No. 15-2130

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE, WILDEARTH GUARDIANS, and NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs-Appellants,

v.

SALLY JEWELL, U.S. BUREAU OF LAND MANAGEMENT, and NEIL KORNZE,

Defendants-Appellees,

and

WPX ENERGY PRODUCTION, LLC, ENCANA OIL & GAS INC., BP AMERICAN CO., CONOCOPHILLIPS CO., BURLINGTON RESOURCES OIL & GAS CO. LP, ANSCHUTZ EXLORATION CORP., and AMERICAN PETROLEUM INSTITUTE,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico
No. 1:15-cv-00209-JB-LF, Honorable James O. Browning, District Judge

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APPELLANTS' REPLY
(Oral Argument Requested)

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GLOSSARY OF TERMS:

2001 RFDS	2001 Reasonably Foreseeable Development Scenario
2003 RMP	2003 Resource Management Plan
2014 RFDS	2014 Reasonably Foreseeable Development Scenario
APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	Bureau of Land Management
BLM Handbook	BLM's Land Use Planning Handbook (H-1601-1)
CBM	Coalbed Methane
CEQ	Counsel on Environmental Quality
Citizen Groups	Diné Citizens Against Ruining Our Environment *et al.*
COA	Conditions of Approval
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land and Policy Management Act
FONSI	Finding Of No Significant Impact
IM	BLM Instruction Memorandum
JA	Joint Appendix
Mancos RMPA	Mancos Shale Resource Management Plan Amendment
NEPA	National Environmental Policy Act
Order	Memorandum Opinion and Order, Preliminary Injunction No. 1:15-cv-00209-JB-SCY (D.N.M. Aug. 14, 2015)

INTRODUCTION

The district court erroneously denied Plaintiffs-Appellants Diné Citizens Against Ruining Our Environment, *et al.*, ("Citizen Groups") Motion for Preliminary Injunction. The district court committed legal error by creating its own, elevated standards for preliminary relief, and abused its discretion in finding that Citizen Groups did not satisfy the four-part test for a preliminary injunction. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

Defendants-Appellees Bureau of Land Management, *et al.*, ("BLM"), have now approved at least 306 applications for permit to drill ("APDs") into the Mancos Shale using horizontal drilling and multi-stage hydraulic fracturing without *ever* having considered the cumulative environmental and human health impacts of this development across the Greater Chaco landscape, as required by the National Environmental Policy Act ("NEPA"). 40 C.F.R. § 1508.7. Over 115 of these Mancos Shale wells have already been drilled, representing a new wave of fossil fuel exploitation to hit the broader San Jan Basin whose residents have already endured and continue to suffer from the drilling of over 30,000 gas wells. *Each* additional Mancos Shale contributes to the proverbial "death by a thousands cuts" the Basin and its residents are witnessing and BLM has never evaluated through a Basin-wide hard look NEPA assessment of cumulative impacts.

LITIGATION BACKGROUND

I. SCOPE OF REQUEST FOR INJUNCTIVE RELIEF

The purpose and need for injunctive relief is clear: BLM has unlawfully approved hundreds of Mancos Shale drilling permits, and continues to do so on an ongoing basis, causing irreparable harm to Citizen Groups, their families, and the broader public. With Citizen Groups having *twice* filed Amended Petitions for Review (ECF Nos. 21 and 87) to add new APDs approved by BLM since this litigation was initiated—including a total of 16 new Environmental Assessments ("EAs") approving 55 new APDs on a cursory, piecemeal basis—and with ongoing drilling of approved Mancos Shale wells, a preliminary injunction is essential in order to maintain the status quo pending resolution on the merits. *Tri-State Generation & Transmission Ass'n v. Shoshone River Power,* 805 F.2d 351, 355 (10th Cir. 1986).

There are three distinct categories for APDs challenged in this case: (1) APDs approved but not yet drilled; (2) APDs approved and already drilled; and (3) APDs with final EAs and signed Findings of No Significant Impact ("FONSI"), but no final approval (or "Decision Record"). Although there is no dispute among the Parties regarding these categories, BLM plays coy and attempts to create confusion where none exists. BLM Resp. 17.

Citizen Groups have made abundantly clear that the scope of the requested

injunctive relief includes *only* those wells that have been approved but not yet drilled. JA00093 (the district court "clarifying once and for all that the Motion applies only to wells that have not yet been drilled"); *Id.* ("[Citizen Groups] are asking the Court to suspend APD approvals for those wells that have not yet been drilled."); Apl. Br. 2 (same). As explained by BLM, this includes 96 APDs, BLM Resp. 17, as well as 46 new APDs included in Citizen Groups' second Amended Petition (ECF No. 87), for a total of 142 APDs. BLM recognizes that this "category of challenged APD approvals are properly before this Court." BLM Resp. 17.

Citizen Groups do not seek to shut-in production on the 115 wells that have already been drilled through their request for preliminary relief. JA00092 n.9 ("the Motion did not seek to shut down producing wells"); JA00147 ("Plaintiffs are not seeking to shut down completed and operating wells"). While these producing wells continue to cause irreparable harm, they have not been included within the scope of Citizen Groups' request for preliminary relief for the same reason that an injunction *should* be imposed on wells not yet drilled: the status quo should be maintained. JA00092 n.9 ("a request [to shut down producing wells] would clearly be altering the status quo, and none of the parties opposing the Motion—the Federal Defendants, the Operators, or the API—argued that the requested preliminary injunction would change the status quo."). Critically, and contrary to

argument from BLM, BLM Resp. 18-19, the wells already drilled are not moot. They are properly before the district court for relief pending resolution on the merits. Unlike the cases cited by BLM, meaningful relief still exists for producing wells.[1] *See*, *e.g.*, *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 428-29 (10th Cir. 1996) (finding claims not moot where project was completed because court could order it closed or impose restrictions until agency complied with NEPA). Regardless, any decision regarding the mootness of this category of wells should properly be raised by BLM in the district court, and not used as a ploy to distract this Court on appeal.

The third category is for those wells where final EAs and signed FONSIs have been released, but where BLM has not yet taken the final administrative step—issuing a Decision Record. The Court's authority over these wells, and any future APD approvals, is simple: once approved, they should immediately be subject to the same injunction imposed on the first category of wells approved but not yet drilled. The Court's equitable authority to structure such a remedy is unequivocal. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 174 (2010) ("a court's function is to do equity and to mould each decree to the necessities of

[1] Citizen Groups hereby reserve the right to request the following types of equitable relief for challenged wells that have already been drilled, pending BLM's compliance with the law: (1) plug and abandon drilled wells; (2) impose interim measures to protect human health and the environment; and/or (3) declare that BLM must consider certain measures to protect human health and the environment in remanded NEPA processes.

the particular case."); *see also Colo. Environmental Coalition v. Office of Legacy Management,* 819 F. Supp. 2d 1193, 1224 (D. Colo. 2011) (ordering that no new leases could be issued and no ground-disturbing activity could occur until the agency fully complied with NEPA). The alternative, which would require Citizen Groups to file separate litigation on each new APD approved by BLM, would not only be burdensome and unnecessary, but a waste of judicial resources.

ARGUMENT

I. CITIZEN GROUPS HAVE DEMONSTRATED THAT BLM'S APD APPROVALS VIOLATE NEPA

To show likelihood of success on the merits, Citizens Groups need to demonstrate that: (1) environmental impacts of horizontal drilling and multi-stage fracturing differ in type and magnitude from those associated with conventional drilling, and that (2) the cumulative environmental effects analysis in BLM's 2003 Resource Management Plan ("RMP") and Environmental Impact Statement ("EIS") did not consider the specific environmental impacts associated with this newly-developed technology. Apl. Br. 19. Record evidence shows Citizen Groups have met this burden. Apl. Br. 20-29. The district court committed legal error, elevating Citizen Groups' burden "closer to a pure merits decision," JA00130; *see also* Apl. Br. 17-19, and abused its discretion in finding that Citizen Groups' did not satisfy the likelihood of success on the merits prong.

A. The Environmental Impacts of Horizontal Drilling and Multi-Stage Fracturing are Different from Conventional Drilling.

The record confirms a fundamental fact underlying this case: the environmental impacts of horizontal drilling and multi-stage fracturing are *not equivalent* to the impacts of conventional drilling. JA00233-48 (declaration of Susan Harvey); JA00149 (district court findings); JA00743 (BLM documents). Yet, for purposes of this litigation, BLM has consistently ignored this evidence—including its own findings about the potentially significant and unanalyzed impacts of this new technology. 79 Fed. Reg. 10,548 (Feb. 25, 2014). In Response, BLM's only argument is that "[s]ince the 1950s, fracking has been applied to nearly all wells drilled in the San Juan Basin." BLM Resp. 32. Such generalities only underscore the limitations of BLM's argument. As recognized by the district court: "directional drilling[2] causes roughly double the surface impacts of vertical drilling[;]" "it can take five to ten times more water to frack a directionally drilled well than a vertical well[;]" and "[d]irectionally drilled wells can produce three-and-one-half to four-and-one-third times as much of certain air pollutants as vertical wells." JA00077 (¶¶88-90). BLM also recognizes that "the two main differences between vertical drilling and horizontal drilling and fracking are the impacts on water and air pollutants." BLM Resp. 36. On the other hand, API offers

[2] The district court's use of "directional drilling" is synonymous with horizontal drilling and multi-stage fracturing.

no rebuttal to the fundamental issue of whether the environmental impacts horizontal drilling and multi-stage fracturing differ in type and magnitude from those associated with conventional drilling, thereby conceding this issue. These findings are undisputed.

Appellees attempt to obscure this plain fact in two ways, both of which fail. First, both BLM and Operators attempt to conflate the impacts of horizontal drilling and multi-stage fracturing with those of vertical drilling, alleging that because both cause harm to land, air, and water, therefore the technological distinction and harms caused by the two drilling technologies is irrelevant. BLM Resp. 31; Op. Resp. 20. This is incorrect. As this Court recognized in *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1158-59 (10th Cir. 2004), it is the difference in *magnitude* of impacts between two different extraction technologies that determines whether a preexisting NEPA analysis adequately analyzed a proposed action's impacts, regardless of whether the different extraction technologies have the same *type* of impacts. *See also* 40 C.F.R. § 1508.27.

Second, Operators claim that, because "one horizontal well can replace up to four vertical wells," impacts to environmental resources "significantly decreases."

Op. Resp. 21.[3] This argument fails for one simple reason: all Mancos Shale wells are being drilled *in addition to*—not instead of—the 9,942 vertical wells projected by the 2003 RMP/EIS. BLM admits, and the district court confirms, that vertical wells are still being approved by BLM and drilled by operators in the San Juan Basin. *See* JA00071 (¶53); JA00074 (¶68). Moreover, *none* of the challenged Mancos Shale wells are a replacement for vertical wells that would otherwise be drilled. JA00765 ("All wells that will be drilled in the Mancos Shale will be horizontally drilled and fractured."). The record proves, *but for* advances in horizontal drilling and multi-stage fracturing technology, the Mancos Shale formation could not be economically developed. JA00180 (noting the Mancos Shale reservoirs "are approaching depletion and are marginally economic."); JA00068 (finding that this technology has "been 'a game changer' in natural gas and oil extraction"). Accordingly, rather than significantly decreasing environmental impacts—as Operators assert—*each* additional Mancos Shale wells adds to the cumulative legacy of exploitation Citizen Groups are forced to endure.

B. Analysis in the 2003 RMP/EIS was Exclusively Focused on Gas Development in the Northern Portion of the Basin.

Appellees also attempt to sell this Court on their theory of blank check NEPA analysis—relying on vague language and a 9,942 well prediction in the

[3] BLM uses the same faulty logic to allege that increased impacts of horizontal drilling are mitigated by the need for fewer horizontally-drilled wells. BLM Resp. 37-8.

2003 RMP/EIS to claim that, as it applies to drilling approvals, anything goes.[4] In addition to being factually incorrect, this is not how NEPA is intended to work. *See* 40 C.F.R. § 1502.9(c)(1)(ii). Rather, the *context* for oil and gas development analyzed in the 2003 RMP/EIS was quite specific and distinct from the drilling at issue in this case. *See* Apl. Br. 10-12, 25; 40 C.F.R. § 1508.27. In particular, the 2003 RMP/EIS identified five natural gas formations: Fruitland, Pictured Cliffs, Mesaverde, Dakota, and Chacra, which together account for *99.7 percent* of the 9,942 wells predicted for Alternative D. JA00404. This *context* formed the basis of BLM's cumulative impacts analysis, which simply did not contemplate horizontal drilling and multi-stage fracturing of the Mancos Shale.

Appellees arguments in Response do not rebut this plain fact. First, BLM asserts that the cumulative impacts analysis in the 2003 RMP/EIS is not limited to natural gas wells, citing a mere *two* instances where the EIS specifically mentions "oil." BLM Resp. 33. One sentence, noting: "oil and gas condensate are produced primarily from the Mancos Shale/Gallup formation," JA00387, is part of a broader section characterizing oil and gas resources in the planning area, and actually

[4] *See, e.g.,* Op. Resp. 21 ("BLM considered the cumulative impacts of drilling 9,942 wells on land, air, water, and cultural resources"); Op. Resp. 23 ("The RMP/EIS's impact analysis does not distinguish between oil and gas wells"); BLM Resp. 35 ("the 2003 RMP and EIS broadly considered the environmental impacts of drilling. Indeed, the 2003 EIS contains extensive discussions of the impacts of drilling all 9,942 oil and gas wells across the San Juan Basin.").

supports the fact that analysis in the 2003 RMP/EIS was performed in the context of natural gas development:

> Hydrocarbon production in the planning area consists *primarily of natural gas production*, CBM production, and a small amount of oil/condensate production…. San Juan County is the largest natural gas producing county in the state…. The planning area is *much less important for its oil production*, producing only 5 percent of the state's oil in 1997 [declining to] 4.4 percent … in 2000.

JA00387. This characterization is consistent with BLM's decision to focus its analyses in the 2003 RMP/EIS on natural gas, rather than shale oil, reserves:

> The amount of gas or oil produced under each alternative depends upon the number of completions associated with the alternative…. The analysis focused on *gas reserves* contained in the major gas-producing formations in the San Juan Basin because of their relative importance as compared to oil production.

JA00403; *see also* JA00410 ("[t]he primary impact to air quality … would occur from proposed natural gas development and production"); JA00411 ("air quality analysis … assumed that all new wells would extract natural gas"); JA00518 (reporting cumulative air quality analysis results using "emissions from the combined RMP gas development."); JA00396 (calculating surface disturbance based on drilling *vertical* wells). Although the 2003 RMP/EIS frequently refers generically to "oil and gas development" in its analysis of environmental impacts, it is clear that the basis and context for this analysis was *exclusively* focused on the impacts of gas development. 40 C.F.R. § 1508.27. BLM offers no record evidence to the contrary.

Next, BLM alleges that analysis in the 2003 RMP/EIS was *not* focused on the "high development area" for gas in the northern portion of the Basin—as the record clearly demonstrates—and that even if it were, it would make no difference. BLM Resp. 33. BLM is wrong on both counts. First, while the planning area for 2003 RMP/EIS encompassed generally "the New Mexico portion of the San Juan Basin," JA00375, BLM's assessment of oil and gas impacts was tied "mainly in the high development area." JA00395; *see also* JA00171-74 (providing that the vast majority of estimated development was from *vertically drilled gas wells* from "major producing reservoirs" in the northern portion of the Basin). This analysis expressly *excluded* development of "low potential" areas, such as the Mancos Shale. JA00180 (recognizing Mancos Shale reservoirs as "approaching depletion" and not "candidates for increased density development"). Second, the record unambiguously demonstrates that energy development—i.e., the type of fluid mineral targeted—is markedly different in the northern versus southern portions of the Basin. The north is characterized by gas development using conventional drilling techniques, whereas the south is characterized by Mancos Shale oil reserves—only recently made economically recoverable through the advent of horizontal drilling and multi-stage fracturing. JA 00187 (noting that interest in using horizontal drilling in the southern portion of the Basin increased significantly in 2013); JA00180 (map showing gas vs. Mancos oil deposits). The 2003

RMP/EIS was focused, for purposes of NEPA compliance, exclusively on the northern Basin, where gas development was predominated. JA00403, 00171-74.

Finally, BLM returns to the same ineffective argument that because the 2003 RMP/EIS considered the impacts of "hydraulic fracturing" and "drilling," the agency satisfied its NEPA obligations. BLM Resp. 34-35. This is incorrect, and reflects BLM's fundamental misrepresentation of this case. Citizen Groups' concerns with Mancos Shale development—and the bases for their legal claims—are not premised on the general use of "fracking" that has long been employed in the San Juan Basin. To the contrary, this case challenges specific agency decisions authorizing development using a *specific* and, as BLM admits, *unanalyzed* technology—horizontal drilling and multi-stage hydraulic fracturing—on a broad geographic scale for the first time. 80 Fed. Reg. 16,128 (March 26, 2015) (noting that recent development of this new technology "[has] allowed greatly increased access" to shale oil reserves, including in areas not previously developed). Multi-stage hydraulic fracturing, in particular in the specific context of the southern extent of the Basin that was not the focus of the 2003 RMP/EIS, is dramatically different from the type of single-stage "fracking" that BLM erroneously relies on. Because BLM did not include the impacts of this technology in the 2003

RMP/EIS's cumulative impacts analysis, BLM cannot satisfy NEPA by tiering its APD approvals to this document.[5]

C. BLM Continues to Unlawfully Approve Mancos Shale APDs by Impermissibly Tiering its Analysis of Cumulative Impacts.

BLM cannot tier to site-specific EAs approving Mancos Shale APDs to the 2003 RMP/EIS because—as detailed above—there is simply no hard look analysis in that document to tier to. 40 C.F.R. §§ 1502.20, 1508.28; *Pennaco*, 377 F.3d at 1151. This is particularly relevant to the cumulative landscape level impacts of Mancos Shale development, where BLM erroneously relies on a patchwork of the 2003 RMP/EIS and individual Mancos Shale EAs to comply with NEPA.

BLM argues that, even if the Court determines the 2003 RMP/EIS did not analyze the impacts of Mancos Shale development, tiering site-specific EAs to the RMP is still appropriate because it would be "impractical" and "defy logic" to include "all analyses of cumulative impacts to appear in the programmatic NEPA document and not in the site-specific NEPA document." BLM Resp. 35. BLM also asserts that the lack of a cumulative impacts analysis for Mancos Shale development in the 2003 RMP/EIS is not fatal to the challenged APD approvals because "BLM provided a supplemental analysis of cumulative impacts in each

[5] As discussed in Citizen Groups' Opening Brief at 27-28, the district court abused its discretion by failing to recognize these distinctions, and ignored its own findings, JA00077 (¶¶88-90), which it would have recognized if it had thoroughly reviewed the record as required by *Pennaco*, 377 F.3d at 1159-60.

APD EA." BLM Resp. 36. Not only does the record contradict this argument, but BLM itself contradicts this argument in the very next sentence, stating: "each EA explains that it tiers to the 2003 EIS and separately addresses site-specific resources and effects of the proposed action" not covered in the 2003 RMP/EIS. *Id*.

Each Mancos Shale EA focuses *solely* on the impacts of drilling a single well or small group of wells; the EAs do not take a hard look at the cumulative impacts of Mancos Shale development across the landscape and, instead, simply attempt, without basis, to tier to the 2003 RMP/EIS:

> "[T]his site-specific Environmental Assessment (EA) tiers into and incorporates by reference the information and analysis contained in the BLM-FFO Proposed Resource Management Plan/Final Environmental Impact Statement (PRMP/FEIS; BLM 2003a).[6]

Although individual Mancos Shale EAs provide site-specific impacts analysis for each well pad, the record demonstrates that the agency failed to provide *any* hard look cumulative analysis for the impacts that Mancos Shale wells have across the Greater Chaco landscape. No such analysis exists in the 2003 RMP/EIS, nor does it appear in any of its EAs for individual APD approvals. BLM's citations to the air and water quality analyses in the EAs do not support the agency's argument on this point because all of the referenced sections deal with *site-specific* impacts from a

[6] *See, e.g.,* JA00296; JA00310; JA00536; JA00723; *see also* JA00302 (stating "[a]nalysis of cumulative impacts for reasonable development scenarios and reasonably foreseeable development scenarios for oil and gas wells on public lands in the BLM-FFO was presented in the [2003] RMP."); JA00317 (same); JA00557 (same); JA00628 (same); JA00732 (same).

single well, not with the *cumulative* air and water quality impacts of Mancos Shale development in the Basin. *See* BLM Resp. 36-37.

Critically, because the 2003 EIS never anticipated or analyzed the landscape level impacts of Mancos Shale development, BLM is now preparing the Mancos Shale RMP Amendment and EIS ("Mancos RMPA/EIS") to consider these new, additional impacts *for the first time*. 79 Fed. Reg. 10,548. While BLM attempts to deflect from the fundamental importance of this analysis, BLM Resp. 41, it cannot substantiate its deflection with anything in the record. BLM is wrong in contending that it need not stay APD approvals pending completion of the Mancos RMPA.[7] BLM Resp. 40; *see also* API Resp. 22-24 (arguing BLM not required to stay APD approvals because agency completed "site-specific EAs and FONSIs" but citing no record evidence for a cumulative impacts analysis of Mancos Shale development). Because the APD approvals are not "within the scope of, and analyzed in" the 2003 RMP/EIS, and because the EAs do not contain the required analysis, the APD approvals are not justified by "adequate NEPA documentation to support the individual action." 43 C.F.R. § 46.160.

As admitted by the agency and demonstrated by the record, the 2003 RMP/EIS does not analyze horizontal drilling and multi-stage fracturing. That failure was not cured through the piecemeal EAs completed for each APD

[7] *See* 30 U.S.C. § 226(p)(2)(A) (requiring BLM to defer APDs pending completion of NEPA).

approval. BLM is required to analyze the direct, indirect, and cumulative impacts of Mancos Shale development *before* approving individual wells. 42 U.S.C. § 4332(2)(C)(i). The agency failed to do so here in violation of NEPA.

II. CITIZEN GROUPS SUFFER IRREPARABLE HARM

But for new horizontal drilling and multi-stage fracturing technology, Mancos Shale development would not be possible and impacts would not occur. JA00071-72 (¶¶59, 61). The drilling of *each* new Mancos Shale well causes irreparable harm from: (1) permanent environmental destruction; (2) harm to human health; and (3) harm from BLM's failure to comply with NEPA.

The district court went through contortions—even going so far as to improperly elevate Citizen Groups' burden—to avoid ruling in Citizen Groups favor on other preliminary injunction prongs, yet irreparable harm in this case is so evident that the district court could not find otherwise:

> The Plaintiffs' identified injury—the construction and drilling of wells pursuant to the challenged APD approvals—is irreparable. The reason for this conclusion is essentially the same reason that the Plaintiffs are not seeking to shut down completed and operating wells, even if they believe the well's APD was erroneously approved: because once a well has been fracked, the environmental damage is done. Any fracking-related environmental impacts that accrue during the pendency of this case—and it is undisputed that such impacts exist—would be irreversible.

JA00147. In identifying such irreparable harms, the district court provided:

> Plaintiffs have pointed to a number of ways in which even properly functioning directionally drilled and fracked wells produce

> environmental harms. These are cited in the Court's findings of fact, and include air pollution, water usage, and surface impacts. Beyond being merely "likely"—the *Winter*-mandated certainty level for irreparable harm—these harms are certain to accompany drilling; they are not just speculative or "possible."

JA00149; *see also* JA00077 (citing JA00233, 00242, 00237).

BLM dramatically misunderstands the nature irreparable harms suffered by Citizen Groups, claiming that Citizen Groups have no "geographic nexus to *any* of the challenged wells," BLM Resp. 21, and that "there is no evidence that the wells proposed in the APD approvals that Diné CARE has challenged pose any threat of imminent, irreparable harm to the declarants." BLM Resp. 23. *Cf. Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that harm to "members' ability to 'view, experience, and utilize' the areas in their undisturbed state" is sufficient to "satisf[y] the 'likelihood of irreparable injury' requirement articulated in *Winter*"). If not Citizen Groups—whose members have called this area home for millennia—it is hard to imagine whom BLM has in mind that would have a "geographic nexus" to the challenged APDs.

As recognized in the district court's findings of fact, Diné CARE is an organization of Navajo community activists deriving its name from the Diné Fundamental Laws, which are "based on customary, traditional, natural and common law, knowledge of which lies mainly with Navajo medicine men and elders." JA00061 n.1. Diné CARE's stated goal is "to protect all life in its ancestral

homeland." JA00061. Citizen Groups' members and their ancestors have called this land home for generations, and have slowly, well-by-well, watched the transformation of their pastoral homeland into an industrial zone. Navajo origin stories say people emerged as humans from the earth in these lands, and where ceremonial and traditional offering practices still occur. To claim that Diné individuals are not injured by *each* additional Mancos Shale well, which adds to the cumulative burden they are forced to endure, callously misjudges their relationship to the Greater Chaco landscape. *See S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1156 (10th Cir. 2013) (recognizing as sufficient individuals who have "traversed through or within view of the parcels where oil and gas development will occur").

Declarations by Diné individuals have intentionally been left in their voice, and powerfully convey the relationship to their land, family members, and fellow Diné, as well as the irreparable harms sustained as a result of Mancos Shale development. For example, Sarah White describes: "Land, grave sites, cultural and scared (sic) sites damage can't be replace, the memories of our ancestors are very important to us Navajo people, it's our roots and the stories we carry on for our next generations, and these very sites are being effective (sic) by the corporation. The past cultural and scared (sic) sites are the maps to our unique stories to our children and this can't be replace with oil and gas fields." JA00264 (¶9). Ms.

White also states: "The smell of chemicals and dust from dirt roads with heavy traffic of oil trucks can trigger asthma and other respiratory problem for not only myself but others. I seen, taste and smell of chemicals in the air, I witness the contaminated water and when I see my dear people and relatives use this water for consumption effects me not only physically but mentally and spiritually." JA00265 (¶10). Victoria Gutierrez describes her experience of oil and gas development in the Lybrook area,[8] including "[t]he smell in these areas is strong of production gases" and that "[w]e breathe this in on a daily basis." JA00267 (¶3). Ms. Gutierrez goes on to describe that "[m]any ceremonial places had been destroyed and replaces with oil fields" and that "this makes me sick and yes it effects me mentally." JA00269-70 (¶8). Ruthie Locke is resident of Nageezi living "less than a quarter of a mile from fracking wells, and flares"[9] offers details regarding health problems to her family and community, including: "My eleven (11) year old grandson had a stroke and no one knew why. The doctors cannot explain how an eleven year old can get a stroke. My brother in law had a sudden swollen abscess in his face. All this happened after they did fracking behind our house." JA00273-74 (¶¶2, 5). Ms. Locke states that "[w]e are scared to drink the water because we see rainbows in it sometimes, the water get clean only with chlorine so when you

[8] Challenged wells in the *Lybrook* area, approved through 27 EAs, are identified *infra* in **Table A**.
[9] Challenged wells in the *Nageezi* area, approved through 32 EAs, are identified *infra* in **Table A**.

get it in a glass from the faucet all you see is white milky fluid." JA00273 (¶3). Ms. Locke also describes "[t]he flares are putting smoke all over the area. We breathing in chemicals from the flares every day and night, and we can smell it which scares me and my family." JA00274 (¶5). Each of these declarations convey harm to Diné individuals ability to "view, experience, and utilize" their ancestral homelands and demonstrate a likelihood of irreparable injury.[10] *Alliance for the Wild Rockies*, 632 F.3d at 1135.

Yet, in addition to BLM's misplaced allegations that Citizen Groups somehow lack a "geographic nexus" to their ancestral homeland, BLM also claims that to satisfy the irreparable harm prong, "Diné CARE must identify additional environmental harms that were not taken into account in the 2003 EIS and are now likely to occur under the approved APD." BLM Resp. 25. This is incorrect. As the district court correctly stated: "the question in front of the Court is whether the harm that would result from the injunction's denial—i.e., the environmental impacts of these particular wells, built pursuant to the specifically challenged APDs—is irreparable, and the Court concludes that it is." JA00150. As admitted by BLM: "All wells that will be drilled in the Mancos Shale will be horizontally drilled and fractured." JA00765. Therefore, arguments attempting to conflate the

[10] Declarant Mike Eisenfeld also describes frequent visits to the Counselor and Lybrook areas, and that he has been impacted by the development concentrated in these places. JA00192. Challenged wells in the *Counselor* area, approved through 25 EAs, are identified *infra* in **Table A**.

impacts of vertical drilling with horizontal drilling and multi-stage fracturing—even going so far as to claim "horizontal drilling will result in fewer, not more, overall impacts," Op. Resp. 32—are a red herring, and only attempt to obscure the plain truth that "the particular environmental injury in this case … is irreversible once a well is fracked." JA00059. *Each* additional Mancos Shale well causes "adverse conditions that form an existing environmental milieu [in the Greater Chaco area]. One more [well] polluting air and water … may represent the straw that breaks the back of the environmental camel." *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972). These cumulative and site-specific environmental harms support a finding of irreparable harm.[11]

III. CITIZEN GROUPS' HARMS OUTWEIGH PURELY ECONOMIC HARM

Permanent harm to the environment, human health, and Citizen Groups' legal rights outweigh the temporary, conditional, and purely economic harm to operators. As this Court has consistently recognized, "financial concerns alone generally do not outweigh environmental harm." *Valley Cmty. Pres. Comm'n v.*

[11] *See United States v. Power Eng'g Co.*, 10 F. Supp. 2d 1145, 1163 (D. Colo. 1998) *aff'd*, 191 F.3d 1224 (10th Cir. 1999) (issuing injunction to prevent a "substantial likelihood that the public health and environment will suffer ongoing irreparable harm."); *San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv.,* 657 F.Supp.2d 1233, 1240 (D. Colo. 2009) (finding irreparable harm from drilling *two* exploratory oil and gas wells disturbing 14 acres of pubic land).

Mineta, 373 F.3d 1078, 1086 (10th Cir. 2004).[12] This case is no exception. BLM attempts to distract from the weight of precedent by citing the few exceptional cases that find otherwise, but that are clearly distinguishable.[13] Not only are the environmental harms in this case "sufficiently likely," but these harms are "undisputed" and "irreversible once a well is fracked." JA00147 (¶50).

The district court committed legal error when it: (1) elevated Citizen Groups' burden, and (2) conflated the balancing test with Rule 65(c). The district court also abused its discretion when it found that temporary, conditional, and purely economic harm to Operators outweighed "undisputed" and "irreversible" irreparable harm to human health and the environment. Accordingly, the district court must be reversed and Citizen Groups' request for preliminary relief must be granted.

BLM's entire argument is premised on selling this Court the false idea that a preliminary injunction here would somehow threaten the entire economy. *See*

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[12] *See also Amoco Prod. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Acierno v. New Castle Cnty.,* 40 F.3d 645, 653 (3d Cir. 1994); *San Luis Valley,* 657 F.Supp.2d at 1242.

[13] *See, e.g., Sierra Club v. Bostick*, 539 F. App'x 885, 892 (10th Cir. 2013) (weighing economic harm of $500 million versus what the Court called a "minimal environmental impact" to less than one acre of water); *Amoco*, 480 U.S. at 545 (involving injury that was "not at all probable" versus the loss of $70 million); *Village of Logan v. U.S. Dep't of Interior,* 577 F. App'x 760, 768 (10th Cir. 2014) (involving a failure to show future harm where the project had already been completed).

BLM Resp. 28 ("The local economy is heavily dependent on oil and gas revenues[;]" "[o]il and gas production contributed over $24 million in ad valorem taxes and $23 million in county tax payments[;]" and "oil and gas development in the San Juan Basin generated $5.2 billion in federal royalties between 2003 and 2013."); *see also* API Resp. 33 (citing "indisputably severe harm to API members and the public" from unspecified and unlinked impacts to "9.8 million U.S. jobs and 8% of the national economy.").

Setting aside for the moment that, as recognized by the district court, the subject "Motion [does] not seek to shut down producing wells," JA00092 n.9—making it impossible that an injunction would have any impact on existing tax or royalty payments—BLM's argument is belied by its repeated assertions that "*none of the wells proposed in the 96 remaining APDs are scheduled for development*." BLM Resp. 10, 13, 20. The incongruities in this argument cannot be reconciled. That *no* Mancos Shale wells are scheduled for development also undermines Operators' claim that "an injunction would have real and immediate impacts on the companies, employees, contractors, and surrounding communities." Op. Resp. 33. Indeed, if none of the challenged APDs are scheduled to be drilled, then an injunction would have zero economic impact on Operators. At the very least, any potential claims of economic loss that *could* stem from a temporary delay in drilling pending resolution on the merits would need to be discounted by

Operators' voluntary decision not to drill.

BLM also offers *no argument* regarding the legal error committed by the district court when it elevated Citizen Groups' burden for this prong, requiring:

> [F]or the Plaintiffs to prevail on this prong, they would most likely have to show that directional drilling creates some heretofore unknown risk of environmental catastrophe that vertical drilling does not … and that the probability of this risk materializing during this case's pendency, multiplied by its impact were it to materialize, outweighs the financial benefits of operation during the case's pendency.

JA 00154 n.25; *see also* Aplt. Br. 34-35.

Operators at least attempt a defense of the district court's reasoning, claiming: "The court sensibly noted that, because BLM had carefully considered the impacts of vertical drilling in the 2003 RMP/EIS and implicitly determined that the benefits of properly managed and mitigated development outweighed any environmental harms, the burden was on Diné to show how horizontal drilling would cause harms distinct from those already weighed by the agency." Op. Resp. 35. However, the district court's decision and the Operators' defense fail to acknowledge the distinction between the court's duty to balance the equities of *specific* harms subject to this Motion—i.e., "the environmental impacts of these particular wells, built pursuant to the specifically challenged APDs," JA000150—and BLM's entirely separate and distinct duty to "develop, maintain and, when appropriate, revise land use plans" under the Federal Land Policy and Management

Act ("FLPMA"), 43 U.S.C. § 1712(a). Indeed, because BLM's duty in the 2003 RMP/EIS was to analyze foreseeable oil and gas development at a landscape scale—which at the time was vertical gas drilling in the northern portion of the Basin—it was impossible for BLM to weigh, even implicitly, the *site-specific* harm of horizontal drilling and multi-stage oil fracturing in the southern portion of the Basin through the 2003 RMP/EIS.

Moreover, none of the Appellees address the critical fact that all Mancos Shale drilling permits at issue in this case—and the economic gains derived therefrom—are by law and rule expressly subject to and conditioned upon compliance with NEPA.[14] Put differently, oil and gas lessees have neither the legal right nor the legal expectation to drill before BLM fully complies with NEPA.

Finally, the district court's decision to conflate the balancing prong with its *independent* consideration of bonding pursuant to Rule 65(c) erroneously imposes an entirely new burden—one impermissibly premised on Citizen Groups' financial wherewithal. JA00060 ("Although not necessary in all cases, in this case, a money bond would have sufficed to swing the balance-of-harms prong in the Plaintiffs'

[14] *See* 30 U.S.C. § 226(p)(2) (requiring BLM to defer APD approval where it has not sufficiently completed the NEPA process); 43 C.F.R. § 3162.1(a) (requiring oil and gas operating rights to comply with applicable laws and regulations). *See also Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 155 (D.C. Cir.1985) (holding "[w]here such non-federal entities act without the necessary federal approval, they obviously would be acting unlawfully and subject to injunction.").

favor."); *see also* JA00153.[15] The district court's decision represents a monumental shift in jurisprudence, the consequences of which would effectively preclude any public interest plaintiff with limited financial resources from seeking relief through a preliminary injunction, dramatically chilling efforts to vindicate the public interest against transgressions by federal agencies and powerful economic interests. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST

There is an overwhelming public interest in protecting human health and the environment, as well as in ensuring BLM's compliance with NEPA.[16] *But for* the advent of new horizontal drilling and multi-stage fracturing technology, none of the challenged wells would be drilled and no harm would occur.

Rather than address the district court's *legal error* for this prong, elevating

[15] The cases cited by Operators, Op. Resp. 37, are inapposite and relate to litigation between *private* parties with *private* interests, rather than litigation involving the *public* interest served by NEPA, where this Court has waived the bonding requirements of Rule 65(c). *Kansas v. Adams,* 705 F.2d 1267, 1269 (10th Cir. 1983); *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002).

[16] *See Colo. Wild v. U.S. Forest Serv.,* 299 F.Supp.2d 1184, 1191 (D. Colo. 2004) (finding "overriding public interest in the preservation of [the environment] that outweighs public or private economic loss"); *San Luis Valley,* 657 F.Supp.2d at1242 (recognizing the "large volume of public comments submitted … also indicates that there is a public interest in maintaining the status quo pending proper review.")

Citizen Groups' burden when weighing the public interest,[17] each of the Appellees chose to erroneously double down on the false and irrational comparison that an injunction would somehow "harm the public interest because the economic benefits of oil and gas development help the public." BLM Resp. 28; *see also* Op. Resp. 38 ("Continued oil and gas development also furthers national goals of energy independence and security."); API Resp. 39-40 (offering that fracking has "a number of environmental benefits" and that "a ban on hydraulic fracturing would deprive the citizens of New Mexico millions of dollars in tax and royalty payments").[18] Such overbroad arguments are the equivalent of crying wolf.

To the contrary, the appropriate scope of consideration—and the reason the district court must be reversed here—is that weighing the public interest must be tied to the specific challenged activity; i.e., "the environmental impacts of these particular wells, built pursuant to the specifically challenged APDs." JA000150. As the district court found, Citizen Groups' request for a preliminary injunction does "not seek to shut down producing wells." JA00092 n.9. It is therefore impossible that the injunction would have *any* impact on existing tax or royalty

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[17] JA00154-55 (providing that Citizen Groups' must demonstrate "either the environment, or the public that enjoys it, would be any worse off with directionally drilled and fracked wells in the San Juan Basin than it would be with vertically drilled and fracked wells in the San Juan Basin.").

[18] *Cf. Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F. Supp. 2d 1232, 1260 (D.Wyo. 2005) (providing that the need for energy does not trump protection of human health and the environment).

payments. Moreover, because "none of the wells proposed … are scheduled for development," BLM Resp. 10, 13, 20, a preliminary injunction would simply codify the existing status quo and ensure the current circumstances are maintained until the district court reaches a decision on the merits.

BLM is required "to promote the orderly and efficient exploration, development and production of oil and gas." 43 C.F.R. § 3160.0-4. This can only be achieved if BLM performs hard look analysis "*before* committing themselves irretrievably to a given course of action so that the action can be shaped to account for environmental values." *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988); *see also New Mexico ex rel. Richardson v. Bureau of Land Mgmt*., 565 F.3d 683, 718 (10th Cir. 2009) ("assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made."). Here, BLM flouts this fundamental duty by authorizing the piecemeal development of Mancos Shale wells to proceed without the benefit of a completed Mancos Shale RMPA, undermining BLM's ability to take a hard look at impacts in the proper "context" and to consider "reasonable alternatives." 40 C.F.R. §§ 1502.14, 1508.27; *see also Marsh v. Or. Natural Res. Council,* 490 U.S. 360, 371 (1989) ("NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.").

Here, the public interest is unquestionably served through protecting people and the environment by maintaining the status quo, i.e., temporarily enjoining the drilling new wells authorized by the challenged APDs, as well as by ensuring BLM's compliance with NEPA.

CONCLUSION

For the foregoing reasons, and those raised in Appellants' Opening Brief, Citizen Groups respectfully request that this Court reverse the district court for legal error and abuse of discretion, and grant Citizen Groups' request for preliminary relief.

RESPECTFULLY SUBMITTED this 18th day of December, 2015.

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TABLE A

Challenged Wells by Area Location

Lybrook, New Mexico

DOI-BLM-NM-F010-2012-0064-EA
DOI-BLM-NM-F010-2012-0410-EA
DOI-BLM-NM-F010-2013-0012-EA
DOI-BLM-NM-F010-2013-0065-EA
DOI-BLM-NM-F010-2013-0144-EA
DOI-BLM-NM-F010-2013-0242-EA
DOI-BLM-NM-F010-2013-0324-EA
DOI-BLM-NM-F010-2013-0332-EA
DOI-BLM-NM-F010-2013-0356-EA
DOI-BLM-NM-F010-2013-0393-EA
DOI-BLM-NM-F010-2013-0358-EA
DOI-BLM-NM-F010-2013-0531-EA
DOI-BLM-NM-F010-2014-0004-EA
DOI-BLM-NM-F010-2014-0009-EA
DOI-BLM-NM-F010-2014-0029-EA
DOI-BLM-NM-F010-2014-0057-EA
DOI-BLM-NM-F010-2014-0080-EA
DOI-BLM-NM-F010-2014-0089-EA
DOI-BLM-NM-F010-2014-0101-EA
DOI-BLM-NM-F010-2014-0120-EA
DOI-BLM-NM-F010-2014-0145-EA
DOI-BLM-NM-F010-2014-0148-EA
DOI-BLM-NM-F010-2014-0250-EA
DOI-BLM-NM-F010-2014-0272-EA
DOI-BLM-NM-F010-2015-0093-EA
DOI-BLM-NM-F010-2015-0104-EA
DOI-BLM-NM-F010-2015-0116-EA
DOI-BLM-NM-F010-2015-0178-EA

Nageezi, New Mexico

DOI-BLM-NM-F010-2012-0391-EA
DOI-BLM-NM-F010-2013-0063-EA
DOI-BLM-NM-F010-2013-0080-EA
DOI-BLM-NM-F010-2013-0081-EA

DOI-BLM-NM-F010-2013-0105-EA
DOI-BLM-NM-F010-2013-0115-EA
DOI-BLM-NM-F010-2013-0219-EA
DOI-BLM-NM-F010-2013-0288-EA
DOI-BLM-NM-F010-2013-0414-EA
DOI-BLM-NM-F010-2013-0473-EA
DOI-BLM-NM-F010-2014-0005-EA
DOI-BLM-NM-F010-2014-0039-EA
DOI-BLM-NM-F010-2014-0065-EA
DOI-BLM-NM-F010-2014-0087-EA
DOI-BLM-NM-F010-2014-0102-EA
DOI-BLM-NM-F010-2014-0107-EA
DOI-BLM-NM-F010-2014-0162-EA
DOI-BLM-NM-F010-2014-0183-EA
DOI-BLM-NM-F010-2014-0191-EA
DOI-BLM-NM-F010-2014-0217-EA
DOI-BLM-NM-F010-2014-0254-EA
DOI-BLM-NM-F010-2014-0274-EA
DOI-BLM-NM-F010-2014-0292-EA
DOI-BLM-NM-F010-2014-0293-EA
DOI-BLM-NM-F010-2014-0294-EA
DOI-BLM-NM-F010-2015-0015-EA
DOI-BLM-NM-F010-2015-0045-EA
DOI-BLM-NM-F010-2015-0066-EA
DOI-BLM-NM-F010-2015-0088-EA
DOI-BLM-NM-F010-2015-0102-EA
DOI-BLM-NM-F010-2015-0138-EA
DOI-BLM-NM-F010-2015-0182-EA

Counselor, New Mexico

DOI-BLM-NM-F010-2012-0198-EA
DOI-BLM-NM-F010-2012-0268-EA
DOI-BLM-NM-F010-2013-0225-EA
DOI-BLM-NM-F010-2013-0535-EA
DOI-BLM-NM-F010-2014-0024-EA
DOI-BLM-NM-F010-2014-0049-EA
DOI-BLM-NM-F010-2014-0109-EA
DOI-BLM-NM-F010-2014-0114-EA
DOI-BLM-NM-F010-2014-0117-EA

DOI-BLM-NM-F010-2014-0122-EA
DOI-BLM-NM-F010-2014-0158-EA
DOI-BLM-NM-F010-2014-0175-EA
DOI-BLM-NM-F010-2014-0178-EA
DOI-BLM-NM-F010-2014-0180-EA
DOI-BLM-NM-F010-2014-0224-EA
DOI-BLM-NM-F010-2014-0233-EA
DOI-BLM-NM-F010-2014-0246-EA
DOI-BLM-NM-F010-2014-0261-EA
DOI-BLM-NM-F010-2014-0262-EA
DOI-BLM-NM-F010-2015-0007-EA
DOI-BLM-NM-F010-2015-0028-EA
DOI-BLM-NM-F010-2015-0036-EA
DOI-BLM-NM-F010-2015-0060-EA
DOI-BLM-NM-F010-2015-0001-EA
DOI-BLM-NM-F010-2015-0077-EA
DOI-BLM-NM-F010-2015-0106-EA

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac, Version 14.5.7, in 14 point font and in Times New Roman.

Dated this, 18th day of December, 2015.

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/s/ Kyle Tisdel
Kyle J. Tisdel

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2015 a copy of this APPELLANTS' REPLY was filed with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to other participants in this case.

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