22-2459

In The United States Court of Appeals For the Eighth Circuit

Mandan, Hidatsa, and Arikara Nation,

Plaintiff-Appellant,

v.

The United States Department of the Interior, Debra A. Haaland, in her official capacity as Secretary of the Interior

Defendant-Appellee,

and

Slawson Exploration Company, Inc.

Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
Case No. 1:19-cv-00037

BRIEF OF APPELLANT

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Summary and Request for Oral Argument

The Bureau of Land Management ("BLM") acted arbitrarily and capriciously in issuing a permit to a non-Indian to drill an oil-and-gas well on the edges of Lake Sakakawea, within the the Tribe's Fort Berthold Indian Reservation. BLM permitted this project without assessing (1) the consequent threat to the MHA Nation's drinking water supply or (2) the applicability of a tribal law requiring well pads in its reservation to be set back 1,000 feet from Lake Sakakawea. The district court granted summary judgment in favor of Defendants and held the Tribe's setback law invalid. Because the Tribe was deprived of necessary administrative proceedings and the scope of the threat posed to the Tribe's health and welfare remains, on the existing record, an unresolved issue of material fact, the judgment below should be reversed and the case remanded for additional fact-finding.

Appellant requests 20 minutes to present their oral argument.

Corporate Disclosure Statement

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and the 8th Circuit R. 26.1A., the Plaintiff-Appellant Mandan, Hidatsa & Arikara Nation is not a subsidiary of any corporation and does not have any stock which can be owned by a publicly held corporation.

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Jurisdictional Statement

Appellants appeal from the final judgment of the United States District Court for the District of North Dakota, the Honorable Daniel M. Traynor presiding, dated June 9, 2022. The district court had jurisdiction pursuant to 5 U.S.C. § 702 and 704 (APA jurisdiction to review agency actions); 28 U.S.C. § 1331 (federal question); and 28 U.S.C. § 1362 (federal question brought in a suit by an Indian Tribe). Appellants filed a timely Notice of Appeal dated July 8, 2022. Fed. R. Civ. App. P. 4(a)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of the Issue

1. **Did the district court err in dismissing the Tribe's claim that BLM's precluding the Tribe from developing a complete record as to the threat the Torpedo Project posed to the Tribe's health and welfare was arbitrary and capricious?**

   Apposite Authorities:

   Montana v. United States, 450 U. S. 544 (1981)

   Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981)

   Bus. Commc'ns, Inc. v. U.S. Dep't of Educ., 739 F.3d 374 (8th Cir. 2013).

2. **Did the district court err in dismissing the Tribe's claim that BLM acted in an arbitrary and capricious manner when the agency concluded the Tribe's Setback Law was inapplicable under *Montana* despite the lack of record evidence regarding the threat the Torpedo Project posed to the Tribe's health and welfare?**

   Apposite Authorities:

   Montana v. United States, 450 U. S. 544 (1981)

   Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981)

Statement of the Case

It is a foundational rule of federal Indian Law that tribes retain inherent sovereign power over the conduct of non-Indians within their reservations where such conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U. S. 544, 566 (1981). So too that the United States owes a trust responsibility to Indian nations, and that this "trust responsibility of the federal government includes protecting tribal sovereignty." *Davis v. Muellar*, 643 F.2d 521, 525 (8th Cir. 1981).

As part of that legal framework, it is a question of *fact* in any given case whether non-Indian conduct threatens or has some direct effect on a tribe's political integrity, economic security, or health or welfare. And in practice, it is impossible for a tribe to make this factual showing when the government pulls the levers of administrative and civil procedure to preclude the development of a full and fair record. That is what happened in this case.

Here, the BLM issued a permit to a non-Indian, Slawson Exploration Company, Inc. ("Slawson"), to engage in conduct on fee land within the boundaries of the Fort Berthold Indian Reservation that the MHA Nation, as codified by tribal law, considered a threat to the Tribe's health or welfare: operating an oil-and-gas well pad on the edges of Lake Sakakawea. Lake Sakakawea is the Tribe's sole source of drinking water and, as part of the Missouri River, is elemental to the Tribe's culture and identity. It is also situated in the middle of the Bakken Formation, where it is vulnerable to spills and blowouts from fossil fuel harvesting.

To protect its health and welfare, the MHA Nation enacted a law requiring well pads within the Fort Berthold Reservation to be set back at least 1,000 feet from the Missouri River/Lake Sakakawea (the "Setback Law"). App. 673-74, 691; R. Doc. 68-1 at 2-3, 20. The Tribe's Setback Law is consistent with and modeled after comparable regulations adopted by numerous federal agencies, including the Bureau of Indian Affairs, the U.S. Army Corps of

Engineers, and the U.S. Fish and Wildlife Service. App. 675-79; R. Doc. 68-01 at 4-8.

The Slawson "Torpedo Project" permitted by BLM involves operating a well pad a mere 600 feet from the shore of Lake Sakakawea. App. 177, 219; R. Doc. 67-16 at 35, 77. The Tribe attempted to follow all necessary procedural steps to ensure that the question of whether the Torpedo Project "threatens or has some direct effect on . . . the health or welfare of the tribe"—a material issue of *fact*—would be subject to rigorous fact-finding and receive a fair hearing. After the BLM's North Dakota Field Office issued its Decision Record and Finding of No Significant Impact ("DR/FONSI") approving the Torpedo Project via a brief Environmental Assessment ("EA")—an assessment which sidestepped the question of the Torpedo Project's risk to the Tribe's health and welfare and thus the applicability of the Setback Law—the Tribe sought administrative review by filing a request for BLM State Director Review in April 2017. App. 672-80; R. Doc. 68-1 at 1-9. The Acting State Director of the BLM Montana State Office denied

the MHA Nation's stay request and affirmed the Field Office's DR/FONSI authorizing the Torpedo Project on April 24, 2017. App. 844-58; R. Doc. 68-1 at 173-87.

On May 24, 2017, the MHA Nation timely filed an appeal and petition for stay of the Acting State Director's decision with the Interior Board of Land Appeals ("IBLA") pursuant to 43 C.F.R. §§ 3165.4(a) and (c) and 43 C.F.R. Part 4. App. 863-83; R. Doc. 68-1 at 192-212. The MHA Nation's appeal and petition for stay requested "a thorough hearing of setback requirements for oil and gas development around Lake Sakakawea" so that the parties could introduce evidence and build a full and fair factual record as to the scope of the threat that the Torpedo Project posed to the health and welfare of the Tribe. App. 865; R. Doc. 68-1 at 194.

The IBLA agreed with the Tribe that further proceedings were necessary and granted the Tribe's stay. App. 360-69; R. Doc. 68-4 at 12- 21. Recognizing that the Torpedo Project's threat to the health and welfare of the Tribe represented a material issue of fact requiring resolution through the introduction of testimony and

other evidence, the IBLA stayed the State Director's decision approving the project until further appeal proceedings could be completed. The IBLA expressly held that the MHA Nation's appeal raised multiple issues of first impression that could be properly addressed only after a "thorough review." App. 869; R. Doc. 68-4 at 21.

Slawson and BLM responded to the IBLA stay order by seeking a Temporary Restraining Order and Preliminary Injunction in district court. Over the Tribe's intervention and opposition, the district court granted the injunctive relief sought by Slawson. App. 372-85, 1318-39 R. Doc. 68-4 at 24-37, 68-7 at 11-32. In so doing, the district court ignored the sparseness of the existing record and opined on the ultimate merits of the *Montana* question. *Id*. Citing the Tribe's purported failure to show in its IBLA stay petition that the Torpedo Project posed a sufficiently large threat to its health or welfare, the Court held that *Montana* did not apply. App. 1334; R. Doc. 68-7 at 27.

In parallel with these district court proceedings, the Director of the United States Department of Interior Office of Hearing and Appeals ("OHA") took the unprecedented step of assuming jurisdiction over the administrative appeal in October 2017. App. 116-25 ; R. Doc. 1 at 17-26. A few months later, the OHA Director invalidated the Board's stay order and affirmed the BLM's DR/FONSI approving the Torpedo Project. App. 116-25 ; R. Doc. 1 at 17-26. The OHA Director based their decision, in part, on the district court's TRO and PI rulings. Characterizing the district court's opinions as "instructive guidance," the OHA Director concluded that "the IBLA Stay Order erroneously amounted to allowing the MHA Nation to exercise 'tribal regulation [of] non-Indians'" and that "BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands." App. 123-24; R. Doc. 1 at 24-25.

In response, the Tribe commenced an Administrative Procedure Act action against the Federal Defendants, which forms the basis for the instant appeal. In its APA action, the Tribe alleged,

inter alia, that the Federal Defendants acted arbitrarily, capriciously, or otherwise contrary to law in permitting the Torpedo Project without analyzing or engaging in sufficient fact-finding as to the potential threat that the Torpedo Project posed to the health and welfare of the Tribe. App. 100-25; R. Doc. 1. The Tribe alleged that this error was compounded by the OHA Director's assumption of jurisdiction, which deprived the Tribe of the hearing and "thorough review" of these risks which the IBLA agreed was necessary. App. 111-12; R. Doc. 1 at 12-13.

Following briefing on the parties' cross-motions for summary judgment, the magistrate judge issued a Report and Recommendation in favor of Defendants. App. 16-92 ; R. Doc 92. The Tribe objected to the Report and Recommendation, with BLM and Slawson responding in turn. R. Docs 109, 114, 115. Notably, BLM itself urged the district court to reject the Report and Recommendation's *Montana* analysis:

> The R&R . . . erred in suggesting that an analysis under *Montana v. United States* is appropriate to assess the propriety of BLM's federal agency permitting action. The R&R compounds this

> initial error by undertaking its own analysis of tribal inherent authority and misinterpreting *Montana*'s second exception to require a showing that catastrophic harm is substantially likely to occur. While the R&R's ultimate conclusion was correct, the Court should not follow its mistaken course, but instead simply apply federal law in evaluating BLM's action.

R. Doc. 114 at 6.

The district court did not modify or depart from the Report and Recommendation in any respect. The Court issued a four-page order in which it rejected all of the MHA Nation's claims and dismissed the MHA Nation's complaint with prejudice. R. Doc. Add. 1-4; R. Doc. 116. The district court concluded that the record, underdeveloped as it was, "supports the possibility that, if there is an equipment or other failure resulting in a discharge of contaminants, some amount of contaminant might reach Lake Sakakawea." Add. 3; R. Doc. 116 at 3. The court nonetheless ruled against the Tribe on the basis of its "mistaken" (as BLM described it) interpretation of *Montana*: "the evidence fails to demonstrate a substantial risk that if a contaminant reached Lake Sakakawea, it would cause significant damage—much less that reaching

catastrophic proportions or otherwise putting in peril the subsistence of the MHA Nation." *Id.* (internal quotes omitted).

Summary of Argument

The MHA Nation has spent more than five years and countless resources seeking a hearing to thoroughly examine the risks that the Torpedo Project poses to the Tribe's health and welfare. The Tribe's efforts to develop a full and fair record have been cut down by a buzzsaw of circular reasoning. The district court and OHA Director have opined that the Tribe is not entitled to further proceedings to develop an adequate factual record regarding the risks posed by the Torpedo Project precisely *because* the existing, inadequate record is insufficient to show that the risks posed by the Torpedo Project are substantial enough to confer Tribal jurisdiction over the Torpedo Project under the second *Montana* exception.

The district court and OHA Director have put the cart before the horse. The Tribe *cannot* make a factual showing that the Torpedo Project threatens its health or welfare, and thus, that there is a basis for jurisdiction under the second *Montana* exception, in the absence of the further proceedings sought by the Tribe and originally ordered by the IBLA. The Federal Defendants' extraordinary efforts

to prevent the Tribe from developing an adequate factual record were arbitrary, capricious, and deprived the Tribe of procedural due process.

The district court's failure to recognize and rectify the agency's arbitrary and capricious conduct is erroneous and must be reversed. As a factual matter, the district court's decision to short-circuit the IBLA's fact-finding was inconsistent with *Montana*, and was particularly remarkable in light of the underlying IBLA order that further proceedings were required before any such determination regarding *Montana*'s applicability could be rendered.

The district court compounded that factual error with a legal error. Rather than limiting its holding to the particular facts of the case before it, the district court offered a sweeping condemnation of the Tribe's setback law. In doing so, the court applied an interpretation of *Montana* that even BLM had urged the court to reject. Indeed, the district court implicitly cast doubt on the continued viability of the second *Montana* exception altogether: "The MHA Nation's setback rule is an attempt to apply its own laws

to non-tribal members on the non-members' fee lands. It is something the MHA Nation cannot do." Add. 3; R. Doc. 116 at 3.

To summarize: the Tribe and the IBLA both recognized that additional administrative proceedings were required to develop a full and fair record regarding the risks posed by the Torpedo Project. The Federal Defendants deprived the Tribe of this opportunity. The partial and one-sided record was then weaponized against the Tribe, with the district court ruling that it was *not* arbitrary or capricious for the Federal Defendants to reject the findings of its own ALJ that additional proceedings were necessary. The basis for the district court's adverse ruling was its "mistaken" (as described by BLM) interpretation of *Montana*, coupled with the Tribe's purported inability to cite evidence, the introduction of which was entirely dependent on the additional proceedings sought by the Tribe.

As a result of the Federal Defendants' conduct, there are material factual issues in this case that remain unresolved. First and foremost is the severity of the risk that the Torpedo Project poses to

the Tribe's health and welfare. If a full and fair record establishes that the risk is sufficiently severe, that would alter the disposition of the critical issue of *Montana*'s applicability to the Setback Law. The only way to resolve this disputed issue of material fact is through further administrative fact-finding proceedings. Accordingly, this Court should reverse and remand for further proceedings.

Standard of Review

A district court's grant of summary judgment is subject to *de novo* review. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). "Summary judgment is proper 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Id*. (quoting Fed. R. Civ. P. 56(c)(2)). The question presented is whether the record, when viewed in the light most favorable to the Tribe, shows that there is no genuine issue as to any material fact and that the Federal Defendants are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, (1986).

Argument

I. Precluding the Tribe from developing a complete record as to the threat the Torpedo Project posed to the Tribe's health and welfare was arbitrary and capricious.

Given the significance of *Montana* to the corpus of federal Indian Law and Tribal-United States relations generally, no conclusions regarding *Montana*'s applicability to the Setback Law should have been drawn in the absence of a fulsome record regarding the threat the Torpedo Project posed, as a factual matter, to the Tribe's health and welfare. Precluding the Tribe from developing such a record was arbitrary and capricious.

The IBLA correctly recognized that further administrative proceedings were required on this issue. As the Torpedo Project's threat to the health and welfare of the Tribe was a material issue of fact requiring resolution through the introduction of testimony and other evidence, the IBLA stayed the State Director's decision approving the project until further appeal proceedings could be completed. The IBLA expressly held that the MHA Nation's appeal raised multiple issues of first impression that could be properly

addressed only after a "thorough review." App. 869; R. Doc. 68-4 at 21.

While the IBLA has discretion to conduct evidentiary hearings, *see* 43 C.F.R. § 4.415, it has long been recognized that the IBLA "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." *Stickelman v. United States*, 563 F.2d 413, 417 (9th Cir. 1977). *See also KernCo Drilling Co.*, 71 IBLA 53, 56 (1983) ("A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence.").

As the presiding ALJ in the Tribe's IBLA appeal recognized, there are significant factual and legal issues that remain to be decided in this case, and the record without a hearing is insufficient for resolving them. Of critical importance is the threat the Torpedo Project poses to the Tribe's drinking water. For want of a formal evidentiary hearing, the record is underdeveloped on this material issue.

It is undisputed that the Torpedo Project poses *some* risk to the MHA Nation's drinking water, water intake and rural water system. The Federal Defendants have acknowledged as much. For example, in its communication plan regarding its permitting of the Torpedo Project, BLM poses the following:

> Q: Why is the BLM allowing Slawson to threaten the community's drinking water by drilling so close to and under Lake Sakakawea?
>
> A: The BLM requires Slawson to mitigate threats to the drinking water. This includes a spill contingency plan and site design requirements to prevent oil spills from impacting the groundwater and reaching the lake.

App. 275; R. Doc. 167-16 at 133. Relatedly, BLM acknowledges that at least one other Slawson well has previously "erupted, spewing gas, oil and saltwater 50 feet into the air 1,000 feet from the well." *Id*.

The Tribe respectfully contends that a full and fair record developed with the benefit of a formal evidentiary hearing will demonstrate that the Torpedo Project poses a significant, potentially catastrophic threat to the Tribe's drinking water, water intake and rural water system, and hence to the Tribe's health and welfare. The

cursory treatment this threat receives in the EA is hardly adequate to delineate and weigh these risks. In fact, the EA barely addresses the potential impact to Lake Sakakawea as a *drinking-water resource* at all. The EA devotes several pages to analyzing the Torpedo Project's impacts on drinking water derived from groundwater aquifers and wells, but none at all to drinking water derived from Lake Sakakawea. App. 191-200; R. Doc. 67-16 at 49-58.

Likewise, the "Spill Prevention, Control, and Countermeasure Plan" that BLM asserts mitigates the threat posed to the Tribe's drinking water source is devoid of meaningful detail. For example, the EA states that Slawson will take steps such as "[l]ocate the source of flow line leak" and "[a]ttempt to stop the source of the leak, if it can be done safely." App. 174; R. Doc. 67-16 at 32. Other steps include "[m]ake appropriate notifications to federal, state, and local [but not tribal] agencies." *Id*. at 175; 33. The EA notes that Slawson will utilize "a blowout preventer (BOP) assembly and well control system" in certain circumstances, but contains no discussion regarding such devices' effectiveness or residual blowout risk, much

less relate that discussion to the threat posed to the Tribe's drinking water. *Id*.

The administrative record in this case may adequately address the potential threat the Torpedo Project poses to groundwater aquifers and wells, but its treatment of the project's potential threat to Lake Sakakawea *qua* tribal drinking-water resource is plainly inadequate. the Torpedo Project's threat to the Tribe's drinking water source is a *significant* factual issue—every bit as significant as the Torpedo Project's threat to groundwater aquifers and wells, which is analyzed at some length in the EA. The administrative record shows that the federal government *knows* the Missouri River and Lake Sakakawea are of "great importance" to the Tribe, having "always provided sustenance and served cultural purposes." App. 758; R. Doc. 68-1 at 87. Yet the Federal Defendants neglected to assess how the Torpedo Project threatens this greatly important tribal resource.

The Tribe has repeatedly urged the Federal Defendants to rectify this deficiency. As early as April 2017, the Tribe made it clear

to the Federal Defendants that "the MHA Nation and millions of others receive their drinking water from Lake Sakakawea" and that the BLM's failure to "recognize or address effects of the [Torpedo] Project on the . . . rural water projects that are dependent upon Lake Sakakawea and the Missouri River" in the EA and FONSI was a material deficiency. App. 769; R. Doc. 68-1 at 8.

Denying the Tribe an opportunity to develop a full and fair record regarding this risk was arbitrary, capricious, and violated procedural due process. Without an adequate factual assessment of the threat the Torpedo Project posed to the Tribe's health and welfare, the Federal Defendants' assertion that the Setback Law was inapplicable under *Montana* was conclusory and question-begging. Indeed, the ALJ recognized that BLM's assertion that it did not need to assess the threat the Torpedo Project posed to the Tribe's health and welfare because the Tribe could not regulate "non-Indians on non-Indian fee lands" amounted to a baseless "rationalization." App. 369; R. Doc. 68-4 at 20.

The OHA Director's unprecedented assumption of jurisdiction from the ALJ deprived the Tribe of an opportunity to develop a factual record that would undercut BLM's erroneous rationalization. It is telling that, in reversing the ALJ and affirming BLM's DR and FONSI, the OHA Director did not cite to evidence in the administrative record purportedly showing that the Torpedo Project posed a minimal threat to the Tribe's health and welfare, and thus that *Montana* jurisdiction was not present. Instead, the OHA Director repeated the same question-begging language that the ALJ had rejected ("the IBLA Stay Order erroneously amounted to allowing the MHA Nation to exercise 'tribal regulation [of] non-Indians'") and cited to the district court's opinion preliminarily enjoining enforcement of the IBLA stay—an opinion based on the same inadequate record the Tribe had sought to supplement through further IBLA proceedings. App. 651; R. Doc. 68-4 at 303.

"Required procedures may vary according to the interests at stake, but the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful

manner." *Bus. Commc'ns, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374, 380 (8th Cir. 2013) (cleaned up) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). It was arbitrary and capricious of the Federal Defendants to deprive the Tribe of this opportunity, and an error by the district court to render a novel, restrictive holding regarding *Montana v. United States* on the basis of only the inadequate record the Tribe was permitted to develop in this case.

With the passage of time, it has become even more apparent that justice requires this case to be remanded for further fact-finding and consideration regarding *Montana*'s applicability. Appellants would respectfully have this Court know that the BLM has, in recent months, changed its practice with respect to the Setback Law. BLM now requires non-Indian applicants seeking a permit to drill within the boundaries of the Fort Berthold Indian Reservation to demonstrate compliance with or a variance from the MHA Nation's Setback Law. Revisiting these issues on remand with the benefit of a more complete factual record is in the best interests of the MHA Nation, BLM, and Tribal-United States relations generally.

II. A genuine issue of material fact exists as to the threat the Torpedo Project poses to the Tribe's health and welfare.

The partial and one-sided record in this case is insufficient to quantify or weigh the threat that the Torpedo Project poses to the Tribe's health and welfare. Accordingly, the district court erred when it concluded that this threat was too insignificant to render the Tribe's Setback Law applicable under the second *Montana* exception and granted summary judgment in favor of Defendants.

The Tribe seeks an administrative hearing precisely to develop a record adequate to assess these risks. For example, the Tribe will introduce testimony and other evidence sufficient to answer the following questions:

- How likely is it that the Torpedo Project will experience a spill or blowout that reaches Lake Sakakawea?
- What amount of oil, gas, and other chemicals would be discharged into Lake Sakakawea in a worst-case spill or blowout scenario?
- What would be the resulting toxicity level in the Tribe's drinking water system, and how long would it persist?
- What amount of oil, gas, and other chemicals would be discharged into Lake Sakakawea in a median-case spill or blowout scenario?

- What would be the resulting toxicity level in the Tribe's drinking water system, and how long would it persist?
- Under what conditions would a spill or blowout result in oil, gas, or other chemicals being discharged into the vicinity of the Tribe's water intake valve on Lake Sakakawea?
- If a spill or blowout occurs, how quickly and to what degree would the measures set forth in Slawson's oil spill response plan be expected to reduce the toxicity in the Tribe's drinking water supply?

Neither BLM, nor the OHA Director, nor the district court address *any* of these questions. Only when these questions are answered will there be sufficient information in the record to resolve the central, material issue of fact in this action: the extent of the threat the Torpedo Project poses to the Tribe's health and welfare. And only when this central issue of material fact is resolved will there be an adequate basis to conclude whether the Setback Law is applicable to the Torpedo Project in accordance with the second *Montana* exception.

Conclusion

For the foregoing reasons, Appellant respectfully asks the Court to reverse the district court's summary judgment order and remand with instructions for additional fact-finding.

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Certificate of Compliance

The undersigned counsel for Appellants, certifies that this brief and addendum complies with the requirements of Fed. R. App. P. 32(a)(7)(B) and 32(a)(5-6) in that it is prepared in 14 point, proportionately spaced Book Antiqua utilizing Microsoft Word 2018 and contains 4,271 words, including headings, footnotes, and quotations. In accordance with L. R. 28A(h), this brief and addendum has been scanned for viruses and is virus-free.

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Certificate of Service

The undersigned counsel for Appellants, hereby certifies that on October 17, 2022, he electronically filed the Brief and Addendum of Appellants with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. He certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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