IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*,

Plaintiffs,

vs.

DAVID BERNHARDT, *et al.*,

Defendants,

and

ENDURING RESOURCES IV, LLC,

Intervenor.

Case No. 1:19-cv-00703-WPJ-JFR

INTERVENOR ENDURING RESOURCES IV, LLC'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Enduring Resources IV, LLC ("Enduring Resources") respectfully opposes Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Motion")(Doc. 5) filed August 1, 2019.

I. INTRODUCTION

Enduring Resources uses well completion technology with a "net zero" use of fresh water to fracture and complete its oil and gas wells. Enduring Resources uses non-potable produced recycled water and non-potable water from the Entrada Formation, a produced water disposal zone in the area. Using this unique state of the art protocol, Enduring Resources has reduced its reliance on fresh water to 2-3% of the total amount of water used to complete a well. To offset this predicted, minimal use of fresh water, Enduring Resources has also obtained a New Mexico water right for a ground water well. That water right fully offsets Enduring Resources' minimal fresh water consumption. This completion technology, because it does not use nitrogen foam, also eliminates any need to vent or flare wells, thus reducing air emissions from Enduring Resources' operations. Accordingly, none of the Plaintiffs' stated goals concerning water quantity and air quality would be advanced by enjoining Enduring Resources' state of the art operations in this long established oil and gas field. Plaintiffs fail to establish any of the required elements for an injunction and their request is unreasonably broad. In any event, no injunction is warranted with respect to Enduring Resources' operations because Enduring Resources is not causing the type of harm identified in the Motion.

Plaintiffs have expressly withdrawn their request to enjoin the operation of producing wells. Accordingly, Section IV of this response identifies Enduring Resources' 24 producing

wells which are no longer the target of Plaintiffs' Motion. These wells are listed on **Exhibit 1**. Enduring Resources requests a ruling confirming that Plaintiffs have withdrawn and waive any right to seek an injunction regarding these wells.

Federal Defendants have already briefed the general factual background of the Bureau of Land Management's ("BLM") environmental review of the Applications for Permit to Drill ("APDs") at issue and procedural history of this and the earlier recited case *Dine Citizens Against Ruining Our Environment et al. v. Bernhardt* ("*Dine C.A.R.E. I*"), 923 F.3d 831, 838 (10th Cir. 2019) and Enduring Resources joins in and adopts the Federal Defendants' Response. Moreover, the Federal Defendants have thoroughly shown Plaintiffs cannot meet their burden to establish any of the requisite elements for a Preliminary Injunction under Fed. R. Civ. P. 65. The Federal Defendants have amply demonstrated Plaintiffs' failure to meet the first two elements (1) likelihood of success on the merits; and (2) irreparable harm. This response focuses on the remaining elements (3) the balance of the equities or harms; and (4) whether an injunction would serve or disserve the public interest, because Enduring Resources' circumstances are unique and pose no threat of harm. Finally, this response addresses the status quo and the requirement of a security bond if any injunction is granted.

II. STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy never awarded as of right. *Winter v. Natural Resources Defense Counsel*, 555 U.S. 7, 21 (2008). Plaintiffs have the burden to show the right to injunctive relief is clear and unequivocal. *Chem. Weapons Working Grp., Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1489 (10th Cir. 1997). The movant's requirement for

substantial proof is "much higher" for a motion for a preliminary injunction than it is for a summary judgment motion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20.

As more fully set forth in Federal Defendants' Response (Doc. 44), review of agency action under the National Environmental Policy Act ("NEPA") must be brought under the Administrative Procedure Act ("APA"). The court must affirm unless the final agency action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

III. ENDURING RESOURCES JOINS IN AND ADOPTS THE RESPONSES OF THE FEDERAL DEFENDANTS AND OTHER INTERVENORS

In the interest of efficiency, Enduring Resources joins in and adopts the Federal Defendants' Response (Doc. 44)[1] filed August 14, 2019 and the Response filed by intervenors DJR Energy Holdings, LLC and BP America Production Company (Doc.46) filed August 15, 2019.[2]

IV. PLAINTIFFS CONCEDE THAT ENDURING RESOURCES' CURRENTLY PRODUCING OIL AND GAS WELLS ARE NOT THE TARGET OF THE MOTION FOR PRELIMINARY INJUNCTION

[1] Federal Defendants' Response in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum in Support, ("Federal Defendants' Response") filed August 14, 2019.
[2] DJR Energy Holdings, LLC and BP America Production Company's Opposition to Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction ("DJR and BP's Opposition") filed August 15, 2019.

Plaintiffs' recent Reply (Doc. 61)[3] filed September 4, 2019 concedes "Citizens Groups do not seek to preliminarily enjoin oil and gas production on the 42 wells already in production or shut-in as of the date this case was filed." (Footnote omitted.) Plaintiffs' Reply at 1. Plaintiffs' reply leaves no doubt that the motion for preliminary injunction does not seek to enjoin any producing wells: "Citizens Groups are not seeking preliminary relief to shut-in any producing wells, but rather to prevent future irreparable harms from the continued development of additional Mancos Shale wells…." Plaintiffs' Reply at 8. Plaintiffs' pledge is repeated at page 18 of its Reply, "As stated above, Citizens Groups' request for preliminary relief does not seek to shut down producing wells…." Finally, Plaintiffs' Reply ends with a Conclusion paragraph, again conceding that Plaintiffs' requested injunction does *not* include wells that "are already in production or have been permanently shut-in." Plaintiffs' Reply at 24.

Enduring Resources operates 24 currently producing wells under the challenged Environmental Assessments ("EAs"). These wells are listed in **Exhibit 1** and are verified by the Affidavit of Alex Campbell, Enduring Resources' Vice President (Campbell Aff.), **Exhibit 2**, p. 2, ¶ 5. Exhibits 1 and 2 establish that the following 24 Enduring Resources wells are currently producing and are not the subject of Plaintiffs' Motion:

Enduring Resources Producing Wells

	Producing Well Name	**Well API #**	**DOI-BLM-NM-EA #**
1.	N Escavada Unit 315H	30-043-21888	2016-0229
2.	N Escavada Unit 316H	30-043-21300	2016-0229

[3] Plaintiffs' Reply to Federal Defendants, DJR Energy Holdings, LLC et al. and American Petroleum Institute's Responses to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, ("Plaintiffs' Reply") filed September 4, 2019.

3.	N Escavada Unit 331H	30-043-21298	2016-0229
4.	W. Lybrook Unit 710H	30-045-35803	2016-0251
5.	W. Lybrook Unit 712H	30-045-35776	2016-0251
6.	W. Lybrook Unit 714H	30-045-35802	2016-0251
7.	W. Lybrook Unit 750H	30-045-35804	2016-0251
8.	W. Lybrook Unit 751H	30-045-35806	2016-0251
9.	W. Lybrook Unit 752H	30-045-35805	2016-0251
10.	W. Lybrook Unit 753H	30-045-35815	2016-0251
11.	W. Lybrook Unit 754H	30-045-35817	2016-0251
12.	W. Lybrook Unit 755H	30-045-35816	2016-0251
13.	Rodeo Unit 500H	30-045-35796	2016-0260
14.	Rodeo Unit 501H	30-045-35800	2016-0260
15.	W. Lybrook Unit 716H	30-045-35813	2016-0251
16.	W. Lybrook Unit 718H	30-045-35774	2016-0251
17.	W. Lybrook Unit 719H	30-045-35812	2016-0251
18.	S. Escavada Unit 352H	30-043-21323	2017-0126
19.	S. Escavada Unit 353H	30-043-21320	2017-0126
20.	Rodeo Unit 508H	30-045-35869	2017-0115
21.	Rodeo Unit 509H	30-045-35880	2017-0115
22.	Rodeo Unit 510H	30-045-35871	2017-0115
23.	W. Lybrook Unit 307H	30-043-21325	2016-0252
24.	W. Lybrook Unit 308H	30-043-21326	2016-0252

Plaintiffs should be held to their word and production from these wells should not be enjoined. Accordingly, whether this Court denies or grants Plaintiffs' Motion, Enduring Resources requests a specific finding that continuing production from these 24 wells is *not* enjoined.

V. THE BALANCE OF HARMS UNEQUIVOCALLY TIPS IN FAVOR OF ENDURING RESOURCES

A. Enduring Resources' Technology Weighs Heavily Against an Injunction

Enduring Resources' operations utilize cutting edge technology which results in net-zero fresh water use and eliminates both venting and flaring. The Affidavit of Enduring Resources' Vice President, Alex Campbell (Exhibit 2) establishes that:

- Enduring Resources invested more than $25 million in a large-scale water system to completely change the methodology for completing its Mancos shale wells in the San Juan Basin. Campbell Aff., p. 5, ¶ 10.
- Enduring Resources uses a "net-zero water methodology" which virtually eliminates demands for fresh and potable water to complete wells. *Id.*, p. 6, ¶ 13.
- Enduring Resources' methodology recycles produced water through multiple cycles and uses produced water from the Entrada disposal zone, reducing its reliance on fresh water to just 2% to 3% of the total amount of water used to complete a well. To offset this minimal use of water, Enduring Resources obtained a New Mexico water right to reduce its use of fresh water to zero. *Id.*
- Enduring Resources' produced water pipelines, brine water wells and lined holding ponds enable it to efficiently transfer water between storage areas, reduces truck traffic by 21,361 truck trips, and this significantly reduces vehicle emissions. *Id.*, p. 6, ¶ 14.
- Enduring Resources' net-zero fresh water methodology eliminates nitrogen foam fracturing and its associated impacts and allows Enduring Resources to complete its wells without any need for venting or flaring gas. Id., p. 5 ¶ 11 and p. 6, ¶ 12.

As this Court recognized in its August 28, 2019 Order Regarding Setting of Hearing on Motion for Injunctive Relief (Doc. 60), the Tenth Circuit affirmed the dismissal of the majority of Plaintiffs' claims in *Dine C.A.R.E. I* except for the sole discrete issue of BLM's failure to consider cumulative water impacts from the drilling for certain parcels of land. *Dine C.A.R.E. I*, 923 F.3d 831, 858. Water consumption during the well completion process is the primary "harm" addressed in the Motion, although Plaintiffs make assertions regarding venting and flaring impacts to air quality and general objections to development. As the Campbell Affidavit shows, Plaintiffs' assertions of harm arises from circumstances that do not apply to Enduring Resources' operations.

Plaintiffs recite a passage from an earlier case concluding that with respect to "any fracking-related environmental impacts" that accrued during the pendency of that case, it was "undisputed that such impacts exist" and "would be irreversible." *Diné C.A.R.E. v. Jewell,* 2015 WL 4997207, at *46 (D.N.M. Aug. 14, 2015), aff'd, 839 F.3d 1276 (10th Cir. 2016) [hereinafter *Dine C.A.R.E. 2015*]. But that was more than three years ago and Enduring Resources' net-zero fresh water technology was not employed then. Moreover, after balancing the harms, the court denied the requested injunction based on the prospect of significant economic costs to the operators. *Diné C.A.R.E.* 2015, 2015 WL 4997207, at *50. Now, as a result of Enduring Resources' net zero fresh water process, it is no longer "undisputed" that harm will accrue to water resources or air, at least with respect to Enduring Resources' wells, so the balance tips even more in Enduring Resources' favor.

B. An Injunction Would Cause Significant Harm to Enduring Resources and the Navajo Allottees

Millions of dollars in revenue and investment funds will be lost if an injunction is granted. Campbell Aff. p. 9, ¶ 22. Halting operations during the drilling of a single well requires standby costs of $22,000 per day. *Id*., p. 10, ¶ 25. Enduring Resources is currently in the process of constructing, drilling and completing 59 wells and each well has an average discounted present value of $19.7 million, for a total value of $1.162 billion. Campbell Aff., p. 9, ¶ 22. The completion operations Plaintiffs seek to enjoin involve a projected capital expenditure of $400 million dollars in 2020 and 2021, *Id*., p. 2, ¶ 3 and halting this investment would delay development of these resources and the payment of royalties to Allottees, the State of New Mexico and the Federal Government.

Furthermore, the Navajo Allottees, many of whom subsist on royalty payments from Enduring Resources, would lose a substantial portion of the income they anticipate receiving from ongoing operations. *See* Navajo Allottees' Unopposed Motion to Intervene in Support of Defendants (Doc. 23) filed August 6, 2019. Enduring Resources wells and planned laterals access minerals under 96 leases – 75 of these leases are Allottee leases, 2 are leases from the State of New Mexico, and 19 are federal leases. Campbell Aff., p. 4, ¶ 8. As recently as May, 2019, Enduring Resources paid $2 million in royalties to Allottees for that single month of production. Id., p. 10, ¶23. The economic harm inflicted on the Allottees by an injunction would be crushing and should not be ignored.

Contrary to Plaintiffs' argument, there is no "paradox" in asserting that in a basin with more than 37,000 existing oil and gas wells, the environmental and aesthetic benefits of halting routine operations would be inconsequential. Enduring Resources' 59 wells in process will

constitute a trivial portion of the existing wells. On the other hand, the economic impact of the Plaintiffs' requested injunction on Enduring Resources would be significant and on the Allottees it would be catastrophic. The State of New Mexico would also lose substantial royalty and tax income; income that supports New Mexico schools. These severe economic concerns are not beyond the scope of harms the court should consider to decide whether Plaintiffs' concerns outweigh the harm which would be inflicted on Intervenors. This Court needs to balance competing interests, not ignore them.

C. Case Law Does Not Support Plaintiffs' Presumptive Harm Argument

Plaintiffs argue that alleged NEPA violations in and of themselves are presumed to constitute irreparable harm. We join Intervenors DJR and BP in their position that to the extent this may have been a permissible presumption in the past, it is no longer controlling law. DJR and BP's Opposition to Petitioner's Motion, at 18 (Doc. 46) (citing *Winter*, 555 U.S. at 22 and *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157-158 (2010). Therefore, the proper focus is on the *specific* harms Plaintiffs assert relating to water and air. As described above, Enduring Resources' technology does not pose a risk of harm to water quantity or air quality, so the Motion should be denied.

D. The Cases Cited by Plaintiffs do not Support Plaintiffs' Position Regarding the Balance of Harms

Plaintiffs cite a number of cases that do not support the Motion. Plaintiffs cite *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1237-38 (D. Colo. 2009) for the proposition that irreparable harm comes from even two wells. This case is inapposite and this Court should not be led astray by the Plaintiffs' sound-bite strategy of quoting excerpts from cases where courts imposed preliminary injunctions to protect

undeveloped, pristine, or federally protected land under the control of agencies who's primary mission, unlike the BLM's, is the protection of land and species, not multiple use development which is the BLM's mission under the Federal Land Management Policy Act ("FLMPA").

In *San Luis,* the U.S. Fish and Wildlife Service ("USFWS"), which owned only the surface of the Baca National Wildlife Refuge, at the conclusion of its NEPA review, issued a Finding of No Significant Impact ("FONSI") in response to coordination with the mineral owner to drill exploratory wells from within the refuge. The purpose of the Baca National Wildlife Refuge was to "restore, enhance, and maintain wetland, upland, riparian, and other habitats for native wildlife, plant and fish species in the San Luis Valley." Omnibus Public Land Management Act of 2009, U.S.C. § 6201(1)(a)(2). In administering the wildlife refuge, USFWS is required, to the maximum extent practicable, to "emphasize migratory bird conservation" as well as "broader landscape conservation efforts." *San Luis,* 657 F. Supp. 2d at 1236 (citing §6201(2)(c)(2)." Further, the court's reasoning for issuing the injunction included its finding that in issuing the FONSI, significant mitigation measures, including a spill prevention control and countermeasure plan as well as a stormwater management plan, were not even developed, much less evaluated. *Id.* at 1246.

The facts in this case are entirely different from those described in *San Luis*. As explained above and by other Intervenors and the Federal Defendants, the San Juan Basin area has a 60-year long history of substantial production of oil and gas beginning in 1946. There are approximately 37,000 existing oil or gas wells in this basin. Unlike the area in *San Luis,* the greater Chaco area is not a wildlife refuge. Its primary economic activity is oil and gas production.

Plaintiffs also rely heavily on the two Colorado Wild cases, both decided under dramatically different circumstances. *See Colorado Wild v. U.S. Forest Service*, 299 F.Supp.2d 1184 (D. Colo. 2004) and *Colorado Wild v. U.S. Forest Service*, 523 F. Supp. 2d 1213 (D. Colo. 2007). The court in the 2004 Colorado Wild case issued a preliminary injunction against the Forest Service because it indisputably failed to collect population trend data on the Management Indicator Species ("MIS") as explicitly required by statute as a part of their FEIS. Here, even taking plaintiff's assertions as true, the BLM has not committed such a blunder in approving APDs because water conservation and air quality are addressed in each challenged EA. The Plaintiffs allege only that the EAs inadequately address these issues, not that they omitted them altogether. The 2004 Colorado Wild case was an extreme case of the federal agency failing to adhere to its own regulatory requirements, distinguishable from the facts before this Court, and does not support Plaintiffs' position.

The 2007 Colorado Wild case is also inapposite. There, the land in question was pristine, undeveloped National Forest land adjacent to 287.5 privately owned acres near Wolf Creek pass in Colorado. The court renewed a *stipulated* injunction against the U. S. Forest Service when it found that plaintiffs would suffer irreparable injury if the court did not enjoin a road from being built through pristine Forest land. The first temporary restraining order was entered after the court found that the FEIS and ROD did not consider the action taken by the Forest Service pursuant to a 2006 decision letter from the Forest Supervisor – namely allowing construction of a road to service a new village planned for 10,000 residents, commercial buildings, power plants and parking facilities for more than 4,500 vehicles. *Colorado Wild*, 523 F. Supp. 2d at 1217-18.

The court determined that the consequences of building such a road would prevent the Forest Service from ever having the ability to prevent further development. *Id*. at 1221.

Unlike this case, the 2007 *Colorado Wild* court was faced with an immense development in an area that was otherwise almost untouched. *Colorado Wild*, 523 F. Supp. 2d at 1216-18. The court questioned whether the National Forest Land System next to the planned village could sustain such an impact and the immense amount of traffic that would be forever more traversing the road – a route that had not been assessed under the NEPA process *at all*. *Id.* at 1221. The court expressed the fear that if the road was built the Forest Service would lose its authority to say "no" later down the line, thus this singular project would become a "bureaucratic steamroller." *Id.* No such circumstances are present here.

By contrast, the instant case does not involve a new project which will impact pristine and undisturbed land. Nor are the APDs in this case presumptively invalid as the Plaintiffs claim. Furthermore, approvals of the APDs were issued under a NEPA analysis which addressed both water and air impacts. The Colorado Wild cases cited by Plaintiffs simply have no bearing here.

Plaintiffs present the following sound bite from *Valley Cmty Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1086 (10th Cir. 2004): "Financial concerns alone generally do not outweigh environmental harm." Reply at 16. Here is the language in context: "A permanent termination of the [highway] project would cost $11,537,000, including demobilization and clean-up costs. Given these figures, it is clear FHWA will suffer significant harm if the injunction is granted." The next sentence reads: "While these costs cannot be ignored, financial concerns alone generally do not outweigh environmental harm." The court then concluded Plaintiffs did *not*

establish that the balance of harms tipped strongly in their favor. The injunction was denied and the Tenth Circuit affirmed. *Id*.

Plaintiffs' reliance on *Hanly v. Kleindiesnst*, 471 F.2d 823, 831 (2.d Cir. 1972) is also misplaced, and Plaintiffs' Reply does not accurately describe that case. Plaintiffs' quote that case as stating "one more [well] polluting air and water … may represent the straw that breaks the back of the environmental camel." Reply, p. 10 (Doc. 61). Plaintiffs grasp at straws. The actual quote was *dicta* and referred to "one more factory", not one more well. *Id*., 471 F.2d at 831. And the *Hanly* case concerned a proposed jail and office administration building in lower Manhattan, New York City. The court concluded that "the office building would not differ substantially from the makeup of the surrounding area," whereas the jail might. Applied here, Enduring Resources wells will not differ substantially from the makeup of this long-established oilfield.

Plaintiffs' Reply, at p. 17, also cites *Mansanto v.Geertson Seed Farms*, 561 U.S. 139, 157 (2010) to support Plaintiffs' objections to tying harms to specific deficiencies in an agency's NEPA analysis as improperly placing a "thumb on the scales" in favor of Defendants. This phrase was used to convey the opposite conclusion. The Supreme Court *rejected* the assumption that an injunction is generally the remedy for a NEPA violation as "invert[ing] the proper analysis" and observed "no such thumb on the scales is warranted." The Court *reversed* the injunction. *Id*.

E. Plaintiffs' Refusal to Post a Security Bond Should be Weighed in Analyzing the Harm to Intervenors

Enduring Resources submits that this Court should follow the lead of other courts and consider, when balancing the equities, whether Plaintiffs will be able to post a sufficient bond to

protect Enduring Resources and other Intervenors in the event Plaintiffs lose. *See Sierra Club, Inc. v Bostick*, 539 Fed. Appx. 885, 890 (10th Cir. 2013) (denying an injunction after balancing the harms, noting that plaintiffs did not suggest that they had the ability to "cover any of the irretrievable loss [to defendants] should they [plaintiffs] ultimately lose" and plaintiffs proved only minimal environmental harm); *Diné C.A.R.E.* 2015 at *33 ("That the Plaintiffs cannot protect the Operators' interest with a bond weighs further in the Operators' favor, because, if the Court were to grant the preliminary injunction and the Operators were to win on the ultimate merits, they would have no way of recouping their lost profits; they would just have to sustain them permanently.").

VI. PUBLIC INTEREST CONSIDERATIONS ALSO WEIGH IN FAVOR OF ENDURING RESOURCES

A. The Authorities Cited by Plaintiffs Address Undeveloped Lands or Wilderness and do not Support the Motion

Once again, a deep dive into the cases cited by Plaintiffs shows that the burdens met by previous plaintiffs in environmental litigation cannot be met by Plaintiffs in this case. Plaintiffs seem to contend that public interest factors always weigh in favor of preventing oil and gas operations when there is any NEPA complaint. But the authorities cited by Plaintiffs do not support such a dogmatic conclusion. Indeed, the cases cited by Plaintiffs simply do not apply to the facts of this case.

Plaintiffs again cite *Colorado Wild* (2004) to say that "[t]here is an overriding public interest in the preservation of biological integrity and the undeveloped character of the Project area that outweighs public or private economic loss in this case." 299 F.Supp.2d 1184, 1190-91 (2004); Reply at 21-22. That case addressed a specific *undeveloped* project area, and did not

establish a blanket rule for all lands. As discussed above, the court in that case issued an injunction because there was *no population trend data* on how the Forest Services' plan would affect the MIS. The court continued (and Plaintiffs strategically exclude this language) to state its finding that the "biological integrity of the area is a risk due to the Forest Service's *failure* to collect population trend data for the MIS." *Colorado Wild*, 299 F.Supp.2d at 1190. No such complete failure has been asserted here.

Plaintiffs' reliance on *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1250 (10th Cir. 1973) is also misplaced. There, the injunction prevented clear cutting of 670 acres in an area of the Teton National Forest that was "traversed only by the jeep roads and [was] basically undeveloped." The lands were described as an area "uninhabited except for various species of wildlife, four outfitter camps, and a number of elk." *Wyo. Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249-1250 (10th Cir. 1973). The injunction decision was further buttressed by a previous decision "concluding that any contracts made by the Forest Service after July 1, 1972, that would change the *wilderness* character of any inventoried 'roadless' or *undeveloped* area should not be made, and that no timber cutting, road building or acts that would change the *wilderness* character of such areas should be permitted under such contracts, until an impact statement was filed and acted on." *Id.* at 1250 (emphasis supplied.) Since the Forest Service in *Wyo. Outdoor* did not do *any* NEPA analysis, the court enjoined the logging.

Here, unlike *Wyo. Outdoor,* this oil and gas field is not an undeveloped area. This is a large swath of multiple use land that has a long history of substantial oil and gas development, a fact Plaintiffs do not dispute. The facts in *Wyo. Outdoor* and *Colorado Wild* involved *complete failures* of the federal agency to do an unequivocally required aspect of their NEPA analysis. In

this case, the most Plaintiffs can assert is that the NEPA analysis did not adequately anticipate changed circumstances regarding cumulative water use in this mature oil and gas field. That is not enough to support their request for the extraordinary relief of a preliminary injunction.

B. Energy Production and Financial Considerations Weigh Heavily Against an Injunction

The Supreme Court has recognized that financial harm can be weighed against environmental harm – and in certain instances outweighs it. See *Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 545 (1987). When weighing the balance of public interests implicated in a motion for preliminary injunction, it is appropriate for the court to consider economic concerns. *Sierra Club, Inc. v Bostick*, 539 Fed. Appx. 885, 890 (10th Cir. 2013). There is no precedent for the court refusing to consider economic interests in a motion for injunctive relief simply because plaintiffs lodge an environmental complaint. In fact, the Tenth Circuit rejects Plaintiffs' argument that "financial harm, as a general matter, cannot weigh at all…." or that "injunctive relief cannot be denied based on a weighing of economic harm." *Sierra Club, Inc. v Bostick*, 539 Fed. Appx. at 890. The Federal Defendants' Response (Doc. 44) thoroughly addresses the importance of the nation's energy needs, and Enduring Resources adopts those arguments. Enduring Resources' discussion of financial considerations in Part V above, also apply to the public interest element of Rule 65.

C. Plaintiffs' Plugging and Abandonment Argument is a Red Herring

The State of New Mexico sets the amount for bonds required of operators to secure eventual plugging and abandonment operations. N.M. Code R. §19.15-25. A preliminary injunction is not the place to second guess the public policy determinations made by state legislators regarding the adequacy of bonds required by statute.

Affidavits submitted with Plaintiffs' Reply (Doc. 61), at p. 21, alleging "worldwide" plugging and abandonment expenses and liabilities "across the oil and gas industry" and around the globe is pure speculation and does not inform the Court regarding the specific harms and interests implicated in this case. Plaintiffs have not presented one piece of hard data to indicate that the Intervenors are unlikely to be able to plug and abandon their wells when the time comes. And Plaintiffs' fanciful suggestion that there will be a "premature demise of the oil and gas industry" (Reply at p. 23) is merely an unsupported opinion attempting to predict an unknown future. These grandiose arguments contradict Plaintiffs' initial assurance to this Court that "[t]his case is not a referendum on the broader political and policy debates occurring around oil and gas exploitation in the Greater Chaco region," Reply at 2. The other side of the scale is certain – Enduring Resources, the Allottees and the State of New Mexico will all suffer substantial economic harm if ongoing operations are enjoined. Plaintiffs' arguments regarding the responsibility for plugging and abandoning wells around the world and in the distant future are pure speculation and add nothing to the determination of the Motion at hand.

VII. PLAINTIFFS' MOTION SEEKS TO ALTER, NOT PRESERVE, THE STATUS QUO

The status quo in the San Juan Basin appears to be undisputed. The San Juan Basin is a thriving area for economic activity in the oil and gas industry with 37,000 operating wells. Operations have gradually increased over many decades. Accordingly, the San Juan Basin is not an area of sparse development or wilderness, a fact that Plaintiffs attempt to dodge. Enduring Resources and the other operator-intervenors have received and rely upon APD's approved by the BLM. For the wells that are not already producing, Enduring Resources is in the process of

completing 59 wells and has already expended substantial sums in reliance upon validly issued APDs. Because the current makeup of the geographic area includes a mature oil and gas field, halting operations on Enduring Resources' 59 wells that are now in the process of construction and completion would serve no purpose. Fifty nine more wells in a basin with 37,000 operating wells would be a trivial disruption for this geographic area. However, halting operations on these wells would cause losses of millions of dollars in state and local tax revenue, royalties, and salaries that go to the Navajo Allottees and Indigenous people employed in the industry. To force these ongoing operations to grind to a halt would dramatically change the status quo. For this reason alone, the Motion should be denied.

VIII. PRODUCERS DID NOT "SELF-INFLICT" THE HARM THAT MIGHT COME FROM AN INJUNCTION

Plaintiffs argue that continuing to develop Mancos Shale wells is an "assumption of the economic risk" which necessarily precludes Intervenors' complaint of economic injury. This argument is without merit and relies, once again, on overbroad generalizations from dissimilar cases. To support this argument, Plaintiffs cite *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002). In *Davis*, the court found the economic harm of the defendant to be self-inflicted harm because defendant entered into contractual obligations and "jumped the gun" in anticipation of a pro forma result. *Id.* at 1116; *See also Valley Cmty. Pres. Comm'n v. Mineta,* 373 F.3d 1078 (10th Cir. 2004) (also cited by Plaintiffs). These cases cannot be analogized to the facts before the court on this Motion.

Enduring Resources and its predecessor expended substantial time and resources to submit APDs, and proceeded only *after* the APDs were approved. Campbell Aff., p. 2, ¶ 4 and p.

4 ¶7. Likewise, the BLM devoted substantial time, resources and study to the EAs underlying the APDs and to approving the APDs themselves. Once issued, the APDs had legal significance and Intervenors were entitled to rely upon them. The mere possibility that a plaintiff might bring a lawsuit someday does not establish "self-inflicted" harm.

Plaintiffs cite no case precedent for the proposition that the specter of possible NEPA litigation waives the right of a defendant to have a court carefully consider the required elements for a preliminary injunction. Most cases cited by Plaintiffs in their Motion and Reply center around a federal decision to allow an extractive use of land or build a highway. By Plaintiffs' logic regarding "self-inflicted" losses, every cattle grazer, outfitter, oil and gas operator, hard rock miner, timber company, or road contractor waives its right to assert economic harm in an injunction proceeding merely because in such a business litigation of the underlying NEPA decision would be unsurprising. Plaintiffs should not be heard to use their own proclivity for litigation to stick a "self-inflicted" label on others. One of the Plaintiffs boasts that it "typically has a docket of approximately 200-300 open cases." Declaration of Aaron Isherwood, ¶ 5 (Doc. 5-45). To assert that operators cannot raise the issue of their own economic harm to the Court merely because they are in a business frequently targeted by environmental lawsuits, often brought by these very same plaintiffs, is an exercise in *ipse dixit*, and should be rejected by this Court.

IX. IF ANY INJUNCTION ISSUES, PLAINTIFFS SHOULD BE REQUIRED TO POST A BOND

Rule 65(c) provides "The court may issue a preliminary injunction … only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Plaintiffs here appear to have millions of dollars of liquid assets at their disposal and have the financial wherewithal to post a bond. See Declaration of John Horning ¶¶ 4-5 (Doc. 5-48) (WildEarth Guardians had a net income in 2018 of $4,465,107 and its "liquid assets" were approximately $2,684,094); Declaration of Mark Pearson, ¶ 6 (Doc. 5-43) (San Juan Citizens' Alliance has a 2019 budget of "approximately $564,000"); Declaration of Carol Davis (Doc. 5-40) (Dine C.A.R.E. has a budget of "approximately $250,000"). Sierra Club does not disclose the size of its coffers, but its funds are sufficient to maintain "200-300 open cases." Declaration of Aaron Isherwood, ¶ 5 (Doc. 4-45)].

Plaintiffs do not merely challenge the EAs prepared by the Federal Defendants, they seek to enjoin the private intervenors' ongoing operations and put royalty payments to Navajo Allottees at risk. Having added private targets to their Motion, Plaintiffs should be required to post a security bond to pay for damages sustained, should Plaintiffs lose.

X. CONCLUSION

Plaintiffs have failed to establish any of the four elements required for a preliminary injunction. Enduring Resources respectfully requests the Motion be denied in its entirety. In the alternative, Enduring Resources requests this Court's Order limiting any injunction to omit

Enduring Resources' 24 producing wells (listed on Exhibit 1) and requiring Plaintiffs to post an adequate security bond pursuant to Rule 65(c).

Respectfully submitted this 20th day of September, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2019, I served a true and correct copy of the foregoing INTERVENOR ENDURING RESOURCES IV, LLC'S RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION on all counsel of record via the Court's ECF system.

s/ Keith D. Tooley
Keith D. Tooley