation [of the wells] as was done in the EA[;]" (2) the EA did consider alternative well pad locations; (3) Slawson submitted APDs for all of the wells and the EA treated them all the same; (4) the EA was comprehensive and appears to have satisfied Situation 3's requirements. The MHA Nation points to the statement in the Decision Record: "The obligation to protect the surface, environment, and interest of the surface owner remain with the surface owner, the lessee, operator, and the state of North Dakota." However, this statement simply emphasizes that others have immediate responsibility for the fee land upon which the well and facilities pads are located, which is true for all three situations covered by IM 2009-078. In fact, as already discussed, the reason for IM 2009-078 was to address the various scenarios that arise when the well pad is located off-lease on fee land not owned by the federal government and other authorities have jurisdiction in terms of land use.

[23] It appears the increased costs and the reduction of in recovery mentioned in the email are in all or in part in reference to the move of the well pad from Slawson's originally proposed location to the one ultimately selected further to the north. And, that it was not related to the .5 mile setback alternative that was eliminated without detailed analysis because of the loss of the ability to develop the mineral acreage that would be beyond the range of the horizontal wells. In short, it appears the MHA Nation has taken the discussion in the emails out-of-context. (AR 2513–15).

As an aid to determine which Situation applies, the IM sets forth short lists of non-exclusive factors that "may" be considered for each of the two Situations as follows:

> Situation 2 may apply if, for example:
>
> - It is apparent that the well pad will be constructed close to the center of the private or state minerals reached by the multiple-wells on the pad. The pad will not be placed closer to the boundary of the Federal minerals to shorten the drilling distance to the Federal minerals.
> - The well pad is selected to achieve the most efficient development of the targeted reservoir in accordance with applicable spacing unit(s).
> - The operator has not stated that the well location was selected to improve access to the Federal minerals.
>
> * * * *
>
> Situation 3 may apply if, for example:
>
> - The Federal lease contains a No Surface Occupancy lease stipulation for the adjoining BLM land.
> - It is apparent that the well pad will be constructed close to the boundary of the Federal minerals to shorten the drilling distance to the Federal minerals.
> - The operator has stated that the well location was selected to improve access to the Federal minerals.

In addition, there is attached to the IM several schematics showing which Situation applies to some of the possible factual scenarios. (AR 5246–47, 5249–51).

It is clear from the foregoing that some judgment is required in determining whether Situation 2 or 3 applies to a particular circumstance. For example, the situation presented here is not one where the well pad is surrounded all or in substantial part by the federal and non-federal minerals, thereby making relevant the non-binding factor of whether the well pad is near the "center" of the minerals to be developed. Rather, the situation in this case is that the federal and non-federal minerals are located beneath Lake Sakakawea and are all to the south or southwest of the onshore well pad. In this situation, the Lake, with some amount of setback, is a constraining factor in terms of locating the

well pad further south or to the west. Hence, the only other potential locations are to north and northeast. Further, as indicated by Appendix Exhibit 1 showing the locations of the federal and non-federal minerals, it is the non-federal minerals that are located at the furthest reaches from the well pad and that the same would be true if the well pad was moved further north or to the northeast.

It is against this backdrop that the State Director concluded Situation 2 applied. While the State Director did not provide an explanation for his conclusion, there is record evidence to support that the well pad's location was primarily dictated by the location of the non-federal minerals. That being: (1) the practical limits on the reach of the horizontal wells, and (2) moving the well pad further to the north or northeast would impact the ability to recover the non-federal minerals at the outer reaches, but the not bulk of the closer-in federal minerals. (AR 6402, 8111). Further, there is evidence supporting the conclusion that the facts meet the Situation 2 example set forth above where the location of the well pad is chosen to maximize the recovery of the state-created drilling unit outlined in Appendix Exhibit 1and not specifically the down-hole locations of the federal wells. (AR 8111).

The disposes of the MHA Nation's IM 2009-078 claim—for what it is worth. It should also dispose of the Tribe's embedded NEPA arguments—taking the Tribe as its word that its NEPA arguments arise as a consequence of BLM having applied the wrong Situation and this was the "fighting issue."[24] Nevertheless, the undersigned will turn to the final reason why the Tribe's IM 2009-078 claim fails, which is that BLM's environmental assessment in fact satisfied Situation 3.

[24] Notably, the MHA Nation has not argued that NEPA was violated even if BLM correctly concluded Situation 2 applied. The obvious reason is that it would have exposed the fact that, for most of its NEPA arguments, IM 2009-078 is beside the point.

5. The scope of BLM's environmental assessment was sufficient to satisfy Situation 3

As noted earlier, Situation 3 in IM 2009-078 requires a more expansive NEPA consideration than Situation 2. While under all three Situations the environmental impacts from the drilling and operation of the wells targeting federal minerals has to be considered, Situation 3 requires, as opposed to Situation 2, a more robust consideration of the environmental impacts of wells targeting the non-federal minerals as well as to consideration of the"the direct, indirect, and cumulative effect of the siting and construction of the well pad and adjacent access road, utilities, pipelines, and other related activities . . . [,]" including alternative well pad locations and reclamation of the well pad site. (AR 5246– 47). Contrary to the contentions of the MHA Nation, it does appear that BLM's review did all of these things, and was not restricted to the more limited consideration permitted by Situation 2. That is:

- The EA considered five alternatives as outlined earlier. Reasons were offered for why two were excluded from a detailed analysis. Of the remaining three alternatives, two considered alternative well pad locations with the third being a "no action" alternative.
- The EA performed a "detailed analysis" for the two proposed well pad locations and the "no action" alternative, which included consideration of: the well site and facilities pad areas; other infrastructure, including the access road, and flowlines; drilling, casing, cementing, completion and commercial production operations; housing and waste management; drill-hole bottom locations; reclamation; best management practices; and mitigation and spill plans. (AR 6375–6409).
- The EA analyzed potential impacts to land resources, water resources (including both

surface and groundwater), air quality, biological resources, cultural resources, socioeconomics, resource use patterns, and environmental consequences. (AR 6409–6475).

- The EA also considered the "cumulative impacts" of the Project "over time" and "in combination with similar events in the area." (AR 6476–88).

In short, even if Situation 3 of IM 2009-078 applied, it was complied with. While again that should dispose of the NEPA arguments based on the MHA Nation's contention the arguments arise as a consequence of the failure to apply Situation 3, the undersigned will address the NEPA arguments specifically.

6. The NEPA arguments lack merit

a. Preliminary points

Before turning to the MHA Nation's arguments for why what BLM did to comply with NEPA as just outlined was not enough, several points are helpful for purposes of perspective.

First, there is another reason why what BLM needed to do to comply with NEPA was limited apart from any consideration of IM 2009-078. That is the fact that the scope and depth of what BLM was required to consider was limited in view of the conclusion reached in the FONSI that approval of the APDs did not constitute a major federal action based on its finding of no significant environmental impact. That is, with a FONSI determination, BLM was not required to prepare a full-blown Environmental Impact Statement ("EIS")—even though, between the detailed BA and EA, it may have come close in terms of substance. See, e.g., Department of Transportation v. Public Citizen, 541 U.S. 752, 757–58 (2004) ("Department of Transportation"); Olmsted Citizens for a Better Community v. U.S., 793 F.2d 201, 204 (1986) ("Olmsted") 40 C.F.R. § 1501.5. In this regard, the Eighth Circuit in Olmsted stated the following:

> The National Environmental Policy Act, while embodying substantive goals for the preservation of our physical environment, imposes basically procedural obligations in pursuit of these goals. Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227, 100 S.Ct. 497, 499, 62 L.Ed.2d 433 (1980) (per curiam). Federal decisionmakers are required at the formative stages of planning to be fully informed about and make well-reasoned judgments regarding the environmental effects of their proposed actions. Id.; Kleppe v. Sierra Club, 427 U.S. 390, 409, 96 S.Ct. 2718, 2729, 49 L.Ed.2d 576 (1976). Such consideration is assured through the development of detailed statements, which have come to be known as "environmental impact statements," in connection with all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). An environmental impact statement need not be prepared if the federal action will have no significant environmental impact, and the burden is on the challenger to raise a substantial environmental issue based on facts which were omitted from consideration in the administrative record. Winnebago Tribe v. Ray, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836, 101 S.Ct. 110, 66 L.Ed.2d 43 (1980). Even once such a showing has been made, the negative determination on environmental impact will be upheld if the agency can support the reasonableness of its decision. Id.; Minnesota Public Interest Research Group v. Butz, 498 F.2d. 1314, 1320 (8th Cir.1974) (en banc).

Olmsted, 793 F.2d at 204.

Second, NEPA's obligations are procedural. That is, NEPA does not mandate a particular result, it only "imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposal and actions." Department of Transportation, 543 U.S. at 756–57. For example, to the extent that NEPA requires consideration of cultural impacts, NEPA is complied with if the discussion of those impacts is sufficient under the circumstances to assist in making a reasoned judgment. What is not a NEPA claim is an allegation that BLM came to the wrong decision because of the cultural impacts. In arguing its points of purported NEPA violation, the MHA Nation blurs this distinction.

Third, in terms of this court's consideration of the NEPA arguments, it is important to keep in mind that the arbitrary-and-capacious standard outlined earlier applies. See also Department of Transportation, 543 U.S. at 763.

b. Argument that the EA failed to more robustly consider alternative well-pad locations

The MHA Nation claims the EA was deficient in not more robustly considering alternative well pad locations. Of all of the NEPA arguments, this one that does not appear to have been mentioned in some fashion in the briefing before the IBLA/OHA and arguably would be objectionable for that reason. Nevertheless, it lacks merit.

Before turning to the specifics, the FONSI determination limited the extent to which BLM was required to consider alternatives apart from IM 2009-078's attempt to parse what is a federal action and consequently limit what NEPA requires in certain situations. In Olmsted, the Eighth Circuit addressed why the consideration of alternatives need not be as robust when there has been a FONSI determination as follows:

> Furthermore, we agree with those circuits which reason that the range of alternatives that reasonably must be considered decreases as the environmental impact of the proposed action becomes less and less substantial. E.g., River Road Alliance, Inc. v. Corps of Engineers of the U.S. Army, 764 F.2d 445, 452 (7th Cir.1985), cert. denied, 475 U.S. 1055, 106 S.Ct. 1283, 89 L.Ed.2d 590 (1986); City of New York v. United States Department of Transportation, 715 F.2d 732, 744 (2d Cir.1983), cert. denied, 465 U.S. 1055, 104 S.Ct. 1403, 79 L.Ed.2d 730 (1984). As the Second Circuit has stated, it is "something of an anomaly" to require that an agency search for more environmentally sound alternatives to a project which it has determined, through its decision not to file an impact statement, will have no significant environmental effects anyway. Id.; cf. Hanly v. Kleindienst, 471 F.2d 823, 837 (2d Cir.1972) (Friendly, C.J., dissenting) (warning of danger of requiring procedures nearly as burdensome as with impact statement despite insignificance of environmental effects), cert. denied, 412 U.S. 908, 93 S.Ct. 2290, 36 L.Ed.2d 974 (1973).

Olmsted, 498 F.2d. at 208–09; see also Missouri Mining, Inc. v. I.C.C., 33 F.3d 980, 984 (8th Cir. 1994) ("Missouri Mining") (stating that the range of alternatives that need be considered is narrow with a finding of no significant environmental impact).

Here, the EA did consider alternatives and concluded that the location for the well pad finally decided upon would likely not have significant environmental impacts, particularly with the mitigation measures employed, and there is support for that finding as discussed in more detail later.

Further, the fact that the risk to Lake Sakakawea would be less with an even greater setback was obvious. That being the case, it cannot be concluded that BLM's not having considered in more detail an alternative further setback from the one that was determined to likely have no significant impact violated NEPA.[25]

c. Argument that the EA failed to consider the precedential impacts of the approval of the APDs

The MHA Nation's argues that the EA was deficient in not considering the precedential impacts of approving APDs using a well pad so close to Lake Sakakawea. Essentially, the same analysis applies. The FONSI concluded that approval of the APDs would not be precedent-setting and gave reasons why as discussed earlier. (AR 6511). Further, there is support in the record for this conclusion. For example, one of the relevant considerations with respect to the ultimate location of the well pad here was topography, *i.e.,* the fact it was located on higher ground and out of the direct line-of-sight from the shore. The same might not be true for another well pad setback the same distance. Another relevant consideration was the ability to locate the operational facilities at a more remote location. That may not be true for other locations. Likewise, for other locations, the use of the immediately-surrounding land may different. In fact, what happened in this case illustrates these points. The closer-to-the-Lake well pad location initially proposed by Slawson proved to be

[25] Slawson contends that a fiber-optic cable used by the United States Air Force for a nearby nuclear weapons facility that runs 10 feet from the northern border of the well pad prohibited Slawson from moving the well pad further from the Lake. Slawson did raise this point after it intervened in the administrative appeal. However, it offered nothing more than a declaratory statement to this effect and it is not clear whether Slawson is claiming the presence of the fiber-optic cable purportedly prohibited a slight move to the north or any move of the well pad to the north–such as back to the location of the facilities pad, for example. Notably, in all of the discussions among FWS, BLM and Slawson about constraining factors in moving the well pad prior to the approval of the APDs, there does not appear to be one mention of the fiber-optic cable. Further, there is no indication that BLM considered the significance of the presence of the cable, much less discussed with the Air Force what its concerns were and/or whether it would be possible to move the cable. Finally, there is no indication that the OHA Director relied upon the fiber-optic cable as being a constraining factor in her summary disposition. Hence, the undersigned has not relied upon this point in making the recommendations set forth below.

unworkable from an environmental standpoint given its closer proximity to critical habitat and the Van Hook recreational area.

In terms of what law applies, BLM's approval of Slawson's APDs with a 600-foot setback (and with operational facilities further setback) sets no clear precedent for a well pad on land that the Tribe does have jurisdiction over. Further, even with respect to non-Indian owned fee land, BLM does not have regulatory authority over the land use as discussed earlier and the regulatory milieu may change. That is, the State of North Dakota or one of its political subdivisions might choose to impose setback requirements. Further, even in the absence of that, BLM's policies might change in terms of what it might decide to do in terms of lease or permit conditions.

Finally, it is difficult to understand how this well pad location sets any more of a precedent in the sense that the MHA Nation contends than the many other well pads located approximately the same distance from Lake Sakakawea, or closer, as outlined earlier in the exhibit listing the wells and Appendix Ex. 2 that comes from the cumulative impacts section of the EA (AR 6476–78).

In short, it cannot be concluded that the FONSI's determination there would be no precedential impact violated NEPA.

d. Argument that the EA did not sufficiently address the cultural importance of Lake Sakakawea to the MHA Nation

The MHA Nation contends the NEPA analysis was deficient in not addressing the cultural importance of Lake Sakakawea to the Tribe.

Here, the BA and EA recognized the importance of Lake Sakakawea as a public resource deserving of protection with the EA concluding that neither Alternative 1 nor the Alternative 2 was expected to have an adverse impact on Lake Sakakawea, including water quality. (AR 6418–21). In addition, Section 4.5 of the EA focused specifically on the potential impacts to cultural resources

and came to the same conclusion—albeit focusing primarily on whether any archeological or historical sites would be impacted. (AR 6445–47).

At least for a BA/FONSI, it was sufficient for purposes of NEPA here that Lake Sakakawea was identified as an important public resource and that the potential environmental impacts to it were considered and determined likely not to be significant. A discussion of the reasons why the resource is existentially important to the Tribe was not required in this instance. Cf. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 255 F. Supp. 3d 101, 131 (D.D.C. 2017) (discussing the point in the context of EIS requirements and citing other authority).

Finally, as discussed earlier, BLM Field Office personnel met with Tribal officials to discuss their concerns prior to the approval of the APDs, and this discussion included a discussion about the cultural significance of the Lake to the BLM Nation. Further, BLM's *contemporaneously prepared* Internal Communication Plan stated: "The BLM understood that Lake Sakakawea is an important resource and culturally significant to the Three Affiliated Tribes." (AR 6499). This indicates BLM was well aware of the cultural importance of the Lake to the Tribe when it reached its decision in this case and any deficiency in the EA failing to more robustly discuss the point was harmless here with the FONSI determination. Cf. Prairie Band Pottawatomie Nation v. Fed. Hwy Admin., 684 F.3d 1002, 1009–10 (10th Cir. 2012); Izaak Walton League of America, Inc. v. Tidwell, No. 06–3357, 2015 WL 632140, at *17 (D. Minn. Feb. 13, 2015).

e. Argument that the EA failed to discuss the MHA Nation's and federal setbacks

Another argument of NEPA deficiency by the MHA Nation is that the BA failed to address the Tribe's and the federal setbacks. However, as already discussed, the MHA Nation's Setback Law did not apply. Further, the same is true for the purported federal setbacks, which, in any event, were

not absolute and could be deviated from. Given this and the fact the EA did address the potential environmental impacts resulting from the well pad location as outlined earlier, it cannot be concluded the EA was deficient in failing to discuss the purported setbacks specifically.

f. Argument that the EA failed to discuss Fort Berthold's rural water system as well as the MHA Nation's reserved water rights

The MHA Nation contends that the EA was deficient in its failure to discuss the potential impacts on the Fort Berthold rural water system for which the source of the water is primarily Lake Sakakawea. The MHA Nation also contends the same is true for the failure of the EA to consider the Tribe' reserved water rights.

As outlined earlier, the EA did recognize that Lake Sakakawea as an important source of water for recreation, fishing, and municipal and industrial purposes and it did address the potential impacts of the Project on the Lake, including water quality. Further, in reaching these conclusions, there is no reason to believe that BLM in issuing the BA believed that the municipal and industrial uses referenced were all downstream from Fort Berthold. In fact, BLM was aware at least from its communications with the Bureau of Reclamation as outlined earlier of the Fort Berthold Rural Water System and the four intakes the Bureau referenced.[26] Further, there is nothing in the record indicating that any of the Fort Berthold Rural Water intakes are in close proximity to the well pad and the MHA Nation has not demonstrated otherwise. In fact, as indicated earlier, the maps supplied by the Bureau of Reclamation to BLM show no intake in the immediate vicinity of the well pad and other information in the record suggests that the closest intake was the City of Parshall's and that this was several miles distant.

[26] Given BLM's extensive involvement in the area, it undoubtedly was aware that the Lake was a source of water for the Fort Berthold Rural Water System apart from what the Bureau of Reclamation advised in this case.

In view of this, it cannot be concluded that the EA was deficient, particularly with the FONSI determination, in not specifically referencing and discussing Fort Berthold's Rural Water System. The same is true for the Tribe's reserved water rights.

g. Record supports the FONSI determination

Finally, before leaving the NEPA arguments, the undersigned will touch upon the sufficiency of the FONSI determination since several of the NEPA arguments call it into question. Further, to be clear, what is at issue here is different from whether BLM's ultimate decision is arbitrary and capricious. As already discussed, the issue for purposes of NEPA is whether before making the decision BLM took into account what NEPA required. And, the issue more particularly here is whether BLM properly limited its compliance with NEPA by relying upon an EA/FONSI in lieu of preparing an EIS and complying with the procedural requirements attendant with an EIS.

This court must honor the FONSI determination if the court finds BLM "took a 'hard look' at the project, identified the relevant areas of environmental concern, and made a convincing case for its FONSI." Sierra Club v. U.S. Forest Serv., 46 F.3d 835, 838–39 (8th Cir. 1995) (citing Audubon Society v. Dailey, 977 F.2d 428, 434 (8th Cir. 1992)). Here, BLM did take a "hard look" and identified the relevant areas of environmental concern in the EA and its accompanying BA. The EA and BA have been discussed at length and that discussion need not be repeated here.

Finally, in terms of the potential impact on Lake Sakakawea that is the focus of all the MHA Nation's claims of error as well as its NEPA arguments, BLM did made a sufficient showing for its FONSI based on the review it conducted with respect to potential impacts to surface water (including water quality), cultural resources, and biological impacts (including endangered species and critical habitat). The scope of that review and what was relied upon was separately discussed earlier. In short, however, BLM concluded there likely would be no significant impact after considering:

- the distance of the well pad to the Lake;
- the information in the BA and other documents supporting the EA which indicate that: (1) the risk of an accidental release of pollutants leaving a well pad are small, and (2) the risk of any pollutants traveling a distance that is equal to or less than the 600-foot setback here in a significant amount to cause some damage to Lake Sakakawea and its shoreline to be even smaller and more remote (*i.e.*, the BIA study and Slawson's evaluation) and with the risks in this instance being further reduced by the even greater setback of the storage and loading facilities;
- the design and mitigation requirements imposed as conditions to the approval of the APDs as detailed earlier that include the employment of a "closed-loop system" and the 24-inch containment berm; and
- the lack of objection by FWS, COE, Bureau of Reclamation, NDDOH, North Dakota State Water Commission, and North Dakota Industrial Commission— federal and stage agencies who are knowledgeable about the relevant risks and the past history of drilling and well operations in the area, which includes numerous wells in the same or closer proximity to Lake Sakakawea.

Based on these points, it cannot be concluded that BLM's FONSI determination was arbitrary, capricious, or in otherwise in violation of NEPA for the reasons that have been articulated by the MHA Nation.[27]

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[27] Notably, this case is different from that presented by the high-volume interstate pipeline crossing beneath Lake Oahe (the next reservoir downstream on the Missouri River from Lake Sakakawea) that is designed to move more than a half million gallons of crude oil a day. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,, __ F.3d __, 2021 WL 244862, at *2 (D.C. Circuit Jan. 26, 2021). In that case, the D.C. Circuit recently upheld the district court's conclusion that preparation of an EIS was required in that instance because, even though the probability of a failure impacting Lake Oahe might be low, the consequences could very well be substantial if not outright catastrophic. The court said this was different from situations where a FONSI determination is appropriate given "a grave harm's

D. The MHA Nation's claim that the administrative record was not properly certified

The MHA Nation claims the administrative record has not been properly certified, contending there are issues with respect to chain-of-custody and lack of personal knowledge by those providing the record certifications. Notably, however, the MHA Nation fails to cite any authority for its chain-of-custody and purported lack-of-personal-knowledge arguments. In fact, taking the MHA Nation's arguments to their logical conclusion, a certification meeting what it claims are the standards would necessitate obtaining affidavits from every agency official that in any way touched the record. Obviously, this is not required.

In this case, there were issues with respect to the administrative record that resulted in this court ordering that the record be re-certified and certain discrepancies explained. (Doc. No. 69). This was done. BLM re-certified the record with respect to what was before it and the IBLA and counsel for the OHA Director re-certified what was before the OHA. In addition, the certifications describe how the record was assembled and maintained and provide other information satisfying the court's concerns. (Doc. Nos. 70-1, 70-2). This was more than enough to provide reasonable assurance of a complete record.

"The Court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary." Bar MK Ranches v. Yuetter, 994 F.2d 735, 740 (10th Cir. 1993); see also Ouachita Watch League v. Henry, No. 4:11-CV-00425, 2013 WL 11374520, at *2 (E.D. Ark. Sept. 30, 2013) ("absent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record") (internal quotations and citing

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probability is so low to be remote and speculative or if the combination of probability and harm is sufficiently minimal." (internal quotations omitted). Id. at *10. Here, the record supports the conclusion that the probability and harm is sufficiently minimal with the mitigative measures adopted as conditions to BLM's approval of the APDs such that an EA/FONSI suffices.

authority omitted). Here, the MHA Nation has offered nothing more than speculation of a possible problem with the record. Given that, the determinations set forth above, and the strong presumption of the record's regularity, the MHA Nation's failure-to-properly-certify claim fails.

E. The MHA Nation's claims that the OHA Director abused her discretion

The MHA Nation claims the OHA Director abused her discretion in several ways. The first is the contention that the power of the OHA Director to assume jurisdiction over a matter before the IBLA is reserved for extraordinary situations and this was not one of them. The MHA Nation, however, cites no regulation or OHA Director decision supporting this argument. The grant of authority to the OHA Director is set forth in 43 C.F.R. § 4.5(b). And, save for one exception explicitly identified, there is no limit upon the OHA Director's power to assume jurisdiction over a matter before the IBLA.

The MHA Nation claims the OHA Director assumed jurisdiction pursuant to the requests made by the BLM and Slawson without first giving it an opportunity for input. Again, the MHA Nation cites no authority for this being required. The governing regulation, 43 C.F.R. § 4.5, contains no such requirement. It requires only that the OHA Director give notice of the assumption of jurisdiction, which was done.

The MHA Nation next claims that the OHA Director's decision was arbitrary because she failed to give any detailed reasons for rejecting the points of error raised by the Tribe. Instead, according to the Tribe, the OHA Director simply relied upon this court's denial of the preliminary injunction as essentially having decided the issues.

The latter contention is wrong in two respects. First, while the OHA Director did rely upon this court's decision granting a preliminary injunction in concluding that the MHA Nation did not have jurisdiction over Slawson's well pad and that the MHA Nation's Setback Law did not apply,

this was not the only basis for these conclusions as discussed earlier. Second, the OHA Director's summary disposition of the MHA Nation's non-jurisdiction arguments was based upon her own review and not this court's earlier decision.

As for the MHA Nation's complaint of summary disposition of the non-jurisdictional claims, the governing regulations only require a written decision. There is nothing prohibiting the OHA Director from making a summary decision akin to an appellate court doing so.[28]

Finally, the MHA Nation may be arguing it was not given a meaningful opportunity to address the merits in the proceedings before the OHA Director. If so, that argument is also without merit. The MHA Nation expressed at length the reasons for why it claimed BLM acted arbitrarily and unlawfully when it sought review by the Acting State Director and this was part of the record submitted to the OHA Director. Further, the MHA Nation restated its arguments at least twice later—first, when it sought the stay from the IBLA and then again in its statement of reasons in support of its appeal. (AR 7586–606, 7275–99).

In short, there is no merit to the MHA Nation's contentions that the OHA Director abused her discretion.

V. CONCLUSIONS AND RECOMMENDATION

Based on the findings and reasons articulated above, the undersigned **RECOMMENDS** that the court **FIND** and **CONCLUDE**:

1. the MHA Nation's claim that administrative record has not been properly certified lacks merit;

2. the MHA Nation's claims of procedural error with respect to the IBLA/OHA appeal

[28] That being said, a more detailed decision by the OHA Director would have been of *substantial* benefit to the court parties here. This is particularly true for the lack of a decision on the procedural objections.

lack merit; and

3. BLM's approval of the APDs at issue in this case was not arbitrary, capricious, or otherwise in violation of the law and the MHA Nation's claims to the contrary lack merit (including the IM 2009-078 claim and NEPA arguments assuming without deciding the claims and arguments are properly before the court).

The undersigned **FURTHER RECOMMENDS** that the court **GRANT** BLM's and Slawson's motions for summary judgment (Doc. Nos. 78 & 79) to the extent of the foregoing, **DENY** the MHA Nation's motion for summary judgment (Doc. No. 73), and **DISMISS WITH PREJUDICE** the MHA Nation's complaint.

NOTICE OF RIGHT TO FILE OBJECTIONS

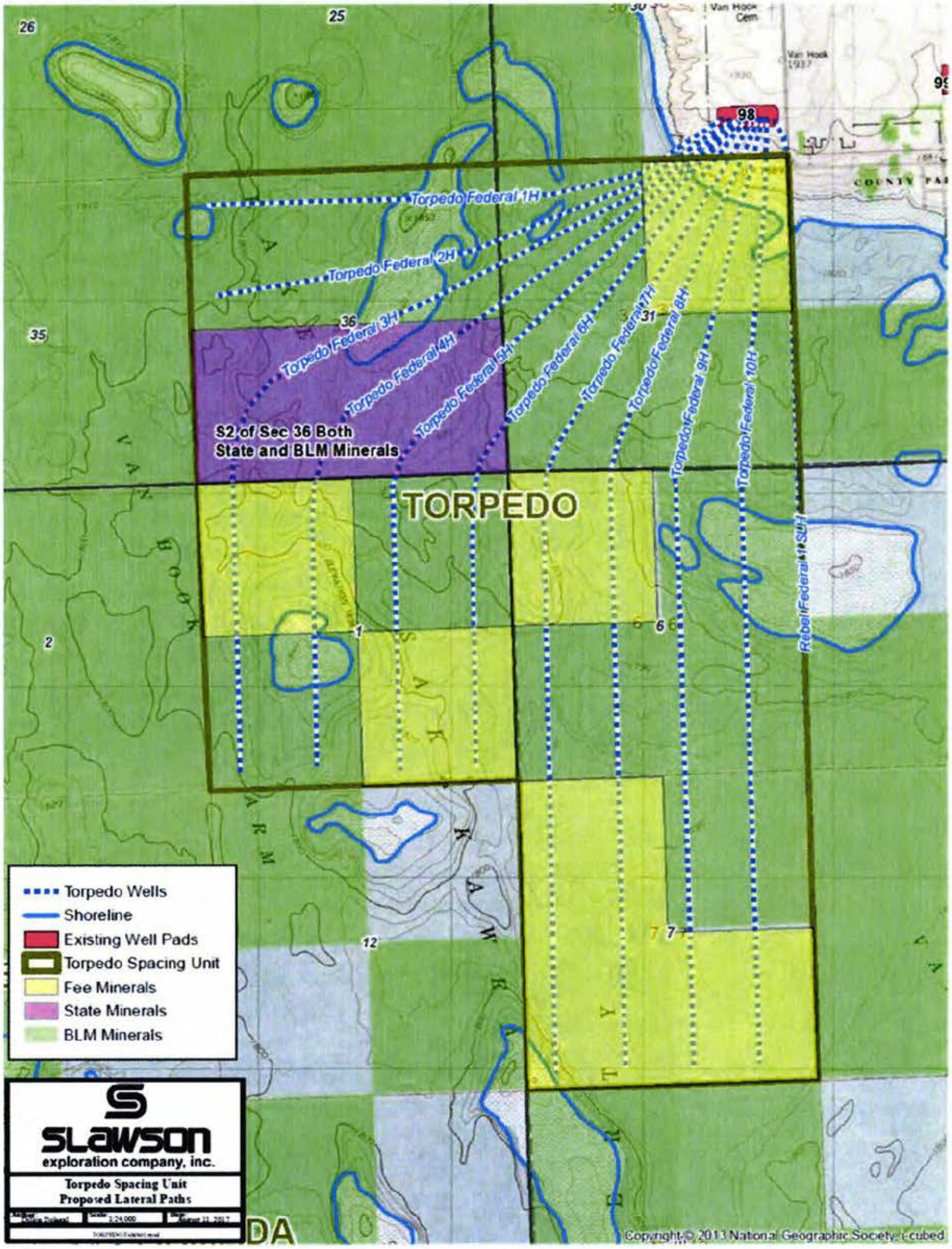
Pursuant to D.N.D. Civil L.R. 72.1(D)(3), any party may object to this recommendation within fourteen (14) days after being served with a copy of this Report and Recommendation. Failure to file appropriate objections may result in the recommended action being taken without further notice or opportunity to respond.

Dated this 22nd day of February, 2021.

/s/ Charles S. Miller, Jr.
Charles S. Miller, Jr., Magistrate Judge
United States District Court

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

Mandan, Hidatsa, and Arikara Nation Plaintiff, vs. United States Department of the Interior; Ryan Zinke, in his official capacity as Secretary of the Interior, Defendants, and Slawson Exploration Company, Inc., Intervenor-Defendant.	)	**APPENDIX TO REPORT AND RECOMMENDATION** Case No. 1:19-cv-0037



Ex. 1 to R&R

(Doc. Nos. 33-3 at p. 3; 68-4 at p. 81)

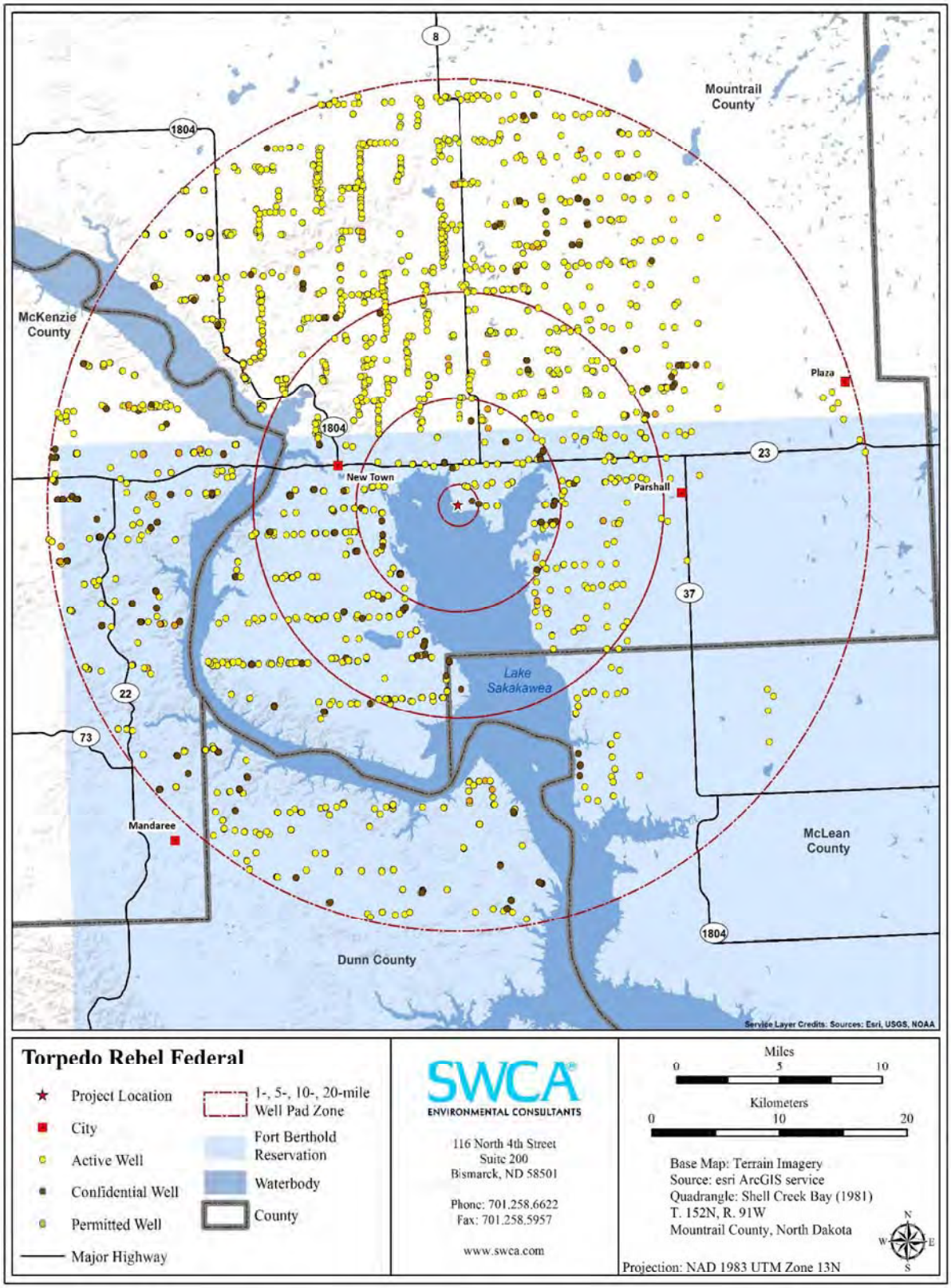


Figure 4-1. Existing and projected future oil and gas development within a 1-, 5-, 10-, and 20-mile radius of the proposed project.

Ex 2. to R&R
(Doc. No. 68-25 at p. 14)

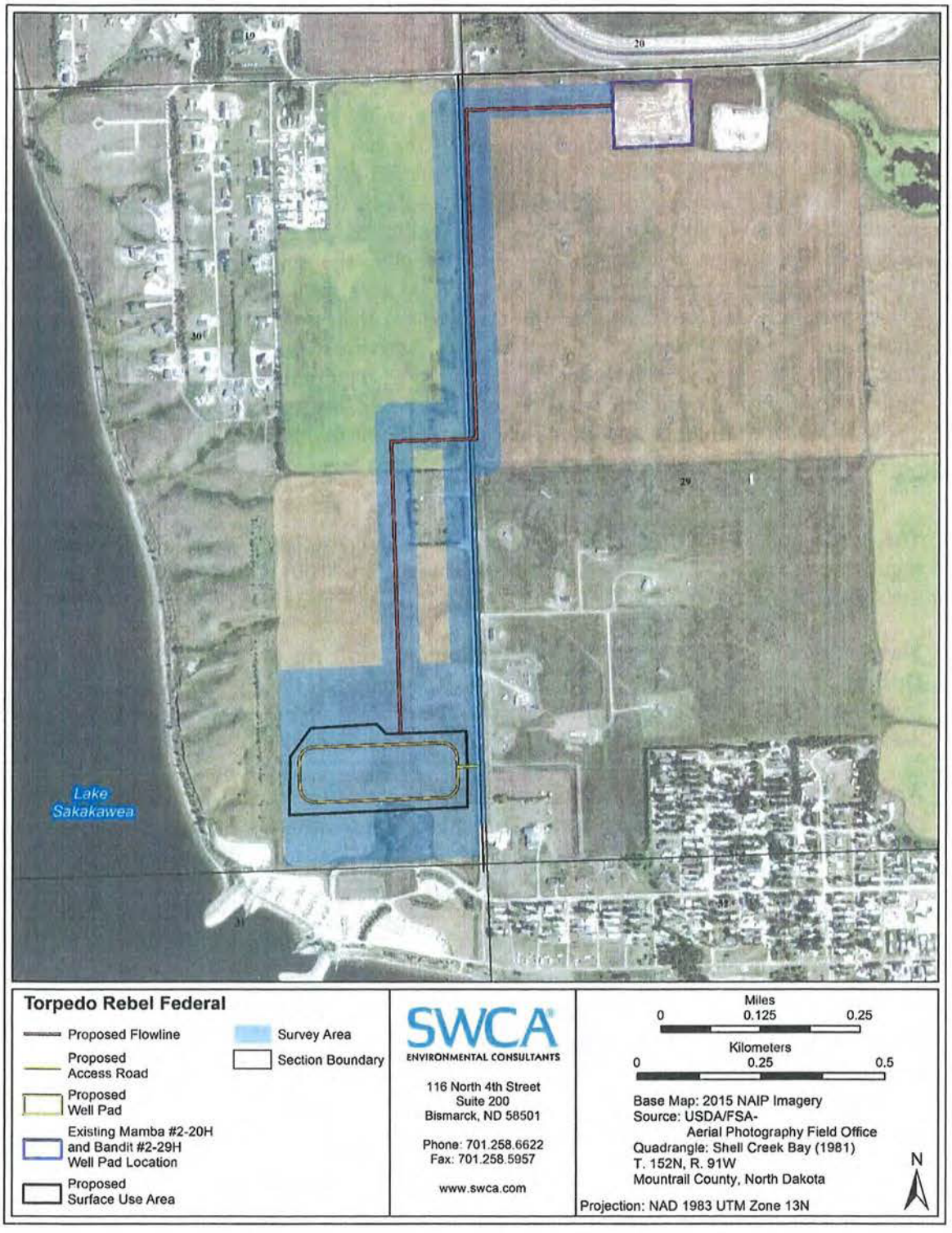


Figure 2. Well Pad, Flowlines, and Project Location and Facility Pad.

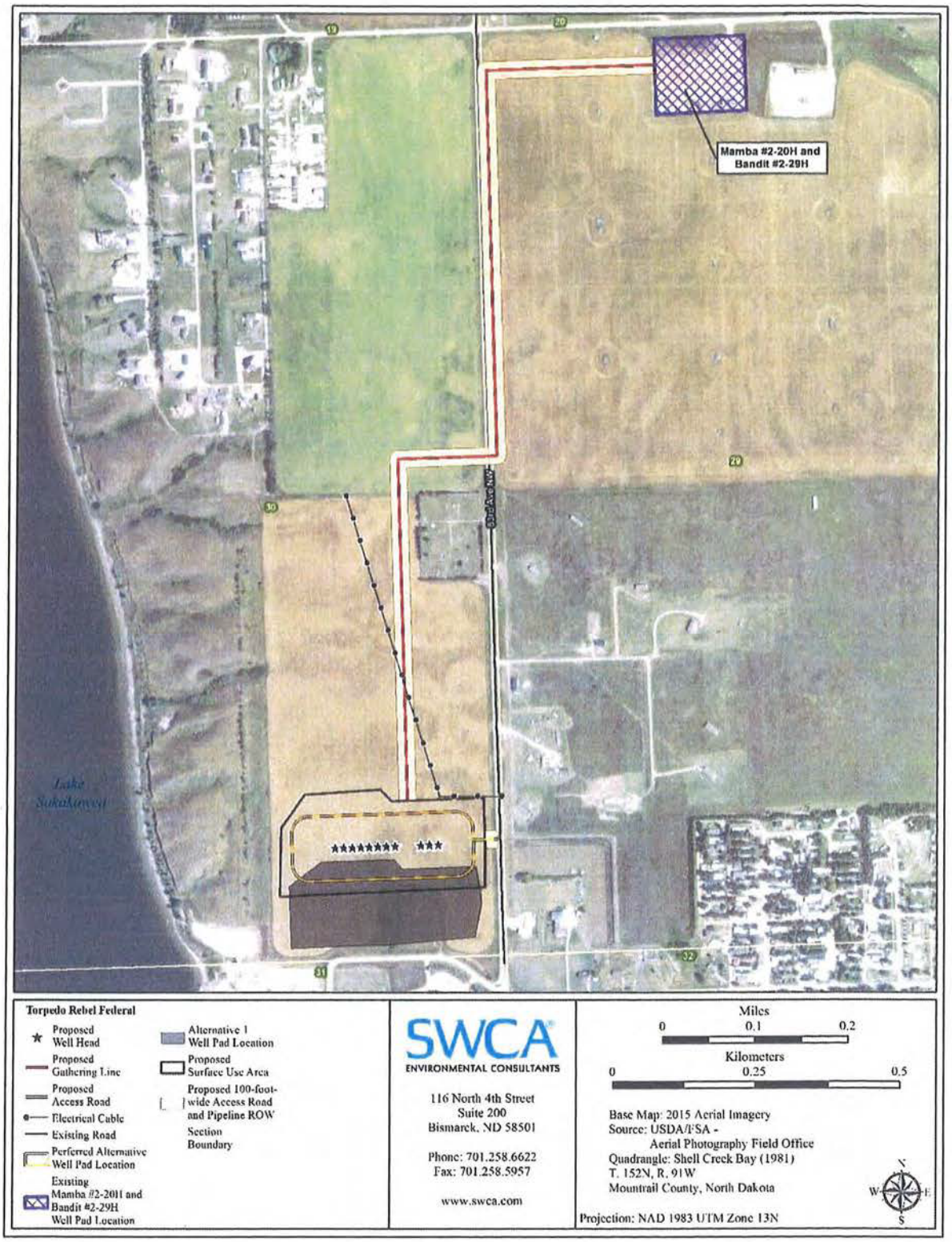


Figure 1. Locations of Alternative 1 Well Pad Location (shaded area), Preferred Alternative, and Appurtenant Facilities

Ex. 4 to R&R
(Doc. No. 67-15 at p. 306)