No. 20-2146

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILDEARTH GUARDIANS,

Plaintiff-Appellant,

vs.

DAVID BERNHARDT, *et al*.,

Defendant-Appellees,

and

WESTERN ENERGY ALLIANCE, *et al*.,

Intervenor-Defendants-Appellees.

On Appeal from the United States District Court for the District of New Mexico,
Civil Action No. 1:19-cv-00505-RB-SCY,
Honorable Robert C. Brack, District Judge

APPELLANT'S UNCITED PRELIMINARY OPENING BRIEF (DEFERRED APPENDIX APPEAL) (Oral Argument Requested)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26(a), Plaintiff-Appellant WildEarth Guardians certifies to this Court that it is a nonprofit organization and that there is no parent corporation or any publicly held corporation that holds any stock in this organization.

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GLOSSARY OF TERMS

APA	Administrative Procedure Act
APD	Application for Permit to Drill
BLM	United States Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
IM	Instruction Memorandum
NEPA	National Environmental Policy Act
NO_x	Nitrogen Oxide
RFDS	Reasonably Foreseeable Development Scenario
RMP	Resource Management Plan
VOC	Volatile Organic Compound

PRIOR RELATED APPEALS IN THIS COURT

None.

JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (federal question) and the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291.

This is an appeal from the amended final order and judgment of the U.S. District Court for the District of New Mexico dated November 19, 2020, which disposed of all of Appellant's claims. The notice of appeal in this case, No. 20-2146, was filed on October 19, 2020, within 60 days of the district court's original final order and judgment dated August 19, 2020. On September 16, 2020, Federal Defendants filed a Motion for Clarification of the final order and judgment. On October 30, 2020, the Clerk of this Court issued an Order abating this appeal until the district court ruled on the Motion for Clarification. The district court ruled on the Motion for Clarification on November 19, 2020, and on that same day Appellant notified this Court through a Status Report. On November 23, 2020, the Clerk of this Court issued an Order lifting the abatement of this appeal.

ISSUES PRESENTED

1. Whether the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) when it failed to analyze indirect and

cumulative environmental impacts to air quality and water resources from development of the challenged oil and gas leases;

2. Whether BLM violated NEPA when it leased for oil and gas development specific parcels contemporaneously being considered for closure to oil and gas development in the agency's Draft Resource Management Plan (RMP) and Environmental Impact Statement (EIS) for the Carlsbad Field Office; and

3. Whether BLM violated the Federal Land Policy Management Act (FLPMA), NEPA, and the APA when it limited public participation in its oil and gas leasing process through the adoption and implementation of Instructional Memorandum (IM) 2018-034.

STATEMENT OF THE CASE

In this litigation, Appellant WildEarth Guardians (Guardians) challenges BLM's Leasing Authorizations for 192 oil and gas leases covering approximately 62,000 acres of land in BLM's Pecos District in southeastern New Mexico, issued after separate lease sales in September 2017, December 2017, and September 2018. Guardians also challenges BLM's adoption and implementation of IM 2018-034 under FLPMA, NEPA, and the APA.

I. LEGAL BACKGROUND

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

BLM manages onshore oil and gas development through a three-phase process. Each phase is distinct, serves distinct purposes, and is subject to distinct rules, policies, and procedures.

In the first phase, BLM prepares a broad-scale resource management plan (RMP), which establishes management priorities, and guides and constrains BLM's future implementation-stage management. 43 C.F.R. Part 1600. The RMP determines which lands will be open to leasing for oil and gas, and under what general conditions, and must analyze the landscape-level impacts from predicted future development. A Reasonably Foreseeable Development Scenario (RFDS) underlies BLM's assumptions regarding the pace and scope of oil and gas development within the RMP planning area.

In the second phase, BLM accepts the nomination of lease parcels, identifies parcel boundaries, and proceeds to sell and execute leases for those lands, in accordance with 43 C.F.R. §§ 3120 *et seq*. Once sold, the lease purchaser has the right to use as much of the leased land as is necessary to explore and drill oil and gas within the lease boundaries, subject to stipulations attached to the lease. *Id*. § 3101.1-2. Absent a No-Surface-Occupancy stipulation, oil and gas leasing represents an "irretrievable commitment of resources," before which NEPA

requires assessment of all "reasonably foreseeable" impacts. 42 U.S.C. § 4332(2)(C)(v); *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 718 (10th Cir. 2009).

The third phase occurs once BLM issues a lease, where the lessee must submit to BLM an application for permit to drill (APD) prior to drilling. 43 C.F.R. § 3162.3-1(c). At this stage, BLM may condition the approval of the APD on the lessees' adoption of "reasonable measures" whose scope is delimited by the lease and the lessees' surface use rights. *Id*. § 3101.1-2.

B. National Environmental Policy Act.

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1.[1] At its core, NEPA's "twin aims" are to promote "informed agency decisionmaking and public access to information." *Richardson*, 565 F.3d at 707. Accordingly, NEPA requires federal agencies to analyze and publicly disclose the environmental impacts of their actions and evaluate all reasonable alternatives to lessen or avoid those impacts. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14. "By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and

[1] All references to the NEPA regulations are to those in effect at the time of BLM's decisionmaking, which occurred entirely before recent amendments effective September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020).

allows the political process to check those decisions." *Richardson*, 565 F.3d at 703.

NEPA imposes "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) (internal quotation omitted). This "hard look" requirement ensures 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. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983). This examination "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish & Wildlife Serv.,* 611 F.3d 692, 712 (10th Cir. 2010) (internal quotation omitted).

Despite primarily laying out procedural requirements, NEPA is fundamentally intended to drive on-the-ground results:

> 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.

40 C.F.R. § 1500.1(c).

C. Federal Land Policy and Management Act.

Enacted in 1976, FLPMA governs BLM's management of public lands. *See* 43 U.S.C. §§ 1701-1787. In FLPMA, Congress directed that 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.

43 U.S.C. § 1701(a)(8).

To promote BLM's multiple-use mandate, FLPMA Section 309(e) requires that BLM establish formal regulations allowing the public meaningful participation opportunities, including an "adequate notice and an opportunity to comment," regarding BLM's public lands planning and management activities. 43 U.S.C. § 1739(e). *See also* 43 U.S.C. § 1702(d) (defining "public involvement" as "the opportunity for participation by affected citizens in rulemaking, decision making, and planning with respect to the public lands…"). FLPMA thus mandates that Interior and BLM involve the public in "the actual management of public lands." *Donald K. Majors*, 123 IBLA 142, 147 (1992). "[T]here are strong indications that Congress intended some form of public input for all decisions that may have significant impact on federal lands." *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 322 (D.C. Cir. 1987) (citing H.R. Rep. No. 94-1163, 7, 1976 U.S.C.C.A.N. 6175, 6181), *rev'd on other grounds*, 497 U.S. 871 (1990).

D. Administrative Procedure Act.

The APA provides a right to judicial review for any "person suffering legal wrong because of agency action." 5 U.S.C. § 702. Actions that are reviewable under the APA include final agency actions "for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

Under the APA, a 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." *Id*. § 706(2)(A). A court must also compel agency action unlawfully withheld or unreasonably delayed. *Id*. § 706(1).

Under the APA, an agency must generally publish public notice of proposed rulemakings. *Id*. § 553. The APA carves out a narrow exception to this requirement for interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. *Id*. § 553(b)(A). This exception does not apply when notice or hearing is required by statute. *Id*. § 553. The Supreme Court has described a substantive or legislative rule as one "affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (internal quotation omitted). In contrast, an interpretative rule is "merely a clarification or explanation of an existing statute or rule." *First Bancorporation v. Bd. of Governors of Fed. Reserve Sys.*, 728 F.2d 434, 438 (10th Cir. 1984) (quoting *Guardian Federal Savings and Loan v. Federal Savings and Loan Ins. Corp*., 589

F.2d 658, 664 (D.C. Cir. 1978)). But the announcement of a "significant policy change" constitutes a legislative rule subject to the rulemaking provisions of § 553. *Id*. Similarly, formal rulemaking is required to "effectively amend[] a prior legislative rule." *Am. Min. Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

II. FACTUAL BACKGROUND

A. Oil and Gas Development in the Greater Carlsbad Region.

Although oil and gas development has been ongoing in the Greater Carlsbad region, or Permian Basin, in southeastern New Mexico for nearly a century, App. at [AR_BLM_0017703], recent technological developments over the past 10 years have significantly lowered production costs and enabled a dramatic and unprecedented expansion in regional production. App. at [AR_BLM_0012714-155, 12721]. Specifically, the widespread adoption of horizontal drilling and multi-stage hydraulic fracturing by the oil and gas industry has opened up significant [u]nconventional oil plays" to production that were previously uneconomical to extract, thereby enabling a "dramatic" boom in oil and gas production. App. at [AR_BLM_0012714-15].

BLM has played a critical role in facilitating this explosive growth in regional oil and gas production. As of October 1, 2008, federal oil and gas leases covered more than 675,000 acres in the Greater Carlsbad region. App. at

[AR_BLM_0012883]. But by 2014, federal oil and gas leases covered 1.96 million acres of federal lands in the Greater Carlsbad region. App. at [AR_BLM_0017704]. Between September 2017 and September 2018, in the actions challenged here, BLM sold off for oil and gas development another 192 lease parcels covering approximately 62,000 acres in the Pecos District. App. at [Am. Compl. tbl.A (Dkt.31)]. Since 2006, the Carlsbad Field Office, a unit within the Pecos District, has approved approximately 700 oil and gas drilling permits each year. App. at [AR_0012884].

B. Leasing's Environmental Impacts.

1. Air Quality.

Oil and gas development and production using horizontal drilling and multi-stage fracking release significant amounts of air pollution, which threatens public health. App. at [AR_005459-60]. Fracking releases numerous Hazardous Air Pollutants (HAPs), including known human carcinogens, such as benzene and formaldehyde, and potent neurotoxins, including hexane and hydrogen sulfide. App. at [AR_BLM_005219].

Of particular concern in the Greater Carlsbad region are the oil and gas industry's emissions of nitrogen oxides (NO_x) and volatile organic compounds (VOCs). App. at [BLM_AR_0017693]. NO_x and VOCs react to form ozone, a pollutant with serious public health risks. 80 Fed. Reg. 65,292, 65,299 (Oct. 26,

2015). Exposure to ozone can cause or exacerbate respiratory health problems, including shortness of breath, asthma, chest pain and coughing, decreased lung function and even long-term lung damage, all of which can contribute to premature deaths. *Id*. at 65,294, 65,302-11.

Ozone levels in the Greater Carlsbad region already threaten human health. App. at [AR_BLM_006191] (2017 EPA monitoring data from Carlsbad showing fourth-highest daily maximum value of 0.076 ppm, well above the 0.070 ppm National Ambient Air Quality Standard (NAAQS)). And BLM's Leasing Authorizations will exacerbate this existing problem. Although nationwide ozone concentrations have decreased on average by 22% from 1990 to 2015, ozone concentrations in Carlsbad actually *increased* 8% from 2000 to 2012. App. at [AR_BLM_19070-71]. In 2014, BLM acknowledged that monitoring data from 2008 showed that ozone levels in Carlsbad were already "close to the regulatory limit." App. at [AR_BLM_0012874]. But not only has that regulatory limit since been tightened, 80 Fed. Reg. at 65,292; App. at [AR_BLM_0017693], the agency expects regional air pollution to further increase from 2010 to 2035. App. at [AR_BLM_0012876]. Consistent with national studies showing the oil and gas industry to be "a major and growing source of ozone in the United States," "data suggest that oil and gas production activities are significant contributors to emissions" in the region. App. at [AR_BLM_005212, 0017691].

2. Water Resources.

Fracking has been documented to cause contamination of groundwater aquifers and requires huge amounts of water, a significant concern in the arid Southwest. App. at [BLM_AR_001550; 002704]. New extraction techniques exacerbate this concern because "[i]t can take five to ten times more water to frack a directionally drilled well than a vertical well." *Diné Citizens Against Ruining Our Env't v. Jewell*, No. CIV 15-0209 JB/SCY, 2015 WL 4997207, at *11 (D.N.M. Aug. 14, 2015), *aff'd*, 839 F.3d 1276 (10th Cir. 2016); *see also* App. at [AR_BLM_0017788 (BLM estimate of 7.3 acre-feet of water per horizontal well compared to 1.53 acre-feet per vertical well). With such "large volumes of water" for horizontal drilling and multi-stage fracturing likely to be sourced primarily from groundwater aquifers, lease development creates a significant risk of drawdown of these resources. App. at [AR_BLM_001550; 002704]. Groundwater drawdown could significantly impact natural springs and the availability of groundwater for other users, including the "main source of municipal water supply" in the area. App. at [AR_BLM_0017634]. However, BLM lacks adequate information needed to assess potential impacts to regional groundwater resources, as "[g]roundwater levels are not currently monitored in the [Greater Carlsbad] area, nor are pump tests performed to measure regional aquifer properties or individual well production." App. at [AR_BLM_0017635].

C. The Challenged Agency Actions.

1. BLM's Leasing Decisions.

Guardians challenges the Leasing Authorizations for the following three BLM lease sales: (1) September 2017 Lease Sale; (2) December 2017 Lease Sale; and (3) September 2018 Lease Sale.[2]

For the September 2017 Lease Sale, BLM released a lease sale notice, draft Environmental Assessment (EA), and unsigned FONSI on June 7, 2017. App. at [AR_BLM_002561; 002472-2560]. On July 6, 2017, Guardians timely filed its administrative protest. App. at [AR_BLM_002619]. On September 7, 2017, BLM held the oil and gas lease sale, with 61 of the 62 offered parcels sold, totaling 15,331.91 acres. App. at [AR_BLM_002634]. On March 30, 2018, BLM denied Guardians' protest, issued its Decision Record, final EA, and signed FONSI, and issued all 61 leases to Lessees. App. at [AR_BLM_002758; 002639-51; 002652-002750; 002638; 002761-62].

For the December 2017 Lease Sale, BLM released a lease sale notice, updated draft EA, and unsigned FONSI on September 7, 2017. App. at [AR_BLM_001422; 001352-001420]. On October 6, 2017, Guardians timely filed

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[2] The lease totals referred to herein—192 parcels and approximately 62,000 acres—excludes leases subsequently cancelled by BLM and voluntarily dismissed from this case. App. at [Joint Stipulation (Dkt.29)].

its administrative protest. App. at [AR_BLM_001494]. On December 7, 2017, BLM held the oil and gas lease sale, with all 7 of the offered parcels sold, totaling 2,104.15 acres. App. at [AR_BLM_001508]. On March 26, 2018, BLM issued its Decision Record, final EA, and signed FONSI. App. at [AR_BLM_1510-13; 001514-85; 001594]. On March 30, 2018, BLM denied Guardians' protest, and issued all 7 leases to Lessees. App. at [AR_BLM_001586; 001593].

For the September 2018 Lease Sale, BLM released a lease sale notice, "final draft" EA and unsigned FONSI on July 23, 2018. App. at [AR_BLM_006356; 006470.] On July 30, 2018, Guardians timely filed its administrative protest. App. at [AR_BLM_005849]. On September 5-6, 2018, BLM held the oil and gas lease sale, with all 142 of the offered parcels sold, totaling 50,796.88 acres. App. at [AR_BLM_006446]. On October 22, 2018, BLM denied Guardians' protest, issued its Decision Record, final EA, and signed FONSI, and issued all 142 leases to Lessees. App. at [AR_BLM_006453-73; 006474-6602; 006604; 006611-20; 006621-28].

2. BLM's Promulgation of IM 2018-034.

On January 31, 2018, BLM issued IM 2018-034, overhauling BLM's oil and gas leasing procedures "to streamline the leasing process from beginning…to end"—by half or more—and "expedite the offering of lands for lease." App. At [AR_BLM_0012477; 0012433]. By cutting short its lease sale and NEPA review

periods, BLM sought to allow industry to "execute exploration and production strategies earlier," explaining that "[r]educing the average time from acreage nomination to lease sale will be BLM's measure of success." App. at [AR_BLM_0012433]. Prioritizing the speedy processing of oil and gas leases over environmental protection and public involvement, BLM intended the new process "to result in additional revenue from increased lease sales and reduced costs for NEPA review, planning, responses to protests, and associated oil and gas program costs." App. at [AR_BLM_0012480].

IM 2018-034 substantially changed BLM's oil and gas leasing process, as illustrated in the table below:

IM 2010-117	**IM 2018-034**
§ III.A Parcel Review Timeframe "[S]tate offices will develop a sales schedule with an emphasis on rotating lease parcel review responsibilities among field offices throughout the year to balance the workload and to allow each field office to devote sufficient time and resources to implementing the parcel review policy established in this IM. State offices will extend field office review timeframes, as necessary, to ensure there is adequate time for the field offices to conduct comprehensive parcel reviews." App. at [AR_BLM_0012103].	**§ III.A Parcel Review Timeframe** "The timeframe for parcel review for a specific lease is to be no longer than 6 months." App. at [AR_BLM_0012478].

§ III.C.7 Public Participation "State and field offices *will* provide for public participation as part of the review of parcels identified for potential leasing through the NEPA compliance documentation process." App. at [AR_BLM_0012105] (emphasis added).	**§ III.B.5 Public Participation** "State and field offices *may* provide for public participation during the NEPA process as part of the review of parcels identified for potential leasing." App. at [AR_BLM_12479] (emphasis added).
III.E NEPA Compliance Documentation "NEPA compliance documentation for oil and gas leasing must include an opportunity for public review … [F]ield offices will provide a 30-day public review and comment period for the DNA.… [F]ield offices will provide a 30-day public review and comment period for the EA and unsigned Finding of No Significant Impact (FONSI) of oil and gas leasing…." App. at [AR_BLM_0012106].	**III.D NEPA Compliance Documentation** "If the BLM concludes that a DNA will adequately document that existing NEPA analysis is sufficient to support the proposed action and the action is consistent with the RMP, no further public comment period is required for the DNA." App. at [AR_BLM_0012479].
III.G Public Notification of Lease Sale "The state office will post the final sale notice at least 90 days prior to the sale date." App. at [AR_BLM_0012107].	**IV.A Public Notification of Lease Sale** "The state office must post the [sale notice] at least 45 days prior to the start of the lease sale…." App. at [AR_BLM_0012479-80].
§ III.H Lease Sale Parcel Protests "A 30-day protest period will begin the day the sale notice is posted, as it has in the past." App. at [AR_BLM_12107].	**§ IV.B Lease Sale Parcel Protests** "A 10-day public protest period will begin the day the sale notice is posted…." App. at [AR_BLM_0012480].

III.H Lease Sale Parcel Protests	**§ IV.B Lease Sale Parcel Protests**
"[A]ppeals will not automatically halt the auction or issuance of leases." App. at [AR_BLM_0012107].	"Parcels subject to protests that are not resolved (i.e., pending protests) will be offered for lease sale." App. at [AR_BLM_0012480].

BLM regulations also allow for BLM officers to suspend lease sales pending resolution of administrative protests and appeals, 43 C.F.R. § 3120.1-3, but IM 2018-034 eliminates this discretion, specifically providing that "[p]arcels subject to protests that are not resolved (i.e., pending protests) will be offered for lease sale." App. at [AR_BLM_0012480].

STANDARD OF REVIEW

The district court's denial of Guardians' *Olenhouse* Motion is a question of law that this Court reviews de novo with no deference to the district court's legal conclusion. *Richardson*, 565 F.3d at 704-05.

The APA governs judicial review of BLM's actions challenged under NEPA, FLPMA, and the APA, 5 U.S.C. § 706, where the reviewing court must set aside an agency action if it "fails to meet statutory, procedural or constitutional requirements or if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (internal quotations omitted). Under this standard, a reviewing court must set aside agency action if:

> [T]he 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) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

SUMMARY OF ARGUMENT

BLM violated NEPA's requirement to take a hard look at leasing impacts in several ways. First, BLM failed to take a hard look at the ozone pollution and public health impacts of its leasing decisions. The agency did not quantify emissions of ozone precursor pollutants, despite the availability of emissions calculators, and did not assess the cumulative impacts of its leasing decisions, taking into account air monitoring data showing ozone pollution levels already exceeding federal standards and reasonably foreseeable regional oil and gas development. *See Diné Citizens Against Ruining Our Environment v. Bernhardt* ("*Diné CARE*"), 923 F.3d 831, 853-54 (10th Cir. 2019)

Second, BLM failed to take a hard look at impacts to water resources. For the September and December 2017 Lease Sales, BLM failed to quantify cumulative water extraction associated with reasonably foreseeable oil and gas development, as this Court specifically mandated in *Diné CARE*, 923 F.3d at 853-

54. For all three Lease Sales, BLM failed to disclose baseline aquifer conditions and analyze the severity of environmental impacts from depleting groundwater for fracking operations.

Third, BLM also leased lands for oil and gas development despite the ongoing Carlsbad RMP planning process. By leasing parcels specifically being considered for closure to oil and gas development in the NEPA review for the new Carlsbad RMP, BLM impermissibly narrowed the range of alternatives available to the agency and prejudiced the outcome of its planning process.

BLM also violated NEPA, FLPMA, and the APA in issuing IM 2018-034. BLM unlawfully amended a legislative rule without following the notice and comment rulemaking procedures required by the APA, and further violated the procedural requirements of NEPA and FLPMA, which require public participation procedures to be established by formal rule. And by eliminating meaningful public participation opportunities, the adoption of IM 2018-034 and its implementation for the September 2018 Lease Sale violated the substantive public participation requirements of NEPA, FLPMA, and their implementing regulations.

ARGUMENT

I. WILDEARTH GUARDIANS HAS STANDING

Guardians has standing to bring this action. Standing requires a showing of injury, traceability, and redressability. *S. Utah Wilderness All. v. Palma*, 707 F.3d

1143, 1153 (10th Cir. 2013). An organization has standing "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000). Standing requirements for immediacy of injury and redressability are relaxed in cases where plaintiffs have sustained procedural injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 n.2 (10th Cir. 1996) (citing *Lujan*).

For injury-in-fact, Guardians must show that (1) "in making its decision without following [NEPA's] procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm," and (2) "the increased risk of environmental harm injures [Guardians members'] concrete interests by demonstrating either [their] geographical nexus to, or actual use of the site of the agency action." *Lucero*, 102 F.3d at 450. Guardians need not show its members have "traversed each bit of land that will be affected by a challenged agency action." *Palma*, 707 F.3d at 1155. Rather, it is sufficient for members to specify

areas they have visited, aver that these specific areas will be affected by oil and gas drilling, and state that their interests will be harmed by such activity. *Id*. at 1156.

Guardians has suffered injury from BLM's Leasing Authorizations and application of IM 2018-034. Guardians' members regularly work in the Greater Carlsbad region documenting pollution in the oil and gas fields, have extensively visited the area and recreated on and in the proximity of the lease tracts, and have plans to continue to do so regularly.[3] Guardians' members have personally experienced the widespread negative effects of oil and gas development in the Greater Carlsbad region, including air pollution, exhaust, noise pollution, and light pollution.[4] Guardians members regularly use parcels sold by BLM, as well as adjacent lands within sight, sound, and smell of foreseeable development on the challenged lease parcels, demonstrating both a geographical nexus and actual use of affected areas.[5] Development of the challenged leases will further degrade air quality, scenic beauty, and solitude in areas used by Guardians' members, reducing their enjoyment of these areas and likelihood of returning in the future.[6] Thus, Guardians' members have established injury-in-fact.

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[3] Eddy Decl. ¶ 32 [App. at ___]; Sobel Decl. ¶¶ 11-15, 24-37 [App. at ___]; Fischer Decl. ¶ 12 [App. at ___].
[4] *Id*. ¶¶ 19, 22-26 [App. at ___], 30-31; *id*. ¶¶ 16-20 [App. at ___]; *id*. ¶ 12 [App. at ___].
[5] *Id*. ¶¶ 31 [App. at ___]; *id*. ¶¶ 24-36 [App. at ___]; *id*. ¶ 12 [App. at ___].
[6] *Id*. ¶¶ 31-33 [App. at ___]; *id*. ¶¶ 24-36 [App. at ___].

To establish traceability in procedural cases, a plaintiff "need only trace the risk of harm to the agency's alleged failure to follow [statutory] procedures." *Lucero*, 102 F.3d at 451-52. Guardians meets this test. Guardians' members' injuries can be traced to BLM's failure to take a hard look at the impacts of reasonably foreseeable oil and gas development, which threatens to degrade air quality, contaminate water resources, and increase noise and light pollution. [7] Thus, Guardians' members have established traceability.

Redressability is satisfied by showing that a plaintiff's "injury would be redressed by a favorable decision requiring the [agency] to comply with [statutory] procedures." *Lucero*, 102 F.3d at 452. Guardians' injuries would be redressed by a favorable result in this suit because BLM would be made to properly analyze the full impacts of lease development under NEPA and provide additional opportunities for public involvement in its leasing process. This analysis could lead to denial of some or all of the challenged leases, or to modifications that would lessen air and water pollution, and other environmental impacts.[8] A favorable decision would thus "avert the possibility that [BLM] may have overlooked significant environmental consequences of its actions," thereby redressing

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[7] Eddy Decl. ¶ 7-8, 17-22-26, 30-33 [App. at ___]; Sobel Decl. ¶¶ 16-23, 34 [App. at ___]; Fischer Decl. ¶ 12 [App. at ___].
[8] *Id*. ¶¶ 34-35 [App. at ___]; *id*. ¶¶ 38-39 [App. at ___]; *id*. ¶ 26-27 [App. at ___].

Guardians' alleged harms. *Lucero*, 102 F.2d at 452 (quotations omitted). Thus, Guardians' members have established redressability.

Guardians' members also demonstrate that IM 2018-034 specifically threatens their procedural interests related to participation in BLM's decisionmaking process for oil and gas leases.[9] Shortened pre-leasing review and public involvement increases the likelihood that BLM will fail to identify or assess potential impacts to resources that could be protected by adequate stipulations or deferral of leasing.[10] Deprivation of a procedural right that impairs Guardians' concrete interests constitutes a procedural injury for which Guardians has standing. *Lujan*, 504 U.S. at 572.

II. BLM FAILED TO TAKE A HARD LOOK AT THE IMPACTS TO AIR QUALITY AND PUBLIC HEALTH

BLM failed to take a hard look at the air quality impacts of lease development, particularly NO_x and VOC emissions that are precursors to ozone formation. 80 Fed. Reg. at 65,299. Despite generally acknowledging regional ozone pollution as a relevant environmental issue, BLM failed to analyze resulting

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[9] *See* Fischer Decl. ¶ 21-23 [App. at ___] (explaining that the shortened review periods at the scoping and protest stages made it "very difficult for Guardians to thoroughly review site-specific details for each parcel on ArcGIS.com, alert our members about comment periods, review draft lease sale documents, and generally provide detailed, meaningful input to BLM within the allotted time").

[10] Fischer Decl. ¶¶ 25-27 [App. at ___].

impacts to public health and the environment from ozone pollution as NEPA requires.

To properly analyze the severity of ozone pollution impacts from the Leasing Authorizations, BLM needed to (1) take a hard look at indirect ozone impacts by estimating potential additional emissions from lease development; and (2) take a hard look at cumulative ozone impacts by analyzing the impacts of new emissions combined with (a) current ozone pollution levels and (b) reasonably foreseeable future emissions. But here, BLM failed to do any of these analyses.

A. BLM Refused to Quantify Indirect Emissions of Ozone Precursors from the Leases Using Available Emissions Calculators

"Accurate scientific analysis" is "essential to implementing NEPA." 40 C.F.R. § 1500.1(b). NEPA requires an agency to ensure "scientific integrity" in its environmental assessments. *Id.* § 1502.24. But by arbitrarily choosing not to utilize available tools to quantify potential ozone precursor emissions from lease development, BLM failed to provide the basic data needed to assess air pollution impacts. As BLM explained in its Air Resources Technical Reports: "necessary before further analysis can be done is an estimate of actual emissions, or an emissions inventory." App. at [AR_BLM_0018951; 0019023; 0019094]. Thus, by failing to estimate air emissions from lease development, BLM lacked the essential information needed to analyze impacts from such emissions.

BLM attempted to explain its failure to estimate potential VOC and NO_x emissions by arguing that it was "not feasible to directly quantify emissions." App. at [AR_BLM_002697; 001542; 006494]. But the record explicitly contradicts BLM's statement, with the agency's own Technical Reports providing "an estimated emissions calculator for one well" that would have allowed BLM to estimate emissions for various pollutants, including VOCs and NO_x. App. at [AR_BLM_006494; AR_BLM_0020156] (Carlsbad Field Office estimate of 4.46 tons VOC emissions and 4.53 tons NO_x emissions from flaring over average individual oil well lifetime). The calculators provide a reasonable range of emission estimates for VOCs and NO_x, based on differences in equipment, geologic formations, and other site-specific variables, accounting for fully *95%* of potential new wells. App. at [AR_BLM_000018955; 0019027; 0019098]. Yet BLM's EAs failed to explain the agency's decisions not to use the emissions calculators. App. at [AR_BLM_002697; 001542; 006494].

BLM argued below that it declined to use the emissions calculators because "at the single well level the uncertainty in emissions projections increases substantially." App. at [BLM Resp. at 18] (quoting App. at [AR_BLM_0018952]). But this argument cuts against the agency's position. Increased uncertainty in the emissions estimates "at the single well level" weighs in favor of estimating aggregate emissions at the leasing stage instead of waiting until the individual

APD stage where uncertainty regarding emissions would *increase*.[11] NEPA requires that environmental impacts be assessed "at 'the earliest stage possible.'" *Richardson*, 565 F.3d at 707 (quoting 40 C.F.R. § 1501.2). The calculators allow BLM to quantify emissions, and aggregating multiple wells together here at the leasing stage would mitigate uncertainty in individual well estimates.

BLM has not provided a reasonable basis for failing to using its own emissions calculators to quantitatively estimate emissions of ozone precursors. BLM had the tools needed to quantify potential emissions, but arbitrarily, and without explanation, chose not to utilize them. *See Motor Vehicle Mfrs.*, 463 U.S. at 52 ("The agency must explain the evidence which is available, and must offer a rational connection between the facts found and the choice made.") (internal quotation omitted).

B. BLM Arbitrarily Failed to Assess the Cumulative Impacts of Its Leasing Authorizations on Ozone Pollution Levels.

BLM must analyze the cumulative impacts of its Leasing Authorizations on air quality, including ozone levels, "when added to other past, present, and reasonably foreseeable future actions…." 40 C.F.R. § 1508.7. Yet BLM provided

[11] As the Technical Reports explain, "the calculators were originally designed to make estimations of emissions at the RMP level which would result in some averaging and smoothing of assumptions." App. at [AR_BLM_0018952; 19024; 19095].

only a qualitative assessment of leasing's air quality impacts in isolation, failing to account for cumulative impacts of its leasing decisions when added to emissions from both existing development and from the 16,000 reasonably foreseeable new wells projected by BLM's RFDS. App. at [AR_BLM_12528].

1. BLM Failed to Analyze the Cumulative Impacts of the Challenged Leasing Decisions Combined With Existing Ozone Pollution Levels Already Exceeding Public Health Standards.

Despite its failure to quantify emissions, BLM generally acknowledges that lease development will result in new emissions of NO_x and VOCs. App. at [AR_BLM_002697; 001542; 006494]. But the impact of these emissions cannot be assessed in a vacuum. Instead, to inform the public and decision-makers regarding the public health impacts of the new emissions, BLM needed to analyze the impacts of the new emissions combined with existing ozone pollution levels already threatening public health.

Ozone pollution in the Greater Carlsbad region is a serious and worsening problem. Although nationwide ozone concentrations have decreased on average by 22% from 1990 to 2015, ozone concentrations in Carlsbad actually *increased* 8% from 2000 to 2012. App. at [AR_BLM_19070-71]. In 2014, BLM acknowledged that monitoring data from 2008 showed ozone levels in Carlsbad were already "close to the regulatory limit." App. at [AR_BLM_0012874]. And the agency expects regional air pollution to further increase from 2010 to 2035, App. at

[AR_BLM_0012876], with BLM's "data suggest[ing] that oil and gas production activities are significant contributors to emissions" in the region, App. at [AR_BLM_0017691].

Yet before authorizing additional oil and gas leasing—and thereby exacerbating the ozone pollution problem—BLM never disclosed that ozone levels in the region were not simply close to, but already at—*or even exceeding*—federal health standards. Absent consideration of current conditions, including existing pollution levels and appropriate health standards, "there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA." *Oregon Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019) (internal quotation omitted), *reh'g denied* (July 3, 2019). *See also WildEarth Guardians v. OSM*, 104 F. Supp. 3d 1208, 1228 (D. Colo. 2015), ("More stringent [air quality] standards would arguably make the same action more significant."), *vacated as moot,* 652 Fed. Appx. 717 (10th Cir. 2016).

In the EAs for the September and December 2017 Lease Sales, BLM obfuscated the critical nature of the ozone problem by comparing 2013 design values (monitored pollution levels) to the 2008 federal ozone limit. App. at [AR_BLM_001527; 002679].[12] But BLM arbitrarily failed to explain that this

[12] In its September 2018 EA, BLM correctly identifies the 2015 ozone limit. App. at [AR_BLM_006601].

ozone limit (0.075 ppm) had been tightened in 2015 (0.070 ppm), based on EPA's determination that the stricter standard was "requisite" to protect human health and welfare, "neither more nor less stringent than necessary for these purposes." 80 Fed. Reg. at 65,294-95. BLM's reliance on an outdated, weaker federal standard presented decision-makers and the public with a significantly distorted picture of the region's serious ozone problem.

Critically, the ozone data reviewed by BLM in the EAs for the 2017 Lease Sales showed Eddy County's design value to be 0.071 ppm, *above* the ozone limit in effect at the time of BLM's approvals. App. at [AR_BLM_001527; 002679]. Hence, the monitoring data presented in the 2017 Lease Sale EAs showed ozone pollution levels *not* in compliance with the 2015 NAAQS. App. at [AR_BLM_001527; 002679]. BLM emphasized the region's formal attainment status and compared monitored pollution levels to an outdated federal standard, but never disclosed that the air monitoring data actually showed ozone pollution levels in excess of the federal NAAQS. App. at [AR_BLM_001526-27; 002678-79].

Without understanding just how close current pollution levels were to exceeding federal health standards or quantifying additional emissions from future development of the leases, BLM lacked any factual basis for its arbitrary conclusion that "[t]he additional NO_2 and VOCs emitted from any oil and gas development on these leases are likely too small to have a significant effect on the

overall ozone levels of the area." App. at [AR_BLM_002697; 001542]; *see also* App. at [AR_BLM_006601] ("The potential amounts of ozone precursor emissions of NOx and VOCs from the proposed lease sale are not expected to impact the current design value for ozone….").

2. BLM Failed to Analyze the Cumulative Impacts of the Challenged Leasing Decisions Combined with Emissions from Future Oil and Gas Development.

Diné CARE held that well drilling projected by BLM's *Reasonably Foreseeable* Development Scenarios (RFDS) is, unsurprisingly, "reasonably foreseeable;" and therefore BLM must analyze the cumulative impacts of full RFDS development under NEPA. 923 F.3d at 853-54. Yet BLM failed to analyze the foreseeable air quality impacts, including ozone pollution, resulting from the 16,000 new oil and gas wells projected by BLM's RFDS. App. at [AR_BLM_0012528]. *See Diné CARE*, 923 F.3d at 853-54. In its Draft RMP, BLM has projected that "by 2021, areas may be in exceedance of the new ozone standard of 70 ppb due to foreseeable development." App. at [AR_BLM_0018310]. But BLM never assessed the cumulative air quality impacts of this foreseeable development before issuing the challenged leases.

BLM's qualitative assessment of air pollution impacts in the Lease Sale EAs focuses entirely on existing conditions, without consideration of reasonably foreseeable future development, including the agency's RFDS projections. App. at

[AR_BLM_001542-42, 001565; 002696-97, 002720-22; 006593-95, 006499]. Similarly, BLM's Air Resources Technical Reports identified *existing* major emissions sources, App. at [AR_BLM_0018959; 0019101; 19030], and described *existing* oil and gas development, App. at [AR_BLM_0018967; 0019109; 0019038], but did not assess cumulative impacts to ozone pollution levels from reasonably foreseeable *future* development, including the 16,000 new wells projected under BLM's RFDS. App. at [AR_BLM_0012528].

BLM's failure to take a hard look at the cumulative impacts of ozone precursor emissions from lease development, when added to reasonably foreseeable future activities, was arbitrary and violated NEPA. 40 C.F.R. § 1508.7.

III. BLM FAILED TO TAKE A HARD LOOK AT IMPACTS TO WATER RESOURCES

A. For the 2017 Leasing Authorizations, BLM Failed to Quantify Cumulative Groundwater Extraction Associated with Foreseeable Oil and Gas Development in the Pecos District.

Diné CARE requires the cumulative impacts associated with full RFDS development to be considered under NEPA. 923 F.3d at 853-54. Yet for the September 2017 and December 2017 Lease Sales, BLM provided no quantification of the total water use required to support the 16,000 new wells projected in the agency's RFDS. App. at [AR_BLM_0012528]. Nor did BLM otherwise analyze the cumulative impacts of the "large volumes of water…needed for hydraulic

fracturing" the thousands of new wells BLM projected for the region. App. at [AR_BLM_001550; 002704].

As in *Diné CARE*, here "BLM was required to, but did not consider the cumulative impacts on water resources associated with drilling the [16,000] reasonably foreseeable horizontal [Permian Basin] wells," rendering BLM's 2017 Lease Authorizations arbitrary. 923 F.3d at 857. BLM's purported cumulative impacts assessment only quantified potential water use for development of the individual lease sales in isolation. App. at [AR_BLM_001568; 002725]. But BLM failed to analyze cumulative impacts to aquifers from groundwater extraction for lease development when added to *any* other future groundwater uses, including water used for development of the projected 16,000 new wells. This failure violated NEPA. 40 C.F.R. § 1508.7.

In upholding BLM's cumulative impacts analysis on water, the district court focused entirely on a water use report prepared for BLM's September 2018 Lease Sale. Op. at 28-29 (citing App. at [BLM_AR_006568-74]). That report, however, post-dated BLM's decisions for the 2017 Lease Sales and did not inform those prior approvals. Courts have rejected the theory that an agency can "cure" deficiencies in an EA and FONSI with such post-facto analysis. *See e.g.*, *Protect Key W., Inc. v. Cheney*, 795 F. Supp. 1552, 1560-62 (S.D. Fla. 1992) (and cases

cited). *Protect Key West, Inc.* explained that allowing post-hoc cure would "render the EA/FONSI process a mere formality":

> As in this case, an agency could issue a perfunctory EA (and FONSI based thereon), and proceed with a project unhindered by further NEPA requirements. If challenged, the agency could support its *pro forma* EA with whatever studies were produced in the course of implementing the proposal. Any remaining environmental problems could be resolved after the decision to go forward with the project was actually made.

795 F. Supp. at 1561-62. But "NEPA's effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process." *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000). Accordingly, NEPA regulations require environmental analysis to be "prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

For the 2017 Leasing Authorizations, BLM failed to quantify or otherwise analyze the cumulative water use needed to support the 16,000 reasonably foreseeable new wells projected by the agency's RFDS, rendering its cumulative impact analysis inadequate under *Diné CARE*, 923 F.3d at 857. The agency's after-the-fact quantification of such cumulative water use cannot cure the deficiencies underlying its earlier arbitrary decisions. *Protect Key W., Inc.*, 795 F. Supp. at 1560-62.

B. For All Leasing Authorizations, BLM Failed to Assess the Severity of Impacts to Groundwater Resources.

Under NEPA, environmental impacts must be both "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Here, however, BLM generally identified aquifer drawdown as a potential risk to water resources, but failed to analyze the environmental implications of such drawdown, such as drying up water wells, depleting natural springs, and causing land subsidence. Absent consideration of the current conditions of area aquifers or potential environmental impacts from pumping groundwater for additional oil and gas development, App. at [AR_BLM_001568-69; 002725; 006567-74], BLM failed to meet its NEPA obligation to take a hard look at cumulative impacts to water resources from its Leasing Authorizations.

For the September and December 2017 Lease Sales, BLM noted that "large volumes of water are needed for hydraulic fracturing," which "generally comes from permitted groundwater wells," and explained that "the use of groundwater for this purpose might contribute to the drawdown of groundwater aquifer levels." App. at [AR_BLM_001550; 002704]. Yet BLM failed to analyze current aquifer conditions or the *severity* of potential environmental impacts associated with potential aquifer drawdown. *See Robertson*, 490 U.S. at 352. "'Without establishing the baseline conditions' before a project begins, 'there is simply no way to determine what effect the project will have on the environment and,

consequently, no way to comply with EPA.'" *Rose*, 921 F.3d at 1190 (internal quotation omitted). Available data from BLM's Draft RMP shows that "[w]ater use from the aquifers exceeds recharge rates, which is [already] leading to groundwater-level declines." App. at [AR_BLM_0017636]. But BLM's EAs failed to disclose the unsustainable state of the area's aquifers or assess how additional groundwater pumping for fracking more than 1,600 new wells on the challenged leases will contribute to this problem. App. at [AR_BLM_001568-69; 002725; 006567-74].[13] Nor did BLM disclose the baseline information needed to assess potential cumulative impacts of more than 50,000 acre-feet of additional groundwater pumping needed for fracking the 16,000 wells projected under full RFDS development. App. at [AR_BLM_006574].

Given BLM's failure to fully disclose declining groundwater levels in area aquifers, decision-makers and the public are left to ponder BLM's water usage numbers in the abstract. Yet the environmental impact of any particular amount of water extraction greatly depends upon the source. For example, an acre-foot of

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[13] Absent contrary record evidence that the state permitting system is adequately protective of aquifers and connected springs, BLM's acknowledgment in the Draft RMP of ongoing groundwater decline provides unrebutted evidence that New Mexico's groundwater permitting system does not, in fact, protect these resources from negative impacts. App. at [AR_BLM_0017636]. Accordingly, BLM's reliance on the state regulatory system to mitigate potential aquifer drawdown does not excuse BLM from analyzing the groundwater impacts of its leasing decisions. App. at [AR_BLM_001550; 002704].

water pumped from Lake Superior would undoubtedly have a different environmental impact than an acre-foot pumped from the Blue Hole of Santa Rosa. While BLM may not be able to predict exact water well locations at the leasing stage, the September 2018 EA identified several aquifers as potential sources for fracking water. App. at [AR_BLM_006573-74 & tbl.7]. BLM's unexplained failure to generally describe current aquifer conditions, disclose that regional water levels are generally declining, App. at [AR_BLM_0017636], and assess the severity of potential impacts associated with further groundwater drawdown – before irretrievably committing federal lands to oil and gas development – was arbitrary and does not support BLM's conclusion in its FONSI that leasing will not significantly impact groundwater reserves.

In upholding BLM's analysis of water resources impacts, the district court relied on BLM's comparison of water usage for RFDS development to total water usage in the Pecos District. Op. at 28-29 (citing App. at [AR_BLM_006574]).[14] But absent any understanding of current aquifer conditions, there is no basis for concluding that even a small proportionate increase in groundwater extraction will not have a significant impact on groundwater resources. *See Rose*, 921 F.3d at 1190. In particular, given unequivocal evidence in the record that groundwater

[14] As noted above, BLM only provided this quantification for the September 2018 Lease Sale, not for the 2017 Lease Sales.

levels are declining in the region, App. at [AR_BLM_0017636], BLM cannot simply assume that exacerbating this situation will not cause significant environmental impacts. An additional 17.9 *billion* gallons[15] of groundwater extracted to support reasonably foreseeable oil and gas development over the next 20 years may indeed "represent the straw that breaks the back of the environmental camel." *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972).

IV. BLM UNLAWFULLY PREJUDICED THE CARLSBAD RMP PLANNING PROCESS BY ISSUING LEASES ON LANDS BEING CONSIDERED FOR CLOSURE TO DEVELOPMENT

Through the challenged Leasing Authorizations, BLM irretrievably committed over 51,000 acres[16] of public lands in the Carlsbad Field Office to oil and gas drilling while work on the revised Carlsbad RMP and EIS is ongoing. BLM's interim actions thus prejudiced its consideration of alternatives in the RMP process—alternatives which would provide additional protections for multiple lease parcels, including complete closure to oil and gas development—in violation of NEPA's prohibition on such prejudicial interim actions. 40 C.F.R. § 1506.1(c).[17]

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[15] 2,744 AF per year for RFDS development * 20 years * 325,851 gallons/AF = 17.9 billion gallons. App. at [AR_006574].

[16] While this case generally relates to BLM's Leasing Authorizations on 62,000 acres across the Pecos District, this claim is limited to the Leasing Authorizations within the Carlsbad Field Office, totaling approximately 51,000 acres. *See* App. at [Am. Compl. tblA (Dkt. 31)].

[17] The district court did not address the merits of this claim.

A. BLM's Issuance of the Leasing Authorizations Prejudices the Outcome of BLM's RMP Planning Process By Foreclosing Viable Alternatives.

While work on a required EIS is pending, NEPA prohibits "interim action" that "prejudices the ultimate decision on the program." 40 C.F.R. § 1506.1(c). Interim action is prejudicial "when it tends to determine subsequent development or limit alternatives." *Id*. By leasing multiple parcels proposed for closure to oil and gas development in the Draft RMP, BLM authorized subsequent development, foreclosing potential closure of these parcels and unlawfully prejudicing the RMP process outcome.

A location comparison of the lease parcels with lands closed for development under RMP Alternative B[18] demonstrates that multiple lease parcels are located in areas proposed for closure in the draft RMP.[19] *Compare* App. at [BLM_AR_002382 *with* 0018394] (for the September 2017 Lease Sale, showing that parcels NM-201707-030, -031, -036, -037[20] overlap with lands closed to

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[18] The draft 2018 RMP includes four action alternatives. BLM_AR_0017373-74. Alternative B would "geographically separate[e] conflicted uses," and "concentrate[e] development in areas where development is already substantially present[.]" App. at [BLM_AR_0017373].

[19] Lands closed to leasing "have other land uses or resource values that cannot be adequately protected even with the most restrictive lease stipulations." App. at [BLM_AR_17440].

[20] For consistency, all referenced parcel numbers are from the final decision record for each lease sale. App. at [AR_BLM_002639-47; 006453-68].

leasing under Alternative B); *compare also* App. at [BLM_AR_009438 *with* 0018394] (for the September 2018 Lease Sale, showing that parcels -011, -012, -013, -027, -029, -030, -031, -032, -084, -085, -102, -117, -119, -121, -122, -132, and -145 overlap with areas closed to leasing under Alternative B); *see also* Fischer Decl. ¶17 ([App. at __]). By providing lessees the right to drill for oil and gas within the lease boundaries, 43 C.F.R. § 3101.1-2, BLM eliminated the potential to close these lands to development in the RMP.

BLM did not dispute below that it sold off multiple parcels in the challenged lease sales located on specific lands the agency was contemporaneously considering for complete closure to oil and gas development through its ongoing RMP-EIS process. *See* App. at [BLM Resp. at 22-25 (Dkt. 40)]. By leasing these lands during the pending RMP-EIS process, BLM plainly took interim action that "tends to determine subsequent development," limits the agency's consideration of alternatives, and prejudices the agency's ultimate RMP decision. 40 C.F.R. § 1506.1(c)(3).

B. BLM's Outdated Planning Documents Do Not Cover the Leasing Authorizations.

NEPA mandates that "[1] while work on a required program environmental impact statement is in progress and [2] the action is not covered by an existing program statement, agencies shall not undertake in the interim [3] any major

federal action covered by the program [4] which may significantly affect the quality of the human environment." 40 C.F.R. § 1506.1(c).

Here, all of these factors are met. Through its Leasing Authorizations, BLM irretrievably committed lands to oil and gas development while the Carlsbad RMP revision was ongoing. App. at [Am. Compl. ¶ 254 & tbl.A]; [BLM_AR_0017305]. As explained above, the Leasing Authorizations constitute major federal actions with significant environmental impacts on air quality and water resources. *See supra* pages 22-36. Moreover, the Leasing Authorizations are not "covered" by the 1988 Carlsbad RMP-FEIS, as updated in 1997, because those outdated documents never evaluated the environmental impacts of horizontal drilling and fracking, which significantly differ from the impacts of traditional vertical drilling.

This Circuit has recognized that not all oil and gas development is created equal. *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1158-59 (10th Cir. 2004), explained that the difference in *magnitude* of impacts between two different technologies determines whether a preexisting NEPA analysis adequately analyzed a proposed action's impacts, regardless of whether the different extraction technologies have the same general *type* of impacts. *See also* 40 C.F.R. § 1508.27. BLM did not previously assess the additional environmental impacts of fracking, and so extraction using fracking cannot be "covered by" the RMP EIS.

Indeed, BLM's failure to address the environmental impacts of these new drilling technologies was a primary reason BLM decided to revise the RMP. BLM specifically explained that "[s]ince 2006, the percentage of wells drilled horizontally has increased substantially." App. at [BLM_AR_12884]. As a result, a plan revision was needed "to examine and more fully develop new decisions and guidance for other resources in response to changing land use conditions, taking into account new technology, such as horizontal drilling methods." App. at [BLM_AR_12773].

Coupling horizontal drilling with fracking was not only a "game changer" in opening up previously uneconomical lands to oil and gas development, App. at [BLM_AR_12721], but has resulted in new and different impacts to air, water, and public health. *See* App. at [BLM_AR_005194-5210] (summarizing studies describing fracking impacts on public health, communities, water resources, radiation exposure, and earthquakes from wastewater injection). The fracking boom has caused both regional drilling rates and per-well water usage to skyrocket, resulting in substantially higher total water usage for oil and gas development. App. at [AR_BLM_0012717] (recognizing "dramatic growth in development since 2010"); *also compare* App. at [AR_BLM_006570] (2018 estimate of 2.4 million gallons per well) *with* [AR_BLM_13177] (1986 estimate of 400,000 gallons per well) *and* [AR_BLM_14787] (1994 estimate of 1.68 million gallons per well).

While the 1986 RMP EIS projected 160 million gallons of total water use for oil and gas drilling each year; App. at [AR_BLM_0013177; 0013543],[21] new development in accordance with BLM's RFDS would demand an addditional 894 million gallons[22] each year, significantly greater than previously contemplated. *See also Diné CARE*, 923 F.3d at 858-59 (holding BLM could not tier to prior RMP EIS for analysis of cumulative impacts to water resources from new drilling permits where water use associated with RFDS projections "far exceeds the water use considered in the [prior RMP] EIS). Thus, fracking water usage in the Pecos District dramatically exceeds the total oil and gas water usage projections previously considered in the outdated RMP-EIS. Because BLM has *never* assessed the cumulative impacts of fracking in the Greater Carlsbad region—including the 16,000 new wells BLM projects within the Pecos District—the direct, indirect, and cumulative impacts of the Leasing Authorizations are not "covered by" the 1988 RMP-EIS and its amendments, constituting unlawful interim actions. 40 C.F.R. § 1506.1(c).

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[21] To Guardians' knowledge, BLM did not provide any total water usage projections in later amendments to the RMP-EIS, nor did the agency assess impacts to groundwater resources from drilling-related water usage. *See* App. at [AR_BLM_0014831] (stating that "[t]he most significant effect of oil and gas activity on soil and water resources is soil erosion.").

[22] 2,744 AF per year for RFDS development * 325,851 gallons/AF = 894 million gallons. App. at [AR_006574].

V. BLM'S ADOPTION AND IMPLEMENTATION OF IM 2018-034 VIOLATED FLPMA, NEPA, AND THE APA

In keeping with the Trump administration's "energy dominance" agenda, BLM issued IM 2018-034—without any public notice, comment, or environmental review—amending prior procedures and sharply limiting public involvement in the agency's oil and gas leasing process. IM 2018-034 is unlawful for two reasons. First, BLM promulgated IM 2018-034 without following notice-and-comment rulemaking procedures required under the APA, FLPMA, and NEPA. Second, the revised procedures disregard BLM's substantive obligations, under both FLPMA and NEPA, to allow for meaningful public participation in its land management decisions. By following IM 2018-034's unlawful procedures for the September 2018 Lease Sale, BLM's authorization for that lease sale violated NEPA and FLPMA.

In *Western Watersheds Project v. Zinke* ("*WWP*"), the District of Idaho found IM 2018-034 to be "both procedurally and substantively invalid under FLPMA and NEPA," and set aside IM 2018-034's inadequate public participation provisions within the Greater Sage-Grouse Habitat Management Areas at issue in that case. 441 F. Supp. 3d 1042, 1073, 1085 (D. Idaho 2020), *reconsideration denied, partial stay granted*, No. 1:18-CV-00187-REB, 2020 WL 2462817 (D. Idaho May 12, 2020). The Court further issued an order setting aside and vacating

BLM lease sales issued under IM 2018-034's inadequate public participation provisions. *Id.* at 1086-89.

A. IM 2018-034 is a Final Agency Action.

The APA permits judicial review of "final agency action[s]." 5 U.S.C. § 704. "'[A]gency action' includes the whole or a part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act[.]" *Id.* § 551(13). Agency action is "final" when two conditions are met: (1) "the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature"; and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations omitted).

1. IM 2018-034 Marks the Consummation of the Agency's Decision-Making Process.

Here, the district court correctly held that "IM 2018-034 reflects the consummation of the decision-making process." Op. at 20. This Court "need only look at the language in the document to draw the same conclusion." *Id*. "Effective immediately," the IM 2018-034 "supersedes existing policy" and "replaces any conflicting guidance or directive found in the BLM Manual or Handbook." *Id.* (citing App. at [AR012477, 12480]). The district court recognized this language "has an air of finality to it," and "[n]othing in the memorandums suggests that

BLM is still sorting through its own policies to make final determinations." *Id.* *WWP* similarly recognized that IM 2018-034's language is "more edict in nature than 'merely tentative or interlocutory.'" 441 F. Supp. 3d at 1060. The IM is "much more than a general statement of policy; rather, it implements a *required* template for BLM's oil and gas leasing process in language that can only be understood as 'finally determinative of the issues or rights to which it is addressed.'" *Id.* at 1061 (quoting *Pacific Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 48 (D.C. Cir. 1974)).

2. Legal Consequences Flow from IM 2018-034.

Under the second *Bennett* prong, IM 2018-034 is also an action by which "rights or obligations have been determined" and from which "legal consequences will flow." 520 U.S. at 178. IM 2018-034 "expressly changes how BLM conducts its oil and gas leasing." *WWP*, 441 F. Supp. 3d at 1064. The court explained:

> Where once there was no deadline for BLM review of nominated lease parcels, IM 2018-034 now imposes a six-month review period; where previously public participation in the NEPA review process was always permitted, IM 2018-034 now provides no such guarantee, leaving the subject entirely to BLM's discretion; where there was a 30-day public review and comment period for every lease sale, IM 2018-034 now eliminates that requirement; and, where there had been a 30-day protest period, IM 2018-034 now imposes a 10-day deadline for public protests of proposed lease sales, including sales as to which no specific prior public participation had been allowed.

Id. *See also supra* 14-16. "IM 2018-034 contains significant substantive and procedural changes in BLM decision-making practices and upon the rights and

abilities of parties like [Guardians] to participate in or challenge such practices and decisions." *WWP*, 441 F. Supp. 3d at 1064. For example, the changes "alter[] BLM's legal duty under both FLPMA and NEPA to facilitate public involvement in its leasing decisions." *Id*. at 1066. Because the agency action alters the obligations of agency officials, it affects legal obligations, regardless of its effect on private parties. *See McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) ("If a statement denies the decisionmaker discretion in the area of its coverage…then the statement is binding, and creates rights or obligations."); *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319-20 (9th Cir. 2013) (accord); *W. Energy All. v. Salazar*, No. 10-cv-237F, 2011 WL 3738240, at *6-*7 (D. Wyo. Aug. 12 2011) (accord).

Further, by "prescrib[ing] and requir[ing] an unmistakably different regulatory framework," IM 2018-034 has practical effects on the ability of the public, including Guardians, to participate in BLM's oil and gas leasing process. *WWP*, 441 F. Supp. 3d at 1064; Fischer Decl. ¶¶ 18-25 ([App. at __]). And "legal consequences necessarily flow from the changes included within IM 2018-034." *Id.* at 1066. For example, the substantially shortened protest period has "an immediate and practical impact on [Guardians], similarly-situated parties, and the public as a whole," particularly given the "risk [of] dismissal in federal court for failure to exhaust administrative remedies if they do not follow the protest

process." *Id.* "This potential risk is compounded by the overlapping comment and protest periods, combined with accelerated oil and gas lease parcel review generally, all of which are left in IM 2018-034's wake." *Id. See also* Fischer Decl. ¶ 22 ([App. at __]).[23]

IM 2018-034 thus impacts "rights and obligations while also contributing to a different milieu of legal consequences," meeting *Bennett's* second prong for final agency action. *WWP*, 441 F. Supp. 3d at 1066. Hence, "IM 2018-034 is a final agency action." *Id.*

B. IM 2018-034 Violated the APA By Amending a Legislative Rule Without Undergoing Notice and Comment Rulemaking.

Agencies may not alter or amend substantive, or legislative rules without going through the APA's formal notice and comment procedures. *Am. Min. Cong.*, 995 F.2d at 1112 (rule is legislative, not interpretive, where it "effectively amends a prior legislative rule"). By directly contradicting the regulatory provisions of 43 C.F.R. § 3120.1-3, IM 2018-034 unlawfully amended this legislative rule without following notice and comment procedures required by the APA. 5 U.S.C. § 553; *see also Chief Prob. Officers of California v. Shalala*, 118 F.3d 1327, 1337 (9th

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[23] While acknowledging "practical effects on the ability of the public, including Guardians, to participate in BLM's oil and gas leasing process," Op. at 20, the district court completely ignored the legal rights to public participation under FLPMA and NEPA affected by IM 2018-034. *See* 43 U.S.C. § 1739(e); 40 C.F.R. §§ 1501.4(b), 1500.2(b), (d).

Cir. 1997) (White, J. (Retired, sitting by designation)) (rule is legislative where it is "inconsistent with another rule having the force of law"); *Berlex Labs., Inc. v. Food & Drug Admin*., 942 F. Supp. 19, 26 (D.D.C. 1996) (rule is legislative if published in Code of Federal Regulations); 44 U.S.C. § 1510(a) (authorizing Code of Federal Regulations to contain only documents having "general applicability and legal effect").

BLM's formal regulations governing oil and gas lease sales provide that "[t]he authorized officer may suspend the offering of a specific parcel while considering a protest or appeal." 43 C.F.R. § 3120.1-3. Thus, the regulation gives discretion to individual officers to suspend specific parcels at the individual lease sale stage while considering a protest or appeal. *Id*. IM 2018-034 takes that discretion away by requiring that "[p]arcels subject to protests that are not resolved (i.e., pending protests) *will be offered for lease sale*." App. at [AR_BLM_0012480] (emphasis added). By negating discretion *specifically provided by regulation* to suspend sale of protested parcels, IM 2018-034 effectively—and unlawfully—amended BLM regulations without adhering to formal rulemaking procedures. *See McLouth Steel Prod. Corp.*, 838 F.2d at 1322 (purported interpretive rule that "substantially curtail[ed] EPA's discretion in delisting decisions" under RCRA was legislative rule requiring notice and comment).

C. IM 2018-034 Violated FLPMA and NEPA by Changing Public Participation Procedures Without Undergoing Notice and Comment Rulemaking.

Even if IM 2018-034 did not qualify as a legislative rule generally requiring notice and comment procedures under the APA, FLPMA Section 309(e) requires that procedures for public involvement in the management of BLM lands be established "by regulation." 43 U.S.C. § 1739(e). *See also* 43 U.S.C. § 1740 (directing BLM to follow APA rulemaking procedures). Where Congress has explicitly directed an agency to proceed "by regulation" on some subject, the agency has no discretion to use a less formal method. *See Ethyl Corp. v. EPA*, 306 F.3d 1144, 1150 (D.C. Cir. 2002) (*abrogation on other grounds recognized by Permapost Prod., Inc. v. McHugh*, 55 F. Supp. 3d 14, 30 (D.D.C. 2014)). Courts have confirmed that Section 309 requires BLM to formalize public participation opportunities by notice and comment rulemaking. *See Nat. Res. Def. Council v. Jamison*, 815 F. Supp. 454, 468-69 (D.D.C. 1992); *WWP*, 441 F. Supp. 3d at 1068. Here, IM 2018-034 falls within the scope of Section 309 because it establishes procedures for public participation in BLM's oil and gas leasing process. *WWP*, 441 F. Supp. 3d at 1068. Accordingly, "IM 2018-34 should have been issued through APA/FLPMA notice-and-comment procedures. It was not. IM 2018-034 is therefore procedurally invalid." *Id.*

Similarly, NEPA regulations require federal agencies adopting and revising agency-specific NEPA procedures to publish proposed regulations in the Federal Register for public review and comment. 40 C.F.R. § 1507.3(a); *see also* 40 C.F.R. § 1506.6(a) ("Agencies shall…[m]ake diligent efforts to involve the public in preparing…their NEPA procedures"). But here, BLM revised its NEPA procedures for oil and gas leasing through IM 2018-034, without publishing proposed changes in the Federal Register or otherwise providing for public comment. This violated NEPA and its regulations, rendering IM 2018-034 unlawful. *WWP*, 441 F. Supp. 3d at 1068 n.11 (explaining that IM 2018-034's "violation of FLPMA's notice-and-comment rulemaking requirement extends to NEPA's similar notice-and-comment rulemaking requirement").

D. BLM's Elimination of Public Participation Opportunities Violated FLPMA's and NEPA's Substantive Requirements.

While there are sufficient procedural grounds to vacate IM 2018-034, IM 2018-034 is also contrary to FLPMA and NEPA substantive public participation mandates. "Public involvement in oil and gas leasing is required under FLPMA and NEPA." *WWP*, 441 F. Supp. 3d at 1069. By unreasonably limiting opportunities for public participation in BLM's oil and gas leasing process, IM 2018-034 violates FLPMA and NEPA.

FLPMA Section 309(e) requires the Secretary of Interior "give … the public adequate notice and an opportunity to comment…and to participate in…the

management of the public lands." 43 U.S.C. § 1739(e). "Congress, through FLPMA…has determined that the public has a right to participate in actions affecting public lands." *Natl. Parks and Conservation Ass'n v. F.A.A.*, 998 F.2d 1523, 1531 (10th Cir. 1993).

Similarly, NEPA requires agencies to involve the public "*to the extent practicable*" in EA preparation. 40 C.F.R. § 1501.4(b) (emphasis added). "Federal agencies shall *to the fullest extent possible*…[i]mplement procedures to make the NEPA process more useful to decisionmakers and the public" and "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R. § 1500.2(b), (d) (emphasis added). *See also* 40 C.F.R. § 1506.6(a) (requiring "diligent efforts to involve the public" in NEPA implementation).

By substantially limiting public participation opportunities from BLM's prior practice under IM 2010-117, *see supra* 14-16, BLM violated these statutory public participation requirements. As the District of Idaho explained:

> On a very fundamental level, it strains common sense to see how these requirements are met when comparing IM 2018-034 to its predecessor, IM 2010-117. That is, how can it be said that IM 2018-034 provides the required public participation "to the fullest extent possible" and "to the extent practicable," when it is dramatically more restrictive on the issue of public participation than what was called for in IM 2010-117?

WWP, 441 F. Supp. 3d at 1070.

For example, IM 2018-034 eliminated the prior requirement in IM 2010-117 that BLM "*will* provide for public participation" in its NEPA process, now providing that BLM "*may* provide for public participation.…" *Compare* App. at [AR_BLM_0012479], *with* [AR_BLM_0012105]. But "[d]iscretionary public participation is not compliant with FLPMA and NEPA." *WWP*, 441 F. Supp. 3d at 1070 (citing *W. Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302, 1316 (D. Idaho 2008)).[24]

IM 2018-034 also narrowed the prior 30 day protest period to 10 days, and relegated *any* public input to that narrow protest window for "a significant subset of lease sales (those involving DNAs and EAs)…neutralizing and diminishing the substantive and practical value of such upfront input." *Id*. at 1071. A 10-day protest period provides an unreasonably narrow window for the public to meaningfully participate in BLM's leasing process. *See* Fischer Decl. ¶¶18-25

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[24] Confusingly, the district court acknowledged that the change in IM 2018-034 making public participation discretionary was required to undergo notice-and-comment rulemaking and also "violates several associated FLPMA and NEPA regulations. Op. at 44-45 (citing 43 C.F.R. §§ 3120.3-2; 3120.4-2; 46.235; 46.305; 46.435). Yet the court still denied "Guardians' request to declare IM 2018-034 unlawful under FLPMA, NEPA, the APA, and their regulations." *Id.* at 47. Instead of providing even minimal declaratory relief, the district court cautiously "remind[ed] BLM that the discretionary language runs counter to the requirement of public participation in the process under NEPA, FLPMA, and their companion regulations," and "urge[d] BLM to alter this language in IM 2018-034 to make it consistent with the NEPA, FLPMA, and their regulations." *Id.* at 46.

[App. at __]. Under the prior IM 2010-117, the agency provided greater public participation opportunities than those available under IM 2018-034. *WWP*, 441 F. Supp. 3d at 1070. Thus, how could IM 2018-034 possibly provide public participation "to the fullest extent possible" and "to the extent practicable?" *Id*. BLM has never explained this logical inconsistency, either when promulgating IM 2018-034 or at the district court.

By adopting IM 2018-034, BLM "inescapably intended to reduce and even eliminate public participation" in its decision-making process. *WWP*, 441 F. Supp. 3d at 1072. But "the public involvement requirements of FLPMA and NEPA cannot be set aside in the name of expediting oil and gas lease sales. It is axiomatic that the benefits of public involvement and protocol by which public involvement is obtained are not 'unnecessary impediments and burdens.'" *Id*. at 1075. By eliminating practicable and meaningful public participation opportunities, IM 2018-034 violated the substantive public participation requirements of FLPMA and NEPA. 43 U.S.C. § 1739 (e); 40 C.F.R. §§ 1501.4(b); 1500.2(b), (d); 1506.6(a).

E. BLM's Implementation of IM 2018-034 Renders Invalid Its Leasing Authorizations for the September 2018 Lease Sale

In following IM 2018-034's procedures for the September 2018 Lease Sale, BLM restricted Guardians' ability to meaningfully participate in BLM's leasing process, particularly at the formation stage of its decision, where public input is more likely to have an impact. *WWP*, 441 F. Supp. 3d at 1071-72. BLM provided

no opportunity for public comment on a draft EA, and limited Guardians to a 10-day protest period, instead of the 30-day period previously provided. App. at [AR_BLM_006366]; Fischer Decl. ¶¶ 18, 21 [App. at __]. Finally, despite Guardians' protest still pending on the date of the lease sale, App. at [AR_BLM_006611], agency officials were prohibited from suspending the sale of the protested parcels, in direct contravention of the provisions of 43 C.F.R. § 3120.1-3. Because BLM significantly restricted Guardians' opportunity to participate in the September 2018 lease sale process, in violation of FLPMA and NEPA, the Leasing Authorizations for the September 2018 Lease Sale were unlawful.

BLM argued below that the agency's scoping notice for the September 2018 Lease Sale provided Guardians and the public with adequate "notice of the lease sale's nature and effects." BLM Resp. at 34 [App. at __] (internal quotation omitted). But the scoping notice simply identified the locations and acreages of the lease parcels. App. at [AR_BLM_005794-5836]. The scoping notice and 10-day protest period together do not represent "diligent efforts to involve the public," 40 C.F.R. § 1506.6(a), or show BLM providing public participation "to the fullest extent possible," particularly in light of BLM's past practice of making draft EAs publicly available for review and comment. 40 C.F.R. § 1500.2(b), (d).

BLM has not explained, either when promulgating IM 2018-034 or to the district court, why it is no longer "practicable" to continue providing the same public participation opportunities it allowed for nearly a decade. Thus, BLM lacked a reasoned basis for back-tracking from IM 2010-117's public participation provisions, rendering its actions arbitrary and a violation of NEPA and FLPMA. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (where an agency changes its existing policy, it must provide "a reasoned explanation…for disregarding facts and circumstances that underlay or were engendered by the prior policy").

VI. VACATUR OF THE LEASING AUTHORIZATIONS AND IM 2018-034 IS THE APPROPRIATE REMEDY

A. Vacatur.

Vacatur of the Leasing Authorizations and IM 2018-034 is the appropriate remedy for BLM's NEPA and FLPMA violations. 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); *Olenhouse*, 42 F.3d at 1573. "'Shall' means shall" under the APA. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999). When a plaintiff prevails on a claim brought under the APA, the "typical remedy" is "remand to the district court with instructions to vacate the agency action." *High*

Country Conserv. Advocates v. U. S. Forest Serv., 951 F.3d 1217, 1228 (10th Cir. 2020); *see also Diné CARE,* 923 F.3d at 859.

In vacating BLM approvals for oil and gas drilling permits, this Circuit recently explained that courts need not analyze injunction factors where vacatur provides NEPA plaintiffs with sufficient relief. *Diné CARE*, 923 F.3d at 859. Accordingly, here, "[b]ecause vacatur is 'sufficient to redress [Guardians'] injury, no recourse to the additional and extraordinary relief of an injunction [is] warranted.'" *Id.* (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 166 (2010)).

Vacatur of the Leasing Authorizations and IM 2018-034 is needed to serve NEPA's fundamental purpose of requiring agencies to look *before* they leap, and to avoid a "bureaucratic steam roller." *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (*abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016)). Vacatur will also insure that any subsequent BLM review is not a pro-forma exercise in support of a "predetermined outcome." *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 mining approval to ensure NEPA compliance on remand would not become "a mere bureaucratic formality.").

B. Alternatively, the Court May Grant Injunctive Relief.

For the foregoing reasons, the Court should apply the standard remedy and vacate the unlawful APD authorizations. Even if the Court applies the injunction factors when considering relief, the *Monsanto* factors support enjoining lease development.[25]

First, Guardians provided detailed declarations from its members showing that development on the challenged leases will eliminate or significantly degrade its members' use and enjoyment of the lands near and adjacent to the leases due to dust, fumes, flares, and noise from drill rigs, fracking trucks, and associated drilling infrastructure. *See* Eddy Decl. ¶¶19, 22-26, 30-33 [App. at ___]; Sobel Decl. ¶¶ 11-20, 24-36 [App. at ___]; Fischer Decl. ¶¶ 12 [App. at ___]. Thus, lease development will irreparably harm Guardians' members and the environment. *Davis*, 302 F.3d at 1115-16; *see also San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240 (D. Colo. 2009) (Development of even a single well threatens "water for the community, clean air, and [a] large expanse of undeveloped land with a significant 'sense of place' and quiet.").

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[25] 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*, 561 U.S. at 156-57.

Second, Guardians' injuries are not compensable by money damages. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). "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."); *see also Catron Cnty. Bd. of Comm'rs, N.M. v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996) (accord). Guardians does not seek money damages, and no amount of money could compensate for members' losses to their health, recreational, and aesthetic interests caused by lease development.

Third, the balance of harms tips decidedly in Guardians' favor, whose members face irreparable environmental and health impacts, compared to any speculative financial loss to BLM or Intervenors from a delay of lease development. *Valley Cmty. Pres. Comm'n v. Mineta*, 373 F.3d 1078, 1087 (10th Cir. 2004) (holding "financial concerns alone generally do not outweigh environmental harm"). 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.

Finally, the public interest would not be disserved by vacating the leases or, at a minimum, enjoining lease development to protect public lands and natural resources, and is necessary to preserve the status quo while BLM fulfills its obligations under NEPA. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84-85

(D.D.C. 2019) (enjoined issuance of additional drilling permits on leased parcels). "[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) (quote omitted). Moreover, "[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." *Colorado Wild v. U.S. Forest Serv.*, 299 F. Supp. 2d 1184, 1190-91 (D. Colo. 2004). And, the "protection of human health, safety and the affected communities also serves the public interest." *San Luis & Delta-Mendota Water Auth. v. Locke*, No. 1:09-cv-01053, 2010 WL 500455, at *8 (E.D. Cal. 2010). Absent a grant of vacatur, an injunction in this case is vital to protecting the public interest by preventing ongoing harm to human health, natural resources, and the environment from lease development.

CONCLUSION

For the reasons discussed above, Guardians respectfully requests that the Court declare that BLM's Leasing Authorizations violated NEPA, and that IM 2018-34 violates NEPA, FLPMA, and the APA. Guardians also requests that the Court vacate the challenged Leasing Authorizations and IM 2018-34.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves complex issues regarding analysis of air and water resource impacts under NEPA, Guardians believes that argument would be beneficial.

RESPECTFULLY SUBMITTED this 4th day of January 2021.

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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 12,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated this 4th day of January, 2021.

/s/ Daniel L. Timmons

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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