UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN FREDERICKS, JOHN FREDERICKS III, CASEY FREDERICKS, SHAWN FREDERICKS, AND MARY MALEE FREDERICKS,

Plaintiff

v.

THE UNITED STATES Department of Interior, *et al.*,

Defendants

Civil Action No. 1:20-cv-02458-KBJ

UNITED STATES DEPARTMENT OF INTERIOR'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

John Fredericks, Jr. ("Decedent") died intestate in 2006, owning surface and mineral interests in trust or restricted land on the Fort Berthold Indian Reservation ("Reservation"). This case is the continuation of a long-running estate dispute between Decedent's wife, Judy Fredericks ("Judy"), and Decedent's children Susan, John, Casey, Shawn, and Mary Fredericks ("Children" or Plaintiffs").

By operation of the American Indian Probate Reform Act of 2004 ("AIPRA"), following Decedent's death intestate his surviving spouse, Judy, received a "life estate without regard to waste" on the Indian land at issue. 25 U.S.C. § 2206(a)(2)(A)(i). Ownership of this property interest entitles Judy to "the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." 25 U.S.C. § 2201(10). Under AIPRA the Children are "remaindermen" meaning that their interest in the land becomes possessory when Judy's life estate without regard to waste expires upon her death. While the Decedent's estate was in probate, pursuant to the Fort Berthold Mineral Leasing Act ("FBMLA"), the Fort Berthold Agency Superintendent ("Superintendent") entered into a lease for mineral development on Decedent's Indian land. Judy, as the holder of a life estate without regard to waste, is the beneficiary of this lease. Plaintiffs' instant Motion challenges this lease as arbitrary and capricious under the Administrative Procedure Act and seeks an injunction prohibiting the United States Department of Interior from disbursing the proceeds of this lease to Judy.

Plaintiffs' motion should be denied, first, because they have not demonstrated an irreparable injury. This case concerns Plaintiffs' alleged loss of income generated from a mineral lease. Cases concerning such monetary harms are paradigmatically not irreparable. That the case concerns property is not enough to demonstrate any irreparable harm will follow

from the denial of an injunction.

Plaintiffs' motion should also be denied because they will not succeed on the merits. Plaintiffs' first merits argument is that the Superintendent never actually "executed" the lease in question—despite signing an Acceptance-of-Lessor form that was attached to the lease, which Plaintiffs do not dispute is a commonly used method of executing leases on the Reservation. This argument is unlikely to succeed on the merits. Plaintiffs primary argument, however, is that Judy's interest in the Indian land is a mere common law "life estate," and thus it is impermissible "waste" for her to benefit from mineral development on the land to the exclusion of the remaindermen Children. This argument is flatly contradicted by the applicable law. Plaintiffs' fundamental error is the assumption that Judy holds a common law "life estate" rather than the statutory "life estate without regard to waste" that was expressly created under AIPRA. Because Judy's life estate is "without regard to waste" all of the cases Plaintiffs cite that stand for the proposition that a life tenant cannot "waste" mineral resources on the estate are simply inapplicable. It was fully consistent with AIRPA for the Superintendent to execute a lease on the land during the pendency of Decedent's probate, and proper that she later determined Judy to be the beneficiary of that lease.

Plaintiffs' attempt to create a conflict between AIPRA and the FBMLA also fails; AIPRA clearly does not amend the FBMLA. The FBMLA is a narrow two-page statute that clarified procedures for leasing on the Reservation. It provides merely that income from leases is to be distributed to "all" owners of Indian land "in accordance with the interest owned by each such owner." Pub. L. No. 105-188, 112 Stat. 620, 621 (1998). Nowhere in its text or legislative history is there a hint that it was meant to limit the types of interests that it applied to. Certainly, there is nothing in the Act that purports to forbid distribution of income to the holders of a life

estate without regard to waste. Plaintiffs' attempts to read such a limitation into the Act and manufacture a conflict with AIPRA is not persuasive. To the extent the FBMLA is ambiguous as to how its income distribution provisions apply to the owner of a life estate without regard to waste created under AIPRA, the Interior Board of Indian Appeals ("IBIA") reasonably resolved this ambiguity and its interpretation is due deference. Plaintiffs are unlikely to prevail on the merits of their claims and their Motion should be denied on this basis.

Finally, the public interest factors also favor denial of the motion. Drawn out estate disputes prompted Congress to pass the Acts at issue in this suit in order to provide clarity and facilitate development of resources on Indian land to the benefit of the Indian owners of those resources. One such owner is Judy Fredericks. Her husband of many years died in 2006, but in the 14 years since his passing, Judy has been unable to fully benefit from the inheritance she is due. Instead, has spent her own time and resources defending her interests in persistent litigation in what is now a third forum. The injunctive relief Plaintiffs seek would unfairly further delay Judy's receipt of the income that by law belongs to her. Plaintiffs' motion for preliminary injunction should be denied and this long-lasting estate dispute should come to a much needed resolution.

II. BACKGROUND

A. Legal Background

1. American Indian Probate Reform Act of 2004

In the late 1800s, individual Indians were given ownership to tracts of reservation land called allotments. While the allotment policy ended in 1934 with the passage of the Indian Reorganization Act, 25 U.S.C. §§ 5101-5144, there were still many tracts of allotted land held in trust by the federal government for individual Indian owners. When such allottees died intestate

the allotments were probated under various state laws, resulting in problems including that land ownership became fractionated among multiple heirs holding land as tenants in common.[1] This fractionation increased over time, and by the 1960s half of the approximately 12 million acres of allotted trust lands were held in fractionated ownership, with over 3 million acres held by more than six heirs to a parcel. *See Hodel v. Irving*, 481 U.S. 704, 709 (1987). This prompted Congress to pass the Indian Land Consolidation Act ("ILCA"), 25 U.S.C.A. § 2201 *et seq*. and its most recent major amendment, the American Indian Probate Reform Act of 2004.

In passing AIPRA Congress recognized the problems with increased fractionalization and sought to create a "uniform Federal probate code" that would, *inter alia*, "reduce the number of fractionated interests in trust or restricted land" and "provide essential elements of general probate law . . .[to] interests in trust or restricted land." Pub. L. No. 108-374, 118 Stat. 1773, 1773-74 (2004). As relevant here the Act provides that:

> Rules governing descent of estate
>
> (A) Surviving spouse
>
> If there is a surviving spouse of the decedent, such spouse shall receive trust and restricted land and trust personalty in the estate as follows:
>
> (i) If the decedent is survived by 1 or more eligible heirs described in subparagraph (B) (i), (ii), (iii), or (iv), the surviving spouse shall receive ⅓ of the trust personalty of the decedent and a life estate without regard to waste in the interests in trust or restricted lands of the decedent.

[1] Tenancy-in-common is a form of concurrent estate in which each owner, referred to as a tenant in common, is regarded by the law as owning separate and distinct shares of the same property. By default, all co-owners own equal shares, but their interests may differ in size. Tenants in common own percentages in an undivided property rather than particular portions of the property and their deeds show only their ownership percentages. *See generally* 86 C.J.S. Tenancy in Common § 1.

25 U.S.C.A. § 2206(2).

A "life estate" is a limited ownership interest that lasts for the duration of a designated person's life. *See generally* Restatement (First) of Property § 18; *see* 25 C.F.R. § 179.2; *Estate of Patricia Marie Manahan*, 62 IBIA 150, 153 (2016). "Without regard to waste" is defined in the Act as: "with respect to a life estate interest in land, that the holder of such estate is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." 25 U.S.C. § 2201(10); 25 C.F.R. § 179.2; 25 C.F.R. § 212.21(c). *See generally* Restatement (First) of Property § 141 (1936) (describing life estate "without impeachment of waste"); 78 Am. Jur. 2d Waste § 8 ("Acts or conduct that would otherwise constitute waste may be authorized or legalized by an appropriate provision…"); Black's Law Dictionary 1824 (10th ed. 2014) ("waste" is "[p]ermanent harm to real property committed by a tenant (for life or for years) to the prejudice of the . . . remainderman.").

Before AIPRA, life estates were subject to impeachment for waste, meaning holders of a life estate could not deplete the value of the land to the determinant of remaindermen. *See* Final Rule, 73 Fed. Reg. 67256, 67286 (Nov. 13, 2008). After AIPRA, the law and implementing regulations provide instead that "[t]he holder of a life estate without regard to waste may cause lawful depletion or benefit from the lawful depletion of the resources." 25 C.F.R. § 179.202. The regulations also provide that "[t]he Secretary must distribute all income, including bonuses and royalties, to the life estate holder to the exclusion of any holders of remainder interests." 25 C.F.R. § 179.201. Upon the death of the life estate heir, the life estate terminates and the land interests pass as a "remainder" interest, it does not become part of the probate estate of the life estate holder. *See* 25 C.F.R. § 179.4; *Estate of Manahan*, 62 IBIA at 153). *See generally* Restatement (First) of Property § 156 (1936).

2. Fort Berthold Mineral Leasing Act

Public Law 105-188, July 7, 1998, 112 Stat. 620, commonly known as the Fort Berthold Mineral Leasing Act ("FBMLA") was passed "[t]o permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation in any case in which there is consent from a majority interest in the parcel of land under consideration for lease." The FBMLA amended the Mineral Leasing Act of 1909, codified at 25 U.S.C. § 396, which had been interpreted as requiring the Secretary of the Interior to secure the consent of all owners holding an undivided interest in a parcel of land that would be the subject of a mineral lease. *See* S. Rep. No. 105-205, at 1, 4, 7 (1998). Because of the fractionalization problem discussed in Section II(A)(1), above, this made leasing difficult on the Reservation.[2] Additionally, before the FBMLA was passed, testimony before Congress revealed that there were nearly 300 estates involving land on the Reservation in the process of probate, effecting as many as 1,200 tracts of land and as many as 12,000 undivided interests in those tracts. These combined problems were a significant disincentive to investment in mineral development on the Reservation for the benefit of individual interest holders. *Id*. The FBMLA was passed to address these twin problems and facilitate mineral development on the reservation. *Id*. In relevant part the Act provides:

> (A) IN GENERAL.—The Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if—
>
> (i) the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement (including any interest covered by a lease or agreement executed by the Secretary under paragraph (3)) consent to the lease or agreement; and

[2] A Government Accountability Office report found that of the approximately 2,600 tracts of land on the Reservation 999 had three to ten Indian owners, 675 had eleven to twenty-five Indian owners, 377 had twenty-six to fifty Indian owners, 174 had fifty-one to one hundred Indian owners, and 33 had from one hundred one to three hundred Indian owners. *Id*

> (ii) the Secretary determines that approving the lease or agreement is in the best interest of the Indian owners of the Indian land.
>
> …
>
> DISTRIBUTION OF PROCEEDS.—
>
> The proceeds derived from a lease or agreement that is approved by the Secretary under subparagraph (A) shall be distributed to all owners of the Indian land that is subject to the lease or agreement in accordance with the interest owned by each such owner
>
> (3) EXECUTION OF LEASE OR AGREEMENT BY THE SECRETARY.—
>
> The Secretary may execute a mineral lease or agreement that affects individually owned Indian land on behalf of an Indian owner if—
>
> (A) that owner is deceased and the heirs to, or devisees of, the interest of the deceased owner have not been determined;

Pub. L. No. 105-188, 112 Stat. 620.

B. Factual and procedural Background

1. The Estate Dispute

John Fredericks, Jr. died intestate on December 27, 2006. At the time of his death he owned surface and mineral interests in trust or restricted land on the Fort Berthold Reservation. He was survived by his wife of approximately 20 years, Judy, and nine children, seven of whom were determined to be heirs to the trust estate. When an Indian who owns trust property dies intestate, the applicable law and regulations generally provide for a Judge within the Department's Office of Hearings and Appeals to determine the heirs of the decedent. *See* 43 C.F.R. § 30.120; 25 U.S.C.A. § 372.[3]

[3] The probate process is defined by regulation to include several steps. It begins when BIA is informed of the death of an individual whose estate the agency is obligated to probate. 25 C.F.R. § 15.103. BIA then prepares the "probate file" which requires BIA to determine the identity of potential heirs to the estate. 25 C.F.R. §§ 15.105(d), 15.201, and 15.202(b). Once the probate file is complete, BIA forwards the file to the Office of Hearings and Appeals within the

At a probate hearing in 2008, Indian Probate Judge James Yellowtail considered arguments concerning the estate's distribution, including that AIPRA did not apply to the estate. *See Estate of John Fredericks, Jr.*, 57 IBIA 204, 205 (2013). Judge Yellowtail issued a Decision on June 20, 2009. *Id*. He determined that because Decedent died after AIPRA's effective date (June 20, 2006), AIPRA's provisions for descent and distribution applied to the probate of Decedent's estate. *Id*. He found that Judy, as the surviving spouse, was entitled to a "life estate without regard to waste," under AIPRA, 25 U.S.C. § 2206(a)(2)(A)(i). *Id*. Judge Yellowtail found Decedent's seven children would receive a 1/7 remainder interest in the life estate properties and Susan, as the oldest surviving child, would receive all of the less-than-5% land interests under AIPRA's "single heir rule," 25 U.S.C. § 2206(a)(2)(D)(iii)(I). *Id*. Judge Yellowtail summarized AIPRA and its regulations, holding that Judy's "life estate without regard to waste" meant that she may "cause minerals to be depleted from [the properties subject to her life estate] to the exclusion of the remaindermen" and she will receive "all royalties and/or income generated" from those properties. *Id*. He also held that mineral interests held in trust are subject to AIPRA. *Id*.

The Plaintiffs petitioned for rehearing, arguing, *inter alia*, that AIPRA was not in effect when Decedent died; that AIPRA and its implementing regulations are unconstitutional; that they were denied due process; and that Decedent's marriage to Judy was never sufficiently established. *Id*. An Administrative Law Judge denied rehearing on May 31, 2011. The Judge found, *inter alia*, that AIPRA applied to the trust estates of Indians who died on or after its

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Department for adjudication. 25 C.F.R. §§ 15.401(a) and 15.402. As part of the probate process a judge within the Office of Hearings and Appeals determines the heirs to the estate. 43 C.F.R. § 30.120(c).

effective date and that it superseded any conflicting regulations at that time. *Id*. The Plaintiffs appealed the Rehearing Order to the IBIA. On appeal, the Plaintiffs argued, *inter alia*, that AIPRA was not effective on its statutory effective date and that the Administrative Law Judge erred when he failed to include in his order a statement describing AIPRA's treatment of permanent improvements. The IBIA rejected these arguments as well as other arguments as outside of its jurisdiction. *Id*. With the IBIA affirming the Rehearing Denial on July 11, 2013, Judge Yellowtail's Decision determining heirs became final for the Department Plaintiffs did not seek district court review of the probate determinations as upheld by the IBIA.

2. The Oil Lease Dispute

In 2008, while the probate proceedings discussed above were occurring, the Fort Berthold Reservation was experiencing an unpresented oil boom. The BIA Superintendent entered into a lease (the "Oil Lease") for oil development on the descendants' allotment pursuant to the provisions of the FBMLA. The Oil Lease was signed by Judy Fredericks for the "Estate of John Fredericks, Jr. deceased" and by Kodiak Oil and Gas (USA), Inc., as lessee, witnessed by two witnesses, and notarized on February 4, 2008. The Superintendent then executed the Lease on April 23, 2008. *Id*. The Superintended executed the lease through a form entitled "ACCEPTANCE OF LESSOR TO BE ATTACHED TO OIL AND GAS MINING LEASE" ("Acceptance Form") on behalf of "John Fredericks Jr. (Estate)." *See* ECF No 1-4; 1-3. The Acceptance-of-Lessor form recites the bonus amount, rental rate, royalty rate, and duration of the lease, and states that it "shall be attached to the formal lease contract, when signed by the lessee, and become a part thereof, with the same effect and in lieu of my signature thereon." *Id*. The Lease was assigned Contract No. 301 7420A49654 in the Department's Trust Asset and Accounting Management System ("TAAMS").

On July 23, 2013, the Children made a request to BIA to declare the Lease invalid and give them the proceeds. On February 15, 2017, the Regional Director issued a Decision in response to Appellants' July 23, 2013, letter denying their request and finding the Superintendent had acted correctly. *See* ECF No. 1-5. The Children appealed the BIA's decision to the IBIA which reviewed it *de novo*. *Fredericks v. Great Plains Reg'l Dir.*, 67 IBIA 130 (2020) ("Oil Lease Decision"). On August 4, 2020, the IBIA affirmed the Regional Director's decision. *Id*. The Oil Lease Decision reviewed the Regional Director's decision to approve the lease, and found that the approval was valid as the Acceptance Form is a "commonly utilized to document consent for oil and gas leases on the Fort Berthold Indian Reservation." *Id*. at 142. Additionally, the IBIA found that "[o]n the same day that the Superintendent executed the Lease by signing the Acceptance-of-Lessor form, he separately approved the Lease by signing the standard form lease." *Id*. at 143.

The IBIA also rejected the Plaintiffs' argument that "Judy is not an heir or owner of the Allotment." IBIA reasoned that Judy was determined pursuant to AIPRA to be an heir to a life estate without regard to waste in the Allotment the Lease encumbered, which made her an interest owner. *Id*. at 144. The IBIA found that by operation of AIPRA Judy was holder of a life estate without regard to waste and was thus entitled to receive income from the Allotment during her lifetime. *Id*. The Board thus affirmed the Regional Direction's decision and declined to invalidate the lease. *Id*.

3. Proceedings at the Court of Federal Claims

While the case was pending before IBIA, both Plaintiffs and Judy brought separate suits in the Court of Federal Claims. *See Susan Fredericks et al v. United States*, No. 14-296, 125 Fed. Cl. 404 (2016); *Judy Fredericks v. United States*, No. 16-1695 (Fed. Cl. 2016). The

Children Plaintiffs argued that while probate was pending the United States improperly approved, *inter alia*, the Oil Lease described above and took Plaintiffs' property without just compensation. Judy's suit seeks payment of the funds being held by Interior that have accrued from, *inter alia*, the Oil Lease. The United States moved to dismiss the Children Plaintiffs' suit arguing they had no property interests until the conclusion of probate, and that pertinent statutes impose no money-mandating duties on the government. The court denied the United States' motion. *Fredericks v. United States*, 125 Fed. Cl. 404, 407 (2016). Both cases are now stayed.

4. The Instant Complaint and Motion

Plaintiffs filed this suit on September 2, 2020 and moved for Preliminary Injunction the following day. ECF Nos. 1, 3. Plaintiffs' Motion for Preliminary Injunction, ECF No. 4, argues the IBIA's affirmation of the Regional Director's approval of the Superintendent's approval of the Oil Lease was arbitrary and capricious, and seeks to enjoin the Department from distributing any funds from the estate account of John Fredericks, Jr. or any proceeds of the oil lease. Pls.' Mot. for Prelim. Inj., ECF No. 4 ("Pls.' Br.").

III. LEGAL STANDARDS

A. Preliminary Injunction

Preliminary injunctive relief is an "extraordinary and drastic remedy" that is "never awarded as [a matter] of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citations and internal quotation marks omitted). A court may only grant the "extraordinary remedy . . . upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). Specifically, a plaintiff must show that it is: (1) "likely to succeed on the merits"; (2) "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in

[its] favor"; and (4) "an injunction is in the public interest." *Id.* (citations omitted). Where the federal government is the opposing party, the balance of equities and public interest factors merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).[4]

The Court should not grant preliminary relief unless Plaintiffs make a "clear showing that [the] four factors, taken together, warrant relief." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016) (internal quotations omitted); *Mdewakanton Sioux Indians of Minn. v. Zinke*, 255 F. Supp. 3d 48, 51 (D.D.C. 2017) (the party moving for injunctive relief carries the burden of persuasion).

B. Administrative Procedure Act

The APA directs the Court to uphold an agency's final action unless it is deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Although the inquiry must be thorough, the standard of review is narrow and highly deferential, an agency's decisions are entitled to a "presumption of regularity," and the Court cannot substitute its judgment for that of the agency decision maker. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). The Court need not find that an agency decision "is the only reasonable one, or even that it is the result [the court] would have reached." *Am. Paper Inst., Inc., v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422 (1983).

[4] Prior to the Supreme Court's ruling in *Winter*, a number of circuits, including the D.C. Circuit, evaluated the four factors using a "sliding scale" approach—allowing a strong showing on one of the factors to make up for a weaker showing on another factor. *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). The D.C. Circuit has suggested, without deciding, that *Winter* should be read to abandon the sliding-scale analysis in favor of a more demanding burden requiring plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm. *See Karem v. Trump*, 404 F. Supp. 3d 203, 209 (D.D.C. 2019) *aff'd as modified*, 960 F.3d 656 (D.C. Cir. 2020). In any event, it is clear that *Winter* rejected the argument that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." 555 U.S. at 21.

The Court must determine whether the agency: (1) "relied on factors which Congress ha[d] not intended it to consider;" (2) "entirely failed to consider an important aspect of the problem;" (3) "offered an explanation for its decision that runs counter to the evidence before the agency;" or, (4) offered an explanation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Confederated Tribes of the Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.C. Cir. 2016).

IV. ARGUMENT

A. Plaintiffs' alleged injuries are purely monetary and thus not irreparable.

Absent a showing of irreparable harm, no injunction may issue. *Cal. Ass'n of Priv. Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, 165 (D.D.C. 2018). The D.C. Circuit "has set a high standard for irreparable injury." *Chaplaincy of Full Gospel Churches v. England (Chaplaincy)*, 454 F.3d 290, 297 (D.C. Cir. 2006). To obtain the requested injunction, the injury "must be beyond remediation" and "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Chaplaincy*, 454 F.3d at 297 (internal quotation omitted). The Plaintiffs must provide actual evidence, not simply conclusory statements or unsupported allegations; "'bare allegations of what is likely to occur are of no value;' the movant must, instead, '*substantiate* the claim that irreparable injury is "likely" to occur.'" *Cal. Ass'n of Priv. Postsecondary Schs.*, 344 F. Supp. 3d at 171 (quoting *Wisc. Gas Co.*, 758 F.2d at 674).

Plaintiffs argue that the case concerns real property and that is sufficient to show irreparable harm. Pls. Br. at 20. But the loss of income from mineral extraction on real property is a monetary harm not sufficient to justify extraordinary injunctive relief. Courts in this Circuit

have recognized that economic loss can constitute irreparable injury only in limited circumstances: where "monetary loss . . . threatens the very existence of the movant's business," *Wis. Gas Co.*, 758 F.2d at 674, or where the claimed economic loss is unrecoverable, *Nat'l Mining Ass 'n v. Jackson*, 768 F. Supp. 2d 34, 53 (D.D.C. 2011); *Dallas Safari Club v. Bernhardt*, No. 19-CV-03696 (APM), 2020 WL 1809181 at *5 (D.D.C. Apr. 9, 2020). This is not the case here.

In the event that Plaintiffs' arguments are correct and Judy did improperly "waste" the mineral resources at issue in this case, Plaintiffs may have a cause of action to recover monetary damages. *See* N.D. Cent. Code Ann. § 47-04-22; *see, e.g.*, § 648. Remedies for waste—Persons entitled to sue, 2 Tiffany Real Prop. § 648 (3d ed.). Plaintiffs may also seek to recover from the United States for alleged breach of trust, as Plaintiffs have already done with a suit in the Court of Federal Claims that is currently stayed. *See* Section II(B)(3), *supra*. The potential availability of such compensation "in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Wisc. Gas Co.*, 758 F.2d at 674 (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)). Because Plaintiffs have not demonstrated irreparable harm, they are not entitled to extraordinary injunctive relief.

B. Plaintiffs are not likely to succeed on the merits.

Plaintiffs have two main arguments on the merits. First, they argue the Oil Lease at issue was never properly executed. Second, they argue that the Judy is not entitled to benefit from the mineral resources of the allotment. Both arguments are incorrect and Plaintiffs are not likely to succeed on the merits.

1. IBIA correctly found the Oil Lease was properly executed

The FBMLA § 1(a)(3) authorizes the Department to "execute a mineral lease … on

behalf of a [deceased] Indian owner if … the heirs … have not yet been determined." Plaintiffs do not dispute that when the Superintendent signed the Acceptance Form that the decedent's heirs had not been determined. Nor do Plaintiffs dispute that the Superintendent intended to execute the lease by signing the Acceptance Form and did so in a way typically used on the Fort Berthold Reservation. *See* 67 IBIA 142. Instead, Plaintiffs' argument is that despite signing the Acceptance Form and entering the lease into BIA's TAAMS system, the Superintendent somehow failed to technically "execute" the lease. Plaintiffs' argument puts form over function; the IBIA was correct to find that by signing an Acceptance-of-Lessor form on behalf of the John Fredericks Jr. Estate the Superintendent "executed" the Oil Lease pursuant to the FBMLA

Plaintiffs cite to no portion of the FBMLA or applicable regulations that require any particular form, or prohibit executing a lease by means of the Acceptance Form used here. As the IBIA found, this method is commonly used on the Fort Berthold Reservation. 67 IBIA 142 (citing Regional Director's Decision, ECF No. 1-5 at 2). Moreover, as the IBIA noted this method is described in BIA's Mineral Estate Handbook. 67 IBIA 142, n.22; BIA Fluid Mineral Estate Procedural Handbook 89 (July 2012) ("Please instruct the owners to *sign the Lease or Acceptance of Lessor form* exactly as we have shown their name on the attached ownership sheet.") (emphasis added). Black's law dictionary defines "execute" as "[t]o make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." EXECUTE, Black's Law Dictionary (11th ed. 2019). That describes what occurred here, as before the Superintendent's action, the lease was not legally enforceable under the FBMLA.

Finally, Plaintiff has not identified any prejudice that follows from the Superintendent signing the Acceptance Form rather than the lease itself. The APA's text directs reviewing courts to take "due account . . . of the rule of prejudicial error." Thus, if there was no prejudice

that resulted from the technical error, remand is inappropriate. *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration."). The Lease was properly executed; but even if it were not, the Superintendent's use of the Acceptance Form was at worst harmless error that does not justify a remand. Plaintiffs are unlikely to succeed on the merits of this argument.

2. IBIA correctly found the execution of the lease was lawful

Plaintiffs' next argument is that even if the lease were validly executed, BIA was not permitted to execute it because it benefited Judy, the holder of a life estate without regard to waste, rather than the Children, who have a remainder interest. The specific provision that Plaintiffs argue has been violated requires only that, in executing a lease, the Superintendent consider generally whether the lease is "in the best interest of the Indian mineral owner." 25 C.F.R. § 212.3. The regulations specifically contemplate that a situation where such "owner is a life tenant." 25 C.F.R. § 212.21. The regulation is drawn extremely broadly, leaving the consideration of "best interest of the Indian mineral owner" to the discretion of the Interior official, who is directed to consider "any relevant factor, including, but not limited to: economic considerations, such as date of lease expiration; probable financial effect on the Indian mineral owner; leasability of land concerned…." 25 C.F.R. § 212.3. Plaintiff does not take issue with any substantive term of the lease, but rather objects that the lease benefits Judy rather than the Children. As noted above, at the time the Superintendent executed the lease, the Indian mineral owners were unknown, as Decedent's probate had not been settled.

Plaintiffs' argument that the Superintendent acted arbitrarily in executing the lease rests on a misunderstanding of the applicable law. Plaintiffs rely on caselaw and a hornbook that does

not address—or even purport to address—AIPRA. The statutory system created by Congress to address the particular situation of Indian probate does not create the bare "life estate" addressed by *every single authority Plaintiffs rely on*. Instead, AIPRA provides for a surviving spouse to inherent a "life estate *without regard to waste*." The owner of a life estate without regard to waste unambiguously is intended to benefit from—that is, to "waste"—the mineral interests on the Indian land at issue. This point is fatal to Plaintiffs' argument. It was consistent with the statutory scheme and not at all arbitrary for the Superintendent to approve the lease at issue.

a) A life tenant without regard to waste is entitled to benefit from mineral resources of the estate

Plaintiffs' central argument is that "'a life tenant, acting alone, is not entitled to extract oil, gas or other minerals from the land'"; rather, mineral assets belong to the remaindermen." Pls. Br. at 13 (quoting Eugene O. Kuntz et al., The Law of Oil and Gas, § 8.4.). This is not correct as applied to the life estate *without regard to waste* present in this case. Even the hornbook Plaintiffs rely on makes clear that while the holder of a typical life estate cannot extract minerals as this "constitutes waste," this rule is not without exception. *See* 1 Kuntz, Law of Oil and Gas § 8.4 (2020) (A "provision contained in the controlling instrument" or "special circumstances" supersede general rule and allow for waste). Another leading hornbook describes the precise circumstances here, noting that while extracting minerals is typically considered improper "waste" of a life estate, this is not so for a "life estate without impeachment of waste." Bruce Kramer and Patrick Martin, *Williams & Meyers Oil and Gas Law* 636.1, § 512.1 (Vol. 2 2004).

AIPRA makes clear that the holder of a life estate without regard to waste "is entitled to the receipt of all income, including bonuses and royalties, from such land to the exclusion of the remaindermen." 25 U.S.C. § 2201(10). Plaintiffs attempt to read out the important qualifier

"without regard to waste" from AIPRA. But there is little doubt that the plain language of the Act manifests Congress's intent to allow the owner of the estate without regard to waste interest to benefit from minerals on the subject allotment even if this causes "waste" that diminishes the benefit to remaindermen. This is confirmed in the applicable regulations which directly pose the question: "May the holder of a life estate without regard to waste deplete the resources?" 25 C.F.R. § 179.202. In answer, the regulations say: "Yes. The holder of a life estate without regard to waste may cause lawful depletion or benefit from the lawful depletion of the resources." *Id.*; *see also* 25 C.F.R. § 179.201. Plaintiffs' argument that the life tenant at issue is not entitled to extract resources from the allotment, Pls. Br. at 13, clearly fails.

b) A life tenant without regard to waste owns a property interest and is entitled to income therefrom

Plaintiffs' next argument is that Judy, the life tenant without regard to waste, does not "own" a property interest in the Allotment at issue and therefore the lease proceeds should not go to her. Pls. Br. at 15. This argument finds no support in the common law, text of FBLMA or AIPRA, or applicable regulations.

Plaintiffs' argument that a life estate without regard to waste cannot be "owned" is puzzling. Pls. Br. at 16. A life estate without regard to waste is certainly a property interest that can be owned. *See, e.g.*, Restatement (First) of Property § 117 (1936) (referring to "[t]he owner" of a life estate); *id.* § 9 (1936) ("estate," a "means an interest in land" including one where "ownership measured in terms of duration."); *id.*; at § 10 ("owner. . . means the person who has one or more interests."); *see also id.* § 5. *See, e.g.*, *Nelson v. Celebrezze*, 215 F. Supp. 417, 417 (D.N.D. 1963) ("The Plaintiff is a widow now 85 and owns a life estate in a 160 acre North Dakota farm…"); *United States v. Reid*, No. CV196-053, 2001 WL 34092608, at *2 (S.D. Ga. Feb. 9, 2001) (one party "owns a life estate in an undivided one-half interest" the other "owns a

remainder interest in an undivided one-half interest"); *Estate of Buckley Melton Hoaglin*, 66 IBIA 26, 34 (2018) ("A 'life estate' is a limited ownership interest . . . ."). A life estate can also be conveyed. *See, e.g.*, *Craig v. Rowland*, 10 App. D.C. 402, 419 (D.C. Cir. 1897) (grantor conveyed "a life estate in the premises"). BIA's regulations regarding life estates and mineral leasing reflect this. 25 C.F.R. § 179.2; 25 C.F.R. § 212.1(c) (referring to life tenant as "owner").[5]

Nothing in the FBMLA contradicts the straightforward reading that the owner of a life estate without regard to waste is an "owner" as understood by the Act. FBMLA § 1(a)(2)(C) is clear that proceeds shall be distributed to "*all owners* of the Indian land that is subject to the lease or agreement *in accordance with the interest owned by each such owner*." *Id*. (emphasis added). The Act thus recognizes there may be different "interests owned" and uses the word "all" to modify owners, suggesting that Congress was not intending to exclude any owners of any interest—including a life tenant without regard to waste. Moreover, "Indian Land" is also not defined to exclude life tenants or other owners, instead the Act defines "Indian land" broadly to include "an undivided *interest* in a parcel of land" held in trust by the United States on the Fort Berthold Reservation. *Id*. As discussed above, a life tenant without regard to waste unquestionably owns a property interest. Judy and the remaindermen are thus both "owners" of an "interest" in Indian Land within the meaning of the FBMLA: Judy owns a life estate without regard to waste, and the remainderman have a vested interest that will spring upon Judy's death.

[5] Plaintiffs appear to be conflating the concepts of ownership in an interest in property with ownership of title. The title to the allotment at issue in this case is owned by the United States and neither the remaindermen nor the life estate holder have title. The IBIA decision Plaintiffs challenge did not find Judy had title to the property at issue; Plaintiffs' arguments on this point miss the mark.

The regulations that "govern leases for the development of individual Indian oil and gas, geothermal and solid mineral resources" confirm that life estate holders are "owners." 25 C.F.R. § 212.1(a). 25 C.F.R. § 212.21(c) explicitly provides that "[i]f an owner is a life tenant, the procedures set forth in 25 CFR part 179 (Life Estates and Future Interests), shall apply." The Board briefly referenced the content of §212.21(c); however, it did not opine that the FBMLA had somehow superseded the Department's recognition that the holder of a life estate without regard to waste could be considered the "owner" of an interest in Indian land within the regulatory framework. 67 IBIA 139, n.17.[6] Though Plaintiffs recognize the Board's distinction in the context of §212.21(a), *see* Pls. Br. at 8, they fail to extend the principle to its logical conclusion or present any direct evidence that any section of the FBMLA must operate to supersede Part 212's unremarkable proposition that an owner of an interest in Indian land to be leased may hold that interest as a life tenant.

The FBMLA and applicable regulations straightforwardly provide that proceeds of a lease shall be distributed to the owners of interests in land in accordance with their respective interest. As applied to this case, the FBMLA and AIPRA provide that Judy as the owner of a "life estate without regard to waste" interest is entitled to receives proceeds during her life, and the remaindermen Children receive the proceeds realized beginning on the date the life estate

[6] Plaintiffs' selective citation to the Board's review of the interplay between the regulations and the FBMLA does not establish that the terms and principles of Indian mineral leasing as described generally in Part 212 do not apply on the Fort Berthold Reservation. Rather, the Board noted only that "FBMLA §1(a)(4) . . . supersedes *a requirement* in §212.21(a) that such a lease must have been offered for sale only through public auction or advertised sale and instead allows the lease to be negotiated." 67 IBIA 133 (emphasis added). In acknowledging the harmless error underlying the Superintendent's overbroad citation choice, the Board noted that reference to Part 212 was "not completely incorrect inasmuch as 212.21(a) authorizes the Superintendent to execute a lease on behalf of the undetermined heirs of a decedent's estate under conditions more onerous than the FBMLA*Id*. at 142.

without regard to waste terminates.

Plaintiffs' arguments to the contrary again ignore that the interest Judy has is not merely a "life estate" as defined by common law. Rather, by the plain language of AIPRA she has a "life estate without regard to waste." Thus Plaintiffs' citation to cases that refer to a mere "life estate" are simply inapplicable. *See* Pls. Br. at 15-16. Had Congress used the term "life estate" without elaboration then presumably it should be interpreted in accordance with its meaning at common law—but Congress has not done so.[7] Instead, Congress chose to create a "life estate without regard to waste." It is no mystery why Congress did so—this provision is entirely in accord with the goal of the overall statute which was to allow for development of mineral resources without delaying such development in estate disputes of the kind evidenced by this suit. *See* S. Rep. No. 105-205, at 1, 4, 7 (1998); Final Rule, 73 Fed. Reg. 67256, 67286 (Nov. 13, 2008).

Plaintiffs' arguments based on the structure of the FBMLA fare no better. Pls. Br. at 16-17. Plaintiffs are correct that FBMLA § 1(a)(2)(A) provides that the Department can approve a mineral lease only if the lease is in "the best interest of the Indian owners." *Id*. at 17. And they are correct that the interests of the remaindermen and the life tenant with regard to use of resources a given allotment are potentially in conflict. However, Plaintiffs are incorrect that the FBMLA resolves the conflict in favor of remaindermen—or speaks to this issue at all. Plaintiffs

[7] Indeed, before AIPRA was passed, surviving spouses only inherited a life estate and had to "ensure that they did not diminish the estates of the remaindermen in their pursuit of rents and profits. . . ." but after the Act, the regulations were updated to reflect that life estates without regard to waste such "that the life estate holder is entitled to the receipt of all income, including bonuses and royalties, from such land, to the exclusion of remaindermen. *See* 25 U.S.C. 2201(10), 2205, 2206(a)(2)." *See* Final Rule, 73 Fed. Reg. 67256, 67286 (Nov. 13, 2008).

simply repeat the argument that "Life tenants are not owners of, and have no interest in, the mineral wealth of a trust allotment." Pls. Br. at 18. As discussed at length above this does not apply to the life estate without regard to waste that no one disputes exists in this case. Judy is the sole owner of a property right that allows her to benefit from the lease's proceeds at this time.

Plaintiffs are correct that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (internal quotation marks omitted); Pls. Br. at 17-18. But they have it exactly backwards: FBMLA deals broadly with procedures for leasing on the Fort Berthold Reservation but is silent as to what holders of a property interest can benefit from a lease. And it is certainly silent on the issue of how the interests of an Indian decedent's estate is probated. Rather, AIPRA is undoubtedly the Act that speaks to this "narrow, precise, and specific" topic. And AIPRA could not be more clear that the holder of a life estate without regard to waste "is entitled to the receipt of all income, including bonuses and royalties . . . to the exclusion of the remaindermen." 25 U.S.C. § 2201(10).

Finally, Plaintiffs' argument that the IBIA's interpretation of AIPRA has the effect of repealing or modifying FBMLA, an act "authorizing the grant or approval of any type of land use transaction involving fractional interests in trust or restricted land" is not persuasive Pls. Br. at 18 (quoting 25 U.S.C. § 2218(g)). As discussed at length above, FBMLA provides broadly that proceeds shall be distributed to "all owners . . . in accordance with the interest owned" but nowhere defines "owner" or "interest" to exclude a life estate without regard to waste. The IBIA correctly concluded "AIPRA and Part 179 do not conflict with, amend, or modify the FBMLA by specifying the extent of the ownership interest of a life tenant." 67 IBIA 148.

c) IBIA's interpretation is subject to deference

To the extent there is any ambiguity about whether the holder of a life estate without regard to waste is an "owner" of a property interest under FBLMA and AIPRA, then IBIA's interpretation is subject to deference under the familiar *Chevron* framework. *Chevron* "established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'" *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (*Brand X*) (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996)).

The *Chevron* analysis proceeds in two familiar steps. A reviewing court first considers "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. The court, which is the "final authority on issues of statutory construction," "employ[s] traditional tools of statutory construction" to determine whether that standard is satisfied. *Id*. at 843 n.9. "If the intent of Congress is clear . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id*. at 842-43. "If, however, the court determines Congress has not directly addressed the precise question at issue," it proceeds to Step Two of the *Chevron* analysis. *Id*. at 843. In the absence of any clearly expressed congressional intent, "the court does not simply impose its own construction on the statute." *Id*. Rather, if the statute is silent or ambiguous with respect to the disputed question, the court must decide "whether the agency's answer is based on a permissible construction of the statute." *Id*. At Step Two of *Chevron*, the court defers to the agency's statutory construction so long as the agency's approach "represents a reasonable accommodation of conflicting policies that were committed to

the agency's care by the statute." *Id*. at 845 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). IBIA's interpretation of statutes administered by Interior are entitled to deference under *Chevron*. *See Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997); *Chemehuevi Indian Tribe v. Salazar*, No. CV 11-4437 SVW (DTB), 2012 WL 13047522, at *6 (C.D. Cal. Aug. 6, 2012); *Am. Hosp. Ass'n v. Azar*, 967 F.3d 818, 828 (D.C. Cir. 2020).

In this case, the IBIA affirmed the Regional Director's finding that that to the extent there was any ambiguity "owner" should be interpreted to "include[] the variations of ownership rights resulting from life estates." 67 IBIA 139. To the extent the term is ambiguous, this represents a reasonable interpretation of the word "owner" in FBMLA, particularly as it addresses the interaction with AIPRA and the complex area of Indian probate.

Plaintiffs offer three brief arguments why *Chevron* does not apply but none are persuasive. First, Plaintiffs argue that *Chevron* does not apply because the statute is not ambiguous but rather "foreclose[s] the Department's interpretation." Pls. Br. at 19. For all the reasons explained above, the Department's interpretation is not foreclosed, and while the Department has argued that the term "owner" is not ambiguous, if the Court believes it is then it should look to *Chevron* to see if the agency's interpretation is reasonable. Plaintiffs next argue that if "an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, [the court] remand[s] to require the agency to consider the question afresh." *Id*. (quoting *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. 1991)). Here, the IBIA stated that FBMLA "is unambiguous that proceeds shall be distributed to 'all owners of the Indian land that is subject to the lease or agreement in accordance with the interest owned by each such owner.'" 67 IBIA 145. However, the Board never said the term "owner" was entirely unambiguous; rather the Board went on to decide the best interpretation of the word

"owner" in the statute was to affirm the Regional Director's conclusion that it encompassed "the variations of ownership rights resulting from life estates." *Id* at 146. Finally, Plaintiffs argue that "to the extent the IBIA relied on and construed the common law" in interpreting the meaning of owner in the FBMLA they lack expertise in common law. Pls. Br. at 19-20. But the IBIA's interpretation did not rest on the common law meaning of "owner;" it rested on the meaning of a "life estate without regard to waste" under the applicable law and regulation in the canon of Indian law. *Id*.

"Judges are not experts" in the "technical and complex" fields that agencies are often charged with overseeing. *Chevron*, 467 U.S. at 865. Agency expertise results not only from the employment of specialized staff, but also from the familiarity with the issues that necessarily results from the agency's day-to-day administration of a statute. Agencies, unlike courts, are also institutionally well situated to engage in the type of broad factual inquiry that may be necessary to a well-informed resolution of a dispute as exists here. The *Chevron* framework thus rests in part on a recognition that the choice between competing interpretations of ambiguous statutory language often "turn[s] upon the kind of thorough knowledge of the subject matter and ability to consult at length with affected parties that an agency . . . possesses." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167-168 (2007). Ultimately, it is the Department that was entrusted by Congress to manage the complex areas of mineral leasing on Indian Land as well as the equally complex area of Indian probate. The Department has exercised that authority reasonably here in finding that Judy, the holder of a life estate without regard to waste was an "owner" of a property interest under the FBMLA.

d) Under AIPRA the surviving spouse with a life estate is an heir

Plaintiffs also argue that Judy, the life estate holder is not an "heir" as understood by the

1886 allotment act. Pls. Br. at 14. *See* Agreement at Fort Berthold art. IV (Dec. 14, 1886), ch. 543, § 23, 26 Stat. 1032, 1033 (1891) (providing that the United States holds the allotted lands in trust for the benefit of the allottee or his heirs). Plaintiffs are vague about how this allegedly shows the lease was not validly executed, but regardless the argument is incorrect.

First, the Estate Decision which Plaintiffs do not directly challenge—and cannot challenge as the statute of limitations has passed—determined that Judy was an heir to allotment encumbered by the Oil Lease. *See Estate of John Fredericks, Jr.*, 57 IBIA 204, 205 (2013). This finding is correct. The 1886 Act itself is silent as to what it intended to mean by an "heir." But the Black's Law definition is broad, including "Someone who, under the laws of intestacy, is entitled to receive an intestate decedent's property." HEIR, Black's Law Dictionary (11th ed. 2019). The law of intestacy that applies here is AIPRA, and under that Act an heir includes "any individual . . . eligible to receive property from a decedent in an intestate proceeding." 25 C.F.R. § 15.2. And a life estate without regard to waste is a property interest. *See* Section IV(B)(2)(b). Thus under the applicable law, Judy is an heir. *See* 67 IBIA 146; *see also Fredericks*, 125 Fed. Cl. at 409 (referring to Judy as an "heir" to the Allotment).

Citing 25 U.S.C. § 2201, Plaintiffs argue broadly that "Surviving spouses who become life tenants are not 'heirs.'" Pls. Br. at 14. But again Plaintiffs misleadingly omit portions of the authority they seek to rely on. Section 2201 says: "'eligible heirs' means, *for purposes of section 2206 of this title*, any of a decedent's children, grandchildren, great grandchildren, full siblings, half siblings by blood, and parents…." 25 U.S.C. § 2201 (emphasis added). Plaintiffs made the same argument before the IBIA which correctly rejected it, noting Plaintiffs "improperly conflate the definition of eligible heirs with the determination of heirs under AIPRA, including surviving spouses, more broadly." 67 IBIA 146; *see* 25 U.S.C. § 2206.

AIPRA's structure makes clear that it was intended to provide benefits to a surviving spouse, separate and apart from "any of Decedent's children" that meet Section 2201(9)(A-C)'s eligibility criteria. Section 2206 therefore begins by describing the inheritance to any surviving spouse. *Id*. at 2206(a)(2)(A). Only after that property disposition is accounted for does the section proceed to describe what interests any "eligible heirs" inherent under 2206(a)(2)(B). Thus, it does not matter that 2201's definition of eligible heir does not list surviving spouse; it does not need to since 2206(a)(2)(A) expressly provides the inheritance of a surviving spouse.

Nor are Plaintiffs arguments that reference a general trust relationship between Interior and the remaindermen persuasive. Pls. Br. at 14. As the Supreme Court explained in *United States v. Jicarilla Apache Nation*, "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." 564 U.S. 162, 177 (2011). The United States "is not a private trustee," even when it expressly assumes "trust" duties by statute. *Id*. at 173-74. Therefore, plaintiffs "cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty." *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (The "bare" trust relationship resulting from federal trust ownership of tribal property "does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations."). The Department's general compliance with the applicable statutes described above is all that is required.

In sum, Plaintiffs have presented no argument that shows the IBIA was arbitrary and capricious in affirming the Regional Director's decision affirming the Superintendent's execution and approval of the lease at issue here. Plaintiffs are not likely to prevail on the merits

and their request for extraordinary injunctive relief should be denied.

C. A preliminary injunction is not in the public interest.

Plaintiffs' failure to show either irreparable harm or likelihood of success on the merits is reason enough to deny their motion for preliminary injunction. The Court need not go further to consider the balance of equities and public interest, since the Plaintiff's showing of entitlement to a preliminary injunction has already failed. *See Nken v. Holder*, 556 U.S. 418, 435–36 (2009) ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the Government is the opposing party."). But should the Court proceed to these factors, the balance of the equities and the public interest favor denying preliminary injunctive relief.

First, it is important to recognize that the flip side of Plaintiffs' equity interests in controlling the mineral income at issue in this case is the interest of Judy Fredericks, widow of the Decedent, her husband of many years. The Regional Director and IBIA have determined that AIPRA entitles Judy to benefit from the mineral interests on the allotment of her late husband during her life, a benefit she has already been denied for nearly fourteen years. Enjoining Interior from distributing proceeds to Judy prevents this aged woman from making use of the income the Department has found her to be entitled.

Second, the public interest would be harmed by entry of an injunction because it would contravene the will of Congress. Both of the Acts implicated in this case—the FBMLA and the AIPRA—were motivated in part by a recognition that resources on Indian land were not being developed as a result of estate disputes. To remedy this problem, Congress provided for the Secretary to execute leases that may benefit the surviving spouse of the decedent before the heirs are determined. *See* Section II(B), *supra*; *see, e.g.*, 50 IBIA at 105-06 (explaining that leasing

statutes and regulations "are designed to allow leases to be granted while probate proceeds so that the heirs do not lose income from their property during the pendency of the probate"). The circumstances of this case illustrate the wisdom of that approach. Here, as when Congress has affirmatively spoken on a matter, the Court should exercise its discretion to support the result Congress directed. *See United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001); *see also Nken*, 556 U.S. at 436. In sum, the public interest factors favor denying the injunction.

V. CONCLUSION

For the foregoing reasons Plaintiffs' motion for preliminary injunction should be denied. Plaintiffs have not demonstrated irreparable harm. Moreover, Plaintiffs are not likely to succeed on the merits. The Oil Lease that Plaintiffs challenge was properly executed. And the income generated from that Lease under law goes the Decedent's surviving spouse who inherited a life estate without regard to waste. Plaintiffs' argument that the FBMLA *sub silentio* prohibits the holder of life estate without regard to waste from benefiting from mineral resources on the allotment is not persuasive. Congress was clear that it intended surviving spouses to benefit from mineral resources under the circumstances present here. Plaintiffs' motion should be denied.

Dated: October 1, 2020

Respectfully submitted,

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By: */s/ Reuben Schifman*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSAN FREDERICKS, JOHN FREDERICKS III, CASEY FREDERICKS, SHAWN FREDERICKS, AND MARY MALEE FREDERICKS,

Plaintiff

v.

THE UNITED STATES Department of Interior, *et al.*,

Defendants

Civil Action No. 1:20-cv-02458-KBJ

[PROPOSED] ORDER

Pending before the Court are Plaintiff's Motion for Preliminary Injunction and Federal Defendants' Opposition. For the reasons set forth in the Federal Defendants' Motion, the Court denies Plaintiff's Motion. Accordingly,

It is hereby ORDERED that Plaintiffs' Motion for Preliminary Injunction is DENIED.

SO ORDERED this ___ day of _____, 2020.

Dated: _____

_____

The Honorable Ketanji Brown Jackson
United States District Judge

CERTIFICATE OF SERVICE

I, Reuben S. Schifman, hereby certify that on October 1, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Reuben Schifman
REUBEN S. SCHIFMAN