CASE NO. 21-2116
Oral Argument Requested

IN THE
United States Court of Appeals for the Tenth Circuit

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, ET AL.,
Plaintiffs-Appellants,

v.

DEBRA HAALAND, ET AL.,
Defendants-Appellees,

and

DJR ENERGY HOLDINGS, LLC, ET AL.,
Intervenors-Appellees.

On Appeal from the United States District Court for the District of New Mexico,
Civil Action No. 1:19-cv-00703-WJ-JFR
Honorable William P. Johnson, Chief United States District Judge

DEFENDANT INTERVENOR-APPELLEE AMERICAN PETROLEUM INSTITUTE'S UNCITED PRELIMINARY RESPONSIVE BRIEF (DEFERRED APPENDIX APPEAL)

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CORPORATE DISCLOSURE STATEMENT

Defendant Intervenor-Appellee American Petroleum Institute ("API") discloses that it is a not for profit corporation, that it has no parent corporation, and that no corporation holds any stock in API.

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Dated: March 2, 2022

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STATEMENT OF RELATED CASES

Issues related to those raised in this litigation have previously been before this Court in *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F. F.3d 1276 (10th Cir. 2016) and *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).

GLOSSARY OF TERMS

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	Bureau of Land Management
EA	Environmental Assessment
FLPMA	Federal Land and Policy Management Act
NEPA	National Environmental Policy Act
ONRR	Office of Natural Resources Revenue
RMP	Resource Management Plan

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because Plaintiffs Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively, "Diné") brought their National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq*., claims pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551, *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Defendant Intervenor-Appellee American Petroleum Institute ("API") adopts the Federal Defendants' statement of issues on the merits. In addition, assuming that Diné could establish a NEPA violation, this case presents the questions:

1. Whether the challenged decisions approving Applications for Permits to Drill ("APDs") in New Mexico's San Juan Basin should be remanded without vacatur of the approved APDs where the purported, and belatedly alleged, NEPA violations involve only a failure fully to consider certain environmental impacts, and vacatur would disrupt the significant reliance interests of leaseholders and lease operators in the investments undertaken pursuant to APDs approved between 2014 and 2019.

2. Whether Diné has carried its burden clearly to show that the balance of equities tip in favor of extraordinary injunctive relief where Diné asserts only

speculative, incremental environmental injury in a densely developed onshore oilfield, significant mitigation measures are in place to ensure the safety of drilling operations, and economic and reliance interests would be threatened (or eliminated) by the requested relief.

STATEMENT OF THE CASE

A. Preliminary Statement.

This is the third time that Diné's NEPA challenges to approved San Juan Basin APDs have been before this Court on the same basic grounds. In this case, Diné challenges the Environmental Assessments ("EAs") and resulting approvals of APDs issued up to eight years ago, and, in many instances, approved before Diné's prior lawsuit that reached this Court in 2015 and 2019. Rather than join these claims to the prior litigation, Diné waited for this Court twice to issue decisions before launching another challenge. On the merits, Federal Defendants—not to mention the district court's thorough decision—have fully demonstrated Diné's failure to establish any NEPA violation.

Nor can Diné's belated NEPA claims, even if they had any merit (which they do not), justify the sweeping remedies that Diné seeks. Vacatur of the EAs and APD approvals issued years ago and a broad injunction prohibiting BLM from issuing future drilling authorizations, *see* Pls.' Br. at 57, are "extraordinary remed[ies] that may only be awarded upon a clear showing that the plaintiff is entitled to such

relief." *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Diné has made no such showing.

B. BLM's Management of Oil and Gas Leasing.

Congress—through the Mineral Leasing Act ("MLA"), *see* 30 U.S.C. § 181—has mandated that "[l]ease sales shall be held for each State where eligible lands are available at least quarterly," *id.* § 226(b)(1)(A). *See also* Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (purpose "[t]o promote the mining of . . . oil . . . on the public domain"); *Harvey v. Udall*, 384 F.2d 883, 885 (10th Cir. 1967) (MLA's "purpose…was to promote the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise" (quotation omitted)).

Lease sales are conducted through a competitive bidding process. *See* 43 C.F.R. § 3120.1-2(b); *id.* § 3120.5-3. Prior to any drilling activity, the lease "operator shall submit . . . for approval an Application for Permit to Drill [("APD")] for each well." *Id.* § 3162.3-1(c). "No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized [BLM] officer's approval of the permit." *Id.* *See also* 30 U.S.C. § 226(g). NEPA requirements must be satisfied before BLM can issue a permit, *id.* § 226(p)(2)(A), with the NEPA review "used in determining whether or not an [Environmental Impact Statement] is

required and in determining any appropriate . . . conditions of approval of the submitted plan." 43 C.F.R. § 3162.5-1(a).

Under the Federal Land and Policy Management Act ("FLPMA"), BLM also "manage[s] the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). BLM must plan in a manner that: (i) will protect scenic, historical, ecological, and environmental values, *see id.* § 1701(a)(8); and (ii) "recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands," *see id.* § 1701(a)(12). While BLM has a responsibility to "prevent unnecessary or undue degradation of the [public] lands," *id.* § 1701(b), accounting for the productivity of the federal mineral estate is a FLPMA imperative.

BLM "uses a multi-step planning and decisionmaking process to fulfill" the FLPMA's mandates. *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 504 (D.C. Cir. 2010). BLM "begins by creating" a resource management plan ("RMP"), which "describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps." *Id.* (quotation omitted). Thereafter, "[s]pecific projects are reviewed and approved separately, but must conform to the relevant RMP." *Id.* BLM prepares an EIS when preparing an RMP. *See* 43 C.F.R. § 1610.5-1; *id.* § 1601.0-6.

C. Diné's Challenges to APD Approvals in the San Juan Basin.

Diné first raised similar NEPA challenges to BLM's approval of APDs in the San Juan Basin in 2015. *See Diné Citizens Against Ruining Our Env't v. Jewell*, No. No. 15-cv-0209-JB-SCY, 2015 WL 4997207 (D.N.M. Aug. 14, 2015). That case challenged nearly 300 APDs, and initially sought a preliminary injunction that was denied by the district court in a decision upheld by this Court. *See id.*; *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016) (collectively, "*Diné I*").

Following this Court's ruling, Diné amended its petition for review in 2018 to challenge additional APDs under NEPA. *See Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031 (D.N.M. 2018). Although the district court rejected Diné's claims on the merits, this Court reversed with respect to a subset of the challenged APDs connected to five particular EAs based upon BLM's failure adequately to consider cumulative impacts of the APDs on water resources. *See Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019) (collectively, "*Diné II*"). Upon this Court's instructions, the district court remanded the affected subset of APDs to BLM for further NEPA proceedings.

Three months after this Court's 2019 decision in *Diné II*, Diné filed the present lawsuit challenging a series of EAs analyzing the approval of drilling permits, which now encompasses 370 APDs approved by BLM between 2014 and 2019. *See Diné*

Citizens Against Ruining Our Env't v. Bernhardt, No. 19-cv-00703-WJ-JFR, 2021 WL 3370899, at *2 (D.N.M. Aug. 3, 2021) (hereinafter, "*Diné III*"). In the interim, BLM completed its additional NEPA analysis following the Court's remand in *Diné II*. *See id.* Based on extensive briefing by Diné, the Federal Defendants, and the industry Intervenors, the district rejected Diné's claims and dismissed the petition for review because, *inter alia*, (1) the court lacked jurisdiction over challenges to APDs that were not yet final and APDs for which drilling was already complete; (2) BLM's further NEPA analysis following *Diné II* was properly considered for the challenged APDs; and (3) BLM adequately considered the potential impacts of APD approval on air and water resources, and the potential impacts of related greenhouse gas emissions. *See generally id.*

SUMMARY OF ARGUMENT

Even assuming *arguendo* that Diné has established any statutory violation of NEPA, Diné fails to demonstrate an entitlement to the extraordinary remedies it seeks.

1. The APA provides the statutory basis for Diné's NEPA claims in this Court. The APA, in turn, preserves the equitable authority of a reviewing court to remand an agency action that violates the APA standard of review, without vacating that agency action. Under the widely followed framework set out by the D.C. Circuit in *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146 (D.C. Cir. 1993),

remand without vacatur is appropriate under the circumstances of this case because (1) Diné alleges only discrete procedural violations of NEPA amounting to failures fully to explain a subset of potential future environmental impacts, which can be further addressed by BLM on remand, and (2) vacatur of the issued APDs—and underlying EAs—would result in significant disruptive consequences to, *inter alia*, leaseholders' contractual and property interests in development of their leases, and the investments undertaken by lessees, lease operators, and other contractors in reliance on APDs approved, in many instances, years before this Court's *Diné II* decision in 2019.

2. Nor has Diné met its burden to make a clear showing of entitlement to the extraordinary remedy of vacatur. In practical effect and under the structure of the APA, vacatur of an agency action is a form of injunctive relief, and the applicant must satisfy the traditional test for such "extraordinary remedy" by a "clear showing." *Winter*, 555 U.S. at 22. Diné has not done so on the record in this case. At most, Diné alleges procedural injuries from a mere absence of sufficient explanation of environmental impacts and either past or speculative injuries to the environment in one of the most developed oil and natural gas fields in the United States. Weighed against this showing, Diné's requested injunctive relief threatens a wide web of state, federal, and private economic interests, and undercuts established

congressional policy favoring oil and gas development. The balance of equities thus tips strongly against Diné.

STANDARD OF REVIEW

"NEPA is strictly a procedural statute" that "does not mandate substantive results." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1237 (10th Cir. 2011). Nor does it "compel agencies to elevate environmental concerns over other appropriate considerations." *WildEarth Guardians v. Conner*, 920 F.3d 1245, 1251 (10th Cir. 2019) (quotation omitted). Because NEPA claims are brought pursuant to the APA, a reviewing court's inquiry is not whether it agrees with BLM's actions, but whether Diné has met its burden of showing that BLM's decision to conduct the lease sale was arbitrary or capricious. *See*, *e.g.*, *Citizens' Comm. to Save Our Canyons v. Krueger*, 513 F.3d 1169, 1176 (10th Cir. 2008) ("A presumption of validity attaches to the agency action and the burden of proof rests with the [plaintiffs] who challenge such action." (quotation omitted)). This APA "standard of review is very deferential to the agency." *New Mexico Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138, 1162 (10th Cir. 2019) (quotation omitted). And, in reviewing an APA claim, this Court "use[es] the same standard of review applicable to the district court's review." *Id.* at 1161 (cleaned up).

To establish an entitlement to extraordinary injunctive relief, an applicant must make a "clear showing" that the traditional test for such relief is satisfied. *Winter*, 555 U.S. at 22.

ARGUMENT

Diné has not carried its considerable burdens in this case. As the district court thoroughly explained, and as Federal Defendants have further demonstrated, Diné's NEPA claims fail on the merits.

Diné's requested remedies fare no better. Even assuming that Diné could demonstrate a statutory violation, in the circumstances of this case those violations would at most justify a remand to the agency without vacating the approved APDs. Nor has Diné demonstrated an entitlement to the "extraordinary" injunctive relief it seeks, *Winter*, 555 U.S. at 22, both in asking this Court to vacate the approved APDs and, more broadly (and expressly) to enjoin BLM from any further drilling authorizations pending further NEPA proceedings. *See* Pls.' Br. at 57.

I. AT MOST, REMAND OF THE APD APPROVALS WITHOUT VACATUR WOULD BE THE APPROPRIATE REMEDY FOR A NEPA VIOLATION.

In the unlikely event that any NEPA shortcoming were identified, a remand without vacatur of the challenged APD approval decisions is the appropriate remedy in this case. Contrary to Plaintiffs' assertions, *see* Pls.' Br. at 52–54 & n.39, a reviewing court is not required to vacate every agency decision that violates NEPA

except in "unusual . . . circumstances." Rather, under the widely followed framework set forth in *Allied-Signal*, 988 F.2d at 151, courts can, and should, decline to vacate agency actions if certain criteria are met. This is such a case.

A. The APA Confers Authority to Remand Without Vacating The Challenged Permitting Decisions.

While the APA 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 . . . appropriate . . . equitable ground," *id.* § 702. Instead, "[a]lthough the . . . 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 APA is controlled by principles of equity." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). Under those principles, vacatur is not appropriate where "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal*, 988 F.2d at 151.

The Courts of Appeals that have directly addressed the issue—including this Court—have uniformly followed *Allied-Signal*'s lead and confirmed that "the remedy of remand without vacatur is within a reviewing court's equity powers under the APA." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289 (11th Cir. 2015) (quotation and alteration omitted); *see also WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1240 (10th Cir. 2017)

(declining to vacate coal leases notwithstanding NEPA deficiency, and remanding to district court, which "may vacate . . ., or it might fashion some narrower form of injunctive relief based on equitable arguments"); *Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 584 (2nd Cir. 2015); *Cent. Maine Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001); *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1380 (Fed. Cir. 2001); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000); *Espy*, 45 F.3d at 1343. *Cf. Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[I]f the agency has not considered all relevant factors," then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

Diné's appeal to the "purpose" of NEPA, *see* Pls.' Br. at 52, does not restrict the Court's discretion. Instead, it is well settled that remand without vacatur is available to remedy deficiencies in an agency's NEPA review. *See*, *e.g.*, *Black Warrior Riverkeeper*, 781 F.3d at 1289–91; *Idaho ex rel. Idaho Pub. Utils. Comm'n v. Interstate Com. Comm'n*, 35 F.3d 585, 599 (D.C. Cir. 1994); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84–85 (D.D.C. 2019); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 108 (D.D.C. 2017); *Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 362–63 (D.D.C. 2012); *Native Vill. of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Alaska 2010).

Indeed, the cause of action for a NEPA claim is provided solely by the APA, *see*, *e.g.*, *Morris v. U.S. Nuclear Regul. Comm'n*, 598 F.3d 677, 690 (10th Cir. 2010) ("NEPA itself does not provide for a private right of action"); *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002), and is therefore limited to the relief—and the equitable discretion—offered by the APA. Because NEPA is "purely procedural" and "does not impose substantive duties mandating particular results," *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 959 (D.C. Cir. 2000) (quotation omitted); *see also e.g.*, *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) ("Congress in enacting NEPA . . . did not require agencies to elevate environmental concerns over other appropriate considerations."), there is no reason to exempt NEPA's requirements from the remedial discretion that courts routinely apply to violations of a wide variety of environmental and other statutes.[1]

Contrary to Diné's assertion, *see* Pls.' Br. at 53, the Supreme Court's decision in *Department of Homeland Security v. Regents of the University of California*, 140

[1] *See*, *e.g.*, *Alliance for the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152, 1155 (D. Mont. 2019) (remand consistent with "the policy underlying the Endangered Species Act"); *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1190 (D.C. Cir. 2018) (Clean Air Act); *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 451 (D.C. Cir. 2017) (Securities Exchange Act); *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 652 (D.C. Cir. 2016) (Clean Air Act); *Delta Air Lines, Inc. v. Export-Import Bank of the U.S.*, 718 F.3d 974, 978 (D.C. Cir. 2013) (Export-Import Bank Act); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (Federal Power Act); *Apache Corp. v. FERC*, 627 F.3d 1220, 1223 (D.C. Cir. 2010) (Natural Gas Act).

S. Ct. 1891 (2020), does not implicate this well-recognized remedial authority. In that case, the Supreme Court did not consider the availability of remand without vacatur. Rather, the peculiar facts of the case required the Court to determine which of two agency explanations for rescission of the Deferred Action for Childhood Arrivals ("DACA") program—the original explanation provided by the agency when the rescission first issued or a second explanation provided by the agency following a remand ordered by the district court—were properly before the Court in assessing the adequacy of the agency's reasoning under the APA. *See id.* at 1907–09.

In that context, the Court explained that "judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *Id.* at 1907 (quotation omitted). While the agency may properly "elaborate later on" those grounds during a remand, the Court determined that the post-remand DACA rescission explanation was not properly before the Court because it included "separate and independently sufficient reasons" for the rescission that were "nowhere to be found in the" agency's original explanation. *Id.* at 1908.

Limited to identifying the appropriate agency reasoning for purposes of judicial review, *Department of Homeland Security* says nothing about the available remedies once the appropriately identified agency explanation is found insufficient. To the extent the Supreme Court subsequently upheld a district court order vacating

the DACA rescission, it did so only after finding that the agency had "offer[ed] no reason" to support rescission of certain DACA provisions relating to deferral of deportation actions. *Id*. at 1912–13. Here, by contrast, Diné's NEPA challenge rests on an alleged "failure to ***fully discuss*** the environmental effects of" the challenged agency decisions. *Zinke*, 368 F. Supp. 3d at 84 (emphasis added). *See* Pls.' Br. at 25–51. Consistent with *Department of Homeland Security*, on remand the Federal Defendants may properly provide the allegedly absent fuller discussion of their original reasons for finding under NEPA that the challenged permitting decisions would not significantly impact the human environment.[2]

[2] Plaintiffs' reliance on two district court decisions from the Ninth Circuit and a prior decision from the District of New Mexico, *see* Pls.' Br. at 53, fares no better. *Western Watersheds Project v. Zinke*, 441 F. Supp. 3d 1042 (D. Idaho 2020), involved a substantively invalid agency action, *see id*. at 1073, 1083, 1086–87, rather than a purely procedural NEPA violation that can readily be cured with further consideration and explanation, and *WildEarth Guardians v. U.S. Bureau of Land Management*, 457 F. Supp. 3d 880 (D. Mont. 2020), involved an agency failure to conduct an analysis, "rather than . . . a flawed analysis," *id*. at 897. While *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, 326 F. Supp. 3d 1227 (D.N.M. 2018), imposed vacatur with little discussion, the court nevertheless acknowledged the discretionary nature of that remedy, *see id*. at 1256 (under the APA "the Court may" set aside agency action). At any rate, all three cases involved challenges to oil and gas lease sales, not the subsequent drilling stage of development at issue in this case, which introduces enhanced concerns over thwarted lessee reliance and immediate, substantial economic disruption, *see infra* pp. 17–19, 30–38.

B. The Circumstances In This Case Support Remand Without Vacatur.

In light of the Court's equitable authority under the APA, because (1) "there is at least a serious possibility raise that the [agency] will be able to substantiate its decision" on remand, and (2) vacatur will lead to impermissibly disruptive consequences in the interim, at most, a remand is appropriate. *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (quoting *Allied-Signal*, 988 F.2d at 151). *See also*, *e.g.*, *Zinke*, 368 F. Supp. 3d at 84; *Standing Rock*, 282 F. Supp. 3d at 97.

The seriousness of the agency's failure depends upon its ability on remand to cure a defect. *See Zinke*, 368 F. Supp. 3d at 84–85 (declining to vacate leases despite "a serious failing" under NEPA (quotation omitted)); *Standing Rock*, 282 F. Supp. 3d at 102–03 ("[T]he Court's role here is not to determine the wisdom of agency action or to opine on its substantive effects. Instead, it must consider only the [agency's] likelihood on remand of fulfilling NEPA's . . . requirements and justifying its prior decision.") (citation omitted). Here, Diné alleges only discrete procedural violations under NEPA—challenging BLM's depth and manner of describing the impacts of the challenged APD approvals on water resources and air quality in the San Juan Basin, and on greenhouse gas emissions. *See* Pls.' Br. at 26–51. At best, these challenges "consist[] merely of a failure to fully discuss the environmental effects of" the challenged agency actions. *Zinke*, 368 F. Supp. 3d at

84. And BLM's environmental analyses included significant discussions of each environmental impact. *See generally* Fed. Defs.' Br.; Appx. at [AR045036–045106]. Because this is not a situation "in which the agency must redo its analysis from the ground up," *Standing Rock*, 282 F. Supp. 3d at 100 (quotation omitted), and "there is a nontrivial likelihood" that Federal Defendants "could justify" the challenged APD approval decisions, remand without vacatur would be appropriate under the first prong of the *Allied-Signal* test, *Bauer v. DeVos*, 332 F. Supp. 3d 181, 186 (D.D.C. 2018) (quotation omitted). *See also Black Oak Energy*, 725 F.3d at 244 (remanding where "plausible that FERC can redress its failure of explanation on remand while reaching the same result").

That Diné subjectively believes that a remand to BLM without vacatur will be a "pro-forma exercise in support of a predetermined outcome," Pls.' Br. at 52 (quotation omitted), is irrelevant. "In essence, [Plaintiffs are] saying that [they] do[] not trust" BLM to comply with the law, but courts "generally presume that government agencies comply with the law and NEPA creates no exception to this presumption." *WildEarth*, 920 F.3d at 1261. *See also*, *e.g.*, *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies[.]"); *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181, 1186–87 (D.C. Cir. 2012) (noting the "presumption of regularity that agency proceedings enjoy"); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1082 (9th

Cir. 2010) ("[W]e presume that agencies will follow the law."). In other words, Diné's speculative assumption that the Federal Defendants will violate NEPA on remand is both unwarranted and an improper basis for relief. At any rate, this Court may sufficiently address Diné's concerns by directing the Federal Defendants "not to treat remand as an exercise in filling out the proper paperwork *post hoc*." *Standing Rock*, 282 F. Supp. 3d at 109.

Remand without vacatur is adequately justified by Federal Defendants' ability to support their permitting decisions on remand because where, as here, the *Allied-Signal* test's "first prong . . . supports remand without vacatur, the second prong 'is only barely relevant.'" *Standing Rock*, 282 F. Supp. 3d at 108 (quoting *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1049 (D.C. Cir. 2002)). *See also id*. (even where "the disruptive consequences of vacatur might not be great," remand is appropriate if the first prong is satisfied (quotation omitted)); *Air Transp. Ass'n of Am., Inc. v. U.S. Dep't of Agric.*, 317 F. Supp. 3d 385, 392 (D.D.C. 2018) (disruption "legally irrelevant" once first prong satisfied). But the disruptive consequences of vacating the 370 APD approvals at issue further supports remand without vacatur.

Oil and gas leases are both contracts and property, *see Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604, 607–08 (2000); *Union Oil Co. of Cal. v. Morton*, 512 F.2d 743, 747 (9th Cir. 1975), and a court should be loathe, in the absence of a very pressing need, to interfere with either, or with parties'

reasonable investment-backed expectations in these property interests and their development. The APDs challenged by Diné were approved pursuant to EAs completed between 2014 and 2019, with many completed and approved years before this Court's May 2019 decision in *Diné II* resolving Diné's challenge to other San Juan Basin APD approvals on similar grounds. *See* Appx. at [AR045042–43]; *Diné II*, 923 F.3d at 852–59. Over the intervening months and years, most of which passed without legal challenge to these APDs despite ongoing parallel litigation on similar issues, the lessees have expended large sums in oil and gas development preparations or operations in reliance on Federal Defendants' issuance to them of leases and permit approvals.

In these circumstances, ordering vacatur of—or other injunctive relief against, *see infra* pp. 20–38—the challenged permitting decisions would impermissibly wipe out investments; undermine the trust and certainty parties should expect when they participate in government-sponsored development programs and in contracting with the United States; and forestall, if not prevent, the production of domestic energy supplies. *See* API Responsive Br., Declaration of Lem O. Smith (Dkt No. 112-1), ¶¶ 4–10 [Appx. at __]. In short, vacatur would cast a huge shadow forward over the United States as a reliable place to do business and undermine lessees' reasonable reliance interests. *See id.*, ¶¶ 9–10 [Appx. at __]; *cf. Habitat for Horses v. Salazar*, 745 F. Supp. 2d 438, 457 (S.D.N.Y. 2010) (reliance interests in preparing personnel

for planned agency action and retaining independent contractors precluded injunctive relief); *Idaho Power Co. v. FERC*, 312 F.3d 454, 460 (D.C. Cir. 2002) (injury where plaintiff requested "an agency [action] that replaces a certain [contract] outcome with one that contains uncertainty").

Nor could the status quo ante be restored after the Federal Defendants complete the additional NEPA analyses on remand. Preparatory efforts would be lost to those lessees, operators, and service providers that spent the money preparing for and initiating development operations. *See* Smith Decl., ¶ 10 [Appx. at __]. Preexisting and ongoing development operations that rely on challenged permitting decisions would be put in jeopardy, *see* Smith Decl., ¶ 11[Appx. at __], and investments in those operations and in preparing the necessary APD submissions would be lost, *see* Smith Decl., ¶¶ 10–12 [Appx. at __]. Indeed, depending upon the unique physical or environmental circumstances of a given lease or planned development and production operation, preparatory efforts may be lost if delayed indefinitely subject to NEPA remand processes of unknown duration. *See* Smith Decl., ¶ 13 [Appx. at __]. By undermining the ongoing operations, investments, and reliance interests of lessees, operators, and service providers, vacatur would jeopardize critical long-term business plans. *See* Smith Decl., ¶ 14 [Appx. at __]. Invariably, if the relief Diné seeks is granted, operators will be forced to move their

businesses—and the economic benefits they bring to New Mexicans—to jurisdictions with greater regulatory certainty.

These economic disruptions weigh against vacatur. "[I]t is clear that courts . . . have repeatedly considered the economic implications of vacatur—including in cases addressing environmental harms." *Standing Rock*, 282 F. Supp. 3d at 104 (citing cases). In equity, economic 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). *See also*, *e.g.*, *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (hypothetical environmental harm outweighed by "committed" investments); *Wild Rockies*, 375 F. Supp. 3d at 1157 ("economic impact is relevant to the question of whether to vacate on remand"); *Diné III*, 2021 WL 3370899, at *16 ("Both the Tenth Circuit and the Supreme Court . . . have found that economic harm *can* outweigh environmental harm." (citing cases)).

Taken together and individually, both prongs of the *Allied-Signal* test weigh strongly in favor of remand of the challenged permitting decisions without vacatur of the issued leases.

II. DINÉ FAILS TO ESTABLISH AN ENTITLEMENT TO EXTRAORDINARY INJUNCTIVE RELIEF.

Nor has Diné established an entitlement to extraordinary injunctive relief. Diné seeks injunctive relief in the form of both vacatur of BLM's APD approvals—and underlying EAs—and an injunction against future BLM drilling authorizations

pending completion of the remanded NEPA review. *See* Pls.' Br. at 57. Diné has not established the requisite "clear showing" that they meet the traditional test for any such extraordinary relief. *Winter*, 555 U.S. at 22.

A. Diné's Request For Vacatur Constitutes A Request For Injunctive Relief.

At the outset, Diné's requested vacatur is a form of injunctive relief. In the context of Diné's APA claims, both vacatur and an injunction would have the identical effect by invalidating the permitting decisions through which Federal Defendants approved the APDs. Where, as here, "the practical effect of the two forms of relief will be virtually identical," the propriety of the relief "should be judged by essentially the same standards." *PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) (quoting *Samuels v. Mackell*, 401 U.S. 66, 71–73 (1971)).

Nor is it clear that the APA's indication that the Court "shall . . . set aside" an unlawful agency action addresses remedies. The APA uses that language only in a section devoted to defining the "Scope of review" under the APA; in other words, the standard for reviewing the challenged agency action, and whether the court must follow the agency's decision in a given case. *See* 5 U.S.C. § 706. By contrast, the APA refers to available remedies in Section 703, which defines the "[f]orm . . . of proceeding" for APA claims. Among other things, Section 703 provides that the form of proceeding under the APA "is the special statutory review proceeding

relevant to the subject matter in a court specified by statute or," as relevant here, "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . ., in a court of competent jurisdiction." 5 U.S.C. § 703.

Requiring a plaintiff to satisfy the traditional requirements for extraordinary injunctive relief thus conforms with both the APA's contemplated forms of relief and its express preservation of "the power or duty of the court to . . . deny relief on any other appropriate . . . equitable ground." 5 U.S.C. § 702. Accordingly, federal courts—including this Court—consistently consider vacatur to be "tantamount to a request for injunctive relief." *PGBA*, 389 F.3d at 1228. *See also*, *e.g.*, *WildEarth*, 870 F.3d at 1239 ("Vacatur of agency action is a . . . form of injunctive relief."); *ForestKeeper v. La Price*, 270 F. Supp. 3d 1182, 1226 (E.D. Cal. 2017) (explaining that vacatur "has the effect of an injunction, and [plaintiff] therefore 'must establish'—with a 'clear showing'—that it is entitled to such extraordinary relief" (quoting *Winter*, 555 U.S. at 20, 22)).[3]

B. Diné Fails To Establish An Entitlement To Injunctive Relief.

As the Supreme Court has made clear, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and

[3] *Diné II* is not to the contrary. *See* Pl.'s Br. at 53–54. Rather, the Court simply declined to impose additional injunctive relief beyond vacatur of a limited number of specific EAs. *See Diné II*, 923 F.3d at 859.

all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, because "[a]n injunction is a matter of equitable discretion[,] it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. At bottom, "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.*, 480 U.S. at 542. *See also*, *e.g.*, *Winter*, 555 U.S. at 32 ("[T]he balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent."); *Romero-Barcelo*, 456 U.S. at 312 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

Here, Diné's claims of speculative environmental injury cannot offset the significant harms to lessees and the local, state, and national economies immediately threatened by the requested injunctive relief. In other words, Diné has failed to carry its burden of establishing that the balance of hardships or public interest clearly support an order vacating BLM's challenged approvals of APDs, or enjoining future drilling authorizations. *See*, *e.g.*, *Winter*, 555 U.S. at 22; *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (applicant for injunctive relief must carry burden on all injunction factors).

1. Diné's Alleged Injuries Are Speculative.

As an initial matter, Diné has not made the requisite "clear showing" of irreparable harm because, among other things, many of the operations considered in the challenged EAs have either not yet been approved through an APD or have already been completed. None of those approvals can cause Diné any certain, prospective harm. *See*, *e.g.*, *Diné III*, 2021 WL 3370899, at *7–8.

Moreover, the EAs underlying Diné's lawsuit were issued between 2014 and 2019—during ongoing litigation on similar issues in *Diné II*. *See supra* pp. 5–6; Order Regarding Setting of Hearing on Motion for Injunctive Relief (Dkt. No. 60), at 4 [Appx. at __] (noting that the 32 EAs originally challenged in this lawsuit "were issued prior to the district court's final order in [*Diné II*], but were not included in any of the several pleading amendments in that case"). Diné's unreasonable and unexplained delay in seeking extraordinary relief "weighs against a finding of irreparable harm," *Air Transp. Ass'n of Am., Inc. v. Export-Import Bank of the U.S.*, 840 F. Supp. 2d 327, 338 (D.D.C. 2012), particularly where, as here, lessees have proceeded with APD preparations and operations in the interim. *See supra* pp. 17–19. *See also*, *e.g.*, *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Social & Rehab. Servs.*, 31 F.3d 1536, 1543–44 (10th Cir. 1994) ("delay in seeking preliminary relief cuts against finding irreparable injury") (quotation omitted); *Am. Ass'n of People With Disabilities v. Herrera*, 580 F. Supp. 2d 1195, 1246 (D.N.M. 2008) (three-year

"delay in seeking relief . . . considerably undercuts their allegation of irreparable harm"); *Newdow v. Bush*, 355 F. Supp. 2d 265, 292 (D.D.C. 2005) ("unexcused delay in seeking extraordinary injunctive relief may be grounds for denial because such delay implies a lack of urgency and irreparable harm"); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 44 (D.D.C. 2000) (delay of two months "militates against a finding of irreparable harm").

Moreover, consistent with Diné's members' averments, *see* Pls.' Br. at 54–55, that the San Juan Basin is "currently impacted by . . . oil and gas development," *see* Declaration of Michael Eisenfeld (Dkt. No. 110-1), ¶ 2 [Appx. at __]; *see also id.*, ¶ 2 [Appx. at __] (alleging that BLM "started allowing new shale well drilling" in 2010); *id.*, ¶ 3 [Appx. at __] (since 2010 declarant "visited over 150 . . . wells being drilled and developed"); *id.*, ¶ 9 [Appx. at __] ("My experiences in the area have already been compromised" by development operations),[4] the challenged

[4] *See also*, *e.g.*, Declaration of Sonia Grant (Dkt. No. 110-2), ¶ 9 [Appx. at __] ("Since I began visiting the Greater Chaco region in 2015, I have noticed that it has become more industrialized."); *id.*, ¶ 10 [Appx. at __] ("I have seen active drilling, flaring, trucks transporting fluids and sand, wastewater storage, pipeline construction, road construction, and other industrial activities."); Declaration of Kendra Pinto (Dkt. No. 110-4), ¶ 6 [Appx. at __] ("The new wave of fracking really started to impact the area in 2013."); *id.*, ¶ 7 [Appx. at __] ("Any time I leave my house I see well sites and other fracking activity."); *id.*, ¶ 10 [Appx. at __] ("There is no escaping the impacts of this fracking."); Declaration of Jeremy Nichols (Dkt. No. 110-6), ¶ 7 [Appx. at __] ("By 2014, there were [drilling] rigs seemingly all over the place . . . ."); *id.*, ¶ 8 [Appx. at __] ("This development has greatly altered the landscape . . . ."); *id.*, ¶ 9 & Map 1 (identifying pre-existing wells).

APDs must be considered in the overall context of oil and gas development in the San Juan Basin. The Basin has been under active oil and gas development for more than 60 years, with more than 23,000 active wells, *see*, *e.g.*, Fed. Defs.' Opp. to Mot. for Prelim. Inj., Declaration of Mark Matthews (Dkt. No. 44-1), ¶¶ 21–22 [Appx. at __], and nearly all of the Basin's wells have been horizontally drilled and hydraulically fractured for decades, *see id.* at ¶¶ 36–39 [Appx. at __]. *See also*, *e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1280 (D.C. Cir. 2012) ("[A] plaintiff who seeks prospective injunctive relief cannot establish standing based on past harm alone.").

Moreover, all drilling operations (whenever approved) are subject to extensive New Mexico regulations that are designed to ensure the safety of all wells on federal, state, and Indian lands. *See*, *e.g.*, N.M. Admin Code § 19.15.7.11 (pre-drilling filing requirements); *id.* §§ 19.15.7.14(D), 19.15.16.10, 19.15.16.11 (well casing and cementing reporting); *id.* § 19.15.26.10 (mechanical integrity testing); *id.* § 19.15.26.11(A) (annulus pressure testing); *id.* § 19.15.16.19 (fluid disclosure requirements).

Indeed, New Mexico regulations impose particular requirements for both horizontal drilling and hydraulic fracturing—the principal bases of Diné's allegations of harm. Among other things:

- An operator must submit a written application to directionally drill a well bore, *see id.* § 19.15.16.14(B);

- A horizontal well must satisfy additional setback requirements, *see id.* § 19.15.16.15;
- An operator must take remedial action if there are indications that hydraulic fracturing operations injure the producing formation and may create underground waste or contaminate fresh water, *see id.* § 19.15.16.17;
- An operator must signify whether a well has been hydraulically fractured, and submit a chemical disclosure, *id.* § 19.15.16.19;
- An operator must obtain a permit, subject to public objection, before injecting any fluid into a formation for enhanced recovery, and must satisfy specific casing, cementing, pressure testing, and monitoring requirements, *see id.* § 19.15.26.8–13.

These mitigation measures further greatly diminish Diné's attempted showing of harm qualifying for extraordinary relief. *See*, *e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163–64 (2010) (government limitations on future actions may reduce or eliminate claimed injury); *In Def. of Animals v. U.S. Dep't of the Interior,* 737 F. Supp. 2d 1125, 1138 (E.D. Cal. 2010) (Government measures designed to mitigate harm undercut plaintiff's claim of irreparable 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).

Viewed in this full context of existing development and mitigation, Diné's assertions of increased environmental injury from potential future drilling authorized by the challenged APDs are, at best, speculative and are therefore insufficient to establish irreparable harm. *See*, *e.g.*, *id.* 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); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) ("Speculative injury is not sufficient [to make out a clear showing of irreparable harm]; there must be more than an unfounded fear on the part of the applicant.").

2. The Balance Of Equities And Public Interest Tip Strongly Against Injunctive Relief.

Balanced against Diné's speculative claimed injuries, the private and public interests tip strongly against injunctive relief. Diné suggests that an alleged NEPA violation presumptively trumps any other concerns. *See* Pls.' Br. at 55–56. Diné is wrong. Even where a NEPA violation is established, the resulting alleged environmental harm may be outweighed by competing interests. *See Winter*, 555 U.S. 22–32 & n.5 (plaintiff not entitled to injunction where plaintiff failed to establish balance of equities or public interest ***even if*** Court assumed likelihood of success on underlying merits of NEPA claim and the existence of irreparable harm).

Through the Mineral Leasing Act, Congress has made clear the national interest in "the orderly development of the oil and gas deposits in the publicly owned lands of the United States through private enterprise," *Harvey*, 384 F.2d at 885

(quotation omitted), for a reasonable financial return to the public, *Cal. Co. v. Udall*, 296 F.2d 384, 388 (D.C. Cir. 1961). *See also* 30 U.S.C. § 181. As part of the implementation of this wider public interest, the local, state, and national economies, as well as private operators, will suffer immediate and significant economic harm upon issuance of Diné's requested injunction against the challenged APDs and suspension of all authorized operations—to say nothing of the vast harms that will follow from enjoining future drilling authorizations.[5]

Contrary to Diné's assertion, *see* Pls.' Br. at 55–56, an injunction's potential to cause economic harm may weigh heavily in the balance in environmental cases. As this Court has explained,

> The Supreme Court has recognized that financial harm can be weighed against environmental harm—and in certain instances outweigh it . . . . Indeed, we too have recognized the appropriateness of weighing financial harm against environmental harm. *See Wilderness Workshop*, 531 F.3d at 1231 (concluding that the district court did not abuse its discretion in according greater weight in the balancing of harms to the

[5] Diné's cited authorities, *see* Pls.' Br. at 56, do not undermine consideration of these significant interests. To the contrary, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138–39 (9th. Cir. 2011), confirmed that "[t]he effect on the health of the local economy is a proper consideration in the public interest analysis," but simply found that effect insufficient to outweigh environmental concerns on the facts presented in that case because the injunction threatened only "18 to 26 temporary jobs" that would end with the challenged project in any event. Here, much weightier economic impacts are implicated. *See supra* pp. 17–19; *infra* pp. 30–38. While the court in *Colorado Wild v. U.S. Forest Service*, 299 F. Supp. 2d 1184, 1190–91 (D. Colo. 2004), focused—without citation—upon environmental interests, it only vaguely—and without citation—alludes to unidentified economic considerations raised to balance those concerns. Again, that is not the case here.

public's interest in gas production and also certain financial interests, over the threatened environmental injuries).

Bostick, 539 F. App'x. at 892; *see also 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.").

For this reason, the district court properly relied upon such economic disruptions to state, federal, and private economic interests in concluding that Diné "failed to show that the balance of equities tips in their favor." *Diné III*, 2021 WL 3370899, at *17. *See also id.* ("Defendants . . . have demonstrated a magnitude of potential loss, both economic and social" that outweighs Diné's "speculative" and "mundane" harms).

a) Disruptions To The State And Local Economies Weigh Against Extraordinary Injunctive Relief.

In the balance of competing interests, "courts 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, oil, natural gas, and

refined petroleum products are critical components of the United States economy, creating and supporting over 10 million U.S. jobs and nearly 8% of the U.S. economy. *See* API Responsive Br., Declaration of Dr. Geoffrey Brand (Dkt. No. 112-2), ¶ 8 [Appx. at __].[6] 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. Brand Decl., ¶ 8 [Appx. at __]. Thus, development of domestic oil and natural gas reserves such as those in the Mancos Shale formation contributes significantly to economic growth, U.S. energy independence, and national security. Brand Decl., ¶ 8 [Appx. at __].

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[6] Although the APA restricts this Court's consideration of the merits of Diné's NEPA claims to the administrative record developed by the BLM, *see Camp v. Pitts*, 411 U.S. 138, 142 (1973), this Court may consider extra-record declarations and evidence in determining whether injunctive relief is appropriate. Indeed, because "[t]he issue of injunctive relief is generally not raised in the administrative proceedings . . ., there usually will be no administrative record developed on these issues. Thus, it will often be necessary for a court to take new evidence to fully evaluate claims of irreparable harm and claims that the issuance of the injunction is in the public interest." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) (quotation and alterations omitted). *See also*, *e.g.*, *Nw. Env't Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1300 (D. Or. 2011) ("Courts may also consider extra-record evidence in determining whether a party will suffer irreparable harm in the absence of injunctive relief.").

Moreover, "[t]he oil-and-gas industry is an enormous job creator and economic engine in New Mexico." *Diné I*, 2015 WL 4997207, at *50. A wide array of businesses are involved in conducting and supporting oil and gas development operations in New Mexico. In general, this web of business starts with "operators," the companies who acquire land, devise well design plans, and, assuming successful construction of an economically viable well, reclaim the land and produce and sell the oil and gas over the decades-long life of the well. *See* Brand Decl., ¶ 9 [Appx. at __]. The operators employ "service companies," which are responsible for drilling, constructing, fracturing, and completing the wells that operators ultimately seek to develop. *See* Brand Decl., ¶¶ 9, 11 [Appx. at __]. And they include the companies that manufacture and distribute equipment used in upstream development, such as producers of steel casing and cement used in every single well. *See* Brand Decl., ¶ 11 [Appx. at __].

In addition, a variety of other industries are necessarily affected by oil and gas operations that occur near their places of business. *See* Brand Decl., ¶ 12 [Appx. at __]. These include restaurants, hotels, real estate, retail, and a host of other products and services required to maintain and support the significant economic and personnel requirements of the oil and gas industry. *See* Brand Decl., ¶ 12 [Appx. at __]. Together, these vendors to the industry—service companies, equipment makers and distributers, and other support firms—comprise over 475 individual businesses

in New Mexico alone. *See* Brand Decl., ¶ 13 [Appx. at __]; American Petroleum Institute, *API Onshore Oil and Gas Vendor Identification Survey for New Mexico*, at 2–6, https://www.api.org/~/media/files/policy/jobs/oil-gas-stimulate-jobs-economic-growth/map/new-mexico.pdf (2014) (last visited Jan. 19, 2022). This figure represents just some of the industry vendors in New Mexico.

The oil and gas industry thus supports significant individual employment in New Mexico. In FY2018, oil and gas production contributed an estimated 18,378 jobs to New Mexico's economy. *See* Brand Decl., ¶ 18 [Appx. at __]; New Mexico Tax Research Institute, *State and Local Revenue Impacts of the Oil and Gas industry, Fiscal Year 2018 Update* (hereinafter, "Institute Report"), at 6, https://cdn.ymaws.com/www.nmtri.org/resource/resmgr/FY18_NMTRI_OGAS_Fiscal_ Impac.pdf (2018) (last visited Jan. 19, 2022). Those are high paying jobs, providing annual average wages to workers of $78,194. *See id.*; Brand Decl., ¶ 18 [Appx. at __].

All of these local business operations are threatened by Diné's requested injunctive relief. Moreover, Diné's broader request—not specifically tied to the 370 APDs at issue here or their related leases—that the Court "enjoin BLM from any further drilling authorizations" during a NEPA remand, Pls.' Br. at 57, effectively seeks to shut down approvals for any new oil and gas operations.

The localized economic injury surrounding the challenged APDs weighs heavily against injunctive relief. *See Del. Dep't of Nat. Res. & Env't Control v. U.S. Army Corps of Eng'rs*, 681 F. 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"); *Diné I*, 2015 WL 4997207, at *50 ("[S]hutting down portions of" the oil and gas industry in New Mexico through injunctive relief "based on speculation about unproven environmental harms is against the public interest.").

The State of New Mexico's broader economic and public interests further tilt the scales against injunctive relief. New Mexico is one of the country's largest onshore producers of oil and natural gas. According to the Department of the Interior's Office of Natural Resources Revenue ("ONRR"), in Fiscal Year 2019, approximately 162 million barrels of oil and 1,039 billion cubic feet of natural gas were produced in New Mexico on onshore lands managed by the federal government. *See* Brand Decl., ¶ 15 [Appx. at __]; *see also* ONRR, U.S. Dep't of the Interior Natural Resources Revenue Production Data 2020, https://revenuedata.doi.gov/?tab=tab-production (Production by Location: New Mexico) (indicating increased production in calendar year 2020, including approximately 211 million barrels of oil and 1,180 billion cubic feet of natural gas in (last visited Jan. 19, 2022)). Approximately 53% of the state's oil production,

and 63% of its natural gas production, comes from federally managed lands. *See* Brand Decl., ¶ 15 [Appx. at __]; *see also* Moss Adams, *New Mexico: A Comparative Analysis of The Oil & Gas Industry's Fiscal Contribution to State Governments* (hereinafter, "Comparative Analysis"), at 11 (2019), https://nm4ep.com/wp-content/uploads/2019/01/18-OAG-1654-NM-Report_PP7-compressed.pdf (last visited Jan. 19, 2022).

New Mexico state and local governments receive a larger share of total oil and gas production value through royalty earnings than any other oil and gas producing State. *See* Brand Decl., ¶ 16 [Appx. at __]; Comparative Analysis at 8. For example, New Mexico receives more than 18% of all revenues collected as federal royalties, rents and bonuses from oil and gas leasing and production on federal onshore lands, which amounted to over $634 million in FY2018. *See* Brand Decl., ¶ 16 [Appx. at __] (citing ONRR, U.S. Dep't of the Interior, *Natural Resources Revenue Data*, https://revenuedata.doi.gov/explore/NM/#production).

State and local government operations are heavily dependent on the oil industry. In FY2018, overall "[r]evenue attributable to the oil and gas industry comprised $2.2 billion . . . or 32.3 percent of total State General Fund Recurring revenue." Institute Report at 1. *See also* Brand Decl., ¶ 16 [Appx. at __]. In addition to its contributions to the State of New Mexico's General Fund, "oil and gas revenue provided an additional total of $1.55 billion to State and Local budgets" in FY 2018.

Id. *See also* Brand Decl., ¶ 16 [Appx. at __]. These oil and gas contributions to the State and local budget flow from a combination of royalties and various taxes, including personal income and corporate taxes. *See id*. at 3–6; Brand Decl., ¶ 16 [Appx. at __].

The State and local revenues derived from oil and gas production in New Mexico contribute funding to important State and local programs. *See* Brand Decl., ¶ 17 [Appx. at __]. Among other things, in FY2018, revenues attributable to the oil and gas industry provided $822 million toward public education in New Mexico, $240 million toward higher education, and $290 million toward health and human services. *See* Institute Report at 1; Brand Decl., ¶ 17 [Appx. at __]. These are significant contributions to New Mexico public services; indeed, the oil and gas industry's contribution to public education amounted to 32.3% of all distributions to state public schools. *See id*. at 7; Brand Decl., 17 [Appx. at __].[7]

Because New Mexico derives such significant economic value from oil and gas production, *see supra*, no other producing State in the Nation "[e]xperiences the same level of exposure" risk to changes in the oil and gas market. Brand Decl., ¶ 19 [Appx. at __] (citation omitted). Thus, the relief Diné seeks would have devastating consequences for the State of New Mexico. It would immediately and irreparably

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[7] In FY2018, the oil and natural gas industry also contributed 96.7% of the more than $586 million in revenues paid into the New Mexico Land Grant Permanent Fund. *See id*. at 3; Brand Decl., ¶ 17 [Appx. at __].

affect hundreds of local businesses, thousands of jobs, and billions of dollars in economic activity, including millions in vital tax revenues. The effects would be felt far beyond the oil and gas industry and reach into the real estate, hospitality, retail, and other sectors. Brand Decl., ¶ 21 [Appx. at __].

b) Economic Disruptions To The Federal Government And The Oil And Gas Industry Further Weigh Against Extraordinary Injunctive Relief.

For industry's part, onshore oil and gas development requires billions of dollars of investments. *See* Brand Decl., ¶ 6 [Appx. at __]. To obtain and develop leases, oil and gas companies pay significant sums to the Government in the form of lease sale bonuses and royalties from subsequent oil and gas production. In 2021 alone, the Government received more than $2 billion in revenue from onshore oil and gas leasing and production in New Mexico.[8] Diné's requested injunctive relief against development operations implicated by the APDs and EAs challenged in this suit threaten this continued revenue to the public fisc.

Moreover, API's members have already spent hundreds of millions of dollars developing the Mancos Shale. Brand Decl., ¶ 20 [Appx. at __]. If the challenged APDs are vacated and future drilling authorizations are enjoined during a NEPA

[8] *See* ONRR, U.S. Dep't of the Interior, *Natural Resources Revenue Data 2019*, https://revenuedata.doi.gov/explore?commodity=Oil%2CGas%2CNatural%20gas%20liquids&dataType=Revenue&location=NF%2CNA%2CNM&mapLevel=State&offshoreRegions=false&period=Fiscal%20Year&year=2021 (last visited Jan. 19, 2022).

remand to BLM, operators will be foreclosed from certain operations indefinitely, *see supra*, thereby damaging the operators' contractual and rational reliance interests as well as the future revenue on which ongoing industry operations, employment, and tax revenues are based. *See* Smith Decl., ¶¶ 4–14 [Appx. at __]; *Habitat for Horses*, 745 F. Supp. 2d at 457; *Idaho Power*, 312 F.3d at 460 (finding injury where plaintiff requested "an agency [action] that replaces a certain [contract] outcome with one that contains uncertainty").

* * *

Taken together, the injuries to the public and private interests heavily weight the balance of harms against the issuance of Diné's requested relief. *See Winter*, 555 U.S. at 23–27 (aggregating harm to non-movants with public interest in denying injunctive relief). Having failed to make a clear showing of their entitlement, Diné's request for extraordinary injunctive relief should be denied.

CONCLUSION

For the foregoing reasons, Diné's appeal should be denied.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

API believes that oral argument will assist the Court in understanding the lengthy and complex record on appeal, and in resolving the numerous issues raised by the appeal. Accordingly, API respectfully requests oral argument under Tenth Circuit Rule 28.2(C)(2).

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, and served via the Court's CM/ECF system upon all counsel of record.

March 2, 2022

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,437 words, excluding the parts of the brief exempted by Fed. R. App. 32(f) and 10th Cir. R. 32(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Times New Roman font.

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