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

Slawson Exploration Company, Inc., Plaintiff, vs. United States Department of the Interior; Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior; Interior Board of Land Appeals; and James K. Jackson, Administrative Judge, Defendants. and Mandan, Hidatsa & Arikara Nation, Intervenor.	)	**ORDER DENYING MOTION TO DISMISS AND GRANTING PRELIMINARY INJUNCTION** Case No.: 1:17-cv-166

Before the Court is the Mandan, Hidatsa & Arikara Nation's motion to dismiss filed on October 12, 2017. See Docket No. 28. On October 25, 2017, the Defendants (collectively "the Federal Defendants") filed a joint response to the motion to dismiss. See Docket Nos. 31 and 32. That same day, the Plaintiff also filed a response to the motion to dismiss. See Docket No. 33. On November 1, 2017, the Mandan, Hidatsa & Arikara Nation filed a reply. See Docket No. 36. The Plaintiff filed a surreply on November 3, 2017. See Docket No. 39. Also before the Court is the Plaintiff's motion for a preliminary injunction filed on August 12, 2017. See Docket Nos. 3 and 10. For the reasons outlined below, the motion to dismiss is denied, and the Plaintiff's motion for preliminary injunction is granted.

I. BACKGROUND

This case arises from an appeal of the permitting process for a project seeking to develop oil and gas leases underneath Lake Sakakawea. On May 31, 2011, and August 2, 2011, Slawson Exploration Company, Inc. ("Slawson") submitted Applications for Permit to Drill ("APDs") to the Bureau of Land Management ("BLM") for eight wells (collectively "the Torpedo Wells") which Slawson proposed to drill in Mountrail County, North Dakota. See Docket No. 3-3. The BLM North Dakota Field Manager approved an Environmental Assessment and the eight APDs for the Torpedo Wells on March 10, 2017. See Docket No. 3-3, p. 6.

On April 11, 2017, the MHA Nation requested State Director Review of the BLM's decision to approve the APDs. See Docket No. 3-3, p. 10. The Acting State Director accepted review, and on April 24, 2017, he affirmed the BLM Field Office's decision to issue the APDs. See Docket No. 3-3. The MHA Nation then filed a timely Notice of Appeal of the State Director Review decision with the Interior Board of Land Appeals ("IBLA") on May 24, 2017, and petitioned for a stay of the drilling. See Docket No. 3-7. Slawson moved to intervene in the IBLA appeal, and the IBLA granted Slawson's motion to intervene on June 13, 2017. See Docket No. 3-5.

The parties disagree as to whether a particular regulation applies to this situation, specifically 43 C.F.R. § 4.21(b)(4) which imposes a 45-calendar day time period to rule on a petition for a stay pending appeal. See 43 C.F.R. § 4.21(b)(4) ("The Director or an Appeals Board shall grant or deny a petition for a stay pending appeal . . . within 45 calendar days of the expiration of the time for filing a notice of appeal."). If 43 C.F.R. § 4.21(b)(4) does, in fact, apply, the deadline for a timely IBLA decision on the stay would have been July 17, 2017.

On August 9, 2017, approximately three weeks after the alleged expiration of the 45-day deadline to timely rule on the stay, the IBLA issued an order granting the stay. See Docket No. 3-2. That same day, Deputy State Director Don Juice sent a letter to Slawson notifying it to shut down all operations on the well pad once the 7-inch casing was cemented in the well. See Docket No. 3-3, p. 7-8.

On August 11, 2017, Slawson filed a complaint in federal district court against the United States Department of the Interior and its Secretary, Ryan Zinke in his official capacity; the IBLA; and IBLA Administrative Judge James Jackson in his official capacity, (collectively "the Federal Defendants"), challenging the stay issued by the IBLA. See Docket No. 1. The following day, on August 12, 2017, Slawson sought a temporary restraining order (TRO) and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. See Docket Nos. 3 and 10. Slawson specifically requested the Court set aside the Order the IBLA issued on August 9, 2017, which stayed the eight previously approved APDs. See Docket No. 3. On August 15, 2017, the Court granted Slawson's motion for a TRO and set a show cause hearing for August 29, 2017 to determine whether a preliminary injunction should be issued. See Docket No. 11. The TRO was set to expire in fourteen days or on or before August 29, 2017. See Docket No. 11, p. 14.

On August 21, 2017, the Federal Defendants filed an unopposed motion for a stay of the federal district court proceedings, noting the parties had consented to an extension of the Court's TRO Order, dated August 15, 2017, for a period of time up to and including October 31, 2017. See Docket No. 16. The parties further requested that the Court stay the instant action and all associated hearings and deadlines until further order by the Court, in order to allow the administrative process to proceed as described in the motion. See Docket No. 16, p. 3. On August 21, 2017, the Court granted the Federal Defendants' unopposed motion; extended the TRO until

October 31, 2017; and stayed the instant action and all associated deadlines and hearings until further order of the Court. See Docket No. 18.

On September 25, 2017, the Mandan, Hidatsa & Arikara Nation ("MHA Nation") filed a motion to intervene in the federal district court action. See Docket No. 20. The Federal Defendants did not oppose the MHA Nation's intervention. See Docket No. 23. On October 10, 2017, the parties filed a joint motion regarding intervention, briefing deadlines, and an extension of the TRO. See Docket No. 26. The parties requested that the Court: (1) rule on the MHA Nation's motion to intervene, which neither Slawson nor the Federal Defendants opposed; (2) lift the stay issued in the Court's Order, dated August 21, 2017, for the limited purpose of resolving the MHA Nation's motion to dismiss; (3) adopt the parties' proposed briefing schedule for the MHA's motion to dismiss; and (4) extend the TRO through November 17, 2017, without prejudice to any party's right to seek or oppose further extensions of the temporary restraining order. See Docket No. 26. On October 11, 2017, the Court granted the parties' joint motion; granted the MHA Nation's unopposed motion to intervene; lifted the stay for the limited purpose of resolving the MHA Nation's motion to dismiss; adopted the parties' proposed briefing schedule for the MHA Nation's motion to dismiss;[1] and extended the TRO through November 17, 2017. See Docket No. 27.

On September 28, 2017, in the administrative action below, the BLM submitted a Petition for Director's Review and Brief in Support, requesting that the Director of the United States' Department of the Interior Office of Hearings and Appeals ("OHA Director") review and reverse the IBLA stay, take jurisdiction over the appeal, and render the final decision in the administrative matter. See Docket No. 31-2. On October 13, 2017, the OHA Director granted the petition for

[1] The Court notes that the briefing schedule the parties proposed dictated that the MHA Nation's motion to dismiss would not be ripe until November 1, 2017. See Docket Nos. 26 and 27.

Director's review and directed the parties to submit a proposed briefing schedule no later than October 27, 2017. See Docket No. 31-3.

On October 12, 2017, the MHA Nation filed a motion to dismiss Slawson's complaint and to dissolve the Court's order granting a TRO. See Docket No. 28. This motion is currently pending before the Court. On October 25, 2017, the Federal Defendants filed a joint response to the MHA Nation's motion to dismiss. See Docket No. 32. That same day, Slawson also filed a response to the MHA Nation's motion to dismiss. See Docket No. 33. On November 1, 2017, the MHA Nation filed a reply in support of its motion to dismiss. See Docket No. 36. On November 3, 2017, Slawson filed a surreply to the MHA Nation's motion to dismiss. See Docket No. 39.

On October 25, 2017, the Federal Defendants filed a "Motion to Continue Stay Federal Proceedings to Allow Administrative Proceedings" which is also currently pending before the Court. See Docket No. 30. On November 8, 2017, the MHA Nation filed a response to the Federal Defendants' motion. See Docket No. 41. On November 15, 2017, the Federal Defendants filed a reply. See Docket No. 44.

On October 27, 2017, Slawson filed a "Motion to Extend Temporary Restraining Order Until the Completion of Director Review." See Docket No. 34. Slawson requested that the Court's order granting a TRO, which was extended through November 17, 2017, be further extended until the OHA Director has completed a review of the Board of Land Management's Approval Order. See Docket No. 34. On November 8, 2017, the Federal Defendants filed a response to Slawson's motion to extend the TRO. See Docket No. 40. On November 13, 2017, the MHA Nation filed a response in opposition to Slawson's motion to extend the TRO. See Docket No. 42. On November 15, 2017, Slawson filed a reply. See Docket No. 43. On November 16, 2017, the Court granted

Slawson's motion to extend the TRO and extended the TRO until December 1, 2017. See Docket No. 46.

II. LEGAL ANALYSIS

A. COURT'S JURISDICTION OVER COMPLAINT AND MOTION FOR TRO

In its motion to dismiss, the MHA Nation argues that this Court lacks jurisdiction over Slawson's complaint, requiring dismissal and the dissolution of the TRO. See Docket No. 28. The MHA Nation argues that because the United States has not waived sovereign immunity under the Administrative Procedure Act ("APA"), this Court lacks subject matter jurisdiction over Slawson's complaint and the motion for a TRO. See Docket No. 29. The MHA Nation notes that the United States has only waived sovereign immunity under the APA where the Plaintiff seeks review of a "final agency action" under 5 U.S.C. § 704, and the IBLA's Stay Order, dated August 9, 2017, is not a "final agency action." See Docket No. 29. In response, the Federal Defendants assert that the IBLA's failure to timely rule on the MHA Nation's petition for stay resulted in the APDs becoming effective, and therefore final under 43 C.F.R. § 4.21, making the IBLA's interference with the APDs subject to APA review by this Court. See Docket No. 31.

Under the Administrative Procedure Act, only "final agency action" is subject to judicial review. 5 U.S.C. § 704. The legal threshold at issue is whether the IBLA's decision to grant the MHA Nation's petition for stay was "final agency action," thereby making it subject to judicial review.

The Federal Defendants argue that in reading 43 C.F.R. § 4.21(a)(3), (b)(4), and (c) all together, the IBLA failed to timely make a decision on the MHA Nation's petition for stay within 45 days after the expiration of the time to file a notice of appeal; thus, the APD decision became

"effective," final, and reviewable as a matter of law. See Docket No. 31. 43 C.F.R. § 4.21(c) states:

> Exhaustion of administrative remedies. No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed and the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section or a decision has been made effective pending appeal pursuant to paragraph (a)(1) of this section or pursuant to other pertinent regulation.

(emphasis added). In order to determine whether a "decision" "shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704," the first question to determine is whether the "petition for a stay of decision has been timely filed." See 43 C.F.R. § 4.21(c). Here, all of the parties agree that the MHA Nation timely sought to stay the BLM decision granting the APDs. See Docket Nos. 29, p. 2; 31, p. 7; and 33, p. 7.

The next question to address is whether "the decision being appealed has been made effective in the manner provided in paragraphs (a)(3) or (b)(4) of this section[.]" 43 C.F.R. § 4.21(a)(3) states: "A decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section." (emphasis added). Paragraph (b)(4) of Section 4.21 states: "The Director or an Appeals Board shall grant or deny a petition for a stay pending appeal, either in whole or in part, on the basis of the factors listed in paragraph (b)(1) of this section, within 45 calendar days of the expiration of the time for filing a notice of appeal." 43 C.F.R. § 4.21(b)(4) (emphasis added). The

Federal Defendants argue the IBLA did not make a decision on the MHA Nation's petition for a stay "within 45 calendar days of the expiration of the time for filing a notice of appeal."[2]

Approximately three weeks after the alleged expiration of the 45-day deadline to decide on the MHA Nation's petition for a stay, the IBLA issued an order granting the stay on August 9, 2017. See Docket No. 3-2. The Federal Defendants argue that because the IBLA did not make a decision on the MHA Nation's petition for a stay within 45 calendar days of the expiration of the time for filing a notice of appeal, the APDs became "effective" and therefore "shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704." See Docket No. 31.

The Federal Defendants point to several cases which construe Section 4.21 in the same manner. "If an Appeals Board fails to act upon a petition for a stay or denies such a petition, the decision becomes effective immediately." See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt., 606 F.3d 1058, 1064 (9th Cir. 2010) (citing 43 C.F.R. § 4.21(a)(3)). "The primary consequence of IBLA failing to rule upon a stay request within 45 days is that the decision becomes effective. In addition, the decision becomes subject to judicial review under 5 U.S.C. § 704." See Ctr. for Biological Diversity v. U.S. Dept. of Interior, 255 F. Supp. 2d 1030, 1034 (D. Ariz. 2003)

[2] In support of their position, the Federal Defendants provide the following analysis: The BLM approved the APDs on March 10, 2017. See Docket No. 3-3, p. 6. The MHA Nation filed a request for State Director Review, and on April 24, 2017, the Acting State Director affirmed the decision to issue the APDs. See Docket No. 3-3. The State Director Review decision was served on the MHA Nation on May 1, 2017. See Docket No. 31-1. Pursuant to 43 C.F.R. § 4.411(a)(2)(i), the appeal period expired 30 days after May 1, 2017. The MHA Nation filed a timely notice of appeal of the State Director Review decision with the IBLA on May 24, 2017, and petitioned for a stay to prevent the APDs from becoming effective. See Docket No. 3-7. The notice of appeal period expired thirty days after May 1, 2017, specifically on May 31, 2017. See 43 C.F.R. § 4.411(a)(2)(i). A timely ruling on a petition for a stay pending appeal is within 45 calendar days of the expiration of the time for filing a notice of appeal. See 43 C.F.R. § 4.21(b)(4). Forty-five calendar days after May 31, 2017, is Saturday, July 15, 2017. The IBLA did not rule on the MHA Nation's petition for a stay until August 9, 2017, approximately three weeks after the 45-day timeframe for timely ruling. See 43 C.F.R. § 4.21(b)(4).

(citation omitted) (holding BLM's decision became "final" once the IBLA did not grant a stay within 45 days of the expiration of the time for filing a notice of appeal pursuant to 43 C.F.R. § 4.21). The Director's decision in *David H. Burton* also held that the IBLA has the inherent authority to issue stays at any time, notwithstanding the 45-day time period in 43 C.F.R. § 4.21; however, the result of waiting longer than 45 days is that the decision becomes "effective" and therefore "final." 11 OHA 117, 125 (1995). The Arizona federal court in *Center for Biological Diversity* stated, "[T]he Court concludes that the IBLA has no authority to make a decision 'non-final,' thereby stripping a federal court of its right to hear a case and disrupting the settled expectations of Plaintiffs, once a BLM decision becomes final under *its own* regulations." 255 F. Supp. 2d at 1035 (emphasis in original). The Arizona Court further noted that the Department of the Interior is obligated to follow its own regulations which specifically define when a decision is "final" for judicial review. Id.

The MHA Nation's brief in support of its motion to dismiss did not discuss 43 C.F.R. § 4.21(c) finality or any case law regarding the IBLA's failure to rule on a petition for stay within the 45-day period. In fact, in the MHA Nation's reply, it argued *for the first time* that the stay was obtained pursuant to 43 C.F.R. § 3165.4(c), which expressly states that Section 4.21(a) is inapplicable.[3] 43 C.F.R. § 3165.4(c) states:

> Effect of an appeal on an approval/decision by a State Director or Administrative Law Judge. All decisions and approvals of a State Director or Administrator Law Judge under this part shall remain effective pending appeal unless the Interior

[3] In its brief in support of its motion to dismiss, the MHA Nation does not argue that 43 C.F.R. § 4.21 does not apply; rather, it argues in a footnote that the IBLA may issue a stay even after the expiration of the 45-day period because "nothing in the regulation [43 C.F.R. § 4.21] waives the IBLA's authority to issue a stay after the 45 day period." See Docket No. 29. The Federal Defendants do not dispute that the IBLA may issue a stay after the 45-day period has run. See Docket No. 31. However, the Federal Defendants assert that if the IBLA does, indeed, issue a stay after the 45-day period, that action does not "retroactively convert a decision reviewable by this Court into a decision that is now unreviewable." See Docket No. 31, p. 11.

> Board of Land Appeals determines otherwise upon consideration of the standards stated in this paragraph. The provisions of 43 CFR 4.21(a) shall not apply to any decision or approval of a State Director or Administrative Law Judge under this part. A petition for a stay of a decision or approval of a State Director or Administrative Law Judge shall be filed with the Interior Board of Land Appeals, Office of Hearings and Appeals, Department of the Interior, and shall show sufficient justification based on the following standards:
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> (1) The relative harm to the parties if the stay is granted or denied,
> (2) The likelihood of the appellant's success on the merits,
> (3) The likelihood of irreparable harm to the appellant or resources if the stay is not granted, and
> (4) Whether the public interest favors granting the stay.
>
> Nothing in this paragraph shall diminish the discretionary authority of a State Director or Administrative Law Judge to stay the effectiveness of a decision subject to appeal pursuant to paragraph (a) or (b) of this section upon a request by an adversely affected party or on the State Director's or Administrative Law Judge's own initiative. If a State Director or Administrative Law Judge denies such a request, the requester can petition for a stay of the denial decision by filing a petition with the Interior Board of Land Appeals that addresses the standards described above in this paragraph.

(emphasis added).

In the MHA Nation's reply, it argues that there is no 45-day limitation on the IBLA's authority to issue a stay under 43 C.F.R. § 3165.4(c) because Section 4.21(a) does not apply, and that, unlike appeals under Section 4.21, the initial decision appealed under 43 C.F.R. § 3165.4 is effective immediately and remains effective unless the IBLA issues a stay pursuant to Section 3165.4(c). See Docket No. 36. However, the MHA Nation cites no case law which applies or any cases which have adopted their same interpretation of the regulations. In addition, the MHA Nation does not comment on the fact that 43 C.F.R. § 3165.4(c) only states that provisions of 43 C.F.R. § 4.21(a) shall not apply; however, 43 C.F.R. § 4.21(b)(4) is the provision which outlines the 45-day limitation, and 43 C.F.R. § 3165.4(c) does not state that subsection (b)(4) does not apply. The Court is not convinced by the MHA Nation's argument nor is there any case law to support their position.

Although 43 C.F.R. § 3165.4(c) does indeed state that 43 C.F.R. § 4.21(a) "shall not apply to any decision or approval of a State Director or Administrative Law Judge under this part," Section 3165.4(c) does not state that Section 4.21(b) shall not apply. 43 C.F.R. § 4.21(b)(4) is the provision which specifically outlines the 45-day limitation, and the MHA Nation has not pointed out to the Court why Section 4.21(b) should not still apply in this situation. Further, in Slawson's surreply to the MHA Nation's motion to dismiss and the Federal Defendants' reply in support of its motion to continue the stay, both parties note that the Department specifically cited 43 C.F.R. § 3165 when explaining that it amended Section 4.21 to ensure that the procedures for obtaining a stay in Section 4.21(b) apply even when Section 4.21(a) does not. See Department Hearing and Appeals Procedures, 58 FR 4939-01, 1993 WL 7740 (Jan. 19, 1993); Docket Nos. 39 and 44. The Office of the Secretary of the Interior already considered and amended Section 4.21 to forestall arguments like the one the MHA Nation is making, i.e. that the Section 4.21 stay procedural provisions do not apply when other "pertinent regulations" apply. At the time Section 4.21 and Section 3165.4(c) were amended, this very issue was raised and addressed when the proposed regulations were opened to public comment:

> **Division of Section 4.21(a) into Paragraphs (a) and (b)**
> Another commenter was concerned that the text of the rule at proposed § 4.21(a), which would require the Director or an Appeals Board to act upon a petition for a stay within 45 days, does not appear to apply to situations governed by "other pertinent regulations," among them the amended provisions of part 3160. The commenter argued that the combined effect of the two rules leaves a "hiatus," which establishes no time limit within which an Appeals Board must act on a stay requests for a decision issued under part 3160. The commenter requested that §4.21(a) include direction indicating how appellate officials should handle stay requests which are governed by other regulations and therefore are not governed by §4.21(a).
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> The amended parts 3150 and 3160 specifically provide that the provisions of §4.21(a) shall not apply. Because proposed §4.21(a) does not apply to decisions governed by other pertinent appeals regulations, for example, parts 3150 and 3160, the procedural provisions in proposed §4.21(a) would not necessarily have applied

> to all petitions for stays. Therefore, while the Department has retained the provision that allows time to file a stay petition before a decision goes into full force and effect in §4.21(a), the procedural changes created by this rule have been moved from paragraph (a) to a new paragraph (b) so as to apply, except where otherwise provided by law or other pertinent regulation, to all petitions for stays to the Director or an appeals Board. Proposed paragraph (b) is redesignated as paragraph (c), and existing paragraph (c) will now become paragraph (d).

Final Rule, Department Hearings and Appeals Procedures, 58 FR 4939-01, 1993 WL 7740 (Jan. 19, 1993). Section 3165.4 is a subpart of 43 C.F.R. Part 3160 and, apart from the default procedural provisions at Section 4.21, the MHA Nation has identified no other "pertinent regulations" in place governing the procedure – and most importantly, the timing of the decision – of a motion for stay under Section 3165.4. In sum, the Department of the Interior added language to Section 3165.4(a) excluding the application of Section 4.21(a) in order to prevent an automatic stay; but, at the same time, also made sure to move procedural safeguards for applicants out of Section 4.21(a) and into subparts (b) and (c) to preserve their effect.

The Court finds the Federal Defendants' and Slawson's legal arguments persuasive. The Court finds that Section 4.21(b)'s 45-day time frame applies in this situation, and there was only a 45-day period in which the IBLA could *timely* decide on the MHA Nation's petition for a stay. Here, the IBLA exercised its authority to issue a stay outside the 45-day time period contemplated by 43 C.F.R. § 4.21, which the Court acknowledges the IBLA has the discretion to do. However, the Court expressly finds as a matter of law that the result of the IBLA waiting longer than 45 days to issue a decision on the petition for a stay is that the decision becomes "effective" and therefore "final." See Center for Biological Diversity, 255 F. Supp. 2d at 1034. The Court further finds as a matter of law that the fact the State Director Review decision becomes effective after the 45-day period expires without a ruling satisfies the requisite finality that allows for APA review by this Court under 5 U.S.C. § 704. The IBLA's untimely decision on the petition for stay interfered with

the already affective APDs, and this Court has subject-matter jurisdiction to review the stay even though the underlying administrative action continues below.

The MHA Nation also argues Slawson "has failed to exhaust administrative remedies prior to turning to federal court." See Docket No. 29, p. 17. While the MHA Nation discussed in their briefs case law regarding the "exhaustion doctrine," it failed to identify or specify what additional administrative steps that Slawson was required to exhaust prior to filing suit. The Court is not persuaded by the MHA Nation's exhaustion argument.

B. SLAWSON'S MOTION FOR PRELIMINARY INJUNCTION

On August 12, 2017, Slawson filed a motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. See Docket Nos. 3 and 10. Slawson specifically requested the Court set aside an order the IBLA issued on August 9, 2017, that stayed eight previously approved APDs. See Docket No. 3.

Slawson initially sought a TRO pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, which provides in relevant part as follows:

> **(b) Temporary Restraining Order.**
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> **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
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> **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
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> **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

The United States Supreme Court has recognized that in some limited situations, a court may properly issue *ex parte* orders of brief duration and limited scope to preserve the status quo

pending a hearing. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974); Carroll v. Princess Anne, 393 U.S. 175, 180 (1968). The limited nature of *ex parte* remedies:

> reflect[s] the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, cf. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 . . . (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.

Granny Goose Foods, 415 U.S. at 438-39 (emphasis in original).

Rule 65(b) directs the court to look to the specific facts shown by an affidavit to determine whether immediate and irreparable injury, loss, or damage will result to the applicant. It is well-established the court is required to consider the factors set forth in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981), in determining whether a preliminary injunction should be granted. The *Dataphase* factors include "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." Id.

It is well-established that the movant has the burden of establishing the necessity of a temporary restraining order or a preliminary injunction. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994). "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." Id. at 1472. The Court notes that although the MHA Nation brought a motion to dismiss Slawson's complaint and to dissolve the TRO, the MHA Nation only addressed the jurisdictional and finality issue and did not address the *Dataphase* factors.

i. PROBABILITY OF SUCCESS ON THE MERITS

When evaluating a movant's likelihood of success on the merits, the court should "flexibly weigh the case's particular circumstances to determine 'whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.'" Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc., 815 F.2d 500, 503 (8th Cir. 1987). At this stage, the Court need not decide whether the party seeking the preliminary injunction will ultimately prevail. PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a temporary restraining order or a preliminary injunction cannot be issued if the movant has no chance on the merits, "the Eighth Circuit has rejected a requirement as to a 'party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits.'" Id. The Eighth Circuit has also held that of the four factors to be considered by the district court in considering preliminary injunctive relief, the likelihood of success on the merits is "most significant." S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

The Court must consider the substantive claims in determining whether Slawson has a likelihood of success on the merits. Slawson is asserting claims of declaratory and injunctive relief. See Docket No. 1. A likelihood of success on the merits of even one claim can be sufficient to satisfy the "likelihood of success" *Dataphase* factor. See Nokota Horse Conservancy, Inc. v. Bernhardt, 666 F. Supp. 2d 1073, 1078-80 (D.N.D. 2009).

Slawson seeks to vacate the alleged untimely and unlawful stay pending review of eight approved APDs that the IBLA issued on August 9, 2017. Slawson asserts it relied on the approvals of the APDs and the lack of a timely ruling on the MHA Nation's Petition for Stay to begin drilling. Slawson requests a preliminary injunction so it can continue drilling without incurring significant

non-reimbursable expenses from ceasing operation and decommissioning the active drilling rig on site. Slawson also asserts it is likely to prevail on its claims against the Federal Defendants.

The Court finds Slawson has a strong likelihood of success on its claims against the Federal Defendants. Slawson's brief in support of its motion for a preliminary injunction maintained three independent reasons which give rise to its substantial likelihood of success:

> (1) The Order directly contradicted the governing regulation which states that the "Appeals Board shall grant or deny a petition for a stay pending appeal . . . within 45 calendar days," and because the stay was not denied within 45 days, Slawson relied on that timing to begin work on the well;
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> (2) The MHA Nation filed its Statement of Reasons in support of its appeal late, without meeting the required standard. Thereby, it was subject to dismissal, and the entire appeal should have been denied; and
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> (3) On the underlying merits, the Order is not in accordance with the law and is in excess of statutory authority because it imposes tribal regulation on non-Indians contrary to *Montana v. United States*, 450 U.S. 544 (1981).

See Docket No. 3-1, p. 17.

The first two arguments Slawson sets forth are alleged procedural deficiencies; however, its third argument addresses the underlying merits. Slawson argues the IBLA's Stay Order was substantively flawed because it ignored the well-settled principles that tribes may not regulate federal agencies and have very limited civil jurisdiction over non-tribal members on non-tribal lands. To the extent that the MHA Nation attempts to regulate authorizations by the BLM to develop federal minerals, Slawson argues the law is clear that the MHA Nation lacks the authority to do so.[4] See Docket No. 3-1, p. 21. Slawson asserts the horizontal wellbores will "penetrate

[4] Slawson maintains Congress has vested the Secretary of the Interior with exclusive authority to lease and manage the minerals under Lake Sakakawea. Flood Control Act of 1944, ch. 655, 58 Stat. 877; Fort Berthold Garrison Act, Pub. L. No. 81-437, 63 Stat. 1026 (1949); Mineral Leasing Act for Acquired Lands of 1947, Pub. L. 80-382, 61 Stat. 913; South Dakota v. Bourland, 508 U. S. 679, 691-92 (1993).

private minerals, state of North Dakota minerals, and federal mineral estate. It will not penetrate tribal or allotted minerals held in trust by the United States." See Docket No. 3-3, p. 4 (emphasis added). To the extent this case concerns the activity of non-tribal members on non-tribal land, Slawson argues an application of *Montana v. United States*, 450 U.S. 544 (1981), is warranted.

In *Montana*, the United States Supreme Court set forth a general presumption that tribes may not exercise civil jurisdiction over non-tribal members "without express . . . delegation" by Congress. 450 U.S. at 564. The MHA Nation's Petition for Stay did not demonstrate any evidence of an express delegation from Congress giving it the authority to apply the 1,000-foot setback at issue in this case.[5] The MHA Nation's Petition for Stay cited one of two exceptions to the general rule outlined in *Montana* which allows tribes to regulate non-tribal conduct on fee lands within a reservation when it "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." See Montana, 533 U.S. at 566. However, this exception only applies when the conduct "imperil[s] the subsistence" of the tribe or will result in "catastrophic" consequences for the tribe. See Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S Ct. 2709, 2726 (2008). Slawson argues that neither the MHA Nation's Petition for Stay nor the IBLA cited evidence of any such "catastrophic consequence." Therefore, Slawson argues the MHA Nation does not have civil jurisdiction over Slawson or the BLM with regard to non-tribal land. The Court agrees.

[5] The MHA Nation's Petition for Stay cited its constitution which purports to apply to non-tribal members on fee lands. The MHA Nation contends its constitution was authorized by Congress and approved by the Secretary of the Interior. See Docket No. 3-7, p. 9. Slawson argues that the congressional authorization the MHA Nation cited, namely the Indian Reorganization Act of 1934, only authorized the MHA Nation to develop a constitution, and did not specifically approve the constitution at issue. See Docket No. 3-1, p. 21, n. 5; see also 25 U.S.C. § 5123(a).

Slawson also argues the IBLA's Order was flawed because it was based on a mistaken belief that the case concerned "trust resources for the MHA Nation" – that is, "mineral interests . . . held in trust for the benefit of the MHA Nation." See Docket No. 1-1, p. 3. The drilling permit which BLM initially approved for Slawson does not allow Slawson to access any resources held in trust for the MHA Nation. Further, Slawson's complaint asserted that the Torpedo Wells "would not penetrate or develop any tribally owned minerals, allotted minerals, or minerals that are held in trust by the United States for the benefit of one or more Indians or tribes." See Docket No. 1, p. 3. Slawson argues the BLM has no obligation to enforce or recognize tribal law when making federal decisions affecting non-Indian lands. The Court agrees.

As the Court has found a strong likelihood of success on Slawson's claims, no further analysis is necessary at this point. See Nokota Horse Conservancy, 666 F. Supp. 2d at 1078-80 (finding sufficient likelihood of success on the merits of one claim, without a need to undertake extensive review of other claims). The Court finds Slawson has shown the "success on the merits" *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

ii. IRREPARABLE HARM

Slawson must establish there is a threat of irreparable harm if injunctive relief is not granted, and that such harm is not compensable by an award of money damages. Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007). "The 'mere possibility' that harm may occur before a trial on the merits is not enough." MKB Mgmt. Corp. v. Burdick, 954 F. Supp. 2d 900, 912 (D.N.D. 2013). The party that seeks injunctive relief must show that a significant risk of harm exists. Id. The absence of such a showing is sufficient grounds to deny injunctive relief. Id.

Slawson contends it will suffer irreparable injury if a preliminary injunction is not ordered. Specifically, Slawson alleges that stopping the drilling of the Torpedo wells will cause it to sustain substantial financial costs that, due to the Federal Defendants' claimed sovereign immunity, cannot be recovered.

The threat of unrecoverable economic loss qualifies as irreparable harm. See Iowa Utilities Bd. v. F.C.C., 109 F.3d 418, 426 (8th Cir. 1996); Baker Elec. Coop. Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding irreparable harm and issuing a preliminary injunction where absence of said injunction would result in unrecoverable economic injury); North Dakota v. U.S. E.P.A., 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015). The Court finds that Slawson has adequately demonstrated the substantial economic loss it would sustain if it were required to shut down drilling operations at the Torpedo Federal well pad and remove the drilling rig. See Docket No. 3-4. Further, Slawson has established the significant losses, including a significant number of leases and lease extension bonuses, it would likely incur if forced to wait on the Board's issuance of a ruling on the appeal. See Docket No. 3-4, p. 4 (noting Slawson's Vice President of Operations', Matt Houston, understanding that the Board often takes up to two years to issue such a ruling and outlining the effects of such a delay).

Further, the Eighth Circuit has explained that a district court can presume irreparable harm if the movant is likely to succeed on the merits. See Calvin Klein Cosmetics Corp., 815 F.2d at 505 (citing Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 753 (8th Cir. 1980)). As Slawson has sufficiently demonstrated the threat of irreparable harm, the Court finds this *Dataphase* factor weighs strongly in favor of the issuance of a preliminary injunction.

iii. BALANCE OF HARMS

As outlined above, Slawson has demonstrated the threat of irreparable harm. The balance of harm factor requires consideration of the balance between the harm to the movant and the injury the injunction's issuance would inflict on other interested parties. See Pottgen v. Mo. State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994). While the irreparable harm factor focuses on the harm or potential harm to the plaintiff, the balance of harm factor analysis examines the harm to all parties to the dispute and other interested parties, including the public. See Dataphase, 640 F.2d at 114; Glenwood Bridge, Inc. v. City of Minneapolis, 940 F.2d 367, 372 (8th Cir. 1991).

At this early stage, Slawson has clearly demonstrated a strong likelihood of success on the merits and a real threat of irreparable harm. Based on the limited record before the Court, it does not appear that the preliminary injunction order which Slawson seeks will harm the Federal Defendants in any significant way, or even at all. The issuance of a preliminary injunction order would simply vacate the Order dated August 9, 2017; however, normal Board procedures would continue to apply and the administrative appeal process would continue on below. To the contrary, if the preliminary injunction order is not granted, Slawson asserts it will likely have to move the drilling rig off the well pad to a different site, in order to mitigate injury, and it would incur substantial costs in doing so. See Docket No. 3-4.

To the extent that claims of injury by the MHA Nation, an intervenor in the case, are relevant at this early stage of the analysis, Slawson argues they are speculative at best. In its Petition for Stay, the MHA Nation argued that the construction of the project only 600 feet from Lake Sakakawea "threatens the reservation lands, waters and resources," but provided no specific injury caused by the development of the well pad. See Docket No. 3-7, p. 6. This is in contrast to the findings of the BLM when it analyzed the wells' potential impacts in an environmental

assessment and found the wells would have no significant environment impact. See Docket Nos. 3-3, pp. 6 and 26-167. The MHA Nation also argued the permits' approval would violate its "sovereign governmental ability to regulate activities within the Fort Berthold Indian Reservation;" however, Slawson argues this claimed injury assumes that the MHA Nation is successful on the merits.

The Court finds that the balance of harm factor favors Slawson. Given the relatively short time period and the potential for Slawson to suffer lengthy and costly delays resulting in significant harm, the Court finds the "balance of harm" *Dataphase* factor weighs in favor of issuance of a preliminary injunction.

iv. PUBLIC INTEREST

The final *Dataphase* factor, which involves consideration of public policy, also favors the issuance of a preliminary injunction. The development and production of oil and gas is in the public interest. Granting a preliminary injunction order comports with this public interest and both Slawson and the Federal Defendants recognized this. Public policy favors the development of oil and gas resources. At this preliminary stage, the Court finds this *Dataphase* factor weighs in favor of the issuance of a preliminary injunction.

After a careful review of the entire record and the *Dataphase* factors, the Court finds Slawson has met its burden under Rule 65(b) of establishing the necessity for the issuance of a preliminary injunction.

III. CONCLUSION

The Court has carefully reviewed the entire record, the parties' briefs, and relevant case law. For the reasons set forth above, the MHA Nation's motion to dismiss (Docket No. 28) is **DENIED**. The Court has also carefully considered each of the *Dataphase* factors, and finds the Plaintiff has met its burden under Rule 65 of establishing the necessity of a preliminary injunction at this early stage of the litigation. The Court **GRANTS** Slawson's motion for a preliminary injunction (Docket No. 10). As a result, the Federal Defendants and any person or entities acting in concert with or on behalf of the Federal Defendants, are **ENJOINED** from enforcing the Interior Board of Land Appeal's Order, dated August 9, 2017, staying the eight Applications for Permit to Drill for the Torpedo Federal Project submitted by Slawson Exploration Company, Inc. Slawson's previously posted $10,000 bond filed in accordance with the Court's Order, dated August 15, 2017, granting Slawson's motion for a TRO (Docket No. 11) will continue to serve as security for this preliminary injunction. Further, the Federal Defendants' "Motion to Continue to Stay Federal Proceedings to Allow Administrative Proceedings" (Docket No. 30) is **FOUND AS MOOT.** The Court's stay of the instant action and all associated deadlines and hearings remains in place until further order of the Court.

IT IS SO ORDERED.

Dated this 27th day of November, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court