No. 18-2089

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.,*

Plaintiffs-Appellants,

vs.

RYAN ZINKE, *et al.*,

Defendants-Appellees,

and

ENDURING RESOURCES IV, LLC, *et al.*,

Intervenor-Defendants-Appellees.

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

APPELLANTS' FINAL OPENING BRIEF
(Oral Argument Requested)

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellants Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, WildEarth Guardians, and Natural Resources Defense Council certify to this Court that they are nonprofit organizations and that there is no parent corporation or any publicly held corporation that holds any stock in these organizations.

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PRIOR RELATED APPEALS IN THIS COURT

On October 27, 2016, this Court issued a decision regarding an interlocutory appeal of the district court's denial of a request for preliminary injunction. *Diné Citizens Against Ruining Our Environment et al. v. Jewell*, (Case No. 15-2130), 839 F.3d 1276 (10th Cir. 2016).

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
APE	Area of Potential Effect
BLM	Bureau of Land Management
CEQ	Counsel on Environmental Quality
Citizen Groups	Diné Citizens Against Ruining Our Environment *et al.*
CO	Carbon Monoxide
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land and Policy Management Act
FONSI	Finding of No Significant Impact
Mancos RMPA	Mancos Shale Resource Management Plan Amendment
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOx	Nitrous Oxide
NPS	National Park Service
Park	Chaco Culture National Historical Park
PM_{10}	Particulate Matter at 10 microns
Protocol	2014 State Protocol Agreement (BLM and NM SHPO)
RFDS	Reasonably Foreseeable Development Scenario
RMP	Resource Management Plan
SHPO	State Historic Preservation Office
SO_2	Sulfur Dioxide
TCP	Traditional Cultural Properties
UNESCO	United Nations Educational, Scientific and Cultural Organization
VOC	Volatile Organic Compound
WHS	World Heritage Site

JURISDICTION

On March 11, 2015, Plaintiffs-Appellants Diné Citizens Against Ruining Our Environment, *et al.,* (collectively "Citizen Groups") filed suit in the U.S. District Court for the District of New Mexico alleging violations of the National Historic Preservation Act ("NHPA") and National Environmental Policy Act ("NEPA"). The district court has jurisdiction pursuant to 28 U.S.C. § 1331. The district court's order denying the requests for relief outlined in Citizen Groups' Opening Merits Brief is appealable pursuant to 28 U.S.C. § 1291. On April 23, 2018, the district court denied all of Citizen Groups' claims and dismissed the case with prejudice. Citizen Groups appealed the district court's order on June 15, 2018, within 60 days after entry of judgment. Fed. R. App. P. 4(a)(1)(B).

ISSUES PRESENTED

1. Whether the Bureau of Land Management ("BLM") violated NHPA, 54 U.S.C. § 300101 *et seq.,* its implementing regulations, and the New Mexico State Protocol, when it failed to analyze the indirect and cumulative impacts of the challenged Mancos Shale drilling permits on cultural sites[1] in the Greater Chaco Landscape; [2] and

[1] The term "cultural sites" encompasses "buildings, structures, sites, objects, districts and landscapes" regardless of their eligibility to the National Register of Historic Places. App. at JA1623

[2] Citizen Groups use the term "Greater Chaco Landscape" to denote the area encompassing all of the known material manifestations of the "Chaco

2. Whether BLM violated NEPA, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations when it failed to analyze the cumulative impacts of the challenged Mancos Shale drilling permits on environmental resources in the Greater Chaco Landscape when cumulative impacts from additional Mancos shale drilling were contextually different from, in addition to, and exceeded the magnitude of cumulative impacts contemplated in the 2003 Resource Management Plan and Environmental Impact Statement ("2003 RMP/EIS").

STATEMENT OF THE CASE

Federal Defendants (collectively, "BLM") have approved at least 362 individual Mancos Shale oil and gas Applications for Permits to Drill ("APDs") wells across the Greater Chaco Landscape. BLM approved these APDs on a piecemeal basis through site-specific environmental assessments ("EAs") and findings of no significant impact ("FONSIs") for each approval, tiering to an outdated Environmental Impacts Statement ("EIS") for its cumulative impacts analysis.

Citizen Groups filed their original complaint on March 11, 2015, alleging BLM violated the NHPA and NEPA by failing to consider, *inter alia*, the indirect and cumulative impacts to cultural sites and environmental resources from Mancos

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Phenomenon" including Chaco Cultural National Historical Park, Chacoan Outliers, Chaco Cultural Archaeological Protection Sites, and the prehistoric Great North Road.

Shale oil and gas development authorized by the challenged APDs. BLM continued to approve APDs using the same piecemeal NHPA and NEPA processes while the litigation was ongoing, requiring Citizen Groups to amend their Complaint two more times to incorporate BLM's ongoing, unlawful APD approvals.

On April 23, 2018, the district court issued a Memorandum Opinion and Amended Order denying Citizen Groups' Petition for Review of Agency Action and dismissing the case with prejudice. App. at JA25 ("Order"). The Order "amended" a prior district court order, issued March 31, 2018, in which the court granted the relief sought by Citizen Groups with respect to the NHPA,[3] and denied the relief sought with respect to NEPA.

I. LEGAL BACKGROUND

A. BLM's Oil and Gas Planning and Management.

BLM manages onshore oil and gas development through a three-phase process. Each phase, ultimately, must ensure "orderly and efficient" development. 43 C.F.R. §§ 3160.0-4. Oil and gas development is a multiple use managed in

[3] The district court previously determined that some of the cultural resource reports did not meet the NHPA's requisite documentation standards. App. at JA163, filed March 31, 2018. But the district court changed its mind: After "having an opportunity to review fully the case's voluminous record, the Court concludes that the BLM meets the required documentation standards." App. at JA146.

accord with the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq*., BLM must manage the public lands:

> [I]n a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition, that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

43 U.S.C. § 1701(a)(8).

In the first phase of oil and gas development, BLM prepares a Resource Management Plan ("RMP") in accordance with FLPMA and associated planning regulations, 43 C.F.R. §§ 1600 *et seq*., along with an EIS required by NEPA. An RMP predicts present and future use of public lands and their resources by establishing management priorities, as well as guiding and constraining BLM's implementation-stage management. With respect to oil and gas, BLM determines in the RMP which lands containing federal minerals will be open to leasing and under what conditions, and analyzes the landscape-level cumulative impacts from predicted implementation-stage development.

In the second phase of oil and gas development, BLM identifies the boundaries for lands to be offered through lease sales and proceeds to sell and execute leases for those lands. 43 C.F.R. §§ 3120 *et seq*. After a lease is issued,

BLM may impose "reasonable measures," also known as lease stipulations, consistent with the terms and conditions of the lease. 43 C.F.R. §§ 3101.1-2.

The third phase of oil and gas development occurs once BLM issues a lease, where the lessee submits an APD for BLM's approval prior to drilling. 43 C.F.R. § 3162.3-1(c). At this stage, BLM may condition APD approval on the lessee's adoption of conditions whose scope is delimited by the lease and a lessee's surface use rights. 43 C.F.R. § 3101.3-1(h)(i).

B. National Historic Preservation Act.

The NHPA, like NEPA, requires agencies to take a "hard look" at a project's impacts, and was enacted specifically to protect America's historic and cultural heritage. 54 U.S.C. § 300101. The heart of the NHPA is Section 106, which prohibits federal agencies from approving any federal "undertaking" unless the agency considers the effects of the undertaking on cultural sites that are included in, or eligible for, inclusion in the National Register of Historic Places. *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 is a "stop, look, and listen provision" that requires federal agencies to consider the effects of their actions and programs on cultural sites before implementation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *see also Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004).

To adequately "take into account" the impacts on cultural sites under Section 106, BLM must first determine whether the "proposed Federal action is an undertaking," and, if so, "whether it is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. §§ 800.3(a), 800.16(y). BLM must then "[d]etermine and document the area of potential effects" ("APE") and then "[r]eview existing information on historic properties within [that] area." *Id*. § 800.4(a)(1-2). An APE is defined as:

> the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties . . . The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

Id. § 800.16(d).

BLM must make a "reasonable and good faith effort" to identify cultural sites within the APE and consult with Indian Tribes and the state historic preservation office ("SHPO") regarding the results of identification efforts. *Id*. § 800.4(b)(1). Consultation involves a comprehensive assessment of actual adverse effects on cultural sites and of ways to "avoid, minimize or mitigate adverse effects," including proposing alternatives. *Id*. § 800.6(a).

If the undertaking is a type of activity where cultural sites "may be affected," BLM applies the "criteria of adverse effect" to cultural sites within the APE. *Id*. §§ 800.4(d)(2), 800.5(a)(1). An "effect" is defined broadly to include any

alteration that directly or indirectly affects the characteristics of a cultural site that make it eligible for listing in the National Register of Historic Places. *Id.* §§ 800.16(i), 800.5(a)(1). An effect is "adverse" when it may "diminish the integrity of the property's location . . . setting . . . feeling, or association." *Id*. § 800.5(a)(1). Adverse effects are not limited to physical destruction of cultural sites, but also include "[c]hange of the . . . physical features within the property's setting that contribute to its historic significance," as well as the "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historical features." *Id*. § 800.5(a)(2)(iv-v). In addition to considering an undertaking's direct and indirect effects to cultural sites, BLM must also consider "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." *Id*. § 800.5(a)(1).

BLM may establish a "program alternative" for complying with Section 106 requirements that substitutes for all or part of the Section 106 regulations. *Id*. §§ 800.3(a)(2), 800.14(a). A program alternative must still comply with NHPA and Section 106 requirements. BLM develops a program alternative in consultation with the SHPO and Native American Tribes, subject to approval by the Advisory Council on Historic Preservation. *Id*. § 800.14(a)(1-2).

C. National Environmental Policy Act.

NEPA "is our basic national charter for the protection of the environment." 40 C.F.R. § 1500.1(a). Congress recognized that "it is the continuing responsibility of the Federal Government to use all practicable means . . . to the end that the Nation may assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings," and to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences," among other policies. 42 U.S.C. § 4331(b).

NEPA regulations at 40 C.F.R. §1500.1(c) explain that:

> The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

NEPA achieves this objective through "'action-forcing' procedures that require that agencies take a '*hard look*' at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations omitted) (emphasis added). Environmental consequences may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8; *see also Hillsdale Envtl. Loss Prevention v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1166 (10th Cir. 2012).

Courts must "ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not

arbitrary or capricious." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council,* 462 U.S. 87, 97-98 (1983). Federal agencies must prepare a "detailed statement" for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine whether a proposed action significantly affects the environment, requiring preparation of an EIS, an agency may first prepare an EA. 40 C.F.R. § 1501.4(c). If an agency determines on the basis of the EA not to prepare an EIS, it shall prepare a FONSI. *Id*. § 1501.4(e). Significance is determined by considering both context and intensity. *Id*. § 1508.27. "Context" includes a consideration of factors such as society as a whole, the affected region, affected interests, and the locality, and can include both short- and long-term effects. *Id*. § 1508.27(a). "Intensity" refers to the severity of impact, including the degree to which the proposed action affects public health or safety. *Id*. t § 1508.27(b).

Under certain circumstances, agencies may "tier" a site-specific action's environmental analysis to a broader EIS for a plan under which agencies carry out the subsequent action. *Id*. §§ 1502.20, 1508.28. The Department of the Interior's NEPA regulations specify that an EA tiering to a broader EIS "must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions." 43 C.F.R. § 46.140. A site-specific EA "can be tiered to a programmatic or other broader-scope [EIS] . . .

for a proposed action with significant effects, whether direct, indirect, or cumulative, if the [EA] is tiered to a broader [EIS] which fully analyzed those significant effects." *Id*. § 46.140(c). Thus, tiering to a broader EIS is not allowed if the significant effects of the proposed action are not fully analyzed therein. Moreover, if EIS's impacts analysis "is not sufficiently comprehensive or adequate to support further decisions," BLM must explain this in its EA and provide any necessary analysis. *Id*. § 46.140(b).

II. FACTUAL BACKGROUND

A. The Greater Chaco Landscape in the San Juan Basin.

Chaco Culture National Historical Park ("the Park") is the heart of the Greater Chaco Landscape in northwestern New Mexico's San Juan Basin ("Basin"), is characterized by a network of outlying cultural sites and ancient roads, and located within a geographic area that includes public lands and federal minerals under the jurisdiction of BLM's Farmington Field Office. Greater Chaco has been described as the "Chaco Phenomenon" due to its unique archeological signatures characterized by massive pueblo architecture dating from A.D. 950 to 1150. App. at JA792-95. This includes multi-story great houses like Pueblo Bonito, with 200 rooms organized around a central plaza with multiple kivas, as well as multiple great houses organized into towns and connected to other great house communities by prehistoric roads. App. at JA794 (EIS), JA1859 (roads), JA1861

(World Heritage Site designation). The descendants of the people that created Greater Chaco's cultural sites still live in the area and attach spiritual and cultural significance to these places that form an important part of their tribal histories, contemporary expression of tribal traditions, and a means of conveying those traditions to future generations. App. at JA1880.

Congress recognized "the national significance of the Chacoan sites" and the need to protect these "unique archaeological resources" when it created the Park in 1980. 16 U.S.C. § 410ii. The Park is listed on the National Register of Historic Places and is designated a World Heritage Site ("WHS") by the United Nations Educational, Scientific and Cultural Organization ("UNESCO") because it is a "unique and exceptional example" of prehistoric Chaco culture not found anywhere else in the world. *See* App. at JA1827-71, JA1864, JA1874-75. The WHS designation includes not only the Park, but also several satellite villages—known as "Chacoan Outliers"—such as Pierre's Site, Halfway House, Twin Angels, Aztec Pueblo, Kin Nizhoni and Casamero.[4] App. at JA1864. These sites are all linked through a network of prehistoric roads—the most prominent of which is the Great North Road, which connects Chaco Canyon to a settlement

[4] To be included on the WHS list, sites must be of outstanding universal value and meet at least one out of ten selection criteria. The Park and the Outliers were added to the WHS list based on criterion III of the selection criteria, meaning the Park and the Outliers "bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared." App. at JA1874-75.

approximately 55 miles to the north, known today as Aztec Ruin. *See* App. at JA1861 (map of prehistoric Chacoan roads).

The legislation creating the Park also designated 33 separate "Chaco Cultural Archaeological Protection Sites" outside the Park boundaries for preservation and interpretation, which are jointly managed by the National Park Service ("NPS"), BLM, Bureau of Indian Affairs, and the Governor of New Mexico. 16 U.S.C. § 410ii-1(b). Of the 33 sites on the WHS list, 13 of them are located on BLM lands subject to Mancos Shale development, which the agency characterizes as "outstanding examples of cultural resources from [the Pueblo II and Pueblo III] period[s]." App. at JA796-97 (EIS). Although the Park itself is significant, these outlying sites and, indeed, the entire surrounding landscape, evidence important historic and contemporary cultural significance to descendants of Chacoan communities as well as Navajo tribal members living in the area. App. at JA807-18.

In June 2004, BLM's New Mexico State Director and the New Mexico SHPO entered into an NHPA program alternative, the State Protocol, which defines the manner in which BLM meets its responsibilities under the NHPA. App. at JA1520-41. The Protocol was renewed in 2014 (hereafter, "2014 Protocol" or "Protocol"), App. at JA1542-628, superseding the 2004 Protocol. App. at JA1546. For all of the Mancos Shale APDs, BLM used the Protocol to meet its NHPA

obligations in lieu of the Section 106 regulations. *See, e.g.,* App. at JA1383 (establishing boilerplate language for APD EAs and describing BLM's use of the Protocol for APD approvals).

B. BLM's Planning and Management of Oil and Gas Development in the Basin.

In 2001, BLM released a reasonably foreseeable development scenario ("RFDS") to project oil and gas development for the New Mexico portion of the Basin. Although not a NEPA document, the 2001 RFDS "form[ed] the basis for projected oil and gas development in the planning area" for the Farmington Field Office's 2003 RMP/EIS. App. at JA769-70. Aggregating well estimates for specific formations, the RFDS predicted the development of 9,970 total *vertical* wells over a 20-year period. App. at JA640. This estimated development included *vertically* drilled gas wells from "major producing reservoirs" in the northern portion of the Basin. App. at JA656, JA663, JA671, JA682. With respect to the Basin's Mancos Shale formation, the 2001 RFDS provided:

> [E]xisting Mancos Shale and Gallup Sandstone reservoirs are approaching depletion and are marginally economic. Most are not currently considered candidates for increased density development or further enhanced oil recovery operations.

App. at JA714. While the 2001 RFDS acknowledged that *horizontal* drilling was a possibility in the Basin, BLM nonetheless excluded horizontally-drilled wells from

its projections because use of this technology was, according to BLM, economically and technically infeasible. App. at JA746.

The 2003 RMP/EIS analyzed the impacts of 9,942 new wells—expressly based on contextual assumptions regarding specific formations, drilling technologies, and practices underlying the analysis of oil and gas development impacts anticipated at that time—which formed the basis of BLM's consideration of alternatives. For example, Table 4-4 in the 2003 RMP/EIS identified five major producing formations in the northern portion of the Basin: Fruitland, Pictured Cliffs, Mesaverde, Dakota, and Chacra, which together account for 99.7 percent of the 9,942 wells predicted for BLM's chosen Alternative D. App. at JA828. BLM stated that "analysis [in the 2003 RMP/EIS] 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." App. at JA827. Analysis in the 2003 RMP/EIS was provided within this context, including, for example, estimates for surface disturbance based on the drilling of *vertical* wells, as well as for "air quality analysis, [where] it was assumed that all new wells would extract natural gas." App. at JA820, JA835.

Since completions of the 2003 RMP/EIS, "[t]he effective combination of fracking and directional drilling has been 'a game changer' in natural gas and oil extraction since the mid–2000s." *Diné CARE v. Jewell*, No. 1:15-cv-0209 JB/SCY,

2015 WL 4997207, at *6 (D.N.M. Aug. 14, 2015) ("*Diné CARE I*") *aff'd,* 839 F.3d 1276 (10th Cir. 2016) ("*Diné CARE II*"). In 2010, BLM began receiving APDs for horizontally-drilled and multi-stage fracked wells in the Mancos Shale formation. *Id.* In the first months of 2014, operators sought to begin horizontal drilling in Mancos Shale. BLM subsequently approved over 250 APDs for Mancos Shale from January 2014 to March 2015. *Id.* at *7. BLM acknowledged that it had not considered the impacts of horizontal wells in the 2003 RMP/EIS, and subsequently published a Notice of Intent to prepare an amendment to the 2003 RMP/EIS ("Mancos RMPA/EIS"), App. at JA1657, which provided in part:

> The RMP amendment is being developed in order to analyze the impacts of additional development in what was previously considered a fully developed oil and gas play within the San Juan Basin in northwestern New Mexico . . . Subsequent improvements and innovations in horizontal drilling technology and multi-stage hydraulic fracturing have enhanced the economics of developing [the Mancos Shale] horizon . . . As full-field development occurs, especially in the shale oil play, additional impacts may occur that previously were not anticipated in the [2001] RFD or analyzed in the current 2003 RMP/EIS, which will require an EIS-level plan amendment.[5]

79 Fed. Reg. 10,548 (Feb. 25, 2014).

In October 2014, BLM released a new RFDS ("2014 RFDS") to inform the Mancos RMPA/EIS, which estimated an additional 3,960 *horizontally* drilled and multi-stage fractured Mancos Shale wells in the Basin. App. at JA1662. To date,

[5] *See also Diné CARE I*, 2015 WL 4997207, at *8.

BLM has still not released a draft RMPA/EIS to the public for comment yet continues to approve APDs allowing horizontally-drilled Mancos Shale wells by tiering to the outdated analyses in the 2003 RMP/EIS.

Since 2014, BLM has approved at least 362 APDs targeting the Mancos Shale formation. Horizontally-drilled wells can have greater impacts than vertical wells. Although a single horizontally-drilled well can replace multiple vertical wells, horizontal drilling causes roughly double the surface impacts of vertical drilling on a well-for-well basis; horizontal drilling requires substantially larger well pads than conventional vertical well pads, which means that other attendant infrastructure is likely to develop, including new access roads, well pads, storage tanks, and pipelines. *Diné CARE I,* 2015 WL 4997207, *11. "The Plaintiffs have pointed to a number of ways in which even properly functioning directionally drilled and fracked wells produce environmental harm [. . . includ[ing] air pollution, water usage, and surface impacts." *Id.* at *48. And this Court recognized that:

> These new drilling techniques have greatly increased access to oil and gas reserves that were not previously targeted for development and have given rise to much higher levels of development in the Mancos Shale than the BLM previously estimated and accounted for. Moreover, horizontal drilling and multi-stage fracturing may have greater environmental impacts than vertical drilling and older fracturing techniques.

Diné CARE II, 839 F.3d at 1283.

BLM has acknowledged that wells drilled using this advanced technology involve a number of "complexities" not associated with vertical wells, including "be[ing] significantly deeper and cover[ing] a larger horizontal area than the operations of the past." 80 Fed. Reg. 16,128 (March 26, 2015). These "greater environmental impacts" and "complexities" are concentrated in the distinctive geographic context of the public lands, cultural sites, and communities within the Greater Chaco Landscape, specifically the portion of the Landscape within the Basin's southern reach, which was not the focus of development projected by the 2003 RMP/EIS. *See* App. at JA828 (listing five major producing formations in northern portion of Basin for which BLM analyzed development impacts).

To justify the challenged APD decisions, BLM prepared individual EAs/ FONSIs, resulting in piecemeal analysis of the environmental impacts of Mancos Shale wells that tier to the outdated environmental analyses in the 2003 RMP/EIS. While BLM analyzed the environmental impacts anticipated within each individual APD footprint, it failed to analyze the cumulative impacts of horizontal drilling and multi-stage fracturing, including past, present, and reasonably foreseeable impacts of Mancos Shale development in the context of the Greater Chaco Landscape, specifically in the Basin's southern reach.

STANDARD OF REVIEW

This Court reviews the district court's decision affirming BLM's APD approvals *de novo,* without deference to the district court's conclusions. *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704-05 (10th Cir. 2009).

Because the NHPA and NEPA do not provide for private causes of action, courts review BLM's compliance with these statutes under the Administrative Procedure Act ("APA"). 5 U.S.C. § 706; *Utah Shared Access Alliance v. Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006), *cert. denied* 550 U.S. 904 (2007). This Court's "review of the lower court's decision in an APA case is de novo," and "owe[s] no deference to the district court's decision." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.,* 248 F.3d 1277, 1281 (10th Cir. 2001) (citations omitted).

Courts "shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). Under this standard of review, the Court must "ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560,

1574 (10th Cir. 1994) (citations omitted). This includes a "thorough, probing, and in-depth review" of the administrative record. *Wyoming v. United States*, 279 F.3d 1214, 1238 (10th Cir. 2002).

SUMMARY OF ARGUMENT

I. NATIONAL HISTORIC PRESERVATION ACT

The NHPA requires BLM to consider the effects of its actions on historic properties and cultural sites prior to implementation. Effects are not limited to direct, physical destruction of cultural sites, but also include adverse effects to a site's setting that contribute to its historic significance, as well as the "introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historical features." 36 C.F.R. § 800.5(a)(2)(iv-v). BLM must also consider "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." *Id*. § 800.5(a)(1).

Where cultural sites are located outside of a project footprint so as not to be impacted by physical destruction, the NHPA still requires BLM to assess whether cultural sites will be indirectly impacted by noise, air, and light pollution from Mancos Shale development, and also cumulatively impacted by industrial-level development across the Greater Chaco Landscape. *Id*. § 800.5(2)(v). According to the 2014 Protocol, BLM must assess these effects by defining an APE of sufficient

size to encompass all of the cultural sites in which these broader effects will be felt. App. at JA1562. The 2014 Protocol recognizes indirect and cumulative effects may be experienced at greater distances than direct effects and, in those cases, a separate APE for indirect effects is appropriate. *Id*. Nonetheless, BLM failed to consider the indirect impacts of Mancos Shale development on cultural sites not located immediately within or adjacent to each well pad footprint. Instead, BLM defined a narrow APE encompassing only direct, physical effects to cultural sites within the well pad footprint. In so doing, BLM violated the NHPA, which requires it to analyze development's indirect impacts to cultural sites. BLM also failed to analyze the cumulative adverse effects to cultural sites from (1) the 362 new horizontal wells already approved, and (2) the 3,960 new horizontal wells predicted by the 2014 RFDS.

II. NATIONAL ENVIRONMENTAL POLICY ACT

NEPA requires agencies to consider the "cumulative impacts" of their actions, which are defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7. Here, NEPA requires that BLM assess the

cumulative impacts of not just the 362 Mancos Shale wells it already approved, but also the 3,960 total Mancos Shale wells that BLM determined are reasonably foreseeable. The cumulative impact of these APD approvals is contextually distinct from, in addition to, and in exceedance of the impacts analyzed in the 2003 RMP/EIS. Yet, by virtue of the agency's piecemeal approval of hundreds of individual Mancos Shale wells, BLM has failed to take a hard look at the cumulative impacts of its APD decisions on water quantity and air quality resources across the Greater Chaco Landscape, specifically the portion that falls within the Basin's southern reach, which is where these wells' impacts are most acutely felt. By using this piecemeal approach, BLM did not take the requisite hard look at all the reasonably foreseeable cumulative impacts of its APD approvals, in violation of NEPA.

ARGUMENT

I. CITIZEN GROUPS HAVE STANDING

Citizen Groups have organizational standing because their members have standing, the claims are germane to their organizational purposes, and participation by individual members is not required to secure the relief sought. *Comm. to Save Rio Hondo v. Lucero*, 102 F.3d 444, 447 n.3 (10th Cir. 1996); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Citizen Groups each have members with standing to challenge BLM's APD approvals because the members have demonstrated: (1) injury in fact; that is (2) fairly traceable to the challenged action; and (3) likely to be redressed by a favorable decision. *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1264-65 (10th Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). As the district court correctly found, Citizen Groups have demonstrated standing for their NEPA and NHPA claims. App. at JA94.

"[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000). Actual environmental harm from complained-of activity need not be shown, as "reasonable concerns" that harm will occur are enough. *Comm. to Save Rio Hondo*, 102 F.3d at 450. Citizen Groups' members are directly harmed by BLM's failure to comply with NEPA and the NHPA in approving APDs for at least 362 horizontal Mancos Shale wells in the Greater Chaco region.[6] Citizen Groups' members live, work, and recreate in the Basin's southern portion where the adverse impacts of Mancos

[6] *See* Eisenfeld Decl. ¶¶ 7, 9, 13-14, App. at JA339-43; Suppl. Eisenfeld Decl. ¶¶ 4, 6-8, App. at JA622-24; Nichols Decl. ¶¶ 4, 10, 12, App. at JA347, JA353-54; Suppl. Nichols Decl. ¶¶ 6, 8-9, 11-12, App. at JA606-08, JA615-16; Green Decl. ¶ 7, App. at JA357-58; Suppl. Green Decl. ¶¶ 8-9, App.at JA630-31; Miura Decl. ¶¶ 6-7, App. at JA361-32; Pinto Decl. ¶¶ 5-11, App. at JA618-19.

Shale drilling activities are visible and audible.[7] Citizen Groups' members' regular use and enjoyment of these areas include recreational uses, such as hiking, camping, night sky viewing, birding, wildlife viewing, use of waters, artistic endeavors, and aesthetic enjoyment, as well as solitude and research.[8] Citizen Groups' members identify ongoing injuries from development of Mancos Shale wells, such as threats to their use and enjoyment of these areas including environmental, recreational, spiritual, and aesthetic interests, and increased concerns about their health and safety,[9] due to the adverse impacts of continued fossil fuel development on air, water, climate, and cultural sites.

To establish traceability in NEPA cases, the Tenth Circuit has explained that a plaintiff "need only trace the risk of harm to the agency's alleged failure to follow [NEPA] procedures." *Comm. to Save Rio Hondo*, 102 F.3d at 451-52. Citizen Group's members' injuries can be traced to BLM's ongoing authorization

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[7] *See* Eisenfeld Decl. ¶¶ 2, 9, 13-14, App. at JA337-43; Suppl. Eisenfeld Decl. ¶¶ 3, 5-6, 8, App. at JA622-24; Nichols Decl. ¶¶ 3-5, 7, App. at JA347-52; Pinto Decl. ¶ 1, 7-8, 10-1, App. at JA617-19.

[8] *See* Eisenfeld Decl. ¶¶ 3, 5, 9, 13-14, App. at JA339-43; Suppl. Eisenfeld Decl. ¶¶ 3, 6, App. at JA622-24; Nichols Decl. ¶¶ 3-5, 7, App. at JA347-52; Suppl. Nichols Decl. ¶¶ 8, 11, App. at JA607-15; Green Decl. ¶¶ 4-5, 7, App. at JA357-58; Suppl. Green Decl. ¶¶ 4-6, App. at JA629-30; Miura Decl. ¶ 4, App. at JA361; Trujillo Decl. ¶¶ 7, 8, App. at JA364-65; Pinto Decl. ¶¶ 3-4, 8-9, 11, App. at JA617-19.

[9] *See* Eisenfeld Decl. ¶¶ 12-15, App. at JA342-44; Suppl. Eisenfeld Decl. ¶¶ 7-8, App. at JA624; Nichols Decl. ¶¶ 7-12, App. at JA352-54; Suppl. Nichols Decl. ¶¶ 8-9, 11-12, App. at JA607-09, JA615-16; Green Decl. ¶¶ 7-8, App. at JA357-58; Suppl. Green Decl. ¶¶ 8-9, App. at JA630-31; Miura Decl. ¶¶ 6-7, App. at JA361-62; Pinto Decl. ¶¶ 5, 8-9, 12, App. at JA618-20.

of Mancos Shale APDs without first evaluating the indirect and cumulative impacts of horizontal drilling and multi-stage hydraulic fracturing on environmental and cultural sites under NEPA and the NHPA, respectively.

"Under [NEPA], 'the normal standards of redressability' are relaxed; a plaintiff need not establish that the ultimate agency decision would change upon [NEPA] compliance." *Comm. to Save Rio Hondo*, 102 F.3d at 452 (quoting *Lujan*, 504 U.S. at 572 n.7). Here, Citizen Groups' members' injuries would be redressed by a favorable result in this case because BLM would be required to analyze the cumulative, landscape-level environmental and cultural impacts, and the indirect impacts on cultural sites resulting from its authorization of at least 362 horizontally drilled Mancos Shale wells. Such analysis is fundamental to the important roles NEPA and the NHPA play in agency decision-making, and could lead to denials of APDs, or the imposition of additional stipulations that might lessen the potential impacts of drilling on human health, the environment, cultural sites, and nearby communities.

II. BLM'S APD APPROVALS VIOLATE THE NHPA BY FAILING TO CONSIDER MANCOS SHALE DEVELOPMENT'S INDIRECT AND CUMULATIVE IMPACTS ON CULTURAL SITES.

This appeal concerns one of the richest cultural landscapes in this country, the heart of which is Chaco Park and outlying Chaco Protection Sites. This area, in the southern portion of the Basin, includes ancient, landscape-level cultural sites,

as well as existing tribal communities that are adversely affected by Mancos Shale development. Adverse effects from BLM-authorized oil and gas development including air, light, and noise pollution, all have the potential to indirectly and cumulatively affect many of the cultural sites within the boundaries of BLM's Farmington Field Office. App. at JA1788-94.

The NHPA and the 2014 Protocol require "landscape-level" analysis of indirect and cumulative effects across the Greater Chaco Landscape and the southern portion of the Basin before BLM can approve any APDs in the Mancos Shale formation, yet BLM failed to do so prior to approving hundreds of Mancos Shale wells. For all of the APD approvals challenged here, BLM considers only direct effects to archaeological sites within individual APD footprints.[10] In doing so, BLM fails to recognize the essential distinction between: (1) small archaeological sites for which direct effects can be easily identified and mitigated at a site-specific level, and (2) off-site, landscape-level cultural properties which can be indirectly and cumulatively impacted by air, light, and noise pollution from APD development—effects that cannot be easily mitigated.[11]

[10] For each APD, the record includes brief reports documenting whether any archaeological sites were found within the APD footprint, and measures to prevent destruction of those sites. *See*, *e.g.*, App. at JA1757-69.

[11] Unlike small archaeological sites that are generally subject to site-specific excavation and mitigation measures, Traditional Cultural Properties and Chacoan cultural sites have large and amorphous boundaries on a landscape level, whose significant attributes include "extensive views of natural landscape without modern

The 2014 Protocol recognizes the distinction between small archaeological sites and landscape-level cultural sites by requiring BLM to "consider potential direct, indirect, *and* cumulative effects to historic properties and their associated setting when setting is an important aspect of integrity." App. at JA1562 (emphasis added); *see*, *also*, *Coal. of Concerned Citizens v. Federal Transit Admin.*, 843 F.3d 886, 908 (10th Cir. 2016) (recognizing that analysis of a project's "indirect visual effects" to historic properties is required for NHPA compliance); *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1153 (D. Mont. 2004) (stating agency must consider effects to cultural sites located outside project footprint); *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985) (finding NHPA violation where agency only considered direct effects to cultural sites within project footprint). Thus, to comply with the NHPA, BLM must analyze Mancos Shale development's indirect and cumulative effects, in addition to direct effects, on landscape-level cultural sites associated with the Chaco Phenomenon—including the Chaco World Heritage Site, Chaco Protection Sites, and any Traditional Cultural Properties ("TCPs").[12] BLM never completed this analysis.

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intrusions." NPS, "*National Register Bulletin No. 38 – Guidelines for Evaluating and Documenting Traditional Cultural Properties*" (1998) ("Bulletin 38") available at: https://www.nps.gov/Nr/publications/bulletins/nrb38/. For example, a TCP or other landscape-level property "can … lose its significance through alteration of its setting or environment." *Id*.

[12] TCPs are eligible or included in the National Register "because of its association with cultural practices or beliefs of a living community that (a) are rooted in that

A. BLM Violated the NHPA by Failing to Consider Indirect Effects to Cultural Sites Outside of Standard APEs for Direct Effects.

Adverse effects that diminish the integrity of cultural sites are not limited to physical destruction of individual sites, but also include off-site audible and visual intrusions that can damage features of a site's setting that contribute to its historic significance. *See* 36 C.F.R. § 800.5(a)(2)(iv), (v); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) (recognizing that "[e]ven if no shovels or backhoes will touch [an] historic area, damage to historic areas can occur in less direct ways."); App. at JA1562 ("[t]he introduction of physical, visual, audible, or atmospheric elements has the potential to affect the historic setting or use of historic properties"). In order to comply with the NHPA, BLM must also consider the indirect effects of Mancos Shale development on cultural sites, in addition to direct effects such as physical destruction of ancient buildings and roads across the Greater Chaco Landscape.

Park resources are also at risk from Mancos Shale Development. The NPS has acknowledged that energy development is "the greatest external threat to [Chaco] park resources" because of development's "intensive" and "indirect" effects including "increasingly low air quality, disturbances to the extensive pre-Columbian cultural landscape, and other visual impacts." App. at JA1873. Drill

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community's history, and (b) are important in maintaining the continuing cultural identify of the community." Bulletin 38.

rigs can extend vertically 100 feet, and drill pad lighting and gas flaring intrude on dark night skies. App. at JA1817. Such visual intrusions can affect Chaco Park's "Dark-Sky Park" designation and, in turn, detract from the pristine night sky characteristic of the Park's historic setting.[13] *See*, *e.g.*, App. at JA1803 (showing drill rig lights at night). The horizontal drilling technique used for Mancos Shale development "can produce three-and-one-half to four-and-one-third times as much of certain air pollutants as vertical wells do, on a well-for-well basis," *Diné CARE I*, 2015 WL 4997207, at *11, affecting the "feeling of remoteness" that NPS has identified as one of the fundamental values of the Greater Chaco Landscape. App. at JA1879. In *N. M. ex rel. Richardson v. Bureau of Land Mgmnt.*, 459 F. Supp. 2d 1102, 1125 (D.N.M. 2006), (rev'd in part on other grounds, 565 F.3d 683), the district court recognized the distinction between direct and indirect effects to cultural sites, and articulated the importance of not limiting assessment of adverse effects only to archaeological sites within a project footprint:

> BLM's argument focuses on historical sites covering relatively small areas, such as discrete archaeological sites. For such sites, mitigation of impacts can be accomplished simply by moving the proposed drill site to a different location on the lease parcel. For landscape-level

[13] On August 28, 2013, the International Dark-Sky Association designated the Park as a "Dark-Sky Park" because of the Park's commitment to preserving its night skies through such efforts as "adopt[ing] a set of strict lighting guidelines that include the use of dark-sky friendly lighting now and in the future, ensuring that it will do its part to keep the nighttime environment natural and unspoiled for generations to come." App. at JA1877.

> [properties] that may or may not be located on the leased parcel itself, however, such movement may not be adequate mitigation.

Thus, analysis of direct effects to individual archaeological sites is neither the equivalent of, nor a substitute for, analysis of *indirect* effects to landscape-level cultural sites.

BLM's failure to consider the indirect effects of Mancos Shale development on cultural sites flows from the agency's arbitrary definition of an APE. Appropriately defining APE boundaries is the first step in assessing impacts to cultural sites because, once defined, the APE circumscribes the area within which BLM must assess impacts to cultural sites. The 2014 Protocol requires the following:

> In defining the APE, the BLM will consider potential direct, indirect, and cumulative effects to historic properties and their associated settings when setting is an important aspect of integrity, as applicable. The introduction of physical, visual, audible, or atmospheric elements has the potential to affect the historic setting or use of historic properties including but not limited to properties of religious and cultural significance to Indian tribes, and the BLM will take this into account in defining the limits of an APE for indirect effects.

App. at JA1562. To this end, the Protocol mandates that BLM define separate APEs for evaluating direct and indirect effects for the challenged APDs. *Id*. The "standard" APE for evaluating direct effects to small archaeological sites from well pad construction is "the well pad construction zone plus 100' on each side from the edge of the construction zone." App. at JA1594. The Protocol does not define a

"standard" APE for evaluating indirect effects; instead "[t]he indirect APE shall include known or suspected historic properties and their associated settings where setting is an important aspect of integrity."[14] App. at JA1562. In other words, where large cultural sites are not contained within or located immediately adjacent to an individual Mancos Shale APD footprint but could be indirectly impacted by noise, lights, and air pollution from drilling, BLM must define an APE that encompasses all of these impacts. Yet here, BLM routinely used only a "standard" APE encompassing the well pad footprint, which resulted in the agency excluding from its analysis all cultural sites likely to be adversely affected by noise, light, and air pollution. By constricting APEs to individual well pads, BLM failed to account for indirect impacts to cultural sites, as required by the NHPA and the Protocol.

Nonetheless, the district court held that BLM did not violate the NHPA's requirement to analyze indirect impacts to landscape-level cultural sites. This holding was based on two erroneous premises. First, the district court claimed BLM was not required to analyze indirect effects because such effects were outside the APE for direct effects, and the BLM field manager did not authorize the agency

[14] The Protocol's requirement that BLM define a separate APE for indirect effects is consistent with 36 C.F.R. § 800.16(d), which instructs that the APE be broad enough geographically to include areas "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties." *See also Valley Cmty.*, 373 F.3d at 1091 (finding an APE complied with the Section 106 regulations where it "took into account both direct and indirect potential effects of the project and varied throughout the corridor depending on type of resource and the nature of [the] potential effect").

to consider impacts to sites outside the narrow APE. App. at JA135, JA139. Second, the district court performed its own *ad hoc* analysis of impacts to the Park and other cultural sites based on the distance between these sites from the challenged APDs, rather than basing its decision on the reasoning proffered by BLM. App. at 117.

With respect to the first error, the district court's reasoning conflates two distinct provisions of the Protocol: (1) the *requirement* that BLM define an APE that sufficiently encompasses an area within which indirect effects can be considered; and (2) the *procedure* BLM must then follow for defining an APE for indirect effects. The Protocol *requires* BLM to consider a separate APE for indirect effects where "[t]he introduction of physical, visual, or audible elements has the potential to affect the historic setting or use" of cultural sites "where setting is an important aspect of integrity." App. at JA1562. Here, NPS has recognized that "solitude, natural sounds, sandstone cliffs, natural events, landscape, and remote sites" are all part of Chaco Park's unique setting that contribute to its designation as a listed historic district.[15] App. at JA1879. Yet BLM has failed to address Mancos Shale development's potential to impact these setting aspects in any of its

[15] Under the NHPA regulations, a "district" is "a geographically definable area . . . possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events . . . A district may also comprise individual elements separated geographically but linked by association or history." 36 C.F.R. § 60.3(d).

EAs/FONSIs accompanying individual APD approvals or in the 2003RMP/EIS.

The Protocol then stipulates the procedure BLM must follow to consider an indirect APE broader than the standard APE:

> Identification efforts outside of the APE for direct effects shall be at the approval of the BLM field manager, taking into account the recommendations of the BLM cultural resource specialist and the SHPO.

App. at JA1562. The district court fixates on the BLM field manager's authority to approve consideration of an indirect APE broader than the standard APE. App. at JA139. The district court ignores, however, the BLM field manager's responsibility—which, here, it did not satisfy—to make such a decision after the BLM cultural resource specialist assesses whether noise, air, and light pollution from development has the potential to adversely affect the integrity of a cultural site's historic setting. App. at JA1562.

The district court's flawed reasoning led to its finding that BLM's narrowly defined APEs were adequate because the BLM field manager did not approve a separate APE for indirect effects. However, the district court failed to consider whether BLM defined the APEs too narrowly in the first place to provide a meaningful assessment of indirect effects to cultural sites. *Id*. As discussed above, NPS already has concerns with air, noise, and visual effects to the Park from conventional oil and gas development. And recent studies of air pollution, noise, and light levels associated with non-conventional development, including

horizontal drilling, demonstrate a greater magnitude of landscape-level impacts from these elements. App. at JA1802-07. Visual and audible intrusions will be felt well beyond 100 feet of the well pad construction zone, App. at JA1821, requiring BLM to set an APE broad enough to encompass these impacts. While the BLM field manager has discretion to define the scope of the APE, that discretion is bounded by the Protocol and NHPA and the field manager must rationally connect her exercise of that discretion to the relevant facts—i.e., the prospect that noise, air, and light pollution from the proposed development would adversely affect the integrity of a site's historic setting. *Olenhouse*, 42 F.3d at 1574.

The district court's second fundamental error was its failure to apply the well-established arbitrary and capricious standard of review to BLM's conclusions that its APD approvals would not indirectly impact cultural sites, and the court's decision to instead perform its own *ad hoc* analysis of impacts to the Park and other cultural sites based on the distance between these sites and the challenged APDs, as shown on a map attached to a BLM declaration. App. at JA128, JA141 ("the Court cannot say that the BLM should have considered those sites given that Chaco Park and its satellites are more than 10 miles away from most of the wells."). The district court concluded that "that noise and light pollution would have minimal effect on those historic sites" and "[t]he same analysis applies for light pollution." App. at JA142.

The district court recognized that its role was to determine whether BLM "considered the factors it was supposed to consider"—not to determine whether BLM correctly decided that the APD approvals would not impact cultural sites. App. at JA129. The district court nonetheless conducted its own analysis and determined that "any noise that would carry miles to the historical site would not be so much" as to require BLM to analyze impacts to cultural sites. JA142. The district court's actions were "impermissible and prejudicial"; Tenth Circuit precedent teaches that a court "*may not supply* a reasoned basis for an agency's action that the agency itself has not given." *Olenhouse*, 42 F.3d at 1574-75, 1577 (emphasis in original) (citing *Motor Vehicle Mfrs.*, 463 U.S. at 43). "An agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983).

Moreover, the district court ignored contrary evidence in the record showing that light, noise, and air pollution are decidedly not confined to the vicinity of a well pad. App. at JA1809-10, JA1817. For example, the NPS expressed concern with potential air quality and visual impacts to Chaco and Mesa Verde National Parks from oil and gas development, with the latter *80 miles away* from the Farmington Field Office. App. at JA2387-91. BLM failed to analyze these concerns. Thus, the district court's determination that noise and light pollution impacts "would not be so much" that BLM would need to consider them, App. at

JA142, was nothing more than the court's own assessment "without regard to the contents of the administrative record." *Olenhouse*, 42 F.3d at 1580. The Tenth Circuit held that this type of error "warrant[s] reversal."[16] *Id*.

B. The Complicated and Controversial Nature of BLM's APD Approvals Required Consultation with Tribes and the SHPO.

The Protocol also requires BLM to consult with the SHPO "where defining the APE is complicated or controversial." *Id*.; App. at JA1594 (noting that consultation with the SHPO is required "[f]or *any* other APEs" not included in the standard APE for evaluating direct effects) (emphasis in original). The Protocol does not include a comprehensive definition of "complicated or controversial," but does provide examples, including actions where "multiple applicants" or "multiple Indian tribes" are involved. App. at JA1562. Here, BLM authorized hundreds of individual APDs from multiple applicants, each of which the agency evaluated in isolation, thereby diluting the true impacts of Mancos Shale development on cultural sites. The APDs are also located on lands known to include places of cultural significance to the Navajo Nation and Hopi Tribe, as well as 20 individual sovereign Pueblos each with historic connections to the area. *See*, *e.g.*, App. at

[16] The district court also erred in finding that BLM's cultural resources reports meet the Protocol's documentation standards. In so holding, the court only considered whether BLM had adequately documented and evaluated the potential for physical destruction of cultural sites within the APE for *direct* effects. App. at JA145. The court did not consider whether BLM had adequately evaluated cultural sites that could be *indirectly* impacted by well pad development.

JA1771 (Navajo Nation "voic[ing] concerns with well pads, and access routes to be constructed within the San Juan New Mexico land base without proper acknowledgment of sacred places and places of cultural significance."); App. at JA1722-23 (Hopi Tribe stating "the co-mingling of energy development and resource protection around Chaco will inevitably lead to adverse effects to cultural resources significant to the Hopi Tribe.").

The Protocol also requires consultation with the SHPO where an action is "subject to unusual public attention or involve[s] strongly opposing viewpoints." App. at JA1554. In addition to the concerns with Mancos Shale development's impacts to cultural sites raised by the Navajo Nation and Hopi Tribe, Citizen Groups have raised similar concerns with the BLM for years, specifically raising potential impacts to cultural sites from Mancos Shale development's air, noise, and light pollution. *See*, *e.g.*, App. at JA1726-27.

The record shows that BLM's APD approvals would lead to air, noise, and light pollution. App. at JA1802-07; JA1812-26. BLM was aware that these impacts could compromise the historic settings of cultural sites. App. at JA1727-28. To comply with the Protocol and the NHPA, BLM was required to consult with the SHPO to define an APE for indirect effects to cultural sites located outside of individual APD boundaries. The record contains no information suggesting BLM complied with these requirements. BLM never defined an APE for indirect effects,

nor did the agency analyze the indirect effects of Mancos Shale development on cultural sites located outside of the individual footprint for any given well pad. These failures violate the NHPA.[17]

C. BLM Failed to Consider the Cumulative Effects to Cultural Sites from APD Approvals and Total Projected Mancos Shale Wells.

The 2014 Protocol and NHPA regulations require BLM to consider not only direct and indirect effects to cultural sites within separately defined APEs, but also to consider "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(1); App. at JA1562. Even if the air, noise, and light pollution from a single APD did not adversely affect the historic setting of a Chacoan cultural site when considered in isolation, BLM's analysis is not complete. BLM must also analyze the cumulative impacts of the 362 challenged APDs, as well as the 3,960 total reasonably foreseeable Mancos Shale wells estimated by the 2014 RFDS. App. at JA1662. This is because noise, air, and light pollution from hundreds or thousands of new wells may cumulatively have an adverse effect on the integrity of the historic setting for any number of cultural sites, the Park, and the Greater Chaco Landscape.

[17] The district court erred in finding BLM's APD approvals were not controversial. In so holding, the court failed to consider record evidence cited by Citizen Groups regarding noise, air, and light pollution impacts on landscape-level cultural sites, instead, presuming that the APD approvals were considered controversial "because the [Appellants] have challenged them." App. at JA144.

The NPS has expressed concerns that oil and gas development in the vicinity of the Park and other features of the Chaco Phenomenon will adversely affect the fundamental values associated with these sites including: physical surroundings, solitude, natural sounds, landscape integrity, night sky viewing, and unpolluted air. App. at JA1800, JA2429-23. Mancos Shale development has the potential to adversely affect the Chaco Landscape's fundamental values on an unprecedented scale, yet BLM failed to analyze the cumulative effects of developing hundreds of new APDs across this culturally significant landscape.

There is no record evidence demonstrating that BLM analyzed the cumulative impacts of either the 362 challenged APDs or the 3,960 new wells predicted in the 2014 RFDS, which are more impactful *horizontal* wells. The two-paragraph discussion of cumulative effects to cultural sites from oil and gas development discussed in the 2003 RMP/EIS is limited to the cumulative amount of acreage disturbed by *vertical* well development, and does not consider cumulative air, noise, and light pollution effects to landscape-level cultural sites. App. at JA2398. By failing to provide a cumulative effects analysis for cultural sites, as required by the NHPA and the Protocol, in approving the 362 APDs at issue here, BLM "failed to consider an important aspect of the problem" rendering

those approvals arbitrary and a violation of the NHPA.[18] *Motor Vehicle Mfrs.*, 463 U.S. at 43.

III. BLM FAILED TO TAKE A HARD LOOK AT THE CUMULATIVE ENVIRONMENTAL IMPACTS OF THE CHALLENGED WELLS IN VIOLATION OF NEPA.

BLM failed to take a hard look at the cumulative impacts of past, present, and reasonably foreseeable future horizontally-drilled Mancos Shale wells to the Greater Chaco Landscape in either the 2003 RMP/EIS or individual APD-level EAs. Yet BLM has already approved 362 horizontal Mancos Shale wells and, in the 2014 RFDS, projected a total of 3,960 reasonably foreseeable horizontal Mancos Shale wells. BLM's failure to take a hard look at the cumulative impacts of these horizontal wells, including the severity of those impacts on the Greater Chaco Landscape's public lands, natural and cultural resources, and communities in the southern reach of the Basin, violates NEPA.

The "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." *Richardson*, 565 F.3d at 718 (citing 40 C.F.R. §§ 1501.2, 1502.22); *see also* 42 U.S.C. § 4332(2)(C)(v). A cumulative impact is

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable

[18] The district court's opinion does not address Citizen Group's arguments regarding BLM's failure to address cumulative effects to cultural sites.

> future actions . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. In any EIS that BLM tiers to for analysis of cumulative impacts, BLM "must analyze the combined effects of the actions in sufficient detail to be "useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Muckleshoot Indian Tribe*, 177 F.3d at 810 (citing *In City of Carmel–By–The–Sea v. U.S. Dept. of Transp*., 123 F.3d 1142, 1160 (9th Cir.1997). "Cumulative impacts that result from individually minor but collectively significant actions are the crux of what the regulations implementing NEPA seek to avoid." *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 645 (9th Cir. 2004).

Although BLM is given "the primary task of defining the scope of NEPA review and their determination is given 'considerable discretion,' connected or cumulative actions must be considered together [in one EIS] to prevent an agency from 'dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" *Wetlands Action Network v. U.S. Army Corps of Eng'rs,* 222 F.3d 1105, 1118 (9th Cir. 2000), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011); *see also* 40 C.F.R. § 1508.25(a)(2). "Specifically, NEPA requires that an EIS provide 'cumulative effects' analysis based on actual data." *Diné CARE I*, 2015 WL 4997207, at *22.

A. The Cumulative Effects of Mancos Shale Development are Contextually Distinct From, In Addition To, and Exceed the Environmental Impacts Contemplated in the 2003 RMP/EIS.

As this Court previously recognized, "horizontal drilling and multi-stage fracturing may have greater environmental impacts than vertical drilling and older fracturing techniques." *Diné CARE II*, 839 F.3d at 1283. The contextual differences in the type of drilling technology used and the formation targeted are meaningful because the location and magnitude of impacts can differ dramatically. Since horizontal drilling and multi-stage fracturing result in a different magnitude of impacts than vertical drilling, BLM's reliance on the existing 2003 RMP/EIS that fails to account for the unique environmental concerns between these drilling technologies violates NEPA. *See Pennaco Energy v. U.S. Dep't of the Interior*, 77 F.3d 1147, 1159 (10th Cir. 2004).

In denying Citizen Groups' motion for preliminary injunctive relief, both the district court and this Court relied on the cumulative impacts analysis in the outdated 2003 RMP/EIS, reasoning that the additional Mancos Shale development had not yet *exceeded* the reasonably foreseeable impacts analyzed in the 2003 RMP. The district court explained: "Proliferation of an activity to an extent that the presently operative EIS did not foresee only necessitates a new EIS when the quantum of environmental impact exceeds that which the operative EIS anticipated." *Diné CARE I*, 2015 WL 4997207, at *45. Similarly, this Court found:

> As the district court pointed out, only 3,860[19] of the anticipated 9,942 new wells in the planning area were drilled in the twelve years between the issuance of the 2003 RMP and the court's consideration of this issue in 2015. Thus, even with increased drilling in the Mancos Shale formation and the switch to horizontal drilling and multi-stage fracturing, the overall amount of drilling and related surface impacts are still well within the anticipated level.

Diné CARE II, 839 F.3d at 1283.[20]

However, the full record now before this Court demonstrates that increased drilling in the Mancos Shale formation—using horizontal drilling and multi-stage hydraulic fracturing—causes impacts that are contextually distinct from, in addition to, and in exceedance of the 2003 RMP/EIS's cumulative impacts analysis. First, new Mancos Shale development is taking place in the southern portion of the Basin, yet the 2003 RMP/EIS only evaluated development in the northern portion. App. at JA828. Critically, as the tables below (based on record data) demonstrate, the total magnitude of 3,960 foreseeable Mancos Shale wells, added to 3,945 existing vertical wells drilled under the 2003 RMP/EIS, considerably exceed the cumulative impacts analyzed in the 2003 RMP/EIS. The

[19] Since the earlier stage of litigation, the number of wells drilled in the San Juan Basin has increased to at least 3,945 wells. App. at JA117.

[20] Judge Lucero, concurring in part and dissenting in part, stated: "Importantly, plaintiffs do not argue that the total impacts of drilling in the basin have exceeded the total impacts predicted in the 2003 EIS." *Diné CARE II,* 839 F.3d at 1289. Although not included as an argument during the preliminary injunction stage, at the merits stage Citizen Groups proffered the argument that total drilling impacts in the Basin exceed total impacts predicted in the 2003 EIS, and proffer that argument here.

tables illustrate the total combined impacts of past, present, and reasonably foreseeable future development, as required by 40 C.F.R. § 1508.7.

Water Consumption[21]			
Well Type	Gallons (per well)	Total Wells	Total Impacts
Vertical	283,500	3,945	1,118,407,500
Horizontal	1,020,000	3,960	4,039,200,000
Total Vertical/Horizontal Combined		**7,905**	**5,157,607,500**
Total Considered By 2003 RMP/EIS			**2,818,557,000**
Percentage Increase			**82%**

Air Pollution[22]					
Well Type	Well construction (days)	NOx (tpy)	CO (tpy)	VOC (tpy)	PM_{10} (tpy)
Vertical	9	2.30	0.63	0.20	0.92
Horizontal	25	6.13	1.64	0.55	2.54
Percentage Increase		267%	260%	275%	276%
Est. Total Impacts (3,945 vertical)		20,869	2,485	789	3,629
Est. Total Impacts (3,960 horizontal)		24,275	6,494	2,178	10,058
Total Combined		**45,144**	**8,979**	**2,967**	**13,687**
Considered (2003 RMP/EIS)		**22,866**	**6,263**	**1,988**	**9,146**
Percentage Increase		**97%**	**43%**	**49%**	**50%**

[21] *See* App. at JA833 (2003 RMP/EIS, averaging water use at 6,750 barrels per *vertical* well, or 283,500 gallons) versus App. at JA1662 (2014 RFDS estimating 3.13 acre-feet per *horizontal* well, or 1,020,00 gallons); *but cf.,* App. at JA1089 (calculating 1.3 million gallons per horizontal well); *accord* App. at JA1139, JA1100, JA1075 (calculating 966,000 gallons per horizontal well), JA1079, JA1083.

[22] *See* App. at JA2331-32 (2003 RMP/EIS providing qualitative assessment of air quality impairment and violations of air standards); App. at JA2328-29 (emissions estimates based on developing 663 wells per year). *See, e.g.,* App. at JA2072 (Mancos EA providing table of air pollutant emissions per horizontal well); *accord* App. at JA1066, JA1088, Dkt.16-7, ¶¶45-47 App. at JA216-17. Notably, several of BLM's APD EAs issued since the 2003 RMP/EIS state that "[h]orizontal drilling typically takes approximately 30 days per well," yet calibrate air pollutant emissions on a 25-day period, *see, e.g.,* App. at JA1079, JA1070-71, further underrepresenting emissions by 20%.

The 2003 RMP/EIS analyzed cumulative impacts based on 9,942 vertical wells, of which 3,945 wells have been drilled. The tables show that even though the current total well count is lower than what BLM considered in the 2003 RMP/EIS, the total *impacts* of the wells drilled—the 3,945 existing vertically drilled and the reasonably foreseeable 3,960 horizontally drilled Mancos Shale wells exceed the total impacts predicted in the 2003 EIS.[23]

In fact, BLM has *never* taken a hard look at the cumulative impacts of reasonably foreseeable horizontal Mancos Shale wells on the Greater Chaco Landscape, including the severity of those cumulative impacts on public lands, natural and cultural resources, and communities in the Basin's southern reach. BLM should have taken this hard look prior to approving any individual Mancos Shale APDs. The tables demonstrate that the agency actually failed to adequately evaluate the environmental impacts of its decisions to grant the APDs. *See Diné CARE II*, 839 F.3d at 1285.

[23] Notably, it remains possible that all 9,942 vertical wells analyzed in the 2003 RMP/EIS could still be developed, regardless of the number of wells drilled to date. App. at JA828. The 2014 RFDS predicted an additional 3,960 Mancos Shale horizontal wells but offered no downward projection of the number of vertical wells that may be drilled, in which case there is a combined total of 13,902 reasonably foreseeable vertical and horizontal oil and gas wells that could be drilled across the Basin.

B. None of BLM's Site-Specific EAs Take a Hard Look at the Cumulative Impacts of Hundreds of APD Approvals.

BLM's attempt to comply with NEPA through the issuance of narrowly focused EAs for individual Mancos Shale APDs does not "give a realistic evaluation of the total impacts" and, instead, "isolate[s] a proposed project, viewing it in a vacuum." *Grand Canyon Trust v. F.A.A.,* 290 F.3d 339, 342 (D.C. Cir. 2002). NEPA requires BLM to take a hard look at the cumulative impacts resulting from the incremental impact of its actions when added to other past, present, and reasonably foreseeable future actions from oil and gas development in the Greater Chaco Landscape. 40 C.F.R. § 1508.7.

The district court recognized that the 2003 RMP/EIS contains "a big-picture analysis of the aggregate effects of BLM-leased drilling in the San Juan Basin, whereas the EAs focused their analyses narrowly on the possible repercussions that each individual APD would have if granted." *Diné CARE I*, 2015 WL 4997207, at *6. Neither the outdated 2003 RMP/EIS upon which BLM relies, nor the EAs supporting the individual APDs, provide an analysis of the cumulative impacts associated with horizontally-drilled and multi-stage fractured wells.

Even BLM's most recent Mancos Shale EAs for APDs approved since initiation of this lawsuit failed to analyze the cumulative impacts of BLM's APD decisions, instead considering analyses of direct, indirect, and cumulative impacts to be equivalent. *See, e.g.,* App. at JA2148 (noting an "analysis area and impact

indicator for cumulative impacts is the same as for direct and indirect impacts."). Although BLM concedes that it must analyze cumulative impacts, BLM still failed to consider the cumulative severity of impacts from all the APDs when considered together. *See* App. at JA2148; JA2150-51; JA2153; JA2156.

BLM failed to provide the requisite hard look at the cumulative impacts of the 3,945 vertically-drilled wells contemplated by the 2003 RMP/EIS, the remaining balance of vertically-drilled wells contemplated by the 2003 RMP/EIS, the 362 horizontal Mancos Shale wells challenged in this case, combined with the 3,960 reasonably foreseeable horizontal Mancos Shale wells from the 2014 RFDS, which were not analyzed in the 2003 RMP/EIS. Thus, BLM violated NEPA.

C. BLM's Cumulative Impacts Analysis Must Include All Reasonably Foreseeable Wells in BLM's 2014 RFDS.

BLM failed to analyze the reasonably foreseeable impacts Mancos Shale development on the Greater Chaco Landscape. An environmental effect is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). Here, BLM determined in its 2014 RFDs that it is reasonably foreseeable that 3,960 horizontal wells will be drilled in the southern portion of the Greater Chaco Landscape. App. at JA1662. However, BLM failed to analyze the impacts of these reasonably foreseeable wells in

combination with its existing APD approvals as NEPA requires. 40 C.F.R. § 1508.7.

The district court attempted to justify BLM's failure to take a hard look at the cumulative impacts of its APD decisions combined with the reasonably foreseeable 3,960 total Mancos Shale wells by erroneously conflating the APA's final agency action requirement with NEPA's cumulative impacts requirement. As the district court explained,

> Plaintiffs do not and cannot challenge all of the 3,960 horizontal wells, because only 382 are at issue, and, as the Court concluded, only 350 are live in this dispute. The narrow question before the Court, therefore, is whether the 350 APDs violate NEPA, because their impacts exceed the 2003 EIS' projection.

App. at 118. The district court used this reasoning to consider only *past* and *present* wells to determine whether BLM complied with NEPA, thereby excluding consideration of reasonably foreseeable *future* wells. App. at 119; *cf.* 40 C.F.R. § 1508.7.

Citizen Groups only challenged final APD approvals. However, NEPA required BLM to take a hard look at the cumulative impacts of its actions, including "reasonably foreseeable future actions," 40 C.F.R. § 1508.7, such as the 3,960 horizontal Mancos Shale wells BLM estimated in its 2014 RFDS. Courts consistently find that an agency violates NEPA when it fails to take a hard look at the cumulative impacts of reasonably foreseeable future actions. *See, e.g., San*

Juan Citizens Alliance v. Bureau of Land Mgmt., No. 1:16-cv-0376-MCA-JHR, 2018 WL 2994406, at *19 (D.N.M. June 14, 2018); *Colorado Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1256 (D. Colo. 2012); *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 503 (9th Cir. 2014) ("[o]nce BOEM made the determination that [oil] production is reasonably foreseeable, it was required to consider the full cumulative impact of that production"); *Te–Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) ("[i]n a cumulative impact analysis, an agency must take a 'hard look' at all actions"); *Richardson*, 565 F.3d at 718 (finding environmental impacts of a planned gas field were reasonably foreseeable). Thus, BLM was required to include the 3,960 new horizontal wells in its cumulative impacts analysis.

IV. THE APPROPRIATE REMEDIES ARE VACATUR OF THE APD APPROVALS AND INJUNCTIVE RELIEF

A. Vacatur

Under the APA, the reviewing court "shall…hold unlawful and set aside agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Olenhouse*, 42 F.3d at 1573. "Shall means shall" in the APA. *See Forest Guardians v. Babbitt*, 164 F.3d 1261, 1268-69 (10th Cir. 1998). Vacatur is the presumptive remedy for APA violations. *See* 5 U.S.C. § 706(2); *see also High Country Conserv. Advocates*

v. U.S. Forest Serv., 67 F. Supp. 3d 1262, 1263 (D. Colo. 2014) ("Vacatur is the normal remedy for an agency action that fails to comply with NEPA").

Here, vacatur of the 362 APD approvals and associated NHPA and NEPA analyses is necessary to assure that BLM's review process on remand is not a pro-forma exercise in support of a "predetermined outcome." *See Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006), accord *Diné CARE v. OSM*, No. 12-cv-1275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015) (vacating approval of mining operations in mine expansion area to assure NEPA compliance on remand would not become "a mere bureaucratic formality."); *Montana Envtl. Information Center v. U.S. Office of Surface Mining*, No. CV 15–106–M–DWM, 2017 WL 5047901, at *6 (D. Mont. 2017) (vacatur appropriate because "error lies at the heart of NEPA's requirement that agencies make informed decisions"). Accordingly, this Court should vacate the APD approvals and their respective NHPA and NEPA analyses, or, in the alternative, remand to the district court with instructions to do so. *See WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1227, 1239 (10th Cir. 2017) (recognizing this Court has both "reversed and remanded with instructions to vacate" and "vacated agency decisions.").[24]

[24] The district court correctly recognized that remand with vacatur was the appropriate relief for BLM's NEPA violations. App. at 148-49. However, the district court incorrectly determined that vacatur was improper for NHPA

B. Injunctive Relief

In the event the Court rules in favor of Citizen Groups, the Court should also enjoin any further ground-disturbing activities on the challenged APDs until BLM complies with the NHPA and NEPA, or remand to the district court with instructions to do so. 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." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (internal references omitted).

1. Uninformed and Unlawful Fossil Fuel Development Will Cause Irreparable Injury.

"Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The district court previously found that the Citizen Groups demonstrated irreparable harm:

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violations based on a purely subjective determination that harms to cultural properties from air, noise, and light pollution "are far less severe" than the "general harm that air pollution causes." App. at JA151.

> [O]nce a well has been fracked, the environmental damage is done . . . [a]ny fracking-related environmental impacts that accrue during the pendency of this case -- and it is undisputed that such impacts exist -- would be irreversible.

App. at JA115; *see also San Luis Valley Ecosystem 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). These irreparable harms still exist as discussed in footnotes 6-9 above.

2. Money Damages Are Not an Adequate Remedy

As to the second prong, the U.S. Supreme Court recognized: "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co.,* 480 U.S. at 545; *see also, Catron Cnty. Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996) (accord); *MEIC*, 2017 WL5047901, at *3 ("Once the federal coal is removed beneath the Bull Mountains, it cannot be put back."). Here, Citizen Groups do not seek money damages. No amount of money could compensate Citizen Groups' members for their losses in recreational, spiritual, aesthetic, and cultural interests caused by Mancos Shale development in the Greater Chaco Landscape. Thus, there is no adequate remedy at law.

3. Considering the Balance of Hardships, a Permanent Injunction on Issuance of New APDs Pending NHPA and NEPA Compliance Is Warranted.

Throughout this brief, Citizen Groups have discussed harms to cultural sites and the environment resulting from BLM's unlawful APD approvals. *See infra* 16, 27-28, 31-32, 34-37, 42-44. If irreparable environmental harm "is sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.*, 480 U.S. at 544. "A third party's potential financial damages from an injunction generally do not outweigh potential harm to the environment." *Fry*, 408 F. Supp. 2d at 1034. In *Colo. Environmental Coalition v. Office of Legacy Mgmt.,* 819 F. Supp. 2d 1193, 1223-24 (D. Colo. 2011), the court found that although injunctive relief is not automatic for a NEPA violation, it was a relevant consideration where the agency had "acted on the EA/FONSI in tangible ways" by issuing uranium leases and authorizing lease development, commencement of ground disturbing activities had caused irreparable injuries not compensable by money damages, and an injunction was in the public interest. *See also Sierra Club v. U.S. Dep't of Agric.*, 841 F. Supp. 2d 349, 359 (D.D.C. 2012) (finding "balance of equities tips" in favor of enjoining federal support of coal plant pending compliance with NEPA); *Fry*, 408 F. Supp. 2d at 1034 (suspending all activity on gas leases "detrimental to the environment" pending BLM's compliance with NEPA). Here, permitting BLM to continue to

issue APDs allowing oil and gas development pursuant to inadequate NHPA and NEPA analyses would allow continued Mancos Shale development in the absence of a lawful analysis including development's full impacts on cultural sites and the environment.

4. Issuance of a Permanent Injunction is in the Public Interest.

In determining whether to issue an injunction, "courts of equity should pay particular regard for the public consequences." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citing *Railroad Comm'n. v. Pullman Co*., 312 U.S. 496, 500 (1941)). "[T]he public interest is best served when the law is followed." *Fry*, 408 F. Supp. 2d at 1038. Indeed, "having government officials act in accordance with law" is a "public interest of the highest order." *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991). "[P]reserving nature and avoiding irreparable environmental injury" and "careful consideration of environmental impacts before major projects go forward" are in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (internal citations omitted). There is a strong public interest in protecting cultural sites, the environment, and public health threatened by ongoing and future Mancos Shale development. As recognized in *Colorado Wild v. U.S. Forest Serv.,* 299 F.Supp.2d 1184, 1190-91 (D. Colo. 2004), "[t]here is an overriding public interest in the preservation of biological integrity and the undeveloped character of the

Project area that outweighs public or private economic loss in this case." Likewise, the "protection of human health, safety and the affected communities also serves the public interest." *San Luis & Delta-Mendota Water Auth. v. Locke*, 2010 WL 500455, at *8 (E.D. Cal. 2010). An injunction in this case is vital to protecting the public interest by preventing ongoing harm to human health, cultural sites, and the environment from Mancos Shale development.

CONCLUSION

BLM violated the NHPA and NEPA by failing to analyze the impacts caused by the development of fossil fuels in the Greater Chaco Landscape on communities, cultural sites, and the environment. For the foregoing reasons, Citizen Groups respectfully request that this Court: (1) reverse and vacate the district court's decision; (2) declare that BLM's 362 APD approvals violated the NHPA; (3) declare that BLM's 362 APD approvals violated NEPA; (4) vacate each of BLM's 362 challenged APD decisions, including their respective NHPA and NEPA analyses; (5) enjoin ground-disturbing activities authorized by the 362 APD approvals until BLM complies with the NHPA and NEPA; and (6) enjoin BLM from approving pending or future APDs until the agency complies with the NHPA and NEPA in a manner consistent with this Court's decision.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves issues of first impression regarding the NHPA and complex issues regarding NEPA, Citizen Groups believe that argument would be beneficial.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018 a copy of this APPELLANTS' FINAL OPENING BRIEF 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.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,000 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 21st day of December, 2018.

/s/ Samantha Ruscavage-Barz

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with ClamXav Version 2.2.2 virus protection software for Mac and, according to the program, is free of viruses.

/s/ Samantha Ruscavage-Barz

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs,

vs. No. CIV 15-0209 JB/SCY

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT, an agency within the United States Department of the Interior; and NEIL KORNZE, in his official capacity as Director of the United States Bureau of Land Management,

Defendants,

and

WPX ENERGY PRODUCTION, LLC; ENCANA OIL & GAS (USA) INC.; BP AMERICA COMPANY; CONOCOPHILLIPS COMPANY; BURLINGTON RESOURCES OIL & GAS COMPANY LP; AMERICAN PETROLEUM INSTITUTE; and ANSCHUTZ EXPLORATION CORPORATION,

Intervenor-Defendants.

MEMORANDUM OPINION AND AMENDED ORDER[1]

THIS MATTER comes before the Court on the Plaintiffs' Opening Merits Brief, filed April 28, 2017 (Doc. 112)("Diné Brief"). The primary issues are: (i) whether the Plaintiffs have standing to pursue their claims under the National Environmental Policy Act, 42 U.S.C. §§ 4321 to 4370m-12 ("NEPA") and the National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6 ("NHPA"); (ii) whether the Plaintiffs are challenging final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"); (iii) whether any of the Plaintiffs' challenges to various Applications for Permit to Drill ("APDs") are moot; (iv) whether Defendant United States Bureau of Land Management ("BLM") violated NEPA by failing to adequately consider the environmental impacts of hydraulic fracturing and horizontal drilling in developing the Mancos Shale in the San Juan Basin; (v) whether the BLM adequately involved the public in its NEPA process; (vi) whether the BLM violated the NHPA for failing to consider the indirect effects that well pads would have on Chaco Culture National Historic Park, Chacoan Outliers, the Chaco Culture Archaeological Protection Sites, and the Great North Road (collectively "Chaco Park and its satellites"); and (vii) if there is a NEPA or NHPA violation, whether the proper remedy is remand without vacatur, remand with vacatur, or a permanent injunction. The Court concludes that: (i) the Plaintiffs have standing to pursue their NEPA and NHPA claims; (ii) the Plaintiffs may challenge most, but not all, of the APDs under the APA; (iii) the Plaintiffs' APD challenges are not moot, except as to permanently abandoned wells; (iv)

[1]The Court previously issued an Order that granted in part and denied in part the requests in the Plaintiffs' Opening Merits Brief, filed April 28, 2017 (Doc. 112). See Order at 4, filed March 31, 2018 (Doc. 128)("Order"). In that Order, the Court stated that it would issue a Memorandum Opinion "at a later date more fully detailing its rationale for this decision." Order at 2 n.1. This Memorandum Opinion and Amended Order is the promised opinion, and details the Court's rationale for the previous Order, and also contains an amended decision and order.

the BLM complied with NEPA's requirements; (v) the BLM adequately involved the public in its NEPA process, as it gave notice of finalized Environmental Assessments' ("EAs") availability through its online NEPA logs, and sent notices of and hosted public meetings at each proposed well's site; (vi) the BLM did not violate the NHPA, because it considered the effects on historical sites within the wells' areas of potential effects; and (vii) if the BLM had violated NEPA or the NHPA, vacatur with remand would be the proper remedy for the NEPA violation, but remand without vacatur would be the proper remedy for the NHPA violation. Accordingly, the Court denies the requests in the Diné Brief.

FACTUAL BACKGROUND

The Court divides its factual background into five sections. First, the Court will introduce the parties. Second, it will discuss oil-and-gas development in the San Juan Basin -- a petroleum-rich geologic structural basin in the Four Corners region of the States of New Mexico and Colorado, which, although sparsely populated, is home to many Navajo Native Americans, also known as the Diné. See Diné Citizens Against Ruining Our Environment v. Jewell, No. CIV 15-0209, 2015 WL 4997207, at *2 (D.N.M. 2015)(Browning, J.)("Dine"). Third, it will explain the BLM's oil-and-gas planning and management framework. Fourth, it will outline the timeline of events giving rise to this case. Finally, it will discuss the BLM's relationship with the NHPA.

1. The Parties.

Plaintiff Diné Citizens Against Ruining Our Environment ("Diné CARE") is an organization of Navajo community activists in the Four Corners region. See Dine, 2015 WL 4997207, at *2. Diné CARE's stated goal is to protect all life in its ancestral homeland by

empowering local and traditional people to organize, speak out, and ensure conservation and stewardship of the environment through civic involvement. See Dine, 2015 WL 4997207, at *2. Plaintiff San Juan Citizens Alliance ("San Juan Alliance") is an organization dedicated to social, economic, and environmental justice in the San Juan Basin. See Dine, 2015 WL 4997207, at *2. Plaintiff WildEarth Guardians is a non-profit membership organization with over 65,000 members and activists and is based in Santa Fe, New Mexico, with offices throughout the western United States of America. See Dine, 2015 WL 4997207, at *3. Plaintiff Natural Resources Defense Council is a nonprofit environmental membership organization with more than 299,000 members throughout the United States, approximately 3,360 of whom reside in New Mexico. See Dine, 2015 WL 4997207, at *3.

a. The Plaintiff Organizations' Members.

Mike Eisenfeld is a member of San Juan Alliance and WildEarth Guardians. See Declaration of Mike Eisenfeld ¶ 1, at 1 (executed April 25, 2017), filed April 28, 2017 (Doc. 112-1)("Eisenfeld Decl."). He has visited Chaco Park -- a historic site in the San Juan Basin -- at least annually since 1997. See Eisenfeld Decl. ¶ 5, at 2. He last visited there in July, 2016. See Eisenfeld Decl. ¶ 5, at 2. He also regularly visits "the greater Chaco region, including areas in and around Counselor, Lybrook, and Nageezi," New Mexico.[2] Eisenfeld Decl. ¶ 5, at 2. He last visited the "Nageezi area" on April 20, 2017, and intends to return in May and June of

[2]Counselor is a town located along United States Route 550 ("Highway 550"), approximately twenty-five miles from Chaco Park. See Google Maps, https://www.google.com/maps/place/Counselor,+NM+87018/@36.1682738,-107.9418258,10z/data=!4m5!3m4!1s0x873cdade76ce96bf:0xfa26b13b4b45c9e3!8m2!3d36.2091806!4d-107.4578264. Nageezi is also a town located along Highway 550, approximately fifteen miles from Chaco Park. See Google Maps, https://www.google.com/maps/@36.1761681,-107.8701589,11z. Lybrook lies between Counselor and Nageezi.

2017. Eisenfeld Decl. ¶ 5, at 2. He contends that the BLM has approved various APDs after conducting EAs that were not available for the public, including himself, to review. See Eisenfeld Decl. ¶ 9, at 4-5. Specifically, Eisenfeld checked the BLM's website and visited its public reading room throughout 2014, and on October 2, 2014, "no NEPA documentation was available to the public." Eisenfeld Decl. ¶ 11, at 6.

According to Eisenfeld, the BLM's approval of these APDs "threatens to irreparably harm [his] personal and professional interest in an intact Chacoan landscape . . . by impacting important environmental (air, water, treasured landscapes), historical, and cultural resources." Eisenfeld Decl. ¶ 9, at 5 (alteration added). Eisenfeld states that he has visited hundreds of well sites in the "greater Chaco area" and has "frequented lands where many other Mancos Shale[3] wells are in view." Eisenfeld Decl. ¶ 12, at 6. Eisenfeld alleges that the BLM has allowed "APD proponents to flare natural gas in the greater Chaco area when drilling for oil." Eisenfeld Decl. ¶ 13, at 6. According to Eisenfeld, this flaring harms the air quality and his health, and "compromises the night sky" in the Chaco Park area. Eisenfeld Decl. ¶ 13, at 6-7. Eisenfeld states that the APD approvals have also "compromised noted archeological sites." Eisenfeld Decl. ¶ 13, at 7. Eisenfeld states that he is "harmed by the lack of government agency compliance in evaluating the direct, indirect, cumulative and connected impacts of operations approved by BLM." Eisenfeld Decl. ¶ 16, at 8.

[3]The Mancos Shale Formation is a geologic layer within the San Juan Basin containing oil and gas, is approximately 2300-2500 feet thick, and is composed of sandstone and limestone. See Farmington Proposed RMP/Final EIS Chapter 3 Affected Environment at 3-6 (A.R.0000908).

In 2010-2012, Eisenfeld visited some Mancos Shale wells amongst the communities of Counselor, Lybrook, and Nageezi. See Supplemental Declaration of Mike Eisenfeld ¶ 3, at 2 (executed July 26, 2017), filed July 28, 2017 (Doc. 117-3)("Eisenfeld Supp. Decl."). He visited "over 150 WPX [and] Encana[4] . . . wells being drilled and developed in the Mancos Shale." Eisenfeld Supp. Decl. ¶ 3, at 2 (alteration added). Specifically, he has visited well sites called "Encana Lybrook, Gallo Canyon Unit and Escrito wells, and WPX Chaco unit wells." Eisenfeld Supp. Decl. ¶ 3, at 2. At these well sites, Eisenfeld has seen "drilling, flaring, hydraulic fracturing, nitrogen treatment, fracking trucks, chemical storage and an endless stream of activity." Eisenfeld Supp. Decl. ¶ 4, at 2. Eisenfeld states that "the flaring of natural gas from the Mancos Shale oil wells have been visually apparent . . . [,] representing waste, pollution and lost revenue/royalties." Eisenfeld Supp. Decl. ¶ 6, at 3. Eisenfeld states that the resulting fumes, reckless truck travel, and even exploding wells have made him feel unsafe when traveling in the Mancos Shale area. See Eisenfeld Supp. Decl. ¶ 7, at 4. Eisenfeld notes that an explosion occurred on a well pad in Nageezi in 2016, and he states that he fears that additional explosions may follow "as long as Mancos Shale development is allowed to proceed unimpeded and unanalyzed." Eisenfeld Supp. Decl. ¶ 8, at 4. Eisenfeld also submits to the Court photographs that "show clustered WPX wells, a producing Mancos Shale oil well, a well site with three active flares, and a five-acre well pad where Mancos Shale oil is being drilled for." Eisenfeld Supp. Decl. ¶ 8, at 4.

[4]Intervener-Defendants WPX Energy Production, LLC and Encana Oil & Gas (USA) Inc. are oil companies that own leases or drilling permits over the Mancos Shale. See Dine, 2015 WL 4997207, at *3.

Jeremy Nichols is a member of WildEarth Guardians. See Declaration of Jeremy Nichols ¶ 2, at 2 (executed April 27, 2017), filed April 28, 2017 (Doc. 112-2)("Nichols Decl."). Nichols states that he visited "the Chaco outlier ruin of Pueblo Pintado" in March, 2017. Nichols Decl. ¶ 5, at 3. He visited Chaco Park in March, 2008, March, 2012, April, 2013, and May, 2015. See Nichols Decl. ¶ 5, at 4-5. Nichols states that he intends to continue visiting "the Greater Chaco region, including [Chaco Park] and its outliers . . . at least once a year for the foreseeable future." Nichols Decl. ¶ 6, at 6. He states that he intends to visit "this area" again in June, 2017, when he has a trip planned. Nichols Decl. ¶ 6, at 6. Nichols states that he does not recall any oil-and-gas development in the area in 2008, but by 2014, "there were rigs seemingly all over the place, around Nageezi and the road to [Chaco Park]." Nichols Decl. ¶ 7, at 6-7. According to Nichols, during his last visit, "there were extensive oil and gas well facilities and infrastructure in the area, particularly around Nageezi and Lybrook." Nichols Decl. ¶ 7, at 7. Nichols states that this new oil-and-gas development "has detracted significantly from [his] enjoyment of the Greater Chaco area," and has "significantly eroded the natural and remote nature of the region." Nichols Decl. ¶ 8, at 7 (alteration added). According to Nichols, the oil-and-gas development has also created "smells, dust, and more industrialization," which are "aesthetically displeasing." Nichols Decl. ¶ 9, at 7. Nichols states that, "[i]f the BLM were prohibited from approving new drilling permits in this area until it developed a new plan . . . [,] it would diminish the harms to [his] recreational enjoyment of the area and likely ensure that [his] future visits with friends and family will be more enjoyable than they currently are." Nichols Decl. ¶ 12, at 9 (alteration added).[5]

[5]Nichols also submits a map to the Court showing the proximity of wells approved since

Deborah Green represents that she is a member of the Natural Resources Defense Council. See Declaration of Deborah Green ¶ 3, at 2 (executed April 14, 2017), filed April 28, 2017 (Doc. 112-3)("Green Decl."). Green states that she visits Chaco Park "at least once a year." Green Decl. ¶ 4, at 2. Green intends to return to Chaco Park "this fall" (referring to fall 2017) and "in the future." Green Decl. ¶ 6, at 2. Green states that oil-and-gas development "in the Chaco Canyon[6] area/region and [Chaco Park]" would harm Green's visitor experience, because of potential air, noise, and light pollution, large truck traffic, and the possibility of "soil and groundwater contamination due to drilling practices." Green Decl. ¶ 7, at 2-3. Green states that she also has "concerns" regarding the use of hydraulic fracturing ("fracking")[7] "in the Chaco Canyon area/region and Chaco [Park]," because fracking may contaminate the area's groundwater. Green Decl. ¶ 8, at 3. Green explains that, if the Court vacates the BLM's approvals of APDs, then she "will be able to continue using the Chaco Canyon area/region and [Chaco Park] for hiking, camping, and spiritual contemplation." Green Decl. ¶ 9, at 3. Green states that she has experienced several environmental problems while driving along Highway 550 to Chaco Canyon, including air pollution from gas flares, exhaust from oil- and-gas trucks, noise pollution from heavy truck traffic, and light pollution from nighttime drilling. See

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January 1, 2009, to Chaco Park, as well as various photographs that he took of oil-and-gas development in the Chaco area. See Supplemental Declaration of Jeremy Nichols ¶ 7-10, at 2-11 (executed July 28, 2017), filed July 28, 2017 (Doc. 117-1)("Nichols Supp. Decl."). He adds that he visited the area again in June, 2017. See Nichols Supp. Decl. ¶ 8, at 5.

[6]Chaco Canyon is a canyon inside Chaco Park. See "Chaco Culture National Historical Park," Wikipedia, https://en.wikipedia.org/wiki/Chaco_Culture_National_Historical_Park (last viewed April 6, 2018).

[7]Fracking is discussed in more detail on page 12.

Supplemental Declaration of Deborah Green ¶ 8, at 3 (executed July 27, 2017), filed July 28, 2017 (Doc. 117-4)("Green Supp. Decl.").

Hope Miura represents that she lives in the Cochiti Pueblo,[8] which is "about a three hour drive . . . to the Chaco Canyon area/region." Declaration of Hope Miura ¶ 1, at 2 (executed April 17, 2017), filed April 28, 2017 (Doc. 112-4)("Miura Decl."). Miura states that she is a member of the Natural Resources Defense Council. See Miura Decl. ¶ 2, at 2. Miura states that she has visited Chaco Park, and she plans to return there "next year, and in the future." Miura Decl. ¶ 5, at 2. According to Miura, oil-and-gas development "in the Chaco Canyon area/region and [Chaco Park]" would "ruin the views and tranquility of the Chaco Canyon area." Miura Decl. ¶ 6, at 2. Miura states that she is concerned that fracking in the area may cause earthquakes, and "damage the rock formations and sacred sites where Native Americans have their ancestral ceremonies." Miura Decl. ¶ 7, at 2-3. Miura also states that she is "concerned about the effects of oil and gas development on air quality in the area, including toxic fumes." Miura Decl. ¶ 7, at 3. Miura contends that if the Court vacates the BLM's approvals of APDs, then she "would be able to continue to visit this area and feel much better about the air quality and the preservation of the archeology." Miura Decl. ¶ 8, at 3.

Gina Trujillo represents that she is the Director of Membership for the Natural Resources Defense Council. See Declaration of Gina Trujillo ¶ 1, at 1 (dated April 30, 2017), filed April 28, 2017 (Doc. 112-5)("Trujillo Decl."). Trujillo asserts that the Natural Resources Defense Council's mission is "to safeguard the Earth; its people, its plants and animals, and the natural

[8]The Cochiti Pueblo is located approximately twenty-two miles southwest of Santa Fe, New Mexico. See "Cochiti, New Mexico," Wikipedia, https://en.wikipedia.org/wiki/Cochiti,_New_Mexico (last viewed April 14, 2018).

systems on which all life depends." Trujillo Decl. ¶ 6, at 2. Trujillo states that protecting Chaco Park and the Chaco Canyon area from damaging oil-and-gas operations "is paradigmatic" of the organization's efforts "to defend endangered wild places and natural habitats." Trujillo Decl. ¶ 7, at 2.

Kendra Pinto represents that she is a member of the Navajo Nation and of Diné CARE. See Declaration of Kendra Pinto ¶ 1, at 1 (executed July 26, 2017), filed July 28, 2017 (Doc. 117-2)("Pinto Decl."). Pinto states that she lives in Twin Pines, New Mexico, which is located on Highway 550 at the San Juan County line. See Pinto Decl. ¶ 1, at 1. Pinto states that, since the "start of oil exploration in the Mancos Shale Formation, [she has] seen an increase in truck traffic, public safety risks, violent crimes, and drug use." Pinto Decl. ¶ 5, at 2 (alteration added). She adds that she has "noticed headaches, blurry vision, occasional stomach issues, fatigue, and allergies." Pinto Decl. ¶ 5, at 2. She states that she often sees "fracking truck traffic" on the highway, which "contributes to the fear of safety." Pinto Decl. ¶ 8, at 2. Pinto states that she has had "numerous encounters with this truck traffic" and was "almost rear ended by a truck carrying liquid nitrogen." Pinto Decl. ¶ 9, at 3. According to Pinto, "there is always a danger" where she lives. Pinto Decl. ¶ 9, at 3. Pinto states that she has been to areas that are "very potent in natural gas odors," and has seen "the giant pillars of fire" from flaring, which are "scary, loud, and excessive." Pinto Decl. ¶ 10, at 3. Pinto states that "there is no escaping the gases, traffic, noise pollution, and sound pollution." Pinto Decl. ¶ 10, at 3. Pinto states that she regularly visits Chaco Park and enjoys observing the dark sky from there, but "the lights staged at well sites can be as bright as stadium lights." Pinto Decl. ¶ 11, at 3. Pinto states that she has

also dealt with these bright lights being pointed at the highway, prohibiting her from seeing the road. See Pinto Decl. ¶ 11, at 3.

b. The Defendants.

Defendant Ryan Zinke is the Secretary of the United States Department of the Interior. See Diné Brief at 12 n.1. Defendant Michael Nedd is the Acting Director of the BLM. See Diné Brief at 12 n.1.[9] The BLM is an agency within the United States Department of the Interior that is responsible for managing public lands and resources in New Mexico, including federal onshore oil-and-gas resources. See 18 C.F.R. § 270.401(b)(15).

Intervenor-Defendant American Petroleum Institute ("the API") is the primary national trade association of the oil-and-gas industry, representing more than 625 companies involved in all aspects of that industry, including some that drill in the Mancos Shale. See Dine, 2015 WL 4997207, at *3. Intervener-Defendants WPX Energy Production, LLC, Encana Oil & Gas (USA) Inc., BP America Production Company, ConocoPhillips Company, Burlington Resources Oil & Gas Company LP, and Anschutz Exploration Corporation (collectively, "the Operators") are all oil companies, and each of them owns leases or drilling permits over the Mancos Shale. See Dine, 2015 WL 4997207, at *3.

[9]When this lawsuit was filed, Sally Jewell was the Secretary of the United States Department of the Interior, and Neil Kornze was the Director of the BLM. See Dine, 2015 WL 4997207, at *3. Because they are no longer in office, "[t]he officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded." Fed. R. Civ. P. 25(d).

2. Oil-and-Gas Development in the San Juan Basin.

The San Juan Basin in northwestern New Mexico is one of the largest oil-and-gas fields in the United States and has been producing for over fifty years. See Farmington Proposed Resource Management Plan and Final Environmental Impact Statement at 1 (dated September, 2003)(A.R.0001945)("PRMP"). "Approximately 23,000 wells are currently producing." Finding of No Significant Impact WPX Energy Production, LLC's West Lybrook UT Nos. 701H, 702H, 703H, 704H, 743H and 744H at 2 (undated)(A.R.0232032)("FONSI").

Since fracking was introduced in 1949, "nearly every well in the San Juan Basin has been fracture stimulated." FONSI at 2 (A.R.0232032). Fracking is the process of "injecting fracturing fluids into the target formation at a force exceeding the parting pressure of the rock, thus inducing fractures through which oil or natural gas can flow to the wellbore."[10] Hydraulic Fracturing White Paper at 6 (dated October 1, 2014)(A.R.0149866)("White Paper"). Fracking and horizontal drilling are commonly used to access the Mancos Shale. See Unconventional Gas Reservoirs, Hydraulic Fracturing and the Mancos Shale at 7-8 (undated)(A.R.0155551-52)("Hydraulic Fracturing"). Horizontal drilling refers to a technique in which the wellbore is drilled down to the target formation, and then turns horizontally so that the well encounters as much of the reservoir as possible. See Hydraulic Fracturing at 6 (A.R.0155550).

"Vertical drilling places a well pad directly above the bottom hole, while directional and horizontal drilling allows for flexibility in the placement of the well pad and associated surface

[10]The parting pressure of the rock refers to "a pressure sufficient to induce fractures through which oil or gas can flow." White Paper at 8 (A.R.0149868). The wellbore refers to the hole produced when drilling an oil or gas well. See "Wellbore," Wiktionary, https://en.wiktionary.org/wiki/wellbore (last viewed April 16, 2018).

facilities." Environmental Assessment DOI-BLM-NM F010-2016-0204/IT4RM-FO10-2016-0081 at 16 (dated April, 2016)(A.R.0236483)("2016 EA"). "Directional or horizontal drilling often allows for 'twinning,' or drilling two or more wells from one shared well pad." 2016 EA at 16 (A.R.0236483). "Generally, the use of this technology is applied when it is necessary to avoid or minimize impacts to surface resources." 2016 EA at 16 (A.R.0236483). Indeed, one objective of horizontal drilling is to avoid surface occupancy "due to topographic or environmental concerns." Oil and Gas Resource Development for San Juan Basin, New Mexico a 20-year Reasonable Foreseeable Development Scenario Supporting the Resource Management Plan for the Farmington Field Office, Bureau of Land Management at 8.1 (dated July 2, 2001)(A.R.0000111)("RFDS"). San Juan Alliance once stated that "[a]lternative drilling methods such as horizontal drilling would, if used in the San Juan basin, reduce adverse impacts such as noise, air pollution, and scarred landscapes from wells and roads. Why can't several wells be drilled from one location? The BLM must consider/require feasible technical alternatives such as horizontal drilling." Appendix P-Public Comments and Responses Farmington Proposed RMP/Final EIS at P-123 (dated 2002)(A.R.0001847)("San Juan Comment").

The area in which the BLM has approved the Mancos Shale APDs already contains hundreds of existing wells. See Reasonable Foreseeable Development for Northern New Mexico Final Report at 19 (dated October, 2014)(A.R.0173844)("2014 RFDS"). Further, many proposed Mancos Shale wells use existing oil-and-gas infrastructure. See Environmental Assessment DOI-BLM-NM-F010-2015-0036 at 1 (dated November, 2014)(A.R.0140148)("2014 EA").

3. The BLM's Oil-and-Gas Planning and Management Framework.

The BLM manages onshore oil-and-gas leasing and development via a three-phase process. The first phase involves preparing a Resource Management Plan ("RMP") and an Environmental Impact Statement ("EIS"). 43 C.F.R. § 1601.0-6. "Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 C.F.R. § 1601.0-2. "[W]herever possible, the proposed plan and related environmental impact statement shall be published in a single document." 43 C.F.R. § 1601.0-6.

> The EIS is the comprehensive, gold-standard document: it is subject to notice-and-comment provisions; "[i]t shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment"; and it "is more than a disclosure document," but rather, "[i]t shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions."

Dine, 2015 WL 4997207, at *40 (quoting 40 C.F.R. § 1502.1)(alterations in Dine). The BLM must prepare a supplement to its EIS if "the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i)-(ii).

In the second phase, the BLM sells and executes oil-and-gas leases. See 43 C.F.R. § 3120.1-1. The BLM "may require stipulations as conditions of lease issuance." 43 C.F.R. § 3101.1-3. Third, and at issue in this case, the lessee submits an APD to the BLM, and "no drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the permit." 43 C.F.R. § 3162.3-1(c).

4. The Timeline of Events Giving Rise to this Case.

In 2001, the BLM issued a Reasonably Foreseeable Development Scenario ("RFDS") as part of the process of revising its Resource Management Plan for the San Juan Basin. See RFDS at 1 (A.R.0000001). This document's purpose was to forecast the scope of oil-and-gas development in the San Juan Basin over the next twenty years, from approximately 2002 to 2022. See RFDS at vi (A.R.0000006).

The RFDS focuses on the New Mexico portion of the San Juan Basin "to determine the subsurface development supported by geological and engineering evidence, and to further estimate the associated surface impact of this development." RFDS at 6 (A.R.0000006). The RFDS discusses the Mancos Shale, and states that "most existing Manco Shale . . . reservoirs are approaching depletion and are marginally economic. Most are not currently considered candidates for increased density development or further enhanced oil recovery operations." RFDS at 5.24 (A.R.0000081). It notes, however, that "there is considerable interest in developing the Mancos Shale as a gas reservoir over a large part of the basin where it has not been previously developed." RFDS at 5.23 (A.R.0000080).

In 2003, the BLM issued its Resource Management Plan/Environmental Impact Statement. See Farmington Resource Management Plan with Record of Decision at 1 (dated December 2003)(A.R.0001931)("RMP/EIS"). The RMP/EIS provided for the development of 9,942 new oil-and-gas wells. See RMP/EIS at 2, 10 (A.R.0001946, A.R.0001954). Since the RMP/EIS was issued, "3,945 wells have been drilled in the planning area, or about 39 percent of the 9,942 wells predicted and analyzed in the RMP/EIS." Federal Defendant's Opposition to Plaintiff's Opening Merits Brief at 10-11, filed June 9, 2017 (Doc. 113)("BLM

Response")(citing Declaration of David J. Mankiewicz ¶ 3, at 3, filed June 9, 2017 (Doc. 113-2)("Mankiewicz Decl.")). The RMP/EIS addresses only the "cumulative impacts of the potential development of 9,942 new oil and gas wells," and "does not approve any individual wells. Each well will require a site-specific analysis and approval before permitting." RMP/EIS at 3 (A.R.0001947). See Dine, 2015 WL 4997207, at *6. The 2003 RMP/EIS itself "makes no explicit mention of drilling in the Mancos Shale." Dine, 2015 WL 4997207, at *6.

The Plaintiffs challenge over 300 APDs that the BLM approved seeking to drill wells into the Mancos Shale. See Third Supplemented Petition for Review of Agency Action ¶ 1, at 1, filed September 9, 2016 (Doc. 98)("Complaint"). For each APD, the BLM issued an EA. See, e.g., 2014 EA at 1 (A.R.0140148). These EAs are "tiered" to the 2003 RMP/EIS, meaning that they incorporate the EIS by reference. 40 CFR § 1508.28. The EAs address the site-specific and cumulative impacts of the proposed wells. See 2014 EA at 25 (A.R.0140172); id. at 23 (A.R.0140170). Although these EAs are tiered to the 2003 RMP/EIS, the BLM also considered newer studies when preparing the EAs, such as one relating to air quality. See 2014 EA at 19 (A.R.0140166).

Generally, an EA concisely analyzes the possible environmental impacts of a proposed action and weighs available alternatives. See 40 C.F.R. § 1508.9. An EA differs from an EIS in that the latter contains a big-picture analysis, whereas EAs focus narrowly on the possible repercussions that each individual action, here granting APDs, would have. See, e.g., 2014 EA at 25 (A.R.0140172). When drafting an EA, the BLM must determine whether to make a finding of no significant impact ("FONSI") or whether the proposal requires a new EIS. See 40 C.F.R. § 1508.9(a)(1). In this context, a FONSI briefly presents the reasons why an action "will not

have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13. If the BLM issues an EA with a FONSI instead of creating a new EIS, the EA tiers to the existing EIS. See 40 C.F.R. § 1508.28. In this case, "[f]or the APDs regarding the Mancos Shale, the BLM prepared FONSIs to accompany each EA." Dine, 2015 WL 4997207, at *7 (alteration added).

In 2014, the BLM decided to prepare an amendment to its 2003 RMP/EIS, because "improvements and innovations in horizontal drilling technology and multi-stage hydraulic fracturing have enhanced the economics of developing" the Mancos Shale. Notice of Intent to Prepare a Resource Management Plan Amendment and an Associated Environmental Impact Statement for the Farmington Field Office, New Mexico, 79 Fed. Reg. 10548 (dated February 25, 2014)(A.R.0173818). The BLM is now preparing the 2003 RMP/EIS amendment. See BLM Response at 12.

5. The BLM and the NHPA.

Section 106 of the NHPA requires federal agencies conducting an "undertaking" to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. A historic property includes those in the "National Register of Historic Places maintained by the Secretary of the Interior." 36 C.F.R. § 800.16(l)(1). Chaco Park fits that definition. See World Heritage List Nomination Submitted by the United States of America Chaco Culture National Historical Park at 26 (dated November, 1984)(A.R.0217996)(noting that Chaco Park "is on the National Register of Historic Places"). One way to comply with Section 106 of the NHPA is to enter into a "programmatic agreement" with the Advisory Council on Historic Preservation. 36 C.F.R. § 800.14(b). "Compliance with the procedures established by an approved programmatic

agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated. . . ." 36 C.F.R. § 800.14(b)(2)(iii). The BLM has entered into such an agreement. See State Protocol Between Bureau of Land Management and the New Mexico State Historic Preservation Officer Regarding the Manner in which BLM will meet its responsibilities under the National Historic Preservation Act in New Mexico at 5 (A.R.0169217)("2014 Protocol")(noting that the BLM has entered into a programmatic agreement). Generally, the 2014 Protocol's purpose is to help the BLM comply with the NHPA. See 2014 Protocol at 6 (A.R.0169218). During BLM's consideration of the APDs at issue in this case, two protocols were in effect. The BLM entered into the first protocol in 2004, see Protocol Agreement Between the New Mexico Bureau of Land Management and New Mexico State Historic Preservation Officer at 1 (dated June 4, 2014)(A.R.0169038)("2004 Protocol"), which remained in effect until the 2014 Protocol superseded it. See 2014 Protocol at 5 (A.R.0169217)("This Protocol supersedes the 2004 Protocol Agreement between the New Mexico BLM and SHPO.").

PROCEDURAL BACKGROUND

The Plaintiffs filed their petition in this case on March 11, 2015. See Petition for Review of Agency Action, at 1, filed March 11, 2015 (Doc. 1)("Petition"). After amending their petition twice, they assert five claims: (i) the BLM violated NEPA by failing to analyze direct, indirect, and cumulative effects of Mancos Shale fracking; (ii) the BLM violated NEPA by not preparing an EIS on fracking the Mancos Shale; (iii) the BLM violated NEPA by taking action during the NEPA process; (iv) the BLM violated NEPA, because it did not involve the public in drafting the EAs; and (v) the BLM violated the NHPA, because it did not consider the indirect and

cumulative effects on Chaco Park and its satellites and did not consult with the New Mexico State Historic Preservation Officer ("SHPO"), Indian tribes, or the public vis-à-vis the effects the wells could have on Chaco Park and its satellites. See Complaint ¶¶ 127-65, at 36-43. The Plaintiffs subsequently filed a motion for a preliminary injunction, arguing broadly on the merits that the BLM violated NEPA for not analyzing the impacts of horizontal drilling and fracking. See Plaintiffs' Motion for Preliminary Injunction at 1, filed May 11, 2015 (Doc. 16); Plaintiff's Memorandum in Support of Motion for Preliminary Injunction at 19-21, filed May 11, 2015 (Doc. 16-1). The Court denied the preliminary injunction. See Diné, 2015 WL 4997207, at *1, *38-45. The Court made that decision, in part, because the Plaintiffs did not have a substantial likelihood of succeeding on the merits. See Diné, 2015 WL 4997207, at *40-45. It concluded that the Plaintiffs' case raises the following issues: (i) whether the APDs are proposals that "will significantly impact the human environment," requiring an EIS for the APDs as opposed to tiered EAs; and (ii) whether the BLM could tier its EAs to the 2003 RMP/EIS instead of the pending, amended RMP/EIS. Diné, 2015 WL 4997207, at *43. The Court determined that (i) the 2003 RMP/EIS fully analyzed the fracking's environmental impacts, and, (ii) while directional drilling was a new technology that the 2003 RMP/EIS did not analyze, it has a "net positive impact for the environment" when compared to vertical drilling. Dine, 2015 WL 4997207, at *44. Because an EIS is needed only when the level of environmental impact actually threatens to exceed levels contemplated in the prior EIS, the Court concluded that this lesser harm of horizontal drilling did not require a new EIS. See Diné, 2015 WL 4997207, at *45.[11]

[11]In explaining this point, the Court gave the following, helpful, example:

The Court acknowledged that, although more environmentally friendly than vertical drilling, horizontal drilling was also more profitable and, thus, could lead to a "quasi-Jevons Paradox"[12] where the operators' increased incentive to drill would lead to more horizontal drills, and thus increase, overall, environmental harm. Diné, 2015 WL 4997207, at *44. The Court concluded that, while that was possible, the likelihood of such a scenario was not likely enough to require the BLM to analyze such a possibility at the EIS level. See Diné, 2015 WL 4997207, at *44.

The Court also considered whether fracking combined with horizontal drilling produced a new kind of environmental impact that vertical drilling combined with fracking did not produce, and, thus, whether an EIS was needed for that harm. See Diné, 2015 WL 4997207, at *45. The Court concluded that the BLM analyzed the qualitative difference between the two varieties of drilling at the EA level and concluded that the impact difference between the two varieties of technology "are insignificant," and therefore an EIS analyzing those harms is superfluous. Diné, 2015 WL 4997207, at *45. Accordingly, the Court concluded that no new RMP/EIS was

> [I]f an EIS anticipates 1,000 instances of an activity causing an aggregate environmental impact of 10,000 units, and a new, more profitable technology were to come out for conducting the activity, and the new technology reduced the environmental impact of the activity from ten units per instance to four units per instance, the popularization of the new technology may merit a new EIS, but only when the aggregate total of proliferated activity's environmental impact threatens to exceed 10,000 units.

Diné, 2015 WL 4997207, at *45.

[12]A Jevons Paradox occurs when technological improvements make the use of a resource more efficient, but the overall consumption of that resource nonetheless rises, because the technological improvement increases demand for that resource. See Dru Stevenson, Costs of Codification, 2014 U. Ill. L. Rev. 1129, 1166 n.210 (2014)(citing Stanley Jevons, The Coal Question (A.W. Flux. Ed., 3d. rev. ed. 1906)).

needed, and that the BLM did not act arbitrarily and capriciously when it tiered its EAs to the 2003 RMP/EIS. See Diné, 2015 WL 4997207, at *45.

The Plaintiffs appealed the Court's determination to the United States Court of Appeals for the Tenth Circuit. See Plaintiffs' Notice of Appeal at 1, filed August 18, 2015 (Doc. 64). The Tenth Circuit affirmed the Court's order denying the Plaintiffs request for a preliminary injunction and agreed with the Court's determination that there was not a substantial likelihood of success on the merits. See Diné Citizens Against Ruining Our Environment v. Jewell, 839 F.3d 1276, 1282-85 (10th Cir. 2016)("Diné II").[13] It agreed with the Court that, "even with increased drilling in the Mancos Shale formation and the switch to horizontal drilling and multi-stage fracturing," the BLM did not act arbitrarily and capriciously, because "the overall amount of drilling and related surface impacts are still within the anticipated level" in the 2003 RMP/EIS. 839 F.3d at 1283. As to the increased air quality impacts, the Tenth Circuit ruled that "the agency considered these impacts in its environmental assessments and concluded that the approved drilling activities would not cause a significant increase in emissions over the amount anticipated in the RMP," and thus there was no NEPA violation. 839 F.3d at 1283. Finally, the Tenth Circuit agreed with the Court that there was insufficient evidence to conclude that the "new horizontal drilling and multistage fracturing technologies will lead to environmental impacts qualitatively different from the impacts assessed in the 2003 RMP." 839 F.3d at 1283-

[13]The Honorable Carlos Lucero, Circuit Judge for the Tenth Circuit, concurred in part and dissented in part. See Diné II, 839 F.3d at 1285. Judge Lucero disagreed that with the majority and the Court that the Supreme Court had, sub silentio, changed the preliminary injunction standard. See Diné II, 839 F.3d at 1285. He agreed with the majority and the Court, however, that the Plaintiffs did not demonstrate a substantial likelihood of success on the merits. See Diné II, 839 F.3d at 1288.

84. According to the Tenth Circuit, the Plaintiffs raised two arguments about this point on appeal:

> First, these technologies allow operators to extract significant amounts of oil from the Mancos Shale, while the RMP mainly anticipated the extraction of gas from other formations in a different region of the San Juan Basin. Second, horizontal drilling and multi-stage fracturing involve a number of complexities not associated with conventional wells that could result in additional environmental impacts that were not anticipated or analyzed when the agency analyzed the impacts of conventional drilling methods in the 2003 [RMP].

Diné II, 839 F.3d at 1284 (alterations in original). The Tenth Circuit rejected both arguments based on the "deferential agency standard of review at issue in this case." 839 F.3d at 1284. According to the Tenth Circuit, the Plaintiffs arguments failed, because they did not "present any argument or cite to any evidence as to how drilling in the Mancos Shale will cause different environmental impacts than drilling in other formations in the San Juan Basin . . . or [demonstrate] as to how additional oil wells will cause qualitatively different impacts from the smaller number of oil wells and larger number of gas wells in the RMP." 839 F.3d at 1284. The Tenth Circuit held that the Plaintiffs similarly failed to show how "horizontal drilling and multi-stage fracturing may give rise to different types -- rather than different levels -- of environmental harms when compared to the traditional vertical drilling and hydraulic fracturing techniques that have historically been used in the San Juan Basin." 839 F.3d at 1284. Accordingly, because the Plaintiffs hold the burden of proof in an environmental case challenging agency action, the Tenth Circuit determined that the Plaintiffs were not likely to succeed on the merits. See 839 F.3d at 1284. The Tenth Circuit cautioned, however, that the Plaintiffs could ultimately prevail if, later, the Plaintiffs uncovered additional evidence or developed their arguments. See 839 F.3d at 1285. The Plaintiffs subsequently filed a petition for review on the merits. See Diné Brief at 1.

1. The Diné Brief.

The Plaintiffs begin by arguing that they have standing to bring this action. See Diné Brief at 8-10. According to the Plaintiffs, they have alleged an injury, because "they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'" Diné Brief at 9 (citing Friends of the Earth Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 183 (2000); Southern Utah Wilderness Alliance v. Palma, 707 F.3d 1143, 1156 (10th Cir. 2013)). Specifically, they contend that they have alleged a concrete injury, because many of the Plaintiffs' members "live and work in the areas affected by the Mancos Shale drilling activities, as well as routinely hike, recreate, camp, research, derive inspiration, engage in cultural and spiritual practices and otherwise use areas on and near the parcels where the horizontal drilling" is occurring, and "from which the effects of this drilling are visible and audible." Diné Brief at 9 (citing Eisenfeld Decl. ¶¶ 2, 9, 13-14, at 1, 3-7; Nichols Decl. ¶¶ 3-5, 7; Green Decl. ¶¶ 3-5, 7 at 2-3; Miura Decl. ¶ 4, at 2). They contend that their injuries from the drilling include harming "their use and enjoyment of the areas" and arise from "concerns about threats to their health and safety." Diné Brief at 10. The Plaintiffs also argue that their injuries are traceable to the BLM's authorization of drilling permits, because the BLM has not first evaluated the drillings' impact to the environment. See Diné Brief at 10. The Plaintiffs aver that adjudication in their favor would redress the harm, because it would lessen the aesthetic, environmental, and recreational harms they are enduring. See Diné Brief at 10.

The Plaintiffs also argue that the BLM violated NEPA, because it failed to "take a hard look" at the potential environmental consequences resulting from authorizing the Mancos Shale

drilling. Diné Brief at 12 (emphasis omitted). Specifically, they contend that the 2003 RMP/EIS, which authorized 9,942 wells, did not analyze the effects of drilling in the Mancos Shale, as it was thought not to be an economical option in 2003. See Diné Brief at 13. The Plaintiffs add that, once fracking technology made the Mancos Shale well development an economically feasible option, the BLM needed to take a hard look at the additional environmental impact that 3,960 new wells in the Mancos Shale would have on the region. See Diné Brief at 13-14. According to the Plaintiffs, the BLM cannot rely on the 2003 RMP/EIS, because "[t]he 2003 RMP/EIS does not offer any analysis for the landscape-level impacts from drilling at this new scale, and therefore cannot be used as an underlying basis for analyzing Mancos Shale EAs and approving APDs." Diné Brief at 14.

The Plaintiffs argue that the Court and the Tenth Circuit erred when denying a preliminary injunction on the grounds that a new EIS is needed only "when the quantum of environmental impact exceeds that which the operative EIS anticipated," and that no new statement was needed, because the "Mancos Shell development had not yet exceeded the foreseeable impacts from 9,942 wells." Diné Brief at 15. According to the Plaintiffs, the Court and the Tenth Circuit erred, because the relevant regulations require the agency to consider "the impacts from *foreseeable* development" and not just the impacts from past development. Diné Brief at 15-16 (citing 40 C.F.R. § 1508.7)(emphasis in Diné Brief). The Plaintiffs argue, therefore, that, because the 2003 EIS did not anticipate horizontal drilling's and fracking technology's effects, and that the foreseeable impact of the Mancos Shale wells exceeds the quantum of environmental impacts anticipated and analyzed in the 2003 EIS, the authorization of the additional wells violates NEPA. See Diné Brief at 16-17 ("BLM has never analyzed the

environmental and human health impacts from the combined total of 13,902 reasonably foreseeable oil and gas wells across the San Juan Basin.").

The Plaintiffs also contend that the BLM violated NEPA when all of the EAs for the Mancos Shale wells "tiered" to the 2003 RMP/EIS. Diné Brief at 18-21. According to the Plaintiffs, tiering is only allowed when the "project being considered is part of the broader agency action addressed in the earlier NEPA document." Diné Brief at 18. The Plaintiffs argue that, because the 2003 RMP/EIS did not consider at length horizontal drilling's or fracking's effects on the environment, tiering was inappropriate and violated NEPA. See Diné Brief at 21.

The Plaintiffs contend that the BLM also violated NEPA, because it did not analyze the cumulative environmental and human health impacts resulting from horizontal drilling and fracking. See Diné Brief at 21-25. The Plaintiffs assert that the BLM's analysis needed to include an examination of the past, present, and future wells, but it did not. See Diné Brief at 22-23. They add that BLM failed specifically to consider "GHG emissions" in the 2003 RMP/EIS. Diné Brief at 24.

The Plaintiffs also argue that the BLM violated NEPA, because it failed to prepare an EIS for the 3,960 Mancos Shale wells. See Diné Brief at 27 ("BLM cannot continue to issue individual drilling approvals absent completion of an EIS."). They assert that the BLM has failed to issue a "convincing statement of reasons" for why the wells "will impact the environment no more than insignificantly," so an EIS is necessary. See Diné Brief at 27. Thus, according to the Plaintiffs, because none has been issued, the BLM has violated NEPA. See Diné Brief at 27-28.

The Plaintiffs add that the BLM violated NEPA, because it failed to satisfy that statute's "public notice and participation requirements." Diné Brief at 29. The Plaintiffs contend that, because BLM approved 362 Mancos Shale wells and 122 APDs without public involvement and by labeling them "routine projects," the BLM did not follow NEPA's command. Diné Brief at 29. The Plaintiffs contend that the BLM had notice as early as August 2012 that the public was interested in the Mancos Shale wells, but, according to the Plaintiffs, the BLM's only outward facing action was to make public its "decision documents" in 2015 several months or years after it had issued APD approvals. Diné Brief at 29-31 (citing 43 C.F.R. § 46.305 (stating that the agency must "notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed")).

The Plaintiffs next argue that the BLM violated NHPA. See Diné Brief at 32-41. They contend that oil-and-gas development adversely affects Chaco Park, which is on the National Register of Historic Places. See Diné Brief at 34-35. The Plaintiffs assert that, despite the development's impact on those locations, the BLM did not conduct a "landscape-level" analysis, so the BLM's approval of APDs violates section 106 of NHPA. See Diné Brief at 35-36.

The Plaintiffs argue that, although the BLM can satisfy NHPA section 106 without conducting a landscape level analysis if it establishes a program alternative, the BLM has not complied with the 2004 or 2014 Protocols, which the BLM entered into as a program alternative to satisfy NHPA. See Diné Brief at 36. The Plaintiffs aver that the BLM has not satisfied the 2014 Protocol, because it requires the BLM to analyze "Mancos Shale development's indirect and cumulative effects" on Chaco Park and its satellite sites, but, according to the Plaintiffs, the BLM has analyzed only the "direct impacts to archaeological sites." Diné Brief at 36. The

Plaintiffs add that the BLM's failure to consider all of the development's indirect impacts to the sites "flows from the agency's arbitrary" definition of the Area of Potential Effect ("APE"). Diné Brief at 37. See id. at 38 ("No record evidence exists to indicate that BLM ever defined an APE for indirect effects, or that BLM ever analyzed the indirect adverse effects of Mancos Shale development on historic properties."). According to the Plaintiffs, because the BLM has ignored indirect effects on Chaco Park and its satellites, such as excess noise, air, and light pollution, the BLM has violated NHPA. See Diné Brief at 39-40.

Finally, the Plaintiffs argue that NHPA's regulations require the BLM to consider "reasonably foreseeable effects" of development, which BLM failed to consider. See Diné Brief at 40 (citing 36 C.F.R. § 800.5(a)(1)). They add that "even if a single APD might not indirectly cause an adverse effect" to Chaco Park, "the 362 APDs already approved by the BLM may *cumulatively* cause an adverse effect" to Chaco Park. Diné Brief at 40 (emphasis in original). They conclude that, even if the BLM may have considered direct effects of development, because BLM failed to consider indirect and cumulative effects, the BLM has violated NHPA. See Diné Brief at 40-41.

2. The BLM's Response.

The BLM responds that: (i) the Plaintiffs do not have standing; (ii) some of the Plaintiffs' challenges fail as they do not attack final agency action; (iii) some of the Plaintiffs' challenges fail as moot; and (iv) the BLM has not violated NEPA nor NHPA. See BLM Response at 1-44. First, the BLM asserts that the Plaintiffs do not have standing to challenge the APDs. See BLM Response at 8-13. BLM contends that the Plaintiffs have not alleged an injury-in-fact, because there is an insufficient geographical nexus between the Plaintiffs' purported harms and the well

developments. See BLM Response at 9-11. There is no geographic nexus, according to the BLM, between the wells and the Plaintiffs, because the Plaintiffs "all state vaguely that they visit an undefined Chaco Region or greater Chaco area," which, according to the BLM, is too undefined a declaration to meet the injury-in-fact requirement. BLM Response at 10-11. It adds that the only specific locations that the Plaintiffs identify are "at least eight miles away" from the challenged wells, so they are not geographically close enough to establish an injury. See BLM Response at 11.

The BLM also argues that the Plaintiffs have failed standing's traceability and redressability prongs. See BLM Response at 12-13. The BLM argues that the Plaintiffs fail the traceability requirement, because the Plaintiffs have not tied their injuries to the 382 specific wells at issue. See BLM Response at 12. Instead, according to the BLM, the Plaintiffs tie their injuries generally to "oil and gas development," which, again according to the BLM, is too vague to meet the standing requirement, because there are 23,000 active wells in the area. BLM Response at 12-13.

Next, the BLM argues that Plaintiffs' arguments challenging future APD approvals fail, because these approvals do not challenge final agency action. See BLM Response at 13. The BLM argues that the Court has jurisdiction, under the APA, to review only "final agency actions." BLM Response at 14 (citing 5 U.S.C. § 704). It follows, according to the BLM, that the Court lacks jurisdiction over the 28 future APD approvals, because those approvals are not final. See BLM Response at 14. The BLM also argues that the Plaintiffs' challenges to the completed wells -- wells that have already been drilled, fracked, or abandoned -- are moot. See BLM Response at 15. According to the BLM, the challenges to the 177 completed wells are

moot, because a court cannot enjoin, preclude, or "undo" a completed project. BLM Response at 15.

The BLM also argues that it complied with NEPA. See BLM Response at 16-36. First, it contends that the BLM took a hard look at the impacts of the challenged wells. See BLM Response at 16. The BLM argues that the Plaintiffs have not presented new evidence since the preliminary injunction stage. See BLM Response at 16. Thus, according to the BLM, "the Court's original analysis continues to apply." BLM Response at 16. It argues that, because the additional Mancos Shale wells will not exceed the impacts accounted for in the 2003 RMP/EIS, the BLM has not violated NEPA. See BLM Response at 16. According to the BLM, the 2003 RMP/EIS accounted for 5,997 wells in the San Juan Basin. See BLM Response at 17. The BLM asserts that, from those 5,997 wells projected, it follows that the 3,960 predicted wells either drilled or to be drilled falls within the original prediction, so the 2003 RMP/EIS remains valid and the BLM can rely upon it. See BLM Response at 17.

The BLM contends that the Plaintiffs' argument, which asserts that the BLM did not consider the foreseeable effect of the 3,960 wells, is incorrect. See BLM Response at 17. It argues that the record demonstrates that the 2001 RFDS concluded that the Mancos Shale "may have significant potential as a shale gas candidate," and that there may be reservoir zones in the Mancos shale not yet recognized. BLM Response at 17. According to the BLM, the RFDS also recognized the potential for horizontal drilling and fracking in the Mancos Shale. See BLM Response at 17-18. The BLM asserts, moreover, that the 2003 RMP/EIS "noted that the Mancos Shale was a source of both oil and gas." BLM Response at 18. The BLM concedes that the 2003 RMP/EIS did not consider developing the Mancos Shale specifically, but the BLM notes

that analyzing the Mancos Shale was not the RMP/EIS' goal. See BLM Response at 18. Rather, according to the BLM, the 2003 RMP/EIS' goal is to analyze the "impacts of all foreseeable oil and gas development on federal lands in the San Juan Basin, regardless of geological formations targeted or technologies used." BLM Response at 18. The BLM also argues that the 2003 RMP/EIS anticipated fracking and "directional drilling," in addition to "other innovative drilling techniques." BLM Response at 18. According to the BLM, "[t]he RMP/EIS did not exclude horizontal drilling and multistage fracking from its analysis because both were widely used in similar formations elsewhere in the United States by 2003, and foreseeable in the Mancos Shale as soon as the market made them economically feasible." BLM Response at 19.

The BLM next contends that tiering to the RMP/EIS is appropriate, because the 2003 EMP/EIS considered fracking and horizontal drilling. See BLM Response at 21. It adds, however, that, even if the 2003 RMP/EIS did not consider fracking and horizontal drilling, tiering is still appropriate, because the 2003 RMP/EIS' analysis of vertical drilling would not be qualitatively different from horizontal drilling and fracking. See BLM Response at 21. According to the BLM, because horizontal drilling and fracking "result in the same types of impacts as other type of oil and gas development," including vertical drilling, tiering to the 2003 RMP/EIS, which considered the effects of vertical drilling, remains appropriate. See BLM Response at 21. The BLM argues that the Plaintiffs present no admissible evidence that horizontal drilling and fracking are so different from vertical drilling that tiering is inappropriate. See BLM Response at 22. It also argues that there is no record evidence that horizontal drilling causes so much more harm than vertical drilling that impacts from horizontal drilling exceed the impacts of the 9,942 wells analyzed in the 2003 RMP/EIS. See BLM Response at 23.

The BLM also argues that that the 2003 RMP/EIS considered the cumulative impacts of the 3,960 Mancos Shale wells, including the region's past, present, and reasonably foreseeable future oil and gas development. See BLM Response at 24-25. The BLM adds that its EAs effectively supplement the 2003 RMP/EIS' analysis of fracking and horizontal drilling. See BLM Response at 25. It also argues that the EAs "explain that fracking in the Mancos Shale is not anticipated to impact groundwater," because the Mancos Shale is separate from the relevant aquifers. BLM Response at 25. The BLM asserts that, contrary to the Plaintiffs' arguments, the 2003 RMP/EIS took a "hard look" at the cumulative impact the wells would have on climate change, because the RMP/EIS estimated the wells' greenhouse gas emissions. See BLM Response at 27.

Next, the BLM asserts that it complied with NEPA's public involvement requirements. See BLM Response at 31. According to the BLM, it satisfied those requirements by: (i) maintaining and updating a NEPA log on its website; (ii) posting notices for proposed wells in a public reading room; and (iii) hosting public meetings at the site of each proposed well. See BLM Response at 31. The BLM contends that it did not need to solicit additional public comment about the Mancos Shale horizontal drilling and fracking, because fracking and horizontal drilling is "routine in the San Juan Basin." BLM Response at 32. The BLM also argues that it is only required to notify the public of final EA and FONSIs. See BLM Response at 31. It contends that it satisfied those specific requirements, because, once it issued an APD decision, the BLM marked the APD as approved on the online NEPA log, and it placed final EAs, FONSIs and decision records in its public reading room and on its website. See BLM Response at 32-33. The BLM also contends that, while there was "some delay" in posting

"certain EAs and FONSIs in the reading room and online," NEPA does not have a notice deadline. See BLM Response at 33. The BLM adds that, even if it failed to give the requisite notice, such an error is harmless, because there has been no evidence of prejudice to the Plaintiffs. See BLM Response at 34. According to the BLM, the error is also harmless, because the Plaintiffs and BLM worked to rectify posting process errors together and the BLM provided the Plaintiffs relevant documents. See BLM Response at 35.

Finally, the BLM argues that it complied with the NHPA. See BLM Response at 36. The BLM argues that it complied with the NHPA "by defining the APE for each challenged APD based on the location of the proposed well and the types of known and suspected historic properties in the area, and assessing the adverse effects to historic properties both within and without the APE." BLM Response at 37. It also argues that the NHPA does not require the BLM to issue a separate APE analysis for direct and indirect effects. See BLM Response at 38 (citing 36 C.F.R. §§ 800.4(a)(1), 800.16(d)). The BLM contends that it did not violate the NHPA by failing to consult with the State Historic Preservation Office ("SHPO") after defining an APE that accounts for direct effects, because a SHPO consultation is required only when defining the APE is complicated or controversial. See BLM Response at 38-39. BLM also contends that it did not contravene the NHPA, because the "vast majority of historic properties near the challenged APDs are not landscape level properties" but are archeological sites. BLM Response at 39. It follows, according to the BLM, that indirect and cumulative effects such as air pollution, noise, and visual disturbances do not affect the archaeological sites' historic characteristics, and thus the BLM did not violate the NHPA. See BLM Response at 39. The BLM also argues that air pollution, noise, and visual disturbances do not adversely affect the

historic characteristics of Chaco Park and its satellite locations, so there is no NHPA violation. See BLM Response at 40. The BLM adds that, even if air pollution, noise, and visual disturbances do affect Chaco Park and its satellite locations, it is not foreseeable that those disturbances would affect those sites, especially because they are miles away from the oil wells, so there is no NHPA violation. See BLM Response at 40-41. Finally, the BLM argues that it has considered effects on historic properties, which, according to the BLM, is all that NHPA requires. See BLM Response at 41-42 ("[T]he NHPA only requires that an agency take procedural steps to identify cultural resources; it does not impose a substantive mandate on the agency to protect the resources.").

3. The Operators' Response.

The Operators also filed a response. See Operators' Response Brief, filed June 23, 2017 (Doc. 114)("Operators' Response"). According to the Operators' the main issue is not whether "newer and more complex technologies are being used to drill Mancos Shale wells," but, instead "whether the environmental impacts of those methods were adequately considered in the project specific EAs, or the programmatic RMP/EIS to which the EAs were tiered." Operators' Response at 9. The Operators contend that the BLM complied with NEPA, because "the impacts of the approved wells fell within the scope of the 9,942 wells studied in 2003." Operators' Response at 8-9. Although the Operators concede that any one horizontal drill may have more impact than a single vertical well, as a horizontal well requires a larger well pad and longer drilling times, see Operators' Response at 6, they argue that horizontal drilling "*decreases*" the overall impact compared to vertical drilling, because "fewer wells are needed to develop the resource," Operators Response at 6-7 (emphasis in original). They also argue that the 2003

RMP/EIS accounted for the impacts of horizontal drilling, so, according to the Operators, there is no NEPA violation. See Operators Response at 9.

The Operators also argue that the tiered 2014 EAs properly updated the 2003 RMP/EIS analysis. See Operators' Response at 11. In support of that contention, they note that the EAs since 2014 incorporate by reference "detailed cumulative air impact analysis" from the BLM's 2014 Air Resources Technical Report ("ARTR"), which describes "the air quality impacts of 21,150 existing oil and gas wells in the Basin, . . . future oil and gas drilling (including in the Mancos Shale), as well as impacts of other greenhouse gas sources." Operators' Response at 11-12. According to the Operators, the 2014 ARTR accounted specifically for the Mancos Shale formation, so the BLM was justified in relying on that report. See Operators' Response at 12.

The Operators echo the BLM's argument that the BLM does not need to analyze the 3,960 potential Mancos Shale wells as additional wells to the 9,942 wells analyzed in the 2003 RMP/EIS. See Operators' Response at 13-14. They also argue that, with regard to cumulative impact studies, NEPA does not require individual APDs to include such an expansive cumulative analysis. See Operators' Response at 14-15. The Operators add that the BLM was not required to halt its decision-making processes once it started the RMP amendment process, because to "hold otherwise would jeopardize or impair BLM's ability to manage the public lands, since it is often engaged in plan amendment or revision." Operators' Response at 17. The Operators also argue that the BLM adequately involved the public in its EA process for the same reasons that the BLM articulated. See Operators' Response at 18-20.

The Operators contend that the BLM complied with NHPA. See Operators' Response at 20. First, they contend that the NHPA does not protect the "Greater Chaco Landscape" -- a

67,000 square-mile region -- as the Plaintiffs assert, because the Greater Chaco landscape is not an historic property. See Operators' Response at 20-21. The Operators also argue that, even if the landscape did qualify as a historic property, "Diné fails to demonstrate how the landscape itself would be adversely affected in a way that would disqualify it from listing on the National register." Operators' Response at 22. The Operators' argue that the Mancos Shale wells will not contribute to changing the region to such a degree that it loses its historic status, because the Mancos Shale area has already been "subject to extensive oil and gas development under pre-existing oil and gas leases." See Operators' Brief at 22. They also argue that many of the landscape alterations Diné asserts -- visual and noise effects associated with drilling and completion -- are temporary in nature, so they "will not permanently alter the character of the landscape." Operators' Brief at 23.

The Operators contend that there was no NHPA violation, because the BLM properly followed the 2004 and 2014 Protocols. See Operators' Brief at 24. According to the Operators, the State Protocol requires the BLM to consult with the State Historic Preservation Office if and only if the APE is "not precisely defined by the State Protocol." Operators' Brief at 24. The Operators argue that the 2014 Protocol defines the APE as "the area of direct effect (as precisely defined for specified actions), and known historic properties indirectly affected in the vicinity, if BLM cultural resource specialists determine it is appropriate to the Area of Potential Effect." Operators' Brief at 24-25. The Operators argue that each proposed APD "applied the direct Area of Potential effect," and the BLM did not identify known historic properties outside the direct APE zone that might be indirectly affected, so, according to the Operators, the BLM complied with the 2004 and 2014 Protocols. Operators' Brief at 25. The Operators also argue that the

BLM properly complied with section 106's requirement that it consult regarding the effects of oil and gas development, because the BLM affirmed seventy-nine specially designated areas, it recognized two sites as Areas of critical environmental concern, and oil and gas leasing was either eliminated in the seventy-nine sites or subjected to strict restrictions. See Operators' Brief at 25-26.

Finally, the Operators argue that, should the Court determine that the Plaintiffs prevail, remand is the appropriate remedy as opposed to an injunction or vacatur. See Operators' Brief at 26. They contend that any deficiencies in the well approvals are not serious enough for vacatur or an injunction, because the BLM has employed "robust cumulative impact analyses" in its most recent RFDs, and "any NEPA errors that may have existed at one time have now been corrected." Operators' Brief at 27. Thus, according to the Operators, "if any NEPA or NHPA error exists, it can be addressed on remand without upsetting the APD approvals." Operators' Brief at 27. They add that any BLM error must be weighed against the harm to the Operators if APDs are vacated. See Operators' Brief at 28. The Operators argue that the harm they would suffer is dire, because their contractors and employees "rely on the continued viability of oil and gas development in northwestern New Mexico." Operators' Brief at 28. They conclude that remand is "the only appropriate remedy." Operators' Brief at 28.

4. API's Response.

The API responds and asserts many of the same arguments as the BLM and the Operators. See Intervenor-Defendant American Petroleum Institute's Opposition to Plaintiffs' Opening Merits Brief at 1-23, filed June 23, 2017 (Doc. 115)("API Response"). It emphasizes that the Court should deny the Plaintiffs' relief, because the Diné Brief largely reasserts

arguments that the Court has already disposed of at the preliminary injunction stage. See API Response at 3-6 ("[T]he Plaintiffs continuously repeat -- sometimes verbatim -- evidence and argument from their preliminary injunction briefing before this Court and the Tenth Circuit."). The API contends that the only new arguments the Plaintiffs assert are that: (i) the BLM failed consider greenhouse emissions and climate change; (ii) the BLM failed to allow public comment; (iii) the BLM violated NHPA. See API Response at 7. Nevertheless, API considers the Plaintiffs' old NEPA arguments and contends that the Court must defer to the BLM's determinations. See API Response at 9-10. It also asserts that the BLM was not required to issue a new or supplemental EIS, because there was no new information compelling a conclusion that the new wells would have affected the environment in a significant manner which the 2003 RMP/EIS did not already address. See API Response at 10.

API also argues, as the Operators did, that the Plaintiffs have not established that the balance of equities favor an injunction or vacatur over remand should the Court determine that the BLM violated NEPA or NHPA. See API Response at 13. It contends that the Plaintiffs' purported environmental harms are not that significant, because the Plaintiffs have already experienced a great deal of oil and gas development, as the San Juan Basin has been subject to drilling for more than 60 years. See API Response at 15 ("Under these circumstances, the incremental environmental impacts of the additional challenged APDs are both relative limited in comparison to the oil and gas rigs seemingly all over the place before Plaintiffs ever filed this lawsuit."). API also contends that the Plaintiffs health and safety concerns are not enough to demonstrate irreparable harm, because extensive New Mexico regulations ensure that all wells are safe. See API Response at 16-17. API adds that the Plaintiffs' harms are outweighed by the

public interest, because the enormous economic benefits of drilling have already been recognized. See API Brief at 18 (citing MOO at 98 n.25, 2015 WL 4997207, at *50 n.25). API also argues that the San Juan Basin drilling is an enormous job creator for the state. See API Brief at 19. Thus, according to API, the public benefit arising from horizontal drilling and fracking outweighs the Plaintiffs' purported environmental injury. See API Brief at 20-22. API concludes that the Court should deny the request for vacatur or injunctive relief. See API Brief at 23.

5. The Plaintiffs' Reply.

The Plaintiffs reply that they have standing. See Plaintiffs' Reply at 1, filed July 28, 2017 (Doc. 117)("Reply"). They contend that to allege an injury-in-fact, they are not required to show that they have visited each well site; they argue that, instead, they need only allege that they have "traversed through or within view of parcels of land where oil and gas development will occur and plans to return." Reply at 2 (citing S. Utah Wilderness All. v. Palma, 707 F.3d 1143 1155 (10th Cir. 2013)). The Plaintiffs allege that they have traversed or seen those parcels as demonstrated in declarations. See Reply at 3-4. The Plaintiffs also contend they have met the traceability requirement, because causation under NEPA is tied to the BLM's failure to comply with NEPA and not to the specific oil wells. See Reply at 4.

The Plaintiffs reiterate that the BLM violated NEPA for not conducting an analysis on the 382 Mancos Shale wells before authorizing them. See Reply at 6. They argue again that the 2003 RMP/EIS never contemplated or analyzed the cumulative impacts form horizontal drilling and fracking, so the BLM cannot rely on that study and statement to contend that they adhered to NEPA. See Reply at 7. Thus, according to the Plaintiffs, the "BLM should have updated its

cumulative impacts analysis," but the BLM failed to do so and thus violated NEPA. Reply at 7. The Plaintiffs also argue that, although fracking and horizontal drilling were widely used in 2003, that fact does not demonstrate that the 2003 RMP/EIS adequately considered those techniques. See Reply at 8-9. They also assert that the BLM violated NEPA, because the "record conclusively demonstrates that the RMP/EIS was focused only on the foreseeable impacts from 9,942 wells developed in economically feasibly gas-bearing formations at that time, not on the Mancos Shale." Reply at 9.

The Plaintiffs also argue that the cumulative impact of the 3,960 horizontal wells added to the wells already drilled exceeds the cumulative impact that the 2003 RMP/EIS analyzed. See Reply Brief at 11. They contend -- with the tables reproduced below -- that the surface impact, the water consumption, and the pollution levels all exceed what the 2003 RMP/EIS considered.

Surface Impacts		
Well Type	Acres (Per Well)	Estimated Total Impacts (3,945 vert./3,960 horiz.)
Vertical	2	7,890
Horizontal	5.2	20,592
	Total Combined	**28,482**
	Considered (2003 RMP/EIS)	**18,577**
	Percentage Increase	**53%**

Water Consumption		
Well Type	Gallons (Per Well)	Estimated Total Impacts (3,945 vert./3,960 horiz.)
Vertical	283,500	1,118,407,500
Horizontal	1,020,000	4,039,200,000
	Total Combined	**5,157,607,500**
	Considered (2003 RMP/EIS)	**2,818,557,000**
	Percentage Increase	**82%**

Air Pollution					
Well Type	Well Construction	NOx (tpy)	CO(tpy)	VOC(tpy)	PM_{10} (tpy)
Vertical	9	2.30	0.63	0.20	0.92
Horizontal	25	6.13	1.64	0.55	2.54
Percentage Increase		267%	260%	275%	276%
Est. Total Impacts (3.945 vert.)		20,869	2,485	789	3,629
Est. Total Impacts (3,960 horiz.)		24,275	6,494	2,178	10,058
Total Combined		**45,144**	**8,979**	**2,967**	**13,687**
Considered (2003 RMP/EIS)		**22,866**	**6,263**	**1,988**	**9,146**
Percentage Increase		**97%**	**43%**	**49%**	**50%**

See Reply at 11-12 (footnotes omitted). The Plaintiffs add that site-specific EAs do not cure the deficiency, because the EAs conflate the direct and indirect impact analysis. See Reply at 12. The Plaintiffs also argue that the 2003 RMP/EIS did not consider climate change, so could not have accounted for the increased impact the horizontal drilling and fracking wells would have had on climate change. See Reply at 13.

The Plaintiffs contend that the Court owes the BLM no deference in the NEPA context. See Reply at 14 (citing Park County v. Dep't of Agric., 817 F.2d 609, 620 (10th Cir. 1987)). They also reiterate their contention that the BLM failed to involve the public in the NEPA process. See Reply at 15. The Plaintiffs argue that, although the BLM provided information to the public through the internet, onsite meetings, notices of staking for individual wells, such notice was insufficient under NEPA, because "none of these actions provided information about the context or potential impacts of APD development." Reply at 15-16 ("BLM failed to provide the public with meaningful information about the direct, indirect, and cumulative impacts of BLM's decisions, prior to approving the wells."). The Plaintiffs contend that this lack of

information was prejudicial, because "public participation and informed agency decisionmaking are the twin aims at the heart of NEPA." Reply at 17.

The Plaintiffs reiterate that the BLM violated NHPA, because the BLM ignored indirect and cumulative affects to the characteristics of the historic property. See Reply at 17-18. They argue that even if the distance between Chaco Park and its satellites insulates them from the adverse noise and light pollution of the wells, the BLM still violated NHPA, because the BLM did not analyze what effect, if any, those pollutions would have on the sites. See Reply at 19. The Plaintiffs add that the BLM did not follow the 2014 Protocol, because, under the 2014 Protocol, the BLM is required to consider indirect effects, which, according to the plaintiffs, the BLM did not consider. See Reply at 20-21. The Plaintiffs assert that the BLM did not meet its NHPA obligations when it spoke to the SHPO as part of the 2003 RMP/EIS, because the 2003 RMP/EIS did not discuss the impacts to landscape-level historic properties. See Reply at 21.

The Plaintiffs aver that their claims are not moot, even though 177 wells have already been drilled or abandoned, because the Plaintiffs' injuries are not confined to "the acts of drilling, and persist even once wells are complete." Reply at 22. They argue that an agency action is not moot if the violation of the applicable law "can be undone," even if doing so would be expensive or complex. Reply at 23. The Plaintiffs add that the Court has "broad discretion to order equitable relief short of" well removal, such as "mitigation measures and restrictions on well operations." Reply at 23. They also argue that the Court can still issue a declaratory judgment. See Reply at 23. They conclude that the BLM's actions are "capable of repetition but evading review." Reply at 23-24 ("If BLM's mootness argument for APDs with already-drilled

wells prevails, nothing would prevent BLM from 'ignor[ing] the requirements of NEPA.'")(citing Cantrell v. City of Long Beach, 241 F.3d 674, 678 (9th Cir. 2001)).

The Plaintiffs also argue that they are entitled to the remedies which they seek, because the BLM's alleged NEPA violations are egregious. See Reply at 25 ("Here, vacatur is the only remedy that serves NEPA's fundamental purpose of requiring agencies to look *before* they leap.")(emphasis in original). The Plaintiffs argue that departing from the typical vacatur remedy is only appropriate in "unusual and limited circumstances." Reply at 25. They conclude that, if the Court determines that the Plaintiffs are correct on the merits, "they respectfully ask the court to bifurcate the remedy phase and allow for additional briefing, at which point they will satisfy the required elements for a permanent injunction." Reply at 26 (citing Monsanto v. Geertson Seed Farms, 561 U.S. 139, 156-57 (2010)).

LAW REGARDING STANDING

A federal court may hear cases only where the plaintiff has standing to sue. See Summers v. Earth Island Institute, 555 U.S. 488, 492-93 (2009). The plaintiff bears the burden of establishing standing. See, e.g., Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998). The plaintiff must "allege . . . facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." FW/PBS v. City of Dallas, 493 U.S. 215, 231 (1990)(internal citations and quotations omitted). Moreover, where the defendant challenges standing, a court must presume lack of jurisdiction "unless the contrary appears affirmatively from the record." Renne v. Geary, 501 U.S. 312, 316 (1991)(quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 546 (1986))(internal quotation marks omitted). "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the

pleadings but rather must affirmatively appear in the record." Phelps v. Hamilton, 122 F.3d 1309, 1326 (10th Cir. 1997)(Henry, J.)(quoting FW/PBS v. City of Dallas, 493 U.S. at 231)(citations omitted)(internal quotation marks omitted).

"Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." San Juan Cty., Utah v. United States, 503 F.3d 1163, 1171 (10th Cir. 2007)(en banc). See U.S. Const. art. III, § 2. "[A] suit does not present a Case or Controversy unless the plaintiff satisfies the requirements of Article III standing." San Juan Cty., Utah v. United States, 503 F.3d at 1171. To establish standing, a plaintiff must show three things: "(1) an injury in fact that is both concrete and particularized as well as actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." Protocols, LLC v. Leavitt, 549 F.3d 1294, 1298 (10th Cir. 2008)(Hartz, J.)(internal quotation marks omitted).

"Standing is determined as of the time the action is brought." Smith v. U.S. Court of Appeals, for the Tenth Circuit, 484 F.3d 1281, 1285 (10th Cir. 2007)(Seymour, J.)(quoting Nova Health Sys. v. Gandy, 416 F.3d 1149, 1154 (10th Cir. 2005)(Ebel, J.)). In Smith v. U.S. Court of Appeals, for the Tenth Circuit, the Tenth Circuit rejected a plaintiff's standing to challenge the Colorado appellate courts' practice of deciding cases in non-precedential, unpublished opinions, which the plaintiff asserted allowed courts to affirm incorrect decisions without interfering with official, "published" law. 484 F.3d at 1285. The Tenth Circuit noted that the plaintiff had recently taken his state appeal and, therefore,

> was in no position to challenge the adequacy of state appellate review in cases culminating in unpublished opinions unless he could show that he would in fact receive such review from the state court of appeals (and from the state supreme court as well, if it took the case on certiorari).

484 F.3d at 1285.

By contrast, in Nova Health Sys. v. Gandy, the Tenth Circuit concluded that abortion providers had standing to challenge an Oklahoma parental-notification law on the grounds that they were in imminent danger of losing patients because of the new law. See 416 F.3d 1154. Although determining that there was standing, the Tenth Circuit was careful to frame the issue as whether, "as of June 2001 [the time the lawsuit was filed]," Nova Health faced any imminent likelihood that it would lose some minor patients seeking abortions. 416 F.3d at 1155. Moreover, while focusing on the time of filing, the Tenth Circuit allowed the use of evidence from later events -- prospective patients lost because of the notification law after the lawsuit began -- to demonstrate that the plaintiff faced an imminent threat as of the time of filing. See 416 F.3d at 1155.

In construing the standing doctrine, the Court has determined that an attorney running for office as a Court of Appeals of New Mexico judge lacked standing when that attorney alleged that the New Mexico attorney disciplinary counsel harmed his chances of election when the counsel published a summary suspension petition about him. See League of United Latin American Citizens v. Ferrera, 792 F. Supp. 2d 1222, 1233-39 (D.N.M. 2011)(Browning, J.). It so concluded, because the suspension petition's facts "were already known to voters" through the aggressive campaign tactics of the attorney's election rival, so the harm was not "fairly traceable to the Defendant's action." 792 F. Supp. 2d at 1238-39. The Court has, however, determined that a woman had standing to challenge a New Mexico criminal statute's constitutionality, even though the state had not yet filed charges against the woman, because the district attorney had not attested that he would not bring charges under the challenged statute. See Payne v. Wilder,

2017 WL 2257390, at *38 (D.N.M. Jan. 3, 2017)(Browning, J.). The Court reasoned that an injury in fact existed, despite the lack of a charge, because the district attorney's refusal to foreswear a prosecution demonstrated a "credible threat of prosecution." Payne v. Wilder, 2017 WL 2257390, at *38. In addition to the cases listed above, the Court has adjudicated standing issues many times. See, e.g., Abraham v. WPX Production Productions, LLC, 184 F. Supp. 3d 1150, 1197 (D.N.M. 2016)(Browning, J.)(concluding that oil-well royalty owners had standing to assert a breach of the implied duty to market under New Mexico and Colorado law); Northern New Mexicans Protecting Land Water and Rights v. United States, 161 F. Supp. 3d 1020, 1042 (D.N.M. 2016)(Browning, J.)(concluding that an association lacked standing to sue on behalf of its members, because the relief sought was damages); Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service, 140 F. Supp. 3d 1123, 1170-75 (D.N.M. 2015)(Browning, J.)(concluding that livestock association whose members had ancestral ties to grazing land in Northern New Mexico had standing to bring a NEPA claim); Alto Eldorado Partners v. City of Santa Fe, 2009 WL 1312856, at *21, 25 (D.N.M. March 11, 2009)(Browning, J.)(concluding that a developer did not have standing to challenge a city ordinance, because the ordinance would only affect him if he "lost his current permits," which, at the time of the lawsuit, he had not lost)

LAW REGARDING MOOTNESS

Article III, Section 2 of the Constitution of the United States limits the federal courts' jurisdiction to actual cases and controversies. See U.S. Const. art. III § 2. "Federal courts are without authority to decide questions that cannot affect the rights of litigants in the case before them." Ford v. Sully, 773 F. Supp. 1457, 1464 (D. Kan. 1991)(O'Connor, C.J.)(citing North Carolina v. Rice, 404 U.S. 244, 246 (1971). See Johansen v. City of Bartlesville, 862 F.2d 1423,

1426 (10th Cir. 1988); Johnson v. Riveland, 855 F.2d 1477, 1480 (10th Cir. 1988)). "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Arizonians for Official English v. Ariz., 520 U.S. 43, 67 (1997). See Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1121 (10th Cir. 2010). Accordingly, if a case is moot, or becomes moot during any stage of the case, the court does not have jurisdiction to hear the case. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)(citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

"Before deciding that there is no jurisdiction, the district court must look at the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and the laws of the United States." Bell v. Hood, 327 U.S. 678, 682 (1946). Jurisdiction is not dependent on whether the plaintiff will succeed in his cause of action; jurisdiction is determined before the cause of action's details, both in law and fact, are considered. See Bell v. Hood, 327 U.S. at 682.

The Tenth Circuit recognized a distinction between mootness and standing in Lucero v. Bureau of Collection Recovery, Inc.:

> Like Article III standing, mootness is oft-cited as a constitutional limitation on federal court jurisdiction. *E.g.*, *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1491 (10th Cir. 1993)("Constitutional mootness doctrine is grounded in the Article III requirement that federal courts only decide actual, ongoing cases or controversies."); *see* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 571 (2009)(citing footnote 3 in *Liner v. Jafco, Inc.*, 375 U.S. 301 . . . (1964), as the first occasion in which the Supreme Court expressly derived its lack of jurisdiction to review moot cases from Article III). But although issues of mootness often bear resemblance to issues of standing, their conceptual boundaries are not coterminous. *See Friends of the*

> *Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-92 . . . (2000). Indeed, the Supreme Court has historically recognized what are often called "exceptions" to the general rule against consideration of moot cases, as where a plaintiff's status is "capable of repetition yet evading review," *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 . . . (1911), or where a defendant has ceased the challenged action but it is likely the defendant will "return to his old ways" -- the latter often referred to as the voluntary cessation exception, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 . . . (1953); *see also, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277 . . . (2000). These exceptions do not extend to the standing inquiry, demonstrating the contours of Article III as it distinctly pertains to mootness. *Friends of the Earth, Inc.*, 528 U.S. at 191, 120 . . . .

Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d at 1242-43.

A claim may become moot if "(i) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (ii) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Cty. of L.A. v. Davis, 440 U.S. 625, 631 (1979). The burden of establishing mootness is a heavy one. See Cty. of L.A. v. Davis, 440 U.S. at 631. Courts are permitted to take into account the relative likelihood of the events which a party asserts keep the dispute from becoming moot. See Golden v. Zwickler, 394 U.S. 103, 109 (1969)("We think that under all the circumstances of the case the fact that it was most unlikely that the Congressman would again be a candidate for Congress precluded a finding that there was 'sufficient immediacy and reality' here."). A case can become moot based on intervening events, such as settling the case, see U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 25 (1994)("Where mootness results from settlement, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal . . . ."), or becoming a resident of the State whose residency laws one is challenging, see Sosna v. Iowa, 419 U.S. 393, 399 (1975)("If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would

make this case moot and require dismissal."). In comparison, while mootness, a statute of limitations, or some other legal doctrine may eventually bar a suit, one cannot lose standing once one has it. See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. at 190-92, ("Furthermore, if mootness were simply 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review,' could not exist.").

The Court has concluded that a due process claim is not moot where the plaintiff does not receive the precise remedy he has requested. See Salazar v. City of Albuquerque, 776 F. Supp. 2d 1217, 1235-36 (D.N.M. 2011)(Browning, J.)("Salazar"). In Salazar, a city bus driver brought a due process claim against the City of Albuquerque after being fired from his job. See 776 F. Supp. 2d at 1223. Although the employee was later reinstated, the Court determined that his due process claim was not moot, because he had asked for more than just reinstatement; he had also asked for punitive and back-pay damages. See 776 F. Supp. 2d at 1235-36. The Court has also determined that a claim is not necessarily moot even when a state court has previously dismissed the claim for lack of prosecution and for failure to appear, because there was still time for the plaintiff to seek reconsideration of the decision or an appeal. See Nieto v. University of New Mexico, 727 F. Supp. 2d 1176, 1191 (D.N.M. 2010)(Browning, J.).

LAW REGARDING JUDICIAL REVIEW OF AGENCY ACTION

Under the APA,

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground

> that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702. The APA states that district courts can:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > (D) without observance of procedure required by law;
> >
> > (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> >
> > (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706.

Under Olenhouse, 42 F.3d at 1560, "[r]eviews of agency action in the district courts [under the APA] must be processed as appeals. In such circumstances the district court should govern itself by referring to the Federal Rules of Appellate Procedure." 42 F.3d at 1580. See WildEarth Guardians v. U.S. Forest Serv., 668 F. Supp. at 1323. "As a group, the devices

appellate courts normally use are generally more consistent with the APA's judicial review scheme than the devices that trial courts generally use, which presume nothing about the case's merits and divide burdens of proof and production almost equally between the plaintiff and defendant." Northern New Mexicans Protecting Land and Water Rights v. United States, 2015 WL 8329509, at *9 (D.N.M. 2015)(Browning, J.).

1. Reviewing Agency Factual Determinations.

Under the APA, a reviewing court must accept an agency's factual determinations in informal proceedings unless they are "arbitrary [or] capricious," 5 U.S.C. § 706(2)(A), and its factual determinations in formal proceedings unless they are "unsupported by substantial evidence," 5 U.S.C. § 706(2)(E). The APA's two linguistic formulations amount to a single substantive standard of review. See Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Reserve Sys., 745 F.2d 677, 683-84 (D.C. Cir. 1984)(Scalia, J.)(explaining that, as to factual findings, "there is no *substantive* difference between what [the arbitrary or capricious standard] requires and what would be required by the substantial evidence test, since it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense" (emphasis in original)). See also id. at 684 ("[T]his does not consign paragraph (E) of the APA's judicial review section to pointlessness. The distinctive function of paragraph (E) -- what it achieves that paragraph (A) does not -- is to require substantial evidence to be found *within the record of closed-record proceedings* to which it exclusively applies." (emphasis in original)).

In reviewing agency action under the arbitrary-or-capricious standard, a court considers the administrative record -- or at least those portions of the record that the parties provide -- and

not materials outside of the record. See 5 U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party."); Fed. R. App. P. 16 ("The record on review or enforcement of an agency order consists of . . . the order involved; . . . any findings or report on which it is based; and . . . the pleadings, evidence, and other parts of the proceedings before the agency."); Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Govs. of the Fed. Reserve Sys., 745 F.2d at 684 ("[W]hether the administrator was arbitrary must be determined on the basis of what he had before him when he acted."). See also Franklin Sav. Ass'n v. Dir., Office of Thrift Supervision, 934 F.2d 1127, 1137 (10th Cir. 1991)("[W]here Congress has provided for judicial review without setting forth . . . procedures to be followed in conducting that review, the Supreme Court has advised such review shall be confined to the administrative record and, in most cases, no de novo proceedings may be had."). Tenth Circuit precedent indicates, however, that the ordinary evidentiary rules regarding judicial notice apply when a court reviews agency action. See New Mexico ex. rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 702 n.21 (10th Cir. 2009)(citing Fed. R. Evid. 201(b))("We take judicial notice of this document, which is included in the record before us in [another case]."); id. at 702 n.22 ("We conclude that the occurrence of Falcon releases is not subject to reasonable factual dispute and is capable of determination using sources whose accuracy cannot reasonably be questioned, and we take judicial notice thereof."). In contrast, the United States Courts of Appeals for the Ninth and Eleventh Circuits have held that taking judicial notice is inappropriate in APA reviews absent extraordinary circumstances or inadvertent omission from the administrative record. See Compassion Over Killing v. U.S. Food

& Drug Administration, 849 F.3d 849, 852 n.1 (9th Cir. 2017); National Min. Ass'n v. Secretary U.S. Dep't of Labor, 812 F.3d 843, 875 (11th Cir. 2016).

To fulfill its function under the APA, a reviewing court should engage in a "thorough, probing, in-depth review" of the record before it when determining whether an agency's decision survives arbitrary-or-capricious review. Wyoming v. United States, 279 F.3d 1214, 1238 (10th Cir. 2002)(citation omitted). The Tenth Circuit explains:

> In determining whether the agency acted in an arbitrary and capricious manner, we must ensure that the agency decision was based on a consideration of the relevant factors and examine whether there has been a clear error of judgment. We consider an agency decision arbitrary and capricious if the agency relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1167 (10th Cir. 1999). Arbitrary-or-capricious review requires a district court "to engage in a substantive review of the record to determine if the agency considered relevant factors and articulated a reasoned basis for its conclusions," Olenhouse, 42 F.3d at 1580, but it is not to assess the wisdom or merits of the agency's decision, see Colo. Envtl. Coal. v. Dombeck, 185 F.3d at 1172. The agency must articulate the same rationale for its findings and conclusions on appeal upon which it relied in its internal proceedings. See SEC v. Chenery Corp., 318 U.S. 80 (1943). While the court may not supply a reasoned basis for the agency's action that the agency does not give itself, the court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974)(internal citations omitted).

2. Reviewing Agency Legal Interpretations.

In promulgating and enforcing regulations, agencies must interpret federal statutes, their own regulations, and the Constitution, and Courts reviewing those interpretations apply three different deference standards, depending on the law at issue. First, the federal judiciary accords considerable deference to an agency's interpretation of a statute that Congress has tasked it with enforcing. See United States v. Undetermined Quantities of Bottles of an Article of Veterinary Drug, 22 F.3d 235, 238 (10th Cir. 1994). This deference is known as Chevron deference, named after the supposedly seminal case, Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837 (1984)("Chevron"). [14] Chevron deference is a two-step process[15] that first asks whether the statutory provision in question is clear and, if it is not, then asks whether the agency's interpretation of the unclear statute is reasonable. As the Tenth Circuit has explained,

[14]The case itself is unremarkable, uninstructive, does not explicitly outline the now-familiar two-step process of applying Chevron deference, and does not appear to have been intended to become a "big name" case at all. Its author, the Honorable John Paul Stevens, former Associate Justice of the Supreme Court, insists that the case was never intended to create a regime of deference, and, in fact, Justice Stevens became one of Chevron deference's greatest detractors in subsequent years. See generally Charles Evans Hughes, Justice Stevens and the Chevron Puzzle, 106 Nw. U. L. Rev. 551 (2012).

[15]There is, additionally, a threshold step -- the so-called step zero -- which asks whether Chevron deference applies to the agency decision at all. See Cass R. Sunstein, Chrevron Step Zero, 92 Va. L. Rev. 187 (2006). Step zero asks: (i) whether the agency is Chevron-qualified, meaning whether the agency involved is the agency charged with administering the statute -- for example, the EPA administers a number of statutes, among them the Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392; (ii) whether the decision fits within the category of interpretations afforded the deference -- interpretation of contracts, the Constitution, and the agency's own regulations are not afforded Chevron deference, see, e.g., U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999)("[A]n unconstitutional interpretation is not entitled to *Chevron* deference."); and (iii) whether Congress intended the agency to "speak with the force of law" in making the decision in question, United States v. Mead Corp., 533 U.S. 218, 229 (2001) -- opinion letters by the agency, for example, do not speak with the force of law and are thus not entitled to Chevron deference, see Christensen v. Harris Cty., 529 U.S. 576 (2000). An affirmative answer to all three inquiries results in the agency's decision passing step zero.

> we must be guided by the directives regarding judicial review of administrative agency interpretations of their organic statutes laid down by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 . . . (1984). Those directives require that we first determine whether Congress has directly spoken to the precise question at issue. If the congressional intent is clear, we must give effect to that intent. If the statute is silent or ambiguous on that specific issue, we must determine whether the agency's answer is based on a permissible construction of the statute.

United States v. Undetermined Quantities of Bottles of an Article of Veterinary Drug, 22 F.3d at 238 (citation omitted).

Chevron's second step is all but toothless, because if the agency's decision makes it to step two, it is upheld almost without exception. See Ronald M. Levin, The Anatomy of Chevron: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253, 1261 (1997)("[T]he Court has never once struck down an agency's interpretation by relying squarely on the second *Chevron* step." (footnote omitted)); Jason J. Czarnezki, An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law, 79 U. Colo. L. Rev. 767, 775 (2008)("Due to the difficulty in defining step two, courts rarely strike down agency action under step two, and the Supreme Court has done so arguably only twice."). Courts essentially never conclude that an agency's interpretation of an unclear statute is unreasonable.

Chevron's first step, in contrast, has bite, but there is substantial disagreement what it means. In an earlier case, the Court noted the varying approaches that different Supreme Court of the United States Justices have taken in applying Chevron deference:

> The Court notices a parallel between the doctrine of constitutional avoidance and the Chevron doctrine. Those Justices, such as Justice Scalia, who are most loyal to the doctrines and the most likely to apply them, are also the most likely to keep the "steps" of the doctrines separate: first, determining whether the statute is ambiguous; and, only then, assessing the merits of various permissible

> interpretations from the first step. These Justices are also the most likely to find that the statute is unambiguous, thus obviating the need to apply the second step of each doctrine. Those Justices more likely to find ambiguity in statutes are more likely to eschew applying the doctrines in the first place, out of their distaste for their second steps -- showing heavy deference to agencies for Chevron doctrine, and upholding facially overbroad statutes, for constitutional avoidance.

Griffin v. Bryant, 30 F. Supp. 3d 1139, 1193 n.23 (D.N.M.2014)(Browning, J.). A number of policy considerations animate Chevron deference, among them: (i) statutory interpretation, i.e., that Congress, by passing extremely open-ended and vague organic statutes, grants discretionary power to the agencies to fill in the statutory gaps; (ii) institutional competency, i.e., that agencies are more competent than the courts at filling out the substantive law in their field; (iii) political accountability, i.e., that agencies, as executive bodies which the President of the United States of America heads, can be held politically accountable for their interpretations; and (iv) efficiency, i.e., that numerous, subject-matter specialized agencies can more efficiently promulgate the massive amount of interpretation required to maintain the modern regulatory state -- found in the Code of Federal Regulations and other places -- than a unified but Circuit-fragmented federal judiciary can.

Second, when agencies interpret their own regulations -- to, for example, adjudicate whether a regulated party was in compliance with them -- courts accord agencies what is known as Auer or Seminole Rock deference. See Auer v. Robbins, 519 U.S. 452 (1997)("Auer"); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945). This deference is applied in the same manner as Chevron deference and is substantively identical. There would be little reason to have a separate name for this doctrine, except that its logical underpinnings are much shakier, and its future is, accordingly, more uncertain. Justice Scalia, after years of applying the doctrine followed by years of questioning its soundness, finally denounced Auer deference in 2013 in his

dissent in Decker v. Northwest Environmental Defense Center, 568 U.S. 597 (2013). The Court cannot describe the reasons for Justice Scalia's abandonment of the doctrine better than the Justice himself:

> For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of "defer[ring] to an agency's interpretation of its own regulations." *Talk America, Inc. v. Michigan Bell Telephone Co.*, [564] U.S. [50], 131 S. Ct. 2254, 2265 . . . (2011) (Scalia, J., concurring). This is generally called *Seminole Rock* or *Auer* deference.
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> The canonical formulation of *Auer* deference is that we will enforce an agency's interpretation of its own rules unless that interpretation is "plainly erroneous or inconsistent with the regulation." But of course whenever the agency's interpretation of the regulation is different from the fairest reading, it is in that sense "inconsistent" with the regulation. Obviously, that is not enough, or there would be nothing for *Auer* to do. In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes. The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading -- within the scope of the ambiguity that the regulation contains.
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> Our cases have not put forward a persuasive justification for *Auer* deference. The first case to apply it, *Seminole Rock*, offered no justification whatever -- just the *ipse dixit* that "the administrative interpretation . . . becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Our later cases provide two principal explanations, neither of which has much to be said for it. First, some cases say that the agency, as the drafter of the rule, will have some special insight into its intent when enacting it. The implied premise of this argument -- that what we are looking for is the agency's intent in adopting the rule -- is false. There is true of regulations what is true of statutes. As Justice Holmes put it: "[w]e do not inquire what the legislature meant; we ask only what the statute means." Whether governing rules are made by the national legislature or an administrative agency, we are bound by what they say, not by the unexpressed intention of those who made them.
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> The other rationale our cases provide is that the agency possesses special expertise in administering its "'complex and highly technical regulatory program.'" That is true enough, and it leads to the conclusion that agencies and not courts should make regulations. But it has nothing to do with who should interpret regulations -- unless one believes that the purpose of interpretation is to

make the regulatory program work in a fashion that the current leadership of the agency deems effective. Making regulatory programs effective is the purpose of rulemaking, in which the agency uses its "special expertise" to formulate the best rule. But the purpose of interpretation is to determine the fair meaning of the rule -- to "say what the law is." Not to make policy, but to determine what policy has been made and promulgated by the agency, to which the public owes obedience. Indeed, since the leadership of agencies (and hence the policy preferences of agencies) changes with Presidential administrations, an agency head can only be sure that the application of his "special expertise" to the issue addressed by a regulation will be given effect if we adhere to predictable principles of textual interpretation rather than defer to the "special expertise" of his successors. If we take agency enactments as written, the Executive has a stable background against which to write its rules and achieve the policy ends it thinks best.

Another conceivable justification for *Auer* deference, though not one that is to be found in our cases, is this: If it is reasonable to defer to agencies regarding the meaning of statutes that Congress enacted, as we do per *Chevron*, it is a fortiori reasonable to defer to them regarding the meaning of regulations that they themselves crafted. To give an agency less control over the meaning of its own regulations than it has over the meaning of a congressionally enacted statute seems quite odd.

But it is not odd at all. The theory of *Chevron* (take it or leave it) is that when Congress gives an agency authority to administer a statute, including authority to issue interpretive regulations, it implicitly accords the agency a degree of discretion, which the courts must respect, regarding the meaning of the statute. While the implication of an agency power to clarify the statute is reasonable enough, there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers -- that the power to write a law and the power to interpret it cannot rest in the same hands. "When the legislative and executive powers are united in the same person . . . there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, *Spirit of the Laws* bk. XI, at 151-152 (O. Piest ed., T. Nugent transl. 1949). Congress cannot enlarge its own power through *Chevron* -- whatever it leaves vague in the statute will be worked out by someone else. *Chevron* represents a presumption about who, as between the Executive and the Judiciary, that someone else will be. (The Executive, by the way -- the competing political branch -- is the less congenial repository of the power as far as Congress is concerned.) So Congress's incentive is to speak as clearly as possible on the matters it regards as important.

But when an agency interprets its own rules -- that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a "flexibility" that will enable "clarification" with retroactive effect. "It is perfectly understandable" for an agency to "issue vague regulations" if doing so will "maximiz[e] agency power." Combining the power to prescribe with the power to interpret is not a new evil: Blackstone condemned the practice of resolving doubts about "the construction of the Roman laws" by "stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it." 1 Wm. Blackstone, *Commentaries on the Laws of England* 58 (1765). And our Constitution did not mirror the British practice of using the House of Lords as a court of last resort, due in part to the fear that he who has "agency in passing bad laws" might operate in the "same spirit" in their interpretation. The Federalist No. 81, at 543-544 (Alexander Hamilton)(J. Cooke ed. 1961). *Auer* deference encourages agencies to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.

It is true enough that *Auer* deference has the same beneficial pragmatic effect as *Chevron* deference: The country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation, until a definitive answer is finally provided, years later, by this Court. The agency's view can be relied upon, unless it is, so to speak, beyond the pale. But the duration of the uncertainty produced by a vague regulation need not be as long as the uncertainty produced by a vague statute. For as soon as an interpretation uncongenial to the agency is pronounced by a district court, the agency can begin the process of amending the regulation to make its meaning entirely clear. The circumstances of this case demonstrate the point. While these cases were being briefed before us, EPA issued a rule designed to respond to the Court of Appeals judgment we are reviewing. It did so (by the standards of such things) relatively quickly: The decision below was handed down in May 2011, and in December 2012 the EPA published an amended rule setting forth in unmistakable terms the position it argues here. And there is another respect in which a lack of *Chevron*-type deference has less severe pragmatic consequences for rules than for statutes. In many cases, when an agency believes that its rule permits conduct that the text arguably forbids, it can simply exercise its discretion not to prosecute. That is not possible, of course, when, as here, a party harmed by the violation has standing to compel enforcement.

In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.

Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616-21 (Scalia, J., dissenting)(alterations in original)(citations omitted). Although the Court shares Justice Scalia's concerns about Auer deference, it is, for the time being, the law of the land, and, as a federal district court, the Court must apply it.[16]

Last, courts afford agencies no deference in interpreting the Constitution. See U.S. West, Inc. v. FCC, 182 F.3d 1224, 1231 (10th Cir. 1999)("[A]n unconstitutional interpretation is not entitled to *Chevron* deference. . . . [D]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." (citing, e.g., Rust v. Sullivan, 500 U.S. 173, 190-91 (1991))). Courts have superior competence in interpreting -- and constitutionally vested authority and responsibility to interpret -- the Constitution's content. The presence of a constitutional claim does not take a court's review outside of the APA, however -- § 706(2)(B) specifically contemplates adjudication of constitutional issues -- and courts must still respect agency fact-finding and the administrative record when reviewing agency action for constitutional infirmities; they just should not defer to the agency on issues of substantive legal interpretation. See, e.g., Robbins v. U.S. Bureau of Land Mgmt., 438 F.3d 1074, 1085 (10th Cir. 2006)("We review Robbins' [constitutional] due process claim against the [agency] under the framework set forth in the APA.").

[16]Clarence Thomas, Associate Justice of the Supreme Court, and Neil Gorsuch, Associate Justice of the Supreme Court, have recently echoed Justice Scalia's concerns with Auer deference and have called on the Supreme Court to reconsider and overrule Auer. See Garco Construction, Inc. v. Speer, 138 S. Ct. 1052, 1052-53 (2018)(dissenting from denial of certiorari).

3. Waiving Sovereign Immunity.

The APA waives sovereign immunity with respect to non-monetary claims. See 5 U.S.C. § 702. The statute provides:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States:

5 U.S.C. § 702. Claims for money damages seek monetary relief "to substitute for a suffered loss." Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d 1290, 1298 (10th Cir. 2009)(emphasis in original). Claims that do not seek monetary relief or that seek "specific remedies that have the effect of compelling monetary relief" are not claims for monetary damages. Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d at 1298. To determine whether a claim seeks monetary relief, a court must "look beyond the face of the complaint" and assess the plaintiff's prime object or essential purpose; "'[a] plaintiff's prime objective or essential purpose is monetary unless the non-monetary relief sought has significant prospective effect or considerable value apart from the claim for monetary relief.'" Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d at 1296 (quoting Burkins v. United States, 112 F.3d 444, 449 (10th Cir. 1997)).

The APA's sovereign immunity waiver for claims "seeking relief other than money damages" does not apply, however, "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Tucker Act, 28 U.S.C. §§ 1346, 1491, permits district courts to hear some claims against the United States, but it also

states that "district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States." 28 U.S.C. § 1346(a)(2). It follows that the APA does not waive the United States' sovereign immunity as to contract claims even when those claims seek relief other than money damages, such as declaratory or injunctive relief. See Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d at 1295. Consequently, two questions determine whether the APA waives the United States' sovereign immunity as to a particular claim: "First, does [the] claim seek 'relief other than money damages,' such that the APA's general waiver of sovereign immunity is even implicated? Second, does the Tucker Act expressly or impliedly forbid the relief that Normandy seeks, such that the APA's waiver does not apply?" Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev., 554 F.3d at 1296 (quoting 5 U.S.C. § 702).

LAW REGARDING PERMANENT INJUNCTION

> To attain a permanent injunction, a plaintiff must demonstrate:
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> (i) that it has suffered an irreparable injury; (ii) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (iii) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (iv) that the public interest would not be disserved by a permanent injunction.

eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006). The Tenth Circuit has formulated that test as: "(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction if issues, will not adversely affect the public interest." Southwest Stainless, LP v. Sappington, 582 F.3d 1176, 1191 (10th Cir. 2009). See Klein-Becker USA, LLC v. Englert, 711 F.3d 1153, 1164 (10th Cir. 2013). "The decision to grant or deny

permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." eBay, Inc. v. MercExchange, LLC, 547 U.S. at 391. See Southwest Stainless, LP v. Sappington, 582 F.3d at 1191 ("The district court's discretion in this context is necessarily broad and a strong showing of abuse must be made to reverse it."). "An injunction is an extraordinary remedy to prevent future violations, and should be used sparingly." Copar Pumice Co., Inc. v. Morris, No. 07-0079, 2009 WL 5201799, at *15 (D.N.M. October 23, 2009)(Browning, J.)(citing Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah, 144 F.3d 1513, 1522 (10th Cir. 1997)).

"A district court may find irreparable harm 'based upon evidence suggesting that it is impossible to precisely calculate the amount of damage plaintiff will suffer.'" Southwest Stainless, LP v. Sappington, 582 F.3d at 1191 (quoting Equifax Servs., Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990)). In Copar Pumice Co., Inc. v. Morris, for example, the Court denied a permanent injunction, because the plaintiff did not demonstrate that damages could not compensate the Fourth-Amendment search injury it had suffered. See 2009 WL 5201799, at *15. The Court further concluded that the plaintiff had "shown few, if any, damages other than attorney's fees and costs," and, accordingly, the extraordinary remedy sought -- a permanent injunction -- was inappropriate. 2009 WL 5201799, at *15.

Injunctive relief requested is subject to Article III mootness. See WildEarth Guardians v. Public Service Co. of Colorado, 690 F.3d 1174, 1190-91 (10th Cir. 2012); State of N.N. ex rel. New Mexico State Highway Dept. v. Goldschmidt, 629 F.2d 665, 669 (10th Cir. 1980). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Cty. of L.A. v. Davis, 440 U.S. 625, 631 (1979).

> Like Article III standing, mootness is oft-cited as a constitutional limitation on federal court jurisdiction. *E.g.*, *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1491 (10th Cir. 1993)("Constitutional mootness doctrine is grounded in the Article III requirement that federal courts only decide actual, ongoing cases or controversies). . . . But although issues of mootness often bear resemblance to issues of standing, their conceptual boundaries are not coterminous. . . . [T]he Supreme Court has historically recognized what are often called 'exceptions' to the general rule against consideration of moot cases, as where a plaintiff's status is 'capable of repetition yet evading review,' *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), or where a defendant has ceased the challenged action but it is likely the defendant will 'return to his old ways' -- the latter often referred to as the voluntary cessation exception, *United States v. W.T. Grant Co.*, 345 U.S. 498, 515 (1911).

Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1242 (10th Cir. 2011). When injunctive relief does not redress plaintiffs' particular injuries, the injunctive relief requested is rendered moot. See WildEarth Guardians v. Public Service Co., 690 F.3d at 1191 (citing United States v. Vera-Flores, 496 F.3d 1177, 1180 (10th Cir. 2007)). Similarly, if the injunction would have no present-day effect, the injunctive relief request is also rendered moot. See Utah Animal Rights Coalition v. Salt Lake City Corp., 371 F.3d 1248, 1257 (10th Cir. 2004)("The alleged violation took place in 2001, the Olympics have come and gone, and neither temporary restraining order, preliminary injunction, nor permanent injunction could have any present-day effect.").

As already noted, mootness is subject to the voluntary-cessation exception. See Brown v. Buhman, 822 F.3d 1151, 1166 (10th Cir. 2016). Under that exception, "voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." Brown v. Buhman, 822 F.3d at 1166. "This rule is designed to prevent gamesmanship. If voluntary cessation automatically mooted a case, 'a defendant could engage in unlawful conduct, stop

when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves his unlawful ends." Brown v. Buhman, 822 F.3d at 1166 (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013)). Nevertheless, a defendant's voluntary cessation may render a case moot, if "the defendant carries the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Brown v. Buhman, 822 F.3d at 1166 (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013)).

LAW REGARDING NEPA

NEPA requires federal agencies to

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
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> > (i) the environmental impact of the proposed action,
> >
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> > (iii) alternatives to the proposed action,
> >
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> >
> > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(C). "Although labeled an 'environmental' statute, NEPA is in essence a *procedural* statute; it does 'not require agencies to elevate environmental concerns over other appropriate considerations.'" Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric., 817 F.2d 609, 620 (10th Cir. 1987)(emphasis in original)(quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def.

Council, Inc., 462 U.S. 87, 97 (1983)). NEPA's procedural requirements exist to prevent "precipitous federal decision making at the agency level which may fail to adequately consider the environmental ramifications of agency actions." Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric., 817 F.2d at 620. "NEPA merely prohibits uninformed -- rather than unwise -- agency action." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989)(Stevens, J.).

Regulations provide guidance on NEPA's implementation. See 40 C.F.R. §§ 1500-08. Those regulations are entitled to substantial deference. See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355-56 (1989); Andrus v. Sierra Club, 442 U.S. 347, 358 (1979). CEQ regulations set out three ways that agencies can comply with § 4332(C)'s "detailed statement" requirement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). First, an agency can satisfy that statutory requirement by preparing a detailed statement, called an EIS, that conforms to regulations regarding its format, content, and methodology. See 40 C.F.R. § 1502, 1508.11.

Second, if an agency is unsure whether an EIS is required for a proposed action, i.e., whether the action qualifies as a "major Federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), the agency may prepare an EA, see 40 C.F.R. §§ 1503(a), 1501.4(b). An EA "provide[s] sufficient evidence and analysis for determining whether to prepare" an EIS or, alternatively, "a finding of no significant impact," 40 C.F.R. § 1508.9(a)(1), which is "a document . . . briefly presenting the reasons why an action . . . will not have a significant effect on the human environment [such that an EIS] therefore will not be prepared," 40 C.F.R. § 1508.13. See 40 C.F.R. § 1502.2 (stating that, "[a]s in a finding of no significant impact," in an EIS' treatment of "other than significant issues[,] . . . there should be

only enough discussion to show why more study is not warranted"). EAs also facilitate the preparation of an EIS when one is necessary, and they help agencies comply with NEPA when an EIS is not necessary. See 40 C.F.R. § 1508.9(a)(2)-(3). An EA needs to include "brief discussions of the need for the proposal, of alternatives as required by [42 U.S.C. § 4332(E), and] of the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(b). Section 4332(E) requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E).

Third, an agency can determine that an EIS is not required without needing to prepare an EA when the proposed action falls within a categorical exclusion ("CE"). See 40 C.F.R. § 1508.4. A CE is "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in [NEPA] procedures adopted by a Federal agency." 40 C.F.R. § 1508.4. See Utah Envtl. Cong. v. Russell, 518 F.3d 817, 821 (10th Cir. 2008); WildEarth Guardians v. U.S. Forest Serv., 668 F. Supp. 2d at 1321-22.

LAW REGARDING THE NHPA

The NHPA "requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishes the Advisory Council on Historic Preservation . . . to administer the Act." Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 755 (D.C. Cir. 2003)(internal quotation marks omitted). Like NEPA, the NHPA is a procedural statute, and not a substantive one. See Friends Of The Atglen-Susquehanna Trail v. Surface Transp. Bd., 252 F.3d 246, 252 (3d Cir. 2001). In general, the NHPA requires that a federal agency take into

account any adverse effects on historical or culturally significant sites before taking action that might harm such sites. See Friends Of The Atglen-Susquehanna Trail v. Surface Transp. Bd., 252 F.3d at 252; Pueblo of Sandia v. United States, 50 F.3d 856, 859 (10th Cir. 1995). To comply with this requirement, federal agencies must engage in consultation with parties such as the SHPO and any potentially affected Indian Tribes -- through a process referred to as "Section 106 consultation" -- to determine whether historic properties or traditional cultural properties exist in the area of the planned activity.

Under § 106 of the NHPA, the Secretary of the Interior must consult with the SHPO on "federal undertakings" that may affect historic properties. The Department of the Interior must identify the historic properties that the undertaking might affect, assess the property's historical significance, determine if there will be an adverse effect to the property, consider ways to reduce or avoid such effects, and provide an opportunity for the Advisory Council on Historic Preservation to review and comment on the undertaking. This process should include "background research, consultation, oral history interviews, sample field investigations, and field surveys." 36 C.F.R. § 800.4.

An Indian Tribe may assume all or part of the SHPO's functions with regard to Tribal lands if, among other things, the Tribe designates a Tribal preservation official to administer the program. In such cases, the Tribal Historic Preservation Officer ("THPO") is the official representative for purposes of § 106 consultation. 36 C.F.R. §§ 800.2(c)(2)(i)(A), 800.3(c)(1). Consultation with an Indian Tribe must recognize the government-to-government relationship between the United States and the Tribe, and the consultation should be conducted in a manner "sensitive to the concerns and needs of the Indian tribe." 36 C.F.R. § 800.2(c)(2)(ii).

Consultation should provide the Tribe with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii). Tribal consultation should be conducted concurrently with NEPA analyses, as historic and cultural resources are expressly included among the factors to be considered in an EIS. See 36 C.F.R. § 800.8.

ANALYSIS

The Court concludes that the Plaintiffs have standing, because they have shown an "alleged increased environmental risk" and an aesthetic injury, which are constitutionally cognizable injuries, Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996); see Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1992)("Lujan"), that are fairly traceable to the "agency's alleged failure to follow the National Environmental Policy Act's procedures," Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452, and which a favorable ruling could likely redress. The Plaintiffs are also challenging final agency action within the APA's meaning for most, but not all, of the relevant APDs. The Court also concludes that the Plaintiffs' claims are not moot, except as to the challenged wells which have been permanently abandoned, because only permanent abandonment makes it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," Friends of the Earth, Inc. v Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000)(internal quotations omitted).

The BLM did not violate NEPA, because the BLM appropriately analyzed the impacts of horizontal drilling and hydraulic fracturing, and "any difference in environmental impacts between the new technology and the technology that the 2003 RMP/EIS analyzed are insignificant," Dine, 2015 WL 4997207, at *45. The BLM complied with NEPA's public involvement requirements, because it posted information about its proposed wells on its public website and invited the public to meetings about proposed wells. Although there was a delay in furnishing final EAs to the public, such delay did not violate NEPA, as the BLM made those EAs available promptly on request. The BLM also did not violate the NHPA, because it defined an APE for each well, considered the effects on historic sites within that APE, and made determinations of no effect, no adverse effect, and adverse effect, as appropriate. Because Chaco Park and its satellites are outside those wells' APEs, the BLM was not required to consider the indirect effects the wells would have on Chaco Park and its satellites. The APEs drawn for those wells did not violate the NHPA by excluding Chaco Park and its satellites, because the BLM followed the 2004 and 2014 protocols in drawing those APEs. Finally, if the Court were to conclude that the BLM had violated NEPA or the NHPA, vacatur with remand would be the proper remedy for the NEPA violation, but remand without vacatur would be the proper remedy for the NHPA violation. The balance of harms favors vacatur for a potential NEPA violation, but not for the aesthetic NHPA violation. Accordingly, vacatur is proper for a NEPA violation, but not the NHPA violation. A permanent injunction would be improper, because the presumption favors vacatur and, in this case, vacatur more properly addresses the harm.

I. THE PLAINTIFFS HAVE STANDING TO PURSUE THEIR NEPA AND NHPA CLAIMS.

The Court concludes that the Plaintiffs have standing to pursue both their NEPA and NHPA claims. The "irreducible constitutional minimum of standing contains three elements." Lujan, 504 U.S. at 560. The first is a concrete and particularized injury, which is "actual or imminent," and not "conjectural or hypothetical." Lujan, 504 U.S. at 560. "[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity of it." Lujan, 504 U.S. at 555-56. "While generalized harm to the forest or the environment will not alone support standing, if that harm affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice." Summers v. Earth Island Institute, 555 U.S. 488, 494 (2009). That a plaintiff "had visited the areas of the projects before the projects commenced proves nothing." Lujan, 504 U.S. at 564 (internal quotation marks omitted). Professing an intent "to return to the places they had visited before . . . is simply not enough. Such 'some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require." Lujan, 504 U.S. at 564 (emphasis in original).

The Tenth Circuit has held that, "under the National Environmental Policy Act, an injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury in fact under Article III." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. "[A] plaintiff must not only show that the agency's disregard of a procedural requirement results in an increased risk of environmental harm, but a plaintiff must also show the increased risk is to the litigant's concrete and particularized interests." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. "To demonstrate that the increased risk of harm injures

the plaintiff's concrete interests, the litigant must establish either its 'geographical nexus' to, or actual use of the site where the agency will take or has taken action such that it may be expected to suffer the environmental consequences of the action." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449.

> Ultimately then, the injury in fact prong of the standing test of Article III breaks down into two parts: (1) the litigant must show that in making its decision without following the National Environmental Policy Act's Procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm; and (2) the litigant must show that the increased risk of environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.

Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449.

Second, the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (alterations in original). "[O]nce the plaintiff has established the likelihood of the increased risk for purposes of injury in fact, to establish causation . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow the National Environmental Policy Act's procedures." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452.

Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561 (internal quotations omitted). Under NEPA, "a plaintiff need not establish that the ultimate agency decision would change upon National Environmental Policy Act compliance. Rather, the [plaintiff] must establish . . . that its injury would be redressed by a favorable decision requiring the [agency] to comply with National Environmental Policy Act[] procedures." Committee to Save the Rio Hondo v. Lucero,

102 F.3d at 452 (alterations added). "The party invoking federal jurisdiction bears the burden of establishing these elements." Lujan, 504 U.S. at 561.

Here, the Plaintiffs have standing to pursue their NEPA claim. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 343 (1977). First, the interests that the plaintiff organizations seek to protect are clearly germane to the organizations' purposes. Diné CARE's stated goal is "to protect all life in its ancestral homeland by empowering local and traditional people to organize, speak out, and assure conservation and stewardship of the environment through civic involvement . . . and oversight of government agencies' compliance with all applicable environmental laws." Dine, 2015 WL 4997207, at *2. San Juan Alliance is an organization dedicated to social, economic, and environmental justice in the San Juan Basin. See Dine, 2015 WL 4997207, at *2. WildEarth Guardians' mission is "to protect and restore the wildlife, wild places, wild rivers, and the health of the American West." Nichols Decl. ¶ 2, at 2. The Natural Resources Defense Council's mission is "to safeguard the Earth; its people, its plants and animals, and the natural systems on which all life depends." Trujillo Decl. ¶ 6, at 2. Protecting Chaco Park and the Chaco Canyon area/region from damaging oil and gas operations "is paradigmatic" of the organization's efforts "to defend endangered wild places and natural habitats." Trujillo Decl. ¶ 7, at 2. The organizations' interests in this suit are therefore "germane

to the organization[s'] purpose[s]." Hunt v. Washington State Apple Advertising Com'n, 432 U.S. at 343 (alterations added).

Second, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Com'n, 432 U.S. at 343. The parties do not contest this point, and the Court sees no reason why individual members would need to participate in this suit. The crux of the standing issue is thus whether the plaintiff organizations' members "would otherwise have standing to sue in their own right." Hunt v. Washington State Apple Advertising Com'n, 432 U.S. at 343.

A. THE PLAINTIFFS HAVE SHOWN AN INJURY IN FACT.

First, the Plaintiffs have shown that, "in making its decision without following the National Environmental Policy Act's Procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. Here, the agency decision that the Plaintiffs challenge under NEPA is the "BLM's ongoing approval of Mancos Shale drilling permits." Diné Brief at 25. Eisenfeld asserts that the BLM's approval of these APDs "threatens to irreparably harm [his] personal and professional interest in an intact Chacoan landscape . . . by impacting important environmental (air, water, treasured landscapes), historical, and cultural resources." Eisenfeld Decl. ¶ 9, at 5 (alteration added). Eisenfeld also alleges that the BLM has allowed "APD proponents to flare natural gas in the greater Chaco area when drilling for oil." Eisenfeld Decl. ¶ 13, at 6. According to Eisenfeld, this flaring harms the air quality, Eisenfeld's health, and "compromises the night sky" in the Chaco Park area. Eisenfeld Decl. ¶ 13, at 6-7.

Nichols does not recall any oil and gas development in the area in 2008, but, by 2014, he asserts that, "there were rigs seemingly all over the place, around Nageezi and the road to [Chaco Park]." Nichols Decl. ¶ 7, at 6-7. According to Nichols, during his last visit, "there were extensive oil and gas well facilities and infrastructure in the area, particularly around Nageezi and Lybrook." Nichols Decl. ¶ 7, at 7. According to Nichols, this new oil-and-gas development "has detracted significantly from [his] enjoyment of the Greater Chaco area," and has "significantly eroded the natural and remote nature of the region." Nichols Decl. ¶ 8, at 7 (alteration added). According to Nichols, the oil-and-gas development has also created "smells, dust, and more industrialization," which is "aesthetically displeasing." Nichols Decl. ¶ 9, at 7.

According to Green, oil-and-gas development "in the Chaco Canyon area/region and [Chaco Park]" would harm Green's visitor experience, because of potential air, noise, and light pollution, large truck traffic, and the possibility of "soil and groundwater contamination due to drilling practices." Green Decl. ¶ 7, at 2-3. Green states that she also has "concerns" regarding the use of hydraulic fracturing "in the Chaco Canyon area/region and Chaco [Park]," because fracking may contaminate the area's groundwater. Green Decl. ¶ 8, at 3.

According to Miura, oil-and-gas development "in the Chaco Canyon area/region and [Chaco Park]" would "ruin the views and tranquility of the Chaco Canyon area." Miura Decl. ¶ 6, at 2. Pinto states that she regularly visits Chaco Park and enjoys observing the dark sky from there, but that "the lights staged at well sites can be as bright as stadium lights." Pinto Decl. ¶ 11, at 3. Pinto states that she has also dealt with these bright lights being pointed at the highway, prohibiting her from seeing the road. See Pinto Decl. ¶ 11, at 3.

These alleged injuries are ones of "alleged increased environmental risk" or aesthetic injury, which are both cognizable under Article III. Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. See Lujan, 504 U.S. at 562-63. The Plaintiffs also show that the alleged increased environmental risk exists because of the BLM's alleged failure to follow NEPA. See Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 450. Eisenfeld asserts that "the agency's current 2003 RMP never contemplated or analyzed oil development in the greater Chaco area as required by NEPA." Eisenfeld Decl. ¶ 7, at 9. See Diné Brief at 17 ("BLM continues to approve Mancos Shale drilling permits at an intense pace and without the required environmental review under NEPA."). The Plaintiffs have therefore established that "the affiants suffer a threatened increased risk of environmental harm due to the [BLM's] alleged failure to follow the National Environmental Policy Act's procedures." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 450.

That oil-and-gas production has existed in the San Juan Basin for over fifty years and thousands of wells are currently producing there does not alter that result. See PRMP at 1 (A.R.0001945). Importantly, the Tenth Circuit's injury-in-fact test under NEPA requires showing an "increased risk of environmental harm." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449 (emphasis added). Regardless whether some risk of harm may already exist, adding a few hundred wells increases the risk. In short, that other producing wells exist in the area is immaterial for injury-in-fact purposes.

The Plaintiffs must also show that "the increased risk of environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. The

Plaintiffs have established a geographical nexus. Eisenfeld has visited Chaco Park at least annually since 1997. See Eisenfeld Decl. ¶ 5, at 2. He also regularly visits "the greater Chaco region, including areas in and around Counselor, Lybrook, and Nageezi." Eisenfeld Decl. ¶ 5, at 2. He last visited the "Nageezi area" on April 20, 2017, and intends to return in May and June of 2017. Eisenfeld Decl. ¶ 5, at 2.

Nichols visited Chaco Park in March, 2008, March, 2012, April, 2013, and May, 2015. See Nichols Decl. ¶ 5, at 4-5. Nichols intends to continue visiting "the Greater Chaco region, including [Chaco Park] and its outliers . . . at least once a year for the foreseeable future." Nichols Decl. ¶ 6, at 6. He intends to visit "this area" again in June, 2017, when he has a trip planned. Nichols Decl. ¶ 6, at 6.

Green visits Chaco Park "at least once a year." Green Decl. ¶ 4, at 2. Green intends to return to Chaco Park "this fall" -- referring to the fall of 2017 -- and "in the future." Green Decl. ¶ 6, at 2. Miura has visited Chaco Park, and plans to return there "next year, and in the future." Miura Decl. ¶ 5, at 2. Pinto regularly visits Chaco Park and enjoys observing the dark sky from there. See Pinto Decl. ¶ 11, at 3.

Given that the affiants visit Chaco Park and the Nageezi area, and at least several of them have plans to return, the question is whether Chaco Park and the Nageezi area have a geographical nexus to the agency action's site, i.e. the challenged APDs' well sites. See Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. It is approximately ten miles from Chaco Park's edge to the nearest challenged APD's well site. See Declaration of Matthew A. Dorsey at 6 (executed June 2, 2017), filed June 9, 2017 (Doc. 113-1)("Map"). It is approximately fifteen miles from the same edge of Chaco Park, in roughly the same direction, to

Nageezi. See Google Maps, https://www.google.com/maps/@36.1761681,-107.8701589,11z. The Court therefore estimates that it is approximately five miles from Nageezi to the above-mentioned well site.

The Tenth Circuit has held that, when affiants lived twelve to fifteen miles downstream of the affected area, they had a geographical nexus to that area, because "the affiants live immediately downstream from and share the same watershed with the [affected area, and] they may be expected to suffer the effects of decreased water quality." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 450 (alterations added). Similarly, the effects of new wells resulting from the challenged APDs could travel ten miles, causing potential air, noise, and light pollution, and "the possibility of soil and groundwater contamination due to drilling practices," in Chaco Park or in the Nageezi area. Green Decl. ¶ 7, at 2-3. The Plaintiffs have therefore established an injury in fact for Article III purposes. See Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 450-51.

B. THE PLAINTIFFS HAVE SHOWN CAUSATION.

The injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560 (alterations in original). In the NEPA context, "once the plaintiff has established the likelihood of the increased risk for purposes of injury in fact, to establish causation . . . the plaintiff need only trace the risk of harm to the agency's alleged failure to follow the National Environmental Policy Act's procedures." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452. Here, the injury is the increased risk of environmental harm from additional oil-and-gas wells drilled near Chaco Park and near Nageezi. See, e.g., Green Decl. ¶ 7, at 2-3 (asserting that

oil-and-gas development "in the Chaco Canyon area/region and [Chaco Park]" would harm Green's visitor experience, because of potential air, noise, and light pollution, large truck traffic, and the possibility of "soil and groundwater contamination due to drilling practices"). The Plaintiffs have asserted that the "BLM's ongoing approval of Mancos Shale drilling permits . . . violates NEPA's requirement that the agency take a hard look at the cumulative impacts of an action prior to making an irretrievable commitment of resources." Diné Brief at 25-26 (citing 42 U.S.C. § 4332(2)(C)(v); 40 C.F.R. § 1508.7). In other words, the Plaintiffs contend that the BLM's granting of APDs allegedly violates NEPA. Because these drilling permits allow operators to drill wells near Chaco Park and near Nageezi, see Map at 6, the Plaintiffs have traced the risk of environmental harm to the BLM's alleged failure to follow NEPA's procedures. See Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452.

C. THE PLAINTIFFS HAVE SHOWN REDRESSABILITY.

To establish redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 561 (internal quotations omitted). Under NEPA, "a plaintiff need not establish that the ultimate agency decision would change upon National Environmental Policy Act compliance. Rather, the [plaintiff] must establish . . . that its injury would be redressed by a favorable decision requiring the [agency] to comply with National Environmental Policy Act[] procedures." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452 (alterations added). That an agency may not change its decision to allow operations "after preparing an environmental impact statement is immaterial." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452.

Here, the injury of an increased risk of environmental harm to Chaco Park and to the Nageezi area would likely be redressed if the Court rules that the BLM has not followed NEPA's procedures, because ordering "[c]ompliance with the National Environmental Policy Act would avert the possibility that the [BLM] may have overlooked significant environmental consequences of its action," that is, granting the APDs. Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 452. The Court therefore concludes that the Plaintiffs have standing to pursue their NEPA claim.

The Supreme "Court's standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press." DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006). For substantially the same reasons that the Plaintiffs have standing under NEPA, they also have standing under the NHPA. The Plaintiffs allege that the "BLM's APD approvals violate the NHPA . . . by failing to identify adverse effects to historic properties." Diné Brief at 47. A historic property includes those in the "National Register of Historic Places maintained by the Secretary of the Interior." 36 C.F.R. § 800.16(l)(1). Chaco Park is a place that fits this definition. See World Heritage List Nomination Submitted by the United States of America Chaco Culture National Historical Park at 26 (dated November, 1984)(A.R.0217996)(noting that Chaco Park "is on the National Register of Historic Places"). For Article III purposes, the injury remains an increased risk of environmental damage to Chaco Park, which is fairly traceable to the BLM's approval of APDs near the park. See Map at 6. The injury would likely be redressed if the Court ruled that the BLM had not followed the NHPA's procedures, because ordering compliance with the NHPA would likely avert the possibility that the BLM overlooked the environmental consequences of granting the APDs. See Dine, 2015 WL 4997207 ("In general,

the NHPA requires that a federal agency take into account any adverse effects on historical or culturally significant sites before taking action that might harm such sites.").

II. THE PLAINTIFFS MAY CHALLENGE MOST, BUT NOT ALL, OF THE APDS UNDER THE APA.

"In addition to Article III standing requirements, a plaintiff seeking judicial review pursuant to the APA must (i) identify some final agency action and (ii) demonstrate that its claims fall within the zone of interests protected by the statute forming the basis of its claims." Catron Cty. Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1434 (10th Cir. 1996)(internal quotation marks omitted).

> In order to determine if an agency action is final, we look to whether its impact is direct and immediate, whether the action mark[s] the consummation of the agency's decisionmaking process, and whether the action is one by which rights or obligations have been determined, or from which legal consequences will flow.

Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d 1171, 1173-74 (10th Cir. 2000)(internal quotations and citations omitted). "An agency's intent to take action if requested does not constitute final agency action." Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d at 1174.

First, the Plaintiffs' claims against all of the APDs fall within the zones of interest that NEPA and the NHPA protect. NEPA's purpose is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere. . . ." 42 U.S.C. § 4321. According to the NHPA, "it is the policy of the Federal Government . . . to . . . provide leadership in the preservation of the historic property of the United States . . . [and to] administer federally owned, administered, or controlled historic property in a spirit of

stewardship for the inspiration and benefit of present and future generations." 54 U.S.C. § 300101(2)-(3)(alteration added). The BLM does not contest that the Plaintiffs' claims fall within the NEPA and NHPA zones of interest for APA purposes. Given the Plaintiffs' allegations of environmental harm to historic sites including Chaco Park, see, e.g., Green Decl. ¶ 7, at 2-3 (alleging that oil-and-gas development "in the Chaco Canyon area/region and [Chaco Park]" would harm Green's visitor experience, because of potential air, noise, and light pollution, large truck traffic, and the possibility of "soil and groundwater contamination due to drilling practices"), the Court concludes that the Plaintiffs' claims fall within the zones of interest that NEPA and the NHPA protect. Catron Cty. Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Serv., 75 F.3d at 1433 (concluding that an environmental injury falls "well within the zone of interests protected by NEPA").

The Plaintiffs have not, however, challenged final agency action with respect to every APD. The BLM has categorized the APDs in this case as follows: "Producing," meaning the well is currently producing; "Approved-Pending Drilling," meaning the BLM has approved the APD but the well has not yet been drilled, "Drilled but not Completed," meaning the well has been drilled but is not yet completed; "Drilled but Temp. Abandon," meaning the well has been drilled but has been temporarily abandoned; "Cancelled," meaning that the EA has been cancelled; "Abandoned," meaning the well has been permanently abandoned; "Shut-in," meaning the well has been shut-in; "Rescinded," meaning the BLM's decision approving the APD has been rescinded; "Withdrawn," meaning the operator has withdrawn the APD; "No APD package," meaning the operator has not submitted the APD package to the BLM; and "Unapproved APD," meaning "the APD package has been submitted to BLM but it has not been

approved or denied." Declaration of Sarah Scott ¶ 8, at 4-5 (executed June 2, 2017), filed June 9, 2017 (Doc. 113-3)("Scott Decl."). The Court concludes that challenging an unapproved APD, a withdrawn APD, or an APD in which the operator has not submitted an APD package to the BLM is not challenging final agency action, because, in such instances, "the consummation of the agency's decisionmaking process" has not yet occurred, and no "rights or obligations have been determined." Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d at 1173-74. Further, "[a]n agency's intent to take action if requested does not constitute final agency action." Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d at 1174.

Additionally, the "Plaintiffs have the burden of identifying specific federal conduct and explaining how it is final agency action within the meaning of [the APA]." Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d at 1173 (alterations added)(internal quotations omitted). Here, the Plaintiffs nakedly assert that the BLM is "mistaken" that a number of the APDs lack final agency action and provide no explanation. Reply at 30. Not only is there no explanation why APDs categorized as "Withdrawn," "No APD package," and "Unapproved APD" are final agency action, but there is no explanation regarding an APD categorized as "cancelled" or "rescinded." Although the BLM defines cancelled only as "the EA has been cancelled," Scott Decl. ¶ 8, at 4, without explaining who or how the EA was cancelled, and defines rescinded only as "the decision approving the APD has been rescinded," Scott Decl. ¶ 8, at 4, it is not the BLM's burden to explain how these decision categories are challengeable as final agency action. Rather, the "Plaintiffs have the burden of identifying specific federal conduct and explaining how it is final agency action within the meaning of [the APA]." Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d at 1173. Because the

Plaintiffs have provided no explanation how APDs categorized as cancelled or rescinded are final agency action, they have not met their burden.

For these reasons, the Plaintiffs "lack the statutory standing required to bring this claim under the APA," Colorado Farm Bureau Federation v. U.S. Forest Service, 220 F.3d at 1174, in regards to any APD listed as "Withdrawn," "No APD package," "Unapproved APD," "Cancelled," or "Rescinded." Scott Decl. ¶ 8, at 4-5. The Court therefore lacks jurisdiction to adjudicate them.[17] See Chemical Weapons Group, Inc. (CWWG) v. U.S. Dept. of the Army, 111 F.3d 1485, 1494 (10th Cir. 1997)("[T]hey must challenge final agency action to confer upon the district court jurisdiction under the Administrative Procedures Act.")(internal quotations omitted).

III. THE PLAINTIFFS' APD CHALLENGES ARE NOT MOOT, EXCEPT AS TO PERMANENTLY ABANDONED WELLS.

The Court concludes that the Plaintiffs' APD challenges are not moot, except as to permanently abandoned wells. Article III, Section 2 of the Constitution limits the federal courts'

[17]These wells are Lybrook O30-2307 02H (Withdrawn); Nageezi Unit L10-2309 2H (Withdrawn); Lybrook E29-2306 02H (No APD Package); Lybrook E29-2306 04H (No APD Package); Lybrook E27-2306 04H; (No APD Package); Lybrook M27-2306 03H (No APD Package); Lybrook E27-2306 02H (No APD Package); Lybrook M28-2306 04H (No APD Package); Lybrook 23-8-16 #201H (No APD Package); Lybrook P12-2206 03H (No APD Package); Lybrook N02-2206 02H (Unapproved APD); Lybrook N02-2206 01H (Unapproved APD); Kaleigh 1H and 2H (ATS Number ATS-F010-14-353)(No APD Package); Kaleigh 1H and 2H (ATS Number ATS-F010-14-354)(No APD Package); W Lybrook UT 764H (No APD Package); W Lybrook UT 766H (No APD Package); Lybrook D34-2307 02H (No APD Package); Lybrook D34-2307 03H (No APD Package); Lybrook D34-2307 04H (No APD Package); Lybrook L34-2307 02H (No APD Package); Lybrook L34-2307 03H (No APD Package); Lybrook L34-2307 04H (No APD Package); Nageezi Unit L10-2309 4H (Cancelled); Chaco 2307-06G 274H (Rescinded); Lybrook B14-2206 02H (Cancelled); Lybrook B14-2206 01H (Cancelled); Lybrook M12-2206 01H (Cancelled); and Lybrook N12-2206 01H (Cancelled). See Scott Decl. at 9, 12-15.

jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2. "Federal courts are without authority to decide questions that cannot affect the rights of litigants in the case before them." Ford v. Sully, 773 F. Supp. 1457, 1464 (D. Kan. 1991)(O'Connor, C.J.)(citing North Carolina v. Rice, 404 U.S. 244, 246 (1971)). See Johansen v. City of Bartlesville, Okla., 862 F.2d 1423, 1426 (10th Cir. 1988); Johnson v. Riveland, 855 F.2d 1477, 1480 (10th Cir. 1988). "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." Arizonians for Official English v. Ariz., 520 U.S. 43, 67 (1997). See Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096, 1121 (10th Cir. 2010). Accordingly, if a case becomes moot at any stage, the court does not have jurisdiction to hear the case. See Brown v. Buhman, 822 F.3d 1151, 1165 (10th Cir. 2016)("Mootness deprives federal courts of jurisdiction."). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)(citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

An exception to the mootness doctrine is voluntary cessation. A "defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189 (quotation marks omitted).

> In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189. (internal quotation marks omitted). "The heavy burden of persuad[ing] the court that the challenged conduct cannot reasonably be expected to start up again lies with the parties asserting mootness." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189 (alteration in original)(internal quotation marks omitted).

The Court concludes that the Plaintiffs' challenges to APDs of permanently abandoned wells are moot. Challenges to wells currently producing, APDs that have been approved but drilling is pending, wells that have been drilled but not yet completed, wells that have been temporarily abandoned, and shut-in wells, however, are not moot. As explained above, the Plaintiffs' injury is "an injury of alleged increased environmental risks." Committee to Save the Rio Hondo v. Lucero, 102 F.3d at 449. This injury persists with respect to producing wells, wells in which the BLM has approved the APD but drilling is pending, and wells that are drilled but not yet complete, because, in all such situations, the increased risk of environmental harm remains.

Under the voluntary cessation doctrine, a challenge to a drilled but temporarily abandoned well is not moot, because temporary abandonment does not make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189 (internal quotation marks omitted). On the contrary, categorizing a well as "temporarily abandoned," Scott Decl. ¶ 8, at 4, implies that drilling may re-commence, so the allegedly wrongful conduct may recur. In contrast, a "permanently abandoned" well, Scott Decl. ¶ 8, at 4, renders a challenge moot, because permanent abandonment, as distinguished from "temporarily abandoned," Scott Decl.

¶ 8, at 4, shows that "the allegedly wrongful behavior could not reasonably be expected to recur." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189 (internal quotation marks omitted). Finally, the wells classified as "shut-in" are not moot, but, rather, are another example of voluntary cessation. The word "shut-in" may describe a spectrum of wells, some only temporarily shut-in for mechanical or engineering reasons, or some shut-in for longer periods, such as no production. Shut-in wells can, however, theoretically, be re-opened, and the "heavy burden of persuad[ing] the court that the challenged conduct cannot reasonably be expected to start up again lies with the parties asserting mootness." Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189 (alteration in original)(internal quotation marks omitted). The BLM has not explained if the wells classified as shut-in might be re-opened, or if they are permanently shut-in, so the Court cannot properly conclude that "the allegedly wrongful behavior could not reasonably be expected to recur."[18] Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. at 189 (internal quotation marks omitted). For these reasons, only the challenges to permanently abandoned wells are moot.[19] The Court therefore has no jurisdiction to adjudicate them. See Brown v. Buhman, 822 F.3d at 1165 ("Mootness deprives federal courts of jurisdiction.").

[18]If a shut-in well required a new APD to re-open the well, then the challenge to an APD of a shut-in well might be moot. The Court could not locate anything in the record, however, suggesting that a new APD is required to re-open a shut-in well.

[19]These wells are Escrito D34-2409 03H (Abandoned); Chaco 2408-33M 120H (Abandoned); Rosa Unit 648H (Abandoned); and Chaco 2407-35I-901 (Abandoned). See Scott Decl. at 7, 11-13.

IV. THE BLM TOOK A HARD LOOK AT THE WELLS' EFFECTS, SO COMPLIED WITH NEPA.[20]

As the Court previously observed,

> This case ultimately boils down to whether the BLM's FONSIs -- which allowed it to rely on the site-specific EAs rather than commissioning an entirely new EIS -- were arbitrary and capricious, or were the result of the BLM's failure to take a hard look at the environmental consequences of approving the challenged APDs.

Dine, 2015 WL 4997207, at *40. The relevant regulation states:

> An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. **An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects.** Tiering to the programmatic or broader-scope environmental impact statement **would allow the preparation of an environmental assessment and a finding of no significant**

[20]The API argues that "the law of the case doctrine resolves the majority of Plaintiffs' claims." API Response at 2. The Court would be remiss, however, to rely only on the law-of-the-case doctrine in adjudicating the Motion, as the Tenth Circuit noted in Diné II that a different outcome could result if the Plaintiffs developed their arguments. See Dine II, 839 F.3d at 1285. As the Court has previously observed, "[u]nlike vertical *stare decisis*" law of the case "is a flexible [rule] that allows courts to depart from erroneous prior rulings, as the underlying policy of the rule is one of efficiency, not restraint of judicial power." Mocek v. City of Albuquerque, 3 F. Supp. 3d 1046 (D.N.M. 2014)(Browning, J.)(italics in original)(quoting Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 823 (10th Cir. 2007)). While the Court should depart from an appellate court's ruling on the same issue in the same case in only few circumstances, one of those circumstances is if the evidence adduced or presented substantially diverges from the evidence presented before the appellate court. The Court must, thus, engage in the analysis it does to ensure that there are no new arguments or evidence presented.

The Court also concludes that law of the case does not apply here, because the Court is not resolving the "same issues" in "subsequent phases of the same case." Been v. O.K. Industries, Inc., 495 F.3d 1217, 1224 (10th Cir. 2007). At the preliminary injunction stage, the Court was deciding whether the Plaintiffs were substantially likely to succeed on the merits. Here, in contrast, the Court is deciding whether the Plaintiffs in fact succeed on the merits. There is a difference between the two issues, otherwise preliminary injunction losers would never be able to continue their claim to the merits phase, as law of the case would always preclude continued litigation. Accordingly, the Court conducts the following analysis.

> **impact for the individual proposed action, so long as any previously unanalyzed effects are not significant.** A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a "finding of no new significant impact."

43 C.F.R. § 46.140(c)(emphasis added). Essentially, the BLM must conduct an EA-level analysis to determine whether any new technology, not analyzed in the EIS, has significant effects. If the new technology has significant effects, the BLM must create a new EIS to analyze those effects. If the new technology does not have significant effects, the BLM may issue a FONSI. See 40 C.F.R. § 1508.9(a)(1)(explaining that an EA serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact"); 42 U.S.C. § 4332(c)(explaining that agencies shall create an EIS for "actions significantly affecting the quality of the human environment"); 40 C.F.R. § 1508.13 (stating that a FONSI explains why, based on an EA, an action is not one significantly affecting the quality of the human environment such that an EIS is unnecessary).

For this case's purposes, the Court must decide whether the EAs determined that new developments in horizontal drilling and fracking technology as used after the 2003 RMP/EIS was issued have no significant environmental effects, compared to the 2003 technology, which would enable the BLM to properly issue FONSIs, see 40 C.F.R. § 1508.13, and would allow the BLM to properly tier the EAs to the 2003 RMP/EIS, see 43 C.F.R. § 46.140(c). The Court has previously noted that the "BLM has both (i) analyzed the impacts of directionally drilled and fracked wells, at the EA level; and (ii) found, again at the EA level, that any difference in environmental impacts between the new technology and the technology that the 2003 RMP/EIS analyzed are insignificant." Dine, 2015 WL 4997207, at *45. The Court stands by this

determination. For example, the EAs explain that "fracking is a common process in the San Juan Basin and applied to nearly all wells drilled. The producing zone targeted by the proposed project is well below any underground sources of drinking water. The Mancos Shale formation is also overlain by a continuous confining layer." 2014 EA at 26 (A.R.0140173). The EAs further explain that there exists "an impermeable layer that isolates the Mancos Shale . . . formations from both identified sources of drinking water and surface water." 2014 EA at 26-27 (A.R.0140173-74). For these reasons, "no impacts to surface water or freshwater-bearing groundwater aquifers are expected to occur from fracking of the proposed wells." 2014 EA at 27 (A.R.0140174). See Environmental Assessment DOI-BLM-NM-F010-2015-0060, at 25 (dated January, 2015)(A.R.0141950)(same); Environmental Assessment DOI-BLM-NM-F010-2015-0045, at 7 (dated January, 2015)(A.R.0141288)(same).

Other EAs explain that "horizontal drilling applications throughout the San Juan Basin have become relatively common. Generally, the use of this technology is applied when it is necessary to avoid or minimize impacts to surface resources." 2014 EA at 17 (A.R.0140164). See Environmental Assessment DOI-BLM-NM-F010-2015-0060, at 17 (dated January, 2015)(A.R.0141942)(same); Environmental Assessment DOI-BLM-NM-F010-2015-0066, at 20 (dated February, 2015)(A.R.0143938)(same). This result is because "horizontal drilling often allows for 'twinning,' or drilling two or more wells from one shared well pad." 2014 EA at 17 (A.R.0140164). Indeed, San Juan Alliance once stated that "[a]lternative drilling methods such as horizontal drilling would, if used in the San Juan basin, reduce adverse impacts such as noise, air pollution, and scarred landscapes from wells and roads. Why can't several wells be drilled from one location? The BLM must consider/require feasible technical alternatives such as

horizontal drilling." San Juan Comment at P-123 (A.R.0001847). Another EA says that estimated C02 emissions from a horizontal well would represent only a "0.0008 percent increase in New Mexico C02 emissions." Environmental Assessment DOI-BLM-NM-F010-2015-0045, at 22 (dated January, 2015)(A.R.0141356). On this record, the Court concludes that the BLM's EAs "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," 40 C.F.R. § 1508.9(a)(1), and that the BLM properly tiered the EAs to the 2003 RMP/EIS, because "any previously unanalyzed effects are not significant." 43 C.F.R. § 46.140(c).

Further, as the Court has previously observed, fracking "has been around for a very long time." Dine, 2015 WL 4997207, at *44. Indeed, since fracking was introduced in 1949, "nearly every well in the San Juan Basin has been fracture stimulated." FONSI at 2 (A.R.0232032). "Effective and economical directional drilling is relatively new, but that technology is a net positive for the environment." Dine, 2015 WL 4997207, at *44. See San Juan Comment at P-123 (A.R.0001847)("Alternative drilling methods such as horizontal drilling would, if used in the San Juan basin, reduce adverse impacts such as noise, air pollution, and scarred landscapes from wells and roads."); 2014 EA at 17 (A.R.0140164)(explaining that "horizontal drilling often allows for 'twinning,' or drilling two or more wells from one shared well pad"). Indeed, the record contains many examples explaining how the use of horizontal drilling and fracking since the 2003 RMP/EIS was issued do not significantly harm the environment. See, e.g., White Paper at 16 (A.R.0149876)("The development of a hydrocarbon resource utilizing horizontal wells, drilled from multi-well pads, and stimulating by fracking minimizes the number of wells and surface disturbance needed to fully develop that resource, therefore minimizing biological

impacts."); White Paper at 22 (A.R.0149882)(explaining that "[t]hrough the practices of reuse and recycling, water resources [used for fracking] can be preserved," and that the "use of other substances acting as the fracking fluid . . . can also reduce the demand on water supplies.")(alterations added).

Additionally, "as the district court pointed out, only 3,860 of the anticipated 9,942 new wells in the planning area were drilled in the twelve years between the issuance of the 2003 RMP and the court's consideration of this issue in 2015." Diné II, 839 F.3d at 1283. "Thus, even with increased drilling in the Mancos Shale formation and the switch to horizontal drilling and multi-stage fracturing, the overall amount of the drilling and related surface impacts are still well within the anticipated level." Diné II, 839 F.3d at 1283.

> As for the possibly increased air quality impacts, the agency considered these impacts in its environmental assessments and concluded that the approved drilling activities would not cause a significant increase in emissions over the amount anticipated in the RMP or a violation of national air quality standards for any criteria pollutant.

Diné II, 839 F.3d at 1283. These facts further show that "any previously unanalyzed effects are not significant." 43 C.F.R. § 46.140(c). In sum, the BLM's EAs complied with NEPA's requirements.

The Plaintiffs contend that the 2003 RMP/EIS "analyzed the environmental consequences of drilling a projected 9,942 wells." Diné Brief at 24. This analysis, however, "did not include the Mancos Shale," because "development of the Mancos Shale formation was not reasonably foreseeable at the time the 2003 RMP/EIS was prepared." Diné Brief at 24. With recent advances in horizontal drilling and fracking, however, developing the Mancos Shale became foreseeable. See Diné Brief at 24. According to the Plaintiffs, in light of these technological

developments, the BLM "prepared the 2014 RFDS, which estimated the drilling of 3,960 Mancos Shale wells," which are "in addition to -- not instead of -- the 9,942 vertical wells previously projected by BLM in the 2003 RMP/EIS" Diné Brief at 24-25. The Plaintiffs therefore conclude that the "BLM has never analyzed the environmental and human health impacts from the combined total of 13,902 reasonably foreseeable oil and gas wells across the San Juan Basin." Diné Brief at 28.

First, as explained above, the Court continues to hold that any difference in environmental impacts between the new technology and the technology that the 2003 RMP/EIS analyzed are insignificant for NEPA's purposes. See San Juan Comment at P-123 (A.R.0001847)("Alternative drilling methods such as horizontal drilling would, if used in the San Juan basin, reduce adverse impacts such as noise, air pollution, and scarred landscapes from wells and roads."); White Paper at 16 (A.R.0149876)("The development of a hydrocarbon resource utilizing horizontal wells, drilled from multi-well pads, and stimulating by fracking minimizes the number of wells and surface disturbance needed to fully develop that resource, therefore minimizing biological impacts.").

Second, even though more drilling is occurring in the Mancos Shale than the 2003 RMP/EIS anticipated, the fact remains that "only 3,860 of the anticipated 9,942 new wells in the planning area were drilled in the twelve years between the issuance of the 2003 RMP and the court's consideration of this issue in 2015." Diné II, 839 F.3d at 1283. "Thus, even with increased drilling in the Mancos Shale formation and the switch to horizontal drilling and multi-stage fracturing, the overall amount of the drilling and related surface impacts are still well within the anticipated level." Diné II, 839 F.3d at 1283. Since the Court and the Tenth Circuit

last considered this issue, the numbers have slightly changed, and now 3,945 wells have been drilled in the San Juan Basin since the 2003 RMP/EIS. See BLM Response at 10-11 (citing Mankiewicz Decl. ¶ 3, at 3). Accordingly, the San Juan Basin now contains 5,997 fewer wells than the 2003 RMP/EIS anticipated. Thus, even if another 3,960 Mancos Shale wells are drilled, the total number of wells and "the overall amount of the drilling and related surface impacts are still well within the anticipated level." Diné II, 839 F.3d at 1283.

The Plaintiffs raise, however, an argument that they did not raise previously before the Tenth Circuit. See Diné II, 839 F.3d at 1289 ("Importantly, plaintiffs do not argue that the total impacts of drilling in the basin have exceeded the total impacts predicted in the 2003 EIS."). Here, they cure that deficiency and argue that the total impacts of horizontal drilling coupled with the already drilled vertical wells will exceed the total impacts considered in the 2003 EIS. See Diné Reply at 11-12. Specifically, they argue that the 2003 EIS considered only the surface impacts to 18,577 acres, whereas, with the addition 3,960 Mancos Shale wells, the combined surface impact of the already-drilled vertical wells and the Mancos Shale wells will be 28,482 acres -- therefore exceeding the surface impact considered in the 2003 EIS. See Diné Reply at 11. Their analysis is flawed, however, because they assume that for every one horizontal well, there will be a surface impact of 5.2 acres. See Diné Reply at 11. That ignores record evidence demonstrating that several horizontal wells may fit per well pad. See Environmental Assessment DOI-BLM-NM-F010-2016-0036 at 16, (February, 2016)(A.R.0234975)(noting that four wells could be drilled from one well pad that encompassed a 4.57 acre area)("2016 EA"); 2014 EA at 17 (A.R.0140164)(explaining that "horizontal drilling often allows for 'twinning,' or drilling two

or more wells from one shared well pad"). The Court declines to adopt that bloated acreage number, as the record refutes it.

The Plaintiffs' argument is even more fundamentally flawed, however, because in aggregating the surface impacts, they count impacts of all of the potential 3,960 horizontal wells. But the Plaintiffs do not and cannot challenge all of the 3,960 horizontal wells, because only 382 are at issue, and, as the Court has concluded, only 350 are live in this dispute. See Complaint ¶ 105, at 30; supra at 83 n.17, 86 n.19. The narrow question before the Court, therefore, is whether the 350 APDs violate NEPA, because their impacts exceed the 2003 EIS' projection. Using all 3,960 wells -- 3,578 of which are purely hypothetical -- to determine the total impact erroneously swells the Plaintiffs' calculation. Using 350 as a multiplier, the surface impacts fall comfortably within the 2003 EIS projection: (7,890 + (5.2 x 350)) = 9,710 acres[21], which is less than the 2003 EIS projection of 18,577 acres.[22] The same analysis applies to the water consumption and air pollution numbers. Projected water consumption is: 1,475,407,500 gallons[23], which is less than the 2,818,557,000 gallon 2003 EIS projection. See Diné Reply at 11. The air pollution numbers are as follows:

[21]The formula used for this calculation is ((acres impacted per vertical well x vertical wells already drilled) + (acres impacted per horizontal well x the 350 horizontal wells at issue)). See Diné Reply at 11.

[22]In calculating these projections, the Court assumes that the Plaintiffs numbers from their reply brief are correct. See Diné Reply at 11-12. For reasons already explained, the Court concludes that the record supports a lower number for acres impacted per horizontal well. Accordingly, the total acres impacted is actually less than the 9,715.2 acres that the Court lists above.

[23]The formula for this calculation is ((gallons consumed per vertical well x vertical wells already drilled) + (gallons consumed per horizontal well x 350 horizontal wells at issue)). Thus, broken down, the calculation is (283,500 x 3,945) + (1,020,000 x 350) = 1,475,407,500 gallons.

Air Pollution[24]					
Well Type	Well Construction	NOx (tpy)	CO(tpy)	VOC(tpy)	PM_{10} (tpy)
Vertical	9	2.30	0.63	0.20	0.92
Horizontal	25	6.13	1.64	0.55	2.54
Est. Total Impacts (3,945 vert.)		9,073.5[25]	2,485	789	3,629
Est. Total Impacts (350 horiz.)		2,145.5	574	192.5	889
Total Combined		**11,219**	**2,706.13**	**982.05**	**4,518**
Considered (2003 RMP/EIS)		**22,866**	**6,263**	**1,988**	**9,146**

Each combined number is far less than the numbers considered in the 2003 RMP/EIS. Accordingly, the total impacts of drilling in the basin still have not exceeded the total impacts predicted in the 2003 EIS, so there is no NEPA violation on these grounds. Because the differences in technology since the 2003 RMP/EIS are not significant for NEPA's purposes, and

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Again, the Court assumes that the Plaintiffs numbers are correct for this argument. Having reviewed the underlying record, the Court concludes that the gallons consumed per horizontal well is lower, as the Plaintiffs do not account for the estimated 25% reuse of flow back water, see 2014 RFDS at 23 (A.R.0173848), nor does it account for foam fracking, which would also reduce the amount of gallons per horizontal wells consumed, see 2014 RFDS at 24 (A.R.0173849). Accordingly, the 1,476,427,500 gallons figure is greater than the number of gallons consumed per well.

[24]The Court assumes, again, that the numbers in this table -- taken from their reply brief -- are correct. Having reviewed the underlying record that they cite, however, the Court cannot discern how the Plaintiffs determined these numbers. For example, they state that NO_x emissions are equal to 2.3 tons per well per year. See Diné Reply Brief at 11. The 2003 EIS notes, in contrast, that the BLM estimates NOx emissions to be 3,333.4 tons per year for 663 wells, which would yield 5.02 tons per well per year. See 2003 RMP/EIS at 4-58, 4-59 (A.R.0001068-69). It is possible that the Court is misinterpreting the 2003 EIS' figures. Nevertheless, the Court suspects that the emissions projected in the 2003 EIS are higher than the Plaintiffs estimate. Thus, the Total Combined numbers above are an inflated figure, but, even as inflated, the BLM has not violated NEPA.

[25]The reply brief lists this number as 20,869, but the Court concludes that it must be an arithmetic error, because 2.3 x 3,945 = 9,073.5, and not 20,869. See Diné Reply at 12.

the total number of wells remain within the 2003 RMP/EIS estimate, the Court concludes that the Plaintiffs' argument is without merit.

V. THE BLM ADEQUATELY INVOLVED THE PUBLIC IN ITS NEPA PROCESS.

The BLM did not violate NEPA when it prepared and published EAs for the Mancos Shale wells. The Plaintiffs assert two arguments: (i) the BLM did not adequately involve the public during its EA process; and (ii) the BLM did not timely post its EAs in a public forum. The Court disagrees with both contentions.

"When preparing an EA, an 'agency shall involve . . . the public . . . to the extent practicable." WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d 677, 698 (10th Cir. 2015)(quoting 40 C.F.R. § 1501.4(b))(alterations in WildEarth Guardians v. U.S. Fish and Wildlife Serv.). "Plainly, this language affords an agency 'considerable discretion to decide the extent to which such public involvement is practicable.'" WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d at 698 (quoting Brodsky v. U.S. Nuclear Regulatory Comm'n, 704 F.3d 113, 121 (2d Cir. 2013)). The BLM is not required to make every draft EA available for public comment to satisfy the public involvement requirement. See Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1279 (10th Cir. 2004)("Flowers"). Rather, as long as the documents circulated give some notice to the public of the project's nature and effects, the agency meets the public notice requirement. See WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d at 698-99; Flowers, 359 F.3d at 1279. For example, in Flowers, the agency did not make publically available the EA or other relevant documents, but it "include[d] maps detailing the layout of the 359-acre proposal" and "also stated that the project is likely to adversely affect bald eagles." Flowers, 359 F.3d at 1279. With those publically available documents, the Tenth Circuit

concluded that the agency adequately included the public. See Flowers, 359 F.3d at 1279. Similarly, in WildEarth Guardians v. U.S. Fish and Wildlife Serv., the Tenth Circuit, citing Flowers with approval, concluded that a "circulated notice" mentioning a projects' impact on Preble's Meadow Jumping Mouse[26] sufficiently gave notice to the public under NEPA. WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d at 698-99. In so concluding, the Tenth Circuit focused on the notice's effect to determine whether the notice given was sufficient. See WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d at 699 ("[T]he notice was presumably sufficient since the comments themselves then brought the issue [of the mouse] up.").

Here, the BLM satisfied that minimal public notice requirement. Although it did not furnish EA drafts for public comment, the BLM provides a NEPA log on its website, which tracks each proposed well, its location coordinates, the county in which the well is located, the date the well was submitted for approval, the date -- if any -- the BLM approved the well, and contact information for the BLM employee responsible for that well. See, e.g., NEPA Log at 1-35 (A.R.0151320-54). See also BLM Response at 31 (citing NEPA Logs in the record at A.R.0150140-15180). Updates to the NEPA log are made weekly. See Letter from Victoria Barr, Bureau of Land Management District Manager, to Mike Eisenfeld at 2 (dated January 26, 2015)(A.R.0178210)("BLM Letter to Eisenfeld"). The BLM also hosts public meetings at each proposed well's site and sends notices of those meetings to parties via email. See Draft Letter

[26]Preble's Meadow Jumping Mouse is a subspecies of meadow jumping mice that Edward A. Preble discovered in 1899. See Preble's Meadow Jumping Mouse, U.S. Fish & Wildlife Service: Endangered Species Mammals, at 1 (October 13, 2017) available at https://www.fws.gov/mountain-prairie/es/preblesMeadowJumpingMouse.php. It is a threatened sub-species found primarily in southeastern Wyoming and Colorado's Front Ranges. See supra Preble's Meadow Jumping Mouse at 1.

from the Bureau of Land Management (unsigned) to Jeremy Nichols, WildEarth Guardians Climate and Energy Program Direct, Erik Schlenker-Goodrich, Western Environmental Law Center Environmental Director, Mike Eisenfeld, San Juan Citizens Alliance New Mexico Energy Coordinator, Anson Wright, Chaco Alliance Coordinator at 2 (undated)(A.R.0178704). See also BLM Response at 31.

The Court concludes that the BLM's NEPA logs and the public meetings about proposed wells gave sufficient notice, because both actions alert the public to the projects and the effects the projects might have on the environment. Although the NEPA logs do not explicitly state that oil-and-gas wells affect the air quality or the environment, see Diné Reply at 16, the BLM does not have to call a horse a horse to give the public adequate notice. In 2018, it is self-evident -- especially to environmental non-profits, such as the Plaintiffs -- that new oil-and-gas wells affect air quality and the environment. See Colorado Environmental Coalition v. Salazar, 875 F. Supp. 2d 1233, 1253 (D. Colo. 2012)(Krieger, J.)(analyzing an environmental groups' contention whether "oil and gas development" in Colorado "would affect air quality"). Cf. Sierra Club v. U.S. Army Corps of Engineers, 803 F.3d 31, 33 (D.C. Cir. 2015)("The construction and operation of [oil] pipelines necessarily affect land, water, air, plants, animals, and human life, and carry the potential for unintended damage."). The Court's conclusion that the BLM gave the requisite notice also follows from WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d at 699. In that case, the Tenth Circuit determined that actual notice of the project's potential impacts also serves as sufficient notice for NEPA purposes. See WildEarth Guardians v. U.S. Fish and Wildlife Serv., 784 F.3d at 699 ("[T]he notice was

presumably sufficient since the comments themselves then brought the issue [of the mouse] up."); Flowers, 359 F.3d at 1279.

Here, in addition to the self-evident proposition that oil-and-gas wells affect the environment, there is record evidence that the Plaintiffs had actual notice of the oil-and-gas wells' environmental effects without the benefit of EAs on every well and without an explicit statement from the BLM that oil-and-gas wells may cause environmental effects. See Letter from Jeremy Nichols, WildEarth Guardians Climate and Energy Program Director, Mike Eisenfeld, San Juan Citizens Alliance New Mexico Energy Coordinator, Erik Schlenker-Goodrich, Western Environmental Law Center Executive Director, Anson Wright, Chaco Alliance Coordinator to Jesse Juen, Bureau of Land Management State Director, Gary Torres, Bureau of Land Management Farmington Field Office Field Manager at 1 (dated October 27, 2014)(A.R.0178400)("WildEarth et al. letter")("The BLM's rampant approval of Mancos shale drilling and fracking is not only threatening the region's air, water, fish and wildlife, but undermining our nation's progress in reducing greenhouse gases and combating climate change."). Accordingly, the Court concludes that the BLM did not violate NEPA by failing to give the public notice of its proposed wells' effects. See also Amigos Bravos v. U.S. Bureau of Land Management, 2011 WL 7701433, at *27 (D.N.M. Aug. 3, 2011)(Brack, J.)("[A]lthough the EAs in this case were not open for public comment, the fact that BLM published Notices of the Lease Sales, made copies of the EAs available to the public at its Farmington field office, listed the EAs on BLM's website, and permitted protests constituted more than adequate public involvement for the issuance of an EA/FONSI.").

The Plaintiffs contend, however, that the BLM did not adequately involve the public when it prepared EAs for the Mancos Shale wells, because the BLM made a case-by-case determination whether to post draft EAs for public comment depending on whether the well was "routine or unique," and "who might be interested or affected by the project." Diné Brief at 29. According to the Plaintiffs, the BLM arbitrarily labeled some wells "routine" to exclude the public. Diné Brief at 29. The Plaintiffs also assert that their repeated requests for information about wells should have signaled to the BLM that the wells were not "routine." Diné Brief at 29-30.

The Court concludes that the BLM's policy of making a case-by-case determination whether to post draft EAs for comment falls within the BLM's considerable discretion to dictate its EA process. The Tenth Circuit has determined that the agency does not need to disclose every draft EA. See Flowers, 359 F.3d at 1279. Moreover, the plain language of the regulation's notice requirement entails notifying the public where "practicable." 40 C.F.R. § 1501.4(b). Such language recognizes that it may be difficult to involve the public in every EA, so commonsense policies cutting down the number of unimportant, ordinary, or redundant draft EAs made publicly available for comment, so that more time can be devoted to unique or significant EAs, is consistent with that regulation. The BLM's process of withholding draft EAs "whose analysis is similar to comparable past actions" is such a commonsense rule. BLM Response at 31.

Although the Plaintiffs contend that the BLM arbitrarily labeled some wells routine to avoid disclosing public draft EAs, there is no record evidence that the BLM acted arbitrarily. The Plaintiffs' citations to support that argument are: (i) an email from environmental groups

arguing that the BLM should put a hold on leasing land and approving APDs in areas where fracking and horizontal drilling is reasonably foreseeable, see Diné Brief at 29 (citing Email from Wilma Tope, Powder River Basin Resource Council Chair, Nathan Johnson, Buckeye Forest Council Staff Attorney, Brendan Cummings, Center for Biological Diversity Public Lands Director, Bruce Valzel, Earthworks Oil & Gas Accountability Project Senior Staff Attorney, Amy Mall, Natural Resources Defense Council Senior Policy Analyst, Barry Weaver, Newton County Wildlife Association Chair, Mike Eisenfeld, San Juan Citizens Alliance New Mexico Energy Coordinator, Walter Loraine McCosker, Ohio Sierra Club Forest and Public Lands Committee Co-Chair, Donny Nelson, Western Organization of Resource Councils Oil and Gas Campaign Team Chair, and Bruce Pendery, Wyoming Outdoor Council Staff Attorney to Michael J Pool, Bureau of Land Management at 1 (dated August 7, 2012)(A.R.0178179-81)); (ii) an email from Eisenfeld stating that he objects to the BLM's practice of self-determining what wells are routine or unique, see Diné Brief at 30 n.10 (citing Email from Mike Eisenfeld, San Juan Citizens Alliance New Mexico Energy Coordinator to Gary Torres, Bureau of Land Management Deputy Division Chief (Acting) at 2 (dated December 3, 2014)(A.R.0178208)); (iii) the WildEarth et al. Letter requesting that the BLM stop issuing new APDs and detailing their arguments why such an action is appropriate, see Diné Brief at 30 (citing WildEarth et al. Letter at 1 (A.R.0178401); and (iv) various requests for final EAs not posted to the BLM's website and the BLM's responses, see Diné Brief at 30 (citing Email from Mike Eisenfeld to Gary Torres at 1 (dated August 5, 2013)(A.R.0178183); Email from Maureen Joe to Mike Eisenfeld at 1 (dated August 28, 2013)(A.R.0178185); Email from Mike Eisenfeld to Amanda Nisula at 1 (dated March 6, 2014)(A.R.0178186); Email from Mike Eisenfeld to Amanda Nisula

at 1 (dated October 2, 2014)(AR178204); Email from Amanda Nisula to Mike Eisenfeld at 1 (dated October 3, 2014)(AR178204)). The record cited demonstrates that environmental groups have objected, for many years, to the way that the BLM has conducted its processes, but it does not demonstrate that the BLM arbitrarily labeled some of the wells routine to avoid public involvement. The Court finds no record evidence, for example, that these wells are so different from each other such that the BLM's determination that their EAs would be alike is clearly without basis. Moreover, after studying several EAs in the record, the Court concludes that the EAs' analyses for many, if not all of these wells, are likely to be substantially similar. In two of the EAs that the Court considered the environmental analysis is highly alike. Compare Environmental Assessment DOI-BLM-NM-F010-2014-0254 at 18-20 (A.R.0120125-27), with Environmental Assessment DOI-BLM-NM-F010-2014-0250 at 18-21 (A.R.0119200-03). For example, in both EA's air quality analysis, the BLM lists harmful pollutants, considers how much the well will increase the amount of those pollutants, and determines the cumulative impact the well will have on the air with the other wells in the San Juan Basin. Compare Environmental Assessment DOI-BLM-NM-F010-2014-0254 at 18-20 (A.R.0120125-27), with Environmental Assessment DOI-BLM-NM-F010-2014-0250 at 18-21 (A.R.0119200-03). The Court concludes, accordingly, that the BLM did not act arbitrarily in labeling these projects routine.

Finally, the Plaintiffs argue that the BLM violated NEPA regulations when it delayed posting the final EAs. See Diné Brief at 30-31. Under 43 C.F.R. § 46.305, the BLM must "notify the public of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed." 43 C.F.R. § 46.305(c). The Court

concludes that the BLM complied with that requirement. 43 C.F.R. § 46.305(c) is, at bottom, a notice regulation. The BLM provided that notice by updating its website whenever an EA was completed. See, e.g., NEPA Log at 1-35 (A.R.0151320-54). It is true that, because of a backlog, the BLM did not immediately post every completed EA to its website. See Email from Amanda Nisula to Mike Eisenfeld at 1 (dated October, 3, 2014)(A.R.0178204). The regulation does not, however, require that the EA be posted to the internet once complete. See 43 C.F.R. § 46.305(c). Instead, it requires that the public be notified when an EA is available. See 43 C.F.R. § 46.305(c). By all accounts, these EAs were available, even though they were not posted on the internet, because the BLM granted access to physical copies of EAs within days of a request. See United States Department of the Interior Bureau of Land Management Visitor Log at 1 (dated October 7, 2014)(A.R.0178205)(listing Mike Eisenfeld as a visitor); Letter from Mike Eisenfeld to Amanda Nisula at 3 (A.R.0178297)("On October 7, 2014 BLM employees ushered me into the worker cubicle area and handed me hard copies of the EAs, Decision Records (DRs) and Finding of No Significant Impacts (FONSIs), and told me to make my own copies."). The delay in receiving the EA also does not run afoul of 43 C.F.R. § 46.305(c), because the regulation imposes no deadline when the public must have access to the EA. See 43 C.F.R. § 46.305(c). Notice of the document's availability must be issued "once" the EA has "been completed," but it says nothing about when the document must be disclosed. 43 C.F.R. § 46.305(c).

The two cases that the Plaintiffs cite to the contrary are inapposite. See Diné Brief at 31 (citing WildEarth Guardians v. OSMRE, 104 F. Supp. 3d 1208, 1224 (D. Colo. 2015)(Jackson, J.), order vacated by 652 F. App'x 717, 719 (10th Cir. 2016); Guardians v. U.S. of Surface

Mining Reclamation and Enforcement, 2016 WL 6442724, at *7 (D. Mont. Jan. 21, 2016)(Otsby, M.J.) order adopted in part and rejected in part, 2016 WL 259285, at *2 (Watters, J.)). In both cases, the agency did not tell anyone that they had placed paper copies of "EAs and FONSIs on a shelf in its high-rise office," and in the public reading room. WildEarth Guardians v. OSMRE, 104 F. Supp. 3d at 1224. See Guardians v. U.S. of Surface Mining Reclamation and Enforcement, 2016 WL 6442724, at *7. Thus, the EAs were available, but they gave the public no notice. Here, in contrast, the BLM gave the public notice of completed EAs with its NEPA log. See, e.g., NEPA Log at 1-35 (A.R.0151320-54). Their availability was not immediate, but the regulation does not require immediate availability. See 43 C.F.R. § 46.305(c). Accordingly, neither of these cases dictate a different outcome.

VI. THE BLM DID NOT VIOLATE THE NHPA, BECAUSE CHACO PARK AND ITS SATELITTES ARE OUTSIDE OF THE APE, AND THE RECORDS' CULTURAL RESOURCE ANALYSES SATISFY THE PROTOCOLS' DOCUMENTATION STANDARDS.

The Court concludes that the Plaintiffs' main contention with respect to the NHPA -- that the BLM violated the NHPA by not analyzing the indirect effects the wells would have on Chaco Park and its satellites -- lacks merit. That contention fails, because the Protocols governing the BLM require it to consider effects on historical sites within the APE, and Chaco Park and its satellites are outside of the wells' APEs. Thus, that the BLM did not consider the wells' effects on Chaco Park and its satellites did not violate the Protocols, so did not violate the NHPA. The records' cultural resources analysis otherwise comport with the Protocol's documentation standards, so there is no other NHPA violation.

"NHPA, like NEPA, is a procedural statute requiring government agencies to stop, look, and listen before proceeding when their action will affect national historical assets." Coal. of

Concerned Citizens To Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transportation, 843 F.3d 886, 905 (10th Cir. 2016)("Concerned Citizens"). Section 106 of NHPA "requires an agency undertaking a project expected to adversely affect a public or private site listed on the National Register of Historic Places to 'take into account the effect of the undertaking on any historic property.'" Concerned Citizens, 843 F.3d at 905 (quoting 54 U.S.C. § 306108).

Because the NHPA is a procedural statute, a reviewing court is not tasked with determining if the BLM correctly decided whether an oil well or another project altered a historic site. See Concerned Citizens, 843 F.3d at 906-08. Instead, a reviewing court must ensure only that the BLM followed the proper procedures and considered the factors it was supposed to consider when the BLM made its determination. See Concerned Citizens, 843 F.3d at 906-08. The NHPA's regulations outline both the requisite procedure and the proper factors. See 36 C.F.R. §§ 800.3-.13. First, they require that the BLM designate an area -- termed the "APE." 36 C.F.R. § 800.4(1)(a). See 36 C.F.R. § 800.16(d) ("Area of Potential effects means the geographic area or areas which an undertaking may directly or indirectly cause alterations in the character or use of historic properties."); Concerned Citizens, 843 F.3d at 906. Within that APE, the BLM must identify historic properties. See 36 C.F.R. § 800.4(b). Next, the BLM must consider whether the undertaking will affect the historic properties identified within the APE. See 36 C.F.R. § 800.4(d)(1)-(2). Finally, if the historical site will be affected, the BLM must assess whether those potential effects are adverse to the historical site. See 36 C.F.R. § 800.5(a). An adverse effect exists when "an undertaking may alter, directly or indirectly any of the characteristics of a historic property that qualify that property for inclusion in the National register." 36 C.F.R. § 800.5(a)(1). Relevant here, one example of an adverse effect is

"[i]ntroduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features." 36 C.F.R. § 800.5(a)(2)(v).[27] In short, the NHPA regulations require the BLM to: (i) designate an area to consider -- the APE; (ii) identify historical sites within that area to consider; (iii) consider whether the undertaking could affect historical sites within that area to consider; and (iv) determine whether those effects are adverse to the historical site. See 36 C.F.R. §§ 800.4-.5; Concerned Citizens, 843 F.3d at 906.

The NHPA's regulations also outline the documentation standards for NHPA determinations. See 36 C.F.R. § 800.11. Broadly speaking, "[t]he Agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis." 36 C.F.R. § 800.11(a). For a finding that "no historic properties are affected," the BLM must provide "[t]he basis for determining that no historic properties are present or affected." 36 C.F.R. § 800.11(d)(3). For a determination of "adverse effect" or "no adverse effect," the BLM must detail "a description of the undertaking's effects on historic properties" and an "explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions of future actions to avoid, minimize or mitigate adverse effect." 36 C.F.R. § 800.11(e)(4)-(5).

Few cases have interpreted 36 C.F.R. § 800.11's documentation standards, but the small number that have done so require that there be at least some detail to understand the basis for the agency's finding. See, e.g., Neighborhood Ass'n of the Back Bay Inc. v. Federal Transit Admin., 463 F.3d 50, 60-61 (1st Cir. 2006); Comanche Nation v. United States, 2008 WL

[27]Some other examples of an adverse effect that the regulation provides are: (i) physical destruction or damage to all or part of the property; (ii) removal of the property from its historic location; and (iii) change of the character of the property's use. See 36 C.F.R. § 800.5(a)(2)(i)-(vii).

4426621, at *19 (W.D. Okla. Sept. 23, 2008)(DeGuisti, J.). 36 C.F.R. § 800.11's plain language, nevertheless, suggests that it is not a demanding standard. See 36 C.F.R. § 800.11(a) ("The agency official shall ensure that a determination . . . is supported by sufficient documentation to enable any reviewing party to understand its basis."). Because the Court is not passing judgment on the agency's ultimate determination, i.e., adverse or no adverse effect on a historical site, a piercing level of detail is unnecessary; all the agency needs to provide is "sufficient documentation" such that the Court or any other reviewing party can understand the findings' "basis." 36 C.F.R. § 800.11(a). This basis includes an "explanation of why the criteria of adverse effect were found applicable or inapplicable." 36 C.F.R. § 800.11(e). Accordingly, the agency's findings need not be a topic treatise or even an essay, but there needs to be some explanation for why the agency made the determination it did, and, if the agency determined that there was an adverse effect, an explanation of "any conditions or future actions to avoid" to "minimize or mitigate adverse effects." 36 C.F.R. § 800.11(e)(5).

An agency, however, may substitute the NHPA's regulations, in whole or in part, if an "agency program alternative" governs the project. 36 C.F.R. § 800.3(a)(2). A program alternative is essentially a contract that establishes alternative procedures that an agency must follow vis-à-vis certain undertakings. See 36 C.F.R. § 800.14(a). In creating a program alternative, the agency must consult with the Advisory Council on Historic Preservation, the National Conference of State Historic Preservation Officers, individual SHPOs, or -- as appropriate -- Indian tribes. See 36 C.F.R. § 800.14(a)(1).

Here, the BLM entered two program alternatives: one in 2004 and another in 2014. See 2004 Protocol at 1-22 (A.R.0169038-59); 2014 Protocol at 1-51 (A.R.0169213-299). Under the

2004 Protocol, a New Mexico Cultural Heritage Specialist ("CHS")[28] determines the APE on a case-by-case basis. See 2004 Protocol § VI(D)(1)-(2), at 11-12 (A.R.0169048-49). If the CHS subsequently determines that an APE contains no historic or only "isolated manifestations" of historic sites, the undertaking will be approved. 2004 Protocol § VI(F)(1), at 14 (A.R.0169051). If the CHS determines that there is a potential that an undertaking will damage or destroy a "cultural resource," but that site is unlikely to be eligible for NHPA protection, the undertaking will be approved. See 2004 Protocol § VI(F)(2), at 14 (A.R.0169051). If the CHS determines that there is a NHPA protected site within the APE, the CHS can make one of three findings: (i) no effect; (ii) no adverse effect; or (iii) adverse effect. See 2004 Protocol § VI(G)(1)-(4), at 15-16 (A.R.01969052-53). A no-effect finding means that the undertaking will not alter the characteristics that make a site eligible for the National Register of Historic places. See 2004 Protocol § VI(G)(2), at 15 (A.R.0169052). A no–adverse-effect finding means either that the undertaking will have a positive effect on the site or that a site, specifically an archaeological site, can be treated to mitigate the adverse effect, such as through "data collection," i.e., all of or the majority of the valuable historic data from an archaeological dig is retrieved. 2004 Protocol § VI(G)(3)(a)-(b), at 15-16 (A.R.0169052-53). An adverse effect occurs when an undertaking changes a site's characteristics that qualify it for inclusion in the National Register of Historic Places. See 2004 Protocol § VI(G)(4), at 16 (A.R.0169053).

[28]The 2004 Protocol does not define CHS, but, based on context clues throughout the 2004 Protocol, a CHS appears to be a BLM employee tasked with surveying different plots of land to determine whether: (i) there are any historic sites eligible for inclusion in the National Historic Register within in a region; and (ii) whether undertakings in that region will affect those sites. See 2004 Protocol §§ VI(E)(1), VI(F), VI(G)(1) at 13-16 (AR169050-53).

The 2004 Protocol also establishes its own documentation standards in lieu of 36 C.F.R. § 800.11. See 2004 Protocol § V(A)(5)(c), at 5-6 (A.R.0169042-43)(dictating that H-8100-1 Procedures for Performing Cultural Resource Fieldwork on Public Lands in the Area of New Mexico BLM Responsibilities (A.R.0168854-9017)("BLM Procedures") governs documentation standards for large- and small-scale inventory reports). Relevant here, for a small-scale inventory report,[29] if there is a historical site within the APE, the CHS must document a "Determination of Effect" which means that the CHS must

> [e]valuate and describe the potential of the undertaking, proposed project, or action to affect each of the cultural resources identified within the project area or immediately adjacent to the project area. This discussion should address each cultural property individually, and should consider the nature of the cultural property and those attributes that determine its potential for nomination to the National Register, its location with respect to ground disturbing activities and other project actions, its location relative to current public access, and its location relative to changes in access resulting from the completion of the proposed undertaking.

New Mexico Bureau of Land Management Reporting Standards for Small-Scale Cultural Resource Inventory Project Reports, at Appendix 3-7 (A.R.0169166)("BLM Procedures Appendix"). The Determination of Effect requirement, like 36 C.F.R. § 800.11, does not appear to require a rigorous analysis, but nonetheless requires a description of the "affect" that each undertaking will have on historic sites, and a "discussion" of each "cultural property individually," which "should consider the nature of the cultural property and those attributes that determine its potential for nomination to the National Register." BLM Procedures Appendix at 3-7 (A.R.0169166). The BLM Procedures, however, also have a "Recommendation" requirement for its reports, which states:

[29]Small-scale inventory report are reports "that cover fewer than 160 acres, or less than 10 linear miles, in total." BLM Procedures at 1-11 (A.R.0168869).

> The field investigator's recommendations concerning measures which can be taken to avoid or mitigate the effects of the undertaking upon properties within the area of potential environmental effect are invaluable. It may prove impossible to revisit each documented property, so suggestions on how to protect them must be as specific as possible.
>
> This section requires the preparer to evaluate whether or not the undertaking could affect the properties recorded. If the answer is no, then explain why. Be explicit as to where each site is located in relation to the project's ground disturbance, increased public access, etc.
>
> If it is felt that the undertaking could affect any of the sites, then state explicitly how each property could be impacted. Be specific and relate any suggestions for avoidance or mitigation of effects to individual site - sketch maps. Discuss how the specific qualities making individual properties significant could be affected by the undertaking.

BLM Procedures Appendix at 3-7 (A.R.0169166). Thus, if the undertaking does not affect the historical site, the CHS "explain[s] why." BLM Procedures Appendix at 3-7 (A.R.0169166). If the undertaking could affect any of the historical sites within the APE, the CHS must "state explicitly how each property could be impacted" and must also "[d]iscuss how the specific qualities making individual properties significant could be affected by the undertaking." BLM Procedures Appendix at 3-7 (A.R.0169166).

The 2014 Protocol is similar to the 2004 Protocol, but also diverges in some important ways. In general terms, the 2014 Protocol requires that

> the BLM will consider potential direct, indirect, and cumulative effects to historic properties and their associated settings when setting is an important aspect of integrity, as applicable. The introduction of physical, visual, audible, or atmospheric elements has the potential to affect the historic setting or use of historic properties including but not limited to properties of religious and cultural significance to Indian tribes, and the BLM will take this into account in defining the limits of an APE for indirect effects.

2014 Protocol at 21 (A.R.0169233). Unlike the 2004 Protocol, which lets the CHS have considerable discretion to determine the APE, the 2014 Protocol discusses an APE definition for

both direct and indirect effects. The APE for direct effects has a fixed boundary depending on the type of undertaking, and, for oil well pads, it is the well pad's construction zone plus one hundred feet on each side of the construction zone's edges. See 2014 Protocol at 21 (A.R.0169233); New Mexico State Protocol Appendix B Standard APEs for Direct Effects at 1, 3 (A.R.0169265, A.R.0169267)("2014 Protocol App. B"). The APE for indirect effects, on the other hand, "shall include known or suspected historic properties and their associated settings where setting is an important aspect of integrity," but identification efforts outside of the Direct Effect APE for historic sites are subject to the BLM Field Manager's approval after considering recommendations from the SHPO. 2014 Protocol at 21 (A.R.0169233). In other words, an indirect APE exists only if the BLM field manager approves of one after he or she considers SHPO recommendations. See 2014 Protocol at 21 (A.R.0169233). The 2014 Protocol then establishes the criteria by which the BLM may classify a historic property as adversely or not adversely affected:

> The BLM will consider the following guidance when determining whether a finding of No Historic Properties Affected is appropriate. If the inventory does not find cultural resources of any kind, and/or only identifies isolated manifestations (isolated occurrences), or only finds ineligible sites, buildings, structures or objects, then a determination of No Historic Properties is appropriate. If historic properties are present in the APE but will not be affected by the undertaking, then a determination of No Historic Properties Affected is appropriate. If a setting analysis is completed, and a proposed project will not be visible from the historic property, then a determination of No Historic Property Affected is appropriate. A determination of No Historic Properties Affected is generally not appropriate when the undertaking involves ground disturbance within the boundaries of a historic property.
>
> . . . .
>
> The BLM will consider the following guidance when determining whether a finding of No Adverse Effect is appropriate.

a. If a historic property is being affected by a proposed undertaking, but the effect will not diminish the aspects of integrity nor alter, directly or indirectly, any of the characteristics that make the property eligible for listing in the NRHP, then a finding of No adverse Effect is appropriate as defined in 36 CFR 800.5(b). This applies to all historic properties located within the APE.

b. If it can be demonstrated that the portion of the property that will be affected directly or indirectly, lacks integrity, then a finding of No Adverse Effect is appropriate. For archaeological sites this will usually involve documentation on how the archaeological site has been disturbed and a discussion of how the integrity deposits has been compromised.

c. If setting, feeling and/or association are contributing aspects of integrity for any historic property, and a proposed undertaking will be visible from the historic property, but the project elements will not dominate the setting or attract the attention of the casual observer, the BLM will document the decision and a finding of No Adverse Effect is appropriate as provided in 36 CFR 800.5(b).

d. If the BLM proposes preservation, stabilization, rehabilitation, or reconstruction of NRHP eligible sites, buildings, structures, or objects, and the work is consistent with the Secretary of Interior's Standards for the Treatment of Historic Properties (SOI Standards), or the BLM modifies the undertaking or imposes conditions on the undertaking to ensure consistency with the SOI Standards, a finding of No Adverse Effect is appropriate as provided in 36 CFR 800.5(b)

. . . .

[T]he BLM will consider the following guidance when determining whether a finding of Adverse Effect is appropriate.

a. If setting, feeling and/or association are contributing aspects of integrity for any historic property, and a proposed undertaking will be visible from the historic property, and the project elements dominate the setting, a

> finding of Adverse Effect is appropriate as provided in 36 CFR 800.5(a)(1).
>
> b. If the proposed undertaking, including research excavation projects, will result in the physical destruction of or damage to all or part of the historic property, a finding of Adverse Effect is appropriate as provided in 36 CFR 800.5(a)(1).

2014 Protocol at 26-30 (A.R.0169238-42). The 2014 Protocol's documentation standard, however, is identical to the 2004 Protocol's documentation standard. See 2014 Protocol at 31 (A.R.0169243). See also BLM Procedures Appendix at 3-7 (A.R.0168975).

The Plaintiffs main contention is that air, light, and noise pollution, and vehicle traffic, adversely affect Chaco Park and its satellites, and that the BLM failed to take those effects into account in its analysis. See Diné Brief at 35; Diné Reply at 18. The BLM counters that it has satisfied its NHPA obligations, because it commissioned a cultural investigation, defined an APE, "considered foreseeable direct and indirect adverse effects to cultural resources," and determined whether the wells would have an adverse effect on the sites. BLM Response at 37-38. The Operators also contend that the BLM properly followed the 2004 and 2014 Protocols. See Operators' Response at 24-25. The Court concludes that the BLM complied with the NHPA, because the BLM followed the Protocols it adopted. For each well, it: (i) defined the APE; (ii) determined if there were any historical sites within that APE; and, (iii) if there were historical sites, it signaled the historical site's nature, and documented how effects to that site could or could not be avoided.

The Court conducts an arbitrary-and-capricious review of the BLM's process and the factors it considered when determining if a historical site has been affected. See Concerned Citizens, 843 F.3d at 909 ("[The Plaintiffs] also fail to establish that the FTA acted arbitrarily or

capriciously in failing to consider these factors."). A historical site's nature affects what factors that the BLM should consider, and the BLM concluded similarly when it drafted its protocols. For example, in the 2014 Protocol, the BLM decided that, if a historical site's setting was what made it historical, then whether the historical site could be seen from the undertaking would be a factor -- perhaps, a dispositive factor -- that the BLM should consider when determining whether a project affects the historical site. See 2014 Protocol at 30 (A.R.0169242). See also 2014 Protocol at 21 (A.R.0169233)("The introduction of physical, visual, audible, or atmospheric elements has the potential to affect the historic setting or use of historic properties."). If the historical site is archaeological, however, visibility of the oil well has little effect on what makes the archaeological site have historical value, so the visible effect the oil well has on the archaeological site need not be considered. See 2014 Protocol at 30 (A.R.0169242). Thus, the historical site's nature dictates the factors that the BLM needs to consider, and the APE, in turn, dictates which historical sites that the BLM must consider. See 2004 Protocol at 11-12 (A.R.0169048-49); 2014 Protocol at 21 (A.R.0169233).

With those concepts in mind, the Court turns to the Plaintiffs' contentions. First, they contend that there is no "record evidence to indicate that BLM ever defined an area for indirect effects,"[30] so the BLM acted arbitrarily and capriciously. Diné Brief at 38. In making this

[30]The parties refer to direct and indirect effects, see, e.g., BLM Response at 39, but the regulations do not define those terms. See 36 C.F.R. § 800.16(i) (defining effect as an "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register," but not defining direct or indirect effects). Based on the parties briefing, it appears that, by indirect effects, they mean effects such as air, noise, and light pollution, and visual disturbances -- i.e., whether the project creates an eyesore affecting the historical site's setting, environment, or feeling. See, e.g., BLM Response at 39; Diné Reply at 20. Direct effects, in contrast, refer to physical damage to historical properties. See, e.g., Diné Reply at 20.

argument, the Plaintiffs attack the first step an agency must take under the NHPA: defining the APE. Nothing in the protocols, however, requires that the BLM define each well's indirect APE separate from the direct APE. Instead, the 2014 Protocol creates a standard direct APE for oil well pads, which is equal to the area of the well pad and construction zone plus a one-hundred foot buffer zone on each side of the construction zone's edges. See 2014 Protocol at 21 (A.R.0169233); 2014 Protocol Appendix B at 1 (A.R.0169265). The 2014 Protocol then states that an indirect APE "shall include known or suspected historic properties and their associated settings where setting is an important aspect of integrity," but the indirect APE definition subsequently notes that "identification efforts" outside of the direct APE for other historical sites shall occur only with the BLM field manager's approval after the BLM manager has considered recommendations from the BLM cultural resource specialist and the SHPO. 2014 Protocol at 21 (A.R.0169233). In other words, the BLM need only consider historic properties within the direct APE, unless the BLM field manager, after taking into account certain recommendations, decides that the BLM needs to broaden its scope to include other "known or suspected properties." 2014 Protocol at 21 (A.R.0169233). Thus, under the 2014 Protocol, the default APE definition is the direct APE's definition -- one-hundred feet within the well pad's construction zone. To be sure, the 2014 Protocol still requires the BLM to consider indirect and cumulative effects that the wells have on those historic sites within the APE, see 2014 Protocol at 21 (A.R.0169233), but there does not need to be a separate indirect APE defined to satisfy the Protocols. Indeed, the 2014 Protocols expect that the direct and indirect APEs, in most cases, will be the same, and will diverge only when the BLM field manager approves of a divergence. See 2014 Protocol at 21 (A.R.0169233).

The 2004 Protocol similarly requires no separate indirect APE definition. It provides: "NM BLM cultural heritage specialists will determine the area of potential effects that will be subject to inventory. This determination will define the geographic area within which the undertaking might directly or indirectly cause changes to the character or use of any historic properties should they exist." 2004 Protocol at 11-12 (A.R.0169048). The 2004 Protocol, unlike the 2014 Protocol, does not create a standard direct APE nor does it create a standard indirect APE. The definition turns on what appears to be the CHS' case-by-case determination. See 2004 Protocol at 11 (A.R.0169048). The 2004 Protocol makes no distinction between direct or indirect APE, so, based on its plain language, the indirect APE does not need to be separately defined. Accordingly, it is not arbitrary and capricious that the BLM did not separately define the indirect APE from the direct APE.[31]

Second, the Plaintiffs cite the 2014 Protocol's language, which states that, "[i]n defining the APE, the BLM will consider potential direct, indirect, and cumulative effects to historic properties and their associated setting when setting is an important aspect of integrity, as applicable" to argue that the BLM needed to consider the wells' effects on Chaco Park and its satellites. Diné Brief at 37 (quoting 2014 Protocol at 21 (A.R.0169233)). See Diné Brief at 38-39. Their argument pivots on whether that language means that the BLM, in defining the APE, had to consider and document their consideration of the historic sites many miles away from the wells. The Court concludes that the 2014 Protocol has no such requirement. Rather, as already explained, efforts to identify historic sites that could be indirectly affected, and thus need to be

[31]The Court also notes that the regulations do not require the indirect APE to be defined separately from the direct APE. See 36 C.F.R. §§ 800.4(a)(1); 800.16(d).

considered, are executed at the BLM field manager's discretion with the BLM cultural resource specialist's and the SHPO's recommendations. See 2014 Protocol at 21 (A.R.0169233). The 2014 Protocol grants the BLM some flexibility in defining the APE, which makes sense, because the indirect APE is bound to be different for different sites. If, for example, a mountain stands between a well and a historic site, considering the well's indirect visual effects on that historic site does not make sense. The NHPA regulations recognize -- perhaps for that reason -- that the APE needs to be flexible. See 36 C.F.R. § 800.16 ("The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."). The 2014 Protocol echoes that sentiment by granting the BLM some discretion to determine, on a case-by-case basis, how far out it must look for historic sites when defining the APE. See 2014 Protocol at 21 (A.R.0169233). See also Valley Community Preservation Com'n v. Mineta, 373 F.3d 1078, 1091 (10th Cir. 2004)("Establishing an area of potential effects requires a high level of agency expertise and as such, the agency's determination is due a substantial amount of discretion.").

That the BLM may not have ever considered Chaco Park and its satellites is not arbitrary and capricious, because (i) the 2014 Protocol does not require the BLM to consider those sites; and (ii) the Court cannot say that the BLM should have considered those sites given that Chaco Park and its satellites are more than ten miles away for most of the wells. See Location of APDs Challenged in DinéCARE v. Zinke 15-cv-209 (D.N.M.) Administrative Record Data at 1, filed June 6, 2017 (Doc. 113-1)("APD Map Aff.").[32] Although some oil wells might be visible from

[32]Although the map constructed in the APD Map Aff. is not in the record, the map was constructed entirely from data in the record. See APD Map Aff. ¶¶ 5-6, at 2. The Court accordingly may consider the APDs locations with relation to Chaco Park and its satellites.

the historic sites, the Court could locate no evidence in the record demonstrating that the wells actually are visible from those sites.[33] The wells' distance from Chaco Park and its satellites also suggests that noise and light pollution would have minimal effect on those historic sites. To be sure, noise can travel a distance, but any noise that would carry miles to the historical site would not be so much that it was arbitrary and capricious for the BLM to exclude Chaco Park and its satellites from the APE. There is already ambient noise from traffic into the park and traffic on Highway 550 -- the area where most of the well pads are located. The same analysis applies for light pollution. Finally, the Court cannot say that the 2014 Protocol is arbitrary and capricious for granting the BLM discretion in determining what sites it needs to consider for indirect effects, because the regulations also suggest that the APE should be defined flexibly. See 36 C.F.R. § 800.16.

Third, the Plaintiffs argue that the BLM violated the 2014 Protocol, because the BLM did not consult with the SHPO to define the indirect effects to historic properties. See Diné Brief at

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[33]The Court notes that there are some well pad photographs in the record, but none of the ones the Court located were taken from where a historical site was situated. See Letter from WildEarth Guardians to Jesse Juen, State Director, Bureau of Land Management and Gary Torres, Field Manager, Farmington Field Office, Bureau of Land Management at 4-6 (dated October 27, 2014)(A.R.01678403-05)("WildEarth Letter"). Some of the photographs were aerial pictures and others were taken close to the well pad. See WildEarth Letter at 4-6 (A.R.01678403-05). The Court also notes that the Plaintiffs attach pictures of the well pads in several of their declarations, but, again, none are taken from a historic site. See Nichols Supp. Decl. ¶¶ 9-10, at 5-11; Eisenfeld Supp. Decl. ¶ 8, at 4-6. Rather the pictures are taken from roads into Chaco Park, see Nichols Suppl. Decl. ¶¶ 9-10, at 5-11, or the supplemental declaration does not say from where the pictures are taken, see Eisenfeld Suppl. Decl. ¶ 8, at 4-6. Moreover, even if the pictures in the supplemental declaration were taken from the historic sites, the Court cannot consider the declarations for substantive evidence, because those pictures are outside the administrative record.

38. In so arguing, the plaintiffs cite language from the 2014 Protocol's Appendix B, which states:

> In certain circumstances, even though an undertaking may have a standard APE listed below, the Field Manager, at the recommendation of the cultural resource specialist, may have justification to require a larger APE. If an APE larger than the minimums below is being recommended, SHPO consultation is not required. For actions where a field office is suggesting a smaller APE for an undertaking listed below, SHPO consultation will be required pursuant to Section IV.B. For any other APEs (i.e. undertakings not listed here, visual effects APE, etc.), the cultural resource specialist will consult with SHPO pursuant to Section IV.B.

2014 Protocol Appendix B at 1 (A.R.0169265)(emphasis in original). The Plaintiffs read the language -- "[f]or any other APEs . . . the cultural resource specialist will consult with the SHPO," 2014 Protocol Appendix B at 1 (A.R.0169265)(emphasis in original) -- to mean that the BLM must consult with the SHPO "to define an APE for indirect effects," and, because there is no evidence that the BLM ever consulted with a SHPO, the BLM violated the Protocol. See Diné Brief at 37-38. The Court agrees with that analysis to a point. It is true that the 2014 Protocol requires the BLM field manager to consider recommendations from the SHPO when that field manager is determining whether identification efforts for historic properties outside of the direct APE are required. See 2014 Protocol at 21 (A.R.0169233). The Plaintiffs' assumption is, however, that the BLM Field Manager must conduct that larger APE analysis for every well, but the 2014 Protocol does not require that analysis; rather, it requires such an analysis only at "the approval of the BLM field manager." 2014 Protocol at 21 (A.R.0169233). That language suggests that a larger APE analysis is an exception to the typical rule. A SHPO consultation is thus not mandatory for every well, but only for wells that the BLM Field Manager is considering expanding the APE. Accordingly, the BLM's failure to consult the SHPO for every well does not, by itself, demonstrate that the BLM acted contrary to law or arbitrarily and capriciously.

Fourth, the Plaintiffs contend that the BLM violated the 2014 Protocol, because a SHPO consultation is required for every "complicated or controversial" undertaking. According to the Plaintiffs, all of the wells at issue are controversial and there is no record of a SHPO consultation, so the BLM violated the 2014 Protocol. See Diné Brief at 37-38. The Plaintiffs do not explain why the wells are controversial, see Diné Brief at 37-38; presumably, they are controversial, because the Plaintiffs have challenged them. The Court concludes that the 2014 Protocol's reference to "complicated or controversial" does not apply, merely because a plaintiff group creates a controversy by challenging the wells. Such a definition would suggest that the BLM should consult a SHPO on every well, because any well could be subject to legal challenge. If the 2014 Protocol's intent was to require the BLM to always consult a SHPO, it would have said as much instead of creating a scheme whereby SHPO consultation is the exception instead of the rule. See 2014 Protocol at 21 (A.R.0169233). Because the Plaintiffs have not demonstrated how any of the wells are otherwise controversial, the Court concludes that the wells are not controversial, so the BLM is not required to consult a SHPO for that reason.

The Plaintiffs' final contention is that the BLM did not consider the indirect or cumulative effects the wells would have on Chaco Park and its satellites. See Diné Brief at 36, 40. The BLM need consider those indirect or cumulative effects only if those historical sites were within the various wells' APE. See 2014 Protocol at 27-28 (A.R.0169239-40); 2004 Protocol at 15 (A.R.0169052). After reviewing the records' cultural resource reports, the Court concludes that Chaco Park and its satellites are not within any of the wells' APEs, see, e.g., A Cultural Resources Survey of WPX Energy Production LLC's Chaco 2306-18M Number 240H/256H Dual Well Pad, Pipeline, and Access Road at 4 (dated March 21,

2014)(A.R.0168011)("Chaco 2306-18M Report"), so the BLM did not act arbitrarily and capriciously when it did not explicitly consider indirect effects to those properties within its cultural resource reports. The Court also concludes that the records' cultural resources reports meet the 2004 Protocol's and the 2014 Protocol's documentation standards. Each cultural resource report and its accompanying cultural resource record of review describes each historical site within the APE with enough detail that the Court can discern the historical site's nature, as required. See 2014 Procedures at Appendix 3-7 (A.R.0168975). The sites identified are archaeological in nature. See, e.g., Chaco 2306-18M Report at 4(A.R.0168011)(identifying the historical site as qualifying for the national registry of historic places under criteria D, which means it is a site that has yielded or is likely to yield information important in history). See also New Mexico Cultural Resource Information System at 24 (A.R.0169118)(defining criteria D under the national registry of historic places as a site that "has yielded, or is likely to yield, information important in prehistory or history," and noting that "[o]bviously most archaeological sites will fall under criteria 'd.'"). Those reports then describe why the BLM has determined that the well pad will not affect those sites. See, e.g., Chaco 2306-18M Report at 4; Cultural Resource Record of Review for Chaco 2306-18M at 1-2 (A.R.0168012-13)("Chaco 2306-18M CRROR"). Most often, the reason is that the site can be avoided during construction, thus eliminating or severely mitigating the risk of physical damage. See, e.g., Chaco 2306-18M Report at 4; Chaco 2306-18M CRROR at 1-2. As explained in the 2014 Protocol, a project's adverse effect on an archaeological site is limited to whether the project could physically destroy or damage the archaeological site. See 2014 Protocol at 30 (A.R.0169242). Such a limitation makes sense, as the archaeological site's historical value stems from the historical data

recoverable from the location and not the historical property's setting or feeling associated with it. As the Court mentioned previously, the documentation standard is not a high standard, and the Court concludes that the record documentation for these archaeological sites meets the low bar that the documentation standard erects.[34] Accordingly, the BLM did not violate the NHPA.

VII. IF THE COURT WERE TO CONCLUDE THAT THERE WERE A NEPA VIOLATION, VACATUR AND REMAND, BUT NOT A PERMANENT INJUNCTION, WOULD BE THE PROPER REMEDY, AND IF THE COURT WERE TO CONCLUDE THAT THERE WERE A NHPA VIOLATION, REMAND WITHOUT VACTUR, IN LIEU OF A PERMANENT INJUNCTION, WOULD BE THE APPROPRIATE REMEDY.

If the Court concluded that there were a NEPA violation, it would conclude that vacatur would be the proper remedy, but a permanent injunction would not be. Vacatur with remand, as opposed to remand without vacatur, of the 350 wells' APDs is proper, because the seriousness of the BLM's violation outweighs the potential harm the operators would suffer. An injunction precluding the BLM from approving more wells would be inappropriate, however, as the

[34]The Court previously determined that some of the cultural resource reports did not meet the requisite documentation standards. See Order at 4, filed March 31, 2018 (Doc. 128)("Order"). After having an opportunity to review fully the case's voluminous record, the Court concludes that the BLM meets the required documentation standards. The Court's previous determination was based on some cultural resource reports, which state that historical sites were within an APE, but then give no explanation why the BLM concluded that the well would not affect that historical site. See Cultural Resources Survey of Encana Oil and Gas (USA) Inc.'s Escrito D34-2409 Number 01H/02H/03H/04H Multiple Well Pad, Access Road, and Pipeline at 4 (dated November 19, 2012)(A.R.0167456)("Escrito D34-2409 Report"). For example, in the Escrito D34-2409 Report, it notes that there are four historical sites within the APE, two of which are eligible for inclusion in the national register of historic places, yet does not explain why it determined that the well pads would not adversely affect those historic sites. See Escrito D34-2409 Report at 4. With an opportunity to review fully the record, the Court uncovered accompanying Cultural Resource Record of Review Documents, which detail the reasoning for the BLM's no-adverse determination. See Cultural Resource Record of Review for Escrito D34-2409 at 1-2 (A.R.0167457-58)(noting that erected physical barriers would protect the historic sites, so the project could proceed). The combined reports satisfy the documentation standards.

presumption is in favor of remand with vacatur. Moreover, on balance, given the harms alleged, vacatur would better serve the public. On the other hand, if there were just a NHPA violation, remand without vacatur would be appropriate, because the harms alleged are purely aesthetic.

A. VACATUR OF THE WELLS' APDS IS PROPER.[35]

Vacatur is the usual remedy for an agency action that is arbitrary, capricious, or contrary to law. See 5 U.S.C. § 706(2)(A); DinéCitizens Against Ruining Our Environment v. United States Office of Surface Mining Reclamation and Enforcement, 2015 WL 1593995, at *1 (D. Colo. April 6, 2015)(Kane, J.)("When a federal agency fails to comply with its obligation to consider the environmental impacts of its action before undertaking a 'major federal action,' the normal remedy is vacatur.")("Diné III"). "[I]n some cases," however, "equitable principles counsel in favor of remand without vacatur." Diné III, 2015 WL 1593995, at *2 (citing Pacific Rivers Council v. United States Forest Service, 942 F. Supp. 2d 1014, 1021 (E.D. Cal. 2013)(England, Jr., C.J.)). See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Com'n, 988 F.2d 146, 150 (D.C. Cir. 1993)("An inadequately supported rule, however, need not necessarily be vacated."). Vacatur is proper as opposed to remand when the seriousness of the rule-making's deficiency outweighs the harm that might arise from vacating the agency's action. See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Com'n, 988 F.2d at 150-51; California Communities Against Toxics v. E.P.A., 688 F.3d 989, 992 (9th Cir. 2012). Reviewing the cases, the presumption is in favor of vacatur instead of remand without vacatur. See e.g., Humane Soc. of U.S. v. Locke, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010)("In rare circumstances, when we deem it

[35]This analysis, which is already contingent on the Court coming to a different conclusion, does not apply to the APD challenges that the Court concluded were moot or were not challenging final agency action. The Plaintiffs' challenges to those wells' APDs would fail even if the Court determined that the BLM violated NEPA or the NHPA.

advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating the agency's action."); Heartland Regional Medical Center v. Sebelius, 566 F.3d 193, 198 (D.C. Cir. 2009). The statute's mandatory language supports that proposition. See 5 U.S.C. § 706(2)(A)("The reviewing court shall . . . hold unlawful and set aside agency action.")(emphasis added).

Here, had the Plaintiffs made a showing that the BLM violated NEPA, because the EIS did not consider the significant effects resulting from these wells that use horizontal drilling and fracking techniques, the APD deficiency would be serious. Hundreds of wells would be operating without a robust EIS level analysis of horizontal drillings' effects on the environment. First, there would be unconsidered impacts to water consumption -- perhaps to the tune of hundreds of millions of gallons of freshwater -- which is of particular consequence in a desert. See RMP/EIS at 4-14, 4-15 (A.R.0001024-25); see 2014 RFDS at 23-24 (A.R.0173848-49).[36] There would also be unconsidered impacts to the surface area, equaling about 2,000 acres, and the air quality, equaling around several thousands of tons of emissions per year. See Reply Brief at 10-11, nn.15, 17 (citing e.g. Environmental Assessment DOI-BLM-NM-F010-2014-0004, at 7

[36]The Court calculates the hundreds of millions of gallons figure by assuming that the BLM did not consider the horizontal wells' effects and assuming that some of the Plaintiffs' reply brief figures are correct. See Reply Brief at 10. Thus, for 350 horizontal wells not considered multiplied by 1,020,000 gallons per well yields 357 million gallons. As already noted, see supra 95, n.22, the Court concludes that the gallons per well figure is likely smaller, but even with a smaller number, the record supports a hundreds of millions of gallons figure. see 2014 RFDS at 23-24 (A.R.0173848-49)(noting a potential 25% per gallon per well reduction by reusing water, which would yield 267 million gallons per well). If the Court were to use the well number that the Plaintiffs want it to use -- 3,960 -- the figure balloons to 4 billion gallons. The Court also notes that the water used may not all be pure freshwater. See 2014 RFDS at 23 (A.R.0173844)(noting that advances in technology may allow oil companies to use a low saline water for its fracking purposes).

(A.R.0047459); (A.R.14456); 2003 RMP/EIS at 4-58 - 4-61).[37] The Court notes that the harm from unconsidered environmental impacts is more than just the direct environmental impacts. The loss of water from horizontal drilling is the same regardless whether the BLM considered that loss of freshwater. Another very real harm from unconsidered effects is the increased risk that these unconsidered effects could cause some more dire unforeseen harm. For example, the increased use of hundreds of millions of gallons of water could impact New Mexico's desert or the San Juan Basin in some way that is not reversible. Thus, in weighing the rulemaking's deficiency, the Court must also consider the risk of unforeseen harms. See Diné III, 2015 WL 1593995, at *2 ("[I]t is apparent that these mercury-related indirect effects could have significant impacts on threatened and endangered species in the area.").

These rulemaking's deficiencies must then be balanced against the harms arising from vacating 350 APDs. The harm stemming from vacatur would primarily be economic. The operators would lose profits from the dormant wells. While this harm is not trivial -- as the Court analyzed previously, see Diné, 2015 WL 4997207, at *49 -- the Court concludes that, had the Plaintiffs prevailed on the merits, the rulemaking's deficiencies would be more serious than lost profits, thus warranting vacatur.[38] It is unclear the amount of lost profits which the Operators would sustain, but it is likely that the amount would be "serious" -- perhaps hundreds

[37]These numbers are assuming, again, that the BLM did not consider the horizontal wells' effects and assuming that some of the Plaintiffs' reply brief figures are correct. Even if the numbers are lower, as the Court concludes above, they would likely still be around a thousand acres and several thousand tons of emissions per year.

[38]The Court notes that, in conducting this balancing test, the Court is not -- as the API intervenors suggest is appropriate, see Operator Response at 18-20 -- weighing all of the benefits of the oil-and-gas industry on the one hand and the environmental effects of horizontal drilling on the other. Rather, the Court must determine the harm that vacating 350 APDs would inflict on the operators.

of thousands or millions of dollars. Diné, 2015 WL 4997207, at *49. Although this harm would be serious, it would not stop the Operators from continued operation in the region with their vertical wells, and there is a chance -- perhaps even a good chance -- that, after the BLM cured its NEPA violation, the wells would be approved, and the wells would produce a profit. The delay in profit certainly imposes a cost, in that the price of oil could drop or another unforeseen factor could affect profits, but this cost is likely less than the upper range of the millions of dollars of loss that the Operators project.

Moreover, as at least one other district court has recognized, in the oil-and-gas industry, the risk of "lost profits and industrial inconvenience" is "the nature of doing business," because it is an industry "fraught with bureaucracy and litigation." Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)(Boasberg, J.)("Standing Rock"). "By nonetheless, proceeding with its venture, the company assumed some risk of economic disruption." Standing Rock, 282 F. Supp. 3d at 104. Although vacatur would impose a cost on the Operators, it is not necessarily an unexpected cost, which lessens the weight the Court will give it. See Standing Rock, 282 F. Supp. 3d at 106 ("In sum, although the Court concludes that there is likely to be some economic disruption from vacatur, this factor does not weigh heavily in the Defendants' favor.")(emphasis in original). An expected cost, for example, is far less likely to cause a company to default on its obligations. Although it may be serious, the Court concludes that the lost profits concern is not so great to overwhelm the environmental concern, had the Court concluded that the BLM violated NEPA. On balance, and with the presumption in favor of vacatur, the rulemaking's deficiencies outweighs the potential economic harm, so vacatur would be warranted. See Standing Rock, 282 F. Supp. 3d at 104-106; Public

Employees for Environmental Responsibility v. United States Fish and Wildlife Service, 189 F. Supp. 3d 1, 3 (D.D.C. 2016)(Bates, J.)("Absent a strong showing by FWS that vacatur will unduly harm economic interests . . . the Court is reluctant to rely on economic disruption as the basis for denying plaintiffs the injunctive relief they seek."); Diné III, 2015 WL 1593995, at *2-3 (concluding that vacatur was warranted even with $400,000.00 per month economic harm, because the challenged mine could significantly impact endangered species in the region). See also California Communities Against Toxics v. EPA, 688 F.3d at 994 (concluding vacatur was not warranted, because stopping the project would be "economically disastrous" as it was "a billion-dollar venture.").[39]

In contrast to the NEPA violation, the environmental harms associated with the NHPA violation are far less severe. The Plaintiffs allege that air, light, and noise pollution adversely affect historic sites. See Diné Response at 35. Although those are cognizable harms, the BLM's failure to consider how air, light, and noise pollution might affect Chaco Park and its satellites is unlikely to lead to irreparable harm or even serious harm to the historic property in the interim between this order and the agency's updated decision.[40] All of those individuals who visit those historic sites might be inconvenienced, or their experience might be less enjoyable, but that harm

[39]The Operators argue that vacatur is not warranted, even if there is a NEPA violation, because the BLM's "latest EAs hav[e] the most robust cumulative impact analysis . . . and address the potential future Mancos shale drilling from the 2014 RFD." BLM Response at 27. Although it may be true that the latest EAs have robust analyses, that fact does not bear greatly on the vacatur balancing analysis. EAs only comment on the environmental impact of particular wells. There is no indication that the newest EAs are EAs for the wells challenged.

[40]Air pollution can certainly be a serious harm. In addition to causing climate change, it can also cause health issues. See Massachusetts v. EPA, 549 U.S. 497, 523 (2007); Whitman v. American Trucking Assocs., 531 U.S. 457, 465 (2001). In this context, however, the air pollution is alleged to harm the historic site's setting, or the aesthetic, which is a much less severe harm than the general harm that air pollution causes.

does not outweigh the potential hundreds of thousands to millions of dollars of economic harm the operators will endure. Accordingly, remand without vacatur would be appropriate for the NHPA violation.

B. A PERMANENT INJUNCTION IS UNWARRANTED.

As the presumption is in favor of remand with vacatur vis-à-vis remand without vacatur, so is the presumption in favor of vacatur vis-à-vis a permanent injunction. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 165-66 (2010)("If a less drastic remedy (such as partial or complete vacatur of APHIS's deregulation decision) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was warranted."); American Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1084 (D.C. Cir. 2001)("If an appellant . . . prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency's order."); Sierra Club v. Van Antwerp, 719 F. Supp. 2d 77, 78 (D.D.C. 2010)(Lamberth, J.). The factors to consider for a permanent injunction are similar to a preliminary injunction's factors:

> A plaintiff 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; 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).

Turning first to irreparable harm, as the Court previously determined in Diné, 2015 WL 4997207, at *46-48, the Plaintiffs' identified NEPA harms are irreparable, id. at *48 ("Environmental injury . . . is often permanent or at least of long duration."). The Court discerns nothing to have happened in the interim to change this determination. Accordingly, this prong

counsels in favor of a permanent injunction. Similarly, the second prong also favors an injunction. See Diné, 2015 WL 4997207, at *48 ("Environmental injury, by its nature, can seldom be adequately remedied by money damages.").

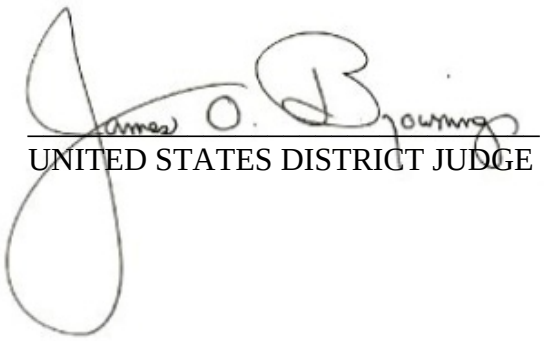
In contrast, the harm alleged under the NHPA -- noise, air, and light pollution causing an aesthetic injury to the historic site -- is not irreparable. To stop the noise all the operators have to do is strop drilling. Similarly, to stop the light pollution, the riggers need only turn off the lights. Although air pollution is typically conceived of as an irreparable environmental harm, the air pollution here, as explained above, is an aesthetic harm affecting the historic site's setting or feeling associated with it. The Court conceives of this harm in the form of smog or a hazy day. Such air pollution would decrease the aesthetic of a site like Chaco Park. This type of air pollution, however, tends to be localized and can be alleviated if the local machinery causing it is stopped. Accordingly, the Court concludes that there is no irreparable harm vis-à-vis the NHPA. Monetary damages have also been found -- at least at common law -- appropriate for aesthetic injuries, depending on their severity. For example, nuisance provides money damages for noxious odors. See Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 886 (10th Cir. 2017). Monetary damages, accordingly, can address the noise, air, and light pollution aesthetic injuries at issue here.

With NEPA, although the first two factors favor a permanent injunction, the balance of hardships do not favor an equitable solution, given the other available remedy -- vacatur. The balance of hardships have already been addressed supra, and the Court determines that the balance favored the Plaintiffs. Nevertheless, the balance of hardships do not counsel a permanent injunction -- "a drastic and extraordinary remedy," Monsanto Co. v. Geertson Seed

Farms, 561 U.S. at 165, because the Court perceives that vacatur will sufficiently redress the respondent's injury. Vacatur, like a permanent injunction, stops the wells from inflicting any more environmental harm. Vacatur is more appropriate, however, because the source of the statutory injury flows from the BLM's failure to consider horizontal drilling's environmental effects. A permanent injunction would preclude the oil wells from ever producing again unless and until the Plaintiffs secured an order modifying the injunction with the Court. In contrast, vacatur stops the wells until the agency reconsiders its previous determination. Given that the harm flows from the agency's failure to consider, a permanent injunction, which stops the agency from correcting its mistake until it comes back to the court is not tailored to the harm alleged. Accordingly, the Court concludes that this factor does not weigh in favor of a permanent injunction for the NEPA violation. This factor, for this case, is dispositive for the Court given the Supreme Court's admonition that, if vacatur is better tailored to the harm, it is the appropriate remedy in lieu of a permanent injunction. See Monsanto Co. v. Geertson Seed Farms, 561 U.S. at 165. In terms of the NHPA violations, the balance of harms factor does not counsel for vacatur, see supra at 127-28, so the Court would also conclude that a permanent injunction is inappropriate.[41]

IT IS ORDERED that the requests in the Plaintiffs' Opening Merits Brief, filed April 28, 2017 (Doc. 112), are denied. All of the Plaintiffs' claims are dismissed with prejudice.

[41]As the Court noted previously, in this case, the balance of equities and the public interest prongs collapse into the same inquiry. See Diné, 2015 WL 4997207, at *50. Accordingly, it concludes that vacatur would be the proper remedy for the NEPA violation and remand without vacatur would be the proper remedy for the NHPA violations.



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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs,

vs. No. CIV 15-0209 JB/SCY

SALLY JEWELL, in her official capacity as Secretary of the United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT, an agency within the United States Department of the Interior; and NEIL KORNZE, in his official capacity as Director of the United States Bureau of Land Management,

Defendants,

and

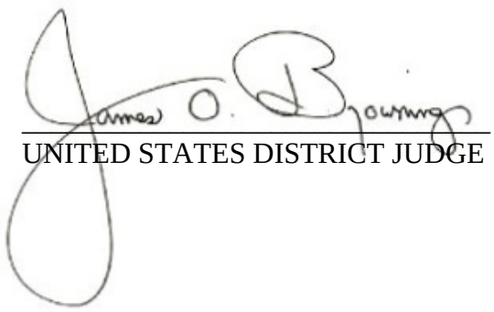
WPX ENERGY PRODUCTION, LLC; ENCANA OIL & GAS (USA) INC.; BP AMERICA COMPANY; CONOCOPHILLIPS COMPANY; BURLINGTON RESOURCES OIL & GAS COMPANY LP; AMERICAN PETROLEUM INSTITUTE; and ANSCHUTZ EXPLORATION CORPORATION,

Intervenor-Defendants.

FINAL JUDGMENT

THIS MATTER comes before the Court on the Court's Memorandum Opinion and Amended Order, filed April 23, 2018 (Doc. 129)("MOO"). In the MOO, the Court dismissed all of the Plaintiffs' claims with prejudice. See MOO at 130. Having disposed of all issues, claims, and parties before the Court, the Court now dismisses this case and enters Final Judgment.

IT IS ORDERED that: (i) this case is dismissed with prejudice; and (ii) Final Judgment is entered.



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5 USCS § 706

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES > PART I. THE AGENCIES GENERALLY > CHAPTER 7. JUDICIAL REVIEW

Notice

Part 1 of 3. You are viewing a very large document that has been divided into parts.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1)compel agency action unlawfully withheld or unreasonably delayed; and

(2)hold unlawful and set aside agency action, findings, and conclusions found to be--

(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D)without observance of procedure required by law;

(E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History

(Sept. 6, 1966,P.L. 89-554, § 1, 80 Stat. 393.)

Prior law and revision:

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 USC Sec. 1009(e)	June 11, 1946, ch 324, Sec. 10(e), 60 Stat. 243.

16 USCS § 410ii

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 16. CONSERVATION > CHAPTER 1. NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES > CHACO CULTURE NATIONAL HISTORICAL PARK

§ 410ii. Congressional findings and statement of purpose

(a) The Congress finds that--

(1)archeological research in the San Juan Basin conducted over the past several years has greatly increased public knowledge of the scope of the prehistoric culture referred to as Chacoan Anasazi;

(2)the discoveries and the increased general interest in the Chaco phenomenon have come at a time when the San Juan Basin is experiencing extensive exploration and development for a wide variety of energy-related resources, including coal, uranium, oil, and natural gas;

(3)development of the San Juan Basin's important natural resources and the valid existing rights of private property owners will not be adversely affected by the preservation of the archeological integrity of the area; and

(4)in light of the national significance of the Chacoan sites and the urgent need to protect them, continued cooperation between Federal agencies and private corporations is necessary to provide for development in the San Juan Basin in a manner compatible with preservation and archeological research.

(b) It is the purpose of this *title [16 USCS §§ 410ii* et seq.] to recognize the unique archeological resources associated with the prehistoric Chacoan culture in the San Juan Basin and surrounding areas; to provide for the preservation and interpretation of these resources; and to facilitate research activities associated with these resources.

History

(Dec. 19, 1980,*P.L. 96-550*, Title V, § 501, *94 Stat. 3227*; May 18, 1995, *P.L. 104-11*, § 2, *109 Stat. 158*.)

End of Document

16 USCS § 410ii-1

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 16. CONSERVATION > CHAPTER 1. NATIONAL PARKS, MILITARY PARKS, MONUMENTS, AND SEASHORES > CHACO CULTURE NATIONAL HISTORICAL PARK

§ 410ii-1. Establishment

(a) Abolition of Chaco Canyon National Monument. There is hereby established in the State of New Mexico, the Chaco Culture National Historical Park comprising approximately thirty three thousand nine hundred and eighty nine acres as generally depicted on the map entitled "Chaco Culture National Historical Park", numbered 310/80,032-A and dated August 1979. The Chaco Canyon National Monument is hereby abolished, as such, and any funds available for the purpose of the monument shall be available for the purpose of the Chaco Culture National Historical Park.

(b) Designation of Chaco Culture Archeological Protection Sites.

(1) Thirty-nine outlying sites as generally depicted on a map entitled "Chaco Culture Archeological Protection Sites", numbered 310/80,033-B and dated September 1991, are hereby designated as "Chaco Culture Archeological Protection Sites". The thirty-nine archeological protection sites totaling approximately 14,372 acres identified as follows:

Name:	Acres
Allentown	380
Andrews Ranch	950
Bee Burrow	480
Bisa' ani	131
Casa del Rio	40
Casamero	160
Chimney Rock	3,160
Coolidge	450
Dalton Pass	135
Dittert	480
Great Bend	26
Greenlee Ruin	60
Grey Hill Spring	23
Guadalupe	115
Halfway House	40

Haystack	565
Hogback	453
Indian Creek	100
Jacquez	66
Kin Nizhoni	726
Lake Valley	30
Manuelito-Atsee Nitsaa	60
Manuelito-Kin Hochoi	116
Morris 41	85
Muddy Water	1,090
Navajo Springs	260
Newcomb	50
Peach Springs	1,046
Pierre's Site	440
Raton Well	23
Salmon Ruin	5
San Mateo	61
Sanostee	1,565
Section 8	10
Skunk Springs/Crumbled House	533
Standing Rock	348
Toh-la-kai	10
Twin Angeles	40
Upper Kin Klizhin	60

(2) The map referred to in paragraph (1) shall be kept on file and available for public inspection in the appropriate offices of the National Park Service, the office of the State Director of the Bureau of Land Management located in Santa Fe, New Mexico, the office of the Area Director of the Bureau of Indian Affairs located in Window Rock, Arizona, and the offices of the Arizona and New Mexico State Historic Preservation Officers.

History

(Dec. 19, 1980,*P.L. 96-550*, Title V, § 502, *94 Stat. 3227*; May 18, 1995, *P.L. 104-11*, § 3, *109 Stat. 158*.)

End of Document

28 USCS § 1291

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART IV. JURISDICTION AND VENUE > CHAPTER 83. COURTS OF APPEALS

Notice

Part 1 of 2. You are viewing a very large document that has been divided into parts.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this *title [28 USCS §§ 1292(c)* and (d) and 1295].

History

(June 25, 1948, ch 646,*62 Stat. 929*; Oct. 31, 1951, ch 655, § 48, *65 Stat. 726*; July 7, 1958, *P.L. 85-508*, § 12(e), *72 Stat. 348*; April 2, 1982, *P.L. 97-164*, Title I, Part A, § 124, *96 Stat. 36*.)

Prior law and revision:

Based on *title 28, U.S.C., 1940 ed., §§ 225(a)*, *933(a)(1)*, and *section 1356 of title 48, U.S.C.*, 1940 ed., Territories and Insular Possessions, and sections 61 and 62 of title 7 of the Canal Zone Code (Mar. 3, 1911, ch. 231, § 128, *36 Stat. 1133*; Aug. 24, 1912, ch. 390, § 9, *37 Stat. 566*; Jan. 28, 1915, ch. 22, § 2, *38 Stat. 804*; Feb. 7, 1925, ch. 150, *43 Stat. 813*; Sept. 21, 1922, ch. 370, § 3, *42 Stat. 1006*; Feb. 13, 1925, ch. 229, § 1, *43 Stat. 936*; Jan. 31, 1928, ch. 14, § 1, *45 Stat. 54*; May 17, 1932, ch. 190, *47 Stat. 158*; Feb. 16, 1933, ch. 91, § 3, *47 Stat. 817*; May 31, 1935, ch. 160, *49 Stat. 313*; June 20, 1938, ch. 526, *52 Stat. 779*; Aug. 2, 1946, ch. 753, Sec. 412(a)(1), *60 Stat. 844*).

This section rephrases and simplifies paragraphs "First", "Second", and "Third" of *section 225(a) of title 28, U.S.C.*, 1940 ed., which referred to each Territory and Possession separately, and to sections 61 and 62 of the Canal Zone Code, section 933(a)(1) of said title relating to jurisdiction of appeals in tort claims cases, and the provisions of *section 1356 of title 48, U.S.C.*, 1940 ed., relating to jurisdiction of appeals from final judgments of the district court for the Canal Zone.

The district courts for the districts of Hawaii and Puerto Rico are embraced in the term "district courts of the United States."

(See definitive section 451 of this title.)

Paragraph "Fourth" of *section 225(a) of title 28, U.S.C.*, 1940 ed., is incorporated in section 1293 of this title.

Words "Fifth. In the United States Court for China, in all cases" in said section 225(a) were omitted. (See reviser's note under section 411 of this title.)

Venue provisions of *section 1356 of title 48, U.S.C.*, 1940 ed., are incorporated in section 1295 of this title.

Section 61 of title 7 of the Canal Zone Code is also incorporated in sections 1291 and 1295 of this title.

In addition to the jurisdiction conferred by this chapter, the courts of appeals also have appellate jurisdiction in proceedings under Title 11, Bankruptcy, and jurisdiction to review:

(1) Orders of the Secretary of the Treasury denying an application for, suspending, revoking, or annulling a basic permit under chapter 8 of title 27;

(2) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(3) Orders of the Secretary of the Army under sections 504, 505 and 516 of title 33, U.S.C., 1940 ed., Navigation and Navigable Waters;

(4) Orders of the Civil Aeronautics Board under chapter 9 of title 49, except orders as to foreign air carriers which are subject to the President's approval;

(5) Orders under chapter 1 of title 7, refusing to designate boards of trade as contract markets or suspending or revoking such designations, or excluding persons from trading in contract markets;

(6) Orders of the Federal Power Commission under chapter 12 of title 16;

(7) Orders of the Federal Security Administrator under section 371(e) of title 21, in a case of actual controversy as to the validity of any such order, by any person adversely affected thereby;

(8) Orders of the Federal Power Commission under chapter 15B of title 15;

(9) Final orders of the National Labor Relations Board;

(10) Cease and desist orders under section 193 of title 7;

(11) Orders of the Securities and Exchange Commission;

(12) Orders to cease and desist from violating section 1599 of title 7;

(13) Wage orders of the Administrator of the Wage and Hour Division of the Department of Labor under section 208 of title 29;

(14) Orders under sections 81r and 1641 of title 19, U.S.C., 1940 ed., Customs Duties.

The courts of appeals also have jurisdiction to enforce:

(1) Orders of the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Board of Governors of the Federal Reserve System, and the Federal Trade Commission, based on violations of the antitrust laws or unfair or deceptive acts, methods, or practices in commerce;

(2) Final orders of the National Labor Relations Board;

(3) Orders to cease and desist from violating section 1599 of title 7.

The Court of Appeals for the District of Columbia also has jurisdiction to review orders of the Post Office Department under section 576 of title 39 relating to discriminations in sending second-class publications by freight; Maritime Commission orders denying transfer to foreign registry of vessels under subsidy contract; sugar allotment orders; decisions of the Federal Communications Commission granting or refusing applications for construction permits for radio stations, or for radio station licenses, or for renewal or modification of radio station licenses, or suspending any radio operator's license.

Changes were made in phraseology.

28 USCS § 1331

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART IV. JURISDICTION AND VENUE > CHAPTER 85. DISTRICT COURTS; JURISDICTION

Notice

Part 1 of 2. You are viewing a very large document that has been divided into parts.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

History

(June 25, 1948, ch 646,62 Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P.L. 96-486, § 2(a), 94 Stat. 2369.)

Prior law and revision:

Based on *title 28, U.S.C., 1940 ed., § 41(1)* (Mar. 3, 1911, ch. 231, § 24, P 1, 36 Stat. 1091; May 14, 1934, ch. 283, § 1, *48 Stat. 775*; Aug. 21, 1937, ch. 726, § 1, 50 Stat. 738; Apr. 20, 1940, ch. 117, *54 Stat. 143*).

Jurisdiction of federal questions arising under other sections of this chapter is not dependent upon the amount in controversy. (See annotations under former *section 41 of title 28, U.S.C.A.*, and 35 C.J.S., p. 833 et seq., Sec. 30-43. See, also, reviser's note under section 1332 of this title.)

Words "wherein the matter in controversy exceeds the sum or value of $ 3,000, exclusive of interest and costs," were added to conform to rulings of the Supreme Court. See construction of provision relating to jurisdictional amount requirement in cases involving a Federal question in *United States v. Sayward, 16 S.Ct. 371, 160 U.S. 493, 40 L.Ed. 508; Fishback v. Western Union Tel. Co., 16 S.Ct. 506, 161 U.S. 96, 40 L.Ed. 630;* and *Halt v. Indiana Manufacturing Co., 1900, 20 S.Ct. 272, 176 U.S. 68, 44 L.Ed. 374.*

Words "all civil actions" were substituted for "all suits of a civil nature, at common law or in equity" to conform with *Rule 2 of the Federal Rules of Civil Procedure.*

Words "or treaties" were substituted for "or treaties made, or which shall be made under their authority," for purposes of brevity.

The remaining provisions of *section 41(1) of title 28, U.S.C.*, 1940 ed., are incorporated in sections 1332, 1341, 1342, 1345, 1354, and 1359 of this title.

Changes were made in arrangement and phraseology.

42 USCS § 4321

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 42. THE PUBLIC HEALTH AND WELFARE > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY

§ 4321. Congressional declaration of purpose

The purposes of this Act [*42 USCS §§ 4321* et seq.] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

History

(Jan. 1, 1970,*P.L. 91-190*, § 2, *83 Stat. 852*.)

End of Document

42 USCS § 4331

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 42. THE PUBLIC HEALTH AND WELFARE > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY > POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act [*42 USCS §§ 4321* et seq.], it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1)fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2)assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3)attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4)preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5)achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6)enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

History

(Jan. 1, 1970,*P.L. 91-190*, Title I, § 101, *83 Stat. 852*.)

42 USCS § 4332

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 42. THE PUBLIC HEALTH AND WELFARE > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY > POLICIES AND GOALS

Notice

Part 1 of 2. You are viewing a very large document that has been divided into parts.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall--

(A)utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B)identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C)include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i)the environmental impact of the proposed action,

(ii)any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii)alternatives to the proposed action,

(iv)the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v)any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i)the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii)the responsible Federal official furnishes guidance and participates in such preparation,

(iii)the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv)after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[;]

(E)study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F)recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G)make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H)initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I)assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

History

(Jan. 1, 1970,P.L. 91-190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, P.L. 94-83, 89 Stat. 424.)

End of Document

43 USCS § 1701

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 43. PUBLIC LANDS > CHAPTER 35. FEDERAL LAND POLICY AND MANAGEMENT > GENERAL PROVISIONS

§ 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that--

(1)the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2)the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3)public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before the date of enactment of this Act [enacted Oct. 21, 1976] be reviewed in accordance with the provisions of this Act;

(4)the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5)in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6)judicial review of public land adjudication decisions be provided by law;

(7)goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8)the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9)the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10)uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11)regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12)the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13)the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

History

(Oct. 21, 1976,P.L. 94-579, Title I, § 102, 90 Stat. 2744.)

End of Document

54 USCS § 300101

Current through PL 115-281, approved 12/1/18

United States Code Service - Titles 1 through 54 > TITLE 54. NATIONAL PARK SERVICE AND RELATED PROGRAMS > SUBTITLE III. NATIONAL PRESERVATION PROGRAMS > PART A. HISTORIC PRESERVATION > SUBPART 1. GENERAL PROVISIONS > CHAPTER 3001. POLICY

§ 300101. Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to--

(1)use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2)provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3)administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4)contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5)encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6)assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

History

(Dec. 19, 2014,P.L. 113-287, § 3, 128 Stat. 3187.)

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
300101…	16 U.S.C. 470-1	Pub. L. 89-665, Sec. 2, as added Pub. L. 96-515, title I, Sec. 101(a), Dec. 12, 1980, 94 Stat. 2988; Pub. L. 102-575, title XL, Sec. 4002, Oct. 30, 1992, 106 Stat. 4753.

The words "Native Hawaiian organizations" are added for consistency in the section.

In paragraph (2), the words "in partnership with States, Indian tribes, Native Hawaiians, and local governments" are omitted as unnecessary because the words are used in the introductory material of this section.

36 CFR 60.3

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY > CHAPTER I -- NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR > PART 60 -- NATIONAL REGISTER OF HISTORIC PLACES

§ 60.3 Definitions.

(a) Building. A building is a structure created to shelter any form of human activity, such as a house, barn, church, hotel, or similar structure. Building may refer to a historically related complex such as a courthouse and jail or a house and barn.

Examples

Molly Brown House (Denver, CO)

Meek Mansion and Carriage House (Hayward, CA)

Huron County Courthouse and Jail (Norwalk, OH)

Fairntosh Plantation (Durham vicinity, NC)

(b) Chief elected local official. Chief elected local official means the mayor, county judge, county executive or otherwise titled chief elected administrative official who is the elected head of the local political jurisdiction in which the property is located.

(c) Determination of eligibility. A determination of eligibility is a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register. A determination of eligibility does not make the property eligible for such benefits as grants, loans, or tax incentives that have listing on the National Register as a prerequisite.

(d) District. A district is a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.

Examples

Georgetown Historic District (Washington, DC)

Martin Luther King Historic District (Atlanta, GA)

Durango-Silverton Narrow-Gauge Railroad (right-of-way between Durango and Silverton, CO)

(e) Federal Preservation Officer. The Federal Preservation Officer is the official designated by the head of each Federal agency responsible for coordinating that agency's activities under the National Historic Preservation Act of 1966, as amended, and Executive Order 11593 including nominating properties under that agency's ownership or control to the National Register.

(f) Keeper of the National Register of Historic Places. The Keeper is the individual who has been delegated the authority by NPS to list properties and determine their eligibility for the National Register. The Keeper may further delegate this authority as he or she deems appropriate.

(g) Multiple Resource Format submission. A Multiple Resource Format submission for nominating properties to the National Register is one which includes all or a defined portion of the cultural resources identified in a specified geographical area.

(h) National Park Service (NPS). The National Park Service is the bureau of the Department of Interior to which the Secretary of Interior has delegated the authority and responsibility for administering the National Register program.

(i) National Register Nomination Form. National Register Nomination Form means (1) National Register Nomination Form NPS 10-900, with accompanying continuation sheets (where necessary) Form NPS 10-900a, maps and photographs or (2) for Federal nominations, Form No. 10-306, with continuation sheets (where necessary) Form No. 10-300A, maps and photographs. Such nomination forms must be "adequately documented" and "technically and professionally correct and sufficient." To meet these requirements the forms and accompanying maps and photographs must be completed in accord with requirements and guidance in the NPS publication, "How to Complete National Register Forms" and other NPS technical publications on this subject. Descriptions and statements of significance must be prepared in accord with standards generally accepted by academic historians, architectural historians and archeologists. The nomination form is a legal document and reference for historical, architectural, and archeological data upon which the protections for listed and eligible properties are founded. The nominating authority certifies that the nomination is adequately documented and technically and professionally correct and sufficient upon nomination.

(j) Object. An object is a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.

Examples

Delta Queen Steamboat (Cincinnati, OH)

Adams Memorial (Rock Creek Cemetery, Washington, DC)

Sumpter Valley Gold Dredge (Sumpter, OR)

(k) Owner or owners. The term owner or owners means those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.

(l) Site. A site is the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure.

Examples

Cabin Creek Battlefield (Pensacola vicinity, OK)

Mound Cemetery Mound (Chester vicinity, OH)

Mud Springs Pony Express Station Site (Dalton vicinity, NE)

(m) State Historic Preservation Officer. The State Historic Preservation Officer is the person who has been designated by the Governor or chief executive or by State statute in each State to administer the State Historic Preservation Program, including identifying and nominating eligible properties to the National Register and otherwise administering applications for listing historic properties in the National Register.

(n) State Historic Preservation Program. The State Historic Preservation Program is the program established by each State and approved by the Secretary of Interior for the purpose of carrying out the provisions of the National Historic Preservation Act of 1966, as amended, and related laws and regulations. Such program shall be approved by the Secretary before the State may nominate properties to the National Register. Any State Historic Preservation Program in effect under prior authority of law before December 12, 1980, shall be treated as an approved program until the Secretary approves a program submitted by the State for purposes of the Amendments or December 12, 1983, unless the Secretary chooses to rescind such approval because of program deficiencies.

(o) State Review Board. The State Review Board is a body whose members represent the professional fields of American history, architectural history, historic architecture, prehistoric and historic archeology, and other professional disciplines and may include citizen members. In States with approved State historic preservation programs the State Review Board reviews and approves National Register nominations concerning whether or not they meet the criteria for evaluation prior to their submittal to the NPS.

(p) Structure. A structure is a work made up of interdependent and interrelated parts in a definite pattern of organization. Constructed by man, it is often an engineering project large in scale.

Examples

Swanton Covered Railroad Bridge (Swanton vicinity, VT)

Old Point Loma Lighthouse (San Diego, CA)

North Point Water Tower (Milwaukee, WI)

Reber Radio Telescope (Green Bay vicinity, WI)

(q) Thematic Group Format submission. A Thematic Group Format submission for nominating properties to the National Register is one which includes a finite group of resources related to one another in a clearly distinguishable way. They may be related to a single historic person, event, or developmental force; of one building type or use, or designed by a single architect; of a single archeological site form, or related to a particular set of archeological research problems.

(r) To nominate. To nominate is to propose that a district, site, building, structure, or object be listed in the National Register of Historic Places by preparing a nomination form, with accompanying maps and photographs which adequately document the property and are technically and professionally correct and sufficient.

Statutory Authority

National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 et seq., and E.O. 11593.

History

46 FR 56187, Nov. 16, 1981.

End of Document

36 CFR 800.2

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Code of Federal Regulations > TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY > CHAPTER VIII -- ADVISORY COUNCIL ON HISTORIC PRESERVATION > PART 800 -- PROTECTION OF HISTORIC PROPERTIES > SUBPART A -- PURPOSES AND PARTICIPANTS

§ 800.2 Participants in Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) Council entry into the section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) Council assistance. Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) State historic preservation officer.

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It

is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants t of apiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) Nature of involvement. The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) Use of agency procedures. The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

16 U.S.C. 470s.

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044, 27071,* May 18, 1999; *65 FR 77698, 77726,* Dec. 12, 2000]

End of Document

36 CFR 800.3

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§ 800.3 Initiation of the section 106 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) Failure of the SHPO/THPO to respond. If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next

step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

16 U.S.C. 470s.

History

[51 FR 31118, Sept. 2, 1986; 64 FR 27044, 27073, May 18, 1999; 65 FR 77698, 77728, Dec. 12, 2000]

36 CFR 800.4

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§ 800.4 Identification of historic properties.

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) Phased identification and evaluation. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background

research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) Evaluate historic significance.

(1) Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) Determine whether a property is eligible. If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) Results of identification and evaluation.

(1) No historic properties affected. If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)

(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council

determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) Historic properties affected. If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

16 U.S.C. 470s.

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044, 27074,* May 18, 1999; *65 FR 77698, 77728,* Dec. 12, 2000; *69 FR 40544, 40553,* July 6, 2004]

End of Document

36 CFR 800.5

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§ 800.5 Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding.

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) Council review of findings.

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)

(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision

and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

16 U.S.C. 470s.

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044, 27075,* May 18, 1999; *65 FR 77698, 77729,* Dec. 12, 2000; *69 FR 40544, 40553,* July 6, 2004]

End of Document

36 CFR 800.6

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Code of Federal Regulations > TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY > CHAPTER VIII -- ADVISORY COUNCIL ON HISTORIC PRESERVATION > PART 800 -- PROTECTION OF HISTORIC PROPERTIES > SUBPART B -- THE SECTION 106 PROCESS

§ 800.6 Resolution of adverse effects.

(a) Continue consultation. The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) Notify the Council and determine Council participation. The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C)A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) Involve consulting parties. In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) Provide documentation. The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) Involve the public. The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to

the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) Restrictions on disclosure of information. Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) Resolve adverse effects.

(1) Resolution without the Council.

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) Resolution with Council participation. If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) Memorandum of agreement. A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) Signatories. The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) Invited signatories.

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) Concurrence by others. The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) Reports on implementation. Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) Duration. A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been implemented within a specified time.

(6) Discoveries. Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) Amendments. The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) Termination. If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) Copies. The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

16 U.S.C. 470s.

History

[51 FR 31118, Sept. 2, 1986; 52 FR 25376, July 7, 1987; 64 FR 27044, 27076, May 18, 1999; 65 FR 77698, 77730, Dec. 12, 2000]

36 CFR 800.14

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Code of Federal Regulations > TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY > CHAPTER VIII -- ADVISORY COUNCIL ON HISTORIC PRESERVATION > PART 800 -- PROTECTION OF HISTORIC PROPERTIES > SUBPART C -- PROGRAM ALTERNATIVES

§ 800.14 Federal agency program alternatives.

(a) Alternate procedures. An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act.

(1) Development of procedures. The agency official shall consult with the Council, the National Conference of State Historic Preservation Officers, or individual SHPO/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations, as specified in paragraph (f) of this section, in the development of alternate procedures, publish notice of the availability of proposed alternate procedures in the Federal Register and take other appropriate steps to seek public input during the development of alternate procedures.

(2) Council review. The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.

(3) Notice. The agency official shall notify the parties with which it has consulted and publish notice of final alternate procedures in the Federal Register.

(4) Legal effect. Alternate procedures adopted pursuant to this subpart substitute for the Council's regulations for the purposes of the agency's compliance with section 106, except that where an Indian tribe has entered into an agreement with the Council to substitute tribal historic preservation regulations for the Council's regulations under section 101(d)(5) of the act, the agency shall follow those regulations in lieu of the agency's procedures regarding undertakings on tribal lands. Prior to the Council entering into such agreements, the Council will provide Federal agencies notice and opportunity to comment on the proposed substitute tribal regulations.

(b) Programmatic agreements. The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

(1) Use of programmatic agreements. A programmatic agreement may be used:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.

(2) Developing programmatic agreements for agency programs.

(i) The consultation shall involve, as appropriate, SHPO/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public. If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section.

(ii) Public participation. The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.

(iii) Effect. The programmatic agreement shall take effect when executed by the Council, the agency official and the appropriate SHPOs/THPOs when the programmatic agreement concerns a specific region or the president of NCSHPO when NCSHPO has participated in the consultation. A programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement. Compliance with the procedures established by an approved programmatic agreement satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency, the president of NCSHPO when a signatory, or the Council. Termination by an individual SHPO/THPO shall only terminate the application of a regional programmatic agreement within the jurisdiction of the SHPO/THPO. If a THPO assumes the responsibilities of a SHPO pursuant to section 101(d)(2) of the act and the SHPO is signatory to programmatic agreement, the THPO assumes the role of a signatory, including the right to terminate a regional programmatic agreement on lands under the jurisdiction of the tribe.

(iv) Notice. The agency official shall notify the parties with which it has consulted that a programmatic agreement has been executed under paragraph (b) of this section, provide appropriate public notice before it takes effect, and make any internal agency procedures implementing the agreement readily available to the Council, SHPO/THPOs, and the public.

(v) If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement.

(3) Developing programmatic agreements for complex or multiple undertakings. Consultation to develop a programmatic agreement for dealing with the potential adverse effects of complex projects or multiple undertakings shall follow § 800.6. If consultation pertains to an activity involving multiple undertakings and the parties fail to reach agreement, then the agency official shall comply with the provisions of subpart B of this part for each individual undertaking.

(4) Prototype programmatic agreements. The Council may designate an agreement document as a prototype programmatic agreement that may be used for the same type of program or undertaking in more than one case or area. When an agency official uses such a prototype programmatic agreement, the agency official may develop and execute the agreement with the appropriate SHPO/THPO and the agreement shall become final without need for Council participation in consultation or Council signature.

(c) Exempted categories.

(1) Criteria for establishing. The Council or an agency official may propose a program or category of undertakings that may be exempted from review under the provisions of subpart B of this part, if the program or category meets the following criteria:

(i) The actions within the program or category would otherwise qualify as "undertakings" as defined in § 800.16;

(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and

(iii) Exemption of the program or category is consistent with the purposes of the act.

(2) Public participation. The proponent of the exemption shall arrange for public participation appropriate to the subject matter and the scope of the exemption and in accordance with the standards in subpart A of this part. The proponent of the exemption shall consider the nature of the exemption and its likely effects on historic properties and take steps to involve individuals, organizations and entities likely to be interested.

(3) Consultation with SHPOs/THPOs. The proponent of the exemption shall notify and consider the views of the SHPOs/THPOs on the exemption.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the exempted program or category of undertakings has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Council review of proposed exemptions. The Council shall review an exemption proposal that is supported by documentation describing the program or category for which the exemption is sought, demonstrating that the criteria of paragraph (c)(1) of this section have been met, describing the methods used to seek the views of the public, and summarizing any views submitted by the SHPO/THPOs, the public, and any others consulted. Unless it requests further information, the Council shall approve or reject the proposed exemption within 30 days of receipt, and thereafter notify the relevant agency official and SHPO/THPOs of the decision. The decision shall be based on the consistency of the exemption with the purposes of the act, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic properties in accordance with section 214 of the act.

(6) Legal consequences. Any undertaking that falls within an approved exempted program or category shall require no further review pursuant to subpart B of this part, unless the agency official or the Council determines that there are circumstances under which the normally excluded undertaking should be reviewed under subpart B of this part.

(7) Termination. The Council may terminate an exemption at the request of the agency official or when the Council determines that the exemption no longer meets the criteria of paragraph (c)(1) of this section. The Council shall notify the agency official 30 days before termination becomes effective.

(8) Notice. The proponent of the exemption shall publish notice of any approved exemption in the Federal Register.

(d) Standard treatments.

(1) Establishment. The Council, on its own initiative or at the request of another party, may establish standard methods for the treatment of a category of historic properties, a category of undertakings, or a category of effects on historic properties to assist Federal agencies in satisfying the requirements of subpart B of this part. The Council shall publish notice of standard treatments in the Federal Register.

(2) Public participation. The Council shall arrange for public participation appropriate to the subject matter and the scope of the standard treatment and consistent with subpart A of this part. The Council shall consider the nature of the standard treatment and its likely effects on historic properties and the individuals, organizations and entities likely to be interested. Where an agency official has proposed a standard treatment, the Council may request the agency official to arrange for public involvement.

(3) Consultation with SHPOs/THPOs. The Council shall notify and consider the views of SHPOs/THPOs on the proposed standard treatment.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the proposed standard treatment has the potential to affect historic properties on tribal lands or historic properties of religious

and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Termination. The Council may terminate a standard treatment by publication of a notice in the Federal Register 30 days before the termination takes effect.

(e) Program comments. An agency official may request the Council to comment on a category of undertakings in lieu of conducting individual reviews under §§ 800.4 through 800.6. The Council may provide program comments at its own initiative.

(1) Agency request. The agency official shall identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public.

(2) Public participation. The agency official shall arrange for public participation appropriate to the subject matter and the scope of the category and in accordance with the standards in subpart A of this part. The agency official shall consider the nature of the undertakings and their likely effects on historic properties and the individuals, organizations and entities likely to be interested.

(3) Consultation with SHPOs/THPOs. The Council shall notify and consider the views of SHPOs/THPOs on the proposed program comment.

(4) Consultation with Indian tribes and Native Hawaiian organizations. If the program comment has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the Council shall follow the requirements for the agency official set forth in paragraph (f) of this section.

(5) Council action. Unless the Council requests additional documentation, notifies the agency official that it will decline to comment, or obtains the consent of the agency official to extend the period for providing comment, the Council shall comment to the agency official within 45 days of the request.

(i) If the Council comments, the agency official shall take into account the comments of the Council in carrying out the undertakings within the category and publish notice in the Federal Register of the Council's comments and steps the agency will take to ensure that effects to historic properties are taken into account.

(ii) If the Council declines to comment, the agency official shall continue to comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(6) Withdrawal of comment. If the Council determines that the consideration of historic properties is not being carried out in a manner consistent with the program comment, the Council may withdraw the comment and the agency official shall comply with the requirements of §§ 800.3 through 800.6 for the individual undertakings.

(f) Consultation with Indian tribes and Native Hawaiian organizations when developing program alternatives. Whenever an agency official proposes a program alternative pursuant to paragraphs (a) through (e) of this section, the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.

(1) Identifying affected Indian tribes and Native Hawaiian organizations. If any undertaking covered by a proposed program alternative has the potential to affect historic properties on tribal lands, the agency official shall identify and consult with the Indian tribes having jurisdiction over such lands. If a proposed program alternative has the potential to affect historic properties of religious and cultural significance to an Indian tribe or a Native Hawaiian organization which are located off tribal lands, the agency official shall identify those Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to such properties and consult with them. When a proposed program alternative has nationwide applicability, the agency official shall identify an appropriate government to government

consultation with Indian tribes and consult with Native Hawaiian organizations in accordance with existing Executive orders, Presidential memoranda, and applicable provisions of law.

(2) Results of consultation. The agency official shall provide summaries of the views, along with copies of any written comments, provided by affected Indian tribes and Native Hawaiian organizations to the Council as part of the documentation for the proposed program alternative. The agency official and the Council shall take those views into account in reaching a final decision on the proposed program alternative.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

16 U.S.C. 470s.

History

[51 FR 31118, Sept. 2, 1986; 64 FR 27044, 27081, May 18, 1999; 65 FR 77698, 77736, Dec. 12, 2000; 69 FR 40544, 40554, July 6, 2004]

End of Document

36 CFR 800.16

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Code of Federal Regulations > TITLE 36 -- PARKS, FORESTS, AND PUBLIC PROPERTY > CHAPTER VIII -- ADVISORY COUNCIL ON HISTORIC PRESERVATION > PART 800 -- PROTECTION OF HISTORIC PROPERTIES > SUBPART C -- PROGRAM ALTERNATIVES

§ 800.16 Definitions.

(a) Act means the National Historic Preservation Act of 1966, as amended, *16 U.S.C. 470*-470w-6.

(b) Agency means agency as defined in *5 U.S.C. 551.*

(c) Approval of the expenditure of funds means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) Comment means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) Council means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) Day or days means calendar days.

(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) Foreclosure means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l)

(1) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term eligible for inclusion in the National Register includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act *(43 U.S.C. 1602),* which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) Local government means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) Memorandum of agreement means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) National Historic Landmark means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) National Register means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) National Register criteria means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s)

(1) Native Hawaiian organization means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) Programmatic agreement means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) Secretary means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) Senior policy official means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.

Statutory Authority

40 CFR 1500.1

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Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1500 -- PURPOSE, POLICY, AND MANDATE

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b)NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55990, Nov. 28, 1978.

End of Document

40 CFR 1501.4

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Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1501 -- NEPA AND AGENCY PLANNING

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

40 CFR 1502.2

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Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55994, Nov. 29, 1978.

40 CFR 1502.15

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55994, Nov. 29, 1978.

End of Document

40 CFR 1502.16

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

40 CFR 1502.20

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1502 -- ENVIRONMENTAL IMPACT STATEMENT

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 55994, Nov. 29, 1978.

End of Document

40 CFR 1508.7

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended *(42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended *(42 U.S.C. 7609),* and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

40 CFR 1508.8

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

40 CFR 1508.25

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

40 CFR 1508.27

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Statutory Authority

40 CFR 1508.28

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER V -- COUNCIL ON ENVIRONMENTAL QUALITY > PART 1508 -- TERMINOLOGY AND INDEX

§ 1508.28 Tiering.

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

43 CFR 3101.1-2

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 43 -- PUBLIC LANDS: INTERIOR > SUBTITLE B -- REGULATIONS RELATING TO PUBLIC LANDS > CHAPTER II -- BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER C -- MINERALS MANAGEMENT (3000) > PART 3100 -- OIL AND GAS LEASING > SUBPART 3101 -- ISSUANCE OF LEASES

§ 3101.1-2 Surface use rights.

A lessee shall have the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold subject to: Stipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed. To the extent consistent with lease rights granted, such reasonable measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. At a minimum, measures shall be deemed consistent with lease rights granted provided that they do not: require relocation of proposed operations by more than 200 meters; require that operations be sited off the leasehold; or prohibit new surface disturbing operations for a period in excess of 60 days in any lease year.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359 and 1751; 43 U.S.C. 1732(b), 1733, and 1740; and the Energy Policy Act of 2005 (Pub. L. 109-58).

History

[53 FR 17352, May 16, 1988]

End of Document

43 CFR 3101.3-1

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 43 -- PUBLIC LANDS: INTERIOR > SUBTITLE B -- REGULATIONS RELATING TO PUBLIC LANDS > CHAPTER II -- BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER C -- MINERALS MANAGEMENT (3000) > PART 3100 -- OIL AND GAS LEASING > SUBPART 3101 -- ISSUANCE OF LEASES > § 3101.3 LEASES WITHIN UNIT AREAS.

§ 3101.3-1 Joinder evidence required.

Before issuance of a lease for lands within an approved unit, the lease offeror shall file evidence with the proper BLM office of having joined in the unit agreement and unit operating agreement or a statement giving satisfactory reasons for the failure to enter into such agreement. If such statement is acceptable to the authorized officer the operator shall be permitted to operate independently but shall be required to conform to the terms and provisions of the unit agreement with respect to such operations.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359 and 1751; 43 U.S.C. 1732(b), 1733, and 1740; and the Energy Policy Act of 2005 (Pub. L. 109-58).

History

[48 FR 33662, July 22, 1983, as amended at 53 FR 17353, May 16, 1988]

End of Document

43 CFR 3160.0-4

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 43 -- PUBLIC LANDS: INTERIOR > SUBTITLE B -- REGULATIONS RELATING TO PUBLIC LANDS > CHAPTER II -- BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER C -- MINERALS MANAGEMENT (3000) > PART 3160 -- ONSHORE OIL AND GAS OPERATIONS > SUBPART 3160 -- ONSHORE OIL AND GAS OPERATIONS: GENERAL

§ 3160.0-4 Objectives.

The objective of these regulations is to promote the orderly and efficient exploration, development and production of oil and gas.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; 43 U.S.C. 1732(b), 1733, 1740; and Sec. 107, Pub. L. 114-74, 129 Stat. 599, unless otherwise noted.

History

[48 FR 36583, Aug. 12, 1983]

End of Document

43 CFR 3162.3-1

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 43 -- PUBLIC LANDS: INTERIOR > SUBTITLE B -- REGULATIONS RELATING TO PUBLIC LANDS > CHAPTER II -- BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR > SUBCHAPTER C -- MINERALS MANAGEMENT (3000) > PART 3160 -- ONSHORE OIL AND GAS OPERATIONS > SUBPART 3162 -- REQUIREMENTS FOR OPERATING RIGHTS OWNERS AND OPERATORS > § 3162.2 DRILLING, PRODUCING, AND DRAINAGE OBLIGATIONS.

§ 3162.3-1 Drilling applications and plans.

[PUBLISHER'S NOTE: Paragraph (j) was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.]

(a) Each well shall be drilled in conformity with an acceptable well-spacing program at a surveyed well location approved or prescribed by the authorized officer after appropriate environmental and technical reviews (see § 3162.5-1 of this title). An acceptable well-spacing program may be either (1) one which conforms with a spacing order or field rule issued by a State Commission or Board and accepted by the authorized officer, or (2) one which is located on a lease committed to a communitized or unitized tract at a location approved by the authorized officer, or (3) any other program established by the authorized officer.

(b) Any well drilled on restricted Indian land shall be subject to the location restrictions specified in the lease and/or Title 25 of the CFR.

(c) The operator shall submit to the authorized officer for approval an Application for Permit to Drill for each well. No drilling operations, nor surface disturbance preliminary thereto, may be commenced prior to the authorized officer's approval of the permit.

(d) The Application for Permit to Drill process shall be initiated at least 30 days before commencement of operations is desired. Prior to approval, the application shall be administratively and technically complete. A complete application consists of Form 3160-3 and the following attachments:

(1)A drilling plan, which may already be on file, containing information required by paragraph (e) of this section and appropriate orders and notices.

(2)A surface use plan of operations containing information required by paragraph (f) of this section and appropriate orders and notices.

(3) Evidence of bond coverage as required by the Department of the Interior regulations, and

(4) Such other information as may be required by applicable orders and notices.

(e) Each drilling plan shall contain the information specified in applicable notices or orders, including a description of the drilling program, the surface and projected completion zone location, pertinent geologic data, expected hazards, and proposed mitigation measures to address such hazards. A drilling plan may be submitted for a single well or for several wells proposed to be drilled to the same zone within a field or area of geological and environmental similarity. A drilling plan may be modified from time to time as circumstances may warrant, with the approval of the authorized officer.

(f) The surface use plan of operations shall contain information specified in applicable orders or notices, including the road and drillpad location, details of pad construction, methods for containment and disposal of waste material, plans for reclamation of the surface, and other pertinent data as the authorized officer may require. A surface use plan of operations may be submitted for a single well or for several wells proposed to be drilled in an area of environmental similarity.

(g) For Federal lands, upon receipt of the Application for Permit to Drill or Notice of Staking, the authorized officer shall post the following information for public inspection at least 30 days before action to approve the Application for Permit to Drill: the company/operator name; the well name umber; the well location described to the nearest quarter-quarter section (40 acres), or similar land description in the case of lands described by metes and bounds, or maps showing the affected lands and the location of all tracts to be leased and of all leases already issued in the general area; and any substantial modifications to the lease terms. Where the inclusion of maps in such posting is not practicable, maps of the affected lands shall be made available to the public for review. This information also shall be provided promptly by the authorized officer to the appropriate office of the Federal surface management agency, for lands the surface of which is not under Bureau jurisdiction, requesting such agency to post the proposed action for public inspection for at least 30 days. The posting shall be in the office of the authorized officer and in the appropriate surface managing agency if other than the Bureau. The posting of an Application for Permit to Drill is for information purposes only and is not an appealable decision.

(h) Upon initiation of the Application for Permit to Drill process, the authorized officer shall consult with the appropriate Federal surface management agency and with other interested parties as appropriate and shall take one of the following actions as soon as practical, but in no event later than 5 working days after the conclusion of the 30-day notice period for Federal lands, or within 30 days from receipt of the application for Indian lands:

(1) Approve the application as submitted or with appropriate modifications or conditions;

(2) Return the application and advise the applicant of the reasons for disapproval; or

(3) Advise the applicant, either in writing or orally with subsequent written confirmation, of the reasons why final action will be delayed along with the date such final action can be expected.

The surface use plan of operations for National Forest System lands shall be approved by the Secretary of Agriculture or his/her representative prior to approval of the Application for Permit to Drill by the authorized officer. Appeals from the denial of approval of such surface use plan of operations shall be submitted to the Secretary of Agriculture.

(i) Approval of the Application for Permit to Drill does not warrant or certify that the applicant holds legal or equitable title to the subject lease(s) which would entitle the applicant to conduct drilling operations.

(j)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Beginning January 17, 2019, when submitting an Application for Permit to Drill an oil well, the operator must also submit a plan to minimize waste of natural gas from that well. The waste minimization plan must accompany, but would not be part of, the Application for Permit to Drill. The waste minimization plan must set forth a strategy for how the operator will comply with the requirements of 43 CFR subpart 3179 regarding control of waste from venting and flaring, and must explain how the operator plans to capture associated gas upon the start of oil production, or as soon thereafter as reasonably possible, including an explanation of why any delay in capture of the associated gas would be required. Failure to submit a complete and adequate waste minimization plan is grounds for denying or disapproving an Application for Permit to Drill. The waste minimization plan must include the following information:

(1)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The anticipated completion date of the proposed well(s);

(2)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] A description of anticipated production, including:

(i)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The anticipated date of first production;

(ii)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The expected oil and gas production rates and duration from the proposed well. If the proposed well is on a multi-well pad, the plan should include the total expected production for all wells being completed;

(iii)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The expected production decline curve of both oil and gas from the proposed well; and

(iv)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The expected Btu value for gas production from the proposed well.

(3)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Certification that the operator has provided one or more midstream processing companies with information about the operator's production plans, including the anticipated completion dates and gas production rates of the proposed well or wells;

(4)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Identification of a gas pipeline to which the operator plans to connect, with sufficient capacity to accommodate the anticipated production of the proposed well(s), and information on the pipeline, including, to the extent that the operator can obtain it, the following information:

(i)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Maximum current daily capacity of the pipeline;

(ii)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Current throughput of the pipeline;

(iii)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Anticipated daily capacity of the pipeline at the anticipated date of first gas sales from the proposed well;

(iv)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Anticipated throughput of the pipeline at the anticipated date of first gas sales from the proposed well; and

(v)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] Any plans known to the operator for expansion of pipeline capacity for the area that includes the proposed well; and

(5)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] If an operator cannot identify a gas pipeline with sufficient capacity to accommodate the anticipated production of the proposed well(s), the waste minimization plan must also include:

(i)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] A gas pipeline system location map of sufficient detail, size, and scale as to show the field in which the proposed well will be located, and all existing gas trunklines within 20 miles of the well. The map should also contain:

(A)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The name and location of the gas processing plant(s) closest to the proposed well(s), and of the intended destination processing plant, if different;

(B)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The location and name of the operator of each gas trunkline within 20 miles of the proposed well;

(C)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The proposed route and tie-in point that connects or could connect the subject well to an existing gas trunkline;

(ii)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] The total volume of produced gas, and percentage of total produced gas, that the operator is currently flaring or venting from wells in the same field and any wells within a 20-mile radius of that field; and

(iii)[This paragraph was removed at 83 FR 49184, 49211, Sept. 28, 2018, effective Nov. 27, 2018.] A detailed evaluation, including estimates of costs and returns, of opportunities for on-site capture approaches, such as compression or liquefaction of natural gas, removal of natural gas liquids, or generation of electricity from gas.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; 43 U.S.C. 1732(b), 1733, 1740; and Sec. 107, Pub. L. 114-74, 129 Stat. 599, unless otherwise noted.

History

[47 FR 47765, Oct. 27, 1982. Redesignated and amended at 48 FR 36583-36586, Aug. 12, 1983, further amended at 52 FR 5391, Feb. 20, 1987; 53 FR 17363, May 16, 1988; 53 FR 22846, June 17, 1988; 53 FR 31958, Aug. 22, 1988; 81 FR 83008, 83078, Nov. 18, 2018; 82 FR 58050, 58072, Dec. 8, 2017; 83 FR 49184, 49211, Sept. 28, 2018]

End of Document

43 CFR 46.140

This document is current through the December 12, 2018 issue of the Federal Register. with the exception of the amendment appearing at 83 FR 63970, December 12, 2018. Title 3 is current through December 10, 2018.

Code of Federal Regulations > TITLE 43 -- PUBLIC LANDS: INTERIOR > SUBTITLE A -- OFFICE OF THE SECRETARY OF THE INTERIOR > PART 46 -- IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 > SUBPART B -- PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY

§ 46.140 Using tiered documents.

A NEPA document that tiers to another broader NEPA document in accordance with *40 CFR 1508.28* must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.

(a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

(b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.

(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a "finding of no new significant impact."

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

42 U.S.C. 4321 et seq. (The National Environmental Policy Act of 1969, as amended); Executive Order 11514, (Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977)); 40 CFR parts 1500-1508 *(43 FR 55978)* (National Environmental Policy Act, Implementation of Procedural Provisions).

History

[73 FR 61292, 61314, Oct. 15, 2008]

Federal Register

Wednesday,
March 7, 2007

Part II

Department of Agriculture

Forest Service
36 CFR Part 228

Department of the Interior

Bureau of Land Management
43 CFR Part 3160

Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations; Final Rule

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 228

RIN 0596–AC20

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3160

[W0–610–411H12–24 1A]

RIN 1004–AD59

Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Onshore Oil and Gas Order Number 1, Approval of Operations

AGENCIES: U.S. Forest Service, Agriculture; Bureau of Land Management, Interior.

ACTION: Joint final rule.

SUMMARY: This final rule revises existing Onshore Oil and Gas Order Number 1 which was published in the October 21, 1983, edition of the **Federal Register**. The Order provides the requirements necessary for the approval of all proposed oil and gas exploratory, development, or service wells on all Federal and Indian (other than those of the Osage Tribe) onshore oil and gas leases, including leases where the surface is managed by the U.S. Forest Service (FS). It also covers most approvals necessary for subsequent well operations, including abandonment. The revision is necessary due to provisions of the 1987 Federal Onshore Oil and Gas Leasing Reform Act (Reform Act), the Energy Policy Act of 2005 (Act), legal opinions, court cases since the Order was issued, and other policy and procedural changes. The revised Order addresses the submittal of a complete Application for Permit to Drill or Reenter package (APD), including a Drilling Plan, Surface Use Plan of Operations, evidence of bond coverage and Operator Certification. The final rule ensures that the processing of APDs is consistent with the Act and clarifies the regulations and procedures that are to be used when operating in split estates, including those lands within Indian country. The final rule addresses using Master Development Plans (which address two or more APDs) to approve multiple well development proposals and encourages the voluntary use of Best Management Practices as a part of APD processing. Finally, the rule requires additional bonding on certain off-lease facilities and clarifies the BLM's authority to require this additional bond.

DATES: This final rule is effective April 6, 2007.

FOR FURTHER INFORMATION CONTACT: James Burd at (202) 452–5017 or Ian Senio at (202) 452–5049 at the BLM or Barry Burkhardt at (801) 625–5157 at the Forest Service. Persons who use a telecommunications device for the deaf (TDD) may contact these persons through the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

I. Background

The regulations at 43 Code of Federal Regulations (CFR) part 3160, Onshore Oil and Gas Operations, in section 3164.1 provide for the issuance of onshore oil and gas orders to ''implement and supplement'' the regulations in part 3160. Also, 36 CFR 228.105 provides for the issuance of FS Onshore Orders or for the co-signing of orders with the BLM. Although they are not codified in the CFR, all onshore orders are issued using notice and comment rulemaking and, when issued in final form, apply nationwide to all Federal and Indian (other than those of the Osage Tribe) onshore oil and gas leases. The table in 43 CFR 3164.1(b) lists existing Orders. This rule revises existing Onshore Oil and Gas Order Number 1 (the Order) which supplements primarily 43 CFR 3162.3 and 3162.5. Section 43 CFR 3162.3 covers conduct of operations, applications to drill on a lease, subsequent well operations, other miscellaneous lease operations, and abandonment. Section 3162.5 covers environmental and safety obligations. In this rule the FS adopts the Order which would supplement 36 CFR 228 subpart E. The existing Order has been in effect since November 21, 1983. For further information, see the October 21, 1983 **Federal Register** at 48 FR 48916.

The BLM and the FS published the proposed rule in the **Federal Register** on July 27, 2005 (70 FR 43349), for a 30-day comment period and on August 26, 2005 (70 FR 50262) extended the comment period for 60 days. On August 8, 2005, the President signed the Energy Policy Act of 2005 (Act). Provisions in the Act impacted the timing of APD approval provisions in the original proposed rule. Therefore, on March 13, 2006, the BLM and the FS published a further proposed rule to make the provisions in the originally published proposed rule consistent with the Act. The further proposed rule also modified a provision in the proposal regarding proposed operations on lands with Indian surface and Federal minerals.

II. Discussion of the Final Rule and Comments

There are four primary reasons the Order is being revised:

1. The 1987 Reform Act, which amended the Mineral leasing Act, 30 U.S.C. 181 *et seq.*, included two significant changes affecting APD processing on Federal leases. The first important change is the addition of a provision for public notification of a proposed action before APD approval or substantial modification of the terms of a Federal lease.

The second important change the Reform Act made is the assignment of authority to the Secretary of Agriculture to approve and regulate the surface disturbing activity associated with oil and gas wells on National Forest System (NFS) lands. Where NFS lands are involved, a Surface Use Plan of Operations, included in an APD, is now approved by the FS. The FS also approves surface disturbing aspects of related and subsequent operations. The FS has actively participated in this revision, and is a cosigner of this Order. The Order would apply to FS review of oil and gas surface operations.

Section 366 of the Energy Policy Act of 2005 sets steps and time requirements for processing APDs. The Order has been revised to be consistent with section 366 requirements.

2. In response to protests to two Resource Management Plans in April 1988, the Office of the Solicitor of the Department of the Interior issued two memorandums related to oil and gas issues. The first and most far-reaching (issued by the Associate Solicitor, Energy and Resources on April 1, 1988, titled ''Legal Responsibilities of BLM for Oil and Gas Leasing and Operations on Split Estate Lands''), concerned BLM responsibilities on Federal leases overlain by private surface (split estate). In this memorandum the Solicitor's Office opined that the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA) require the BLM to regulate exploration, development, and abandonment on Federal leases on split estate lands in essentially the same manner as a lease overlain by Federal surface. The memorandum also stated that while a private owner's wishes should be considered in decisions, they do not overrule requirements of these

statutes and their implementing regulations.

The second memorandum (issued by the Assistant Solicitor, Onshore Minerals, Division of Energy and Resources on April 4, 1988, titled ''Legal Responsibilities of BLM for Oil and Gas Leasing and Operations under the National Historic Preservation Act'') lays out in more detail the BLM's responsibilities under NHPA, elucidating further the discussion on cultural resources in the first opinion.

The pertinent requirements of the existing Order do not fully conform to the memorandums issued by the Solicitor's Office in 1988.

3. The existing Order does not adequately address the BLM Rights-of-Way or FS Special Use Authorizations which are often required for ancillary facilities or those activities outside of lands committed to a unitized area. This has led to confusion and delays on the part of both the agencies and industry. Under the existing Order, APD approval is often delayed pending completion and approval of a Right-of-Way or Special Use Authorization. We intend for the proposal to eliminate or reduce this delay. The rule provides for early identification of any needed Right-of-Way or Special Use Authorization, allows for conducting a single environmental analysis for the APD and Right-of-Way or Special Use Authorization, and permits concurrent approval of the Right-of-Way or Special Use Authorization with the APD. On NFS lands, the FS will approve activities directly related to the drilling and production of the well consistent with 36 CFR Subpart E.

4. Existing Order Number 1 is over 20 years old. Conditions, regulations, policies, procedures, and requirements have been altered, added, and eliminated since the Order was issued. The BLM is in the process of reviewing Field Office practices and the preliminary findings from that review were considered in the proposed revisions to the Order. The BLM has reorganized the Order to follow the review and approval process and the processing timeframes for each step are now in one section. Also, operations on split estate are discussed in more detail.

The BLM encourages operators to employ Best Management Practices when they develop their APDs. Best Management Practices are innovative, dynamic, and economically feasible mitigation measures applied on a site-specific basis to reduce, prevent, or avoid adverse environmental or social impacts. The BLM Field Offices incorporate appropriate Best Management Practices into proposed APDs and associated on-lease and off-lease Rights-of-Way approvals after required NEPA evaluation. They can then be included in approved APDs as Conditions of Approval. Typical Best Management Practices can currently be found on the BLM's Web site at *http://www.blm.gov/bmp/.*

Discussion of Major Changes

Definition of ''Complete APD''

The term ''Technically and Administratively Complete APD'' has been replaced with a clear definition of ''Complete APD.'' This new definition reflects what is already a common practice in many Field Offices and would require all Field Offices to adopt the same convention. The new definition makes the approval process more consistent. The BLM considered defining the terms ''Administratively complete'' and ''Technically complete'' separately, but abandoned this idea because it is difficult to separate the two concepts and because potential delays might be caused when processing APDs in certain circumstances. This final rule requires that an onsite inspection conducted jointly by the BLM (and the FS if appropriate) and the operator be completed prior to the BLM designating the APD package as complete. The BLM (and the FS if appropriate) currently conducts onsite inspections to determine if the material submitted in the APD package is accurate and to determine if Conditions of Approval are necessary. Examining existing on-the-ground circumstances is the only way to ensure that the information in the APD package is consistent with conditions at the proposed drill site and along the proposed access route. The final rule codifies the current BLM practice of onsite inspections as part of the APD approval process.

APD Processing

Section 366 of the Act amends the Mineral Leasing Act (30 U.S.C. 226(p)(1)) and adds the statutory requirement that the Secretary shall notify an applicant within 10 days of receiving an APD and state that either the APD is complete or specify what additional information is required to make the application complete.

The Act requires that the Secretary (the BLM is the delegated authority) approve an APD within 30 days after its completion or notify the applicant of: (1) Any actions that the operator can take to get approval; and (2) What steps, such as National Environmental Policy Act (NEPA) or other regulatory compliance, remain to be completed and the schedule for completion of these requirements. This provision of the Act is made a part of the final rule.

In those situations where the BLM defers the decision, the Act and the final rule give the applicant 2 years to take whatever actions are identified in the 30-day notice. The Act amends 30 U.S.C. 226 by adding a new paragraph (p)(3)(B), and the final rule also adds a new requirement that the BLM must make a final decision on the application within 10 days of the applicant's completion of these requirements, if all other regulatory requirements are complete. The timeframes established in this section apply to both individual APDs and to the multiple APDs included in Master Development Plans. Even though the time limits established in Section 366 of the Act are amendments to the Mineral Leasing Act and, therefore, do not apply to Indian leases, the final rule states that the same time limit will apply to both Federal and Indian leases.

The BLM does not approve Surface Use Plans of Operations for National Forest Service (NFS) lands. The FS notifies the BLM of its Surface Use Plan of Operations approval and the BLM proceeds with its APD review. For APDs on NFS lands, the decision to approve a Surface Use Plan of Operations or Master Development Plan are subject to existing FS appeal procedures, which may take up to 105 days from the date of the decision. Pursuant to the Mineral Leasing Act (30 U.S.C. 226(g)), as amended by the Reform Act, the final rule in Section III.E.2.b. provides that the BLM may not approve an APD until the FS has approved the Surface Use Plan of Operations. This condition is consistent with the addition to Section 17 of the Mineral Leasing Act (30 U.S.C. 226(p)(2)) adopted in Section 366 of the Energy Policy Act, which provides that the Secretary shall issue a permit within 30 days only if requirements of other applicable law have been completed within that timeframe. Therefore, in situations where the Surface Use Plan of Operations is not approved, the BLM will provide notice within the 30-day period that action on the APD will be deferred until the FS completes action on the Surface Use Plan of Operations.

Operating on Split Estate Lands With Indian Surface Ownership

The final rule makes it clear that split estate lands include those having Indian surface and Federal minerals. It also explains that the operator is required to address surface use issues with the Bureau of Indian Affairs (BIA) when Indian trust lands are involved.

The final rule addresses the responsibility of the operator to confer

with surface owners in the case of privately owned surface and Federal/Indian leases, as well as Indian oil and gas leases where the surface is in different Indian ownership. The final rule applies to privately owned surface and to all Indian surface and Federal oil and gas lease situations. The final rule requires a good faith effort to reach a Surface Access Agreement, and provides for the posting of a bond to protect against covered damages in the absence of an agreement. This final rule codifies existing policy with the exception that surface owner compensation is based on the terms of the statute that reserved the mineral estate. Under the previous rules, this compensation was based on the terms of the Stockraising Homestead Act.

Drilling and Surface Use Plans

The final rule makes specific changes to the drilling and surface use plans as follows:

The former 8-point Drilling Program (also referred to as the Subsurface Use Plan) is replaced with a 9-point Drilling Plan. The new requirement in the final rule requires the operator to address the type and amount of cement to be used in setting each casing string.

The final rule replaces the former 13-point Surface Use Program (or Plan) with a 12-point Surface Use Plan of Operations. ''Operator Certification'' is a separate component of the APD in the final rule. The final rule makes it clear that the Operator Certification covers the entire APD package and not just the Surface Use Plan of Operations. Under the final rule, the operator is required to certify that they have made a good faith effort to provide the surface owner with a copy of the Surface Use Plan of Operations and any Conditions of Approval that are attached to the APD.

Master Development Plans

The final rule establishes a new approval process for Master Development Plans. An operator uses this process to submit plans for field development of a multiple well program. A Master Development Plan proposal can be addressed in a single NEPA analysis and approval. This facilitates the consideration of cumulative effects early in the process and enables broad application of identified mitigation measures, and minimizes the overall timeframe for approval. Because the process allows for better planning of field development, adverse environmental impacts are minimized.

Use of Best Management Practices

The final rule encourages operators to use Best Management Practices when developing their APDs. Using Best Management Practices is the BLM's current policy. Best Management Practices are innovative, dynamic, and economically feasible mitigation measures applied on a site-specific basis that reduce, prevent, and avoid adverse environmental or social impacts of oil and gas activities. The BLM Field Offices currently incorporate Best Management Practices into proposed APDs and associated on-lease and off-lease Rights-of-Way approvals if they are carried forward as part of the NEPA required evaluation or environmental review. This final rule clarifies the existing policy that Best Management Practices may be included as Conditions of Approval. The BLM started using Best Management Practices in 2004 and encourages the voluntary use of these practices.

Bonding Authority

The final rule clarifies the BLM's authority under 43 CFR 3104.5 to require an additional bond to be applied to off-lease facilities that are required to develop a lease, such as the large impoundments being created in Wyoming for water produced from Federal and non-Federal coalbed natural gas wells. The BLM is directed by the Reform Act to require sufficient bond to insure ''the restoration of any lands or surface waters adversely affected by lease operations after the abandonment or cessation of oil and gas operations on the lease'' 30 U.S.C. 226(g). An Assistant Solicitor's Opinion of July 19, 2004, concluded that the BLM has the authority under existing regulations to require an additional bond for such facilities and that the current regulation does not limit the BLM to increasing the required amount of an existing bond. Accordingly, the final rule does not represent a change in the regulatory scheme.

Response to Comments

The BLM received 81 comments on the proposed and further proposed rules. In the following discussion we categorize the comments according to the sections of the text or preamble to which the comments were directed. Some comments were general in nature and did not relate to a particular section in the text or preamble. These are grouped in a general category and addressed accordingly. Other comments are grouped by the section of the Order to which they pertain. If a section of the Order is not discussed in this preamble, that means that we received no public comment on that section. Note that, when used in conjunction with Section 106 of the National Historic Preservation Act and the Endangered Species Act, ''inventory'' and ''survey'' are equivalent terms and are used interchangeably.

Although we received no substantive comments on the proposed changes to 36 CFR 228.105(a)(1) (FS regulations), we amended that section in the final rule to make it consistent with the final Order.

General Comments

Several commenters asked that the five statutory categorical exclusions that are in Section 390 of the Energy Policy Act of 2005 be included in the Order. The Order does not address the statutory categorical exclusions because they are already a legal requirement and we believe they would best be addressed in subsequent manual and handbook updates. Some commenters were concerned that we would apply acreage limits for categorical exclusions to Master Development Plans rather than leases. These comments exemplify the problems that would be inherent in addressing categorical exclusions in the Order.

One commenter asserted that revising the Order was premature until the BLM has the data from the pilot project under Section 365 of the Energy Policy Act of 2005. We disagree. The BLM is looking forward to obtaining useful information from the pilot projects, but there is no reason to delay revisions to the Order.

A few commenters believed that we should use stronger language than saying that ''BLM will comply with other applicable laws'' before approving an APD as stated in Section III. and in numerous other places in the Order. We disagree. The language in the rule is similar to that in the Energy Policy Act of 2005 (Act). The Order is clear and requires that the BLM comply with applicable law naming NEPA, the National Historic Preservation Act, and the Endangered Species Act, which are the principal laws impacting Federal actions related to approval of APDs. We do not believe that a description of the requirements of other applicable law is needed or appropriate because those requirements are adequately addressed in other rules and policy specific to implementation of those laws.

One commenter said the rule should address conducting cultural inventories prior to approving geophysical operations. We disagree. Geophysical operations are outside the scope of this rule and are generally approved under

Kralove, Dvur Kralove nad Labem, Czech Republic, for the purpose of enhancement of the species.

Applicant: Virginia Safari Park, Natural Bridge, VA; PRT–213382

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include the families Equidae and Bovidae and species: Red ruffed lemur (*Varecia rubra*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: John Aynes, Oklahoma City, OK; PRT–29141A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include blue-throated macaw (*Ara glaucogularis*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64161A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include Arabian oryx (*Oryx leucoryx*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64797A

The applicant requests amendment and renewal of their permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), Arabian oryx (*Oryx leucoryx*), addax (*Addax nasomaculatus*), dama gazelle (*Nanger dama*) and red lechwe (*Kobus leche*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities over a 5-year period.

Applicant: Villanova University, Villanova, PA; PRT–28374B

The applicant requests a permit to import biological samples from wild White-breasted thrashers (*Ramphocinclus brachyurus*) for the purpose of enhancement of the survival of the species.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: August Herff, San Antonio, TX; PRT–22132B

Applicant: James Walkup, Dallas, TX; PRT–21493B

Applicant: William Nye, Oneida, NY; PRT–21705B

Applicant: Gregory Pipkin, Houston, TX; PRT–20341B

Applicant: Frank Beelman, Freeburg, IL; PRT–22543B

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2014–03975 Filed 2–24–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNMF01000.L13100000.DO0000]

Notice of Intent To Prepare a Resource Management Plan Amendment and an Associated Environmental Impact Statement for the Farmington Field Office, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Farmington Field Office, Farmington, New Mexico, intends to prepare a Resource Management Plan (RMP) Amendment with an associated Environmental Impact Statement (EIS) to address issues relating to oil and gas in the Mancos Shale/Gallup Formation. This notice announces the beginning of the scoping process to solicit public comments and identify issues.

DATES: Comments may be submitted in writing until April 28, 2014. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local news media, newspapers and the BLM web site at *http://www.blm.gov/nm/farmington.* In order to be included in the analysis, all comments must be received prior to the close of the 60-day scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation as appropriate.

ADDRESSES: You may submit comments on issues and planning criteria related to the oil and gas RMP Amendment/EIS for the Mancos Shale/Gallup Formation by any of the following methods:

- *Web site: http://www.blm.gov/nm/farmington.*
- *Email: BLM_NM_FFO_RMP@blm.gov.*
- *Fax:* 505–564–7608.
- *Mail:* 6251 N. College Blvd. Suite A, Farmington, NM 87402.

Documents pertinent to this proposal may be examined at the Farmington Field Office 6251 N. College Blvd. Suite A, Farmington, NM 87402.

FOR FURTHER INFORMATION CONTACT: Lindsey Eoff, Project Manager, Telephone: 505–564–7670; address: 6251 N. College Blvd. Suite A, Farmington, New Mexico 87402; email: *BLM_NM_FFO_Comments@blm.gov.* Contact Lindsey if you wish to have your name added to our mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The RMP amendment is being developed in order to analyze the impacts of additional development in what was previously considered a fully developed oil and gas play within the San Juan Basin in northwestern New Mexico. The Mancos Shale/Gallup Formation was analyzed in the 2002 Reasonable Foreseeable Development (RFD) Scenario and current Farmington Field Office 2003 RMP/EIS. Subsequent improvements and innovations in horizontal drilling technology and multi-stage hydraulic fracturing have enhanced the economics of developing this stratigraphic horizon. With favorable oil prices, the oil play in the southern part of the Farmington Field Office boundary has drawn considerable interest and several wells are planned and being drilled. As full-field development occurs, especially in the shale oil play, additional impacts may occur that previously were not anticipated in the RFD or analyzed in the current 2003 RMP/EIS, which will require an EIS-level plan amendment and revision of the RFD for complete analysis of the Mancos Shale/Gallup Formation. The planning area is located in northwestern New Mexico, encompassing about 4 million acres,

and the analysis area encompasses about 6 million acres. The Field Office is part of the Farmington District and includes San Juan, McKinley, Rio Arriba, and Sandoval Counties. The majority of the BLM-managed land in the Field Office is located within larger tracts, with tribal, Indian allotted, scattered private, and State-owned inholdings. The area includes the larger communities of Farmington, Aztec, Bloomfield, and the smaller communities of Kirtland, Fruitland, Shiprock, Crownpoint, and Navajo Dam. Lands and mineral estate managed by the BLM for other Federal agencies, such as the U.S. Forest Service and the Bureau of Reclamation, are included in this RMP Amendment process and the analysis area. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. Preliminary issues for the plan amendment area have been identified by BLM personnel; Federal, State, and local agencies; and other stakeholders. The issues include: Public safety and hazardous materials; air quality; leasable, locatable and salable minerals; vegetation management; socio-economics; water (ground and surface); wildlife; migratory birds; special status species management; cultural resources; paleontological resources; realty and lands authorizations; and transportation and travel management. This EIS is in preparation of an RMP Amendment and not a revision, therefore, not all decisions from the 2003 RMP will be revisited. Decisions will be made related to impacts from oil and gas for the following resources and resource uses in the planning area: Air resources (air quality and climate change); soil resources; water resources (ground and surface); vegetative communities (e.g., rangelands, riparian areas, and weeds); wildlife/habitat management areas; leasable, locatable, and salable minerals; land use authorizations. Additional inventories will be conducted for lands with wilderness characteristics, transportation and travel management. All other resources are outside of the scope of this planning effort; however, impacts of the decisions for the resources being addressed will be analyzed on all affected resources. Preliminary planning criteria include:

- The Field Office will prepare the RMP Amendment in compliance with FLPMA, the Endangered Species Act, the Clean Water Act, the Clean Air Act, NEPA, and all other applicable laws, Executive Orders, and the BLM management policies.
- The Field Office will use the EIS as the analytical basis for any decision it makes to amend the RMP.
- The Field Office is developing an RFD to predict future levels of development.
- Lands covered in the RMP Amendment/EIS will be public land and split estates managed by the BLM.
- No decisions will be made relative to non-BLM administered lands.
- The Field Office will recognize valid existing rights under the RMPs, as amended.
- The Field Office will coordinate with Federal, State, and local agencies, and with tribal governments in the EIS and plan amendment process to strive for consistency with existing plans and policies, to the extent practicable.
- The Field Office will coordinate with tribal governments and provide strategies for the protection of recognized traditional uses in the EIS and plan amendment process.
- The Field Office will take into account appropriate protection and management of cultural and historic resources in the EIS and plan amendment process and will engage in all required consultation.
- The Field Office will recognize in the EIS and plan amendment the special importance of public lands to people who live in communities surrounded by public lands and the importance of public lands to the nation as a whole.
- The Field Office will make every effort to encourage public participation throughout the EIS process.
- The Field Office has the authority to develop protective management prescriptions for lands with wilderness characteristics within RMPs. As part of the public involvement process for land use planning, the BLM will consider public input regarding lands to be managed to maintain wilderness characteristics.
- Environmental protection and energy production are both desirable and necessary objectives of sound land management practices and are not to be considered mutually exclusive priorities.
- Broad-based public participation will be an integral part of the planning and EIS process. Decisions in the plan will strive to be compatible with the existing plans and policies of adjacent local, State, Federal, and tribal agencies as long as the decisions are consistent with the purposes, policies, and programs of Federal law and regulations applicable to public lands.
- The RMP Amendment/EIS will recognize the State's responsibility and authority to manage wildlife. The BLM will consult with the New Mexico Department of Game and Fish.
- The RMP Amendment/EIS will incorporate management decisions brought forward from existing planning documents.

The BLM will use the NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470(f)) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such resources in the context of both NEPA and Section 106 of the NHPA.

The BLM will consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments by the close of the 60-day scoping period or within 15 days after the last public meeting, whichever is later. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The minutes and list of attendees for each scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed. The BLM will evaluate identified issues to be addressed in the plan, and will place them into one of three categories:

1. Issues to be resolved in the plan amendment;

2. Issues to be resolved through policy or administrative action; or

3. Issues beyond the scope of this plan amendment.

The BLM will provide an explanation in the Draft EIS as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

Parties interested in leasing and developing Federal coal in the planning area should provide coal resource data for their area(s) of interest. Specifically, information is requested on the location, quality, and quantity of Federal coal with development potential, and on surface resource values related to the 20 coal unsuitability criteria described in 43 CFR part 3461. This information will be used for any necessary updating of coal screening determinations in the planning area. The coal screening process is described in 43 CFR 3420.1–4. Proprietary data marked as confidential may be submitted in response to this call for coal information. Please submit all proprietary information submissions to the address listed above. The BLM will treat submissions marked as ''Confidential'' in accordance with applicable laws and regulations governing the confidentiality of such information.

The BLM will use an interdisciplinary approach to develop the plan amendment in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: Rangeland management, minerals and geology, outdoor recreation, archaeology, paleontology, wildlife, migratory birds, vegetation, special status species, air quality, lands and realty, hydrology, soils, sociology and economics.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2.

Aden L. Seidlitz,

Associate State Director.

[FR Doc. 2014–04051 Filed 2–24–14; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDC00000. 14XL1109AF. L101000000. MU0000. 241A; 4500062009]

Notice of Public Meeting, Coeur d'Alene District Resource Advisory Council Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council (RAC) will meet as indicated below.

DATES: March 27, 2014. The RAC meeting will begin at 9:30 a.m. and end no later than 3:30 p.m. The public comment period will be held from 11:00 a.m. to 11:30 a.m. The meeting will be held at the Coeur d'Alene BLM District Office located at 3815 Schreiber Way, Coeur d'Alene, Idaho 83815.

FOR FURTHER INFORMATION CONTACT: Suzanne Endsley, RAC Coordinator, BLM Coeur d'Alene District, 3815 Schreiber Way, Coeur d'Alene, Idaho 83815 or telephone at (208) 769–5004.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda will include the following main topics: The Clearwater National Forest will present a proposal to increase recreation fees at specific sites on the Forest (Recreation RAC Subcommittee will convene); updates from the Cottonwood and Coeur d'Alene Field Offices; presentations on hazardous fuels reduction and forestry projects. Additional agenda topics or changes to the agenda will be announced in local press releases. More information is available at *http://www.blm.gov/id/st/en/get_involved/resource_advisory/coeur_d_alene_district.html.*

All meetings are open to the public. The public may present written comments to the RAC in advance of the meeting or during the scheduled public forum the day of the meeting. Each formal RAC meeting has allocated time for receiving public comments. Depending upon the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the BLM as provided above.

Dated: February 14, 2014.

Kurt Pavlat,

Coeur d'Alene Field Manager.

[FR Doc. 2014–04004 Filed 2–24–14; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14X LLIDB00200 LF2200000.JS0000 LFESHUJ60000]

Notice of Temporary Closure on Public Lands in Elmore County, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Temporary Closure.

SUMMARY: Notice is hereby given that the Pony and Elk fires temporary closures to motorized vehicles and winter uses are in effect on public lands administered by the Four Rivers Field Office, Bureau of Land Management (BLM).

DATES: The temporary motorized vehicle closure will be in effect on February 25, 2014 and will remain in effect for up to 3 years, or until rescinded or modified by the authorized officer, whichever comes first. The all-entry closure will be in effect January 1 through April 30, 2014, and January 1 through April 30, 2015. Depending on the rate of recovery of the area and condition of the wintering elk and mule deer populations, the all-entry closure may be unnecessary in 2015.

FOR FURTHER INFORMATION CONTACT: Terry Humphrey, Four Rivers Field Manager, at 3948 Development Avenue, Boise, ID 83705, via email at *thumphrey@blm.gov,* or phone 208–384–3430. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individuals during normal business hours. The FIRS is available 24 hours a day, seven days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The temporary closures affect BLM-administered lands burned August 8–31, 2013, by the Pony and Elk fires, located approximately 10 miles north of Mountain Home, Idaho. The parcels of public lands affected by these closures, depicted on the Pony and Elk Fires Temporary Closure Area Map, dated

Kralove, Dvur Kralove nad Labem, Czech Republic, for the purpose of enhancement of the species.

Applicant: Virginia Safari Park, Natural Bridge, VA; PRT–213382

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include the families Equidae and Bovidae and species: Red ruffed lemur (*Varecia rubra*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: John Aynes, Oklahoma City, OK; PRT–29141A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include blue-throated macaw (*Ara glaucogularis*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64161A

The applicant requests amendment of their captive-bred wildlife registration under 50 CFR 17.21(g) to include Arabian oryx (*Oryx leucoryx*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Recordbuck Ranch, Utopia, TX; PRT–64797A

The applicant requests amendment and renewal of their permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), Arabian oryx (*Oryx leucoryx*), addax (*Addax nasomaculatus*), dama gazelle (*Nanger dama*) and red lechwe (*Kobus leche*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities over a 5-year period.

Applicant: Villanova University, Villanova, PA; PRT–28374B

The applicant requests a permit to import biological samples from wild White-breasted thrashers (*Ramphocinclus brachyurus*) for the purpose of enhancement of the survival of the species.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: August Herff, San Antonio, TX; PRT–22132B

Applicant: James Walkup, Dallas, TX; PRT–21493B

Applicant: William Nye, Oneida, NY; PRT–21705B

Applicant: Gregory Pipkin, Houston, TX; PRT–20341B

Applicant: Frank Beelman, Freeburg, IL; PRT–22543B

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2014–03975 Filed 2–24–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNMF01000.L13100000.DO0000]

Notice of Intent To Prepare a Resource Management Plan Amendment and an Associated Environmental Impact Statement for the Farmington Field Office, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) Farmington Field Office, Farmington, New Mexico, intends to prepare a Resource Management Plan (RMP) Amendment with an associated Environmental Impact Statement (EIS) to address issues relating to oil and gas in the Mancos Shale/Gallup Formation. This notice announces the beginning of the scoping process to solicit public comments and identify issues.

DATES: Comments may be submitted in writing until April 28, 2014. The date(s) and location(s) of any scoping meetings will be announced at least 15 days in advance through local news media, newspapers and the BLM web site at *http://www.blm.gov/nm/farmington.* In order to be included in the analysis, all comments must be received prior to the close of the 60-day scoping period or 15 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation as appropriate.

ADDRESSES: You may submit comments on issues and planning criteria related to the oil and gas RMP Amendment/EIS for the Mancos Shale/Gallup Formation by any of the following methods:

- *Web site: http://www.blm.gov/nm/farmington.*
- *Email: BLM_NM_FFO_RMP@blm.gov.*
- *Fax:* 505–564–7608.
- *Mail:* 6251 N. College Blvd. Suite A, Farmington, NM 87402.

Documents pertinent to this proposal may be examined at the Farmington Field Office 6251 N. College Blvd. Suite A, Farmington, NM 87402.

FOR FURTHER INFORMATION CONTACT: Lindsey Eoff, Project Manager, Telephone: 505–564–7670; address: 6251 N. College Blvd. Suite A, Farmington, New Mexico 87402; email: *BLM_NM_FFO_Comments@blm.gov.* Contact Lindsey if you wish to have your name added to our mailing list. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The RMP amendment is being developed in order to analyze the impacts of additional development in what was previously considered a fully developed oil and gas play within the San Juan Basin in northwestern New Mexico. The Mancos Shale/Gallup Formation was analyzed in the 2002 Reasonable Foreseeable Development (RFD) Scenario and current Farmington Field Office 2003 RMP/EIS. Subsequent improvements and innovations in horizontal drilling technology and multi-stage hydraulic fracturing have enhanced the economics of developing this stratigraphic horizon. With favorable oil prices, the oil play in the southern part of the Farmington Field Office boundary has drawn considerable interest and several wells are planned and being drilled. As full-field development occurs, especially in the shale oil play, additional impacts may occur that previously were not anticipated in the RFD or analyzed in the current 2003 RMP/EIS, which will require an EIS-level plan amendment and revision of the RFD for complete analysis of the Mancos Shale/Gallup Formation. The planning area is located in northwestern New Mexico, encompassing about 4 million acres,

and the analysis area encompasses about 6 million acres. The Field Office is part of the Farmington District and includes San Juan, McKinley, Rio Arriba, and Sandoval Counties. The majority of the BLM-managed land in the Field Office is located within larger tracts, with tribal, Indian allotted, scattered private, and State-owned inholdings. The area includes the larger communities of Farmington, Aztec, Bloomfield, and the smaller communities of Kirtland, Fruitland, Shiprock, Crownpoint, and Navajo Dam. Lands and mineral estate managed by the BLM for other Federal agencies, such as the U.S. Forest Service and the Bureau of Reclamation, are included in this RMP Amendment process and the analysis area. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process. Preliminary issues for the plan amendment area have been identified by BLM personnel; Federal, State, and local agencies; and other stakeholders. The issues include: Public safety and hazardous materials; air quality; leasable, locatable and salable minerals; vegetation management; socio-economics; water (ground and surface); wildlife; migratory birds; special status species management; cultural resources; paleontological resources; realty and lands authorizations; and transportation and travel management. This EIS is in preparation of an RMP Amendment and not a revision, therefore, not all decisions from the 2003 RMP will be revisited. Decisions will be made related to impacts from oil and gas for the following resources and resource uses in the planning area: Air resources (air quality and climate change); soil resources; water resources (ground and surface); vegetative communities (e.g., rangelands, riparian areas, and weeds); wildlife/habitat management areas; leasable, locatable, and salable minerals; land use authorizations. Additional inventories will be conducted for lands with wilderness characteristics, transportation and travel management. All other resources are outside of the scope of this planning effort; however, impacts of the decisions for the resources being addressed will be analyzed on all affected resources. Preliminary planning criteria include:

- The Field Office will prepare the RMP Amendment in compliance with FLPMA, the Endangered Species Act, the Clean Water Act, the Clean Air Act, NEPA, and all other applicable laws, Executive Orders, and the BLM management policies.
- The Field Office will use the EIS as the analytical basis for any decision it makes to amend the RMP.
- The Field Office is developing an RFD to predict future levels of development.
- Lands covered in the RMP Amendment/EIS will be public land and split estates managed by the BLM.
- No decisions will be made relative to non-BLM administered lands.
- The Field Office will recognize valid existing rights under the RMPs, as amended.
- The Field Office will coordinate with Federal, State, and local agencies, and with tribal governments in the EIS and plan amendment process to strive for consistency with existing plans and policies, to the extent practicable.
- The Field Office will coordinate with tribal governments and provide strategies for the protection of recognized traditional uses in the EIS and plan amendment process.
- The Field Office will take into account appropriate protection and management of cultural and historic resources in the EIS and plan amendment process and will engage in all required consultation.
- The Field Office will recognize in the EIS and plan amendment the special importance of public lands to people who live in communities surrounded by public lands and the importance of public lands to the nation as a whole.
- The Field Office will make every effort to encourage public participation throughout the EIS process.
- The Field Office has the authority to develop protective management prescriptions for lands with wilderness characteristics within RMPs. As part of the public involvement process for land use planning, the BLM will consider public input regarding lands to be managed to maintain wilderness characteristics.
- Environmental protection and energy production are both desirable and necessary objectives of sound land management practices and are not to be considered mutually exclusive priorities.
- Broad-based public participation will be an integral part of the planning and EIS process. Decisions in the plan will strive to be compatible with the existing plans and policies of adjacent local, State, Federal, and tribal agencies as long as the decisions are consistent with the purposes, policies, and programs of Federal law and regulations applicable to public lands.
- The RMP Amendment/EIS will recognize the State's responsibility and authority to manage wildlife. The BLM will consult with the New Mexico Department of Game and Fish.
- The RMP Amendment/EIS will incorporate management decisions brought forward from existing planning documents.

The BLM will use the NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470(f)) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such resources in the context of both NEPA and Section 106 of the NHPA.

The BLM will consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments by the close of the 60-day scoping period or within 15 days after the last public meeting, whichever is later. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The minutes and list of attendees for each scoping meeting will be available to the public and open for 30 days after the meeting to any participant who wishes to clarify the views he or she expressed. The BLM will evaluate identified issues to be addressed in the plan, and will place them into one of three categories:

1. Issues to be resolved in the plan amendment;

2. Issues to be resolved through policy or administrative action; or

3. Issues beyond the scope of this plan amendment.

The BLM will provide an explanation in the Draft EIS as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

Parties interested in leasing and developing Federal coal in the planning area should provide coal resource data for their area(s) of interest. Specifically, information is requested on the location, quality, and quantity of Federal coal with development potential, and on surface resource values related to the 20 coal unsuitability criteria described in 43 CFR part 3461. This information will be used for any necessary updating of coal screening determinations in the planning area. The coal screening process is described in 43 CFR 3420.1–4. Proprietary data marked as confidential may be submitted in response to this call for coal information. Please submit all proprietary information submissions to the address listed above. The BLM will treat submissions marked as ''Confidential'' in accordance with applicable laws and regulations governing the confidentiality of such information.

The BLM will use an interdisciplinary approach to develop the plan amendment in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: Rangeland management, minerals and geology, outdoor recreation, archaeology, paleontology, wildlife, migratory birds, vegetation, special status species, air quality, lands and realty, hydrology, soils, sociology and economics.

Authority: 40 CFR 1501.7 and 43 CFR 1610.2.

Aden L. Seidlitz,

Associate State Director.

[FR Doc. 2014–04051 Filed 2–24–14; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDC00000. 14XL1109AF. L101000000. MU0000. 241A; 4500062009]

Notice of Public Meeting, Coeur d'Alene District Resource Advisory Council Meeting; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council (RAC) will meet as indicated below.

DATES: March 27, 2014. The RAC meeting will begin at 9:30 a.m. and end no later than 3:30 p.m. The public comment period will be held from 11:00 a.m. to 11:30 a.m. The meeting will be held at the Coeur d'Alene BLM District Office located at 3815 Schreiber Way, Coeur d'Alene, Idaho 83815.

FOR FURTHER INFORMATION CONTACT: Suzanne Endsley, RAC Coordinator, BLM Coeur d'Alene District, 3815 Schreiber Way, Coeur d'Alene, Idaho 83815 or telephone at (208) 769–5004.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda will include the following main topics: The Clearwater National Forest will present a proposal to increase recreation fees at specific sites on the Forest (Recreation RAC Subcommittee will convene); updates from the Cottonwood and Coeur d'Alene Field Offices; presentations on hazardous fuels reduction and forestry projects. Additional agenda topics or changes to the agenda will be announced in local press releases. More information is available at *http://www.blm.gov/id/st/en/get_involved/resource_advisory/coeur_d_alene_district.html.*

All meetings are open to the public. The public may present written comments to the RAC in advance of the meeting or during the scheduled public forum the day of the meeting. Each formal RAC meeting has allocated time for receiving public comments. Depending upon the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the BLM as provided above.

Dated: February 14, 2014.

Kurt Pavlat,

Coeur d'Alene Field Manager.

[FR Doc. 2014–04004 Filed 2–24–14; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[14X LLIDB00200 LF2200000.JS0000 LFESHUJ60000]

Notice of Temporary Closure on Public Lands in Elmore County, ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Temporary Closure.

SUMMARY: Notice is hereby given that the Pony and Elk fires temporary closures to motorized vehicles and winter uses are in effect on public lands administered by the Four Rivers Field Office, Bureau of Land Management (BLM).

DATES: The temporary motorized vehicle closure will be in effect on February 25, 2014 and will remain in effect for up to 3 years, or until rescinded or modified by the authorized officer, whichever comes first. The all-entry closure will be in effect January 1 through April 30, 2014, and January 1 through April 30, 2015. Depending on the rate of recovery of the area and condition of the wintering elk and mule deer populations, the all-entry closure may be unnecessary in 2015.

FOR FURTHER INFORMATION CONTACT: Terry Humphrey, Four Rivers Field Manager, at 3948 Development Avenue, Boise, ID 83705, via email at *thumphrey@blm.gov,* or phone 208–384–3430. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individuals during normal business hours. The FIRS is available 24 hours a day, seven days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The temporary closures affect BLM-administered lands burned August 8–31, 2013, by the Pony and Elk fires, located approximately 10 miles north of Mountain Home, Idaho. The parcels of public lands affected by these closures, depicted on the Pony and Elk Fires Temporary Closure Area Map, dated

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Part III

Department of the Interior

Bureau of Land Management

43 CFR Part 3160

Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Final Rule

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3160

[LLWO300000 L13100000.PP0000 14X]

RIN 1004–AE26

Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: On May 11, 2012, the Bureau of Land Management (BLM) published in the **Federal Register** a proposed rule titled Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands. Because of significant public interest in hydraulic fracturing and this rulemaking, on May 24, 2013, the BLM published in the **Federal Register** a supplemental notice of proposed rulemaking and request for comment titled Oil and Gas Hydraulic Fracturing on Federal and Indian Lands. The BLM has used the comments on the supplemental proposed rule and the earlier proposed rule in drafting this final rule. Key changes to the final rule include the allowable use of an expanded set of cement evaluation tools to help ensure that usable water zones have been isolated and protected from contamination, replacement of the ''type well'' concept to demonstrate well integrity with a requirement to demonstrate well integrity for all wells, more stringent requirements related to claims of trade secrets exempt from disclosure, more protective requirements to ensure that fluids recovered during hydraulic fracturing operations are contained, additional disclosure and public availability of information about each hydraulic fracturing operation, and revised records retention requirements to ensure that records of chemicals used in hydraulic fracturing operations are retained for the life of the well. The final rule also provides opportunities for the BLM to coordinate standards and processes with individual states and tribes to reduce administrative costs and to improve efficiency.

DATES: This final rule is effective on June 24, 2015.

ADDRESSES:

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 2134 LM, 1849 C St. NW., Washington, DC 20240, Attention: 1004–AE26.

Personal or messenger delivery: Bureau of Land Management, 20 M Street SE., Room 2134 LM, Attention: Regulatory Affairs, Washington, DC 20003.

FOR FURTHER INFORMATION CONTACT: Steven Wells, Division Chief, Fluid Minerals Division, 202–912–7143 for information regarding the substance of the rule or information about the BLM's Fluid Minerals Program. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. FIRS is available 24 hours a day, 7 days a week to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

Executive Summary

The BLM final rule on hydraulic fracturing serves as a much-needed complement to existing regulations designed to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands, which were finalized nearly thirty years ago, in light of the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology. This technology has opened large portions of the country to oil and gas development.

The BLM began work on this rule in November 2010, when it held its first public forum amid growing public concern about the rapid expansion of complex hydraulic fracturing. Since that time, the BLM has published two proposed rules and held numerous meetings with the public and state officials, as well as many tribal consultations and meetings. The public comment period was open for more than 210 days. During this period, the BLM received comments from more than 1.5 million individuals and groups. The BLM reviewed and analyzed these comments based on thoughtful analysis and robust dialogue, which resulted in a rule that is more protective than the previous proposed rules and current regulations. It also strengthens oversight and provides the public with more information than is currently available, while recognizing state and tribal authorities and not imposing undue delays, costs, and procedures on operators. The final rule fulfills the goals of the initial proposed rules: To ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and to provide public disclosure of the chemicals used in hydraulic fracturing fluids.

The final rule also: (1) Improves public awareness of where hydraulic fracturing has occurred and the existence of other wells or geologic faults or fractures in the area, as well as communicates what chemicals have been used in the fracturing process; (2) Clarifies and strengthens existing rules related to well construction to ensure integrity and address developments in technology; (3) Aligns requirements with state and tribal authorities with regard to water zones that require protection; and (4) Provides opportunities to coordinate standards and processes with individual states and tribes to reduce costs, increase efficiencies, and promote the development of more stringent standards by state and tribal governments.

Various types of hydraulic fracturing have long been used on a relatively small scale to complete or to re-complete conventional oil and gas wells. More recently, hydraulic fracturing has been coupled with relatively new horizontal drilling technology in larger-scale operations that have allowed greatly increased access to shale oil and gas resources across the country, sometimes in areas that have not previously or recently experienced significant oil and gas development. These newer wells can, among other complexities, be significantly deeper and cover a larger horizontal area than the operations of the past. This increased complexity requires additional regulatory effort and oversight.

Rapid expansion of this practice and its complexity have caused public concern about whether fracturing can lead to or cause the contamination of underground water sources, whether the chemicals used in fracturing pose risks to human health, and whether there is adequate management of well integrity and the fluids that return to the surface during and after fracturing operations.

The BLM's regulations that address issues surrounding hydraulic fracturing are at least 25–30 years old, and pre-date the current common use of the practice. In 2011, the Natural Gas Subcommittee of the Secretary of Energy's Advisory Board recommended that the BLM undertake a rulemaking to ensure well integrity, water protection, and adequate public disclosure. Prior to that, in 2009 the American Petroleum Institute published a guidance document titled ''Hydraulic Fracturing Operations-Well Construction and Integrity Guidelines, First Edition,

October 2009,'' commonly known as HF1, to provide guidance and highlight industry recommended practices for well construction and integrity for those wells that will be hydraulically fractured. The purpose of the guidance was to ensure protection of shallow groundwater aquifers and the environment while enabling economically viable development of oil and natural gas resources. More recently, regulations from states, such as Colorado and Wyoming, and professional papers, such as King, George, SPE 152596, (Feb. 2012), focused on the estimation, analyses, and control of risks from hydraulic fracturing operations. All of these factors have led to, and informed, this rulemaking. To ensure that these standards adequately address emerging technological developments and health and environmental protections, the BLM will evaluate the adequacy of this rulemaking 7 years after the date of publication.

Pursuant to the Federal Land Policy and Management Act (FLPMA), Indian mineral leasing laws, and other statutes, the BLM is charged with administering oil and gas operations in a manner that protects Federal and Indian lands while allowing for appropriate development of the resource. The BLM oversees approximately 700 million subsurface acres of Federal mineral estate and carries out some of the regulatory duties of the Secretary of the Interior for an additional 56 million acres of Indian mineral estate across the United States. Currently, nearly 36 million acres of Federal land are under lease for potential oil and gas development in 33 states. As of June 30, 2014, there were approximately 47,000 active oil and gas leases on public lands, and approximately 95,000 oil and gas wells. Like other BLM regulations, this final rule applies to oil and gas operations on public lands (which include split estate lands, *i.e.,* lands where the surface is owned by an entity other than the United States), as well as operations on Indian lands, to ensure that these lands and communities all receive the same level of protection as provided on public lands.

Oil and gas leasing decisions on public lands are made through a thorough, deliberative, and transparent process rooted in Resource Management Plans (RMPs) that cover virtually all BLM-administered public land and related mineral estate. Oil and gas decisions contained within BLM RMPs also apply to lands where the surface is privately owned, but the mineral estate is in Federal ownership. The BLM establishes, amends, and revises RMPs as required by the FLPMA with involvement by the community and stakeholders. As part of the land use planning process, the BLM engages the public in a variety of ways and conducts environmental reviews as required by the National Environmental Policy Act (NEPA), and other applicable natural and cultural resource protection authorities. While the public makes known to the BLM which lands they are interested in leasing, prior to leasing any lands, the BLM undertakes the appropriate NEPA review and provides an opportunity for the public to review and comment on the analyses and documents that the agency prepares.

Existing Requirements

Relevant existing requirements for oil and gas operations are set out at 43 CFR 3162.3–1 and Onshore Oil and Gas Orders 1, 2 and 7. Most of these requirements have been in place for at least 25 years. This final rule will supplement the existing requirements, which will remain in place. On either Federal leaseholds, or Indian lands, an operator may not begin operations until it has filed an Application for a Permit to Drill (APD) with the BLM and received approval from the BLM to commence operations. Existing Federal law requires the BLM to post notices of APDs for oil and gas development on public lands for public inspection for 30 days, during which time the public may express any concerns to the BLM's authorized officer as the agency conducts a site-specific environmental analysis of the proposed well site proposal. Those concerns and other issues identified earlier in the process, or during site examinations, may result in conditions of approval (COA) on the operator's drilling permit that require, forbid, or control specified activities or disturbances. Examples of COAs include providing for road improvements and erosion control measures, or applying seasonal restrictions on some activities. In addition, baseline water testing is a best management practice that the BLM encourages. The BLM may require water testing and monitoring, particularly if water quality impacts are a significant concern based on local conditions, and where the BLM or a cooperating landowner or manager manages the surface estate where testing could yield useful water quality information. This is consistent with what several states, including California, Colorado, and Wyoming, are already doing. The BLM does not post for public inspection notices of APDs for Indian oil and gas leases or agreements because there is no requirement in the Indian leasing statutes similar to that in Section 17 of the Mineral Leasing Act.

Under Onshore Oil and Gas Order 1, Approval of Operations, the location of the well must be identified and important aspects of the proposed operations described. Onshore Order 2 requires all usable water zones to be protected by steel casing and cement, and requires the casing, once in place, to be pressure tested. Casing and cement must meet specific design criteria, which BLM engineers verify as part of the permit review process. When a well is no longer capable of producing, Onshore Order 2 mandates minimum standards for the placement, quality, and verification of cement plugs to ensure that any remaining oil and gas cannot migrate into usable water zones. BLM inspectors witness aspects of drilling and plugging operations to ensure that the operator is in compliance with Onshore Order 2 and the permit to drill.

New Requirements

With this rule, the BLM establishes new requirements to ensure wellbore integrity, protect water quality, and enhance public disclosure of chemicals and other details of hydraulic fracturing operations. The rule requires an operator planning to conduct hydraulic fracturing to do the following:

- Submit detailed information about the proposed operation, including wellbore geology, the location of faults and fractures, the depths of all usable water, estimated volume of fluid to be used, and estimated direction and length of fractures, to the BLM with the APD or a Sundry Notice and Report on Wells (Form 3160–5) as a Notice of Intent (NOI) to hydraulically fracture an existing well;
- Design and implement a casing and cementing program that follows best practices and meets performance standards to protect and isolate usable water, defined generally as those waters containing less than 10,000 parts per million of total dissolved solids (TDS);
- Monitor cementing operations during well construction;
- Take remedial action if there are indications of inadequate cementing, and demonstrate to the BLM that the remedial action was successful;
- Perform a successful mechanical integrity test (MIT) prior to the hydraulic fracturing operation;
- Monitor annulus pressure during a hydraulic fracturing operation;
- Manage recovered fluids in rigid enclosed, covered or netted and screened above-ground storage tanks, with very limited exceptions that must be approved on a case-by-case basis;