

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

DINÉ CITIZENS AGAINST
RUINING OUR ENVIRONMENT, *et*
al., Plaintiffs/Appellants,

Case No. 21-2116

vs.

DEB HAALAND, *et al.*;
Defendants/Appellees.

UNCITED PRELIMINARY RESPONSE BRIEF OF NAVAJO ALLOTTEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Intervenors Alice Benally, Lilly Comanche, Virginia Harrison, Samuel Harrison, Dolora Hesuse, Verna Martinez, Lois Phoenix, and Mabel C. Senger make the following disclosure: Amici Navajo Allottees are not publicly traded corporations, have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

s/ Harriet M. Retford

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Dated: May 2, 2022

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STATEMENT OF RELATED CASES

Defendants Navajo allottees, Delora Hesuse, Alice Benally, Lilly Comanche, Virginia Harrison, Samuel Harrison, Verna Martinez, Lois Phoenix, and Mabel C. Senger (“Navajo Allottees”) adopt and incorporate by reference the Statement of Related Cases of Defendant Deb Haaland and the other defendants in this matter.

STATEMENT OF THE ISSUE

Are Plaintiffs entitled to an injunction or other relief that would halt oil and gas royalty payments to the Navajo Allottees, exposing them and their families and neighbors to even more grinding poverty, as a remedy for alleged minor procedural shortcomings in the government's National Environmental Policy Act, 42 U.S.C. 4331, et. seq. ("NEPA") documentation?

STATEMENT OF THE CASE

For the *Diné*, in keeping with beliefs they consider *bá'hást'i* (sacred), the Navajo Supreme Court has emphasized that “economic opportunity means more than alleviating the effects of poverty or economic injustice.” *Iiná Bá, Inc. v. Navajo Business Regulatory*, No. SC-CV-60-10 (Nav. S. Ct. May 15, 2014), p. 15. “It means providing opportunities to prosper on our own lands, and thereby the means of survival of our people as a community and sovereign nation,” so that “the *Diñé* shall live together as a viable community on our sacred lands in order to continue our way of life.” *Id.*

The Eastern Navajo Agency, which encompasses Navajo communities in Northwestern New Mexico, remains one of the least economically developed places in the United States. The Navajo Nation (“Nation”) has an official poverty rate of 40.5 percent and a median household income of just \$26,862. *See* Federal Reserve Bank of Minneapolis, Navajo Nation Reservation Profile, available at <https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/navajo-nation-reservation> (accessed Jan. 14, 2022). Economic conditions are even bleaker in the Eastern Navajo Agency, where the Navajo Allottees – all enrolled citizens of the Nation – eke out a living on allotted lands allocated to their forebearers by the Federal government as a modest consolation for removing the entire region from what used to be Navajo Indian Reservation (“Reservation”).

Plaintiffs now seek to eviscerate the chief remaining source of economic benefit from the Navajo Allottees' limited landholdings: oil and gas revenue.

More specifically, Plaintiffs have brought this suit to stop the principal economic activity that sustains the Navajo Allottees, who reside in prefabricated homes or in *hó'gáns* (traditional round or hexagonal dwellings with a wood- or coal-burning stove) in the Nation's Nageezi, Huerfano, and Counselor Chapters, where the disputed Applications for Permits to Drill ("APDs") are primarily located. Allottees in the Eastern Navajo Agency whose mineral rights have been so developed, on information and belief, typically receive royalty payments totaling about \$20,000 per year, in a region where the median income is below \$27,000.

The local community overwhelmingly supports continued oil and gas development and has expressed its support through formal resolutions of its local government, public comments at all stages of the Bureau of Land Management process, and participation in both stages of this litigation, first as *amici* then as intervenors. *See Diné Citizens Against Ruining Our Environment v. Zinke*, Case No. 18-2089.

On July 1, 2018, the Nageezi Chapter, a locally elected political subdivision of the Nation's government, passed a Resolution stating:

Navajo Allotment Land Owners are concerned that self-serving special interest organizations are violating the rights of Navajo Allotment Land Owners. That such publicized demonstrations and meetings by these special interest and outside groups have over shadowed the Navajo

Allotment Land Owners who [are] currently benefitting from oil and gas development on their allotment lands; and

Navajo Allotment Land Owners do not share opinions of environmentalists voicing their objections on natural resources developments. These over publicized objections by the environmentalists have drowned out and overshadowed Navajo Allotment Land Owners Rights; and

Navajo Allotment Land Owners are truly the impacted people of the Chaco area. These lands were patented and allotted to the Navajo People in New Mexico and handed down through many generations. These lands were given in exchange for land taken by the U.S. Government [and] in exchange for citizenships. Therefore, as Navajo People being Land Owners, they have the right to lease, develop, or excavate their lands.

Resolution of the Nageezi Chapter, Resolution Number NC-18-07, App. at ____, Doc. 23-3. The neighboring Huerfano Chapter passed a similar resolution on July 8, 2018, Resolution # HUE- 090-18.2. *Id.*

On September 26, 2019, Intervenor Navajo Allottees held a community meeting regarding the current litigation. At that meeting 196 allottee landowners signed declarations in support of the position of Intervenor Allottees, laying out the financial impact that the loss of oil and gas revenue could potentially have for their families. App. ____, Doc. 75. Although these additional allottees were not permitted to intervene, App. ____, Doc. 85, their affidavits demonstrate the intense local interest and concern that this litigation has generated. Interest among allottees who have not yet leased their minerals is also intense. When the Indian Minerals Office held information sessions at chapter houses in the Eastern Navajo Agency to go over the

basics of oil and gas leasing, more than 300 people attended. Sharon Pinto, Bureau of Indian Affairs Navajo Region Report to the 23rd Navajo Nation Council, January 22, 2018 at 5.¹ The following year, the Naabik'iyáti' Committee of the Navajo Nation Council, which functions as the standing committee of the whole for the Nation's legislative branch of government, passed a resolution (No. NABIJA 05-20) establishing the official position of the Nation favoring a five-mile buffer zone around Chaco Culture National Historic Park. Rima Krisst, *RDC advocates for Dine priorities in D.C.*, THE NAVAJO TIMES (Feb. 10, 2022) at 2.²

A. Procedural Background

The Mancos Shale of the San Juan Basin has been under intensive oil and gas production for more than 60 years. Decision Below at 5, App. ____, Doc. 125. During that period more than 40,000 oil and gas wells have been drilled, including 23,000 wells that are active today. *Id.*³

¹ Unfortunately, the link to this report appears to be broken, and we do not have a copy on file. It was previously posted at the Navajo Office of Legislative Services, <https://www.nnols.org/uploads/FileLinks/e09e7cbe7af64047>.

² Such a five-mile buffer would extend to any of the lands held by the Navajo Allottees. However, in November 2021, President Joe Biden announced a 20-year ban on oil and gas drilling within a 10-mile radius of the Park. Following this announcement, Navajo Nation President Jonathan Nez sent a letter to President Biden reaffirming the Nation's position favoring a five-mile buffer zone, and he and a delegation of Council delegates, including members of the Resources and Development Committee, traveled to Washington, DC in January to press the issue with the Biden Administration. *Navajo Times, Id.*

³ For general information about the San Juan Basin, see Navajo Nation, Oil and Gas Leasing Potential in the San Juan Basin (Summer NAPE 2020),

In 2015, Plaintiffs filed a Petition for Review of Agency Action challenging the Bureau of Land Management’s (“BLM”) decision to grant over 300 APDs. *Id.* at 2, App. _____. Their motion for preliminary injunction was denied, and this Court affirmed. *Dine Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016). Having been denied preliminary relief, the Plaintiffs proceeded to the merits and after extensive litigation and three separate amendments to Plaintiffs’ petition, the District Court dismissed the case in 2018. Decision Below at 2, App. ____; *Dine Citizens Against Ruining Our Environment v. Jewell*, 312 F. Supp. 3d 1031, 1054 (D.N.M. 2018).

This Court affirmed on every point, except that the Court found that there were five of the Environmental Assessments (“EA”) at issue in which the BLM had not adequately considered the cumulative water impacts. Decision Below at 3, App. ____; *Dine Citizens Against Ruining Our Env’t v. Bernhardt*, 923 F.3d 831, 859 (10th Cir. 2019). In response to this decision, BLM drafted a voluminous supplement to the EA, the “EA Addendum,” addressing 81 APDs. Decision Below at 3, App. ____.

This extensive additional analysis went far above and beyond what this Court had ordered.

<https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/demd/pdf/202008-navajonation-NAPE-brochure.pdf>.

Plaintiffs filed another Petition for Review, App. ____, Doc. 95, arguing both that the EA Addendum was inadequate, and that the BLM should have vacated all of the APDs and cut off the Navajo Allottees' royalty payments while it worked on updating its paperwork. Opening Brief at 11. The District Court was unpersuaded, denied a preliminary injunction, and dismissed Plaintiffs' claims in their entirety. Decision Below at 64, App. ____ (“The fourth prong in the preliminary injunction test required the Court to undergo a detailed merits analysis, an analysis ultimately revealing that Plaintiffs have not and cannot demonstrate that BLM’s documentation fails NEPA’s requirements[,] [and] [b]ecause no further analysis by the Court or argumentation by the parties will change the Court’s disposition as to the merits of this litigation, the Court accordingly grants Defendants’ request (Doc. 111 at 49) and Plaintiffs’ claims are hereby DISMISSED with prejudice.”)

Challenges to the majority of APDs were dismissed as either unripe or because they had not yet been finally approved, or as moot because the wells had been abandoned. Decision Below at 15, App. ____. Of the APDs that were properly before the Court, the Court found that supplementation of the EA was an appropriate response to correct minor deficiencies in NEPA documents that were otherwise in compliance with the statute. “BLM’s documentation is over 100,000 pages long, and BLM’s initial EA and FONSI [“Finding of No Significant Impact”] were only demonstrably insufficient with regard to a discrete element of analysis covering a

small subset of the APDs Plaintiffs contested,” and there is no evidence “that BLM failed to undertake an objective, good faith inquiry into the environmental consequences of the agency’s proposed action.” *Id.* at 19 (quoting *Forest Guardians v. U.S. Fish and Wildlife*, 611 F.3d 692, 714 (10th Cir. 2010)). “[G]ood faith efforts to conduct environmental analysis under NEPA . . . abound in both these old EAs from *Dine II* and the new EAs at issue in the instant case.” Decision Below at 22, App. ____.

The District Court also found that the Plaintiffs’ claims fail on the merits because BLM’s analysis, as supplemented, satisfied the requirements of NEPA. *Id.* at 36, App. ____ . BLM conducted a detailed and thorough analysis of the water impacts, carefully considering the “slick water” issue that was particularly a focus of Plaintiffs. *Id.* at 40-43, App. ____ . BLM also undertook an extensive air quality analysis, *id.* at 44-54, App. ____, and green-house gas analysis, *id.* at 55-62, App. ____ .

SUMMARY OF ARGUMENT

For decades, the Navajo Allottees have worked with the federal government and oil and gas companies to lease their mineral rights and secure the economic benefits that flow from such rights. Oil and gas development has brought desperately needed economic opportunities to the Navajo Allottees, their families and the entire region.

This Court should affirm the District Court and dismiss the case in its entirety, for the reasons already detailed by the District Court and by the other Defendants in this matter. Yet regardless of whether this Court rejects the Plaintiffs' ultimate merits arguments, it should not grant Plaintiffs the relief they seek because such extreme measures would cause substantial hardship to the Navajo Allottees and are not in the public interest. *Heideman v. South Salt Lake City*, 348 F. 3d 1182, 1188 (10th Cir. 2003) (stating that a movant must show "that the threatened harm to the movant outweighs any harm to the opposing party if the injunction issues; and ... that issuance of the injunction would not be adverse to the public interest.").

Plaintiffs are not entitled to a preliminary injunction, a permanent injunction, or the vacatur of the APDs, which is functionally a permanent injunction. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) ("Vacatur of agency action is a ... form of injunctive relief granted by district courts."). Instead, the Navajo Allottees respectfully ask this Court to exercise its substantial discretion, *id.* at 1240, to fashion a remedy that will ensure that even if the federal government has not fully completed its paperwork, the Navajo Allottees do not lose their income and find their families and communities mired in even greater poverty.

STANDARD OF REVIEW

The District Court’s decision is reviewed de novo. *Forest Guardians v. U.S. Fish and Wildlife*, 611 F.3d 692, 703-04 (10th Cir. 2010) (“We afford the district court’s decision no particular deference, but rather, review the rules and administrative record independently.”) The agency’s decision, however, is reviewed under the Administrative Procedures Act, and may not be overturned if the agency “(1) acted within the scope of [its] authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion.” *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). “An agency's action is entitled to a presumption of validity, and the petitioner challenging that action bears the burden of establishing that the action is arbitrary or capricious.” *Forest Guardians*, 611 F.3d at 704.

ARGUMENT

I. Oil and gas development provides desperately needed royalty money and economic opportunity to Navajo allottees.

The royalty revenue provided by oil and gas development is enormously important to Navajo allottees and neighboring communities. The region of the San Juan Basin where the wells at issue are located is a rural and isolated area approximately 50 miles or more from Farmington, New Mexico. There are few jobs or other economic opportunities, and many residents still rely on a traditional Navajo lifestyle of grazing sheep and other livestock to support themselves. The money

obtained through oil and gas royalties and related employment helps allottees to pay their bills and provide for the daily needs of their families and enables them to send their children to college and improve their properties, creating new opportunities for the future. *See* App. ____, Doc. 23; App. ____, Doc. 78.

A. The Nation suffers from high poverty and unemployment.

Alternative sources of family income in the region where the Navajo Allottees live and work can be difficult to find. In addition to the staggering unemployment and poverty rates discussed above, only 8.6 percent of the population have college degrees. Federal Reserve Bank of Minneapolis. *Id.* Modern connectivity and work from home is unlikely to change this: Just 24 percent of households in the area have access to the Internet, and that access tends to be concentrated in the smattering of larger communities. *Id.* The Federal Reserve Bank does not track how many of these houses also lack electricity and running water. But it does include a chart of mortgage applications, showing thousands of applications for loans to buy a mobile home, but almost none to purchase a non-prefabricated house. *Id.*

Oil and gas development is one of the most important sources of employment and income. Alex Campbell, at Enduring Resources, has attested that it employs

250 Native Americans in the area. Affidavit of Alex Campbell at ¶ 24, App. ____, Doc. 70-2. These jobs, in turn, support other local businesses.⁴

The population of the]Nation is also much younger than the population of the United States as a whole and has higher birth rates, so economic growth is needed not only to support the current population but to accommodate a rapidly growing younger generation. Navajo Division of Health and Navajo Epidemiology Center, *Navajo Population Profile: 2010 U.S. Census* (2013), <https://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf>. The 2010 census determined that 56 percent of people of Navajo descent are under the age of 29. *Id.* at 8. Although people of Navajo ancestry are on average younger than most Americans and have more children, they often struggle to find work on the Nation itself. For instance, people of Navajo descent between the ages of 20 and 39 are far less likely to live on Navajo land than other age groups, reflecting the lack of economic opportunity, although many remain nearby in the border towns. *Id.* at 47. In the last 30 years there was “a population increase of 109.4 percent for all Navajo

⁴ Of course, the biggest economic driver in the region is coal mining and the associated coal fired power plants, which, before they were shut down, were the two biggest employers in the region and also supplied the majority of the Navajo Nation’s government revenue. James Rainey, *Lighting the West, dividing a tribe*, NBC NEWS (December 18, 2017), <https://www.nbcnews.com/specials/navajo-coal/>. The economic effects of the closure of these plants have been catastrophic.

in the U.S. and a population decrease of 6.3 percent for the Navajo population on Navajo Nation.” *Id.* at 50.

Poverty is especially grinding in those local governmental districts or chapters where the drilling permits at issue in this lawsuit are located. *Id.* at 30. In the Nageezi Chapter, where many allottees who benefit from the wells at issue reside, *The Navajo Times* reported in 2013 that 30 percent of households lack electricity. Cindy Yurth, *The Orphan on the Checkerboard*, THE NAVAJO TIMES (April 9, 2013), <http://navajotimes.com/news/chapters/050913hue.php>. The neighboring Huerfano Chapter is only accessible by unpaved roads. *Id.*⁵ “The chapter does sport 15 churches, two [Bureau of Indian Education] boarding schools, a clinic, and at 90 square miles it’s so large it hosts two land boards, two fire stations and two transfer stations.” *Id.*

The Navajo Allottees attest that they have very deep ties to this region, residing as they do within the four mountains that the *Diné* (or “The People,” as Navajo call themselves) consider sacred, where their ancestors have lived for generations. The Eastern Navajo Agency was not part of the original Reservation, which was created by the Treaty of 1868. Peter Iverson: *Diné: A History of the*

⁵ Many of the local access roads are maintained and plowed by oil and gas companies, a significant benefit to local community. When a school bus encountered a washed-out road a few weeks ago, for example, the driver called Defendant-Intervenor Enduring, which sent out a road crew out to make emergency repairs.

Navajos 133 (Univ. New Mexico Press 2002). Instead, this section of the Navajo Eastern Agency was added to the Reservation by Presidential executive order on Nov. 9, 1907. *Id.* However, after intense lobbying by non-Indian ranching and railroad interests, these same lands were removed from the Reservation and restored to the federal public domain by executive orders issued on Dec. 30, 1908 and Jan. 16, 1911, respectively. *Id.* As a consolation for their lost Reservation, many of the families in the area were granted allotments by the federal government in the late 1920s and early 1930s. *Id.* These allotments have passed down through the generations by devise, or more typically operation of law through intestacy, and have typically become highly fractionated by multiple heirs. This complicates surface land development, particularly when nearly all the allotments at issue are too arid to farm or ranch profitably. *Id.* Only the presence of oil and gas make this complex heritage something that might be able to support a family.

As Navajo Allottee Delora Hesuse attested, “[my] ancestors were allotted the land ... many generations ago,” and her family has a long history of leadership in the community, which her father and grandmother have represented on the Navajo Nation Council. Declaration of Hesuse at ¶¶ 1, 3, App. ___, Doc. 23-2. Allotment was halted by the Federal government in 1934; all the Navajo Allottees therefore have family ties to this specific land dating back to at least the early 20th Century, and often much further. 25 U.S.C. § 461 (“On and after June 18, 1934, no land of

any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.”). Although the policy of allotment was “disastrous,” *Hodel v. Irving*, 481 U.S. 704, 707 (1987), many individual allottees still live on their allotments and rely on them for income and take pride in them as their ancestral lands.

B. The Navajo Allottees rely on their oil and gas income for basic daily expenses.

Oil and gas development, including the challenged APDs, are an important source of income for the Navajo Allottees, often “the only source of income desperately needed to feed, shelter, and clothe our families.” Declaration of Hesuse at ¶ 2, App. ___, Doc. 23-2. This income averages a few hundred dollars a month – just enough cash to buy groceries for a family or make a car payment. In 2015, the Federal Indian Minerals Office distributed \$96 million to 20,835 individual Indian mineral interest owners on Navajo allotted land. Office of Inspector General, Bureau of Indian Affairs’ Federal Indian Minerals Office, Report No.: 2015-EAU-079 (February 2017) at 1, https://www.oversight.gov/sites/default/files/oig-reports/FinalAudit_BIAFederalIndianMineralsOffice_02032017_Public.pdf. That is about \$4,600 per person - about \$383 per month - although amounts vary from person to person and are often spread through extended family networks.

In the first ten months of 2021, Defendant Enduring Resources paid \$18.2 million in royalties to allottees on the Nation, of which \$7.3 million came from leases that are currently before this Court.⁶ Between 2021 and 2018, Enduring paid Navajo allottees a total of approximately \$70 million in royalties, of which \$27.8 million came directly from the leases at issue here. *Id.*

This money has made concrete improvements in peoples' lives, enabling them to purchase basic necessities that most Americans take for granted: “[S]ome families have purchased new vehicles and mobile homes with the money they’re receiving from the oil companies.” Alastair Lee Bitsoi, *Agreement gets oil flowing from Navajo land*, THE NAVAJO TIMES (March 6, 2014), <http://www.navajotimes.com/news/2014/0314/030614oil.php>. Most allottees who receive oil and gas royalties double their income, from around \$20,000 to around \$40,000 – still below the median income in the United States. The lost income to the allottees who benefit from these disputed leases will have a devastating effect on their lives and may lead to them losing their homes or cars. The surface value of these allotments is seriously limited not only by their relative inaccessibility, but by

⁶ These numbers are current as of January 21, 2022. Earlier numbers were provided to the district court showing that “[f]rom December 2017 to May 2019, Enduring Resources paid the 9,000 allottees \$24,807,072 in royalty revenue.” Affidavit of Alex Campbell at ¶ 23, App. ___, Doc. 70-2.

the harsh climate and arid, rocky terrain, which as a practical matter eliminates farming and severely restricts livestock grazing potential.

Reversing the District Court and substituting a new rule that requires federal agencies to vacate any potentially affected APD every time an agency decides to supplement its environmental analysis in response to legal or scientific developments, *see* Plaintiffs' Opening Brief at 52, would make a mockery of the Federal government's policy generations ago to allot these lands so that Navajo families, who had previously lost their Reservation status, could live and work on them.

C. This would be a disastrous time to shut Navajo allottees off from their income.

This is a particularly bad time to enjoin oil and gas development and the associated royalty payments. The Nation is suffering severely and disproportionately from the COVID-19 pandemic, with much higher case rates and severity than other populations. *See* The Disproportionate Impact of COVID-19 on Communities of Color, U.S. House of Representatives, Ways & Means Committee, May 27,2020.

<https://waysandmeans.house.gov/legislation/hearings/disproportionate-impact-covid-19-communities-color-0>. In Spring 2020, the Nation had the highest per capita rate of covid cases in the country, which it eventually turned around through a successful vaccination campaign and exceptionally strict control measures. Erik Ortiz, *How the Navajo Nation, once battered by the coronavirus, is staring down a*

delta surge, NBC NEWS (Aug. 26, 2021). Native Americans in general had an incidence of covid 3.5 times that of non-Hispanic white persons, and all three of the counties surrounding the Navajo Nation were among the top ten counties in per capita covid cases nationwide. Haoying Wang, *Why the Navajo Nation was hit so hard by coronavirus: Understanding the disproportionate impact of the COVID-19 pandemic*, 134 APPLIED GEOGRAPHY 102526 at 1-2 (2021), <https://www.sciencedirect.com/science/article/pii/S0143622821001429>. As of January 19, 2022, the Navajo Nation Department of Health reported 44,997 and 1,600 deaths. Navajo Nation Dep't of Health, *Dikos Ntsaaígíí-19 (COVID-19)*, <https://www.ndoh.navajo-nsn.gov/covid-19>.

These high caseloads led to some of the most restrictive pandemic control measures in the country. Wang, *supra*, at 2 (“As early as April 2020, the Navajo Nation instituted the country’s most extensive and restrictive lockdown orders, but underfunded infrastructure and lack of access to basic needs have worked against the efforts.”). Few people on the Nation have Internet access, and almost none has broadband service sufficient to support video and videoconferencing. But the strict measures were necessary and may still be necessary because most Navajo families live in crowded multigenerational housing that makes protecting the vulnerable almost impossible. As the Navajo Allottees told the District Court in opposition to the Plaintiffs’ request for a preliminary injunction, “[t]he pandemic has only

increased the Navajo Allottees’ near-total reliance [on] oil-and-gas-related income, [and] [t]heir survival depends on the oil and gas industry now more than ever.” App. ___, Doc. 103.

These challenges persist. Schools on the Nation are currently on red status, and activity on the Reservation is tightly restricted. Navajo Nation Dep’t of Health, Dikos Ntsaaígíí-19 (COVID-19), <https://www.ndoh.navajo-nsn.gov/covid-19> (under the Public Health Order tab); *see also*, Shondiin Silversmith, *Facing rising COVID-19 case numbers, the Navajo Nation issues new tribal public health orders*, THE DURANGO HERALD (January 17, 2022), <https://www.durangoherald.com/articles/facing-rising-covid-19-case-numbers-the-navajo-nation-issues-new-tribal-public-health-orders/>. This is simply not the time to cut off the Navajo Allottees’ income, just as it was not when the Plaintiffs first requested the District Court grant their preliminary injunction. *See* App. ___, Doc. 103.

II. The remedies requested by Plaintiffs would cause enormous harm to the Navajo Allottees and do not meet the standard for injunctive relief.

In their Petition, Plaintiffs ask the court to “[v]acate BLM’s approvals of the challenged APD Authorizations” and “[e]njoin BLM from approving any pending or future APDs that permit horizontal drilling or hydraulic fracturing in the Mancos Shale formation pending completion of a Final Environmental Impact Statement.” App. ___, Doc. 95 at ¶¶ B, C. This relief is not required by law and would cause

substantial hardship to the Navajo Allottees for little public benefit. The challenged APDs provide more than \$7 million in annual income in this small, rural community, although the precise numbers vary from year to year, and pending and future APDs could transform the lives of the allottees who begin to receive royalty payments.

Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal. *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (citing *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991)). A preliminary injunction should be granted only in cases where the necessity for it is clearly established. *United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888-89 (10th Cir. 1989). Preliminary injunctions are particularly disfavored include “(1)[P]reliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits” *Schrier*, 427 F.3d at 1259.

To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) that the threatened harm to the movant outweighs any harm to the opposing party if the injunction issues; and (4) that issuance of the injunction would not be adverse to the public interest. *Heideman v. South Salt Lake City*, 348

F. 3d 1182, 1188 (10th Cir. 2003); *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). Similarly, “a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief... (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; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L. C.*, 547 U.S. 388, 391 (2006).

Vacatur of an agency order is a form of injunctive relief subject to these requirements. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) (“Vacatur of agency action is a form of injunctive relief”). It is the most serious of a menu of remedial options available in response to a NEPA or other procedural violation.

In the event that this Court does find a NEPA violation, it may: “(1) reverse[] and remand[] without instructions, (2) reverse[] and remand[] with instructions to vacate, [or] (3) vacate[] agency decisions.” *Id.* When a lease has been issued and operations are ongoing, that is a factor that weighs against vacatur. *Id.* at 1240. Remand without vacatur is also appropriate when “the defects identified by [the] Court are minor ... [and] BLM is likely to reconsider the issues but ultimately reach the same leasing decision.” *Wild v. Haaland*, Civil Action 18-cv-02468-MSK, at

*17 (D. Colo. Sep. 28, 2021). “In that circumstance, premature vacatur of the existing leases would simply result in administrative delay and additional costs for all parties involved in order to re-lease the same lands.” *Id.*

Plaintiffs seeking injunctive relief for incomplete administrative procedure are held to the same standards as plaintiffs seeking injunctive relief for common law torts and other claims. “The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Although there are cases that “appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances[,] [n]o such thumb on the scales is warranted.” *Id.*

The first and foremost reason why Plaintiffs are not entitled to the relief that they seek is that their claims fails on the merits. The other defendants in this case have explained in detail why the District Court was correct to find that the EAs, as supplemented, were compliant with NEPA and that the decision to supplement the record instead of vacating the APDs was appropriate and in keeping with the BLM’s obligations. The Navajo Allottees will not repeat their arguments here, but instead will focus on the fact that the relief sought by the Plaintiffs will cause significant hardship to the other parties and is not in the public interest.

The balance of harms weighs in favor of the Navajo Allottees, who would be economically devastated by an injunction. As described above, these oil and gas

royalties are the primary source of income for allottees on the Navajo Nation, who earned more than \$7 million in the first 10 months of 2020 just from the leases that Plaintiffs are attempting to enjoin. It is difficult to overstate how important this money is, spread over thousands of people living in this very poor, rural area.

There is also no rule that prevents environmental harm from being balanced against economic harm. *See 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)); *see also Wilderness Workshop v. United States BLM*, 531 F.3d 1220, 1231 (10th Cir. 2008). In this case the environmental harm is minimal, as the BLM found in its comprehensive NEPA documentation, and the financial harm is devastating, particularly for the people who can least afford it. Although “[u]nder normal circumstances, monetary loss may be remedied by an award of compensatory damages, ... [h]ere . . . the court considers the consequences of such losses as extremely serious and potentially devastating to the Tribes.” *Sac & Fox Nation of Missouri v. LaFaver*, 905 F. Supp. 904, 907 (D. Kan. 1995). Furthermore, the Navajo Allottees are not seeking favors from the government; instead, they are simply trying to lease their own private property to sell a lawful product.

An injunction or order of vacatur is also against the public interest. Economic growth and opportunity on and near the Reservation and other Native American homelands is a longstanding, bipartisan public policy priority. As Congress has

stated, “the United States has an obligation to guard and preserve the sovereignty of Indian Tribes in order to foster strong Tribal governments, Indian self-determination, and economic self-sufficiency among Indian Tribes.” 25 U.S.C. § 4301(a)(6). “[D]espite the availability of abundant natural resources on Indian lands and a rich cultural legacy that accords great value to self-determination, self-reliance, and independence, Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing, and associated social ills than those of any other group in the United States; [and] *the United States has an obligation to assist Indian Tribes with the creation of appropriate economic and political conditions with respect to Indian lands to encourage investment from outside sources that do not originate with the Tribes*; and facilitate economic ventures with outside entities that are not Tribal entities.” *Id.* at § 4301(a)(8)&(9)(emphasis added). Thus, it is the official policy of the United States, expressed through Congressional enactment, to assist Native Americans with the development of their natural resources by encouraging and permitting them to obtain outside capital and business investment.

It is a “paramount federal policy that Indians develop independent sources of income.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001); *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989); *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1007 (10th Cir. 2015). This both supports individual Native Americans and avoids

burdening already overstretched public services. *Sac & Fox Nation v. LaFaver*, 905 F. Supp. 904, 907-08 (D. Kan. 1995)(finding that the public interest would be ill-served by the potential influx of tribal members into social service and welfare programs). Only through achieving economic stability and opportunity can the United States achieve its broader political goals of tribal self-sufficiency and self-determination. *Id.*

The United States also stands as the trustee for Indian allotted lands and has an obligation to act accordingly on behalf of all Navajo and other Native American allottees – an obligation very different from the multiple use mandate that the BLM applies to federal lands. 25 U.S.C. § 348. “[T]he BIA is first and foremost the trustee for the Indian landowners.” *Wilkinson v. U.S.*, 440 F.3d 970, 975 (8th Cir. 2006). With respect to allotted lands, these are not simply federal lands that may be used and managed in accordance with current federal policy, and where environmental interests are balanced against the government’s interest in collecting revenue. Instead, these lands belong to the allottees, who hold the permanent beneficial interest in both surface and subsurface rights, and it would be an abuse of the government’s trust responsibilities to divert resources from the allottees to other federal priorities.

CONCLUSION

The relief sought by Plaintiffs is not required by law, would cause substantial hardship to the Navajo Allottees without any corresponding public benefit, and is manifestly against the public interest. For this and the other foregoing reasons, the District Court's decision should be affirmed.

Respectfully submitted this 2nd day of March 2022,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,504 words. This word count was obtained from Microsoft Word.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Uncited Preliminary Response Brief of Navajo Allottees was delivered to the Court via CMF/ECF System and served upon counsel of record via electronic transmission on this 2nd day of March 2022.

s/ Harriet M. Retford
