No. 18-2089

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, et al.,

*Plaintiffs-Appellants*,

v.

RYAN ZINKE, in his official capacity as Secretary of the U.S. Department of the Interior, et al.;

*Defendants-Appellees*,

and

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

*Intervenor Defendants-Appellees*

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

# INTERVENORS' UNCITED PRELIMINARY RESPONSE BRIEF (DEFERRED APPENDIX APPEAL)
**(Oral Argument Requested)**

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## Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, Encana Oil & Gas (USA), Inc., BP America Production Co., Enduring Resources IV, LLC, and the American Petroleum Institute provide the following corporate disclosure statements:

- Encana Oil & Gas (USA) Inc. is an indirect, wholly owned subsidiary of Encana Corporation, which is a publicly held corporation;
- BP America Production Company is a wholly owned subsidiary of BP Company North America, Inc., which is not a publicly held corporation. BP Company North America, Inc. is owned by BP, p.l.c., which is a publicly held corporation;
- Enduring Resources IV, LLC is limited liability company, that does not have a parent corporation, and no publicly held corporation owns 10% or more interest in Enduring Resources IV, LLC; and
- The American Petroleum Institute is a not for profit corporation, that has no parent corporation; no corporation holds any stock in API.

## Table Of Contents

## Table of Authorities

**Page(s)**

### Cases

**Statutes**

**Rules and Regulations**

**Other Authorities**

## Statement of Prior or Related Appeals

Pursuant to 10th Circuit Rule 28.2(C)(1), the Intervenors state that this case is related to prior appeal No. 15-2130, in which Diné appealed the district court's decision, 2015 WL 4997207 (D.N.M. Aug. 14, 2015), denying Diné's motion for preliminary injunction. This Court affirmed the district court's decision on appeal, holding that Diné had not demonstrated a reasonable likelihood of success on the merits. *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016).

## Glossary

| | |
|---|---|
| APE | Area of Potential Effect |
| BLM | Bureau of Land Management |
| Chaco Park | Chaco Culture National Historical Park |
| Diné | Appellants Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, WildEarth Guardians, and Natural Resources Defense Council |
| EA | Environmental Assessment |
| Intervenors | Encana Oil & Gas (USA), Inc., BP America Production Co., and Enduring Resources IV, LLC, and the American Petroleum Institute |
| MOO | *Diné Citizens Against Ruining Our Environment v. Jewell*, No. CIV 15-0209 JB/SCY, Memorandum Opinion & Amended Order (D.N.M. Apr. 23, 2018) |
| NEPA | National Environmental Policy Act |
| NHPA | National Historic Preservation Act |
| Operators | BP America Production Co., Encana Oil & Gas (USA), Inc., and Enduring Resources IV, LLC |
| RFDS | Reasonable Foreseeable Development Scenario |
| RMP/EIS | Farmington Field Office Resource Management Plan and Final Environmental Impact Statement prepared by BLM in 2003 |
| SHPO | State Historic Preservation Officer |
| TCP | Traditional Cultural Property |

## Introduction

Diné's burden on appeal is high: It must show that BLM's decisions to authorize the Mancos Shale wells in the San Juan Basin at issue were arbitrary and capricious. This Diné has not done. As the district court ruled in a thorough 132-page order, BLM fully complied with its obligations under both the National Historic Preservation Act ("NHPA") and National Environmental Policy Act ("NEPA") in approving each of 350 challenged wells.

BLM's NHPA Section 106 record reflects a careful review of both direct and indirect effects to historic properties with appropriate tribal consultation. Diné's contrary arguments misstate BLM's duties under the NHPA and ignore the administrative record. As for NEPA, BLM took a hard look at the impacts of developing each challenged well in both the 2003 Resource Management Plan and Environmental Impact Statement ("RMP/EIS") and in site-specific Environmental Assessments ("EAs") tiered to the Basin-wide review. Contrary to Diné's claims, the environmental effects of Mancos Shale development through horizontal, multi-stage hydraulic fracturing are no different in type than those associated with vertical, single-stage hydraulic fracturing—a practice that has been ongoing in the Basin for 70 years across 22,000 active wells. Overall, horizontal drilling *reduces* the environmental and cultural resource impacts by minimizing the number of wells in the landscape.

The district court dismissed the case with prejudice. This Court should affirm.

## Jurisdictional Statement

The Intervenors agree with the Jurisdictional Statement in Appellants' Uncited Preliminary Opening Brief ("Diné Br.").

## Statement Of The Issues

I. Did BLM meet its NHPA Section 106 consultation obligation as set out in the New Mexico State Protocol, including consideration of indirect and cumulative effects to historic properties?

II. Did BLM adequately analyze the cumulative environmental effects of authorizing each of the 350 challenged Mancos Shale wells under NEPA?

## Statement Of The Case

### I. Factual Background

#### A. Historical San Juan Basin Development

The San Juan Basin in northwestern New Mexico hosts one of the largest oil and natural gas fields in the United States. [App. at AR1945 (RMP/Record of Decision)]. Development began in the Basin in the 1940s, and there are now some 22,000 active federal wells—approximately 18,000 as of 2003, and another 3,945 as of June 2017. [App. at AR1945 (RMP/ROD); AR911 (RMP/EIS); *Diné v. Jewell*, Memorandum Opinion & Order at 15 (D.N.M. Apr. 23, 2018) (Dkt. No.

129) ("MOO")]. Hydraulic fracturing, a process by which high-pressure fluids are injected into rock formations to promote hydrocarbon flow, has been used to stimulate almost all wells in the Basin since the 1950s. [App. at AR140173 (EA 2015-0036); MOO at 12].

### B. The 2003 Resource Management Plan

In April 2003, BLM prepared the RMP/EIS,[1] which describes, among other things, the management direction for and environmental impacts of oil and gas development in the Farmington Field Office area covering the New Mexico portion of the Basin. [App. at AR809-810 (RMP/EIS)]. The RMP/EIS evaluated alternative levels of development based on a 20-year Reasonable Foreseeable Development Scenario ("RFDS") for future oil and gas production. [App. at AR1011-1147 (RMP/EIS); AR1-125 (2001 RFDS)].

BLM ultimately selected an alternative that allows for drilling and development of 9,942 new wells. [App. at AR1115 (RMP/EIS)]. The RFDS provides a well-count estimate by considering projections for development of the Basin's primary subsurface hydrocarbon formations over the planning period. [App. at AR114 (2001 RFDS)]. The environmental analysis in the RMP/EIS,

[1] BLM adopted the Final RMP/EIS in its December 2003 Record of Decision. [App. at AR1931-AR1963].

however, does not specify any target formations, nor does it find that the relevant impacts are dependent on the particular formation. *See* [App. at MOO at 16].

Rather, the RMP/EIS describes, at a programmatic level, the Basin-wide impacts to 22 resource categories from the total development of 9,942 wells, including potential surface disturbance, possible water usage, potential new roads, potentially affected cultural resource sites, and possible increases in air emissions. [App. at AR898-901, AR1115-1130]. The RMP/EIS also analyzes the cumulative impacts of anticipated oil and gas development along with other past, present, and reasonably foreseeable actions in the planning area. [App. at AR1131-1139]. Overall, the RMP/EIS "provides a broad scale, 'big picture' level of analysis, and the exact locations of projected oil and gas development and other changes are not known at this time." [App. at AR1011].

### C. BLM's RMP-Level Section 106 Consultation

As part of the 2003 RMP/EIS process, BLM engaged in NHPA Section 106 consultation with many Indian tribes, including the Navajo Nation and 19 New Mexico Pueblos, regarding the Basin-wide effects of oil and gas development on historic properties. [App. at AR988-90, 1149 (RMP/EIS); AR1942-1953 (RMP ROD)]. BLM requested information necessary to identify Traditional Cultural Properties ("TCPs") of religious or cultural significance to tribal members. [App. at AR1953]. The process yielded an inventory of known and suspected TCPs,

[App. at AR989] and led BLM to designate 79 Areas of Critical Environmental Concern to protect cultural sites, including 18 Chacoan Outlier sites and three Chacoan road sites. [App. at AR1126 (RMP/EIS) (describing preferred Alternative D); AR1951, 1992, 2184-2268 (RMP ROD)]. Oil and gas leasing was either eliminated in the 79 specially designated areas or subjected to strict surface occupancy restrictions. [App. at AR1967-1972 (RMP ROD)]. Noise protections were also implemented for 34 of the sites. [App. at AR1126 (RMP/EIS)].

Appellant San Juan Citizens Alliance challenged the RMP/EIS, but the district court held that BLM fully complied with NEPA and the NHPA. *San Juan Citizens All. v. Norton*, 586 F. Supp. 2d 1270 (D.N.M. 2008). As of June 2017, only 3,945 of the 9,942 wells analyzed in the RMP/EIS had been drilled. [App. at MOO at 15].

**D. Recent Mancos Shale Development**

In 2010, WPX Energy Production, LLC[2] drilled the first horizontal well in the Mancos Shale by combining hydraulic fracturing (used in the Basin for 70 years) with horizontal drilling. [App. at AR173833 (2014 RFDS)]. Horizontal drilling allows oil and gas operators to simultaneously improve production per well and *decrease* overall environmental impacts. This is because one horizontal well

[2] In 2018, WPX sold its leases in the Basin to Enduring Resources IV, LLC, which was substituted for WPX as intervenor. [App. at Dkt. No. 140].

can replace up to four vertical wells, and multiple horizontal wells can be drilled from the same well pad, reducing overall surface disturbance and other environmental impacts. [App. at MOO at 13, 89-90, 93-94; AR236483 (EA 2016-0204, 2016-0081)].

For this reason, Appellant San Juan Citizens Alliance *supported* expanded use of horizontal drilling in its comments on the 2003 RMP/EIS. [App. at AR1847] ("Alternative drilling methods such as horizontal drilling would, if used in the San Juan basin, reduce adverse impacts such as noise, air pollution, and scarred landscapes from wells and roads. Why can't several wells be drilled from one location?").

Over roughly seven years, BLM approved 350 Mancos Shale wells that are at issue in this appeal.[3] The area in the southern portion of the Basin where the wells are being developed is already occupied by hundreds of existing vertical wells. Many of the Mancos Shale wells make use of existing oil and gas infrastructure to avoid and minimize new surface disturbance. *See, e.g.*, [App. at AR140148 (EA 2015-0036)] (proposing to use three existing disturbed areas). The figure in the Addendum to this brief, [*see* App. at Dkt. 41-1, at 13], shows that

[3] Appellants' Third Supplemented Petition for Review challenged EAs covering 382 wells. But the District Court held that there was no final agency action for 28 of the wells, and that the appeal with respect to four abandoned wells was moot. MOO at 83 n.17, 86 n.19. Appellants do not challenge these rulings.

Mancos Shale wells are interspersed with active wells in existing well fields. *See also* [App. at AR173844] (2014 RFDS map showing existing vertical wells and recent drilling in Mancos Shale area).

Before approving permits for the new wells, BLM prepared EAs to address the site-specific and cumulative impacts of drilling horizontal wells targeting the Mancos Shale. *See, e.g.*, [App. at AR140144-140206 (EA 2015-0036); AR125972-126043 (EA 2014-0272); MOO at 16]. BLM tiered portions of its cumulative impact analysis to the 2003 RMP/EIS. BLM also considered new studies to address cumulative impacts in each EA.

To address cumulative air impacts, BLM relied on a new region-wide analysis that accounted for full Mancos Shale development. *See, e.g.*, [App. at AR140149-140150, 140166-140171 (EA 2015-0036); AR125981, 126001-126008 (EA 2014-0272)]. BLM also updated its cumulative impact analyses for other resources.

For instance, the 2016 EA for the Kimbeto Wash Unit analyzes the impacts of drilling four wells from a single wellpad. [App. at AR235829]. With respect to vegetation impacts, BLM determined that the cumulative impact area would encompass the 147,176-acre Escavada Wash watershed where the wells were proposed. It then explained that 105 wells had already been drilled and 326 potential future wells could be drilled within the watershed. [App. at 235855-56].

In this context, the 1.02 acres of long-term disturbance associated with the four proposed wells would account for just 0.18% of the total cumulative impacts to vegetation in the watershed. [App. at AR235856]. BLM performed similar cumulative impact analyses for other resources. [App. at AR235856-57 (noxious weeds), 235857-60 (wildlife), 235860-62 (sensitive species), 235862-64 (livestock grazing), 235866-68 (public health and safety)].

In 2014, BLM began preparing an RMP amendment to consider "full-field development" of the Mancos Shale play. [App. at AR173818 (Federal Register Notice of Intent)]. BLM prepared an updated RFDS projecting, based on current geological and engineering evidence, that full development would result in up to 1,960 oil wells and 2,000 gas wells. [App. at AR 173823, 173841, 173846, 173857 (2014 RFDS)]. The RFDS does not predict when those wells might be drilled. *See* [App. at AR173841, AR173846].

### E. BLM's Tribal Consultations For Mancos Shale Wells

For each proposed well or group of wells, BLM consulted with the New Mexico State Historic Preservation Officer ("SHPO"). The consultation process is documented in the EA and accompanying cultural resource reports for each well or group of wells. For each permit decision, BLM (i) defined the Area of Potential Effect ("APE"), (ii) required on-the-ground pedestrian surveys within the APE, and (iii) identified historic properties, including TCPs, within and in close

proximity to the APE through literature review, BLM's TCP database, or consultation with affected tribes.

For example, the Kimbeto Wash Unit EA explains that BLM delineated an APE of 7.27 acres, but surveyed 24.51 acres within and around the APE. [App. at AR238937]. The survey revealed that the project area was already disturbed by energy development, livestock grazing, illegal trash dumping, and recreation activities. [App. at AR238938]. BLM also invited the Counselor Chapter of the Navajo Nation to attend the on-site inspection[4] to comment on the proposed wellsite and operations. [App. at AR 235834-35, 235872].

No affected historic sites were identified, [App. at AR238934-38], and no TCPs were known to exist in the APE. [App. at AR235865]. BLM concluded that the wells would have no adverse effect on historic properties. [App. at AR238934]. In terms of cumulative effects, BLM noted that the wells were more than 10 miles from the boundary of the Chaco Culture National Historical Park ("Chaco Park") and outside the viewshed of any National Park Service known observation point. [App. at AR235866].

[4] An onsite inspection is a necessary step before a well permit can issue. BLM's cultural and environmental review specialists, along with the other attendees, are required to develop a list of resource concerns that the operator must address before drilling is permitted. BLM, Onshore Order No. 1, Secs. II, III.C, 72 Fed. Reg. 10,308, 10,329-30 (Mar. 7, 2007).

Similar site-specific Section 106 consultations occurred for the other challenged wells. With respect to identified archeological sites within the APE, either the sites were avoided or mitigation was implemented. *See, e.g.*, [App. at AR238970-72] (surveying 108.01 acres in and around 25.76-acre APE). In some cases, BLM identified TCPs in proximity to proposed wells (outside the direct APE) and initiated consultation with appropriate tribal parties regarding potential mitigation. *See, e.g.*, [App. at AR238974, AR239025][5] (literature search for TCPs within one mile of project and interview with area residents and member of the Nageezi Chapter Land Board of the Navajo Nation). At no time did any tribe request consultation regarding any specific well or undertaking.

## II. Procedural History

In March 2015, Diné filed suit challenging BLM's NEPA and NHPA compliance in approving wells. Diné moved for a preliminary injunction on its NEPA claims seeking to enjoin all further drilling in the Mancos Shale and "further approvals of Mancos Shale [wells]." [App. at Dkt. 16-1, at 6].

The district court denied Diné's motion. *Diné Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 WL 4997207, at *33 (D.N.M.

[5] The actual TCP documentation is kept confidential to protect sensitive location information, but is nonetheless part of the administrative record. *See, e.g.*, [App. at AR239025-26].

Aug. 14, 2015). This Court affirmed. 839 F.3d 1276, 1285 (10th Cir. 2016). The Court confirmed that, for purposes of NEPA review, "even with increased drilling in the Mancos Shale formation and the switch to horizontal drilling and multi-stage fracturing, the overall amount of drilling and related surface impacts are still well within the anticipated level [in the 2003 RMP/EIS]." *Id*. at 1283. It added that appellants had failed to "support their contention that horizontal drilling and multi-stage fracturing may give rise to different types—rather than just different levels—of environmental harms when compared to the traditional vertical drilling and hydraulic fracturing techniques that have historically been used in the San Juan Basin." *Id*. at 1284.

The case returned to the district court for briefing on the merits. Diné renewed its NEPA claims and also asserted new NHPA claims. The court held that BLM complied with the NHPA by following the procedures set out in the State Protocol. The court found that BLM properly (i) designated the APE for each well approval, (ii) determined whether historical properties existed within the APE, and (iii) where historical properties existed, documented how those sites would be addressed. MOO at 113.

On the NEPA claims, the district court reaffirmed that the difference between the environmental impacts of the technology used for development today and the technology analyzed in the 2003 RMP/EIS are insignificant. *Id*. at 92. It

added that, even though more drilling is occurring in the Mancos Shale than anticipated in 2003, the impacts still fall within the impacts considered in the 2003 RMP/EIS. *Id*. at 92-93. The court further found that Diné's cumulative impact calculations for full-field Mancos Shale drilling were mistaken given Diné's failure to recognize that horizontal wells are often twinned on the same wellpad. *Id*. at 93-94. Nor were the cumulative effects of full-field development at issue in this case. *Id*. at 94-95. The court concluded that BLM complied with both the NHPA and NEPA, and dismissed the case with prejudice. *Id*. at 130.

## Summary Of Argument

The district court properly ruled that BLM fulfilled its duties under both the NHPA and NEPA. Diné has failed to show that BLM's decisions, which are entitled to a presumption of validity, were arbitrary and capricious.

1. BLM complied with the NHPA by adhering to the New Mexico State Protocol to define the APE for each of the 350 wells. At this preliminary step, consultation is not required with either the SHPO or the tribes. Contrary to Diné's and Amici's claims, the APE encompassed both the direct and indirect effects of each well and considered impacts on Chaco Park and other Chacoan outlier sites at even greater distances. BLM's consultation was commensurate with the scope and scale of the proposed drilling permit applications, and to the extent landscape-level

TCPs may be affected by oil and gas development, those were addressed during consultation for the 2003 RMP.

Amici's argument that BLM failed to consult with the Pueblos was not preserved by the parties below. In any case, BLM was not required to consult with the Pueblos, which identify no TCPs of religious or cultural significance within the wells' APEs.

2. BLM fully complied with NEPA. Given that there is no difference in the types of effects caused by horizontal, multi-stage fracturing and vertical, single-stage fracturing, BLM was not arbitrary and capricious in relying on its 2003 RMP/EIS cumulative impact analysis. The 2003 RMP/EIS analyzed the effects of up to 9,942 wells, less than half of which have been developed to date. The effects of Mancos Shale drilling fall comfortably within the level of effects already analyzed and are located within pre-existing well fields.

Nor was BLM required to complete an environmental review of full-field Mancos Shale development before authorizing the individual wells at issue here. Full-field development has not yet been authorized, and every potential future well is not reasonably foreseeable today. BLM's NEPA review was appropriate to the scope and scale of the proposed wells, and the tiered EAs accounted for the cumulative impacts of future Mancos Shale wells to the extent those impacts were likely to overlap with the impacts of current development.

3. Even assuming *arguendo* that Diné has established a violation of NEPA or the NHPA, it is not entitled to the equitable relief it seeks, including a permanent injunction and vacatur. Even in environmental cases, these are extraordinary remedies to be imposed only in strictly circumscribed situations and on a clear showing that the applicant satisfies the four traditional equitable factors. Diné falls well short of the requisite showing.

**Standard Of Review**

This Court applies the same standard of review as the district court to Diné's NHPA and NEPA claims, *i.e.*, whether the agency's action was "arbitrary and capricious" within the meaning of the Administrative Procedure Act. *WildEarth Guardians v. United States Bureau of Land Mgmt.*, 870 F.3d 1222, 1233 (10th Cir. 2017); 5 U.S.C. § 706(2)(A). An agency's decision is arbitrary and capricious if the agency (i) "entirely failed to consider an important aspect of the problem," (ii) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," (iii) "failed to base its decision on consideration of the relevant factors," or (iv) "made 'a clear error of judgment.'" *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (citation omitted). "This standard of review is 'very deferential' to the agency's determination, and a presumption of validity attaches to the agency action such that

the burden of proof rests with the party challenging it." *Kobach v. United States Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014) (citation omitted).

**Preservation Of Issues**

Diné preserved the issues presented in its Opening Brief before the district court, and the Appellees preserved their responsive arguments. *See* [App. at Dkt. No. 112, Dkt. No. 113, Dkt. No. 114, Dkt. No. 117]. The district court ruled on these issues and arguments in its April 23, 2018 MOO. [App. at Dkt. No. 129]. At least some of the issues raised by Amici Curiae were not preserved and are not properly before the Court. *See infra* at 31–32.

**Argument**

## I. BLM Met Its NHPA Section 106 Consultation Obligation.

### A. The NHPA Section 106 Process

NHPA Section 106 requires federal agencies to "take into account the effect of [a federal] undertaking on any historic property." 54 U.S.C. §§ 306108, 300308. The NHPA is a "stop, look, and listen" statute, because it imposes procedural, as opposed to substantive, requirements on federal agencies to consider the effects of their actions on historic properties. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). The NHPA does not mandate any

particular outcome so long as the prescribed process is followed. *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004).

The NHPA process encompasses several steps. The first is to define the APE—the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. §§ 800.4(a)(1), 800.16(d). Agencies are granted substantial discretion in defining the APE. *Coal. of Concerned Citizens to Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transp.*, 843 F.3d 886, 906 (10th Cir. 2016).

The second step is to identify historic properties that may be adversely affected within the APE. 36 C.F.R. § 800.4(b). An historic property is "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register . . . ." 54 U.S.C. § 300308. These may include "[p]roperty of traditional or religious and cultural importance to an Indian tribe," generally referred to as TCPs. *Id.* § 302706(a). The agency must make a "reasonable and good faith effort" to identify historic properties with the APE. 36 C.F.R. § 800.4(b)(1).

If BLM identifies historic properties within the APE, the third step is to evaluate the properties' historical significance through the lens of eligibility for listing on the National Register of Historic Places. 36 C.F.R. § 800.4(c). If

identified properties are not eligible for listing, consultation ends. 36 C.F.R. § 800.4(d)(1).

If eligible properties are identified, the fourth step is to determine whether the undertaking will adversely affect the property—that is, "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). "Adverse effects may include reasonably foreseeable effects . . . that may occur later in time, be farther removed in distance or be cumulative." *Id*. They also encompass the "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historical features," *id*. § 800.5(a)(2)(v), where "setting is an important aspect of [the site] integrity" that makes it eligible for listing, [App. at AR169233 (2014 Protocol)].

If an adverse effect may occur, the last step is "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." *Id*. § 800.6(a). It is the agency's prerogative whether to implement the identified modifications given that Section 106 does not demand any particular substantive result. *Valley Cmty. Pres. Comm'n*, 373 F.3d at 1085; *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 62 (1st

Cir. 2001) (recognizing "the choice whether to approve the undertaking ultimately remains with the agency").

The NHPA requires that any Indian tribe "that attaches religious and cultural significance to property" be consulted in the Section 106 process. 54 U.S.C. § 302706(b). Tribes must be provided "a reasonable opportunity to identify [their] concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate [their] views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A).

This NHPA regulatory process, however, may be superseded by a programmatic agreement. 36 C.F.R. § 800.14(b). Development of a programmatic agreement requires consultation with affected Indian tribes. *Id*. § 800.14(b)(2). Once approved, compliance with the programmatic agreement satisfies the agency's Section 106 obligations. *Id*. § 800.14(b)(2)(iii).

In 2012, BLM entered into a programmatic agreement that substitutes for the regulatory procedures in this case. *See* Programmatic Agreement Among the [BLM], Advisory Council on Historic Preservation, and National Conference of SHPOs Regarding the Manner in Which the BLM Will Meet Its Responsibilities

Under the [NHPA] (Feb. 2012).[6] The BLM program provides a "systematic basis" for NHPA compliance, *id*. at 3, and allows BLM to enter into state-by-state implementation protocols, *id*. at 11.

In 2014, BLM and the New Mexico SHPO executed the New Mexico State Protocol, [App. at AR169213-169299], an update to the 2004 New Mexico State Protocol, [App. at AR169038-169058]. BLM consulted with the Indian tribes, including the Navajo Nation and the Pueblos, in developing the Protocol, which is intended to "streamline and simplify" the consultation process. [App. at AR 169217, 169221].

Among other things, the Protocol establishes a standard APE for *direct* effects of common undertakings on BLM land—100 feet surrounding the wellpad and 50 feet on each side of roads and pipelines associated with oil and gas activity. [App. at AR169233, AR169265]. For indirect effects, the APE "shall include known or suspected historic properties and their associated settings where setting is an important aspect of integrity. Identification efforts outside of the direct APE shall be at the approval of the BLM field manager, taking into account the

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[6] *Available at* https://www.tribalconsultation.arizona.edu/docs/BLM/BLM.National%20Programmatic%20Agreement.pdf (last visited Nov. 5, 2018). This Court may take judicial notice of government records and materials available on government websites. *New Mexico ex rel. Richardson*, 565 F.3d at 702 & n.22; Fed. R. Evid. 201.

recommendations of the BLM cultural resource specialist and the SHPO." [App. at AR169233].

### B. BLM Complied With Section 106.

Both Diné and Amici claim that BLM inappropriately relied on the State Protocol to define a narrow, standardized APE, failed to consider any indirect off-site effects outside the standardized APE, and, by extension, failed to consider indirect and cumulative effects of oil and gas development to "landscape-level cultural sites" across the Greater Chaco region. Diné Br. at 24-39; Amici Br. at 20-29.

The record does not bear out their claims. Rather, BLM followed its Protocol and engaged in robust consultations that varied by well, encompassed areas outside the standardized direct APE, identified TCPs, considered indirect effects on nearby properties, consulted with affected Indian tribes and tribal members, and implemented minimization and mitigation measures to resolve adverse effects where identified.

#### 1. BLM Properly Relied On And Applied The New Mexico State Protocol To Define The APE.

Amici, in particular, question BLM's reliance on the State Protocol to define the APE for the challenged wells, because, in their view, it does not account for indirect effects. Amici Br. at 21, 27. But the legality of the 2014 State Protocol—authorized by the 2012 BLM national programmatic agreement and the NHPA

regulations, *see* 36 C.F.R. § 800.14(b)—has not been challenged in this case. In developing the Protocol, BLM consulted with the Indian tribes (including the Navajo and the Pueblos), interested stakeholders (including the National Trust for Historic Preservation—another amicus in this case), and the public at large.[7] [App. at AR169221-22]. That the Pueblos are not signatories to the Protocol is irrelevant. *See* Amici Br. at 12. The Protocol is an agreement between BLM and the SHPO regarding how they will engage in NHPA consultation. As Amici admit, the Protocol is binding on and governs the conduct of BLM and the SHPO. *Id*. at 12.

Nor is the Protocol inconsistent with the NHPA. *See id*. at 12. The agency's general obligation to consult with "any Tribe that attaches religious and cultural significance," 54 U.S.C. § 302706(b), is fulfilled through the Protocol, which further defines the NHPA's general directive to "consult." The Protocol sets out how "consultation" must occur, the scope of necessary engagement, and the points at which consultation is required in the agency's decision-making process. The Protocol reinforces the NHPA requirements for consultation, providing that BLM "shall assure that Indian tribes have the opportunity to identify historic property concerns and to participate as consulting parties in all aspects of consultation for

[7] Of course, the underlying record for development of the Protocol is not before the Court, because no party has challenged it.

projects that are of interest to them." [App. at AR169228-229]. The Pueblos' disagreement with BLM's application of the Protocol does not invalidate the Protocol itself.

Diné's and Amici's subsequent argument that BLM misapplied the Protocol by failing to delineate a separate, indirect APE for each well elevates form over substance. While BLM might not have explicitly delineated an "indirect APE" for every well, BLM applied the Protocol to define an APE that encompassed both direct and indirect effects, identified historic properties and TCPs both inside and outside the direct APE, consulted with tribal entities and individuals regarding adverse effects where necessary, and applied mitigation measures to minimize adverse effects where possible.

Rather than a one-size-fits-all approach, the geographic extent and consulting parties varied by well based on the cultural resources in close proximity to the well. While BLM started with the standardized, direct APE, in most cases, pedestrian cultural resource surveys were conducted of an area three or four times larger. *See, e.g.*, [App. at AR216883] (surveying 43.7 acres, of which 16.5 were within the direct APE); [AR238937] (surveying 24.51 acres, of which 7.27 were within the direct APE). Literature reviews to identify known or suspected properties in proximity to the wells extended even farther. *See, e.g.*, [App. at AR238937] (identifying sites 1.2 miles and 0.9 miles from the wells, but noting

that "no place sacred to the Navajo is located in the vicinity of the project area"). BLM also conducted interviews with area residents and members of the Navajo Tribe to identify TCPs in the area and determine whether they might be affected. [App. at AR238974, 239025].

Where known or suspected historic properties, including TCPs, were identified in close proximity to, but outside of, the direct APE (by definition, within the indirect APE), BLM consulted with interested parties, including the tribes. *See, e.g.,* [App. at AR238771-239772; AR238773-238774; AR239210-239211] (Navajo Nation Historic Preservation Department concurrence in resolution of potential adverse effects to burial site); [AR239112-239114] (emails describing identification of potential TCP that was ultimately found to be approximately 1.5 miles from the well); [AR238577, AR238594] (cultural survey report describing local interviews and relocation information).

BLM also considered effects to distant historic properties listed on the National Register, including Chaco Park and Chacoan Outlier sites. For instance, the Kimbeto Wash EA considered that the proposed well site was more than 10 miles from Chaco Park, and determined that "no portion of the Proposed Action fall[s] within the viewshed of any [National Park Service] designated [Known

Observation Points]."[8] [App. at AR235866]; *see also* [App at AR235834] (same EA explaining that the wells were 7.5 miles west of the nearest Area of Critical Environmental Concern, the North Road Chacoan outlier site). Thus, BLM concluded that the proposed development would have no negative effects—including negative visual effects—on historic properties. *Id*.

Diné's blanket allegation that "BLM considers only direct effects to archaeological sites within individual [well] footprints," Diné Br. at 25, does not square with the record. BLM's identification of and consultations regarding TCPs in the indirect APE was neither arbitrary nor capricious.

**2. BLM's Consultation Was Properly Relative To The Scope And Scale Of The Undertaking.**

Having failed to show that its contentions are supported by the record, Diné and Amici seek to redefine the indirect APE, even for an individual well, to encompass the entire Greater Chaco Landscape. [App. at AR217743] (Petition to Designate Greater Chaco Landscape as Area of Critical Environmental Concern, describing scale of Greater Chaco region). This position ignores that an agency should "plan consultation appropriate to the scale of the undertaking . . . ." 36

[8] Diné also claims that the district court engaged in its own ad hoc analysis of the distance between proposed development and Chaco Park. Diné Br. at 33-34. The court, however, did not calculate these figures, but rather relied on figures also cited by BLM as considerations in its consultation record. [App. at AR235866].

C.F.R. § 800.2(a)(4). Here, where BLM is permitting a single well or group of wells, the APE is appropriately drawn to reflect the limited scale and effects of that undertaking, which even in its broadest sense would not encompass the entirety of the Greater Chaco landscape. *Id*. § 800.16(d) ("The [APE] is influenced by the scale and nature of an undertaking . . . .").

The decision in *New Mexico ex rel. Richardson v. BLM*, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006), *rev'd in part on other grounds*, 565 F.3d 683 (10th Cir. 2009), *see* Diné Br. at 28, recognizes the distinctions between consultation at varying scales, *i.e.*, the RMP, oil and gas leasing, and permit approval levels. In that case, plaintiffs challenged an RMP amendment as well as an oil and gas lease covering a portion of the amendment area. Plaintiffs argued that Section 106 consultation was required at the RMP amendment stage, because this was the only time when BLM could evaluate effects to "landscape level" TCPs. *Id*. at 1124. BLM countered that Section 106 consultation could wait until the well-permitting stage, because that was when BLM could pinpoint affected sites in the area of disturbance for each well. *Id*.

The court disagreed with both sides. It held that the RMP amendment was not the last point at which BLM could preclude oil and gas leasing, so that BLM was not necessarily obligated to engage in Section 106 consultation for oil and gas development at the RMP stage. *Id*. BLM could not, however, defer consultation

until the well permitting stage, because, at that point, BLM would have committed to authorizing development. *Id*. at 1125.

Although it focused on the timing rather than the geographic scope of Section 106 consultation, the court recognized that the scope and scale of consultation necessarily differs based on the nature of the undertaking and the discretion remaining for agency action. At the well-permitting stage, lease rights already exist that prevent BLM from denying access to develop the lease. 43 C.F.R. § 3101.1-2. Thus, the permitting stage is not the point at which BLM can resolve atmospheric, visual, or auditory effects on a landscape level.[9]

This does not mean that BLM is not obligated to consult regarding the landscape-level effects of oil and gas development. When BLM engages in landscape-scale RMP planning decisions for oil and gas leasing, the scope and scale of the undertaking necessarily requires consideration of TCPs on a different level.[10] And that is precisely what BLM did here as part of the Basin-wide

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[9] Here, even if BLM could consult on a landscape level at the well-permitting stage, it is not clear how BLM could mitigate visual, auditory, or atmospheric impacts in a way that would make any material difference in a landscape that has already been subject to extensive oil and gas development. *See, e.g*., Addendum (map figure); [App. at AR173845 (2014 RFD)].

[10] Diné's description of oil and gas leasing process, Diné Br. at 4, is incorrect. Oil and gas lease stipulations are assigned at the RMP planning phase and later applied to leases, if any are offered in RMP-designated lease areas. *See* [App. at AR1973-1983 (RMP/ROD)].

RMP/EIS process. [App. at AR1149 (RMP/EIS); AR1953 (RMP ROD)]. BLM affirmed the designation of 79 specially designated areas, including many Chacoan Outlier sites.[11] [App. at AR1127 (RMP/EIS) (describing preferred Alternative D); AR1951, 1953, 1992 (RMP/ROD)]; *supra* at 4-5. The Navajo Nation and the Pueblos were consulting parties, and a federal district court upheld BLM's Section 106 process for the RMP.[12] *San Juan Citizens Alliance*, 586 F. Supp. 2d at 1292-94. BLM is not required to repeat that landscape-wide Section 106 consultation for each subsequent site-specific well. Rather, BLM's task is to focus within the scope and scale of the undertaking on the potential adverse effects to historic properties of each proposed well or group of wells. It did so here.

To the extent Diné argues that the greater Chaco Landscape itself is a TCP requiring consultation, regardless of the scale of the undertaking, a landscape does not necessarily qualify as an NHPA historic property. A historic property is "any prehistoric or historic *district, site, building, structure, or object* included in, or

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[11] Neither Diné nor the Pueblos have identified any TCP that remained unidentified after the 2003 RMP consultation process, or that should have been identified and subject to consultation for any particular well approval.

[12] BLM is currently engaged in a similar consultation process for the ongoing RMP amendment covering full-field development. *See* [App. at AR173819 (RMP amendment notice committing to tribal consultation for management of cultural and historic resources)]; RMP Amendment Final Scoping Report, Vol. 1, at 1-17 to 1-18 (May 2017), *available at* https://eplanning.blm.gov/epl-front-office/projects/lup/68107/108404/132730/FMG_FinalScopingRpt_Vol1_508.pdf (last visited Nov. 5, 2018).

eligible for inclusion in, the National Register of Historic Places . . . ." 36 C.F.R. § 800.16(l)(1) (emphasis added). The entire Greater Chaco landscape, which Diné has loosely defined to include a vast area in and around the Chaco Park, has never been so designated. [App. at AR217743, AR218157].

The Greater Chaco landscape does not qualify as a "historic district." BLM specifically rejected that designation in its response to Diné's Petition to Designate the Greater Chaco Landscape as an Area of Critical Environmental Concern. [App. at AR217732-217740]. BLM explained, relying on National Park Service guidance, that a district must be "a definable geographic area that can be distinguished from surrounding properties by changes such as density, scale, type, age, style of sites, buildings, structures, and objects, or by documented differences in patterns of historic development or associations." [App. at AR217738]. "A district is usually a singular geographic area of contiguous historic properties." [App. at AR217738].

The Greater Chaco landscape, however, is not distinguishable from surrounding properties. While many historic properties exist *within* the larger area—and are fully protected as part of Chaco Park or by BLM as Areas of Critical Environmental Concern (*see* [App. at AR217733-217734])—"[a]s a general rule, it is preferable to identify a reasonably defensible smaller landscape rather than stretching boundaries to distant horizons, and perhaps threatening the credibility of

the process." [App. at AR217738]; *accord Coal. of Concerned Citizens to Make Art Smart*, 843 F.3d at 906 (affirming that Route 66, along Albuquerque's Central Avenue, was not eligible for listing as an historic district). As the Ninth Circuit stated in *Te-Moak Tribe of Western Shoshone of Nevada v. Department of the Interior*, "[a]lthough 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." 608 F.3d 592, 611 (9th Cir. 2010). Here, the entire landscape would not qualify as a historic property for purposes of Section 106 consultation.

### 3. BLM Was Not Required To Consult With The Tribes Or The SHPO About The Extent Of The APE.

Amici claim that BLM was required to consult with the Pueblos in defining the APE for each well. Amici Br. at 26-27. But nothing in either the NHPA regulations or the Protocol requires tribal consultation at the preliminary step of defining the APE, a task over which the agency is granted substantial discretion. *Valley Cmty. Pres. Comm'n*, 373 F.3d at 1085. Although the agency "shall . . . [d]etermine and document the area of potential effects" "*[i]n consultation with the SHPO/THPO*," 36 C.F.R. § 800.4(a)(1) (emphasis added), no mention is made of consulting with the tribes at this stage.

By contrast, NHPA regulations expressly require tribal consultation at later stages of the process. *Id.* §§ 800.4(a)(4), (b) (identifying properties); 800.4(c)

(evaluating eligibility); 800.5 (determining adverse effects); 800.6(a) (resolving adverse effects); *see also id*. 800.2(c)(2)(ii)(A) (listing points of tribal consultation, and excluding designation of the APE). Nor does the State Protocol require tribal consultation over the APE. *See* [App. at AR 169229; AR169233] (tribal consultation required no later than the identification stage and commencing with seeking information on TCPs within the APE).

Further, BLM consulted with the SHPO. Diné Br. at 35-37; Amici at 28-29. It fulfilled that obligation through the negotiation of the State Protocol, which set standardized APEs for routine undertakings such as well pads, pipelines, and roads. [App. at AR169233, AR169265]. The Protocol also defined the circumstances under which further SHPO consultation would be required: Where a standardized APE was not in place, where BLM chose an APE smaller than the standard APE, or "where defining the APE is complicated or controversial." [App. at AR169233]. Diné and Amici insist that defining the APEs for the challenged wells was "complicated or controversial," but they cite only the present controversy of their own making.[13] BLM has authorized literally thousands of

[13] Diné and Amici also argue that the undertakings involve "multiple Indian tribes," because all 20 Pueblos are affected by each well, making them complicated or controversial by default. Diné Br. at 35-36; Amici Br. at 28. But the reference in the Protocol to "multiple tribes" is merely an example. Further, under Diné and Amici's logic, any well in the Basin would necessarily involve multiple tribes, particularly where the Pueblos (by definition, including 20 tribes) are concerned.

wells in the Basin, and nothing indicates that any of the 350 Mancos Shale wells posed complications requiring SHPO consultation over the APE. If generalized policy opposition to oil and gas development by a third party were sufficient to render an undertaking complicated or controversial for purposes of defining the APE, virtually every well BLM ever permitted would require consultation, rendering BLM's streamlined and standardized Protocol a nullity.

#### 4. BLM Was Not Obligated To Consult With The Pueblos Regarding Every Mancos Shale Well.

Amici argue that BLM was required to, but did not, engage in consultation with the Pueblos before authorizing each well. Amici Br. at 8-20. This argument is not properly before the Court and, at any rate, fails on the merits.

This is an entirely new substantive claim invoking the NHPA and rights under the federal government's trust responsibility to the Indian tribes. *See* Amici Br. at 12-13. From the start, Diné's NHPA claims have been about the scope of the APE and BLM's consideration of indirect and cumulative effects of Mancos Shale development on a landscape scale. *See* [App. at Dkt. No. 112; Dkt. No. 117]; Diné Br. at 24-39. Diné did not advance direct allegations of a failure to consult with any tribe, including the Pueblos, and amici cite no such argument in

the record.[14] *See* Tenth Cir. Rule 28.2(C)(2) ("[f]or each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on.").

This Court generally will not "reach out to decide issues advanced not by the parties but instead by amicus." *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997). The Pueblos cannot now complain of an alleged failure to consult that was never asserted at any time prior to this appeal. The Court will consider new issues raised for the first time by an amicus only in "exceptional circumstances," such as when "a party attempts to raise the issue by reference to the *amicus* brief" or the issue "involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered *sua sponte*." *Id.* (quotation omitted).

Neither exceptional circumstance is present here. Diné has not raised a question regarding consultation with the Pueblos by reference to the amicus brief, and cannot now assert rights or claims that are unique to a third party. *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994) (a party "generally must assert his

[14] The Amici may argue that Diné raised general issues relating to tribal consultation below, but that is not enough. As this Court has explained, "vague, arguable references to [a] point in the district court proceedings do not preserve the issue on appeal." *Sierra Club v. Oklahoma Gas and Elec. Co*, 816 F.3d 666, 672 n.6 (10th Cir. 2016) (quoting *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721-22 (10th Cir. 1993)).

own legal rights and interests" (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982)). Nor does Amici's argument involve jurisdictional questions or issues of federalism or comity. Thus, the Court should decline to consider Amici's novel arguments.

Even if the Court were to reach this issue, Amici's arguments are premised on their overbroad characterization of BLM's consultation obligation as extending to "identif[ication of] all properties and the historical characteristics potentially adversely affected" across the "Greater Chaco Landscape." Amici Br. at 13. BLM's consultation obligation does not require consultation across the landscape for every proposed well. *See* Section I.B.2, *supra*.

Here BLM defined the APE for each proposed undertaking, identified the TCPs and consulting parties in the vicinity, and reached out to the local tribal members, the affected Navajo chapter, and the Navajo Nation Historic Preservation Department where sites of interest to the tribe were identified. *See supra* at 8-10, 22-24. This process did not include the Pueblos, not because BLM failed to consult, but because BLM appropriately did not identify the Pueblos as consulting parties. Indeed, the area in which the Mancos Shale wells are being developed is interspersed with Navajo Nation and allottee land and is

geographically removed from the Pueblos. *See* [App. at AR173844] (2014 RFDS map showing proximity of Mancos Shale wells to Navajo lands).

Further, BLM consulted with the Pueblos and other tribes leading up to the 2003 RMP/EIS. [App. at AR2006 (RMP/ROD)]. That process led to the official protection of 79 Areas of Critical Environmental Concern and development of a robust TCP database for the planning area. For the proposed Mancos Shale wells, BLM considered the effects to nearby Areas of Critical Environmental Concern and Chaco Park, where appropriate. *See supra* at 9, 23-24. BLM also reviewed the available literature and its own database to identify TCPs in close proximity to proposed Mancos Shale wells and consulted with the relevant tribal parties. *See supra*, at 8-10, 22-24. The Pueblos do not identify any particular TCP that BLM failed to identify or on which BLM failed to consult. The Court should therefore reject their new, and unfounded, arguments.

## II. BLM's Consideration Of Cumulative Impacts Satisfied NEPA.

NEPA is a procedural statute that requires federal agencies to consider the environmental impacts of their proposed actions. 42 U.S.C. § 4332(2)(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) (NEPA merely guards against "uninformed—rather than unwise—agency action"). For actions with "significant" environmental effects, the agency must prepare an EIS. 42 U.S.C. § 4332(2)(C). An agency may first prepare an EA to determine whether

the effects of its action will be significant. 40 C.F.R. §§ 1501.3, 1508.9. If the EA concludes with a Finding of No Significant Impact, no EIS is required. *Id.* § 1508.13. To avoid unnecessary paperwork and eliminate repetitive discussion, agencies are encouraged to tier their analyses by "incorporating by reference the general discussions" covered in "broader [EISs]" and "concentrating solely on the issues specific to the . . . subsequently prepared" analysis. 40 C.F.R. §§ 1508.28, 1502.20; *San Juan Citizens Alliance v. Stiles*, 654 F.3d 1038, 1054-55 (10th Cir. 2011) (endorsing tiering in the context of area-wide RMPs).

Among other things, NEPA review must address cumulative impacts that result "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. §§ 1508.7, 1508.25(c). Assessing cumulative impacts requires consideration of the timing and scope of potential impacts that could be caused by the proposed action. *Manygoats v. Kleppe*, 558 F.2d 556, 560-61 (10th Cir. 1977); [App. at AR173130 (BLM NEPA Handbook)].

For each resource potentially affected, the agency determines the geographic scope of the affected resource and the timeframe in which the impacts might occur. *See Stiles*, 654 F.3d at 1056. Next, the agency identifies other past, present, or reasonably foreseeable actions affecting the same resource, in the same area, during the same time, *i.e.*, with overlapping effects. *Id.* Finally, the agency

explains the cumulative impacts to the resource of the proposed action when added to those other projects. *See id.*; [App. at AR173129-173132 (BLM NEPA Handbook)]; Council on Environmental Quality Guidebook, *Considering Cumulative Impacts Under the National Environmental Policy Act* at 11 (Jan. 1997).[15]

Here Diné continues to press the argument, rejected by the district court and this Court at the preliminary injunction phase, that BLM cannot rely on or tier to the 2003 RMP/EIS, because the impacts of horizontal drilling and multi-stage fracturing are "contextually distinct from" and exceed the impacts in the 2003 analysis. Diné Br. at 42-43. Neither argument has merit.

### A. The Types And Context Of Environmental Impacts Are Ihe Same For Mancos Shale And Other Oil And Gas Wells.

As this Court previously pointed out, there is no support for the contention "that horizontal drilling and multi-stage fracturing may give rise to different types—rather than just different levels—of environmental harms when compared to the traditional vertical drilling and hydraulic fracturing techniques that have been used in the San Juan Basin." *Diné,* 839 F.3d at 1284. Diné offers no new information to establish a difference in the *types or kinds* of environmental impacts

[15] *Available at* https://ceq.doe.gov/publications/cumulative_effects.html (last visited Nov. 5, 2018).

caused by horizontal drilling and multi-stage fracturing compared to vertical drilling and single-stage fracturing. *See* [App. at MOO at 88-89] (finding insignificant differences in impacts between the 2003 and newer development technologies). Though Diné makes a passing reference to "unique environmental concerns," it offers no examples and cites no evidence. Diné Br. at 41.

Failing to establish a difference in the types of effects, Diné contends that the "context" is different, because the Mancos Shale wells are in the southern portion of the Basin, while the wells anticipated in the 2001 RFDS were in the northern portion. Diné Br. at 42. The 2003 EIS/RMP impact analysis, however, was not geographically constrained; it analyzed at a programmatic level the *Basin-wide* impacts from the total development of 9,942 wells. [App. at AR898-901, 1011, 1115-1130]. Further, the Mancos Shale wells are being developed in an area that is home to hundreds of active wells, not a pristine landscape. *See* Addendum (map figure). Diné does not explain how a shift in development from the northern to the southern portion of the Basin invalidates the Basin-wide cumulative impact analysis for tiering purposes.

### B. The Magnitude Of Mancos Shale Environmental Impacts Does Not Exceed That Disclosed In The 2003 RMP/EIS.

Diné now argues that even if the impacts of 350 Mancos Shale wells fall within the scope of cumulative impacts considered in the 2003 RMP/EIS, no cumulative impact review has ever considered the effects of the 3,960 Mancos

Shale wells that *might* be drilled under a full-field development scenario.[16] Diné. Br. at 42-45. Diné claims that adding the impacts of 3,945 vertical wells drilled in the Basin under the 2003 RMP/EIS to the impacts of 3,960 potential Mancos Shale wells exceeds the impacts discussed in the 2003 RMP/EIS.[17] By Diné's logic, no Mancos Shale well, or any other well, can be authorized in the Basin absent a cumulative impact analysis that accounts for full-field Mancos Shale development. This argument fails for several reasons.

*First*, full-field development is not at issue in this case. As much as Diné wishes this case to be a referendum on whether and how the Mancos Shale should be developed over the next 20-30 years, it is not. *See* [App. at MOO at 94]. This case concerns 350 individually authorized wells and whether the corresponding NEPA impact analyses were arbitrary and capricious.

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[16] In a footnote, Diné goes even further. It asserts that the cumulative impact analysis must account for all 9,942 wells included in the 2001 RFDS (even though only 3,945 have been drilled) *plus* the 3,960 Mancos wells, because all the wells remain reasonably foreseeable. Diné Br. at 45 n.3, 47. But the record indicates that Mancos Shale drilling will largely, if not totally, replace other drilling in the Basin and that most wells will be horizontal rather than vertical going forward. [App. at AR154436 (Air Resources Technical Report)] ("Between 2015 and 2030, it is estimated that most of the oil and gas drilling in [the Basin] will be within the Mancos Shale formation.").

[17] The district court pointed out a number of incorrect assumptions underlying Diné's comparison of vertical and horizontal well impacts. [App. at MOO at 93-95, nn. 21-25].

*Second*, Diné confuses the proper scope of cumulative impact review, which must be tailored to the proposed action and is, therefore, necessarily different for Basin-wide planning actions, versus individual projects or well permit approvals. 40 C.F.R. § 1508.7. In Basin-wide planning, the RFDS is an important tool to predict the potential levels of resource development, anticipate potential impacts, and make plan-level management decisions that will apply for decades. [App. at AR173128 (BLM NEPA Handbook); AR172982 (BLM Fluid Minerals Planning Handbook)]. The RFDS, however, does not define the scope of cumulative impact review for every individually authorized project in the planning area thereafter. Rather, the RFDS is an engineering exercise based on geotechnical data that delineates the extent of potential oil and gas resources and makes an educated guess about how many wells would be needed to accomplish full-field development using current technology. [App. at AR173823] (RFDS is based on "geological and engineering evidence"). Just because the RFDS says that it will take 3,960 wells to develop the Mancos Shale resource does not mean that any lessee or operator has plans to drill them.

For purposes of NEPA cumulative impact review, "reasonably foreseeable" future actions are generally those that have crystallized into a proposal. *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1229 (10th Cir. 2008) ("'[P]rojects,' for purposes of NEPA, are described as 'proposed actions', or

proposals in which action is imminent." (quotation omitted)). "NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have on a proposed project." *Sierra Club v. Lujan*, 949 F.2d 362, 368 (10th Cir. 1991); *see also Wyoming v. Dep't of Agric.*, 661 F.3d 1209, 1253 (10th Cir. 2011) (agencies need not "speculate about the possible effects of future actions that may or may not ensue" (quotation and citation omitted)); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 310 (D.C. Cir. 2013) (other coal leases, even those for which applications were pending, were not reasonably foreseeable, "[b]ecause projects in their infancy have uncertain futures" (quotation omitted)).

Here, no operator has proposed to drill 3,960 Mancos Shale wells. While the wells might be proposed over the coming years depending on market conditions and other variables, at this point, whether, when, and where they will be drilled is pure speculation. *See also Wilderness Workshop*, 531 F.3d at 1231 (future development "ultimately depend[s] on [oil and] gas price and demand, among many other variables" (citation omitted)). Thus, it was appropriate for BLM to tailor the cumulative impact analysis for each challenged well to the nature of the action and the scale of its potential effects.[18]

[18] None of Diné's proffered cases addresses when a project is reasonably foreseeable for purposes of cumulative impact analysis. Diné Br. at 49. Rather,

*Third*, even if the wells in the 2014 RFDS were reasonably foreseeable, BLM need only consider those future actions with potentially overlapping impacts in time and space. The geographic and temporal scope of the cumulative impact analysis for an individual well or group of wells is necessarily more limited than for an RMP-level planning decision. [App. at AR173130 (BLM NEPA Handbook)] (cumulative impacts are limited to a proposed action's scope and do not exceed the direct and indirect effects of the proposed action); *see also Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958-63 (9th Cir. 2003) (deferring to agency's articulation of the geographic scope of cumulative impact analysis).

Here, for the challenged wells, BLM considered the overlapping impacts of potential future Mancos Shale development. While Diné discounts the EAs because none analyzed the impacts of full Mancos Shale development of 3,960

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they involve the following: (1) the reasonably foreseeable impacts of *the proposed action*—oil and gas leasing—not whether *other actions* are reasonably foreseeable, *see San Juan Citizens Alliance v. BLM*, 2018 WL 2994406, *19 (D.N.M. June 14, 2018); *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 503 (9th Cir. 2014); *N.M. ex rel. Richardson*, 565 F.3d at 718; (2) a failure to analyze cumulative impacts of a nearby mine that BLM conceded was reasonably foreseeable, *see Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 603 (9th Cir. 2010); and (3) admittedly reasonably foreseeable development (oil and gas drilling on adjacent private lands) in an RMP-level analysis that, unlike the project-specific proposals at issue here, are designed to incorporate long-term fieldwide development projections, *see Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1256 (D. Colo. 2012).

wells Basin-wide, *see* Diné Br. at 46-47, each EA includes a cumulative impact analysis tailored to the scope of the proposed action.

For example, for air impacts, the EAs since 2014 have incorporated and relied on the detailed cumulative air impact analysis in BLM's 2014 Air Resources Technical Report. *See, e.g.*, [App. at AR126007-126008 (EA 2014-0272); AR235852 (Kimbeto Wash Unit)]. That report analyzed the air-quality impacts of 21,150 existing oil and gas wells in the Basin, *plus* predicted future oil and gas drilling (including full-field Mancos Shale development). [App. at AR154404-154471, 154436] ("most of the oil and gas drilling in [the Basin] will be within the Mancos Shale formation"). It assumed that up to 400 wells could be drilled per year—a total of 6000 wells over 15 years—and incorporated that assumption, factoring new drilling technologies into its emissions calculations. [App. at AR154436-154437]. BLM thus considered the potential cumulative air impacts of full-field Mancos Shale development.

For other resources, the EAs also rely on the 2014 RFDS for updated cumulative impact analyses. In each EA, BLM estimated the number of potential future Mancos Shale wells that could be drilled within the same watershed as the proposed action and calculated cumulative impacts to identified resources. *See, e.g.*, [App. at AR235848-49 (Kimbeto Wash Unit EA) (describing cumulative impact methodology relying on 2014 RFDS assumptions); 235855-56 (vegetation

impacts), 235857 (noxious weed impacts), 235860 (wildlife impacts), 235862 (sensitive species impacts), 235863-64 (livestock grazing impacts), 235868 (public health and safety impacts)]. These updated cumulative impact analyses, together with the 2003 Basin-wide RMP/EIS, properly disclose the cumulative impacts of the challenged wells.

*Finally*, in practice, if Diné were right that an RFDS renders all development it covers reasonably foreseeable, BLM's initiation of an RMP amendment process would automatically foreclose authorization of all individual activities in the RMP area. Tiering to the existing RMP would not be permitted, because the foundational analysis, by definition, could not account for all "reasonably foreseeable" future actions identified in the new RFDS. The law is otherwise.

NEPA regulations preclude actions only where (i) they are not covered by an existing EIS or (ii) the interim action will limit the agency's choice among reasonable alternatives. 40 C.F.R. § 1506.1(c). BLM has made clear that initiating an RMP amendment process does not impose a moratorium on actions covered by the existing plan. [App. at AR173075 (BLM NEPA Handbook)] (recognizing that the limits of 40 C.F.R. § 1506.1 do not apply to permits for oil and gas wells that are within the existing land use plan); *see also* [AR172860 (BLM Land Use Planning Handbook)] (any decision to voluntarily defer certain actions when amending or revising a land use plan must not lead to an area-wide moratorium).

Accordingly, courts have consistently held that BLM need not halt its project-level decisions pending completion of an RMP amendment. *Diné Citizens*, 839 F.3d at 1285 ("The agency's decision to improve its plan for managing federal lands in the San Juan Basin does not immediately invalidate the old plan or prevent the agency from referring to it."); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 509-10 (D.C. Cir. 2010) (no improper pre-commitment of resources under 40 C.F.R. § 1506.1 by approval of oil and gas development during the RMP amendment process where development was covered by the existing RMP). "To hold otherwise would jeopardize or impair BLM's ability to manage the public lands, since it is often engaged in plan amendment or revision." *Powder River Basin Res. Council, et al.*, 180 IBLA 32, 53 (2010). Diné's unrealistic contentions ignore this settled law and should be rejected.

## III. Diné Fails To Satisfy The Legal Test Applicable To The Relief It Seeks.

Even assuming that BLM's approval of the Mancos Shale wells—and of past or future horizontal drilling and hydraulic fracturing in the Mancos Shale—violated NEPA or the NHPA, Diné has failed to establish that it is entitled to injunctive relief based on an appropriate balance of the equities and public interests. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22-32, 31 n.5 (2008) (relief sought was inappropriate "even if plaintiffs are correct on the

underlying merits" of their NEPA claim, on examining "the balance of equities and consideration of the public interest").

### A. Vacatur Constitutes Injunctive Relief Subject To The Traditional Equitable Principles Applicable To Such Relief.

Diné asks the Court (or, on remand, the district court) to "vacate the [drilling permit] approvals and their respective NHPA and NEPA analyses," and "enjoin any further ground-disturbing activities on the challenged [drilling permits]." Diné Br. at 50, 51. Diné must demonstrate an entitlement to either form of relief.

Contrary to Diné's suggestion that vacatur is an automatic or mandatory remedy under the Administrative Procedure Act, *see* Diné Br. at 49-50, vacatur amounts to injunctive relief subject to traditional principles of equity. *WildEarth Guardians*, 870 F.3d at 1239 (vacatur is a "form of injunctive relief"); *PGBA, LLC v. U.S.*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) ("[R]elief in the form of an order setting aside the [decision] . . . is tantamount to a request for injunctive relief.") (citation omitted). Thus, by seeking vacatur, Diné requests permanent injunctive relief barring horizontal drilling and hydraulic fracturing pending additional environmental review. Both Diné's request for vacatur and a prospective injunction are subject to traditional principles of equity.

Indeed, while the Administrative Procedure Act provides that a reviewing court "shall . . . hold unlawful and set aside agency action . . . found to be arbitrary [or] capricious," 5 U.S.C. § 706(2)(A), it also makes clear that "[n]othing

herein . . . affects . . . the power or duty of the court to . . . deny relief on any other appropriate . . . equitable ground," *id*. § 702. Accordingly, "[a]lthough the . . . [reviewing] court has power to do so, it is not required to set aside every unlawful agency action. The court's decision to grant or deny injunctive or declaratory relief under the [Administrative Procedure Act] is controlled by principles of equity." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). *Accord WildEarth Guardians*, 870 F.3d at 1240 (declining to vacate coal leases notwithstanding NEPA deficiency, and remanding to the district court, which "may vacate the entire [supporting] EIS . . . , or it might fashion some narrower form of injunctive relief based on equitable arguments"); *Nat. Res. Def. Council v. U.S. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) ("[W]hen equity demands, the [agency action] can be left in place while the agency follows the necessary procedures.") (quotation omitted); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289 (11th Cir. 2015) ("We agree, as have most other courts, that the remedy of remand without vacatur is within a reviewing court's equity powers under the [Administrative Policy Act].)" (quotation and alteration omitted).[19]

[19] Diné's cited cases (Diné Br. at 49-50) are not to the contrary. *WildEarth Guardians* acknowledges the availability of more limited forms of relief based on equitable principles. 870 F.3d at 1240. *See also High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014) ("The

### B. Diné Has Not Made A Clear Showing Of Entitlement To Injunctive Relief.

"[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added). Because "[a]n injunction is a matter of equitable discretion[,] it does not follow from success on the merits as a matter of course." *Id*. at 32.

Instead, even if it has established the merits of its claim, "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law . . . are inadequate to compensate for that injury; (3) that, considering the balance of hardships between [the parties], a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. *See also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139,

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[Administrative Procedure Act] does not . . . deprive reviewing courts of traditional equitable powers when fashioning a remedy."); *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1034 (D. Mont. 2006) (same). Unlike this case, *Forest Guardians v. Babbitt*, 164 F.3d 1261, 1269-70 (10th Cir. 1998), involved a claim to compel agency action allegedly unreasonably delayed past a set statutory deadline and, at any rate, relied heavily upon a decision of the Ninth Circuit—a court that has adopted the application of equitable remedies short of vacatur. *See*, *e.g., Nat'l Wildlife Fed'n*, 45 F.3d at 1343.

157 (2010) ("The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation.").

"[A] court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Winter*, 555 U.S. at 32 ("[T]he balance of equities and consideration of the overall public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent."). Diné has failed to carry its burden.

### 1. Diné's Assertions Of Environmental Harm Are Speculative And Undercut By Existing Protections.

The Supreme Court has rejected Diné's effective "presum[ption] that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." *Monsanto*, 561 U.S. at 157. Even setting aside Diné's "inver[sion]" of the "proper mode of analysis," *id*., Diné has failed to substantiate its assertions of certain, impending environmental harm. *Compare id*. at 160 (noting that the agency "and petitioners submitted voluminous documentary submissions in which they purported to show" the risk (or lack thereof) of environmental damage from the challenged agency decision).

Relying solely on standing declarations of association members, *see* Diné Br. at 22-23 & nn.6-9, 52, Diné claims that members' alleged generalized interests in the use of the "Greater Chaco region" justify judicial relief on their claims, observing that the members "live, work, and recreate in the Basin's southern portion where the adverse impacts of Mancos Shale drilling activities *are* visible and audible." *Id.* at 22 (emphasis added). But the challenged wells must be considered in the overall context of oil and gas development in the Basin.

The challenged Mancos Shale wells do not represent an expansion of oil and gas development into new areas or regions. Rather, "[d]rilling for oil and gas has occurred in the Basin for more than sixty years, and the Basin is currently one of the most prolific sources of natural gas in the county." *Diné Citizens*, 839 F.3d at 1279. Indeed, approximately 22,000 federal wells are currently producing in the Basin, nearly all of which have been stimulated by hydraulic fracturing. [App. at MOO at 15]. And the specific Mancos Shale wells at issue are within existing well fields. *See supra* at 6-7.

Under these circumstances, the incremental environmental impacts of the additional challenged wells are both relatively limited and wholly speculative. *E.g.*, *Winter*, 555 U.S. at 21-23 (injunctive relief may not issue on mere "possibility" of harm, especially when "this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the

environment"); *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1253 (10th Cir. 2017) (finding "speculative assertions are insufficient to carry the [plaintiff's] burden" of making a "clear showing" of irreparable harm).

The court below held in denying Diné's motion for preliminary injunction, Diné has "failed to establish that the either [sic] environment, or the public that enjoys it, would be any worse off with directionally drilled and fracked wells in the San Juan Basin than it would be with vertically drilled and fracked wells in the San Juan Basin—and the latter will continue to exist regardless [of] whether the court issues the requested injunction." *Diné Citizens*, 2015 WL 4997207, at *50 (denying preliminary injunction). Further, Diné "ha[s] neither established what the magnitude or the likelihood of harm resulting from an environmental catastrophe would be, nor have they established that the more mundane, certain day-to-day harms inflicted by drilling outweigh the economic benefits of the drilling." *Id*. Diné offers no new evidence or declarations that would change the district court's assessment.

Moreover, New Mexico regulations specifically impose requirements for both horizontal drilling and hydraulic fracturing. *See* N.M. Admin. Code §§ 19.15.16.14(B) (requiring written application for directional drilling), 19.15.16.15(C) (establishing setback requirements for horizontal wells), 19.15.16.17 (setting remedial requirements for hydraulic fracturing injuries),

19.15.16.19 (establishing reporting requirements for hydraulically fractured wells), 19.15.26.8-13 (requiring permit, subject to public objection, for fluid injection into a formation for enhanced recovery).

These mitigation measures further diminish Diné's attempted showing of harm qualifying for extraordinary relief. *See*, *e.g.*, *Monsanto*, 561 U.S. at 163-64 (government limitations on future actions may reduce or eliminate claimed injury); *cf. Winter*, 555 U.S. at 22-23 (criticizing lower courts for failure to consider both voluntary and unchallenged mitigation measures undertaken by the government in assessing whether injunctive relief was appropriate).

**2. Diné's Speculative Environmental Harm Is Outweighed By The Public Interest.**

"[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation omitted). Here, the national and local public interests militate strongly against the requested injunctive relief.

As the district court stated below, "The BLM—and, really, the United States as a whole—has already determined that the economic benefits of vertical drilling outweigh its environmental costs, and directional drilling has both greater economic benefits and lower environmental costs than vertical drilling." *Diné Citizens*, 2015 WL 4997207, at *50 n.25. Petroleum products are used as the primary transportation fuels for commercial and fleet vehicles and urban mass

transit; as fuels for over a quarter of the electricity generated nationwide; for the heating and cooling of tens of millions of homes and commercial customers across the country; as raw materials and feedstock for fertilizer production and chemical manufacturing; and for many other applications. *See* [App. at Declaration of Dr. Geoffrey Brand, Dkt. No. 38-2, ¶ 8].

Moreover, "[t]he oil-and-gas industry is an enormous job creator and economic engine in New Mexico . . . ." *Diné Citizens*, 2015 WL 4997207, at *50. Over half of all energy production in New Mexico occurs on federal lands, [App. at Dkt. No. 38-2, ¶ 16], and in 2017, the State received $455 million in federal royalties from federal oil and gas production.[20] The oil and natural gas industry contributed 95% of revenues paid into the New Mexico Land Grant Permanent Fund. *See also* [*id*. ¶¶ 17, 18 (documenting job and salary data in oil and gas production)]. Oil production on federal land in New Mexico has almost tripled over the last decade.[21]

Such localized economic injury weighs heavily against injunctive relief. *See Del. Dep't of Nat. Res. & Envt'l Control v. U.S. Army Corps of Eng'rs*, 681 F.

[20] *See* U.S. Department of the Interior News Release, https://www.onrr.gov/pdfdocs/20171130.pdf (last visited Nov. 5, 2018).

[21] *See* U.S. Department of the Interior, *Natural Resources Revenue Data: New Mexico*, https://revenuedata.doi.gov/explore/NM/#production (last visited Nov. 1, 2018).

Supp. 2d 546, 563 (D. Del. 2010) (the public interest would be undermined by injunctive relief that would impose "harm [on] the local economy" by reducing ports' shipping capacity and thus "economic vitality").

### 3. Diné's Speculative Harm Is Greatly Outweighed By Harms To Business And Government Economic Interests.

An injunction's potential to cause private and governmental economic harm may also weigh heavily in the balance in environmental cases. As this Court has explained, "financial harm can be weighed against environmental harm—and in certain instances outweigh it." *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 892 (10th Cir. 2013) (citing *Amoco Prod.*, 480 U.S. at 545 (hypothetical environmental harm outweighed by "committed" oil company investments)); *Vill. of Logan v. U.S. Dep't of Interior*, 577 F. App'x 760, 767-68 (10th Cir. 2014) (balance of equities tipped in defendants' favor where "[d]efendants have shown that they would suffer immediate and significant harm in the form of construction related delays if an injunction issues now stopping this project. The economic cost alone of stopping construction cannot easily be overlooked—one estimate puts the probable *monthly* cost of delaying the Project at $745,592." (emphasis in original)).

Diné's argument that financial damages from an injunction cannot outweigh "potential harm to the environment," *see* Diné Br. at 53 (quoting *Fry*, 408 F. Supp.

2d at 1034), is thus contrary to the Supreme Court's admonitions in *Amoco* as further articulated by this Court.

If the existing well permits are vacated and future operations are enjoined, operators—the companies that identify, access, and ultimately produce petroleum resources over the decades-long life of the well, [App. at Dkt. No. 38-2, ¶ 9]—will be foreclosed from operating in the Mancos Shale indefinitely, thereby damaging the operators' rational reliance interests. *See Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 457 (S.D.N.Y. 2010) (citing, *inter alia*, government's reliance interests in preparing personnel for planned agency action and retaining independent contractors in denying injunctive relief); *Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002) (finding injury where plaintiff requested "an agency [action] that replaces a certain [contract] outcome with one that contains uncertainty").

An injunction would also harm service companies that research, develop, and market formulations used as additives to hydraulic fracturing fluids, and are employed by operators usually for weeks or months at a time to move equipment to the well site, operate drilling equipment, cement steel casing into the wellbore,

and blend and pump hydraulic fracturing fluids into hydrocarbon-bearing zones, among many other specialized tasks. *See* [App. at Dkt. No. 38-2, ¶¶ 9, 11].[22]

Taken together, and coupled with the public interests outlined above, the injuries to these economic interests strongly outweigh Diné's speculative harms and warrant denial of the requested relief. *See Winter*, 555 U.S. at 23-31 (aggregating harm to non-movants with public interest in denying injunctive relief).

* * *

Having failed to establish a clear entitlement to injunctive relief, the most that Diné can obtain (assuming success on the merits) is a remand to BLM for further consideration. Remand, not vacatur, is "generally appropriate when there is at least a serious possibility that the [agency] will be able to substantiate its decision given an opportunity to do so, and when vacating would be disruptive." *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (quotations and citation omitted).

"In circumstances like these, where it is not at all clear that the agency's error incurably tainted the agency's decision-making process, the remedy of

[22] A variety of other industries are also adversely affected. [App. at Dkt. No. 38-2, ¶ 12]. Together, these vendors to the industry comprise over 475 individual businesses in New Mexico alone. [*Id.* ¶ 13].

remand without vacatur is surely appropriate." *Black Warrior*, 781 F.3d at 1290. Here, BLM could unquestionably remedy any NEPA or NHPA issues on remand—particularly given that NEPA and the NHPA are purely procedural. *See WildEarth Guardians*, 870 F.3d at 1240 (remanding so that the agency could satisfy its obligations under NEPA, but not vacating lease decisions). Any statutory violations would justify, at most, a remand in this case. *See id*.

Finally, while Diné argues that vacatur is "necessary" to prevent BLM's consideration on remand from being a "pro forma exercise in support of a predetermined outcome," Diné Br. at 50 (quotation omitted), such an assumption that the agency will violate the NHPA and NEPA on remand is both unwarranted and an improper basis for relief. *See*, *e.g.*, *Franklin Sav. Ass'n v. Director, Office of Thrift Supervision*, 934 F.2d 1127, 1147 (10th Cir. 1991) ("a presumption of procedural and substantive regularity attaches" to "an agency's decision concerning matters lying within the agency's field of expertise").

## Conclusion

For the foregoing reasons, the district court's decision dismissing Appellants' Petition for Review should be affirmed.

## Statement Concerning Oral Argument

Pursuant to 10th Circuit Rule 28.2(C)(4), the Intervenors respectfully request oral argument. The Intervenors submit that oral argument would assist the Court in understanding and resolving the various factual and legal issues raised in this appeal.

## Certificate Of Compliance With Type-Volume Limitation, Type Face Requirements, And Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,764 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted this 5th day of November, 2018.

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I hereby certify that on November 5, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will serve the document on the other participants in this case.

*s/ Stephen G. Masciocchi*

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# ADDENDUM

# Map Exhibit A - WPX and Encana Existing and Permitted Federal Well Locations at Issue