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, in her official capacity as Secretary of the United States Department of the Interior, et al.,

Defendants-Appellees,

and

DJR ENERGY HOLDINGS, LLC, ENDURING RESOURCES IV, LLC, SIMCOE, LLC, et al.

Intervenor Defendants-Appellees

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

ENDURING RESOURCES IV, LLC'S UNCITED PRELIMINARY RESPONSE BRIEF (DEFERRED APPENDIX APPEAL)

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Oral argument is requested.

RULE 26.1 DISCLOSURE STATEMENT

Enduring Resources IV, LLC is a Delaware Limited Liability Company that does not have any parent corporation, and it is not aware of any publically held corporation that owns 10% or more of its stock.

RULE 31.3 CERTIFICATE

Enduring Resources IV, LLC has conferred with the other non-governmental Defendants to minimize duplicative briefing. Enduring files this separate brief to raise issues based on the factual differences between Enduring's oil and gas wells that are drilled and completed using different, more environmentally friendly, methods than the wells drilled by most other producers in the San Juan Basin. Enduring thereby intends to point out that the Environmental Assessments at issue are not all the same, and that they should not necessarily all be treated the same. Also, it is Enduring's understanding that it is seeking different relief in the alternative, should this Court deem it necessary for the Federal Defendants to conduct additional NEPA analysis, than the other non-governmental Defendants.

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GLOSSARY OF TERMS

2019 Water Analysis	2019 BLM New Mexico Water Support Document.
APD	Application for Permit to Drill.
BLM	Bureau of Land Management.
Chaco	The 33,978 acre Chaco Culture National Historical Park.
EA	Environmental Assessment.
EA Addendum	December 9, 2019 addendum to prior EAs at issue here.
Enduring	Enduring Resources IV, LLC.
Entrada formation	A deep geological formation containing non-potable saline water.
Farmington FO	BLM's field office in Farmington, N.M.
Flare	The process whereby gas is burned instead of released to the atmosphere to reduce its environmental impact.
Fracking	Injection of liquid at a high pressure into underground formation to open fissures to extract oil, gas, or water.
Navajo allottees	Native Americans with lands allotted by the Federal Government that they leased for oil and gas development.
Nitrogen gel	Viscous fracking liquid containing mainly nitrogen.
Producers	Companies extracting and thereby producing oil and gas.
San Juan Basin	A 4,800,000 acre geologic basin in the Southwest.
Slick water	Less viscous fracking liquid containing mainly non-potable water.

PRIOR RELATED APPEALS

Diné Citizens Against Ruining Our Env't v. Jewell,
839 F.3d 1276 (10th Cir. 2016).

Diné Citizens Against Ruining Our Env't v. Bernhardt,
923 F.3d 831 (10th Cir. 2019).

STATEMENT OF THE CASE

The portion of the San Juan Basin where oil and gas development occurs is entirely outside Chaco Culture National Historical Park ("Chaco"). App. at __ [AR003897] (map including Chaco and all nearby oil and gas leases). While Chaco has cultural and natural value, the greater San Juan Basin also has immense economic value as "one of the largest petroleum-producing basins in the United States." App. at __ [AR045668]. While Chaco was preserved as a national monument just over 100 year ago, the first well was drilled in the San Juan Basin just over 100 years ago. 35 Stat. 2119 (designating Chaco as a national monument in 1907); App. at __ [AR045668] (noting the discovery of oil in the San Juan Basin in 1911). While Chaco is largely undeveloped and now enjoys protection as a national historical park, the greater San Juan Basin has seen extensive development with over 40,000 oil and gas wells. Pub. L. No. 96-550 (changing Chaco's status from national monument to national park); App. at __ [AR045668] (noting presence of over 40,000 oil and gas wells "producing 42.6 trillion cubic feet of gas and 381 million barrels of oil."). Accordingly, the two areas have a long history of parallel but distinct uses. Nevertheless, Plaintiffs attempt to conflate the 33,978 acre Chaco with the 4,200,000 acre portion of the San Juan Basin included within BLM's planning area for its studies at issue here to insinuate that the entire area contains the values preserved within Chaco. Op. Br. 4 (citing AR008132).

This is the sixth time Plaintiffs ask a court to review related Environmental Assessments ("EAs") underpinning BLM's approvals of Enduring Resources, IV ("Enduring") and other operators' applications for permit to drill ("APDs") oil and gas wells in the San Juan Basin. *Diné Citizens Against Ruining Our Env't v. Jewell*, 2015 WL 4997207 (D.N.M. Aug. 14, 2015) ("*Diné I*") (rejecting Plaintiffs' request for preliminary injunction); *Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016) (affirming rejection of preliminary injunction); *Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031 (D.N.M. 2018) (dismissing Plaintiffs' administrative appeal); *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019) ("*Diné II"*) (affirming dismissal in full for all but five of the challenged EAs, and in part for the remainder); *Diné Citizens Against Ruining Our Env't v. Bernhardt*, 2021 WL 3370899 (D.N.M. Aug. 3, 2021) ("*Diné III*") (the opinion on appeal here dismissing Plaintiffs' new administrative appeal).

This Court previously refused to enjoin BLM from continuing to approve APDs while the *Diné I* case and the two other appeals to this Court were pending, holding that Plaintiffs "had not shown a substantial likelihood of success on their claim that the agency acted arbitrarily and capriciously in approving the APDs." *Diné Citizens Against Ruining Our Env't*, 839 F.3d at 1285.

Subsequently, this Court affirmed that for the most part Plaintiffs had "not carried their burden of demonstrating that the BLM acted arbitrarily or capriciously" in approving over 300 APDs based on similar EAs. *Diné II* at 856. This Court agreed with Plaintiffs on only one issue—the lack of a cumulative water consumption analysis—and then only for five of the EAs challenged in that round of litigation. *Id.* For those five only, this Court held BLM had not evaluated the cumulative water consumption for the then reasonably foreseeable number of wells to be drilled in the area. *Id.* In all other respects, this Court affirmed the district court's dismissal of Plaintiffs' prior appeal. *Id.*

To reduce environmental impacts of its development, Enduring invested over 25 million dollars in a new water extraction, treatment, and completion system using recycled produced water, or "slick water," which can be used for no other purpose. App. at __ [ECF # 114-1, 4-5] (Campbell Aff., ¶ 10). This water recycling system has reduced Enduring's net freshwater use to zero. *Id*. This system also significantly reduces air emissions of carbon dioxide and methane by eliminating the need to flare gas during completions and eliminating approximately 24,615 truck trips otherwise needed to bring water to the drill pads. App. at __ [ECF # 114-1, 5 and 8-9] (Campbell Aff., ¶¶ 11, 16).

After remand from *Diné II* and after Enduring developed its new water system, BLM initiated reanalysis of the cumulative water consumption of reasonably

foreseeable wells. It did so for not only the five EAs for which this Court ordered BLM to conduct such analysis on remand but also the other similarly situated EAs Plaintiffs now attempt to challenge here. App. at __ [ECF # 111, 10] (Fed. Def.'s Resp. to Pl.'s Op. Merits Br., 1); App. at __ [AR045036]. Additionally, to further address Plaintiffs' air and climate impact concerns (even though this Court previously rejected Plaintiffs' claims based thereon) BLM also updated its air and climate analysis for the EA Addendum at issue here. App. at __ [AR045036-71]. In its additional analysis, BLM considered updated information from Enduring about its new completion methods referred to as slick water fracking. *See, e.g.*, App. at __ [AR083887-91] (correspondence between BLM and Enduring); App. at __ [AR083895-97] (same); App. at __ [AR083900-07] (same).

Further supporting its approval of Enduring's APDs, BLM included in the EA Addendum a discussion of Enduring's innovative slick water completion method, a process that uses recycled and non-potable water from the Entrada formation. App. at __ [ECF # 114-1, 4-6] (Campbell Aff., ¶¶ 10-13). BLM noted that

> there have been calls to increase the use of alternative sources such as brackish water or recycled produced water, minimizing the strain on local freshwater resources . . . water-intensive stimulation methods such as slick water fracturing can be accomplished using non-traditional water sources, including the non-potable connate groundwater within the Entrada formation, recycled flowback water, and produced water. The BLM encourages the use of recycled water in hydraulic fracturing techniques . . . .

App. at __ [AR045070-71]. Moreover, in its 2019 Water Analysis, used to support the EA Addendum, BLM describes Enduring's "technological advances," and notes "additional information regarding the slick water stimulation technique has been gathered by the Farmington FO through outreach conducted with local operators actively drilling and producing mineral resources in the New Mexico portion of the San Juan Basin." App. at __ [AR009393]. Thus, Enduring's innovative fresh water and emissions reducing approach informed and supports BLM's additional analysis.

Before BLM could complete its additional analysis after remand in *Diné II*, Plaintiffs filed the appeal in *Diné III* alleging the EAs supporting the APDs Plaintiffs challenge in this case suffer from the same defect as the five EAs this Court vacated and remanded for further analysis in *Diné II*. App. at __ [ECF # 1, 2] (Pet. for Review of Agency Action ¶ 2). The "environmental assessments challenged in this lawsuit were issued prior to the district court's final order in the prior lawsuit, but were not included in any of the several pleading amendments in that case." App. at __ [ECF # 60, 4] (Order Regarding Setting of Hearing on Mot. for Injunctive Relief, 4). Although Plaintiffs failed to include the EAs at issue here in the prior litigation, and they are not clear about which APDs are the "final agency actions" they challenge now, this challenge is to fewer than 1% of the existing oil and gas wells in the area and fewer than 10% of the reasonably foreseeable future wells. *See* Op.

Br. 4-5 (asserting Plaintiffs' challenge is to 370 of the 40,000 existing wells and 3,200 foreseeable future wells).[1]

After the district court denied Plaintiffs' request for a temporary restraining order, the parties agreed to stay the *Diné III* case pending BLM's additional analysis. App. at __ [ECF # 90] (Joint Motion to Stay Proceedings). When BLM issued its additional analysis, Plaintiffs amended their petition to include additional EAs covered thereby, and to assert a new claim that this additional analysis was somehow predetermined. App. at __ [ECF # 95, 1] (Am. and Supp. Pet. for Review of Agency Action (May 1, 2020)). Plaintiffs did not, however, include the EAs and underlying APDs this Court vacated in *Diné II,* although BLM reissued those APDs based on the same additional analysis as the EAs challenged here. *Id.* at Ex. A (listing the EAs Plaintiffs challenge here).

While Plaintiffs have pursued their numerous challenges, producers like Enduring have spent hundreds of millions of dollars drilling and producing from the oil and gas wells approved through the challenged APDs. App. at __ [ECF # 114-1, 2] (Campbell Aff., ¶ 2). Approximately 9,000 Navajo allottees have received tens of millions of dollars in royalties from these wells—royalties that have served as a

[1] As this Court noted in the prior appeal, "[t]he number of wells at issue on appeal is unclear." *Diné II* at 838 n. 2. Plaintiffs challenge APDs, but they list only the underlying EAs in their Petition. App. at __ [ECF # 95, 41] (Am. and Supp. Pet. for Review of Agency Action, App. A).

major component of their meager annual income. App. at __ [ECF # 114-1, 11] (Campbell Aff., ¶ 25). And, the Federal Government has received millions of dollars in revenue as well. App. at __ [ECF # 114-1, 10] (Campbell Aff., ¶ 24).

SUMMARY OF THE ARGUMENTS

Unless this Court sends a clear message that BLM has now done what NEPA requires and this Court previously asked BLM to do—analyze cumulative water impacts—it appears Plaintiffs will continue to bring these piecemeal challenges to oil and gas development in the San Juan Basin. *See* Nichols, J., *A Big Win for Greater Chaco*, *available at* https://wildearthguardians.org/brave-new-wild/show-on-home/a-big-win-for-greater-chaco/ (accessed January 13, 2022) (celebrating nearby protections as "one giant step closer to full protection," but warning that "[t]he fight is not over"). This Court and the district court have already rejected Plaintiffs' challenges to BLM's air and climate analyses five times. And, BLM has now performed exactly the additional analysis this Court ordered for cumulative water impacts.

Nevertheless, Plaintiffs challenge BLM's analysis yet again in an attempt to both re-litigate air and climate issues and to argue BLM's cumulative water analysis remains inadequate. Plaintiffs' argument primarily relies on their assertion that this Court should not consider BLM's additional analysis after this Court's decision in *Diné II*. Plaintiffs argue the outcome of BLM's additional analysis was

predetermined, but they cite no evidence to support that assertion other than the fact that BLM did not complete that additional analysis until after Plaintiffs had rushed to court again. This Court should not endorse Plaintiffs' gamesmanship of rushing to court and then arguing that already initiated analysis should be ignored as a post-hoc rationalization after the commencement of litigation. Moreover, it would serve no purpose to ignore BLM's additional analysis now merely to remand and have BLM reissue the same analysis again so that Plaintiffs could bring their merits argument to this Court yet another time. Plaintiffs are simply chasing their own tails.

Tellingly, Plaintiffs have not appealed BLM's EAs supporting re-approval of the APDs at issue in *Diné II* even though those were the only EAs this Court actually required BLM to reanalyze. Likely, that is because Plaintiffs realize they cannot convince this Court to ignore BLM's additional analysis for these EAs when this Court expressly required this additional analysis, and because Plaintiffs realize that if this Court considers BLM's additional analysis, there is no basis left for deeming BLM's decisions arbitrary and capricious.

In particular, BLM expressly analyzed the cumulative water impacts as required by this Court. App. at __ [AR045065-71]; App. at __ [AR009020-84]; App. at __ [AR009358-431]. BLM also considered the changes in technology that Enduring has spearheaded whereby completions are now done (at least by Enduring) using recycled or non-potable water from deep underground formations containing

water that can be used for no other purpose. *Id.* Accordingly, not only is BLM's water analysis now significantly more comprehensive than the analysis at issue in *Diné II*, the actual and foreseeable impacts on water resources have diminished. *Id.*

Moreover, Plaintiffs' attempt to re-litigate air and climate issues fails again both because BLM's analysis was already NEPA compliant, and because BLM has provided additional analysis of the issues that Plaintiffs unsuccessfully raised in all five prior court challenges. App. at __ [AR045036-71].

Finally, even if Plaintiffs' arguments had any merit, the requested relief is grossly disproportionate to Plaintiffs' remaining flyspeck arguments concerning BLM's analysis. Plaintiffs ask this Court to vacate existing permits and enjoin BLM from issuing new permits where Enduring has spent hundreds of millions of dollars developing oil and gas wells, provided tens of millions of dollars to the local economy, the federal government, and Navajo allottees in reliance on BLM's approval of its APDs. App. at __ [ECF # 114-1, 10-11] (Campbell Aff., ¶¶ 20-25). If this Court remands for BLM to conduct additional analysis, it should do so without vacating existing APDs or enjoining development because the impact of such a decision would be immense and grossly disproportionate given the extensive environmental analyses BLM performed to ensure its decisions are sound.

ARGUMENT

This Court previously recognized that its review of BLM's approval of APDs is an individual analysis for each EA underpinning the challenged APDs. *Diné II* at 845 (holding that this Court needs to "to evaluate the sufficiency of the . . . complete EA for each challenged APD."). Unlike other operators, Enduring has invested over $25 million in a state-of-the art water and fracking system which provides the following environmental benefits: (1) reduces net freshwater consumption to zero, (2) eliminates nitrogen from the frack fluid and thereby eliminates flaring of the initial gas (methane) production, (3) and reduces dust and combustion emissions by avoiding the trucking of water. App. at __ [ECF # 114-1, 4-6] (Campbell Aff., ¶¶ 10-12). Enduring's system is precisely what Plaintiffs previously argued BLM should consider and require. *See Diné I* at *48 (referring to Plaintiffs' comments on how to improve environmental impact of fracking if permitted); App. at __ [AR_083993] ("BLM should require process and flowback water recycling to the maximum extent practicable to reduce freshwater consumption….").

While BLM has not required any operator to use Enduring's innovative system, it properly considered the reduced environmental impacts of this system when analyzing Enduring's APDs. *See, e.g.*, App. at __ [AR083887-91] (correspondence between BLM and Enduring); App. at __ [AR083895-97] (same); App. at __ [AR083900-07] (same). Thus, this Court should decline Plaintiffs'

implicit invitation to treat all APDs the same because the environmental impacts are different. In addition to the reasons set forth in the other Defendants' briefs, the Court should affirm BLM's issuance of Enduring's APDs for the reasons set forth herein.

I. The standard of review of the merits of this administrative appeal is whether the BLM's decisions were arbitrary and capricious.[2]

The arbitrary and capricious standard applies to review of an agency's permitting decision in a NEPA challenge. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376 (1989) (citing 5 U.S.C. § 706(2)(A)). This Court's "review is highly deferential." *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 451 F.3d 1183, 1188 (10th Cir. 2006) (internal quotation marks omitted). A "presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action." *Colorado Health Care Ass'n v. Colorado Dep't of Soc. Servs.*, 842 F.2d 1158, 1164 (10th Cir. 1988).

Plaintiffs incorrectly argue that this Court should apply a *de novo* standard of review. Op. Br. 10. The case cited by Plaintiffs is clear that the arbitrary and capricious standard in 5 U.S.C. § 706(2)(A) applies, and it merely points out that the

[2] Enduring does not address Plaintiffs' standing argument because "[t]he court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Instead, Enduring addresses the standard of review in this Section I of the Arguments rather than outside the argument section as Plaintiffs did. Fed. R. App. P. 28(a)(8)(B) (standard of review to be addressed in argument section).

decision under review is the agency's decision, not the district court's appellate opinion. *New Mexico ex rel. Richardson v. U.S. Bureau of Land Mgmt.*, 565 F.3d 683, 704–05 (10th Cir. 2009). Because the district court acts in an appellate capacity on a petition for review of an agency action, rather than as a finder of fact, this Court need not defer to the district court's analysis of the agency's decision. *Id.* Rather, this Court should itself review the agency's permitting decisions based on the arbitrary and capricious standard of review. *Id.*

II. BLM properly supplemented its environmental analyses in light of *Diné II* by conducting a cumulative water impact analysis.

"A petitioner must meet a high standard to prove predetermination." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). "[P]redetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis." *Id.* (emphasis in original). Moreover, an agency may—and often must—conduct additional environmental analyses after it makes a decision when circumstances change. *Marsh*, 490 U.S. at 370-71.

Where an agency rectifies a perceived shortcoming in its prior environmental analysis by conducting additional studies after the commencement of litigation, a court cannot order the agency "to conduct studies already completed" if the already completed studies "could not be successfully challenged." *Warm Springs Dam Task*

Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980). To determine whether a subsequent study can be successfully challenged, the reviewing court must, of course, consider it—not ignore it as Plaintiffs urge here. Thus, a reviewing court must consider subsequent analyses, and they should not be considered predetermined unless Plaintiffs meet the high burden of proof on such claim.

Here, circumstances changed when this Court issued its opinion in *Diné II* requiring BLM to conduct a cumulative water impact analysis, so additional analysis was not only permitted but in fact required. Plaintiffs' argument that the Court should nevertheless ignore BLM's additional analyses is based on the unsupported argument that BLM had predetermined its conclusion. Op. Br. 15-25. Plaintiffs cite no evidence to support their contention that BLM had predetermined the outcome of its additional analysis. *Id.* (citing only the final decisions). In fact, Plaintiffs cite no document or other piece of evidence predating the final decisions, whether supportive of their argument or not. *Id.* Thus, Plaintiffs' argument that BLM's decisions were predetermined is entirely devoid of any evidence of predetermination.

The fact that BLM's additional analysis came after the initial issuance of the APDs does not imply any predetermination when the analysis was performed in compliance with this Court's prior order. *See Marsh*, 490 U.S. at 370-71 (endorsing post-decision supplementation); 40 C.F.R. § 1502.9(c)(1)(ii), (2) (2018). In the prior

related appeals, this Court ordered BLM to perform additional analysis on cumulative water impacts, and it allowed BLM to continue to approve new APDs while developing further analysis, concluding as follows:

> While Plaintiffs identify several areas in which they believe the BLM's methodologies and conclusions fall short, their disagreements with the agency's decision are insufficient to convince us that the district court abused its discretion in concluding they had not shown a substantial likelihood of success on their claim that the agency acted arbitrarily and capriciously in approving the APDs.

Diné Citizens Against Ruining Our Env't, 839 F.3d at 1285. Plaintiffs now seek, through the back door, to challenge this Court's prior refusal to enjoin BLM from continuing to approve APDs while updating its environmental analyses by asking the Court to vacate APDs BLM approved before completing this additional analysis. It was not only permissible for BLM to update is analysis during and after issuing APDs, it was the expected result of this Court's prior orders. *See id.* Thus, the mere fact that BLM updated its analysis after issuing the APDs at issue does not mean the outcome of that analysis was predetermined.

Finally, the fact that BLM reached the same ultimate conclusion does not imply predetermination either. Rather, this Court already recognized that the prior remand might not lead to a different outcome. *Diné II* at 844 (recognizing that a successful NEPA challenge does not necessarily result in a different agency decision, but merely a more informed basis for the decision). Accordingly, it is not surprising that BLM came to the same decision after further analysis, especially in

light of Enduring's improved completion methods that have reduced water, air, and climate impacts. Certainly, the mere fact that BLM's decision to issue the APDs is the same now as before is not, standing alone and without any further evidence, an indication that the decision was predetermined.

Plaintiffs' complete failure to cite any evidence of predetermination is fatal to Plaintiffs' argument because neither the timing nor ultimate outcome of the additional analysis demonstrates predetermination. *See Forest Guardians*, 611 F.3d at 714 (Plaintiffs "must meet a high standard to prove predetermination."). In short, by citing no evidence, Plaintiffs failed to overcome the "presumption of validity [that] attaches to the agency action." *Colorado Health Care Ass'n*, 842 F.2d at 1164.

III. BLM expressly considered each of the issues Plaintiffs raise (again) in this sixth challenge to BLM's decision, thereby satisfying NEPA.

Contrary to Plaintiffs' argument that BLM failed to take certain water, air, or climate impacts into account, BLM in fact considered estimated impacts that exceed what is likely in light of current technology—particularly the state-of-the-art technologies employed by Enduring.

A. BLM considered water impact estimates above what is likely in light of Enduring's state-of-the-art net zero fresh water consumption fracking method.

Plaintiffs acknowledge that BLM performed a cumulative water use analysis as required by this Court's order in *Diné II*. *See, e.g.,* Op. Br. 41. Now, instead of attacking the lack of such analysis, Plaintiffs attempt to flyspeck the contents of

BLM's additional analysis after remand in *Diné II*. *Diné III* at 26 (holding that Plaintiffs' challenge to BLM's "now-supplemented water resource analysis is exactly the type of 'flyspeck'" that this Court considers insufficient in a NEPA challenge) (citing *Richardson*, 565 F.3d at 704). For example, Plaintiffs assert without citation to any evidence that "over 40-billion gallons of water [] will be lost from the hydrologic cycle in arid northwest New Mexico" due to BLM's approval of the challenged APDs, and that BLM failed to consider the impact thereof. Op. Br. 41. Contrary to Plaintiffs' unsupported assertion, BLM analyzed this issue and referred to the individual APDs as listing the sources of water. *See, e.g.,* App. at __ [AR045065-71] (summary of water use analysis and cumulative impact thereof, incorporating other sources). BLM recognized that while newer methods, such as Enduring's recycling and slick water method, uses more water, the source of water is different because the water used by Enduring is non-potable deep, salty groundwater "that generally cannot be used for other water uses." App. at __ [AR045070]. Thus, the net water lost from the hydrological cycle in arid northwest New Mexico from Enduring's modern wells is zero.

Regardless, in an abundance of caution, BLM even considered the impact there would be if most wells were fracked like Enduring's wells, but using fresh water instead. *See, e.g.,* App. at __ [AR045065-71]. BLM thereby more than satisfied NEPA despite Plaintiffs' attempt to flyspeck the analysis. Given BLM's

robust analysis, there is no reason to believe that BLM would reach a different ultimate decision even if this Court decides it should further address one of the flyspecks Plaintiffs identified. At this point, further analysis would be little more than a paperwork exercise and cannot justify the draconian relief Plaintiffs seek.

B. BLM considered air and climate impact estimates above what is likely in light of Enduring's state-of-the-art flare-eliminating fracking method.

Plaintiffs attempt to re-litigate BLM's analysis of cumulative air and climate impacts from additional drilling in the San Juan Basin. Plaintiffs have already lost on those issues before this Court twice, and before the district court three times. *Diné Citizens Against Ruining Our Env't*, 839 F.3d at 1284 (denying injunction because Plaintiffs were unlikely to succeed on the merits); *Diné II* at 856 (dismissing Plaintiffs' challenge to BLM's air and climate analyses); *Diné I* (same), *Diné Citizens Against Ruining Our Env't*, 312 F. Supp. 3d 1031 (same); *Diné III* (same).[3] Now, in their sixth attempt, Plaintiffs argue that the Court should consider Plaintiffs'

[3] Amicus argues this Court should require BLM to analyze the so-called global "social cost of greenhouse gases" on the theory that the Council on Environmental Quality guidance from 2016 requires it. Amicus Br., 11. Amicus does acknowledge, as it must, that this guidance was withdrawn less than a year later. *Id.* at 11, f.n. 11. Moreover, the Federal Government has been enjoined from implementing the new guidance on social cost of greenhouse gases under Executive Order 13,990 that Amicus argues renews the alleged obligation to consider the social cost of greenhouse gases. Memorandum Ruling, *Louisiana v. Biden*, 21-cv-01074-JDC-KK (W. D. Okla. February 11, 2022). Regardless, that Executive Order is irrelevant because it was issued after the decisions at issue.

updated arguments and record support but ignore BLM's updated analysis as predetermined. But what is sauce for the goose is sauce for the gander. Either this Court should affirm its prior determinations on this issue disregarding intervening developments, or it should consider everything in the new record before it.

When the present record is viewed in its entirety it is clear that Plaintiffs have yet again failed to carry their burden to show that BLM's decisions were arbitrary and capricious. Not only were BLM's decisions well-supported and made after accounting for the foreseeable air and climate impacts of drilling, BLM affirmed its approval of the APDs even after considering over-estimates of these impacts. Enduring's state-of-the art completion method discussed above not only reduces fresh water use to net zero, it also minimizes and eliminates two significant sources of air pollution. App. at __ [ECF # 114-1, 4-6] (Campbell Aff., ¶¶ 10-12). First, Enduring's fracking method avoids using nitrogen gel. *Id.* This means the gas produced immediately after fracking does not contain the significant amounts of nitrogen that forces other producers to flare the initial gas produced to eliminate the nitrogen they introduce during fracking. *Id.* By eliminating the need to flare the initial gas after fracking, Enduring has reduced its methane emissions and increased the gas that is put to beneficial use. *Id.* This means the amount of emissions both per well and per unit of gas produced is reduced.

Moreover, Enduring's updated water system includes local water wells extracting deep, salty non-potable water and pipeline infrastructure to bring both recycled and this local non-potable water to the well sites where it is needed for completions. App. at __ [ECF # 114-1, 8-9] (Campbell Aff., ¶ 16). This eliminates approximately 24,615 truck trips that otherwise would have been needed to bring water to these well sites. *Id.* By eliminating 24,615 truck trips, Enduing eliminates the major source of particle matter emissions from dust as well as combustion emissions from trucks. *Id.* While BLM did consider Enduring's forward thinking approach to minimizing impacts, BLM also relied on over-estimates of air and climate impacts that were not reduced based on the improved methods Enduring employs. App. at __ [AR045036-106].

Thus, BLM's analysis of air and climate impacts was robust and erred on the side of environmental protection. Remanding for additional analysis to address any flyspecks would likely not result in a different outcome given the over-estimates BLM employed. A mere paperwork exercise does not justify the draconian relief Plaintiffs seek.

IV. Vacatur and injunctive relief are not appropriate remedies because any remaining flyspecks Plaintiffs want BLM to address are insignificant compared to the impact of such draconian measures.

A. Vacatur is an extreme remedy with dire and disproportionate economic consequences to Enduring, its Navajo allottee royalty owners, and the local economy.

"[V]acating BLM action at this stage is an extreme remedy when a solution—supplementation—has already presented itself as a much more workable solution in curing any deficiencies in the proposed agency action." *Diné III* at 23 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *N.M. Health Connections v. U.S. Dep't of Health & Human Servs.,* 946 F.3d 1138, 1161 (10th Cir. 2019)). "Remand is generally appropriate [and *vacatur* is not] when 'there is at least a serious possibility that the [agency] will be able to substantiate its decision' given an opportunity to do so, and when vacating would be 'disruptive.'" *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (citing *Allied-Signal, Inc. v. U. S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C.Cir.1993)).

"The decision whether to vacate depends on [(1)] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [(2)] the disruptive consequences of an interim change that may itself be changed." *AT&T Servs., Inc. v. FCC*, __ F.4th __, 2021WL6122734, *9 (D.C. Cir. 2021) (quoting *Allied-Signal, Inc.*, 998 F.2d at 150–51). This Court previously declined to vacate an agency's decision when in doubt and instead remanded to the

district court without instructions to vacate so that the parties could fully present evidence and argument on whether vacatur is appropriate. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1240 (10th Cir. 2017).

The evidence already before the Court is sufficient to deny vacatur even if the Court remands to BLM for further analysis. Vacatur would be financial ruin for thousands of already destitute Navajo allottees who rely on royalties from Enduring and the other producers to sustain themselves. App. at __ [ECF # 114-1, 10-11] (Campbell Aff., ¶¶ 24-26). It would of course also have significant economic consequences for the producers and the local economy. App. at __ [ECF # 114-1, 10-11] (Campbell Aff., ¶¶ 20-23, 26). Because the remaining issues raised by Plaintiffs in this sixth review of BLM's actions are mere flyspecks, and because the consequences of vacatur would be enormous, vacatur is inappropriate here. *See AT&T Servs., Inc.*, 2021WL6122734 at *9.

Moreover, there is a strong policy reason not to vacate at least the EAs associated with Enduring's APDs. It would chill investment in innovative technology to reduce environmental impacts if Enduring's APDs are treated the same as all other APDs even though Enduring has invested millions to eliminate flaring and consumptive use of fresh water as well as thousands of truck trips. Accordingly, to further NEPA's environmental goals, this Court should refrain from vacating the EAs associated with Enduring's APDs.

Alternatively, if this Court nevertheless considers the evidence before it on the impact of vacatur insufficient to outright deny such relief, it should remand to the district court to allow the parties to present further evidence thereon. *WildEarth Guardians*, 870 F.3d at 1240. Not only can the district court then determine whether "it might fashion some narrower form of injunctive relief based on equitable arguments," *id.*, it can also address Plaintiffs' failure to list the APDs that constitute the challenged agency decisions at issue and what effect, if any, potential vacatur should have on already completed and producing wells.

B. Injunctive relief is not warranted because the balance of hardships and public interest weigh against an injunction.

Plaintiffs recognize that a "party seeking a permanent injunction must demonstrate: '(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; (4) that the public interest would not be disserved by a permanent injunction.'" Op. Br., 54 n. 40 (quoting *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 156-57 (2010)).

Plaintiffs sought a preliminary injunction below, but they do not directly ask for injunctive relief here. *See* Op. Br. 54 (prefacing argument on injunctive relief with "[e]ven if the Court applies the injunction factors when considering relief . . .").

In the prior appeals, this Court made clear that it was "not persuaded that the BLM's continued approval of wells under an existing RMP that allows for continued drilling in the planning area will impermissibly limit the choice of reasonable alternatives in the BLM's revision of its RMP." *Diné I* at 1284–85 (internal quotation marks omitted) (declining to grant Plaintiffs their requested injunction in prior appeal).

Here, Plaintiffs fail to acknowledge this Court's prior ruling that BLM could proceed with approving APDs and allow drilling. Plaintiffs thereby fail to present any evidence or argument that the additional analysis BLM has now performed while also revising the RMP should somehow make it less permissible to continue to approve APDs and allow continued production. Whether Plaintiffs are collaterally estopped from making the same arguments again in this round of litigation, *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir. 1995), they have presented nothing new to warrant a different outcome. The Court should therefore rely on its prior determination that continued approval of wells and continued production from existing wells will not impermissibly limit BLM's choices even if this Court requires BLM to perform additional analysis. Thus, an injunction is not warranted.

Moreover, the balance of hardships weigh heavily against an injunction. Plaintiffs' alleged harms are the minor incremental impacts from "dust, fumes,

flares, and noise from drill rigs, fracking trucks, and associated drilling infrastructure," Op. Br., 54-55, from a few hundred additional wells in an area with 40,000 existing oil and gas wells. In contrast, hundreds of millions of dollars in revenue and investment funds will be lost if this Court enters an injunction. *See* App. at __ [ECF # 114-1, 9-10] (Campbell Aff., ¶¶ 18-23). Even without accounting for recent price increases, each producing well accounts for, on average, $5.8 million of net monthly revenue to Enduring and as much as $2.6 million in royalties to the Navajo allottees every month. App. at __ [ECF # 114-1, 10-11] (Campbell Aff., ¶¶ 21-25). Enduring's investment of over $225.5 million would be rendered indeterminately valueless if an injunction issues. App. at __ [ECF # 114-1, 2] (Campbell Aff., ¶ 2). Moreover, halting Enduring's drilling operations for just a single well requires standby costs of approximately $22,000 per day. App. at __ [ECF # 114-1, 12] (Campbell Aff., ¶ 27). Accordingly, an injunction would be catastrophic for Enduring's business.

Furthermore, as discussed above, an injunction would, like vacatur, be devastating to the thousands of Navajo Allottee royalty owners who receive millions of dollars in royalty payments from Enduring each month. App. at __ [ECF # 114-1, 10-11] (Campbell Aff., ¶¶ 24-25). Likewise, an injunction would harm the local economy both in terms of lost tax revenues and lost jobs. App. at __ [ECF # 114-1, 11] (Campbell Aff., ¶ 26). Thus, the public interest weighs heavily against an

injunction. The Court should therefore, as it previously did, decline to award Plaintiffs any injunctive relief.

CONCLUSION

The Court should affirm the district Court's dismissal of Plaintiffs' administrative appeal because BLM complied with its obligations under NEPA and this Court's prior orders.

In the alternative, should the Court deem further analysis necessary, it should remand for such analysis without vacating existing APDs or enjoining BLM from approving future APDs because BLM has substantially complied with NEPA and will in all likelihood reach the same conclusion after additional analysis, and because the district court should be permitted to accept additional evidence on the devastating effect of an injunction or vacatur on producers, Navajo allottee royalty owners, and the local economy before deciding whether such remedies are warranted.

STATEMENT CONCERNING ORAL ARGUMENT

Enduring believes that oral argument is warranted based on the scope and impact of the issues before the Court, and to allow the parties to address any questions the Court may have regarding the complicated facts and procedural history of this matter. Enduing therefore respectfully requests oral argument pursuant to Rule 28.2(C)(2).

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,129 words.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this second day of March, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Jens Jensen
Jens Jensen