[ORAL ARGUMENT IS REQUESTED]

No. 18-2089

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE, WILDEARTH GUARDIANS, and NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs-Appellants,

v.

RYAN ZINKE, in his official capacity as Secretary of the U.S. Department of the Interior; U.S. BUREAU OF LAND MANAGEMENT; and NEIL KORNZE, in his official capacity as Director of the U.S. Bureau of Land Management;

Defendants-Appellees,

and

ENDURING RESOURCES, LLC; ENCANA OIL & GAS (USA), INC.; BP AMERICA PRODUCTION COMPANY; and AMERICAN PETROLEUM INSTITUTE;

Intervenor Defendants-Appellees.

On Appeal from the U.S. District Court, District of New Mexico
No. 1:15-CV-209-JB-LF, Honorable James O. Browning, District Judge

FEDERAL APPELLEES' UNCITED PRELIMINARY RESPONSE BRIEF (DEFERRED APPENDIX APPEAL)

ERIC GRANT
Deputy Assistant Attorney General

MARK R. HAAG
CLARE M. BORONOW
EMILY A. POLACHEK
Attorneys, U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov

Of Counsel:

MICHAEL C. WILLIAMS
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

STATEMENT OF RELATED CASES

This Court published an opinion in *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016), upholding the district court's decision denying Plaintiffs' motion for a preliminary injunction in this case.

GLOSSARY

APA	Administrative Procedure Act
APD	Application for Permit to Drill
APE	Area of Potential Effects
Aplt.Br.	Appellants' Brief
BLM	Bureau of Land Management
COPA	Chacoan Outliers Protection Act
EA	Environmental Assessment
ECF No.	District court document number
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
RFDS	Reasonably Foreseeable Development Scenario
RMP	Resource Management Plan
SHPO	State Historic Preservation Officer
TCP	Traditional religious and cultural property

INTRODUCTION

Plaintiff environmental groups assert challenges under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) to decisions by the U.S. Bureau of Land Management (BLM) concerning applications for permits to drill (APDs). In 2003, BLM prepared a programmatic Environmental Impact Statement (EIS) and issued a Resource Management Plan (RMP) that envisioned development of 9,942 oil and gas wells in the San Juan Basin area of New Mexico. BLM later prepared site-specific Environmental Assessments (EAs) for each APD or set of APDs and tiered those EAs to certain analyses in the 2003 RMP/EIS. Consistent with the NHPA, BLM's phased NEPA review was coordinated with the agency's examination of the effects of energy development on historic properties and traditional religious and cultural properties (TCPs) at the programmatic and site-specific stages. BLM consulted with the New Mexico State Historic Preservation Officer and tribes to identify historic properties and TCPs and either avoided or mitigated any adverse effects from proposed activities.

On this record, BLM's NEPA and NHPA analyses were reasonable, and the district court was correct to dismiss all of Plaintiffs' claims with prejudice. The court's judgment should be affirmed.

STATEMENT OF JURISDICTION

As discussed below in Part I of the Argument, Federal Defendants deny that the district court had subject-matter jurisdiction because Plaintiffs lack Article III

standing. If Plaintiffs do have standing, then the district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arise under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704–06. *See* ECF No. 1.

The district court denied Plaintiffs' motion for summary judgment and entered final judgment on April 23, 2018. ECF Nos. 129, 130. Plaintiffs filed a notice of appeal on June 15, 2018, ECF No. 147, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Do Plaintiffs lack standing to challenge BLM's decisions to approve the APDs?

2. Did BLM comply with NEPA when approving the challenged drilling permits because, between the 2003 RMP/EIS and the site-specific EAs, BLM took a hard look at the environmental effects of reasonably foreseeable hydraulic fracturing and horizontal drilling in the San Juan Basin?

3. Did BLM comply with the NHPA when it inventoried and examined the potential adverse effects of oil and gas development on historic properties and TCPs at the programmatic RMP/EIS stage and the site-specific APD-approval stage?

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

A. National Environmental Policy Act (NEPA)

NEPA, 42 U.S.C. §§ 4321–4370h, encourages informed decision-making by agencies and ensures the dissemination of relevant information to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA is a procedural statute that prescribes the process by which an agency must make its decisions, but does not mandate particular substantive results. *Id.* at 350–51; *Utah Envtl. Cong. v. Russell,* 518 F.3d 817, 821 (10th Cir. 2008). NEPA requires federal agencies to prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

NEPA also established the Council on Environmental Quality, 42 U.S.C. § 4342, which adopted regulations governing federal agency compliance with the statute. *See* 40 C.F.R. §§ 1500.1–1517.7. Under those regulations, an agency may prepare an Environmental Assessment (EA) to determine whether an action requires an EIS. *Id.* §§ 1501.4(b), 1508.9. An EA is "a concise public document" that serves to "[b]riefly provide sufficient evidence and analysis for determining whether" to prepare an EIS. *Id.* § 1508.9(a). If the EA concludes there will not be any significant environmental impact, the agency may issue a Finding of No Significant Impact

(FONSI) and is not required to prepare an EIS. *Id.* §§ 1501.3, 1501.4(c), 1501.4(e), 1508.9; *Greater Yellowstone Coal. v. Flowers,* 359 F.3d 1257, 1274 (10th Cir. 2004).

B. The National Historic Preservation Act (NHPA)

Like NEPA, the NHPA is a procedural "stop, look, and listen" statute, *Coalition of Concerned Citizens to Make ART Smart v. Federal Transit Administration*, 843 F.3d 886, 905 (10th Cir. 2016), that requires agencies to "take into account the effect of [a proposed activity] on any historic property,"[1] 54 U.S.C. § 306108; *see also* 36 CFR §§ 800.3–800.13. A "historic property" is one that is "in, or eligible for inclusion on," the National Register of Historic Places ("National Register"). 54 U.S.C. § 300308. Sites may be eligible for inclusion in the National Register if they possess "significance in American history, architecture, archeology, engineering, and culture" and fall within at least one of four enumerated categories. Relevant here, the fourth category (criterion d), applies to sites that "have yielded, or may be likely to yield, information important in prehistory or history." 36 C.F.R. § 60.4(d). Additionally, the NHPA recognizes that "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." 54 U.S.C. § 302706(a). As such, this Court has treated traditional religious and cultural properties (TCPs) like historic properties

[1] This process is often referred to as "section 106" consultation because the cited statute originated as Section 106 of Public Law 89-665, 80 Stat. 915, 917 (1966).

under the NHPA. *See Pueblo of Sandia v. United States*, 50 F.3d 856, 859–62 (10th Cir. 1995).

The NHPA's implementing regulations, promulgated by the Advisory Council on Historic Preservation ("Advisory Council"), require an agency to make a "reasonable and good faith effort" to identify historic properties within the area of potential effects (APE) for the proposed action. 36 C.F.R. § 800.4. The APE is "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." *Id.* § 800.16(d). For historic properties within the APE, the agency, in consultation with the State Historic Preservation Officer (SHPO), must determine whether the action will have "adverse effects." *Id.* § 800.5.

An action has an adverse effect on a historic property when it "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id.* § 800.5(a)(1). If the agency proposes a finding of "no adverse effect" and the SHPO agrees or does not object, then the agency may proceed with the undertaking. *Id.* §§ 800.5(c)(1), (d)(1). If the action will adversely affect historic properties, the agency must consider whether modifications to the project would avoid, minimize, or mitigate the adverse effect. *Id.* § 800.6. As a procedural statute, however, the NHPA does not require the agency to eliminate adverse effects if they

cannot be avoided or if they prevent the agency from taking action even if there will be adverse effects to historic properties.

C. The Chacoan Outliers Protection Act (COPA)

COPA, 16 U.S.C. §§ 410ii *et seq.*, was enacted preserve, interpret, and research the "unique archeological resources associated with the prehistoric Chacoan culture in the San Juan Basin." [App. at AR0217737]; *see also* 16 U.S.C. § 410ii-5(b). COPA established the Chaco Culture National Historical Park and designated 39 outlying sites, including the sites identified by Plaintiffs as the "Chacoan Outliers" and "Chaco Culture Archaeological Protection Sites." 16 U.S.C. § 410ii-1. While federal agencies must "protect, preserve, maintain, and administer" these sites, *id.* § 410ii-5(b), Congress expressly recognized the importance of oil and gas development in the Basin, *id.* § 410ii(a). COPA does not "prevent exploration and development of subsurface oil and gas . . . from without the sites which does not infringe upon the upper surface of the sites." *Id.* § 410ii-5(c); *see also id.* § 410ii(a)(3) ("[D]evelopment of the San Juan Basin's important natural resources and the valid existing rights of private property owners will not be adversely affected by the preservation of the archeological integrity of the area.").

II. FACTUAL BACKGROUND

A. Oil and Gas Development in the San Juan Basin

The San Juan Basin in northwestern New Mexico is one of the largest natural-gas fields in the nation, and has been in production for more than 60 years. [App. at

AR0001945]. During that time, more than 30,000 oil and gas wells have been drilled in the Basin, and approximately 23,000 wells are currently producing. [App. at AR232032]. Traditionally, oil and gas wells were drilled vertically, but drilling technology has developed. *See* [App. at AR0149899]. Horizontal drilling, which has been used in the San Juan Basin since the early 2000s, is a type of directional drilling in which the wellbore is first drilled vertically toward the oil or gas reservoir and then turned horizontally to reach a wider area of the targeted formation. *See* [App. at AR0001205]. Hydraulic fracturing, or fracking, is the process of extracting oil or natural gas by injecting a mixture of water, nitrogen foam, sand, and certain chemicals under high pressure into wellbores to fracture the rock, allowing the oil or gas to escape. [App. at AR0149866]. Fracking can be used in vertical or horizontal drilling, and nearly every well in the San Juan Basin has been fracture-stimulated since the 1950s. [App. at AR0232032].

B. The 2003 RMP and Programmatic EIS

The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, directs BLM to manage public lands "in a manner which recognizes the Nation's need for domestic sources of minerals." *Id.* §§ 1701(a)(12), 1702(e). To achieve FLPMA's goals of "multiple use and sustained yield," *id.* § 1732(a), BLM must "develop, maintain and, when appropriate, revise land use plans," *id.* § 1712(a). These Resource Management Plans (RMPs) are designed to guide and control future management decisions for public lands. *See id.*; 43 C.F.R. §§ 1601.0-2, 1601.0-4. BLM

may amend an RMP to respond to new proposals, circumstances, or information. *Id.* § 1610.5-5. Prior to adopting an amendment, the agency undertakes a NEPA analysis and provides for public involvement. 43 C.F.R. § 1610.5-3(a).

Oil and gas development on federal lands follows a three-stage decisionmaking process, with NEPA analyses at each stage. First, BLM develops an RMP that guides future oil and gas development across a broad region by determining which lands should be open or closed to leasing and prescribing stipulations to attach to leases. 43 U.S.C. § 1712. In the second stage, BLM decides which particular parcels of land will be offered for lease through competitive lease sales. 43 C.F.R. Subpart 3120. At the third stage of the development process (the stage at issue in this case), BLM determines whether and under what conditions it will approve APDs and issue drilling permits for wells on existing leases. *Id.* § 3162.3-1; 30 U.S.C. § 226(g).

In August 2000, BLM's Farmington Field Office began the process of revising its existing RMP for the San Juan Basin to address the uses of public land and federal minerals located within the Basin. *See* 65 Fed. Reg. 52,781-02 (Aug. 30, 2000). As part of its NEPA review of the proposed plan revision, BLM first prepared a Reasonably Foreseeable Development Scenario (RFDS) to forecast the scope of oil and gas development in the San Juan Basin over the next 20 years. *See* [App. at AR0000001, AR0000006–7]. At that time, the primary drilling method was vertical drilling; however, the RFDS noted the availability of other techniques, including horizontal drilling. *See* [App. at AR0000111–13].

The geologic formation at issue in this case is the Mancos Shale/Gallup Sandstone formation ("Mancos Shale")—a geologic layer within the San Juan Basin. *See* [App. at AR0000908]. The RFDS noted that, in 2001, most operators overlooked the Mancos Shale formation due to limits on the drilling technology of the time. [App. at AR0000081–84]. But the RFDS explained that "there is excellent potential for the Mancos to be further evaluated" and, if the area proved to be "even marginally productive," it could see development in the next 20 years. *See* [App. at AR0000083–84]. The RFDS therefore predicted development of 180 oil wells in the Mancos Shale formation and 4,108 gas wells across the Dakota and Mancos Shale formations. *See* [App. at AR0000114].

In 2003, after reviewing the RFDS's development forecast and soliciting public comments, BLM's Farmington Field Office issued a Proposed RMP and Final EIS ("2003 RMP/EIS") for the San Juan Basin. *See* 68 Fed. Reg. 16,545 (Apr. 4, 2003). The 2003 EIS evaluated the direct, indirect, and cumulative effects of four alternatives on 20 different resources and uses. *See* [App. at AR0001011–AR0001147]. In December 2003, BLM issued a Record of Decision adopting the final RMP and selecting an alternative that envisioned the development of 9,942 new oil and gas wells in the San Juan Basin, not limited to any particular formation, geographic area, or technology. [App. at AR0001946–47, AR0001115–30]. Since the 2003 RMP was adopted, only 3,945 wells have been drilled in the area—approximately 40% of the 9,942 wells predicted and analyzed in the 2003 EIS. *See* ECF No. 113 ¶ 3.

Because the 2003 EIS and RMP are programmatic documents for the entire San Juan Basin, BLM prepares site-specific EAs when considering APDs for specific wells or clusters of wells. *See, e.g.*, [App. at AR0017395–AR0017437, App. at AR0136701–39, AR0233358–AR0233434]. These EAs "tier" to the analyses in the 2003 EIS. Tiering occurs when a subsequent environmental analysis (here, the APD EAs) incorporates by reference the general discussions of a broader EIS (the 2003 RMP/EIS). *See* 40 C.F.R. § 1508.28. The EAs also include additional analyses of site-specific and cumulative impacts not addressed in the 2003 EIS, including impacts specific to horizontal drilling and fracking. *See, e.g.*, [App. at AR0143915–88].

For each of the challenged drilling permits, BLM also prepared a finding of no significant impact (FONSI) and issued a decision notice. *See, e.g.*, [App. at AR0233525–36]. Although Plaintiffs challenged approximately 384 drilling permits, the district court ruled that only some of those permits (337 at the agency's most recent count) constitute final agency actions reviewable under the Administrative Procedure Act (APA). ECF No. 129 at 83 (Plaintiffs lack statutory standing to challenge "any APD listed as 'Withdrawn,' 'No APD package,' 'Unapproved APD,' 'Cancelled,' or 'Rescinded'"); ECF No. 129 at 85 (challenges to permanently abandoned wells are moot). Plaintiffs have not appealed that ruling.

C. Pending Amendment to the 2003 RMP

Plaintiffs' assertions that the 2003 EIS and RMP are deficient rest heavily on BLM's recent decision to amend the 2003 RMP. In February 2014, BLM began the

NEPA scoping process for an amendment to the 2003 RMP that would analyze development of the Mancos Shale. *See* [App. at AR0173818–20]. Because horizontal drilling and fracking made accessing the oil and gas in the Mancos Shale more economically feasible, the oil and gas industry initially projected that full-field development of the Mancos Shale might result in more than 20,000 oil and gas wells—substantially exceeding the 9,942 wells envisioned in the 2003 EIS and RMP. Responding to that projection, BLM prepared a new Reasonably Foreseeable Development Scenario ("2014 RFDS") to better predict the Mancos Shale's potential for oil and gas development. [App. at AR0173821–58].

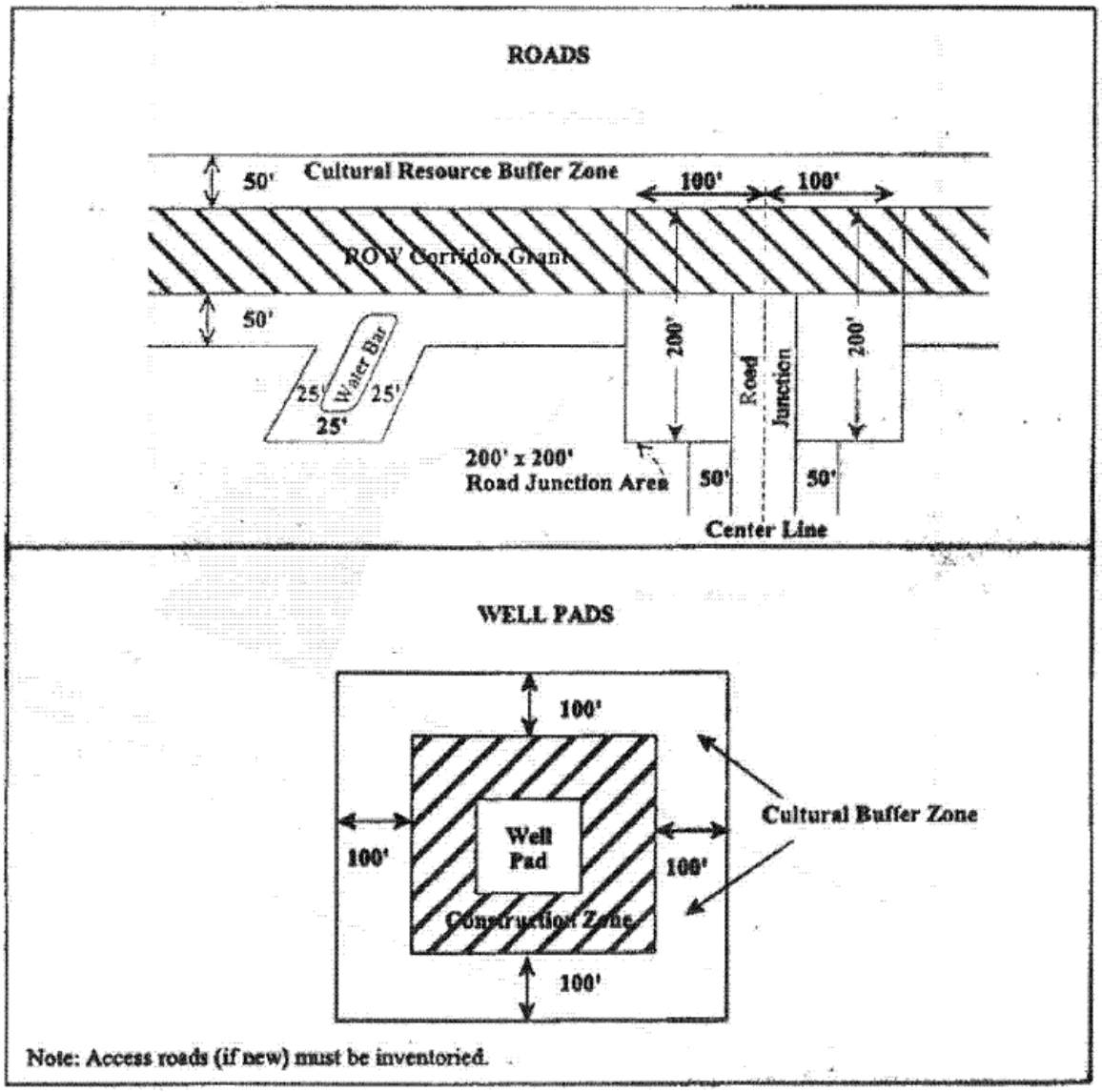
The 2014 RFDS did not match industry's projections—it forecast only an additional 1,930 oil wells and 2,000 gas wells in the Mancos Shale, most of which would be horizontally drilled. *See* [App. at AR0173841, AR0173846]. Even aggregated with development that has already occurred within the San Juan Basin, those wells would not exceed the 9,942 wells predicted in the 2003 RMP. *See* ECF No. 113-2 ¶ 3 (noting that 3,945 federal oil and gas wells have been drilled in the New Mexico portion of the San Juan Basin as of June 9, 2017). Nonetheless, BLM decided to press forward with the RMP amendment, addressing oil and gas development, realty, lands with wilderness characteristics, and vegetation management. *See* ECF No. 52-1 at 3. The Bureau of Indian Affairs joined the NEPA process for the amendment in October 2016. *See* 81 Fed. Reg. 72,820 (Oct. 21, 2016). The agencies expect to finalize the RMP amendment in the summer of 2019.

D. BLM's NHPA Protocol Agreement with the New Mexico SHPO

The NHPA regulations allow an agency to enter into a "programmatic agreement" with the Advisory Council to make the Section 106 consultation process more efficient. 36 C.F.R. § 800.14(b). Compliance with a programmatic agreement satisfies an agency's Section 106 responsibilities. *Id.* § 800.14(b)(2)(iii). BLM, the Advisory Council, and the National Conference of State Historic Preservation Officers executed the current programmatic agreement in accordance with the Section 106 regulations, *id.* § 800.14(b)(2), which included consultation with Indian tribes and other parties, e.g., Amicus National Trust for Historic Preservation. *See* [App. at AR0169217]. To implement that national agreement in New Mexico, BLM's New Mexico State Office and the New Mexico SHPO executed a State Protocol Agreement that directs the manner in which BLM will comply with the NHPA. Two versions of that protocol agreement are relevant here: the first was consummated in June 2004 and remained in effect until it was superseded by the second protocol on December 17, 2014. [App. at AR0169038] (2004 Protocol); [App. at AR0169213] (2014 Protocol). Approximately 221 of the challenged drilling permits were approved at the time the 2004 Protocol was operative, and approximately 163 permits fell under the 2014 Protocol.

As relevant here, the Protocols set forth guidelines for defining the area of potential effects (APE) for an undertaking. [App. at AR0169048–49] (2004 Protocol); [App. at AR0169233–34] (2014 Protocol). BLM and the SHPO created standard

APEs to apply to certain common undertakings. [App. at AR0169043, AR0168872] (discussing "block survey" boundaries in the 2004 Protocol); [App. at AR0169265–70] (describing well-pad APEs in the 2014 Protocol). For well pads, the standard APE includes "the well pad and construction zone plus 100' on each side from the edge of the construction zone." [App. at AR0169265]. The following depicts this standard APE, as well as the APE for new access roads that may accompany a well pad:



[App. at AR0168995, AR0169267].

For these common undertakings, BLM may examine a larger area, but it must consult with the SHPO before adopting an APE smaller than the standard. [App. at AR0169265]. The protocol permits the BLM field officer, at his or her discretion, to expand the scope of the APE for purposes of identifying historic properties that may experience indirect effects from an undertaking. [App. at AR0169233].

E. BLM's NHPA Analyses for the 2003 RMP and Site-Specific APDs

BLM complies with its NHPA obligations at each stage of the oil and gas development process. *See* [App. at AR0000842] (noting in the 2003 RMP/EIS that BLM's cultural resource staff reviewed more than 1000 undertakings each year related to oil and gas development in that planning area). For the 2003 RMP, BLM defined the APE to encompass the entire planning area, which includes the Mancos Shale formation. *See* [App. at AR0001956, AR0002047]. The RMP/EIS then identified numerous historic properties and traditional religious and cultural properties (TCPs) within the APE (the planning area). *See San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270 (D.N.M. 2008) (describing BLM's NHPA analysis for the 2003 RMP and rejecting Plaintiffs' claim that BLM's cultural consultations were insufficient under the NHPA). BLM recounted the San Juan Basin's cultural history, taking note of areas within the planning area that "are actively managed to protect outstanding examples of cultural resources" from each prehistoric and historic period. [App. at AR0000968–88].

BLM also sought information about TCPs from many sources. [App. at AR0000989]. BLM sent scoping letters to 51 different tribal governments and 29 other tribal officials, "initiat[ing] efforts to identify and consider traditional cultural places." [App. at AR0001149, AR0001952–53]. Only one tribe responded, but it did not identify any TCPs. [App. at AR0001178–80, AR0001953]. The agency "met with Navajo Nation staff, several Navajo Chapters and Eastern Navajo Land Board," and hired a sociological consulting firm to interview local residents regarding potential land management issues. [App. at AR0001952]. BLM also utilized legacy cultural resources maps, published and unpublished ethnographic literature, and other cultural resource management documents. [App. at AR0000989]. In addition to archeological sites, BLM was able to identify "73 TCPs or potential TCPs on federal, private, or state lands within the planning area," including "clan origin places, landscape associated with origin history, battle sites, offering places, springs, antelope game traps/corrals, pottery gathering, a now abandoned community, trails, and a hanging location." *Id.*

The 2003 RMP/EIS addressed the potential direct, indirect, and cumulative impacts on cultural resources at a broad, programmatic level, [App. at AR001051–53, AR0001126, AR0001138], explaining that the "actual impacts on archaeological sites cannot be determined until site-specific locations of wells, roads, and pipelines are known," [App. at AR0001052]. The RMP adopted BLM's continuing management guidelines, which direct the agency to avoid cultural resources where possible. [App.

at AR0000842]. Where avoidance is impossible or not recommended, approvals are conditioned on mitigation of adverse effects. *Id.* Mitigation measures include "project relocation or redesign, fencing and barriers, monitoring of construction activities and site condition, and data recovery." *Id.*; *see also* [App. at AR0001144–45] (further mitigation measures provided in the 2013 EIS). Additionally, the 2003 RMP provided special protections for "important cultural sites in 84 [Specially Designated Areas] within" the planning area. [App. at AR0001053, AR0002184–2268].

At the APD stage, BLM thoroughly examined the potential site-specific impacts of each proposed well on historic properties and TCPs.[2] *See, e.g.*, [App. at AR0238970–AR0239064]; [Sealed App. at AR0159472–AR0159522] (examples of cultural resource records of review for wells where historic properties and TCPs were located). BLM complied with the Protocol Agreements when defining the scope of the APE for each APD by including the well pad, construction area, access roads, and cultural buffer zones. *See, e.g.*, [App. at AR0167303, AR0167448, AR0167765, AR0238976]. To identify historic properties and TCPs within the APEs that were not listed in the 2003 RMP/EIS, BLM consulted more recent literature, including a 2006 comprehensive ethnography for Navajo sites. *See* [App. at AR0168723–25].

[2] Many of these cultural reports were withheld from the record because they contain information concerning the location of protected cultural resources. BLM offered to provide access to the withheld reports to Plaintiffs upon request, but Plaintiffs did not request access. ECF Nos. 77, 93, 105.

BLM also conducted Class III inventories, which involve walking across the entire APE at intervals no greater than 15 meters apart. *See* [App. at AR0168871] (explaining the Class III inventory procedures in a BLM Manual); *see also, e.g.*, [App. at AR0167766, AR167304, AR0167449, AR0238976] (reporting, under "survey field methods," that "[p]edestrian transects spaced no greater than 15m apart were used to examine the well pad and the allowable construction zone, plus an additional 100 foot cultural resources buffer"). When historic properties or TCPs were found, BLM documented the site, disclosed the expected impacts of the proposed development, and provided management recommendations. *See, e.g.*, [App. at AR0238986]; [Sealed App. at AR0159488–95]. Additional analyses of potential effects to cultural resources were documented in the EAs for each APD. *See, e.g.*, [App. at AR0017406–07, AR0017422–23, AR0136710, AR0233404–07]. Based on its investigation and analysis, BLM developed a Cultural Resource Record of Review that indicated whether the proposed project should proceed and whether BLM was attaching any stipulations to protect cultural sites. *See, e.g.*, [App. at AR0167307, AR0167349–50, AR0167452, AR0167629–30, AR0167769–70, AR0238970–71]; [Sealed App. at AR0237998–AR0238002].

III. PROCEDURAL BACKGROUND

Plaintiffs first challenged a number of drilling permits on March 11, 2015. ECF No. 1. Plaintiffs subsequently amended their complaint three times to challenge more drilling permits as they were approved by BLM. *See* ECF Nos. 32, 87, 98. On

May 11, 2015, Plaintiffs moved for a preliminary injunction on their NEPA claims, seeking to stop all drilling and halt further APD approvals pending publication of the amended RMP. ECF No. 16. The district court denied that motion and Plaintiffs appealed to this Court. ECF Nos. 63, 64.

In an opinion published on October 27, 2016, this Court affirmed. *Diné Citizens Against Ruining Our Environment v. Jewell* ("*Diné CARE*"), 839 F.3d 1276 (10th Cir. 2016). "After reviewing the agency's RMP and its assessment of site-specific and cumulative impacts in the APD approvals," the Court held that Plaintiffs were not likely to succeed on the merits because there was no evidence that horizontal drilling and fracking give rise to different or greater environmental harms than those techniques "that have historically been used in the San Juan Basin." *Id.* at 1283–84. The Court further held that BLM's decision to revise the RMP did not "invalidate the old plan or prevent the agency from referring to it" in site-specific drilling permits. *Id.* at 1285.

In subsequently moving for summary judgment, Plaintiffs renewed their NEPA arguments and also argued that BLM's analysis of effects on cultural resources was deficient under the NHPA. *See* ECF No. 112. Federal Defendants challenged Plaintiffs' standing in their opposition brief, ECF No. 113, and Plaintiffs submitted new standing declarations in their reply brief, ECF No. 117. On April 23, 2018, the district court issued a 131-page opinion and order denying Plaintiffs' motion and dismissing all of Plaintiffs' claims with prejudice. ECF No. 129. The court first held

that Plaintiffs had established standing to challenge the drilling permits, concluding that Plaintiffs' professed aesthetic interest in "the Greater Chaco landscape" demonstrated a sufficient geographical nexus to the challenged permits and that allegations of an incremental increase in environmental effects in that general region were causally linked to the permits. *Id.* at 70–80. The court agreed with Federal Defendants that Plaintiffs could not challenge all 384 drilling permits referenced in their most recent complaint, but only those permits that constituted final agency action and were not permanently abandoned (numbering 337 as of October 17, 2018). *Id.* at 80–87.

Turning to the merits, the district court concluded that BLM complied with NEPA because the agency took a hard look at the potential environmental effects of approving the APDs, *id.* at 87–96, and provided adequate opportunities for public participation, *id.* at 96–104. The court also concluded that BLM did not violate the NHPA. *Id.* at 104–22. The court found no evidence in the record to suggest that the challenged wells would have an adverse indirect effect on the Chaco Culture National Historical Park or its outlier sites, *id.* at 117–18, and the court held that BLM was not required to consult with the SHPO when defining the APEs for the APDs, *id.* at 118–20. The court therefore dismissed all of Plaintiffs' claims with prejudice. *Id.* at 130.

SUMMARY OF ARGUMENT

Plaintiffs are attempting to disrupt energy development in the San Juan Basin by challenging site-specific decisions to allow approximately 337 oil and gas wells in a

region where more than 23,000 wells have been drilled. But Plaintiffs lack standing to challenge these agency actions, and they cannot succeed on the merits.

1. Under the APA, Plaintiffs must show that they have been "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. This requirement means that Plaintiffs must establish an injury-in-fact for *each challenged APD approval*. Plaintiffs assert only generalized harms from oil and gas development in an area where approximately 23,000 wells have been drilled. That showing is insufficient to establish that the 337 drilling permits challenged here each have a geographic nexus and causal relationship to Plaintiffs' alleged injuries. Because Plaintiffs have not established standing under the APA for each challenged agency action, their claims must be dismissed.

2. Even if the Court concludes that Plaintiffs have standing, Plaintiffs have not met their burden of showing that BLM's decisions to issue drilling permits were arbitrary and capricious. Plaintiffs contend that the EAs prepared for more than 300 APDs in the San Juan Basin violate NEPA because the EAs are tiered to an EIS that, in Plaintiffs' view, failed to examine the effects of new drilling technologies, including horizontal drilling and multistage hydraulic fracturing (i.e., fracking). But wells have been fracked in the Basin since the 1950s, and horizontal drilling has been in use since the early 2000s. The 2003 RMP/EIS included sufficient analyses of the cumulative impacts of foreseeable oil and gas development in the area, and any impacts that differ in kind and degree from conventional drilling were adequately addressed in BLM's

tiered EAs. This Court concluded as much at the preliminary injunction stage, *Diné CARE*, 839 F.3d at 1284, and Plaintiffs presented no new evidence to warrant a different conclusion now.

3. Plaintiffs' arguments that BLM violated the NHPA also fail on the merits. BLM conducted a phased review of historic properties and TCPs in the planning area, taking a programmatic look at the RMP stage and defining and examining an APE appropriate to the size and scale of the site-specific APDs. BLM's coordinated NEPA and NHPA review examined indirect effects where such effects would alter the historic characteristics of the properties. Finally, BLM complied with all relevant requirements to consult with the SHPO and interested tribes.

For these reasons, the district court's judgment should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo the district court's assessment of the merits of Plaintiffs' NEPA and NHPA claims, and that review is "highly deferential" to the agency. *Cure Land, LLC v. U.S. Dep't of Agric.*, 833 F.3d 1223, 1230 (10th Cir. 2016). The Court may set aside agency action only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also, e.g.*, *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1182 (10th Cir. 2013). BLM's action is valid if it "examined the relevant data and articulated a rational connection between the data and its decision," considered each important aspect of the problem, and offered an explanation for its decision that is supported by the

record before it. *See, e.g.*, *WildEarth Guardians*, 703 F.3d at 1182–83. Deference to BLM's judgment "is more substantial" where, as here, "the challenged decision involves technical or scientific matters within the agency's area of expertise." *Id.* at 1183.

ARGUMENT

I. PLAINTIFFS LACK STANDING TO CHALLENGE ANY APD APPROVALS.

"A court cannot reach the merits of a case unless it first satisfies itself that the plaintiff is a proper party to bring the suit and that the issues raised are justiciable." *Glover River Org. v. U.S. Dep't of Interior*, 675 F.2d 251, 253 (10th Cir. 1982). Plaintiffs' arguments and declarations addressing standing overlook the fact that they have challenged many discrete agency actions (the individual authorizations to drill 337 wells). Plaintiffs assert generalized harm from the cumulative effects of energy development in a vast region that hosts more than 23,000 oil and gas wells on public, private, and tribal lands. They have not traced these alleged injuries to challenged permits or shown that the cumulative effect of drilling these particular wells (all of which are at least eight miles away from areas where the declarants recreate) will actually and noticeably increase their risk of harm from oil and gas development. For this reason, Plaintiffs have failed to establish standing under either Article III of the Constitution or the APA.

A. Plaintiffs have not established standing as required by the APA's limited waiver of sovereign immunity.

"Courts lack subject matter jurisdiction over a claim against the United States for which sovereign immunity has not been waived." *Iowa Tribe Of Kansas & Nebraska v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010). "Consequently, plaintiffs may not proceed unless they can establish that the United States has waived its sovereign immunity with respect to their claim." *Id.* A waiver of sovereign immunity must "be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted).

Because neither NEPA nor the NHPA waive sovereign immunity or create a private right of action, Plaintiffs must rely on "the limited waiver of sovereign immunity provided for in the APA." *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1245 (10th Cir. 2012); *see also San Carlos Tribe v. United States*, 417 F.3d 1091, 1096 (9th Cir. 2005). The APA waives sovereign immunity and provides a right of action for persons "adversely affected or aggrieved by agency action." 5 U.S.C. § 702. This requirement "parallels the Article III standing requirement[s]." *Donelson v. United States*, 730 F. App'x 597, 601 (10th Cir. 2018) (citing *Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 (1991)). To establish standing under Article III of the Constitution, Plaintiffs must show that one of their members suffered a concrete injury-in-fact that is both fairly traceable to challenged agency

action and likely to be redressed by a favorable decision from the court. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Here, Plaintiffs have challenged 337 individual agency actions. Under the APA, each agency action gives rise to a distinct claim for the person or persons adversely affected. *Donelson*, 730 F. App'x at 601; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62–65 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990). Therefore, Plaintiffs must establish standing under the APA for *each challenged APD approval*. *Donelson*, 730 F. App'x at 601–02 (holding that plaintiffs failed to establish standing where they alleged only "that their properties were affected by some oil and gas activities"); *see also Bronson v. Swensen*, 500 F.3d 1099, 1106 (10th Cir. 2007) (holding that plaintiffs "must have standing to seek each form of relief in each claim"). Establishing standing to challenge one drilling permit does not establish justiciability as to all 337 challenges. *Col. Outfitters Assoc. v. Hickenlooper*, 823 F.3d 537, 551 (10th Cir. 2016) ("[S]tanding is not dispensed in gross.").

For this reason, the district court erred when it found that Plaintiffs had established standing. The district court relied on declarations that merely identified two regions where Plaintiffs' members had seen oil and gas wells. *See* [ECF No. 129 at 76]. But even if these declarations showed injury from the decisions authorizing wells in those general areas, Plaintiffs would nonetheless lack standing under the APA as to hundreds of their claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5

(2006) (noting that a litigant cannot "by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him").

B. Plaintiffs have not established standing as to *any* challenged agency action.

In fact, Plaintiffs have not met their burden of proving standing for any of their claims because they have identified no specific drilling permits that are allegedly causing redressable harm to their members. In ruling that Plaintiffs established standing, the district court inappropriately lessened Plaintiffs' burden because the court assumed, without any supporting evidence, that a few hundred additional wells in an area replete with oil and gas development will necessarily make an appreciable difference in the impacts felt by Plaintiffs' members.[3] *See* ECF No. 129 at 73–79. In fact, Plaintiffs have offered no more evidence than was present before this Court when it ruled that Plaintiffs had not shown a likelihood of harm from the challenged drilling permits. *See Diné CARE*, 839 F.3d at 1284.

[3] The district court also erred to the extent that it relied on portions of Plaintiffs' declarations that address the merits of this case. *See, e.g.*, ECF No. 112-1 ¶¶ 6–11; ECF No. 112-2 ¶ 11; ECF No. 117-1 ¶¶ 7–8; ECF No. 117-3 ¶ 5. Under the APA, judicial review of an agency action is based on the administrative record before the agency rather than on a factual record created de novo in the reviewing court. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973). Plaintiffs' declarations are admissible only to support standing; their commentary on the merits of this case (i.e., the adequacy of BLM's NEPA and NHPA analyses) is outside of the record and not properly before this Court. *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242 (10th Cir. 2004) (affirming district court's strike of "expert" affidavit as extra-record evidence).

1. Plaintiffs have not shown that their members have suffered a concrete injury-in-fact with a geographical nexus to any challenged drilling permit.

"[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). To establish injury-in-fact for claims based on procedural statutes like NEPA and the NHPA, Plaintiffs must show that (1) the agency's alleged procedural violation created an increased risk of actual, threatened, or imminent environmental harm; and (2) the increased risk of environmental harm injures Plaintiffs' members' concrete interests as demonstrated by a "geographical nexus to, or actual use of the site of the agency action." *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 449 (10th Cir. 2005). Plaintiffs have not met either test.

The procedural violation alleged by Plaintiffs is the failure to examine the cumulative impacts on the environment and historic properties in the San Juan Basin from full-field oil and gas development using horizontal drilling and multistage fracking rather than conventional vertical drilling. Plaintiffs have not met their burden of showing that these alleged violations of NEPA and the NHPA will increase their risk of environmental harm. In ruling otherwise, the district court erroneously relied on an assertion from one declarant that the 2003 RMP/EIS "never contemplated or analyzed oil development in the greater Chaco area as required by NEPA." [App. at Order 75]. In fact, it is undisputed that the 2003 RMP/EIS

considered the cumulative effects of drilling 9,942 wells using conventional techniques, *see* Aplt.Br. 13–14, and determined that drilling that many wells was an appropriate use of public lands, [App. at 2003 ROD at 1]. Plaintiffs have offered no evidence to show that developing these wells using horizontal drilling and multistage fracking will increase the risk of environmental harm in a manner or to a degree not already considered. Indeed, in a comment on the 2003 RMP/EIS, Plaintiff San Juan Citizen Alliance urged BLM to *require* horizontal drilling in the San Juan Basin to "reduce adverse impacts such as noise, air pollution, and scarred landscapes from wells and roads" developed with conventional methods. [App. at AR0001847].

Plaintiffs' declarations also fail to establish a geographical nexus to the challenged agency actions. The few specific locations (Chaco Culture National Historical Park and Pueblo Pintado) mentioned in the declarations are at least eight miles away from any development of challenged wells. ECF No. 113-1, Ex. A. Although the declarations Plaintiffs submitted at the close of summary judgment briefing state that the declarants have either visited or seen particular wells, they do not demonstrate an established or continuing aesthetic interest in those locations. *See* [ECF No. 117-1 (claiming an aesthetic interest in Chaco Culture National Historical Park where no drilling has been permitted); ECF No. 117-3 (stating that he has visited and flown over wells and development areas with environmental groups, but claiming no personal interest in any areas outside of the Park)]. Instead, the declarants all state vaguely that they visit an undefined "greater Chaco region" or the Mancos Shale

formation. *See* [ECF No. 112-1 ¶¶ 5, 14; ECF No. 112-2 ¶¶ 5, 6; ECF No. 112-3 ¶¶ 4–7; ECF No. 112-4 ¶ 3]. Because archaeological sites tied to the Chaco culture are located throughout much of the San Juan Basin, [App. at AR0000973–77, AR0000991–92], the "greater Chaco area" would likely include a large portion of the 8,274,100 acres within the Farmington Field Office's planning area, and could expand into Colorado, Arizona, and Utah. [App. at AR0000791, AR0000974]. And the Mancos Shale formation covers an area of approximately 1,168,400 acres. [App. at AR0173841–42].

General references to these million-acre regions are insufficient to establish a geographical nexus to any of the site-specific drilling permits challenged in this lawsuit. This case is not like *New Mexico ex. rel. Richardson v. BLM*, 565 F.3d 683, 696 n.13 (10th Cir. 2009), wherein the Court held that standing declarations citing a general interest in Otero Mesa were sufficient. That case involved a challenge to the RMP, which established management guidelines for the entire planning area. Plaintiffs here already challenged the 2003 RMP and lost. *See San Juan Citizens Alliance*, 586 F. Supp. 2d at 1270. In the present case, Plaintiffs challenge only the issuance of 337 site-specific drilling permits. As such, their standing declarations must be similarly site-specific.

The Supreme Court reached a similar conclusion in *Summers*, 555 U.S. at 495–97, in which environmental groups sought to enjoin Forest Service regulations related to post-fire salvage projects, *id.* at 490. There, the Court held that the declaration of

an environmental group's member failed to establish an injury-in-fact because it "fail[ed] to allege that *any* particular timber sale or other project" would "impede a specific and concrete plan of [that individual] to enjoy the National Forests." *Id.* at 495. Because "national forests occupy more than 190 million acres," the Court held that "[a]ccepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Id.* at 496. The Court acknowledged that while "it is certainly possible—perhaps even likely—that one individual" member of a plaintiff environmental group could have a legitimate claim of injury, standing "is not an ingenious academic exercise in the conceivable." *Id.* at 499. Instead, plaintiff environmental groups bear the burden of showing the Court that their members "'use the area affected by the challenged activity and not an area roughly in the vicinity of' a project." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)). As in *Summers*, Plaintiffs' standing arguments fail because they are based on general allegations that they recreate on or live in "the greater Chaco area"—a description that could apply to more than *eight million acres* of land.

2. Plaintiffs have not shown that their generalized harms from energy development are causally linked to the challenged drilling permits such that the Court could redress the harms.

Additionally, Plaintiffs cannot show that their alleged harms are causally connected to the specific drilling permits they challenge, or that it is "'likely,' as

opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560–61. To satisfy the causation prong of the standing analysis, Plaintiffs must show that their alleged injuries are "fairly traceable" to the 337 challenged permits rather than to the approximately 23,000 active oil and gas wells in the San Juan Basin that are not the subject of this action. *Id.* at 560. To establish redressability, Plaintiffs must show that the relief sought—the vacatur of BLM's decisions approving these 337 APDs—will remedy their alleged injuries. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

Plaintiffs have not met these burdens because their declarations do not tie their alleged injuries to the 337 drilling permits at issue. *See DaimlerChrysler*, 547 U.S. at 335. Rather, Plaintiffs' declarations allege injuries caused by "oil and gas development" in the "greater Chaco region." *See, e.g.,* ECF No. 112-2 ¶ 7 (referring generally to "extensive oil and gas well facilities and infrastructure in the area"); ECF No. 112-3 ¶ 7 (referring generally to "[o]il and gas leasing and development in the Chaco Canyon area/region and Chaco Culture National Historical Park"); ECF No. 112-4 ¶ 6 (same); ECF No. 112-1 ¶ 12 (stating vaguely that he has visited "hundreds of well sites" in the "greater Chaco area"). Even those statements in Plaintiffs' supplemental declarations that reference more specific regions of the San Juan Basin lack any causal explanations tying the declarants' alleged injuries to those areas. *See, e.g.*, ECF No. 117-1 ¶¶ 9–11

(documenting the existence of specific wells, alleging that they are challenged wells, but claiming aesthetic interest in "the Greater Chaco region" with no explanation as to how challenged wells affect that interest); ECF No. 117-3 ¶¶ 3, 6 (noting that the declarant "visited" wells with no explanation as to how these wells affect his prior or continuing aesthetic interests). Moreover, because Plaintiffs claim only generalized harms from oil and gas development in an area where there are 23,000 active wells that are not the subject of this lawsuit, Plaintiffs cannot show that an order from the Court vacating the APD approvals in this case will redress their alleged injuries.

Therefore, the Court should remand this case to the district court with instructions to dismiss for lack of standing.

II. BLM COMPLIED WITH NEPA

Plaintiffs' claims under NEPA and the NHPA lack merit because Plaintiffs fail to account for BLM's phased analysis of oil and gas development in the San Juan Basin. Plaintiffs allege that BLM failed to examine the potential cumulative impacts of approving the challenged APDs, as required under NEPA. But BLM's analysis of such effects was not confined solely to the site-specific EAs prepared for each APD or group of APDs. The APD EAs properly tier to the 2003 RMP/EIS for its programmatic analysis of the broad impacts of oil and gas development across the San Juan Basin. To the extent that the RMP/EIS did not fully consider the cumulative effects of horizontal drilling and multistage fracking on the Mancos shale formation, the site-specific APD EAs address the impacts of those technologies. *See San Juan*

Citizens Alliance, 654 F.3d at 1055 (affirming that a programmatic EIS may leave further review for site-specific permit applications). Taken together, then, the RMP/EIS and APD EAs provide complete NEPA analyses, informing the public and the decisionmaker of the potential environmental impacts of granting the challenged APDs. This Court agreed at the preliminary injunction stage, *Diné CARE*, 839 F.3d at 1283–85, and Plaintiffs have presented no new evidence to bolster their arguments.

A. BLM considered the cumulative effects of energy development in the San Juan Basin in the 2003 RMP/EIS.

Plaintiffs first contend that BLM erred in tiering the APD EAs to the 2003 RMP/EIS's analysis of the cumulative effects of oil and gas development in the San Juan Basin because the cumulative effects of horizontal drilling on the Mancos Shale formation are distinct from and greater than the impacts examined in the RMP/EIS. This argument fails because, as this Court previously held, the impacts of 3,960 additional Mancos wells are comfortably within the impacts of the 9,942 wells analyzed in the RMP/EIS.

The RMP/EIS analyzed the cumulative impacts of past, present, and reasonably foreseeable future oil and gas development, taking into account both the 18,000 wells active in the San Juan Basin in 2003 and 9,942 future wells, not limited to any particular formation or to the use of any particular technology. [App. at AR000001131–39]. Plaintiffs are incorrect in their continued assertion that the 2003 RMP/EIS "only evaluated development in the northern portion" of the San Juan

Basin. Aplt.Br. 42. The planning area analyzed in the EIS "encompasses the New Mexico portion of the San Juan Basin." [App. at AR0001945, AR0000810]. Although the EIS identified a "high development area" for oil and gas in the northeastern portion of the planning area, that label was not a reflection of any difference in the "context" of the Basin in that area; it was merely an acknowledgment that high development was likely because "99 percent of federal oil and gas resources are currently leased" in that area. [App. at AR0000851–52]. The preferred alternative in the EIS included significant acreage outside of the high-development area open for oil and gas development and considered environmental impacts throughout the entire planning area. *See* [App. at AR0000886, AR0001011].

Plaintiffs erroneously contend that development of the 3,960 Mancos Shale wells predicted in the 2014 RFDS in addition to the 3,945 existing vertical wells would "considerably exceed the cumulative impacts analyzed in the 2003 RMP/EIS." Aplt.Br. 42. As support for this claim, Plaintiffs created a table that purports to show that full-field development of the Mancos Shale formation using horizontal drilling would use more water and release more air pollutants than vertical drilling. Aplt.Br. 44. Not only does this argument misconstrue NEPA's requirements, but Plaintiffs' calculations do not withstand scrutiny.

As an initial matter, Plaintiffs' argument depends on too narrow a definition of cumulative impact—one that would require specific, quantitative measurements of all potential effects. A cumulative impact is "the impact on the environment which

results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. BLM's analysis of cumulative impacts was therefore not limited to quantifying the estimated impacts of foreseeable wells on federal land. [App. at AR0001131] (explaining that the cumulative effects analysis looked at "development of oil and gas on all lands and from all mineral ownership types within the planning area"). The RMP/EIS considered those impacts against the larger backdrop of all potential sources of environmental impacts in the San Juan Basin, such as non-federal oil and gas development, electricity production, vehicle travel, and grazing. *See, e.g.*, [App. at AR0001134, AR0226612, AR0226615]. This broad, qualitative approach is consistent with the purpose of programmatic EIS, which reviews agency action at a more general level, often before the agency has made decisions about site-specific actions.

Even if Plaintiffs' attempt to reduce BLM's robust programmatic analysis to a few figures were appropriate, the numerical values Plaintiffs used in their table of cumulative effects, *see* Aplt.Br. 44, have no basis in the record or in arithmetic. *See* ECF No. 129 at 95 n.24. Plaintiffs' table therefore underestimates the effects analyzed in the 2003 RMP/EIS and overestimates the cumulative effects of full-field oil and gas development (a scenario that is unlikely to occur before BLM completes and publishes its revised RMP). For example, the 2003 RMP/EIS estimated that emissions of the pollutant nitrogen oxide (NOx) for the development of 663 vertical

wells would be 3,678.3 tons per year, excluding offsets from abandoned wells. [App. at AR0001068–69]. Thus, the 2003 RMP/EIS predicted that the construction and production of each individual vertical well would release 5.54 tons of NOx per year. But Plaintiffs' table inexplicably represents that the 2003 RMP/EIS examined the effects of only 2.30 tons per year for each vertical well. Aplt.Br. 44. Plugging the corrected 5.5 tons into Plaintiffs' table would show that the 2003 RMP/EIS, in considering the effects of developing 9,942 oil and gas wells, accounted for impacts from the release of 55,078 tons of NOx per year. By comparison, combined impacts of the 3,945 vertical wells and 3,960 horizontal wells would only be 46,130 tons per year—well under the amount studied in the 2003 RMP/EIS.

Moreover, Plaintiffs' estimated figures ignore the ways in which directional drilling is environmentally preferable to vertical drilling. Indeed, in a comment on the 2003 RMP/EIS, Plaintiff San Juan Citizen Alliance urged BLM to *require* horizontal drilling in the San Juan Basin to "reduce adverse impacts such as noise, *air pollution*, and scarred landscapes from wells and roads." [App. at AR 0001847] (emphasis added). Here, with respect to Plaintiffs' estimates of air pollutants, Plaintiffs used net vertical-well emissions that offset the predicted emissions from abandoned or retired wells, *see* [App. at AR0001069], but did not incorporate similar offsets with respect to horizontal wells. And while horizontal fracturing requires more freshwater than traditional vertical drilling, [App. at AR0173847], the industry has responded with new "strategies and technologies to reduce the need for fresh water for stimulation," [App.

at AR0173848]. Plaintiffs' estimates of water consumption for horizontal wells do not account for these techniques. *See* Aplt.Br. 44 n.21 (using 2013 water volumes). As a result, Plaintiffs' allegation that the 2003 RMP/EIS did not adequately account for cumulative impacts from horizontal drilling and fracking is flawed. Consequently, the record does not support Plaintiffs' arguments that BLM failed to adequately consider cumulative impacts under NEPA.

B. The APD EAs properly tiered to the 2003 RMP/EIS.

To the extent that new developments in horizontal drilling and fracking technologies are producing impacts different from those forecast in the 2003 RMP/EIS, BLM provided a supplemental analysis of cumulative impacts in the EA for each APD. *See Friends of the Bow v. Thompson*, 124 F.3d 1210, 1217 (10th Cir. 1997) (holding that "plan-level concerns" may be considered at the time of a site-specific action). Specifically, each EA explains that it tiers to the 2003 EIS and separately "addresses site-specific resources and effects of the proposed action that were not specifically covered within the [2003 EIS]." [App. at AR0103130, AR0125981, AR0140149, AR0141336, AR0143920]. Recognizing that vertical drilling and horizontal drilling and fracking differ most in their potential impacts on air and water resources, the EAs took a hard look at the additional groundwater and air-quality impacts that horizontal drilling and fracking may cause in the Mancos Shale region.

As to groundwater, the EAs described how fracking works and concluded that fracking will not impact surface water or groundwater aquifers because the approved

wells are "well below any underground sources of drinking water." *See, e.g.*, [App. at AR0143924]. The record also shows that horizontal drilling can reduce water consumption in the aggregate because one horizontal well can replace multiple vertical wells. *See* [App. at AR0149882] (explaining that water use for fracking "does not represent long-term commitment of the resource" because, "[t]hrough the practices of reuse and recycling, water resources can be preserved"); [App. at AR0173848] ("At the anticipated peak of [Mancos Shale] development the total water volume used is within the normal operating range of previous years."). Moreover, the water used for fracking is further regulated because the operators must "ensure that water would be obtained legally and that all required permits would be obtained prior to obtaining water." [App. at AR0148185]. For these reasons, "[n]o impacts to surface water or freshwater bearing groundwater aquifers are expected to occur from fracking of the proposed wells." [App. at AR0148178, AR0143924].

The APD EAs considered air quality effects of not only the "approximately 21,150 active oil and gas wells in the San Juan Basin," but also "electricity generation . . . and vehicle travel." *See* [App. at AR0136684–85]. The EAs incorporate by reference the 2014 Air Resources Technical Report, *see, e.g.*, [App. at AR0137636], which was developed "to summarize technical information on air quality and climate change relative to all Environmental Assessments (EAs) for Application[s] for Permit to Drill (APD) and Lease sales." [App. at AR0154407]. The report includes estimates of greenhouse gas emissions for oil and gas production from federal leases in the San

Juan Basin. [App. at AR0154451]. The report explains that its emissions estimates account for a range of variables specific to development in the Basin, including the fact that "future wells in the region will most likely be accomplished with hydraulic fracturing." [App. at AR0154434–36]. The EAs also include an approximation of the greenhouse gas emissions from a horizontally drilled and fracked well and estimate that the CO_2-equivalent emissions from one horizontal well represent a 0.0008% increase in New Mexico statewide emissions. *See, e.g.*, [App. at AR0137640–41]. BLM determined that horizontal wells drilled in the Mancos Shale could result in "very small direct and indirect increases" in greenhouse gases, but, cumulatively, these emissions are not expected to "exceed the NAAQS for any criteria pollutants in the project area." *See, e.g.*, [App. at AR0137642; AR0225490].

In conclusion, because the site-specific APD EAs addressed cumulative drilling effects that differ in type and magnitude from those examined in the 2003 RMP/EIS, BLM's decisions approving the 337 challenged APDs complied with NEPA.

III. BLM COMPLIED WITH THE NHPA.

Plaintiffs and Amici assert several challenges to BLM's NHPA analyses, all of which reflect a misunderstanding of the agency's process and its NHPA obligations. Plaintiffs contend that (1) BLM failed to analyze the direct, indirect, and cumulative effects of approving the challenged APDs on "landscape-level cultural sites" located outside of the standard APE, Aplt.Br. 24–34, and (2) BLM should have consulted with the State Historic Preservation Officer (SHPO) in defining the area of potential

effect (APE) because the APD approvals were, in Plaintiffs' view, complicated and controversial, Aplt.Br. 35–38. Plaintiffs arguments fail because (1) BLM identified and set forth management guidelines for "landscape-level" historic properties and traditional religious and cultural properties (TCPs) when preparing the 2003 RMP, (2) BLM complied with NHPA regulations and the 2004 and 2014 Protocol Agreements in defining the APEs for APD approvals, and (3) neither BLM nor the SHPO—the only two parties to the 2014 Protocol Agreement—considered the APD approvals to be complicated or controversial.

A. BLM conducted a "landscape-level" NHPA review when preparing the 2003 RMP.

As an initial matter, Plaintiffs' various references to "landscape-level" historic properties and TCPs lack any accepted meaning under the NHPA because no landscape here has been found eligible for the National Register of Historic Places. Plaintiffs variably use such phrases as "the Greater Chaco Landscape" (Aplt.Br. 24, 28, 37) and "the Chaco Phenomenon" (Aplt.Br. 26, 38), claiming these are "landscape-level cultural sites" (Aplt.Br. 25). But these "landscapes" are not listed in the National Register, nor have they been found eligible for listing.[4] Instead, the

[4] Plaintiffs San Juan Citizens Alliance and WildEarth Guardians have unsuccessfully petitioned the Department of the Interior to designate "the Greater Chaco Landscape" as an Area of Critical Environmental Concern. *See* [App. at AR0217741]. BLM denied this request for several reasons, [App. at AR0217732–40], including that "the archaeological sites within the proposed [area] are no more fragile, sensitive, irreplaceable, endangered, threatened, and vulnerable to adverse change than other

NHPA requires examination of the specific sites that Plaintiffs identify as components of "the Greater Chaco landscape"—the Chaco Cultural National Historical Park, the Chacoan outliers, Chaco cultural archaeological sites, and the North Road. Aplt.Br. 2 n.2.

Plaintiffs are also incorrect in asserting that BLM never conducted an NHPA review for the cultural sites across the Farmington Field Office's planning area. Aplt.Br. 24–28. The NHPA directs agencies to coordinate their section 106 reviews with the NEPA process, 36 C.F.R. § 800.8, and allows agencies to conduct this coordinated review in a phased process, *id.* § 800.4(b)(2). Consistent with these principles, BLM performed section 106 analyses not only at the APD stage, but also when the agency was preparing the 2003 RMP.

As detailed in the Factual Background, Part II.E, the 2003 RMP/EIS included a section 106 review wherein the APE was the entire planning area. BLM inventoried numerous historic and archeological sites, [App. at AR0000968–88], as well as 73 TCPs or potential TCPs, [App. at AR0000989]. The RMP adopted BLM's continuing management guidelines, which direct the agency to avoid or mitigate adverse effects to these cultural resources. [App. at AR0000842]. The RMP also designated 84 important cultural sites to receive special management protection as Areas of Critical

---

sites in the American Southwest or the San Juan Basin," [App. at 217738]. Most of Plaintiffs' record citations in support of their NHPA arguments are taken from this failed petition.

Environmental Concern, [App. at AR0001053, AR0002184–2268], including the specific cultural sites mentioned by Plaintiffs (Aplt.Br. 2 n.2). In compliance with the Chacoan Outliers Protection Act (COPA), 16 U.S.C. §§ 410ii *et seq*, 21 of those Areas of Critical Environmental Concern are Chacoan outliers and other Chacoan archeological sites. [App. at AR002200, AR0217737]. Areas of Critical Environmental Concern receive additional protections related to oil and gas development in that existing leases must have stipulations prohibiting surface occupancy, and future leases may be closed to development. [App. at AR0002200; AR0002205; AR0002207]; *see also* [App. at AR0000837–43] (RMP discussion of cultural resource management).

B. BLM properly defined the scope of the APEs.

At the site-specific APD stage, BLM complied with the NHPA by defining the area of potential effects for each challenged APD based on the location of the proposed well and the types of known and suspected historic properties in the area. Where applicable, BLM used the standard APE, which includes the well pad, the construction zone, and a 100-foot cultural buffer zone. [App. at AR0169265.] For every APD, BLM commissioned a cultural investigation that described the project, delineated the APE, indicated if known historic properties were located near the project, and surveyed an area commensurate with or larger than the APE for any additional cultural sites. [App. at AR0167306]. Based on its investigation and analysis, BLM developed a Cultural Resource Record of Review that indicated

whether the proposed project should proceed and whether the agency was attaching any stipulations to protect cultural sites. [App. at AR0022648].

Plaintiffs' argument that BLM violated the NHPA when it did not define a separate APE for indirect effects misstates the law. Nothing in the NHPA, its implementing regulations, or the 2004 or 2014 Protocols *requires* BLM to define separate APEs for direct and indirect effects. The regulations and 2014 Protocol grant BLM the *option* of defining a different APE for different types of effects. *See* 36 C.F.R. § 800.16(d) (providing that an APE "*may* be different for different kinds of effects caused by the undertaking" (emphasis added)); [App. at AR0169233] (granting the BLM field manager discretion to look "outside of the APE for direct effects"). Ultimately, however, BLM complies with the NHPA when it takes foreseeable indirect effects into account in defining the APE, and the APE for direct and indirect effects can be the same. [App. at AR0169233] (consistently referring to "the APE"); 36 C.F.R. §§ 800.4(a)(1), 800.16(d). Moreover, this Court has "emphasized that 'establishing an APE requires a high level of agency expertise, and as such, the agency's determination is due a substantial amount of discretion.'" *Coal. of Concerned Citizens.*, 843 F.3d at 906 (quoting *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1091 (10th Cir. 2004)).

Plaintiffs contend that BLM's use of the standard APE for site-specific APDs failed to account for indirect adverse effects from "noise, lights, and air pollution" on cultural sites that are not within the vicinity of an APD. Aplt.Br. 29–30. This

argument conflates BLM's obligations under NEPA and the NHPA. While NEPA requires analysis of an action's potential impacts on the human environment, 42 U.S.C. § 4332, the NHPA is concerned only with those adverse effects that may harm "the characteristics of a historic property that qualify the property for inclusion in the National Register," 36 C.F.R. § 800.5(a)(1). Because adverse effects depend on a property's listing criteria, an agency defines the APE for a project in light of those criteria: APE "means the geographic area or areas within which an undertaking may directly or indirectly cause alterations *in the character or use of historic properties*, if any such properties exist." *Id.* § 800.16(d) (emphasis added). The 2014 Protocol recognizes this: "In defining the APE, the BLM will consider potential direct, indirect, and cumulative effects to historic properties and their associated settings *when setting is an important aspect of integrity, as applicable*." [App. at AR0169233] (emphasis added). With respect to visual impacts, moreover, even if setting is an aspect of integrity for a property, the 2014 Protocol provides that an adverse effect determination is not warranted unless "the project elements *dominate* the setting." [App. at AR0169242] (emphasis added).

Here, Plaintiffs have not even attempted to explain how air pollution, noise, and visual disturbances adversely affect the characteristics of the sites that qualify those properties for listing. *See Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 611 (9th Cir. 2010) ("Although it is understandable that the Tribe values the landscape of the project area as a whole, the NHPA requires that the

BLM protect only against adverse effects on the features of these areas that make them eligible for the National Register."). This failure is unsurprising given that the vast majority of historic properties near the challenged drilling permits are archeological sites listed or eligible for listing under the National Register's criterion d (sites that may yield historical data), 36 C.F.R. § 60.4(d). *See, e.g.*, [App. at AR0167255; AR0168247; AR0168260; AR0216712]. Adverse effects to such sites are those that would harm the site's ability to provide information important to prehistory or history. 36 C.F.R. § 60.4(d). Because an archaeological site can yield important historic information so long as the site itself remains physically undisturbed (regardless of whether it is in a pristine location or surrounded by development), setting is not an important aspect of its integrity. Thus, indirect and cumulative effects like air pollution, noise, and visual disturbances are generally not adverse effects for such properties. *See, e.g.*, [App. at AR0213507, AR0217739]. It was therefore reasonable for BLM to use standard APEs for APDs in which adverse indirect effects to historic properties in the area—namely, discrete archaeological sites—were not reasonably foreseeable.

Even if air pollution, noise, and visual disturbances could, in theory, adversely affect the specific characteristics of the Park and outlier sites that qualified them for listing, there is no evidence that adverse effects are foreseeable. Given that approval of the APDs is not expected to cause any NAAQs exceedances, [App. at AR0137642; AR0225490], there is no reason to believe air pollutants will adversely affect historic

properties or TCPs. And because every site identified by Plaintiffs is miles from the challenged drilling permits, *see* ECF No. 113-1, Ex. A; [App. at AR0002201], BLM reasonably determined that noise and visual disturbances from the approved drilling would not adversely affect the Park and outlier sites. *See, e.g.*, [App. at AR0228414] (determining that well would not be visible from Park or outlier sites); [App. at AR0233587–89] (finding that the impact on night skies as seen from the Park would be "imperceptible" given the location of the proposed well, and cumulative impacts of foreseeable development minimal because the well is located in existing oil and gas field); *see also* [App. at AR0217736] (diagram showing artificial light visible from the Chaco Culture National Historical Park). BLM was not alone in this determination: per the Protocol, the agency submits samples of its eligibility and adverse effect determinations to the SHPO. *See, e.g.*, [App. at AR0168755; AR0169300]. At no point has the SHPO disagreed with BLM's determinations for the challenged wells. *Coal. of Concerned Citizens To Make Art Smart v. FTA*, 843 F.3d 886, 907 (10th Cir. 2016) (ruling that SHPO concurrence carries weight when reviewing agency determinations under NHPA).

Finally, BLM ensured that any adverse indirect effects that might alter the historical characteristics of the cultural sites would be avoided or mitigated. As encouraged by the NHPA, BLM coordinated its NHPA and NEPA review and considered foreseeable direct and indirect adverse effects to cultural resources in the EA for each APD. *See* 36 C.F.R. § 800.8; *see also, e.g.*, [App. at AR0188769–71;

AR0233583–86]. BLM also analyzed cumulative adverse effects to cultural resources within the Cumulative Impacts Analysis Area, which includes both the project footprint as well as surrounding sub-watersheds. *See, e.g.*, [App. at AR0233585]. The EA for each APD discusses best practices for avoiding adverse effects to these cultural resources, including "design features such as but not limited to reduction of construction areas, temporary barriers, and site monitoring." [App. at AR0213507–08; AR0148206]. In addition, the EAs discuss ways to minimize and mitigate visual impacts and noise impacts. *See, e.g.*, [App. at AR0188771–74; AR0188784-85; AR0233585]. Finally, the FONSIs delineate the distance of the well from nearby Areas of Critical Environmental Concern and incorporate conditions of approval to protect cultural resources. *See, e.g.*, [App. at AR0144311–12; AR0233534].

C. BLM complied with its obligations to consult with the SHPO.

Plaintiffs also claim that BLM's use of the standard APEs violated the NHPA because the 2014 Protocol directs BLM to consult with the New Mexico SHPO "where defining the APE is complicated or controversial." Aplt.Br. 35–36 (citing [App. at AR0169233]). As support for their argument, Plaintiffs cite two letters from tribes in response to notifications that BLM sent for two different APDs. But neither letter suggests that the tribes contested the scope of BLM's APEs for the challenged APDs. Instead, both letters address BLM's ongoing inventory of cultural resources as part of the pending RMP amendment—an agency action that is not yet final. *See* [App. at AR0217004, AR0174742–43]. As the district court correctly observed, the

definition of an APE does not become complicated or controversial "merely because a plaintiff group creates a controversy by challenging the wells." ECF No. 129 at 120.

Instead, the APE consultation requirement applies when the parties to the 2014 Protocol Agreement—BLM and the SHPO—consider the APE to be complicated or controversial. There is no evidence in the record to suggest that BLM or the SHPO considered the APEs for the challenged APDs to be complicated or controversial.[5] To the contrary, the fact that BLM and the SHPO established standard APEs for well pads shows that such undertakings are common in the region. *See* [App. at AR0000842] (2003 RMP noting that BLM's cultural resource staff reviewed more than 1000 undertakings each year related to oil and gas development in the Farmington Field Office planning area). Moreover, as explained above, the SHPO did review samples of the agency's NHPA analyses for APD approvals and never disagreed with BLM's APE definitions. *See* [App. at AR0169233] (noting that "BLM may assume concurrence with the APE determination if SHPO does not respond"). Therefore, BLM did not err in using the standard APE for well pads rather than consulting with the SHPO on each individual APE.

[5] Even if Plaintiffs were correct, the 2004 Protocol contains no corollary SHPO consultation requirement. Therefore, APEs for the 221 APDs reviewed under the 2004 Protocol need not be approved by the SHPO.

D. Amici's NHPA claims are not properly before the Court.

Amici All Pueblo Council of Governors and National Trust for Historic Preservation argue that BLM did not fulfill the NHPA's tribal consultation requirements when considering the APDs. The Court need not address Amici's arguments because they inappropriately attempt to expand the scope of litigation rather than support Plaintiffs' claims. The task of "fram[ing] the issues on appeal [is] a prerogative more appropriately restricted to the litigants." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997). Thus, "it is truly the exceptional case when an appellate court will reach out to decide issues advanced not by the parties but instead by *amicus*," *id.* at 1404, and no exceptional circumstances are present here. Amici do not raise "jurisdictional questions or touch on issues of federalism or comity [that the Court] might consider *sua sponte*." *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000).

Even if Plaintiffs adopt Amici's arguments in their reply brief, the Court should not review those claims. This case does not involve important and unsettled legal issues that would justify the Court's exercise of discretion to reach Amici's arguments. *Cf. EagleMed LLC v. Cox*, 868 F.3d 893, 902 (10th Cir. 2017) (adopting arguments presented in an amicus brief in a lawsuit challenging Wyoming's regulation of air ambulance services). Additionally, these arguments are being presented for the first time in this appeal: Plaintiffs have not advanced in any previous brief in this Court or the district court the argument that BLM failed to consult with any tribes under the

NHPA. *See* ECF No. 112 at 32–41; ECF No. 117 at 17–21. As such, neither Amici nor Plaintiffs can assert those claims now. *See Daniels v. United Parcel Service, Inc.*, 701 F.3d 620, 632 (10th Cir. 2012) ("Litigants who do not raise a claim or argument before the district court cannot do so on appeal."). Plaintiffs also lack authority to assert rights on behalf of the Pueblo Nations in New Mexico. *See San Juan Citizens Alliance*, 586 F. Supp. 2d at 1293 (finding it "questionable, at best," whether Plaintiffs had standing to claim that BLM failed to adequately consult with the Navajo Nation during the NHPA analysis for the 2003 RMP). For these reasons, the Court should decline to consider Amici's NHPA claims.

Even if the Court reaches Amici's claims, they fail on the merits. Amici argue that BLM's NHPA analyses are flawed because the agency did not consult with the Pueblos. The NHPA's implementing regulations direct BLM to "make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." 36 C.F.R. § 800.3(f)(2). Following BLM's good-faith effort to invite consultation, a tribe must "request[] in writing to be a consulting party." *Id.* Determining consulting parties "should commence early in the planning process." *Id.* § 800.2(c)(2)(ii)(A).

BLM made a reasonable and good faith effort to identify and consult with interested tribes regarding oil and gas development in the San Juan Basin. BLM first reached out to tribes when the agency prepared the 2003 RMP. *San Juan Citizens*

Alliance, 586 F. Supp. 2d at 1292–94 (upholding BLM's NHPA tribal consultation for the 2003 RMP). All New Mexico members of Amicus All Pueblo Council of Governors received invitations to participate in the planning process and assist in identifying TCPs. [App. at AR0001150–51, AR0001953]. But none of the Pueblos responded to BLM's request for information or requested consulting party status. BLM therefore had no reason to believe the Pueblos were interested in site-specific consultation for these challenged wells. Indeed, Amicus All Pueblo Council of Governors identifies no specific Pueblo cultural site that BLM allegedly overlooked in the agency's NHPA analysis. *See also* [App. at AR0217738] (noting the thoroughness and "intensity of archaeological investigations during the past 40 years"). Amici's arguments therefore fail on both procedural and substantive grounds.

In sum, BLM complied with the NHPA when approving the APDs at issue.

IV. IF THE COURT FINDS THAT AN APD APPROVAL WAS UNLAWFUL, REMAND FOR FURTHER PROCEEDINGS IN THE DISTRICT COURT IS THE APPROPRIATE REMEDY.

The APA directs a reviewing court to "*set aside* agency action, findings, and conclusions that it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2) (emphasis added). Here, Plaintiffs have challenged 337 agency actions—the individual decision notices authorizing APDs. If one of those agency actions is set aside, the drilling activities

authorized in that drilling permit presumptively must cease.[6] There is simply no point, and no authority, to additionally "enjoin" an agency action that has already been set aside. *Cf.* Aplt.Br. 51. Similarly, because any NEPA or NHPA deficiencies could be remedied in future APD analyses, *see Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1158–59 (10th Cir. 2004), there is no legal basis for enjoining *future* BLM decisions on pending APDs. *Cf.* Aplt.Br. 55.

Because Plaintiffs have challenged 337 discrete agency actions in one lawsuit, the scope of any remedial order would vary widely depending on the violation found. *See, e.g.*, *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 962 (10th Cir. 2002) (reaffirming that principles of equity require that relief be "narrowly tailored to remedy the harm shown"). For example, Plaintiffs' NHPA arguments regarding indirect effects cite only the 2014 Protocol, but 221 APDs were approved under the 2004 Protocol. Moreover, some of the cultural records of review for the APDs found no historic properties or TCPs in the vicinity of the proposed wells. *See, e.g.*, [App. at AR0167452, AR0167769–70]. As such, even if the Court found some deficiency in

[6] However, the nature of any alleged violation and the disruptiveness of altering the status quo may support remand from the district court to the agency without vacatur as the most appropriate remedy. *See Allied Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 202 (D.C. Cir. 1993). Indeed, the district court opined that "remand without vacatur would be the appropriate remedy for [an] NHPA violation" in this case because the potential economic harm from vacatur outweighs any potential harm from an NHPA violation. ECF No. 129 at 127–28.

BLM's section 106 review of indirect effects, there would be no basis for setting aside those particular APD approvals.

In short, Plaintiffs' decision to challenge multiple agency actions in one lawsuit has introduced numerous factual distinctions that would need to be teased out should the Court find a deficiency in BLM's review under NEPA or the NHPA. For that reason, in the event the Court reverses the judgment below, Federal Defendants request that the Court remand to the district court for further remedial proceedings.

CONCLUSION

For the foregoing reasons, the case should be remanded to the district court with instructions to dismiss for lack of jurisdiction; in the alternative, the district court's judgment should be affirmed.

Respectfully submitted,
s/ Emily A. Polachek

ERIC GRANT
Deputy Assistant Attorney General

MARK R. HAAG
CLARE M. BORONOW
EMILY A. POLACHEK
Attorneys, U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov

Of Counsel:

MICHAEL C. WILLIAMS
Attorney-Advisor
Office of the Solicitor
U.S. Department of the Interior

NOVEMBER 5, 2018
90-1-4-14399

STATEMENT REGARDING ORAL ARGUMENT

Federal Defendants believe that oral argument is necessary in this case because it involves complicated jurisdictional and substantive issues. Federal Defendants would also appreciate an opportunity to respond in the event Plaintiffs alter their arguments based on the amicus brief, which introduced new arguments into this case. Most importantly, the Court would be aided by having the parties appear to address questions concerning these issues.

CERTIFICATIONS

I hereby certify that:

- this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);
- this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Garamond;
- there is no information in this brief that is subject to the privacy redaction requirements of 10th Cir. R. 25.5;
- any hard copies of this brief submitted to the Court are exact copies of the version submitted electronically; and
- this brief was scanned with Windows Defender Antivirus, version 1.279.1242.0 (updated 11/5/18), and found to contain no known viruses.

s/ Emily A. Polachek

EMILY A. POLACHEK
U.S. Department of Justice
Env't & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Emily A. Polachek

EMILY A. POLACHEK
U.S. Department of Justice
Env't & Natural Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 514-5442
emily.polachek@usdoj.gov