No. 22-2459

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MANDAN, HIDATSA & ARIKARA NATION,
Plaintiffs/Appellants,

v.

U.S. DEPARTMENT OF THE INTERIOR, and DEB HAALAND, in her official capacity as Secretary of the Interior,
Defendants/Appellees

and

SLAWSON EXPLORATION COMPANY, INC.,
Intervenor-Defendant/Appellee.

Appeal from the United States District Court for the District of North Dakota
No. 1:19-cv-00037 (Hon. D. Traynor)

BRIEF OF FEDERAL APPELLEES

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SUMMARY OF THE CASE

This case concerns the Bureau of Land Management's approval of eight Applications for Permit to Drill submitted by Slawson Exploration Company for an oil-and-gas well pad located on privately owned, non-Indian land within the Fort Berthold Indian Reservation. In this appeal, the Mandan, Hidatsa, and Arikara Nation asserts that the administrative record does not support the approval, and that the Nation was prevented from developing the record on the issue of the threat to the Nation's health and welfare from the Bureau's action.

These arguments lack merit. The Bureau's decision meets all legal requirements. It is supported by an environmental assessment that considered environmental and human health risks from the project, and imposed conditions to mitigate the risk. And the Nation, which submitted evidence and argument to the Bureau at each stage of the administrative process, had ample opportunity to develop a record. The Court should uphold the Bureau's approval of the Applications for Permit to Drill as reasonable, well-supported, and procedurally valid.

Appellees the Department of the Interior and Deb Haaland request 15 minutes to present oral argument.

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STATEMENT OF JURISDICTION

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and 5 U.S.C. § 702 (review of agency action).

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment that disposes of all parties' claims. Addendum to Brief of MHA Nation 5 (hereinafter, "MHA Add.")

(C) That judgment was entered on June 9, 2022. *Id.* Plaintiffs timely filed their notice of appeal on July 8, 2022. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. By failing to develop this argument on appeal, has the MHA Nation forfeited any argument that the Tribe's setback law binds BLM or requires BLM to determine whether the MHA Nation has jurisdiction to apply its tribal setback law to Slawson?

Authorities: *Border State Bank, N.A. v. AgCountry Farm Credit Servs.*, 535 F.3d 779 (8th Cir. 2008); *Meyers v. Starke*, 420 F.3d 738, 743 (8th Cir. 2005).

2. If the MHA Nation has not forfeited this argument, is BLM obligated to evaluate tribal jurisdiction over non-Indians or implement tribal law as part of its process for reviewing APDs on non-Indian land, such that its failure to develop a record on the application of *Montana*'s second exception was arbitrary and capricious?

Authorities: *E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 510 (2014); *N. States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996); *MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1069 (10th Cir. 2007); 30 U.S.C. § 226; 43 C.F.R. Part 3160.

3. Was the BLM's approval of the Applications to Drill arbitrary and capricious, where the BLM's Environmental Assessment and supporting documents considered potential adverse effects on Lake Sakakawea?

Authorities: *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 838 (8th Cir. 1995); *Cent. S. Dakota Co-op. Grazing Dist. v. Sec'y of U.S. Dep't of Agric.*, 266 F.3d 889, 895 (8th Cir. 2001); *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1128 (8th Cir. 1999); *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004).

4. Did BLM improperly deny the Tribe required process, where the Tribe had a full and fair opportunity to present its arguments and evidence to the agency, and never requested an evidentiary hearing before the Department?

Authorities: *Vt. Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc.*, 435 U.S. 519, 553 (1978); *Newton County Wildlife Ass'n v. Rogers*, 141 F. 3d 803, 808 (8th Cir. 1998).

INTRODUCTION

This case concerns the Department of the Interior Bureau of Land Management's (BLM) approval of eight Applications for Permit to Drill (APDs) submitted by Slawson Exploration Company. The well pad for these APDs (referred to as the Torpedo Project) is located on privately owned, non-Indian land near Lake Sakakawea, within the exterior boundaries of the Fort Berthold Indian Reservation. The well pad has been used to drill horizontal wells to reach federal leases of non-tribal minerals under the Lake. In accordance with federal law relating to permits to drill into federal leases, BLM conducted a thorough environmental review, and as part of its approval, required that Slawson move the well pad further from the Lake and take other measures designed to protect human health and the environment. BLM also consulted with the Mandan, Hidatsa, and Arikara Nation (MHA Nation or Tribe) regarding the APDs, and was aware that while the APDs were under BLM review, the MHA Nation enacted a series of resolutions addressing setback of drilling operations from the Lake.

The Tribe's appeal centers on the issue of whether BLM, and the Department on administrative appeal, had a sufficient record before it

to assess the Torpedo Project's threat to the Tribe's health and welfare, specifically the Project's effects on the water quality of Lake Sakakawea, the source of the Tribe's drinking water. The Tribe asserts that BLM erred by failing to assess, or incorrectly assessing, the applicability of tribal setback laws as part of the federal approval process.

The Tribe's appeal fails at the threshold. The Tribe's "record" arguments are predicated on an assertion made (but not supported) in the district court: that as part of the APD review process, BLM was required to evaluate the Tribe's jurisdiction over Slawson under *Montana v. United States,* 450 U.S. 544, 565 (1981), and give effect to the Tribe's setback laws. But the Tribe did not develop this argument on appeal, and it is forfeited.

This assertion also fails on the merits. BLM's approval of the APDs was based on federal law, and did not depend on whether the MHA Nation has jurisdiction to enforce its setback laws against Slawson. Nor did the district court need to address the limitations on *tribal* government jurisdiction in a case concerning *federal* government permitting. *Montana*'s jurisdictional limitations are inapplicable to the

federal government, and to BLM's decision here. As a result, the Tribe's entire argument lacks foundation—there was no need for BLM to develop a record addressing tribal jurisdiction because it was not necessary for the agency's decision. The Tribe's argument ought to be rejected on that basis alone.

To the extent that the Tribe's appeal is challenging the adequacy of the environmental review conducted by BLM, the agency fully considered human health and environmental effects of the drilling operation, including potential effects to the Lake and other surface waters, and implications for nearby drinking water systems. And the Tribe had a full and fair opportunity to present its arguments and evidence to the agency, including appeals to the State Director and the Department of the Interior's Office of Hearings and Appeals. BLM's action readily meets the deferential standard of review under the Administrative Procedure Act and should be upheld.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Development of federal oil and gas resources follows a multi-stage decision-making process, with environmental reviews at each stage.

This case involves the final stage, at which BLM determines whether and under what conditions it will issue drilling permits for wells on existing federal leases. 30 U.S.C. § 226(g); 43 C.F.R. § 3162.3-1. These permits are governed by the Mineral Leasing Act of 1920 (as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987), 30 U.S.C. §§ 181-237, which authorizes the Secretary of the Department of the Interior to "regulate all surface-disturbing activities conducted pursuant to" federal leases. 30 U.S.C. § 226(a), (g). The statute requires an operations plan for surface-disturbing activities, financial assurances and reclamation commitments, and certain procedures and deadlines. *See* 30 U.S.C. § 226(f), (g), (p).

The BLM has issued regulations addressing onshore oil and gas operations. *See* 43 C.F.R. Part 3160. Those regulations specify what must be included in a complete Application for Permit to Drill, and provide general direction to the BLM official on the processing of the application. *Id.* § 3162.3-1. The regulations give BLM the authority and discretion to "require that all operations be conducted in a manner which protects other natural resources and the environmental quality" and "protects life and property." *Id.* § 3161.2. They also direct BLM

officials to prepare "an environmental record of review or an environmental assessment, as appropriate," which "will be used in determining whether or not an environmental impact statement is required and in determining any appropriate terms and conditions of approval of the submitted plan." *Id.* § 3162.5-1(a). Through this review process, BLM fulfills its responsibilities under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347.

B. Legal Principles Addressing Tribal Authority over Non-Indians on Non-Indian Lands within a Reservation

Federal law recognizes Indian tribes as "separate sovereigns pre-existing the Constitution" that exercise inherent sovereign authority unless curtailed by Congress. *See Mich. v. Bay Mills Indian Cmty*, 572 U.S. 782, 788 (2014) (citations and internal quotations omitted). The Supreme Court has held that "[d]ue to their incorporation into the United States, however, the sovereignty that Indian tribes retain is of a unique and limited character." *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

In *Montana*, 450 U.S. at 565, the Supreme Court stated a "general proposition" that the inherent sovereign powers of an Indian tribe do

not extend to the exercise of civil jurisdiction over the activities of nonmembers of the tribe on fee lands (meaning land that is not owned by the federal government or the Tribe or held in trust for the Tribe or one of its members by the federal government) within the exterior boundaries of a reservation. That "general proposition" is "not an absolute rule" and is subject to "two important exceptions." *Cooley*, 141 S. Ct. at 1643. First, a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. Second, a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566; *see also Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927 (8th Cir. 2010) (discussing *Montana* test). Tribal jurisdiction may also be authorized by Congress, through statute or treaty. 450 U.S. at 564.

C. Factual Background

1. Slawson's Applications for Permit to Drill

Starting in 2011, Slawson submitted eleven APDs to BLM for the "Torpedo Project." Appendix of Appellant 149 (hereinafter, "App. __."); R. Doc. 67-16, at 7. The Torpedo Project involves construction of a single onshore well pad from which Slawson sought to drill (and has now drilled) multiple horizontal wells to develop oil and gas reserves located beneath Lake Sakakawea that cannot be accessed by drilling vertical wells. App. 149; R. Doc. 7-16, at 7. The reserves relevant here are a mix of federal, State of North Dakota, and privately-owned minerals. App. 17; R. Doc. 92, at 2; App. 94; R. Doc. 92, at 79 (map showing wells and ownership). Slawson obtained leases from BLM for the federally owned oil and gas reserves, but could not develop them without first obtaining BLM's approval of a permit for each well. App. 287; R. Doc. 67-16, at 145.

The well pad is in Mountrail County, North Dakota, on the southern end of a peninsula that extends into a bay of Lake Sakakawea. App. 149; R. Doc. 67-1, at 7. It is located on privately owned fee land within the exterior boundaries of the Fort Berthold Indian Reservation

(the "Reservation"). App. 149; R. Doc. 67-16, at 7; App. 95; R. Doc. 92, at 80 (map showing proposed and active well pads and Reservation boundaries).

2. BLM's Environmental Assessment Process

After receiving Slawson's APDs as well as a certification of the surface owner's agreement, the BLM North Dakota Field Office issued a notice of intent to prepare an Environmental Assessment (EA). App. 152; R. Doc. 67-16, at 10. BLM held an extended sixty-day scoping period from November 9, 2015 to January 9, 2016. *Id.* BLM solicited comments from the general public, and reached out to roughly 70 individuals, organizations, and federal, state, and local agencies during this time. App. 152-57; R. Doc. 67-16, at 10-15. Following the scoping process, BLM prepared a draft EA and sought public comment on this document. App. 157-58; R. Doc. 67-16, at 15-16.

During the scoping process, BLM also initiated consultation with the MHA Nation. App. 157; R. Doc. 67-16, at 15. BLM provided the Tribe with copies of the EA, and held multiple meetings to discuss tribal views. *Id.*; Federal Appellees' Separate Appendix (hereinafter, "BLM App.") 2; R. Doc. 67-15, at 436. BLM also sent two letters to the Tribal

Historic Preservation Office, but did not receive a response. App. 157; R. Doc. 67-1, at 15.

BLM consulted with the U.S. Fish and Wildlife Service (FWS) to satisfy its obligations under the Endangered Species Act (ESA), and commissioned the preparation of a detailed biological assessment to assess whether the final design for the Project would comply with the Endangered Species Act. App. 1207; R. Doc. 68-3, at 113. BLM also consulted with other federal agencies. The Bureau of Reclamation (Reclamation) provided comments, noting its role in the development of the Fort Berthold Rural Water System, and that Reclamation owns and funds six water intakes on the Missouri River for two Indian reservations, including the Fort Berthold Reservation. BLM. App. 3; R. Doc. 67-8, at 111-117. Reclamation included maps showing the location of rural water system pipelines in the vicinity of the Torpedo Project. BLM App. 6-8; R. Doc. 67-8, at 114-16. Reclamation expressed no concern about the impacts of the Torpedo Project on the Lake as a source of drinking water. *Id.* BLM also contacted State agencies and considered their comments. App. 158; R. Doc. 67-16, at 16.

As a result of the feedback received through the EA process and from FWS, the original proposal was adjusted in several ways. The well pad was moved approximately 300 feet to the north, further from Lake Sakakawea and on higher ground. App. 158; R. Doc. 67-16, at 16. The tank battery, truck-loading equipment, and other operating equipment would be located on a separate facilities pad located just under a mile from the well pad and over half a mile from the Lake. App. 162; R. Doc. 67-16, at 20. Adjustments were also made to the drilling method and orientation of the wells on the well pad to lessen noise and impacts on critical habitat. App. 178-79; R. Doc. 67-16, at 36-37.

In March 2017, BLM completed the EA, which runs more than 100 pages in length, with several hundred pages of supporting documents. App. 143-272; R. Doc. 67-16, at 1-130. The EA examined five alternatives: (1) Slawson's proposed well pad location; (2) the revised well pad location 300 feet further from Lake Sakakawea (the "preferred alternative"); (3) a "no action" alternative; (4) moving the well pad 0.5 miles north; and (5) shifting the flowlines east. App. 158, R. Doc. 67-16, at 16. BLM eliminated the latter two alternatives due to technical and feasibility constraints. App. 176; R. Doc. 67-16, at 34.

BLM addressed the remaining alternatives in detail. The EA considered the impacts of the proposed Project on the affected environment, including on water (both surface and groundwater), air quality, wildlife, cultural resources, agriculture, vegetation, recreation, mineral development, transportation networks, housing, population, and income. App. 158-249; R. Doc. 67-16, at 16-107. The EA also assessed the cumulative impacts of the Project with other existing and planned oil and gas development in the area. App. 250-262; R. Doc. 67-16, at 108-120.

With regard to surface water resources like Lake Sakakawea, the EA examined potential impacts within 0.5 miles of the well pad and facilities pad. App. 191-95; R. Doc. 67-16, at 49-53. The EA noted the importance of Lake Sakakawea as "the premier water resource in the State of North Dakota" and explained that its uses included industrial, domestic, fishing, recreation, and agricultural. App. 209; R. Doc. 67-16, at 67. The EA recognized the potential effects of a spill on water quality, but concluded that the alternative well site farther from the Lake was not expected to adversely impact surface water quality, aquatic resources, wildlife, and critical wildlife habitat. App. 194-95; R. Doc. 67-

16, at 52-53. The EA relied on the location of the well pad, the use of a "closed-loop" drilling system, design and containment features including a 2-foot tall berm around the well pad, and Slawson's commitment to use best management practices. App. 194-95; R. Doc. 67-16, at 52-53. The EA also incorporated Slawson's Oil Spill Contingency Plan, which addresses the risks of pollutants reaching Lake Sakakawea and describes Slawson's planned response to any accidental release and commitment to participate in Sakakawea Area Spill Response LLC. App. 174; R. Doc. 68-1, at 12.

3. MHA Nation Setback Requirements

On August 9, 2012, after Slawson had submitted its APDs to BLM, the MHA Nation passed Resolution No. 12-087-VJB, titled *The Missouri River, Badlands and Sacred Sites Protection Act*. That resolution required a "one-half mile" (2,640-foot) setback from the Missouri River for oil and gas wells within the Reservation. App. 683; R. Doc. 68-1, at 12. Several months later, the MHA Nation amended this resolution, clarifying that the Missouri River includes Lake Sakakawea, and permitting 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….” App. 687; R. Doc. 68-1, at 16. In February 2017, approximately a month before BLM issued its final EA and approved Slawson’s APDs, the Tribe passed Resolution 17-038, which stated that “[i]n no event shall a setback of less than 1000 feet be allowed.” App. 691; R. Doc. 68-1, at 20.

BLM officials met in-person with MHA Nation officials, including the Tribal chairman, on three occasions in 2016 to discuss the Tribe’s setback laws and the Tribe’s concerns about the well pad’s proximity to the Lake, and also communicated in writing and by telephone. BLM App. 2; R. Doc. 67-15, at 436. On March 10, 2017, BLM advised the MHA Nation’s Chairman that it would approve the APDs. App. 297; R. Doc. 67-16, at 155.

4. BLM’s Decision Record and FONSI

On March 10, 2017, the North Dakota Field Office of the BLM issued a Decision Record and a NEPA Finding of No Significant Impact (FONSI) approving eight of the eleven APDs with the preferred alternative, which required moving the well pad 200-300 feet farther

from the Lake and the use of a separate facilities pad located more than half a mile from the Lake. App. 287-89; R. Doc. 67-16, at 145-47; App. 283-86; R. Doc. 67-16, at 141-44. The Decision Record acknowledged environmental, recreational, and other concerns and stated that the Project "has design features aimed at reducing impacts and addressing health and safety concerns." App. 288; R. Doc. 67-16, at 146. The Decision Record stated that the approval of the APDs was subject to attached "Conditions of Approval." App. 289; R. Doc. 67-16, at 147. These consisted of six pages of detailed mitigation and safety measures, including moving the drill pad farther from the Lake, the separate facilities pad, the use of the closed-loop drilling system, and the construction of a 2-foot 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. App. 290-95; R. Doc. 67-16, at 148-53.

The Decision Record also noted comments "regarding the applicability of tribal resolutions for setbacks from the Lake" and from State agencies. App. 288; R. Doc. 67-16, at 146. The Decision Record provides 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." App. 287; R. Doc. 67-16, at 145.

5. MHA Nation Administrative Appeals

Department of the Interior regulations permit any adversely affected party to request administrative review of decisions before the State Director. 43 C.F.R. § 3165.3(b). On April 11, 2017, the MHA Nation requested review of BLM's decision by the Montana-Dakotas State Director. App. 672, R. Doc. 68-1 at 1. The State Director affirmed the Field Office's decision on April 24, 2017. App. 844-58, R. Doc. 68-1 at 173-87.

On May 24, 2017, the MHA Nation filed a Notice of Appeal and Petition for Stay with the Interior Board of Land Appeals ("IBLA"). App. 863-83; R. Doc. 68-1 at 192-212. On August 9, 2017, after the 45-day deadline for ruling on a stay petition had passed, the IBLA issued an order granting the MHA Nation's Petition for Stay. App. 360; R. Doc. 68-4, at 12; *see also* 43 C.F.R. § 4.21(b)(4). The order stated that the MHA Nation's Petition for Stay raised "multiple legal issues of first impression," including whether BLM was required to apply tribal law to its approval of the APDs. App. 369; R. Doc. 68-4, at 21.

On August 11, 2017, Slawson filed a complaint in U.S. District Court against the United States Department of the Interior and its officials, challenging the IBLA's stay order. App. 353; R. Doc. 68-4, at 15 (*Slawson Expl. Co. v. U.S. Dep't of the Interior,* Case No. 1:17-cv-00166-DLH-CSM (D.N.D. filed Aug. 27, 2017)). The district court granted Slawson's motion for a temporary restraining order, and after the MHA Nation was permitted to intervene, granted a preliminary injunction barring enforcement of the IBLA stay order. The district court found that Slawson had a likelihood of success 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." App. 372-85; R. Doc. 68-4, at 24-37; App. 1318-1339; R. Doc. 68-7, at 11-32. The Court also agreed that "the BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands." App. 380; R. Doc. 68-4, at 26-27.

Interior regulations provide that the Director of the Office of Hearings and Appeals (OHA) "may assume jurisdiction of any case before any board of the Office" including the IBLA. 43 C.F.R. § 4.5(b). On September 28, 2017, while Slawson's district court case was

pending, BLM (and later, Slawson) submitted a Petition for Director's Review, requesting that the Director review and reverse the IBLA stay, take jurisdiction over the appeal, and render the final decision in the administrative matter. App. 959; R. Doc. 68-2, at 75 (BLM request); App. 943; R. Doc. 68-2, at 59 (Slawson request).

On October 13, 2017, the OHA Director assumed jurisdiction from IBLA over the appeal under 43 C.F.R. § 4.5(b). App. 887; R. Doc. 68-2, at 3. The OHA Director accepted additional briefing from all parties, *id.*, and the Tribe submitted a 20-page Request for Reconsideration with attachments. App. 892-942; R. Doc. 68-2, at 8-58. On March 22, 2018, the OHA Director issued an order overturning the IBLA's stay order and affirming BLM's decision on the merits. App. 116; R. Doc. 1, at 17.

D. Proceedings Below

On June 20, 2018, the MHA Nation filed a Complaint in the United States District Court for the District of Columbia containing one cause of action for violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. App. 100, 112-13; R. Doc. 1, at 1, 13-14. The Complaint alleged that BLM was required to apply the MHA Nation's setback law to the Project and deny the APDs, and that the OHA

Director's Decision failed to consider the Department's treaty obligations to the MHA Nation and the MHA Nation's jurisdiction over activities on fee land within the Reservation. App. 113; R. Doc. 1, at 14. The complaint does not allege any violations of NEPA or other environmental statutes.

On motion by Slawson (which had intervened) and the Federal Defendants, on February 5, 2019, the case was transferred to the North Dakota district court. App. 2-4; Dkt. Nos. 33, 35. On February 14, 2020, the MHA Nation filed a motion for summary judgment, asserting that BLM's approval of the APDs was arbitrary and capricious on a variety of grounds, most of which are not raised in the MHA Nation's opening brief and thus are not before this Court. App. 7; Dkt. Nos. 73, 75. BLM and Slawson cross-moved for summary judgment. App. 7; Dkt. Nos. 78-79.

On February 22, 2021, the Magistrate Judge issued a lengthy Report and Recommendation (R&R). MHA Add. 6-82. The R&R recommended that the district court find that BLM's approval of the APDs at issue in this case was not arbitrary and capricious or otherwise in violation of the law on any of the grounds raised by the Tribe. MHA

Add. 82. The R&R addressed a variety of "NEPA arguments" (including that BLM's decision failed to adequately consider the impacts upon Fort Berthold's rural water system) made by the Tribe, while noting that these arguments were not made to the agency nor properly raised in the complaint. MHA Add. 57, 64-65. The R&R found that BLM's decision process adequately considered impacts on nearby water sources, including the Fort Berthold water system. MHA Add. 76-77. The R&R also found that the OHA Director did not abuse her discretion in assuming jurisdiction over the appeal, and that the MHA Nation had a meaningful opportunity to present its case to the agency. MHA Add. 80-81.

The R&R also rejected the MHA Nation's assertion that the Tribe had jurisdiction to enforce the setback law here, finding that the case law and record evidence identified by the MHA Nation did not demonstrate the applicability of *Montana*'s second exception. MHA Add. 41-44. In a footnote, the Magistrate noted BLM's argument that the court "need not reach the jurisdiction question" in reviewing BLM's action but stated that he "is not so sure" speculating that even if 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 concluded the Tribe had jurisdiction." MHA Add. 44.

The MHA Nation filed objections to the Magistrate's R&R, and BLM and Slawson filed responses. App. 9-10; Docket Entries 109, 114, 115. In its response, BLM asserted that the R&R correctly recommended summary judgment in favor of BLM, but that neither the Magistrate nor the district court needed to reach the question of whether the MHA Nation had civil jurisdiction to apply its setback laws to non-Indians on fee lands under *Montana*'s second exception. BLM App. 15-19; R. Doc. 114, at 7-10.

In a four-page Order, the district court adopted the R&R in its entirety, granted summary judgment for BLM and Slawson, and dismissed the MHA Nation's complaint. MHA Add. 1-4. The district court did not address BLM's argument that it was not necessary to reach the question of the Tribe's jurisdiction over Slawson. Instead, the district court distinguished the situation from the Supreme Court's decision in *Cooley*, which upheld tribal law enforcement's authority to stop, detain, and search non-Indians who had committed a state or federal violation on a public right-of-way through an Indian reservation.

MHA Add. 2. The district court found that the Magistrate correctly concluded that the Tribe had failed to show that there was a substantial risk to the Lake from the well pad, or that this risk "would cause significant damage," "reach catastrophic proportions, or otherwise put[] in peril the subsistence of the MHA Nation." MHA Add. 3.

SUMMARY OF ARGUMENT

The MHA Nation's appeal raises two overlapping arguments: (1) the Tribe was improperly "precluded" from further developing the record on the issue of the threat from the Torpedo Project to the Tribe's health and welfare (Br. at 17); and (2) that the agency's record is insufficient on this point (Br. at 25). The Tribe's brief indicates that evidence regarding any "threat to its health and welfare" is relevant for purposes of evaluating tribal jurisdiction over non-Indians under *Montana*'s second exception.

1. A threshold problem with the Tribe's appeal is that it does not identify any law or other requirement that obliges BLM to assess the Tribe's jurisdiction or implement tribal law as part of this permitting process. The Tribe's brief references *Montana*, but does not

make any argument that this case or any other authority requires the agency to undertake this analysis. This is a necessary premise of the Tribe's argument that the agency must develop a further record on the question of the Tribe's jurisdiction to apply its law to Slawson. Since the Tribe did not develop this argument, it is forfeited, and the Tribe's argument thus lacks an essential foundation.

2. If the Court considers this issue, it should conclude that BLM correctly conducted its approval process under federal law, and that it was not necessary for BLM—nor the district court—to reach the question of the MHA Nation's jurisdiction over Slawson under *Montana*'s second exception. Further, because *Montana* is inapplicable, the agency correctly did not develop a record specifically addressing the application of *Montana*'s second exception, and there is no need to remand for further record development. BLM's approval was based on consideration of the factors required by law, and was not arbitrary or capricious.

3. To the extent the Tribe's appeal is interpreted as a challenge to the sufficiency of BLM's environmental review (a claim not raised in the Tribe's complaint or before the agency), BLM's decision was made

after a multi-year process of environmental reviews, public input, communications with interested federal and state agencies, and consultation with the Tribe. BLM complied with its obligations under environmental and other applicable laws by fully considering the human health and environmental effects of the Project, including potential effects to the Lake and other surface waters and implications for nearby drinking water systems. Changes were made to the Project to accommodate information received during this process and reduce the risk of a spill impacting the Lake. BLM's decision meets all legal requirements and should be upheld.

4. Nor did BLM improperly deny the Tribe an evidentiary hearing or any other required process. The MHA Nation had a full and fair opportunity to present its arguments and evidence to the agency, and it did so on multiple occasions. There is no basis for further factual proceedings before the Department.

BLM's approval was not arbitrary, capricious, or otherwise in violation of the Administrative Procedure Act, and should be upheld.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*, applying the same legal standards used by the district court. *Darst–Webbe Tenant Assoc. Bd. v. St. Louis Housing Auth.,* 339 F.3d 702, 709 (8th Cir. 2003).

Judicial review of administrative decisions is governed by the Administrative Procedure Act. 5 U.S.C. § 706. Under the APA, review of an agency decision is limited. The Court should only set aside agency action that is "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). This standard of review gives "agency decisions a high degree of deference." *Sierra Club v. Envtl. Prot. Agency*, 252 F.3d 943, 947 (8th Cir. 2001). The reviewing court must decide whether the agency's decision was "based on consideration of the relevant factors and whether there has been a clear error of judgment." *Voyageurs Nat'l Park*, 381 F.3d at 763 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971)).

"If an agency's determination is supportable on any rational basis," the court must uphold it. *Voyageurs Nat'l. Park,* 381 F.3d at 763 (citing *Friends of Richard-Gebaur Airport v. FAA*, 251 F.3d 1178, 1184 (8th Cir. 2001)). This is especially true when an agency is acting within its own sphere of expertise. *Friends of the Boundary Waters Wilderness v. Dombeck,* 164 F.3d 1115, 1128 (8th Cir. 1999).

ARGUMENT

I. The MHA Nation Has Forfeited Any Argument That BLM Was Required to Apply the Tribe's Setback Law or Evaluate the Tribe's Jurisdiction over Non-Indians.

Underlying the MHA Nation's appeal before this Court is a premise that the Tribe has failed to develop or support: that BLM was required to apply tribal law in approving the APDs, and that this required BLM to evaluate whether the MHA Nation has jurisdiction to apply its setback law to Slawson under *Montana v. United States*. But the Tribe's Brief does not provide any authority or argument in support of this proposition. It thus should not be considered by this Court.

At the outset of its argument, the Tribe alludes vaguely to the "significance of *Montana* to the corpus of federal Indian law and Tribal-United States relations generally," suggesting this required the agency

to develop a further record as to the risks to the "Tribe's health and welfare." MHA Br. at 16. But it does not provide any statutory or case law to support the proposition that the agency was required to undertake this analysis. This does not meet this Court's standard for presenting an issue "with some specificity." *Meyers v. Starke*, 420 F.3d 738, 743 (8th Cir. 2005). Elsewhere, the Tribe's brief vaguely alludes to BLM's actions relating to this issue, but in contradictory ways and without any development or support. *See* MHA Br. at i (asserting BLM made its decision "without assessing" the applicability of the tribal law); *id.* at 2, *id.* at 22 (asserting BLM "concluded the Tribe's Setback Law was inapplicable under *Montana*"). But the Tribe provides no authority that shows how BLM's failure to develop a record on this issue is "not in accordance with law" or is otherwise arbitrary or capricious. 5 U.S.C. § 706(2)(A). This is not for lack of notice that this issue is in dispute: BLM asserted both the inapplicability of *Montana* and the lack of any requirement that BLM implement tribal law as its primary argument in the district court briefing. *See* BLM App. 37-41, R. Doc. 81, at 10-14 (BLM Summary Judgment Motion); BLM App. 16-19; R. Doc. 114, at 6-10 (BLM Response on R&R).

Failure to present an issue with specificity in the appellant's brief "can result in waiver." *Meyers*, 420 F.3d at 743 (citing *Sweet v. Delo*, 125 F.3d 1144, 1159 (8th Cir. 1997)). This is particularly appropriate where, as here, the Tribe's brief does not provide BLM with adequate notice of the Tribe's argument, such that the agency can respond. Because this issue is not developed in the Tribe's brief, it should not be addressed by this Court. *See id.* ("To be reviewable, an issue must be presented in the brief with some specificity."); *Border State Bank, N.A. v. AgCountry Farm Credit Servs.*, 535 F.3d 779, 783-84 (8th Cir. 2008) (declining to address issue not "developed in the appellate briefs"). Similarly, the Tribe's brief notes the federal government's trust responsibility (Br. at 2), but makes no argument based on the trust responsibility. This argument is also forfeited. *Id.*

Since the Tribe does not provide authority to support the premise of its argument for reversal, the Tribe's argument should be rejected, and the Court can uphold the Department's decision on this basis.

II. BLM Was Not Required to Evaluate Tribal Jurisdiction or Implement the Tribe's Setback Laws in Approving the APDs.

A. Federal Law Does Not Require BLM to Apply or Enforce Tribal Laws in Reviewing APDs.

If this Court reaches this issue, it should conclude that questions about the application of the Tribe's setback laws to Slawson provide no basis to set aside BLM's decision under the APA. The MHA Nation has provided no authority that mandates that BLM implement tribal law, and no such authority exists. BLM's authorities and responsibilities with respect to the management of the federal mineral estate are those set forth by Congress in statute and by Interior in regulation. *E.g., N. States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996) ("Our analysis starts, and in this case ends, with the statutes themselves.") (citing *Staples v. United States*, 511 U.S. 600 (1994)). Neither the Mineral Leasing Act nor BLM's implementing regulations direct BLM to apply or enforce other sovereigns' laws.[1] *See* 30 U.S.C.

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[1] As a matter of discretion and pursuant to its federal authorities, BLM may require that operators demonstrate compliance with requirements found in tribal or state law. As it did here, BLM routinely consults with affected tribes and state agencies to ensure that it is informed about those sovereigns' concerns and legal requirements. And the BLM has broad discretion under federal law to "require that all operations be conducted in a manner which protects other natural resources and the

§ 226 (provisions addressing requirement for APDs); 43 C.F.R. § 3162.3-1; *Id.* § 3161.2 (provisions for protection of natural resources and environment); *Id.* § 3162.5-1(a) (requiring environmental assessment). To the contrary, the regulations repeatedly place this burden on the operator, instructing them to "comply with applicable laws and regulations." 43 C.F.R. § 3162.1(a); *see also id.* § 3162.5-1(c) ("An operator's compliance with the requirements of the regulations in this part shall not relieve the operator of the obligation to comply with other applicable laws and regulations."); *id.* § 3162.5-3 (same).

Throughout the MHA Nation's briefing in this case, it has not pointed to a single authority indicating that BLM has a legal obligation to enforce tribal law in approving APDs on non-Indian land. *Cf. E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 510 (2014) (rejecting lower court's imposition of requirement on EPA where "nothing in the statute places EPA under an obligation" to take that

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environmental quality" and "protects life and property." 43 C.F.R. § 3161.2. Thus, in appropriate circumstances, under federal law BLM may exercise its discretion to require that operators demonstrate compliance with State or Tribal law prior to the approval of APDs, or otherwise factor in other sovereigns' requirements into its approval process. But the Tribe has not pointed to any legal requirement that the BLM do so.

action); *N. States Power Co.*, 73 F.3d at 768 ("Congress knows very well how to mandate something; it has not done so here."). The Tribe's brief references *Montana v. United States*, but this case does not require federal agencies to step in to enforce tribal laws against nonmembers, or otherwise suggest that federal agencies are bound by tribal law. *See MacArthur v. San Juan Cty.*, 497 F.3d 1057, 1069 (10th Cir. 2007) ("*Montana* only applies insofar as the tribe in question is seeking to assert regulatory authority over the activities of a nonmember."); *cf. United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980) ("no provision in a tribal constitution could limit the taxing power of the United States, a superior sovereign, any more than such a provision in a state constitution could."). It is simply irrelevant to BLM's approval of the APDs.[2]

Instead, *Montana* and its progeny indicate that tribes, as sovereigns, may directly assert their own authority over non-members,

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[2] Nor does the other case cited by the Tribe, *Davis v. Muellar*, 643 F.2d 521, 525 (8th Cir. 1981) (MHA Br. at 1, 2), support a federal obligation to enforce tribal law here. While the *Davis* Court referenced the general trust responsibility of the federal government, it did not hold that there is a legal obligation for the federal government, absent clear direction in statute, treaty, or other law, to enforce tribal laws.

separate from any federal agency processes. "Tribal jurisdiction under the second *Montana* exception may exist concurrently with federal regulatory jurisdiction." *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019) (upholding tribal enforcement of permit fees against FMC under *Montana*'s first and second exceptions, notwithstanding that the FMC site was the subject of consent decrees between FMC and EPA). In this Circuit, several cases have addressed the MHA Nation's authority under *Montana* with respect to oil and gas operations on non-Indian fee lands, but none of these cases involved the federal government—notwithstanding the federal role in regulating in this area. *See Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125 (8th Cir. 2019) (addressing jurisdiction over tribal members' suits against oil and gas companies for royalties from flared gas from federal leases); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994) (addressing tribal authority to enforce tribal taxes and employment ordinances on oil and gas operations on non-Indian fee lands). In these cases, the Tribe directly asserted its own authority over nonmembers, addressing questions of its own jurisdiction under *Montana* (or any other basis) as necessary.

Absent any such legal requirement, the Department's decision must meet only the standard for APA review, e.g., it must be reasonable and reasonably explained, and should consider "those factors Congress intended it to consider." *See Motor Vehicles Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); *Downer v. United States*, 97 F.3d 999, 1002 (8th Cir. 1996). That standard is readily met here. The Decision Record demonstrates that BLM was aware of the Tribe's setback laws and concerns about impacts on the Lake and took them into account. App. 287-88, R. Doc. 67-16, at 145-45. But it also determined with respect to these APDs that "[t]he BLM is obligated only to follow federal law and regulations." App. 846; R. Doc. 68-1, at 175; *see also* App. 124; R. Doc. 1, at 25 (OHA Director's decision citing district court statement that "BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands."); App. 119; R. Doc. 1, at 20 (OHA Director's decision noting "setback requirement's threshold inapplicability"). BLM reasonably declined to embark on the novel endeavor of assessing the Tribe's jurisdiction under *Montana*, where it was not required by law.

BLM did not (contrary to the Tribe's assertions, Br. at 21) rely on the "assertion that the Setback Law was inapplicable under *Montana*" to support its approval. Instead, the agency viewed the scope of tribal authority over Slawson's activities as an issue that was not necessary to BLM's approval process, and expressly made compliance with other sovereigns' laws Slawson's responsibility. *See* App. 287; R. Doc. 67-16, at 145; *see also* App. 275-76; R. Doc. 67-16, at 133-34.

Thus, the agency's decision "considered those factors Congress intended it to consider," *Downer*, 97 F.3d at 1002 (citation omitted). The MHA Nation has failed to demonstrate that the Department erred in approving the APDs, notwithstanding the tribal setback law, and its decision should be upheld. *Cf. Voyageurs Nat'l Park Ass'n*, 381 F.3d at 764 (Park Service decision should be upheld where it complied with statutory and regulatory mandates).

B. The District Court Unnecessarily Addressed the Tribe's Jurisdiction to Enforce the Tribal Setback Law.

In this APA review case, the question before the district court was whether BLM's approval of the APDs was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A); *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. To

answer the question before it, the district court only needed to address whether BLM's approval, including its decision to not implement the Tribe's setback law, met this standard. The district court found that it did, concluding that BLM reasonably approved the Project notwithstanding inapplicable setback guidelines, and that the BLM's actions otherwise complied with NEPA and agency policy. MHA Add. 45-81. The district court, however, also addressed the irrelevant question of whether the Tribe has jurisdiction over Slawson under *Montana*'s second exception. As described above, the Tribe's own jurisdiction is not relevant to the agency's authority under federal law, and was not the basis of BLM's approval. This Court should uphold BLM's decision, but should not reach the question of tribal jurisdiction over non-Indians.

The R&R incorrectly identified the threshold question with respect to what the Magistrate termed "the MHA Nation's jurisdiction-based claims." MHA Add. 37. The R&R identified the first question as "whether the MHA Nation had regulatory jurisdiction over *Slawson* with respect to the well pad location — not whether it had jurisdiction over BLM." *Id.* (emphasis in original). "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…." *Id.* (emphasis in original). The R&R gets the inquiry exactly backwards. The threshold question is the second one: whether BLM—the defendant—has a legal obligation to evaluate tribal jurisdiction or apply the tribal law, such that its failure to do so here was arbitrary and capricious. Since BLM has no such obligation, it was unnecessary for the district court to opine on the MHA Nation's jurisdiction over Slawson.

The R&R acknowledges that BLM argued that the court "need not reach the jurisdiction question." MHA Add. 44 n. 13. The Magistrate stated that he "is not so sure," reasoning that even if it were true that BLM is not required to give effect to the tribal setback law, "we do not know what BLM would have decided to do if it had concluded the Tribe had jurisdiction," speculating that the agency might have imposed different conditions or even denied the APDs. *Id.* But APA review does not permit a court to address questions that were not the basis of the agency decision based on mere speculation that the agency might have decided to do something different if it had reached the issue. It is a

"'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907-08 (2020) (citing *Mich. v. EPA*, 576 U.S. 743, 758 (2015)). The agency's "action must be measured by what [it] did, not by what it might have done." *Michigan*, 576 U.S. at 758 (quoting *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 93-94 (1943)).

In any event, there is no reason to believe that the Department would have reached a different conclusion initially or on appeal if it concluded that the Tribe did have jurisdiction over Slawson. *Cf. Cent. S. Dakota Co-op. Grazing Dist. v. Sec'y of U.S. Dep't of Agric.*, 266 F.3d 889, 899 (8th Cir. 2001) (remand only appropriate if "there is a significant chance that but for the errors the agency might have reached a different result."). The OHA Director's decision recognized that the "threshold" question was whether tribal law applies to federal decision-making regarding non-tribal minerals. App. 119; R. Doc. 1, at 20 (describing the "setback requirement's threshold inapplicability"); App. 124; R. Doc. 1, at 25 (citing district court "that the MHA Nation lacked authority to regulate BLM's decision in this case" and that "BLM

has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands."). To the extent the administrative appeal decisions address the *Montana* exception at all, they do so only in response to the Tribe's arguments and as a secondary consideration, after finding that BLM is not obligated to follow tribal law in this review process. App. 846; R. Doc. 68-1, at 175 (noting Tribe asserted jurisdiction under *Montana* in its request for State Director Review, and responding to Tribe's argument).

The R&R thus did not need to address issues that were not the basis of, or necessary to, the agency's decision. "If an agency's determination is supportable on *any* rational basis," then a court "must uphold it." *Org. for Competitive Markets v. U.S. Dep't of Agriculture*, 912 F.3d 455, 459 (8th Cir. 2018) (citation omitted) (emphasis added). The district court compounded this error by not even addressing the question of whether the court needed to decide the question of tribal jurisdiction over nonmembers under *Montana*, notwithstanding that this was BLM's primary argument in its response to the R&R. MHA Add. 2-3; BLM App. 15-19; R. Doc. 114, at 6-10. And, a court should be particularly reluctant to suggest limits on the scope of the Tribe's

sovereignty where such a finding is not necessary to uphold BLM's decision and would be *dicta*. *Cf. Bay Mills Indian Cmty*, 572 U.S. at 790 ("courts will not lightly assume that Congress in fact intends to undermine Indian self-government").

For these reasons, this Court should not address the scope of the MHA Nation's jurisdiction under *Montana* to enforce its setback law against Slawson. If, however, the Court finds the scope of the Tribe's jurisdiction under *Montana* relevant to this case, there is not a sufficient record on this subject, and the proper remedy would be remand. *Dep't of Homeland Sec.*, 140 S. Ct. at 1907.

III. BLM's Decision Is Based on a Robust Record and Is Not Arbitrary, Capricious, or Contrary to Law.

The MHA Nation's brief asserts that there is insufficient evidence in the administrative record as to the risks from the well pad "to the Tribe's health and welfare," and specifically the threat to the Tribe's water system. MHA Br. at 16-20. As described above, BLM was under no obligation to undertake a review of the Tribe's jurisdiction under *Montana*'s second exception. To the extent the Tribe is asserting that BLM's environmental review was otherwise inadequate, this argument is without merit.

BLM's regulations direct the preparation of "an environmental record of review or an environmental assessment" prior to approving any APD. 43 C.F.R. § 3162.5-1(a). These documents are used to determine whether an environmental impact statement is required under NEPA, and "in determining any appropriate terms and conditions of approval of the submitted plan." *Id.* Thus, to meet its obligations under NEPA and its own regulations, BLM prepared an Environmental Assessment that considers the human health and environmental effects of the Project. *See* App. 142-272; R. Doc. 67-16, at 1-130. To the extent that the Tribe's assertion that BLM failed to adequately evaluate the "threat that the Torpedo Project poses to the Tribe's health and welfare" seeks to challenge BLM's compliance with NEPA or other environmental obligations, this argument should be rejected.[3]

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[3] The MHA Nation's Complaint does not assert a NEPA claim. *See* MHA Add. 64 ("Nowhere in the complaint, however, is there a specific reference to … NEPA, or a specific NEPA deficiency."); App. 100; R. Doc. 1; *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979) (complaint must provide "fair notice of the nature and basis or grounds for a claim."). Nor did the MHA Nation challenge the sufficiency of the NEPA analysis before the agency. *See Vt. Yankee*, 435 U.S. at 553 (issues must be raised before an agency so that the agency may address the concerns); 43 C.F.R. § 4.410(c) (parties may raise on

As the R&R correctly concluded, the record shows that BLM fully assessed impacts to water resources, including drinking water resources, as part of its review. NEPA "imposes procedural requirements, but not substantive results" on federal agencies. *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835, 837 n.2 (8th Cir. 1995) (citations omitted). BLM's EA and subsequent Finding of No Significant Impact is reviewed under an arbitrary and capricious standard, looking at whether the agency considered the relevant factors or made a "clear error of judgment." *Id.* at 838. The scope of review "is narrow" and the court does not substitute its judgment for that of the agency. *Cent. S. Dakota Co-op. Grazing Dist.*, 266 F.3d at 895 (citation omitted).

Here, the EA considered impacts on water resources, including drinking water resources, at length. And, BLM required certain changes to the well pad location and design, as well as other conditions to mitigate the risk of any adverse effects to the Lake. The EA devotes an entire section to "Water Resources." App. 191-200; R. Doc. 67-16, at

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appeal only those issues raised in the prior proceeding). Although the Magistrate elected to dispose of the case because "the NEPA arguments fail on the merits," the Magistrate recognized that the "court might very well be on solid ground in concluding that the MHA Nation waived or procedurally defaulted" on its NEPA argument by failing to raise it in the complaint. MHA Add. 65.

49-58. That section recognized that drinking water could be implicated (see App. 191; R. Doc. 67-16, at 49 (acknowledging applicability of Safe Drinking Water Act); App. 194; R. Doc. 67-16, at 52 (Lake used for municipal/domestic uses)) and that "runoff from the project area could flow through a ditch that leads to Lake Sakakawea approximately 400 feet to the south if it were not contained." App. 192; R. Doc. 67-16, at 50. The EA contains significant discussion of how to reduce the potential for surface water impacts, such as by the use of a closed-loop drilling system, the construction of a 2-foot-tall berm around the pad location, and other conditions that were included in the approval. App. 194-95; R. Doc. 67-16, at 52-53; App. 254-55; R. Doc. 67-16, at 112-13. Groundwater effects were also considered. App. 195-200; R. Doc. 67-16, at 53-58.

The Bureau of Reclamation, the owner and lead federal agency for the Fort Berthold Rural Water System, also provided views. App. 158; R. Doc. 67-16; BLM App. 3; R. Doc. 67-8, at 111. The Bureau of Reclamation provided information about the System, but expressed no concerns about impacts to drinking water quality. *Id.* BLM also discussed the Tribe's concerns about water quality and setbacks in

multiple meetings. BLM App. 2; R. Doc. 67-15, at 436; App. 157; R. Doc. 67-16, at 15. *See also* App. 153-57; R. Doc. 67-16, at 11-15 (comments from environmental groups and North Dakota Department of Health).

The Tribe's support for its assertion that the "record is undeveloped" on the threat from the Project to the Tribe's drinking water (Br. at 17) mischaracterizes and cherry-picks from the record. Contrary to the Tribe's statements (Br. at 4, 18-19), the EA does not "sidestep the question of the Torpedo Project's risk to the Tribe's health and welfare," nor does it ignore the specific potential impacts on drinking water sourced from the Lake. To the contrary, it recognizes the Lake as a source of municipal and domestic water, but identifies no likely adverse impacts to those uses given the mitigation measures that will be used. App. 194-95; R. Doc. 67-16, at 52-53; App. 209; R. Doc. 67-16, at 67; *see also* App. 288; R. Doc. 67-16, at 146 (Decision record, noting "design features aimed at reducing impacts and addressing health and safety concerns, as well as comments on tribal resolutions on setbacks from the Lake). The Tribe also asserts that the Spill Prevention plan lacks meaningful detail (Br. at 19), but makes no specific allegation that the plan is inadequate or based on erroneous

assumptions. *Cf. Dombeck*, 164 F.3d at 1128 ("We need not 'fly speck' an [environmental impact statement] for inconsequential or technical difficulties." (quoting *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1287 (1st Cir. 1996)). And, the Tribe cites the BLM communications plan as acknowledging that there is "*some* risk to the MHA Nation's drinking water" (Br. at 18), but this demonstrates that the agency *did* consider the potential risk, and found that the site design requirements and spill contingency plan adequately mitigate that risk. App. 275; R. Doc. 67-16, at 133.

In reviewing an agency's compliance with NEPA, "the role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97-98 (1983). That standard is easily met here. The EA considered and disclosed the potential impacts from the Project on the Lake, including as a source of drinking water, and meets the APA standard of review. *See also Dombeck*, 164 F.3d at 1128 (noting that where analysis involves "a high level of technical

expertise," the court must defer to the informed discretion of the responsible federal agencies." (quotation and citation omitted)).

The Magistrate found no merit in any of the Tribe's challenges to the adequacy of the EA, and the Tribe does not address, much less identify any error in, these findings. *See* MHA Add. 76-77. The R&R notes that "nothing in the record indicat[es] 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." MHA Add. 76. The R&R also notes the lack of objection from state and federal agencies "who are knowledgeable about the relevant risks and the past history of drilling and well operations in the area, which include numerous wells in the same or closer proximity to Lake Sakakawea." MHA Add. 78; *see also* MHA Add. 54-56 (reasons why BLM's decision to not impose 1000-foot setback was not arbitrary and capricious). The Tribe claims that additional questions should be answered about the risk of a "spill or blowout" (Br. at 24-25), but as the R&R recognized, for purposes of fulfilling BLM's environmental obligations, these issues are adequately vetted in the EA and supporting documents, and BLM's conclusions

about risk and mitigation measures are reasonable.[4] MHA Add. 54-56, 76-78.

In sum, the Tribe has not demonstrated that BLM's environmental review failed to consider important and relevant evidence regarding the risks to the Lake as a source of drinking water, for purposes of complying with federal environmental laws. Where, as here, BLM "has considered relevant evidence and arrived at a rational result," the Tribe's "mere dissatisfaction with the agency's decision does not entitle it to relief." *Cent. S. Dakota Co-op. Grazing Dist.*, 266 F.3d at 898 (citing *Von Eye v. United States,* 92 F.3d 681, 685 (8th Cir. 1996)). The record supports BLM's decision, and it should be upheld.

IV. The MHA Nation Had Ample Opportunities to Develop a Factual Record on the Relevant Issues.

The MHA Nation asserts that it was not permitted to develop a record on the risks that the well pad "poses to the Tribe's health and

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[4] The Tribe's brief asserts there is "genuine issue of material fact exists as to the threat the Torpedo Project poses to the Tribe's health and welfare," which may allude to the summary judgment standard found in Federal Rule of Civil Procedure 56(a). MHA Br. at 25, 26. But the administrative record establishes the facts in an action seeking judicial review of agency action. *Vt. Yankee*, 435 U.S. at 549. In such cases, there are generally "no genuine issues of material fact."

welfare." MHA Br. at 11. Even if the Tribe's evidence relating to *Montana*'s second exception were relevant, the MHA Nation had multiple opportunities to submit evidence and arguments to the Department, and it did so. To supplement the record, the MHA Nation must "provide adequate justification for its failure to present [the additional] materials to the agency during its decision-making process." *Newton County Wildlife Ass'n v. Rogers*, 141 F. 3d 803, 808 (8th Cir. 1998) (citing *Vt. Yankee*, 435 U.S. at 553-54). It has not, and cannot do so here.

The administrative process extended over nearly seven years, from 2011 through 2018. The Tribe was contacted from the very outset of the process, and given opportunities to articulate its concerns. *See* BLM App. 2; R. Doc. 67-15, at 436; App. 23; R. Doc. 92, at 8; App. 30-31; R. Doc. 92, at 15-16. Before the EA and Decision Record was issued, BLM had five face-to-face meetings with Tribal representatives, two additional phone conversations, and several written communications. *See* BLM App. 2; R. Doc. 67-15, at 436 (summarizing tribal representative contacts).

After the Decision Record was issued, the MHA Nation had the opportunity to present its arguments and evidence at each stage of the administrative appeals process. *See* App. 675-680; R. Doc. 68-1, at 4-9 (MHA Nation request for State Director Review, including supporting materials); App. 862-884; R. Doc. 68-1, at 191-213 (MHA Nation notice of appeal and petition to stay); App. 891-912; R. Doc. 68-2, at 7-28 (MHA Nation Request for Reconsideration of Director Review). The OHA Director noted that the stay petition included "twenty pages of legal analysis containing numerous arguments" and "the MHA Nation provided twelve exhibits, many of which are voluminous and factually-intensive, and others of which contain detailed, in-depth legal analysis on issues presented in the petition." App. 117; R. Doc. 1, at 18. *See also* MHA Add. 81 (R&R description of how MHA Nation was given a meaningful opportunity to address the merits before the OHA Director).

For the first time on appeal, the MHA Nation argues that it should be allowed an evidentiary hearing before the Department. MHA Br. at 17. The Tribe states that it "has spent more than five years … seeking a hearing" (Br. at 11), but in fact, the Tribe has never requested a hearing. Nor did it raise its evidentiary hearing argument, or any

other complaint about "fact-finding," before the Department, in its Complaint, or in its summary judgment briefing. This argument is thus forfeited. *See Vt. Yankee*, 435 U.S. at 553 (finding that issues must be raised before an agency so that the agency may address the concerns); *Shanklin v. Fitzgerald*, 397 F.3d 596, 601 (8th Cir. 2005) ("Absent exceptional circumstances, we cannot consider issues not raised in the district court." (citation omitted)).

The argument also lacks merit. The MHA Nation relies heavily on the IBLA judge's Order, which the Tribe says "recognized [that] there are sufficient factual and legal issues that remain to be decided in this case, and the record without a hearing is insufficient for resolving them." MHA Br. at 17; *see also id.* at 18 (asserting that IBLA judge "recognized there are a significant factual and legal issues … and the record without a hearing is insufficient for resolving them"); *id.* at 12 (criticizing "district court's decision to short-circuit the IBLA's fact-finding"). The Tribe's brief misrepresents the IBLA judge's Order. That Order found that the Tribe's appeal "raises multiple *legal* issues of first impression that can only be addressed after a thorough review of applicable law and precedent." App. 369; R. Doc. 68-4, at 21 (emphasis

added). And, the Order discusses only legal questions. App. 368-69; R. Doc. 68-4, at 20-21 (identifying "key questions presented on appeal," all of which are questions of law). The IBLA judge never indicated that an evidentiary hearing or other fact-finding was necessary.

Nor are such hearings required under the agency's regulations. *See* 43 C.F.R. § 4.415 (setting forth procedures for a motion for a hearing on an appeal involving questions of fact). Those regulations provide that, where an appeal involves a question of fact, a "party may file a motion that the Board refer a case to an administrative law judge for a hearing." *Id.* § 4.415(a). But the Tribe never filed such a motion. Nor does the Tribe's Request for Reconsideration of Director Review and Assumption of Jurisdiction reference any intent to file such a motion, or any need to submit additional evidence. App. 891-912; R. Doc. 68-2, at 7-28. *Stickelman v. United States*, 563 F.2d 413 (9th Cir. 1977), cited by the MHA Nation (Br. at 18), does not support a hearing requirement, but rather requires sufficient procedures that will provide fairness to the parties involved and a basis for judicial review. *Id.* at 417. That standard is met here, where the Tribe had multiple opportunities to be

heard, and in fact submitted dozens of pages of legal argument and hundreds of pages of exhibits to agency decision-makers.

The MHA Nation also objects to the assumption of jurisdiction by the OHA Director (Br. at 22), but this is expressly permitted by Interior regulations. 43 C.F.R. § 4.5(b). The OHA Director's Decision explained that the IBLA Order was untimely and involved multiple errors of both law and fact. App. 116-19; R. Doc. 1, at 17-21. The proceedings also involved the unusual circumstance of having been enjoined by a federal district court. App. 372-85; R. Doc. 68-4 at 24-37; R. Doc. 68-7 at 11-32.[5]

The Tribe has not pointed to any procedural requirement that was violated. It had ample opportunity to submit argument and evidence to the Department, and did so. Its procedural argument should be rejected.

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[5] The MHA Nation asserts that it is "unprecedented" for the OHA Director to assume jurisdiction (Br. at 7, 22), but this is inaccurate. The OHA Director has assumed jurisdiction over other cases. *E.g. Grasshopper Suppression on Lands Administered by the BLM in Wyoming*, 40 OHA 202 (May 10, 2010); *Estate of Frank Anasouk Topsekok*, 34 OHA 30 (Jan. 16, 2007).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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s/ *Amber Blaha*
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2022, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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