No. 21-2116

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.*,
Intervenor Defendants-Appellees.

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

DJR ENERGY HOLDINGS, LLC'S and SIMCOE LLC'S UNCITED PRELIMINARY RESPONSE BRIEF (DEFERRED APPENDIX APPEAL)

Hadassah M. Reimer
HOLLAND & HART LLP
645 S. Cache St., Suite 100
Post Office Box 68
Jackson, WY 83001
Phone: (307) 739-9741
Fax: (307) 739-8175
hmreimer@hollandhart.com

John F. Shepherd
Tina R. Van Bockern
HOLLAND & HART LLP
555 Seventeenth Street
Suite 3200
Denver, CO 80202
Phone: (303) 295-8000
Fax: (303) 295-8261
jshepherd@hollandhart.com
trvanbockern@hollandhart.com

Robert J. Sutphin
HOLLAND & HART LLP
110 North Guadalupe, Suite 1
Post Office Box 2208
Santa Fe, NM 87501
Phone: (505) 988-4421
Fax: (505) 983-6043
rsutphin@hollandhart.com

Attorneys for Intervenor Defendants-Appellees
DJR Energy Holdings, LLC and SIMCOE LLC

Oral Argument Requested

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, DJR Energy Holdings, LLC and SIMCOE LLC provide the following corporate disclosure statements:

- DJR Energy Holdings, LLC has no parent corporation and no publicly traded company owns more than 10% of DJR Energy Holdings, LLC.
- SIMCOE LLC has no parent corporation and no publicly traded company owns more than 10% of SIMCOE LLC.

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

CASES

STATUTES

RULES AND REGULATIONS

OTHER AUTHORITIES

GLOSSARY OF TERMS

APA	Administrative Procedure Act
APD	Application for Permit to Drill
API	American Petroleum Institute
BLM	Bureau of Land Management
Diné	Appellants Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians
DJR	DJR Energy Holdings, LLC
EA	Environmental Assessment
Federal Defendants	The Secretary of the Interior, BLM, the Acting New Mexico State Director of BLM, and the Acting Field Manager of BLM's Farmington Field Office
Mancos Shale	Mancos Shale/Gallup formations in the San Juan Basin of northwestern New Mexico
NEPA	National Environmental Policy Act
SIMCOE	SIMCOE LLC

STATEMENT OF PRIOR OR RELATED APPEALS

Pursuant to 10th Circuit Rule 28.2(C)(3), DJR Energy Holdings, LLC and SIMCOE LLC state that this case is related to prior appeal No. 15-2130, in which Diné appealed the district court's decision, 2015 U.S. Dist. LEXIS 109986 (D.N.M. Aug. 14, 2015), denying Diné's motion for preliminary injunction. This Court affirmed the district court's decision on appeal, holding that Diné had not demonstrated a reasonable likelihood of success on the merits. *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016).

This case is also related to prior appeal No. 18-2089, in which Diné appealed the district court's decision on the merits in *Diné Citizens Against Ruining Our Environment v. Bernhardt*, 312 F. Supp. 3d 1031 (D. N.M. 2018). This Court affirmed in part and reversed in part the district court's judgment and remanded to the district court with instructions. *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).

INTRODUCTION

In their latest attempt to halt the development of oil and gas in the Mancos Shale/Gallup formations ("Mancos Shale") in the San Juan Basin of northwestern New Mexico, Appellants Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Sierra Club, and WildEarth Guardians (collectively referred to herein as, "Diné") return to this Court for the third time seeking to invalidate environmental assessments ("EAs") associated with hundreds of oil and gas wells approved by the Bureau of Land Management ("BLM") between 2014 and 2019. In many cases, Diné could have, but failed to, challenge the approved drilling permits for these oil and gas wells in the previous iteration of Diné's challenge to Mancos Shale development. In 2019, Diné's previous challenge culminated in this Court's remand of just five out of 122 EAs on narrow grounds.

Now, after BLM voluntarily undertook the very environmental review that Diné claims was missing from the 2014-2019 decisions at issue here, Diné brings this belated lawsuit, claiming the Court should ignore BLM's supplemental analysis and strike down the approved applications for permits to drill ("APDs") authorized up to eight years ago. But, as detailed by the Federal Defendants, the district court correctly concluded that Diné's National Environmental Policy Act ("NEPA") claims have no merit. BLM's NEPA process was thorough and the court's decision should be affirmed in all respects. DJR Energy Holdings, LLC

("DJR") and SIMCOE, LLC ("SIMCOE") adopt the briefing on the merits as provided by the Federal Defendants.

Though the record supports BLM's NEPA review, Intervenors DJR and SIMCOE submit this Response Brief to address the appropriate remedy in the event this Court identifies a NEPA procedural error. Diné seeks to vacate all APD approvals issued under the challenged EAs and to suspend and enjoin BLM from approving any pending or future drilling permits that allow for horizonal drilling or hydraulic fracturing in the Mancos Shale formation. Op. Br. at 52-57; *see also* App. at [ECF_No._95], Relief Requested, ¶ C. DJR and SIMCOE together have obtained the approval of approximately fifty APDs in this appeal, and, thus, have distinct and important interests that merit this Court's consideration.

Should Diné prevail on any of their NEPA claims, neither vacatur of the approved APDs nor the issuance of an injunction is warranted. If granted, the sweeping and drastic remedies of vacatur and injunctive relief would not only preclude drilling of new wells but could require DJR and SIMCOE to stop production by shutting in wells that have been producing for many years. In turn, their investment of hundreds of millions of dollars in their leases would be jeopardized, production revenues would be lost, and ongoing development would be left in limbo, contributing to large-scale impacts on local economies and Indian allottee mineral owners.

STATEMENT OF THE CASE

Consistent with Fed. R. App. P. 28(i), DJR and SIMCOE adopt the Statement of the Case in the American Petroleum Institute's ("API") Responsive Brief (at 2–6), and add the following facts regarding the development of oil and gas resources by DJR and SIMCOE consistent with the APD approvals at issue in this litigation. In order to provide the Court with up-to-date information for the purpose of determining an appropriate remedy (should this Court identify a NEPA violation), DJR and SIMCOE submitted along with this Response Brief a Motion to Supplement the Record on Appeal with the supplemental affidavits of Mr. Donald F. Koenig (hereinafter, "Koenig Supp. Aff.") and Mr. Joseph Zimmerman (hereinafter, "Zimmerman Supp. Aff."). The supplemental affidavits apprise the Court of material changes to DJR's and SIMCOE's operations since DJR and SIMCOE submitted their merits briefing to the district court and the related harms associated with Diné's requested relief..[1]

[1] In weighing equitable factors for injunctive relief, courts are not limited to the administrative record. *See, e.g., WildEarth Guardians v. BLM*, 870 F.3d 1222, 1240 (10th Cir. 2017) (considering extra-record evidence regarding current status of mining operations on federal coal leases in fashioning appropriate remedy); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (considering extra-record evidence in relation to request for injunctive relief), *abrogated on other grounds by Monsanto v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) ("there usually will be no administrative record developed" regarding requests for injunctive relief and, thus, "it will often be necessary for a court to take new evidence to fully evaluate claims" for such relief) (internal quotation

Diné seeks vacatur of the EAs associated with at least thirty-eight approved APDs for DJR and at least fourteen approved APDs for SIMCOE. App. at [ECF_No._113-1], Koenig Aff. ¶ 3; App. at [ECF_No._113-2], Zimmerman Aff. ¶ 4. Collectively, DJR and SIMCOE have invested several hundred million dollars in developing the oil and gas wells subject to the litigation, twenty-eight of which are, or will soon be, producing substantial quantities of oil and gas and generating important revenues for DJR and SIMCOE and royalties for the mineral owners. App. at [ECF_No._113-1], Koenig Aff. ¶¶ 3, 5, 6, 10 (DJR has eighteen wells producing oil); App. at [ECF_No._113-2], Zimmerman Aff. ¶¶ 4, 6–7 (SIMCOE has six wells producing natural gas); Koenig Supp. Aff. ¶ 2 (DJR has drilled five additional wells, four of which will soon be producing oil). DJR and SIMCOE have both developed horizontal wells in the Mancos Shale formation, although DJR's focus has been oil production in the southern portion of the Mancos Shale and SIMCOE has concentrated its efforts on developing natural gas resources in the northern portion of the formation.[2] App. at [ECF_No._113-1], Koenig Aff. ¶ 2

---

marks omitted); *see also* API Br. at 31 n.6. Should this Court deny DJR and SIMCOE's Motion to Supplement the Record on Appeal, DJR and SIMCOE refer the Court to the affidavits that were submitted in the district court proceedings which contain similar, but not as current information regarding well status, drilling plans, and monetary impacts of vacatur or an injunction. *See* App. at [ECF_No._113-1]; App. at [ECF_No._113-2].

[2] As noted by Federal Defendants, combining the technology of horizontal drilling and multi-stage hydraulic fracturing means fewer wells are needed to develop the

(Map Attachment); App. at [ECF_No._113-2], Zimmerman Aff. ¶¶ 2-3 (Map Attachment).

Many of the wells authorized under the challenged APDs were approved and drilled years ago, meaning the environmental impacts associated with drilling—*i.e.*, water use for well completions and air emissions associated with hydraulic fracturing, venting, and flaring—have already occurred. App. at [ECF_No._113-1], Koenig Aff. ¶ 3; App. at [ECF_No._113-2], Zimmerman Aff. ¶ 4. Moreover, while Diné paints with a broad brush and makes sweeping assertions about impacts associated with development of the Mancos Shale formation generally (*see* Op. Br. at 12-14, 54-55), no two wells are alike and the EAs for each APD approval highlight the site-specific differences in operations and impacts.

For instance, unlike the Mancos Shale oil wells, SIMCOE's natural gas wells are located in the northern portion of the San Juan Basin approximately sixty miles from Chaco Culture National Historic Park. App. at [ECF_No._113-2], Zimmerman Aff. ¶¶ 2-3 (Map Attachment). These wells were drilled using surface water purchased from the Navajo Nation as the owner of Navajo Agricultural

---

resource. App. at [ECF_No._111_at_4]. Horizontal drilling allows operators to simultaneously improve production per well and decrease overall environmental impacts because one horizontal well can replace numerous vertical wells. *Id*. In addition, multiple horizontal wells can be drilled from the same well pad, further reducing surface disturbance. *See, e.g.*, App. at [AR066612; 066617] (the Venado Canyon Unit EA proposes to drill four wells from a single well pad).

Products Industry and piped to the well locations to avoid unnecessary truck traffic. App. at [ECF_No._113-2], Zimmerman Aff. ¶¶ 2-3; App. at [AR058180-81]. The "dry gas" wells produce no liquid hydrocarbons, such as oil or condensate that require liquid storage tanks and associated emissions. App. at [ECF_No._113-2], Zimmerman Aff. ¶ 3. Only small amounts of water are produced, and those are disposed of through underground injections. *Id*.; App. at [AR058189-90]. Further, all produced gas is transmitted by pipeline to market, minimizing truck traffic. App. at [ECF_No._113-2], Zimmerman Aff. ¶ 3.

In addition to DJR's and SIMCOE's twenty-eight existing producing wells, DJR holds approximately 15 approved APDs that are challenged in this case where the wells have yet to be drilled. Koenig Supp. Aff. ¶ 2. Moreover, DJR plans to drill up to 63 horizontal Mancos Shale oil wells in 2022 and 76 in 2023, including four of the challenged wells in 2022 and two of the challenged wells in 2023. *Id*. ¶ 5. If drilling is foreclosed on the approved locations and any other new locations, the impacts to DJR will be severe.

SUMMARY OF ARGUMENT

The district court properly ruled that BLM fulfilled its NEPA environmental review obligations. Diné has failed to show that BLM's decisions, which are entitled to a presumption of validity, were arbitrary and capricious.

1. BLM complied with its obligations under NEPA.

2. Even assuming arguendo that Diné has established a violation of NEPA, they are not entitled to the equitable relief they seek, including vacatur and permanent injunction. As detailed below, the circumstances of this case do not warrant vacatur of agency action considering both the relative insignificance of the alleged flaws in the broader context of BLM's detailed environmental review and the serious consequences that would stem from vacatur of the APD approvals. Further, even in environmental cases, the extraordinary remedy of permanent injunction is to be imposed only in strictly circumscribed situations and on a clear showing that the applicant satisfies the four traditional equitable factors. Diné falls well short of the requisite showing.

STANDARD OF REVIEW

DJR and SIMCOE agree with the Standard of Review set forth by Diné and add: the standard of review in an Administrative Procedure Act ("APA") case "is 'very deferential' to the agency's determination, and a presumption of validity attaches to the agency action such that the burden of proof rests with the party

challenging it." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1197 (10th Cir. 2014) (citation omitted).

ARGUMENT

I. Diné Fails To Satisfy Their Burden For Vacatur of APD Approvals or the Issuance of Injunctive Relief.

Even assuming that BLM's approval of APDs for the Mancos Shale wells violated NEPA, Diné has failed to establish that they are entitled to either vacatur of the challenged APD approvals or injunctive relief requiring the cessation of ongoing production operations and foreclosing future well authorizations.[3] *See Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (setting forth standard for vacatur of agency action); *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22-32, 31 n.5 (2008) (the injunctive relief sought was inappropriate "even if plaintiffs [were] correct on the underlying merits" of their NEPA claim, on examining "the balance of equities and consideration of the public interest"). At most, any violation of NEPA warrants a narrowly tailored remand to remedy only those procedural deficiencies identified by the Court, without vacatur

[3] On the merits of Diné's NEPA claims, this Court should disregard the extra-record evidence cited in the Amicus Brief submitted by the Institute for Policy Integrity at New York University School of Law (*see, e.g.,* Amicus Brief at 2, 9, 12). *Audubon Soc'y of Greater Denver v. U.S. Army Corps of Eng'rs*, 908 F.3d 593, 609 (10th Cir. 2018) (judicial review of agency action under the APA is limited to the administrative record and the "consideration of extra-record materials is appropriate in extremely limited circumstances" (quotation and citation omitted)).

of the APD approvals or an injunction foreclosing future drilling authorizations.[4] Consistent with Fed. R. App. P. 28(i), DJR and SIMCOE adopt the arguments on remedy set forth in API's Responsive Brief (at 9–38) and submit the following to detail the serious and substantial harms to DJR and SIMCOE that would result from vacatur and injunctive relief.

A. Vacatur is Not Warranted Because Federal Defendants Can Substantiate Their Decision on Remand, and Vacatur Will Lead to Extreme Disruptive Consequences.

Diné asks this Court to vacate the challenged APD approvals as the "only appropriate remedy" for their alleged NEPA violations. Op. Br. at 52-54. However, federal appellate courts have made clear that courts retain broad equitable discretion to craft an appropriate remedy upon the finding of a NEPA violation. API Br. at 10–11. In other words, vacatur is not an automatic remedy. *See id*. Here, vacatur is not appropriate because BLM can likely substantiate its decision on remand after performing corrective NEPA analysis (API Br. at 15–17) and because, as detailed below, vacatur would impose significant disruptive consequences on DJR and SIMCOE, both of which hold substantial property and contract rights at issue in this appeal.

---

[4] *See Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 844-45, 852 n.14 (10th Cir. 2019) (issuing narrowly-tailored remand to correct deficiencies in five EAs, while declining to grant relief for other EAs in which the court lacked the full administrative record, and further finding that appellants' argument did not apply to sixth challenged EA).

Vacatur of BLM's approval of 370 APDs, many of which were approved as many as eight years ago and have been producing oil and gas for almost as long (*see, e.g.,* App. at [ECF_No._113-1], Koenig Aff. ¶ 3; App. at [ECF_No._113-2], Zimmerman Aff. ¶ 4), will result in widespread and significant disruptive consequences for DJR and SIMCOE. As explained below, vacating the APD approvals that support twenty-eight producing wells would cause severe, immediate, and unjustified consequences.

Impacts to Development Operations. The damage to DJR and SIMCOE from shutting in producing wells is grave and potentially irreversible. This is, in part, because shutting in producing wells jeopardizes the integrity of the wellbore. App. at [ECF_No._113-2], Zimmerman Aff. ¶ 8. As Mr. Zimmerman of SIMCOE explained, horizontal dry gas wells "are engineered to remain on production so that a stable flow of dry gas out of the reservoir can ensure wellbore integrity." *Id.* Mr. Zimmerman further explained that there is no technical precedent for shutting in these wells for periods exceeding a few days and that a shutdown of anything longer than a few days could cause a permanent collapse of the shale. *Id.*; *see also* App. at [ECF_No._113-1], Koenig Aff. ¶ 7. In other words, the well could be lost entirely, or at the very least, extensive recompletion work may be required at significant expense, App. at [ECF_No._113-2], Zimmerman Aff. ¶ 8, leading to more environmental harms than if the well were left in a steady state of production.

Financial Losses. If DJR's twenty-two producing wells are shut in, DJR would suffer lost production of approximately 4,835 barrels of oil per day with an approximate revenue of $4,127,269 per month based on current product prices. Koenig Supp. Aff. ¶ 4. During the shut-in, the lost severance tax to the State of New Mexico would be approximately $297,163 per month. *Id.* The loss of royalties to about 900 Indian allottee mineral owners would be approximately $213,131 per month. *Id*. ¶ 7. And, the loss to local contractors used to support the twenty-two producing wells would be approximately $64,232 per month. *Id*. ¶ 4.

If SIMCOE's six producing wells are shut in, SIMCOE will suffer a gross monetary loss of approximately $781,000 to $1,100,000 per month with associated royalty losses to the federal government ranging from approximately $97,000 to $136,000 per month. Zimmerman Supp. Aff. ¶ 4. During the shut-in, minimum royalty payments may have to be maintained regardless of production. App. at [ECF_No._113-1], Koenig Aff. ¶ 6.

For wells that have been authorized by BLM but have not yet been drilled, halting Mancos Shale development would have dire consequences for DJR and its contractors and employees who rely on the continued viability of oil and gas development in northwestern New Mexico (not to mention substantially frustrating DJR's rights granted under the leases). Koenig Supp. Aff. ¶¶ 5-6; *see also* API Br. at 19–20. In 2022 and 2023, DJR intends to drill six wells under APDs that are

challenged in this litigation. Koenig Supp. Aff. ¶ 5. With each month drilling is delayed, the monthly production not realized would amount to a total lost revenue of approximately $3,714,227 for these six future wells. *Id*.

The immediate, concrete, and substantial disruptive consequences to DJR and SIMCOE, not to mention other interested parties (oil and gas companies and allottee royalty owners) far outweigh any NEPA deficiencies or harms alleged by Diné. Given the severely disruptive consequences of vacatur and the relatively minor procedural errors, if any, a limited remand to repair any procedural defects is the only appropriate remedy.

Interference with Reasonable Investment-Backed Expectations. Diné's requested relief also interferes with DJR's and SIMCOE's contractual and property rights, as well as their investment-backed expectations, which vested when Federal Defendants granted DJR and SIMCOE oil and gas leases and permits to develop those leases. *See* API Br. at 17–18; *see also W. Watersheds Project v. Haaland*, 2022 U.S. App. LEXIS 240, *34-35 (9th Cir. Jan. 5, 2022) (oil and gas lessees have "legally protected interest[s] in contract rights with the federal government[,]" including "a substantial due process interest in the outcome of . . . litigation by virtue of its contract with an existing party"). For example, in acquiring the leases in question and completing the wells drilled thus far, DJR has spent several hundred million dollars in reliance on Federal Defendants' issuance

of the leases and permit approvals. App. at [ECF_No._113-1], Koenig Aff. ¶ 5. SIMCOE, its predecessor, and other working interest owners have invested over $89 million. App. at [ECF_No._113-2], Zimmerman Aff. ¶ 6. Vacatur of the challenged permits would cause irreparable harm to DJR's and SIMCOE's investment-backed expectations in their leases and cause substantial financial loss. Many of these wells have been producing oil and natural gas for five, six, or even seven years in reasonable reliance on the validity of the APDs that Diné failed to challenge in their prior round of litigation. *See Diné Citizens Against Ruining Our Env't*, 923 F.3d at 838. For some APD approvals, five years passed before Diné even commenced the instant litigation. App. at [ECF_No._1] (filed Aug. 1, 2019). Thus, any ruling from this Court to reverse BLM's APD decisions now would severely upset years of business decisions and reasonable expectations.

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

Diné contends on appeal that vacatur is sufficient to redress the harm from BLM's alleged NEPA errors and, therefore, injunctive relief may be unnecessary. *See* Op. Br. at 54. However, court-ordered vacatur of the APD approvals and associated EAs does not, as a matter of law, automatically suspend oil and gas operations being conducted pursuant to those APD approvals or enjoin BLM from issuing future APD authorizations. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1054 (D.C. Cir. 2021) ("If a district court could, in every

case, effectively enjoin agency action simply by recharacterizing its injunction as a necessary consequence of vacatur, that would circumvent the Supreme Court's instruction in *Monsanto* . . . ."). Certainly, if BLM were to require shut-in of the wells as a result of the vacatur, there would be significant disruptive consequences to DJR and SIMCOE as a result of the vacatur. *See supra* at 9–13. Indeed, BLM took this approach by issuing shut-in orders after the district court vacated the APDs covered by the inadequate NEPA analysis identified by this Court in *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831, 844-45 (10th Cir. 2019).[5] Regardless, Diné seeks injunctive relief from this Court, thereby requiring Diné to meet their burden under the traditional four-part test for obtaining injunctive relief in this NEPA challenge. *See* API Br. at 21-23. Diné has not, and cannot, meet this burden.

Diné's arguments on injunctive relief are inconsistent and can be interpreted either broadly or narrowly; therefore, DJR and SIMCOE attempt to address the full scope of injunctive relief Diné may be seeking from this Court. *First*, as stated in their Amended and Supplemented Petition for Review of Agency Action before the

[5] *See, e.g.*, BLM, Finding of No Significant Impact, KWU #768H, #769H, #770H, and #771H Oil and Natural Gas Wells Project, DOI-BLM-NM-F010-2019-0086, at 2 (Aug. 1, 2019), *available on BLM's eplanning website at* https://eplanning.blm.gov/public_projects/nepa/123915/20001212/250001374/signed_docs.pdf (last visited Feb. 26, 2022).

district court, App. at [ECF_No._95], Relief Requested, ¶ C, and as stated in the conclusion of their Opening Brief, Diné seeks to "suspend and enjoin BLM from any further drilling authorizations pending BLM's full compliance with NEPA." Op. Br. at 57. To the extent Diné seeks broad prospective injunctive relief that would preclude BLM from approving APDs in the Mancos Shale more generally based on future NEPA analyses that are not subject to this lawsuit, Diné has not demonstrated that they are entitled to such relief. Any attempt to prevent BLM from approving APDs or prevent DJR and SIMCOE from developing APDs based on future NEPA analysis that is not subject to this litigation is beyond the Court's jurisdiction because those agency actions have not yet occurred, are not final, and are not before the Court.[6] 5 U.S.C. § 704 (review of "final" agency action).

Second, to the extent Diné seeks a narrower injunction to "enjoin[] APD development,"[7] Op. Br. at 54, 56, presumably either by shutting in existing

[6] Recent APDs have also been subject to new NEPA analyses. *See, e.g.,* BLM, Final EA, North Alamito Unit 2208 and Betonnie Tsosie Wash Unit 2308 Cluster Oil and Natural Gas Wells Project, DOI-BLM-NM-F010-2021-0003-EA (April 2021), *available on BLM's eplanning website at* https://eplanning.blm.gov/public_projects/2003179/200482794/20038240/250044437/Final%20EA%202021-0003.pdf (last visited Feb. 26, 2022).

[7] Notably, a request for such relief can be found nowhere in the Amended and Supplemented Petition for Review filed in the district court (App. at [ECF_No._95], Relief Requested, ¶¶ A-H).

producing wells or preventing the development of wells authorized by a challenged APD, but not yet drilled, Diné has not met their burden for injunctive relief.

DJR and SIMCOE adopt the four-part test for injunctive relief set out in API's arguments, API Br. at 22–23, and add the following arguments:

1. Diné Fails to Prove Irreparable Harm From the Challenged Wells.

As API argues, Diné's alleged injuries are speculative and, therefore, fail to demonstrate irreparable harm. *Id.* at 24–28. Indeed, to carry their burden on irreparable injury, Diné's alleged harms "must be both certain and great," not "speculative or theoretical." *Colorado v. EPA*, 989 F.3d 874, 884 (10th Cir. 2021) (quotation and citations omitted); *see also N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1251 (10th Cir. 2017) (To satisfy the irreparable harm factor, an appellant "must establish both that *harm will occur*, and that, when it does, such harm will be irreparable." (emphasis added) (quotation and citation omitted)). As explained below, Diné has not made the required showing.

Operations considered in the challenged EAs that have already occurred cannot serve as a basis for claiming irreparable prospective harm.[8] API Br. at 25–26. To the extent Diné alleges harms resulting from drilling and hydraulic

[8] Diné does not challenge the portion of the district court's decision holding that claims challenging expired APD approvals are moot. Op. Br. at 4 n.1. Therefore, DJR's and SIMCOE's expired APD approvals are not implicated in this appeal. *See* Koenig Supp. Aff. ¶ 2; Zimmerman Supp. Aff. ¶ 2.

fracturing, for DJR's twenty-two producing wells and SIMCOE's six producing wells, *see* Koenig Supp. Aff. ¶ 2; Zimmerman Supp. Aff. ¶ 2, those impacts have already occurred and cannot be remedied now by an injunction shutting in producing wells or foreclosing future development. *Schrier v. Univ. of Colorado*, 427 F.3d 1253, 1267 (10th Cir. 2005) ("The purpose of . . . [an] injunction is not to remedy past harm but to protect [appellants] from irreparable injury that will surely result without their issuance.").

2. The Balance of Harms Weighs Against an Injunction.

Diné's discussion of the balance of harms largely ignores or discounts the concrete and calculable harm to the lessees, including DJR and SIMCOE, from granting an injunction. *See* Op. Br. at 55 (referring to lessees' harms as "*potential* delay and *speculative* financial loss" (emphasis added)). And Diné cannot demonstrate that their alleged harm is sufficiently likely if an injunction does not issue, particularly as it relates to producing wells. In this circumstance, an injunction is not warranted. *See Winter*, 555 U.S. at 24–26; *see, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 42–43 (D.D.C. 2013) (holding generalized allegation of environmental harm of pipeline project did not outweigh harm to pipeline company and federal agencies of enjoining project where record showed pipeline company "committed major resources" to the project); *S. Utah Wilderness All. v. Thompson*, 811 F. Supp. 635, 641–42 (D. Utah 1993) (economic

threats to grazing permittees outweighed the environmental and recreational interest of petitioners in protecting coyotes).

As this Court has explained, "financial harm can be weighed against environmental harm—and in certain instances outweigh it." *Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 892 (10th Cir. 2013) (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (hypothetical environmental harm outweighed by "committed" oil company investments)); *Vill. of Logan v. U.S. Dep't of the Interior*, 577 F. App'x 760, 767–68 (10th Cir. 2014) (balance of equities tipped in defendants' favor where "[d]efendants have shown that they would suffer immediate and significant harm in the form of construction related delays if an injunction issues now stopping this project. The economic cost alone of stopping construction cannot easily be overlooked—one estimate puts the probable *monthly* cost of delaying the Project at $745,592." (emphasis in original)).

Here, the harms to the lessees (including DJR and SIMCOE), the state and local communities, the Federal government, and Indian mineral owners is substantial. API Br. at 18–20, 30–38. The damage to DJR and SIMCOE of shutting in producing wells and barring future drilling activities is grave and potentially irreversible. In addition to the significant consequences of shutting in producing wells (*see supra* at 9–13), if the Court were to prevent the development of DJR's six planned wells that are scheduled to be drilled in 2022 and 2023, DJR

estimates it would lose approximately $3,714,227 for each month that drilling is delayed. Koenig Supp. Aff. ¶ 5. Thus, where Diné's harms are remote and speculative, and the harms to DJR and SIMCOE will be immediate and substantial, the balance of harms weighs against an injunction.

3. The Public Interest Favors Continued Operations.

The public interest weighs against granting an injunction. *See* API Br. at 28–38. Oil and gas development in the San Juan Basin is an "enormous job creator and economic engine" for New Mexico, the loss of which will affect the lessees as well as their employees, contractors, and local communities. *Diné Citizens Against Ruining Our Env't v. Jewell*, 2015 U.S. Dist. LEXIS 109986, at *163 (D. N.M. Aug. 14, 2015), *aff'd* 839 F.3d 1276 (10th Cir. 2016); *see also* Letter from Michelle Lujan Grisham, New Mexico Governor, to President Biden (Mar. 15, 2021) (describing oil and gas production as "a significant economic force in New Mexico," the revenue from which "fund[s] public schools, infrastructure projects, and a range of other priorities, including environmental initiatives"), *available at* https://www.westernenergyalliance.org/uploads/1/3/1/2/131273598/gov._lujan_grisham_letter.pdf (last visited Feb. 26, 2022). Mancos Shale drilling also provides a significant benefit to the Federal government, as well as state and local governments. DJR and SIMCOE alone contribute hundreds of thousands of dollars per month in royalties and taxes. Koenig Supp. Aff. ¶¶ 4, 7; Zimmerman

Supp. Aff. ¶ 4. DJR pays royalties on more than four million dollars in monthly revenue for the challenged wells, including to Indian allottees. Koenig Supp. Aff. ¶¶ 4, 7. DJR also estimates that it pays approximately $297,163 per month to the State of New Mexico in severance taxes. *Id*. ¶ 4. SIMCOE pays monthly royalties of at least $97,000 per month on its six producing gas wells. Zimmerman Supp. Aff. ¶ 4.

Development in the San Juan Basin also furthers national goals of energy independence. The Mining and Minerals Policy Act of 1970 directs the Secretary of the Interior to "foster and encourage private enterprise in . . . the development of economically sound and stable . . . industries, [and in] the orderly and economic development of domestic mineral resources . . . to help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a (defining "minerals" to include oil and gas). The development of the Mancos Shale ensures that an important oil and gas resource will contribute to the energy independence and domestic security of the country, as well as generate substantial revenues for the federal government. API Br. at 37.

In sum, the public interest favors the orderly production of oil and gas under valid existing leases pursuant to both previously authorized drilling permits and future drilling authorizations deemed appropriate by BLM. Diné's alleged procedural harms do not warrant an injunction.

****

While the inevitable disruptive consequences and balance of harms do not favor vacatur or an injunction, to the extent the Court determines relief is warranted, the Court has broad discretion to craft a remedy that takes into consideration the equities discussed above. *See WildEarth Guardians*, 870 F.3d at 1240. If a NEPA error is found, the Court should remand the case to the district court with instructions for it to retain continuing jurisdiction, direct BLM to complete the additional environmental review on an expedited basis (with the availability of extensions only upon a showing of good cause), and defer vacatur or an injunction during the limited timeframe set out by the Court.

CONCLUSION

For the foregoing reasons, the district court's decision dismissing Diné's Amended and Supplemented Petition for Review of Agency Action should be affirmed in all respects and Diné's requests for vacatur and injunctive relief should be denied.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to 10th Circuit Rule 28.2(C)(2), DJR and SIMCOE respectfully request oral argument. DJR and SIMCOE submit that oral argument would assist the Court in understanding and resolving the various factual and legal issues raised in this appeal.

STATEMENT CONCERNING SUBMISSION OF SEPARATE BRIEF

Pursuant to 10th Circuit Rule 31.3(B), counsel for DJR and SIMCOE represent that the submission of a separate brief is necessary to inform the Court of the significant and distinct interests of DJR and SIMCOE that are at stake in this litigation and to aid the Court in its fact-specific consideration of the appropriate remedy should the Court overturn the district court's determination that BLM did not commit a NEPA violation.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPE-FACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,410 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Circuit Rule 32(B).

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 2010 in 14-point Times New Roman font.

Respectfully submitted this 2nd day of March, 2022.

s/ Hadassah M. Reimer
Hadassah M. Reimer
HOLLAND & HART LLP
645 S. Cache St., Suite 100
Post Office Box 68

Jackson, WY 83001
Phone: (307) 739-9741
Fax: (307) 739-8175
hmreimer@hollandhart.com

John F. Shepherd
Tina R. Van Bockern
HOLLAND & HART LLP
555 Seventeenth Street
Suite 3200
Denver, CO 80202
Phone: (303) 295-8000
Fax: (303) 295-8261
jshepherd@hollandhart.com
trvanbockern@hollandhart.com

Robert J. Sutphin
HOLLAND & HART LLP
110 North Guadalupe, Suite 1
Post Office Box 2208
Santa Fe, NM 87501
Phone: (505) 988-4421
Fax: (505) 983-6043
rsutphin@hollandhart.com

Attorneys for Intervenor Defendants-Appellees DJR Energy Holdings, LLC and SIMCOE LLC

CERTIFICATE OF DIGITAL SERVICE
AND PRIVACY REDACTIONS

All required privacy redactions have been made to this document, and with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the clerk. This document has been scanned for viruses with Windows Defender Security Center - Version 4.18.1807.18075, which runs real time virus scans and is updated every six hours, and according to those programs is free of viruses.

s/ Hadassah M. Reimer

CERTIFICATE OF SUBMISSION OF HARD COPIES OF PLEADING

Pursuant to the Court's January 25, 2022 Order, seven (7) copies of this pleading will be submitted to the clerk's office on or before April 20, 2022. The copies will be exact copies of the ECF filing, with the addition of citations to the deferred appendix.

s/ Hadassah M. Reimer

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will serve the document on the other participants in this case.

s/ Hadassah M. Reimer