UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILDEARTH GUARDIANS, *Plaintiff*, v. DAVID BERNHARDT, *et al*., *Defendants*, and AMERICAN PETROLEUM INSTITUTE, and WESTERN ENERGY ALLIANCE, *Defendant-Intervenors*.	Case No. 1:19-cv-505-RB-SCY

PLAINTIFF'S REPLY BRIEF

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APA	Administrative Procedure Act
APD	Application for Permit to Drill
API	Intervenor American Petroleum Institute
BLM	United States Bureau of Land Management
CO_2-e	Carbon Dioxide-Equivalent
DNA	Determination of NEPA Adequacy
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
GHG	Greenhouse Gas
IM	Instruction Memorandum
NEPA	National Environmental Policy Act
NO_x	Nitrogen Oxide
RFDS	Reasonably Foreseeable Development Scenario
RMP	Resource Management Plan
SCC	Social Cost of Carbon
VOC	Volatile Organic Compound
WEA	Intervenor Western Energy Alliance

INTRODUCTION

The Federal Land Policy and Management Act (FLPMA) charges the Bureau of Land Management (BLM) with managing federal public lands "under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). In the Greater Carlsbad region, or Permian Basin, of southeastern New Mexico, the agency has lost sight of these fundamental principles. Seeking to dedicate vast swaths of public lands to a single purpose—oil and gas development—BLM's actions serve the short-term interests of the oil and gas industry without considering long-term impacts on the health and welfare of all Americans. In pursuit of an "energy dominance" agenda incompatible with addressing the critical threat of climate change, BLM has slashed required public involvement in its oil and gas leasing decisions, given short shrift to its consideration of oil and gas development's environmental impacts in the Greater Carlsbad region, and hastened the sell-off of tens of thousands of new acres of public lands.

BLM argues that it fully considered environmental impacts before authorizing the three lease sales challenged here, but the record contradicts BLM's arguments. BLM provided some greenhouse gas (GHG) emission estimates in its Environmental Assessments (EAs), but ignored the elephant in the room—the cumulative impacts of downstream combustion emissions from rapidly expanding production in the Greater Carlsbad region. BLM also identified ozone pollution as a potential concern, but—without explanation—refused to utilize existing emissions calculators to quantify emissions contributing to that serious problem and arbitrarily concluded that additional emissions would not significantly impact ozone levels. BLM further identified the potential for horizontal drilling and multi-stage hydraulic fracturing (fracking) to negatively impact water resources, but failed to actually assess such risks—a particularly problematic omission in light of record evidence documenting drilling fluids already entering area aquifers.

Finally, BLM's adoption and implementation of Instruction Memorandum (IM) 2018-034 was both procedurally invalid and violated the public participation requirements of the National Environmental Policy Act (NEPA) and FLPMA. Because none of BLM's or Intervenors' arguments for excusing BLM's NEPA, FLPMA, and Administrative Procedure Act (APA) violations have merit, the Leasing Authorizations and IM 2018-034 must be set aside.

ARGUMENT

I. BLM FAILED TO TAKE A HARD LOOK AT GHG EMISSIONS AND CLIMATE CHANGE IMPACTS

NEPA's "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, and 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).

A. BLM's Analysis of Direct and Indirect Climate Impacts was Arbitrary.

Here, BLM provided quantitative estimates of direct and indirect GHG emissions, but quantification alone does not substitute for actual *analysis* of the impacts of GHG emissions. In isolation, abstract estimates of metric tons of carbon dioxide-equivalent (CO_2e) GHG emissions fail to "provide the decision-makers with useful information" needed to fulfill NEPA's purpose. *Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1317 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc. v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

In their respective responses, BLM and Intervenors highlight BLM's comparison of emissions from lease development with total emissions at national and state levels, as well as

from federal leases in New Mexico and the Permian Basin. BLM Resp. (ECF No. 40) at 9; API Resp. (ECF No. 38) at 24-25; WEA Resp. (ECF No. 39) at 23. But such comparisons say nothing about the climate impacts or significance of new emissions. As the Fifth Circuit has recognized, even a "very small portion" of a "gargantuan source of [harmful] pollution" may nevertheless "constitute[] a gargantuan source of [harmful] pollution on its own terms." *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1032-33 (5th Cir. 2019).[1] Further, BLM and Intervenors fail to explain that BLM's comparative analysis focused solely on *direct wellhead emissions* from lease development, which represent only about 8% of total lifecycle emissions. AR_BLM_002699-70 & tbls.6, 7[2]; AR_BLM_001545-46 & tbls.6, 7; AR_BLM_006496-98 & tbls.8, 9. For indirect emissions from downstream oil and gas combustion—which represent "fully 80% of emissions" resulting from lease development, AR_BLM_002700—BLM provided no similar comparative analysis to enable decision-makers or the public to assess the significance of GHG emission impacts. Thus, BLM's assessment of the climate impacts from direct and indirect GHG emissions was arbitrary.

B. BLM's Assessment of Cumulative Climate Impacts from GHG Emissions was Arbitrary.

Under NEPA, BLM was required to assess the cumulative impacts of its leasing decisions "when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. Such analysis is particularly critical in the context of the climate crisis because, as BLM specifically acknowledged, "cumulative emissions" are the primary driver of climate change.

[1] Similarly, the Council for Environmental Quality has recognized that "a statement that emissions from a proposed Federal action represent only a small fraction of global emissions is essentially a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether or to what extent to consider climate change impacts under NEPA." AR_BLM_006193, 6203 (withdrawn by 82 Fed. Reg. 16576 (April 5, 2017)).

[2] Table 7 is mislabeled, but correctly described in the text. AR_BLM_002700.

AR_BLM_0031454. Yet BLM's cumulative climate analysis completely ignored GHG emissions from oil and gas development on private and state lands within New Mexico, as well as GHG emissions from the large portion of the Permian Basin located just across the border in Texas. AR_BLM_002724 tbl.12; AR_BLM_001567 tbl.12; AR_BLM_006500. BLM's mathematical sleight-of-hand cannot obscure the fact that—beyond direct well-field emissions within the Pecos District alone—BLM failed to account for the cumulative impacts of GHG emissions associated with *any* future BLM or non-BLM actions.

BLM argues that the URS Group's 2013 Air Technical Support Document (2013 URS Report) referenced in the September 2018 Lease Sale EA "quantified cumulative GHG emissions attributable to the 16,000 wells predicted by the 2012 and 2014 [Reasonably Foreseeable Development Scenario (RFDS)] and update." BLM Resp. at 10. But this report only estimated foreseeable *direct* wellhead emissions, thus excluding the vast majority of emissions which come from downstream oil and gas combustion. AR_BLM_0021079. By failing to account for cumulative downstream emissions from future development, including BLM's RFDS projections, BLM "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Finally, despite acknowledging that (1) lease development will lead to increased GHG emissions, and (2) GHG emissions are the primary cause of climate change, BLM inconsistently—and arbitrarily—concluded that approving the leases "would not produce climate change impacts that differ from the No Action Alternative." AR_BLM_002724; 001568; 006500. This Court previously rejected an identical conclusion as arbitrary in *San Juan Citizens Alliance v. BLM*, 326 F. Supp. 3d 1227, 1248 (D.N.M. 2018), and API's attempt to distinguish that case is without merit. Contrary to API's claim that the climate analysis in *San Juan Citizens*

Alliance was limited to the conclusory statement quoted above, API Resp. at 28 n.9, Judge Armijo specifically noted that BLM conducted "various estimations of expected emissions and an analysis of the effect of such emissions on climate change," and also incorporated Air Resource Technical Reports similar to those BLM relied on here. *San Juan Citizens Alliance*, 326 F. Supp. 3d at 1247. But the Court recognized that while the specific impact of any individual lease sale may be minor, leasing could still contribute to significant cumulative impacts. *Id.*; *see also* 40 C.F.R. § 1508.7 ("Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."). Absent a true cumulative assessment—taking into account the full life-cycle emissions, including downstream combustion, of the individual lease sales in conjunction with other regional oil and gas development—BLM's "facile conclusion that this particular impact is minor and therefore 'would not produce climate change impacts that differ from the No Action Alternative,' is insufficient to comply with Section 1508.7," which requires assessment of cumulative impacts. *San Juan Citizens Alliance*, 326 F. Supp. 3d at 1248.

C. BLM Failed to Assess the Significance of GHG Emissions and Climate Change Impacts.

To meet NEPA's hard look mandate and support its significance determination, BLM was required to evaluate the severity of the Leasing Authorizations' climate impacts, but failed to do so. Contrary to BLM's representations, Guardians has not argued that BLM must use Social Cost of Carbon (SCC) analysis to assess climate impacts. Instead, here the agency failed to explain its decision *not* to utilize this available tool to assess climate impacts from new GHG emissions. Thus, the agency's refusal to use SCC was arbitrary.

BLM argues that SCC analysis "would not be useful given the technical difficulties with the protocol." BLM Resp. at 14. But this explanation is a non-sequitur, as any technical

challenges in applying SCC would not render the resulting cost estimates "not useful." Further, the challenges associated with "model[ing] effects at a global scale on the welfare of future generations caused by additional carbon emissions occurring in the present," AR_BLM_006618, are not challenges BLM faced here—but challenges faced, and already overcome, through development of SCC. Application of the protocol itself is a straight-forward exercise of multiplying projected emissions by the SCC estimates established by the Interagency Working Group. AR_BLM_002632.0381.

In the September 2018 Lease Sale EA, BLM also argued that estimating SCC is "subject to great uncertainty," but that uncertainty is accounted for by the published range of SCC values. AR_BLM_002632.0380. Further, it is well-established that "some degree of speculation and uncertainty is inherent in agency decisionmaking." *Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203, 219 (D.D.C.), *order clarified on other grounds*, 389 F. Supp. 2d 4 (D.D.C. 2005). BLM routinely relies on uncertain estimates and projections to support its decision-making and has not shown that the range of SCC values is so great as to render resulting cost estimates "not useful."[3] Absent BLM's adoption of an alternative approach to assess the significance of climate impacts, BLM's failure to "thoroughly explain" its decision to forego this available analytical tool was arbitrary. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 75 & n.30 (D.D.C. 2019).

[3] Intervenor Western Energy Alliance (WEA) argues that BLM considered the costs of oil and gas development, but "simply stated their effects qualitatively." WEA Resp. at 26. But BLM's statements regarding the general nature and impacts of climate change fail to substitute for an analysis of the direct, indirect, and cumulative impacts of the challenged leasing decisions.

II. BLM FAILED TO TAKE A HARD LOOK AT IMPACTS TO AIR QUALITY AND WATER RESOURCES

A. BLM Failed to Take a Hard Look at Air Quality Impacts, Particularly Ozone Pollution.

BLM's failure to use the agency's own emissions calculators to assess potential emissions of ozone precursors—or explain its decision not to use these available tools—was arbitrary. In its EAs, BLM argued it was "not feasible to *directly* quantify emissions," AR_BLM_002697; 001542, but failed to explain why the agency could not *estimate* potential emissions using the available calculators. The agency now argues that more specific information regarding well location and equipment is needed to "reasonably quantify emissions from future development." BLM Resp. at 17. But the calculators provide a reasonable range of emission estimates for volatile organic compounds (VOCs) and nitrogen oxide ($NO_{x)}$, based on a range in equipment, geologic formations, and other site-specific variables, accounting for fully 95% of potential new wells. AR_BLM_0031436. BLM also misleadingly stated in the September 2018 Lease Sale EA that "the potential development scenarios that could result from [the leasing alternatives] *are analyzed for* in the calculators developed for the one-well scenario in the Air Resources Technical Report." AR_BLM_006494 (emphasis added). But BLM never actually *used* the calculators to assess the impacts of any of the lease sales, never multiplied the one-well emissions estimates by BLM's projected number of wells.[4] Moreover, for the September and December 2017 Lease Sale EAs, BLM made no reference to the emissions calculators, completely ignoring these available tools in its analysis of ozone pollution.

[4] API also argues that BLM "relied on the Air Report's 'calculators' …[to] give an approximation of criteria pollutant[s] … to be compared to regional and national levels," API Resp. at 29, but the record shows that is simply not the case. BLM *never* used the emissions calculators to estimate total projected VOC or NO_x emissions from lease development, and provided no emissions estimates to compare to regional totals.

Attempting to explain BLM's failure to utilize the emissions calculators, BLM notes that "at the single well level the uncertainty in emissions projections increases substantially." BLM Resp. at 18 (quoting AR_BLM_0031433; 18952). This uncertainty, however, cuts against BLM and weighs in favor of estimating emissions in the aggregate—i.e. at the leasing stage—instead of waiting until the individual APD stage, where the uncertainty regarding emissions *increases*. Environmental impacts must be assessed "at 'the earliest stage possible.'" *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 707 (10th Cir. 2009) (quoting 40 C.F.R. § 1501.2). Since uncertainty for individual well estimates would be smoothed out by aggregating multiple wells together here at the leasing stage, BLM has no excuse for failing to estimate emissions of air pollutants, including critical ozone precursors such as VOCs and NO_x.

Finally, BLM's Technical Reports do not support the agency's conclusion that additional emissions—particularly cumulative emissions—will be insignificant. To the contrary, the 2013 URS Report projected significant cumulative impacts on ozone levels from oil and gas development following BLM's RFDS, including statistically significant increases in ozone levels for 364 out of 365 days per year. AR_BLM_0021026. The modeling effort further projected design value concentrations above the 70 ppb air quality limit for every air quality monitoring stations in the Carlsbad Field Office, including peak air pollution levels significantly exceeding federal health-based limits. AR_BLM_0020131 tbl.4-17; 21033. The URS Report specifically acknowledged cumulative ozone impacts contributing to air quality violations from RFDS development, even at the now-outdated 75 ppb limit. AR_BLM_0021082 tbl.6-1.

Even absent quantitative estimates ozone precursor emissions, the record shows that oil and gas development in the Greater Carlsbad region has significant cumulative impacts, and additional development is likely to contribute to ozone pollution above federal limits in the near

future. AR_BLM_0021031; 21033 tbl.4-17; 21082 tbl.6-1. Thus, BLM failed to take a hard look at ozone pollution impacts, and its dismissal of ozone pollution impacts as insignificant was arbitrary and unsupported by the record.

B. BLM Failed to Take a Hard Look at Water Resources Impacts.

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 potential impacts to water resources, but failed to evaluate the significance of such impacts. Merely identifying the general nature of potential impacts—such as aquifer drawdown and potential contamination—failed to provide sufficient information for BLM, the public, or decision-makers to adequately assess the risks to scarce water resources from fracking.

Notably, BLM has acknowledged that groundwater levels are currently declining in the region, AR_BLM_0017636, but failed to assess how additional groundwater pumping for fracking more than 1,600 new wells on the challenged leases will contribute to this problem.[5] AR_BLM_002725; 001549-50; 006573; 002672; 001525; 006487. BLM failed to analyze the rate of current decline or assess what short- and long-term environmental impacts may result from continuing or exacerbating the problem of groundwater overdraft. "'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.'" *Oregon Nat. Desert Ass'n v. Rose*, 921 F.3d 1185, 1190 (9th Cir. 2019), *reh'g*

[5] Absent contrary record evidence that the state permitting system is adequately protective of aquifers and connected springs, BLM's acknowledgment of ongoing groundwater decline provides unrebutted evidence that New Mexico's groundwater permitting system does not, in fact, protect these resources from negative impacts. AR_BLM_001550; 002704. *See also* API Resp. at 30 n.12; WEA Resp. at 32. 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.

denied (July 3, 2019) (*quoting Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016) (brackets omitted). BLM acknowledged that "natural flow from seeps, springs, and water wells could be reduced," but provided no analysis describing the potential scope or significance of such impacts. AR_BLM_001549.

BLM also explains that the agency quantified cumulative water usage associated with the RFDS for the September 2018 Lease Sale EA, BLM Resp. at 19, but BLM performed no such quantification for the September 2017 or December 2017 lease sales. Further, water usage quantification by itself does not provide useful information regarding the environmental impacts of such usage, particularly in light of BLM's failure to assess current aquifer conditions.

BLM similarly acknowledged a potential risk that oil and gas development will contaminate water resources, but failed to analyze the likelihood or significance of potential contamination. AR_BLM_002703-04; 001549-50; 006504-06. Instead, BLM continues to rely on well casing design requirements at the APD stage to fully mitigate potential contamination risks. BLM Resp. at 19-20. Yet BLM fails to recognize the troubling implications of the agency's tracer dye study, which conclusively showed that "drilling fluids are entering the aquifers." AR_BLM_0021319. Despite this empiric evidence that BLM and state regulations are *not* effectively preventing aquifer contamination, BLM requests this Court to simply defer to its unsupported conclusion that "no significant adverse effect is anticipated." BLM Resp. at 20. But the Court "cannot defer to a void," or to an unsupported, arbitrary conclusion. *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010).

Absent an assessment of baseline aquifer conditions, *Rose*, 921 F.3d at 1190, and a "hard and honest look" at potential groundwater pollution, *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 895 F.3d 32, 49 (D.C. Cir. 2018), BLM failed to meet its NEPA hard look obligation.

Thus, BLM's conclusion that lease development would not significantly impact water resources was unsupported by the record and therefore arbitrary.

III. BLM'S LEASING ACTIVITIES PREJUDICED RMP DEVELOPMENT

BLM does not dispute 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. 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).

BLM argues that this type of prejudicial interim action is not precluded because its leasing activity is "covered by" the existing 1988 RMP and EIS "so long as it falls within the land use anticipated by that document and analyzed in its EIS." BLM Resp. at 22-23. But, as the Tenth Circuit has recognized, not all oil and gas development is created equal. In *Pennaco Energy, Inc. v. U.S. Dep't of Interior*, 377 F.3d 1147, 1158-59 (10th Cir. 2004), the Court 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 *type* of impacts. *See also* 40 C.F.R. § 1508.27. BLM did not previously assess fracking's environmental impacts, and so extraction using fracking cannot be "covered by" the RMP EIS.

BLM acknowledges that where an action results in impacts not fully analyzed in the RMP EIS, such impacts must be analyzed in subsequent NEPA documents. BLM Resp. at 23. But while BLM acknowledges that fracking impacts were not considered in the RMP EIS or its updates, BLM Resp. at 24, the agency fails to recognize that the widespread adoption of fracking has not only been a "game changer" in opening up previously uneconomical lands to oil and gas

development, BLM_AR_0012721, but has resulted in new and different impacts to air, water, and public health. *See* BLM_AR_005194-5210 (summarizing studies describing fracking impacts on public health, communities, water resources, radiation exposure, and earthquakes from wastewater injection).

BLM argues that Guardians has not shown that the challenged lease sales "will cause the region to exceed the total impacts anticipated by the RMP and its amendments." BLM Resp. at 24 n.8. To the contrary, 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. AR_BLM_0012717 (recognizing "dramatical growth in development since 2010"); Op. Br. at 35 (*comparing* AR_BLM_006570 (2018 estimate of 2.4 million gallons/well) *with* AR_BLM_13177 (1986 estimate of 400,000 gallons/well) *and* AR_BLM_14787 (1994 estimate of 1.68 million gallons/well). Accordingly, while the 1986 RMP EIS projected 160 million gallons of total water use for oil and gas drilling each year; AR_BLM_0013177; 0013543,[6] new development in accordance with BLM's RFDS would demand 1.92 *billion* gallons of water each year, an order of magnitude greater than what was contemplated in the existing RMP EIS.[7] Thus, fracking water usage in the Pecos District is dramatically exceeding the total oil and gas water usage projections considered in the outdated RMP EIS. Because BLM has *never* assessed the cumulative impacts of fracking in the Greater Carlsbad region—including

[6] 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* AR_BLM_0014831 (stating that "[t]he most significant effect of oil and gas activity on soil and water resources is soil erosion.").

[7] AR_BLM_006570 (2018 estimate of 2.4 million gallons/well); 0012485 (RFDS estimate of 800 new wells/year). 2.4 million gallons/well * 800 wells/year = 1.92 billion gallons/year.

the 16,000 new wells BLM projects within the Pecos District—the direct, indirect, and cumulative impacts of the challenged leasing activities are not "covered by" the 1988 RMP EIS and its amendments. 40 C.F.R. § 1506.1(c)(3).

Diné Citizens Against Ruining Our Env't v. Jewell ("*Diné CARE I*"), 839 F.3d 1276 (10th Cir. 2016), does not support BLM's argument, as that case is distinguishable. There, on appeal from denial of a motion for preliminary injunction, the Court found that plaintiffs had failed to present "any argument or evidence to support their contention that horizontal drilling and multi-stage fracturing may give rise to different types—rather than just different levels—of environmental harms" compared to traditional drilling techniques. *Id.* at 1284. Hence, the Court assumed that ongoing development was covered by the existing RMP EIS. *Id.* at 1285. But when plaintiffs were able to later show—*on the merits*—that fracking resulted in impacts to water resources in excess of those considered in the prior RMP EIS, the Court held that the RMP EIS analysis was insufficient to support the proposed drilling. *Diné Citizens Against Ruining Our Env't v. Bernhardt* ("*Diné CARE II*"), 923 F.3d 831, 858 (10th Cir. 2019). Here, the record similarly shows cumulative water usage for oil and gas development in the Greater Carlsbad region substantially exceeding water use levels previously considered, so new fracking activities are not "covered by" the existing RMP EIS. *Compare* AR_BLM_0013177; 0013543 *with* AR_BLM_006570; 0012485.

Finally, plaintiffs in *Diné CARE I* only provided general allegations that leasing would impermissibly limit BLM's choice of alternatives; whereas here Guardians identified *specific parcels* leased by BLM that were under consideration for closure to oil and gas development. Op. Br. (ECF No. 35) at 33-34; Declaration of Rebecca Fischer ("Fischer Decl.") (ECF No. 35-

3) ¶ 17. So unlike plaintiffs in *Diné CARE I*, Guardians has specifically identified how BLM's leasing activities have prejudiced the ongoing RMP EIS process.

WEA also argues that Guardians failed to explain "how leasing decisions that were made *before* issuance of the Draft [RMP] EIS could prejudice the planning process." WEA Resp. at 33. WEA, however, fails to recognize that the "work on a required program environmental impact statement" did not begin with publication of the Draft EIS, but has been ongoing since 2010. AR_BLM_0017305. Accordingly, at all relevant stages of BLM's decision-making for the challenged leases, the RMP EIS was "in progress." 40 C.F.R. § 1506.1(c). By leasing lands under consideration for closure to oil and gas development under Alternatives A and B in the Draft EIS, BLM's leasing decisions have prematurely removed these lands from consideration for non-extractive uses and thereby improperly prejudiced BLM's RMP decision-making process. Finally, WEA's "most important" argument—that 40 C.F.R. § 1506.1(c) does not apply because BLM concluded that the lease sales do not significantly affect the quality of the environment—assumes that BLM's FONSIs were properly issued, an assumption specifically challenged in this litigation. *See* Op. Br. (ECF No. 35) at 31-33. Because BLM's leasing decisions prejudiced the agency's consideration of alternatives or the outcome of the RMP update, BLM has violated 40 C.F.R. § 1506.1(c).

IV. GUARDIANS DID NOT WAIVE ITS CLAIMS RELATED TO OZONE POLLUTION AND IMPACTS TO WATER RESOURCES

Guardians did not waive its claims challenging BLM's inadequate assessment of impacts to water resources and air quality, as API asserts. API Resp. at 17-20. API misinterprets caselaw as requiring that Guardians provide fully-fleshed out legal arguments at the administrative stage to preserve issues for judicial resolution, but API's interpretation goes too far. Instead, to satisfy the APA's and NEPA's issue exhaustion requirements, a party need only "'structure their

participation so that it… alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 764 (2004) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978)).

This rule is "not a strictly-construed jurisdictional prerequisite." *Wyoming Lodging & Rest. Ass'n. v. U.S. Dep't of Interior*, 398 F. Supp. 2d 1197, 1209 (D. Wyo. 2005). Instead, it is simply meant to "ensure that reviewing courts do not substitute 'their judgment for that of the agency on matters where the agency has not had an opportunity to make a factual record or apply its expertise.'" *Id*. (quoting *New Mexico Environmental Imp. Div. v. Thomas*, 789 F.2d 825, 835 (10th Cir.1986)). Thus, "bring[ing] sufficient attention to an issue to stimulate the agency's attention and consideration of the issue during the environmental analysis comment process" is enough to preserve an issue for judicial review. *Benton County v. U.S. Dep't of Energy*, 256 F. Supp. 2d 1195, 1198–99 (E.D. Wash. 2003). Here, each of the issues underlying Guardians' legal claims were raised during the administrative process.

For the September 2017 lease sale, the issue of water resources impacts was directly raised in comments provided to BLM, *see e.g*. AR_BLM_001831 (arguing that oil and gas development "could have significant negative impacts on water quality"), while Guardians identified air pollution as an issue in its administrative protest and attached exhibits, AR_BLM_002621-22 (explaining Guardians' "concerns over the impacts of oil and gas leasing to …air quality"); 002624–25 (discussing report which estimated foreseeable emissions of "greenhouse gases, criteria pollutants, and hazardous air pollutants associated with oil and gas development," and providing table showing emissions estimates for NO_x and VOCs);

002632.0040-43 (report providing emission inventories, including VOCs and NO_x, for "typical oil and gas well emissions").

For the December 2017 lease sale, BLM received dozens of public comments arguing that the proposed leases "promise[d] a flood air pollution [and] water contamination" AR_BLM_0021-103. Guardians' comment letter specifically complained that BLM failed to "include a discussion of the intense on-the-ground impacts associated with fracking, [including] air emissions," AR_BLM_00107 (emphasis added), and Guardians also provided BLM with a report estimating air pollutant emissions, including VOCs and NO_X, and modeling ozone impacts from oil and gas development, AR_BLM_00178, 00408-39. Guardians' protest further explained that BLM's Final EA "still completely fails to discuss increased air quality and public health impacts" associated with fracking. AR_BLM_001500.

For the September 2018 lease sale, BLM received scoping comments explaining that oil and gas development "could have significant negative impacts on water quality," AR_BLM_004682; that "poorly planned oil and gas development … can result in significant impacts to …water quality and quantity," AR_BLM_004685; and that drilling risked jeopardizing cave and karst resources, as well as the spring-fed "water source" for Carlsbad Caverns National Park, AR_BLM_004686, 4689. *See also* AR_BLM_004719-5137 (400+ letters requesting removal of lease parcels for the protection of "desert rivers"); 005145 (describing potential impacts to "hydrologic resources, and known cave and karst features," including "surface and groundwater quantity and quality"). Guardians' protest also identified concerns that "the process of fracking … causes more intense impacts to our public health, air [and] water," highlighted risks including "adverse impacts on water," and explained that state records show "743 instances of all types of oil and gas operations polluting groundwater." AR_BLM_005859.

See also AR_BLM_005862 (explaining that "[f]racking presents a risk of water contamination," including risks to areas "recognized as the recharge area for the [Capitan Aquifer]"; 005228-87 (report compiling studies describing fracking-related water contamination). The record demonstrates that BLM was aware of Guardians' concerns with the agency's inadequate analyses of impacts to air quality and water resources.

The issue exhaustion waiver rule also "does not apply… when an agency, for whatever reason, considers a potential issue." *N.M. Health Connections v. U.S. Dep't of Health and Human Services,* 340 F. Supp. 3d 1112, 1168 (D.N.M. 2014). "If an agency addresses an issue—even if the agency does so on its own initiative—then an administrative record exists for a court to review; likewise, when an agency addresses an issue *sua sponte*, then the agency had a fair opportunity to consider the issue." *Id. See also Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (recognizing that courts have "excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue").

Here, Guardians is not raising any new issues of which BLM was previously unaware. In its EAs, BLM specifically acknowledged risks to air quality, including ozone, AR_BLM_2696-97; 001542; 006493-95, as well as water resources quantity and quality, AR_BLM_002703-04; 001549-50; 006504-06. Moreover, BLM specifically argues that it took a hard look at impacts to these resources, thereby acknowledging that the agency ostensibly applied its expertise and made a record regarding its analysis of impacts to them. BLM Resp. at 8-20. This is not a case where Guardians has tried to play "gotcha" and raised new issues at the eleventh hour.[8] Instead, BLM

[8] For example, if Guardians were to bring claims regarding BLM's failure to assess risks associated with induced seismicity—or human-caused earthquakes—such claims might properly be precluded under the administrative exhaustion doctrine.

was aware of and had every opportunity to address the issues raised by Guardians—but did so only generally rather than taking the requisite hard look.

V. THE MINERAL LEASING ACT'S STATUTE OF LIMITATIONS IS INAPPLICABLE

WEA argues that Guardians' NEPA claims are time-barred by the Mineral Leasing Act's (MLA's) 90-day statute of limitations at 30 U.S.C. § 226-2. WEA Resp. at 19. However, the Tenth Circuit specifically rejected application of the MLA's 90-day limitations period to NEPA claims in *Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609, 616-17 (10th Cir. 1987), overruled on other grounds by *Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (reversing *Park County*'s use of a 'reasonableness' standard of review to review an agency's failure to prepare an EIS). *Park County*'s holding on this point has not been overturned and thus binds this Court. Therefore, the general 6-year limitations period provided by 28 U.S.C. § 2401(a) applies to Guardians' NEPA claims.

WEA generally concedes this legal framework, but argues that *Park County* "does not apply here" because Guardians "challenges the substance of leasing decisions under the [MLA]," rather than bringing claims under NEPA. WEA Resp. at 20. WEA is not only incorrect, but fails to acknowledge that this Court previously rejected the argument that the MLA 90-day limitations period applied to a NEPA challenge of BLM's oil and gas leasing decisions. In *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, Nos. CIV 09-0037-RB-LFG; CIV 09-0414-RB-LFG, 2010 WL 11437250, at *5 (D.N.M. Feb. 9. 2010) (J. Brack), this Court emphasized that *Park County* still controlled, referencing *Park County*'s distinction between an action contesting an MLA decision versus an action challenging non-MLA decisions, and held that the MLA's statute of limitations did not apply to NEPA claims.

This Court also rejected the applicability of *Turtle Island Restoration Network v. U.S.*

Dept. of Commerce, 438 F.3d 937 (9th Cir. 2006), for challenges to the NEPA analyses for oil and gas leases. *Id*. at *6. *Turtle Island*, 438 F.3d at 949, held that the Magnuson Act's 30-day limitations period barred a challenge—under NEPA—to regulations re-opening a swordfish fishery. This Court, however, distinguished *Turtle Island* on the ground that the Magnuson Act's statute of limitations "applies only to a very specific class of claims—those that clearly challenge regulations promulgated under the Magnuson Act." *Amigos Bravos*, 2010 WL 11437250, at *6 (quoting *Turtle Island*, 438 F.3d at 948). In contrast, *Park County* recognized that a NEPA action does not "contest[] decisions of the Secretary of the Interior *under the Mineral Leasing Act*." *Amigos Bravos*, 2010 WL 11437250, at *6 (quoting *Park County*, 817 F.2d at 616) (emphasis in original). Accordingly, the MLA limitations period only "applies in cases challenging the lack of compliance with all the intricate requirements of Subchapter IV of the [MLA] which deals with oil and gas leasing." *Park County*, 817 F.2d at 609. None of Guardians' claims implicate any MLA sections, but fall squarely under NEPA.

WEA also argues that because Guardians has requested vacatur of the challenged leases, this remedy constitutes a challenge to "the substance of leasing decisions under the [MLA]." WEA Resp. at 20. But WEA cites no authority for the principle that vacatur is only available under the MLA. Quite the opposite. Vacatur is the presumptive remedy for APA violations. *WildEarth Guardians v. U. S. Bureau of Land Mgmt.,* 870 F.3d 1222, 1239 (10th Cir. 2017) (quoting 5 U.S.C. § 706(2)). Guardians' NEPA claims are therefore subject to the limitations period provided by 28 U.S.C. § 2401(a), not 30 U.S.C. § 226-2, and are not time-barred.

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

A. Guardians has standing to challenge IM 2018-034.

Intervenors dispute Guardians' Article III standing to challenge IM 2018-34 on grounds that Guardians is not injured by the IM and that even if Guardians has been injured, the Court cannot redress those injuries. *See generally* WEA Br. at 9-16; API Br. at 32-36. Guardians has demonstrated standing by showing that IM 2018-034 impairs the organization's ability to effectively engage in BLM's leasing decisions, and that those BLM decisions in turn threaten its members' use and enjoyment of specific public lands and resources where BLM applied the IM.

Standing requirements for immediacy of injury and redressability are relaxed 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*). To establish a "concrete interest," an environmental plaintiff "must establish either its geographical nexus to, or actual use of the site where the agency will take or has taken action." *Lucero*, 102 F.3d at 449; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496-97 (2009).

Guardians has demonstrated injury to its members' concrete interests in their use and enjoyment of public lands in areas leased by BLM under IM 2018-034. *See*, *e.g.*, Declarations of Nathalie Eddy (ECF No. 35-1); Rebecca Sobel (ECF No. 35-2), and Rebecca Fischer (ECF No. 35-3); Op. Br. at 8-9. These declarations establish a geographic nexus to and actual use of sites affected by BLM's application of IM 2018-034 for the September 2018 lease sale, sufficiently establishing injury-in-fact. *See*, *e.g.*, *Diné CARE II*, 923 F.3d at 841-42 (finding standing where plaintiff had regularly visited the area affected by the challenged BLM decisions.); *W.*

Watersheds Project v. Zinke ("*W. Watersheds I*"), 336 F. Supp. 3d 1204, 1221 (D. Id. 2018) (finding standing to challenge IM 2018-034 where plaintiffs regularly visited areas affected by BLM leasing decisions governed by the IM).

Guardians' members also demonstrate that IM 2018-034 threatens their procedural interests related to participation in BLM's decisionmaking process for oil and gas leases. *See* Fischer Decl. ¶21-23 (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"). 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. *See* Fischer Decl. at ¶¶ 25-27. Deprivation of a procedural right that impairs Guardians' concrete interests constitutes a procedural injury for which Guardians has standing. *Lujan*, 504 U.S. 572.

1. WEA's Arguments Lack Merit.

In arguing that Guardians lacks standing, WEA disregards the basis for standing in procedural cases and ignore the concrete injury allegations in Guardians' standing declarations. First, WEA argues that the IM itself does not injure Guardians' concrete interests because the IM "has no impact on [Guardians'] members' ability to visit or recreate on any lands," does not "cause" environmental pollution, and does not authorize BLM to issue leases. WEA Resp. at 10. But in procedural cases, such as this one, the procedural injury was complete once BLM issued the IM and implemented it with respect to the September 2018 lease sale challenged herein.[9] *See*

[9] Because Guardians' injury occurred upon BLM's issuance and application of IM 2018-034, the fact that Guardians submitted scoping comments and protested the September 2018 lease sale

S. Utah Wilderness All. v. OSM ("*SUWA v. OSM*"), 620 F.3d 1227, 1234-35 (10th Cir. 2010); *W. Watersheds I*, 336 F. Supp. 3d at 1224.

Second, WEA argues that IM 2018-034 does not injure Guardians because the IM is legally valid and so cannot impair Guardians' legal rights and. WEA Resp. at 11-12. But WEA's arguments improperly tie demonstration of injury-in-fact to resolution of the merits. The U.S. Supreme Court and the Tenth Circuit have rejected this cart-before-the-horse approach to standing. *See*, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 528 U.S. 167, 181 (2000) (warning that the standing inquiry should not be a higher hurdle than the merits inquiry); *WildEarth Guardians v. U.S. EPA*, 759 F.3d 1196, 1207 (10th Cir. 2014) (following the Ninth, D.C., and Federal Circuits in recognizing that "[i]n resolving a standing issue … we must start from the premise that the plaintiff will prevail on its merits argument."). Thus, courts do not determine standing based on the likely outcome of merits questions.

Third, WEA argues that any injury Guardians suffers from IM 2018-034 cannot be redressed because Guardians "fails to state a claim upon which relief could be granted." WEA Resp. at 13-14. WEA's argument that the Court cannot grant relief because Guardians has brought an impermissible "broad programmatic attack" rather than challenging a particular agency action not only conflates redressability with failure to state a cognizable legal claim, but is also wrong. Guardians challenges issuance and implementation of IM 2018-034—a "particular 'agency action' that causes it harm." *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 891 (1990). Guardians is not challenging BLM's oil and gas leasing program, or any of that program's objectives, as was the case in *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004). There,

within the abbreviated comment and protest periods does not mean that Guardians was not injured by the IM, as argued by Intervenors. WEA Resp. at 13; API Resp. at 34.

plaintiffs brought a failure-to-act-claim against BLM pursuant to Section 706(1) of the APA, claiming BLM violated its mandate to manage off-road vehicle use in Wilderness Study Areas "so as not to impair the suitability of such areas for preservation as wilderness." *Norton*, 542 U.S. at 65. The Court held that the non-impairment mandate was not the type of discrete agency action that a court could impel under APA § 706(1). *Id*. at 66. But here, Guardians seeks judicial review of the IM pursuant to APA § 706(2), claiming that BLM's issuance and implementation of the IM was arbitrary and capricious. There is no question that BLM has acted here, and it is within the Court's authority to grant the relief requested—vacatur of IM 2018-034.

Finally, WEA argues that because there are no "standards" for "adequate" or "timely" public participation, the Court cannot compel a specific remedy to redress Guardians' public participation injuries. WEA Resp. at 14-15. This argument lacks merit because Guardians is not asking the Court to compel BLM to comply with a nondiscretionary duty. Moreover, there are public participation standards in NEPA and FLPMA regulations, case law interpreting those regulations, and the previously-implemented provisions of IM 2010-117 to guide the Court in evaluating the legality of the abbreviated public participation components of IM 2018-03. *See*, *e.g.*, Guardians' Op. Br. at 37 (summarizing relevant statutory and regulatory provisions) and 41-42 (summarizing case law); *W. Watersheds Project v. Zinke* (*W. Watersheds II*), 2020 WL 959242, at *16, -- F. Supp. 3d --, (D. Id. Feb. 27, 2020) (finding IM 2018-034 violated public involvement requirements of NEPA and FLPMA and reinstating IM 2010-117).[10]

2. API's Arguments Lack Merit.

API also ignores the concrete injury allegations in Guardians' standing declarations, and focuses only on allegations relating to the tangible injuries of having to comply with IM 2018-

[10] To the extent that it goes to the merits of Guardians' challenge to the IM, as discussed above, this argument is not properly part of the standing inquiry.

034—devoting organizational resources in response to abbreviated comment and protest periods for the September 2018 lease sale—arguing that "mere frustration of the organization's objectives does not impart standing." API Resp. at 33 (case citation omitted). But unlike the plaintiffs in *Summers v. Earth Island Institute,* 555 U.S. 488 (2009), Guardians has not alleged injury to a procedural right "*in vacuo*." *Id.* at 496. In *Summers*, environmental plaintiffs could not establish standing to challenge Forest Service regulations because they failed to identify any application of those regulations that impacted their members. *Id.* at 496-99. In contrast here, BLM's application of IM 2018-034 for the 2018 September lease sale in the Greater Carlsbad area specifically threatens lands used and enjoyed by Guardians' staff and members. Eddy Decl. ¶ 31; Sobel Decl. 32-36; Fischer Decl. ¶ 12. This type of concrete interest, coupled with the procedural injury, is sufficient to confer standing.[11] *Summers*, 555 U.S. at 496; *see also Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1081 (9th Cir. 2015).[12]

Finally, API argues that even if Guardians should prevail on the merits, its injuries are not redressable because BLM might not revert back to using the previous IM governing oil and gas leasing. *Id*. at 35-36. However, in procedural cases such as this one, redressability does not require Guardians "to demonstrate that the ultimate decision would necessarily be different." *SUWA v. OSM*, 620 F.3d at 1235 (citing *Summers*, 555 U.S. at 496). Guardians has shown that IM 2018-034 has made it more difficult for Guardians to meaningfully participate in BLM's oil and gas leasing process and decreased the quality of public data, research, and analysis available

[11] Similarly, API's claim that Guardians' alleged injuries amount to mere "speculation" is without merit because Guardians has identified specific concrete injuries resulting from the application of IM 2018-034 to the September 2018 lease sale. API Resp. at 35; Op. Br. at 8-9.
[12] None of the cases cited by API support this argument because none deal with the basis for standing in procedural cases such as this one where a plaintiff alleges deprivation of a procedural right impairs a concrete interest in recreational use of an area for which the plaintiff has demonstrated a geographic nexus. *See* API Resp. at 33 (citing cases).

to BLM. Fischer Decl. ¶¶ 18-27. An order vacating IM 2018-034, particularly if the Court finds that the IM is contrary to public participation requirements in NEPA and FLPMA, could redress Guardians' injuries from the IM. The Court also has the authority to order BLM to reinstate the prior IM 2010-117 as the court did in *W. Watersheds II*, 2020 WL 959242, at *30. The Court has broad discretion to fashion an appropriate remedy, and is not limited to the relief Guardians requested in its Complaint or merits briefing.[13]

B. IM 2018-034 is a final agency action.

As the District of Idaho recently recognized in its decision setting aside the public participation provisions of IM 2018-034 at issue here,[14] "IM 2018-034 is a final agency action" subject to challenge under the APA. *W. Watersheds II*, 2020 WL 959242, at *13. Under Supreme Court precedent, 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). As BLM recognized, the Tenth Circuit has added a third inquiry to the *Bennett* factors: "whether its impact is direct and immediate." *Colorado Farm Bureau Fed'n v. U.S. Forest Serv.*, 220 F.3d 1171, 1173–74 (10th Cir. 2000) (citing *Franklin v. Massachusetts,* 505 U.S. 788, 796–97 (1992)).

[13] This case is distinguishable from *Cache Valley Elec. Co. v. State of Utah Dept. of Trans.*, 149 F.3d 1119 (10th Cir. 1998), relied on by API. API Resp. at 37. *Cache Valley* was an equal protection case where the Court found no redressability because the plaintiff could not show that elimination of racial and gender preferences from a disadvantaged business program would reduce the number of businesses in the program with which plaintiff was competing. *Id*. at 1123.

[14] The Court in *W. Watersheds II* set aside IM 2018-034 only in the sage grouse habitat area specifically at issue in that case; however, plaintiffs have recently filed a Motion for Reconsideration requesting the court's vacatur of the IM nationwide. *W. Watersheds Project v. Bernhardt*, 1:18-cv-187-REB (ECF No. 175) (D. Id. Mar. 17, 2020).

Under this three-part test, BLM first argues that IM 2018-034 has no "direct and immediate impact" because it only establishes procedures for future leasing decisions and Guardians and the public will not be impacted "unless and until BLM issues a decision on a particular lease." BLM Resp. at 26. To the contrary, the IM states that "[t]his policy is effective immediately," and "will be implemented across the BLM." AR_BLM_0012480-81. Although the IM does not direct the outcome of any particular lease sale, its impact was "direct and immediate" on BLM and its officials, as well as on Guardians' and the public's ability to participate in BLM's oil and gas leasing decision-making process.

Second, BLM incorrectly argues that IM 2018-034 is not the "consummation of the agency's decisionmaking process" because certain discretion is left to agency officials at the site-specific leasing stage. BLM Resp. at 26. But BLM does not claim that its staff have discretion to revisit the issues which IM 2018-034 conclusively addressed—such as the mandatory 10 day protest period. AR_BLM_0012480. That IM 2018-034 did not comprehensively determine all aspects of BLM's lease review process does not render it any less final. *See Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (action must be "finally determinative of the issues … to which it is addressed"). As *Western Watersheds II* explained: "IM 2018-034 unequivocally replaces IM 2010-117 and was effective immediately' (as of January 31, 2018) 'across the BLM.' Such definiteness lets the air out of any argument that IM 2018-034 operates only as provisional guidance." 2020 WL 959242, at *10. *See also Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 350 (D.D.C. 2007) (statement within "Guidelines" that "guidance [is] effective immediately" demonstrates that "there is nothing 'tentative' or 'interlocutory' about the Guidelines; rather they 'mark the consummation of the agency's decision-making process'") (quoting *Bennett*, 520 U.S. at 178).

The District of Wyoming rejected a nearly-identical argument from BLM regarding a 2010 IM challenged by Intervenor WEA in *Western Energy Alliance v. Salazar,* No. 10-CV-237F, 2011 WL 3738240, at *5 (D. Wyo. Aug. 12, 2011). There, BLM argued that the 2010 IM did not "represent the consummation of [BLM's] decisionmaking processes for authorizing oil and gas development activities on federal lands," but only established internal procedures for BLM to follow when reviewing and issuing an Application for Permit to Drill (APD). *Id*. The court rejected BLM's argument that is was "the decision to authorize an APD that marks the culmination of the agency decision-making process," holding that because BLM adopted a "final, binding and substantive change to, (indeed a 180 degree reversal of), its past practices," the 2010 IM was final agency action subject to challenge under the APA. *Id.*

Third, BLM argues that IM 2018-034 "determines no rights or obligations." BLM Resp. at 26. Contrary to BLM's argument, this prong is met where, as here, the agency action alters the obligations of agency officials, 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) (guidance binding on EPA regional administrators was final); *Salazar*, 2011 WL 3738240, at *6–7 (BLM IM a final agency action where it "bind[s]" the agency). IM 2018-034 binds BLM staff in several ways, including requiring completion of lease review in 6 months and allowing only a 10-day protest period. As *Western Watersheds II* recognized, even if some discretion remains for agency officials, "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." 2020 WL 959242, at *12.

Further, "legal consequences necessarily flow from the changes included within IM 2018-034," changes which "alter[] BLM's legal duty under both FLPMA and NEPA to facilitate public involvement in its leasing decisions." *Id*. at *13. 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. WEA's characterization of shortening the protest period as "a practical consequence, not a legal one" conflicts with API's legal argument that Guardians has waived litigation of any issues it failed to raise in its protest. *See* WEA Resp. at 19; API Resp. at 17-19. While neither FLPMA nor NEPA specifically require a protest period, BLM Resp. at 32, so long as filing a protest is arguably a legal prerequisite for litigation, reducing the protest period directly affects Guardians' legal rights.

C. IM 2018-034 is a Rule Subject to Notice and Comment.

Because IM 2018-034 does not "merely provide policy guidance" to assist agency personnel in applying existing regulations, BLM Resp. at 30, but provides binding requirements that direct agency personnel to follow certain defined procedures in providing (and limiting) public participation for BLM's lease sales, IM 2018-034 is a substantive rule subject to notice and comment under the APA. *W. Watersheds II*, 2020 WL 959242, at *14. BLM unlawfully issued IM 2018-034 without undergoing formal rulemaking procedures. All of BLM's arguments to the contrary lack merit and are contradicted by case law.

Under the APA, the "critical factor" in distinguishing a general policy statement from a substantive rule is "the extent to which the challenged [directive] leaves the agency, or its

implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987) (internal citation omitted) (alteration in original). IM 2018-034 fails this standard. As *Western Watersheds II* explained, "IM 2018-034 is not a general statement of policy. It is written in binding terms. It is effective immediately. It outlines the leasing procedures for all current and future parcels under review by BLM field offices and correspondingly creates binding legal obligations." 2020 WL 959242, at *14. Though discretion remains in certain respects, "IM 2018-034 allows for no discretion on essential details [including] imposition of a shortened, 10-day protest period." *Id.*

And as noted above, the District of Wyoming previously rejected a similar BLM IM as an improperly promulgated legislative rule. *Salazar*, 2011 WL 3738240, at *1. There, IM 2010-118 limited the use of "categorical exclusions" under NEPA for certain oil and gas activities on federal oil and gas leases. *Id.* The court rejected BLM's nearly-identical argument that IM 2010-118 was a policy statement or interpretive rule, and held that IM 2010-118 was a legislative rule requiring notice and comment because it was binding on the agency and represented "a complete 'about-face' by [BLM] compared to [its] past practices." *Id*. at *7. The court vacated IM 2010-118 because it was improperly promulgated without notice and comment. *Id.* This Court should follow *Salazar's* analysis and vacate IM 2018-034 as an improperly promulgated substantive, or legislative rule.

Second, FLPMA and NEPA each require agencies to use formal rulemaking procedures to establish procedures for public participation in agency decision-making. 43 U.S.C. § 1739(e); 40 C.F.R. § 1507.3(a). BLM argues that it has already established public involvement procedures by regulation, and IM 2018-034 "merely provides policy guidance to agency personnel about

how those existing regulations should be applied." BLM Resp. at 29-30. To the contrary, IM 2018-034 is not a mere policy statement because it established binding procedural requirements dictating the manner in which BLM will provide public participation opportunities for oil and gas lease sales. *W. Watersheds II*, at *15.

Further, BLM's FMPMA regulations do not establish public involvement procedures, but simply allow for the submittal of nominations for lands to be leased, and require BLM to post at the relevant field office a list of lands to be offered for leasing at least 45 days prior to the lease sale. 43 C.F.R. §§ 3120.3-2, 3120.4-2. But a regulatory requirement to post a list of parcels available for leasing is not a regulation providing for *public participation*, as required by FLPMA Section 309. Instead, FLPMA Section 309 mandates promulgating regulations that:

> establish procedures, *including public hearings where appropriate*, to give the Federal, State, and local governments and the public adequate notice and an *opportunity to comment* upon the formulation of standards and criteria for, and *to participate in*, the preparation and execution of plans and programs for, and the management of, the public lands.

43 U.S.C. § 1739(e) (emphasis added). BLM's FLPMA regulations, however, provide no opportunity for public comment, public hearings, site visits, or formal administrative protests. In fact, they provide *no* means for the public to meaningfully *participate* in BLM's leasing process, as required by FLPMA Section 309.[15]

Finally, BLM argues that IM 2018-034 does not effectively amend 43 C.F.R. § 3120.1-3, which provides that "[t]he authorized officer may suspend the offering of a specific parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale," but merely represents the exercise of that discretion. BLM Resp. at 30-31. Both the regulatory

[15] Because BLM has not, in fact, promulgated regulations governing public participation in its oil and gas leasing process, BLM fails to distinguish *Natural Resources Defense Council v. Jamison*, 815 F. Supp. 454 (D.D.C. 1992), in any relevant manner. BLM Resp. at 30 n.10.

language and IM 2018-034 contradict this argument. The regulation plainly provides discretion to individual officers to suspend specific parcels at the individual lease sale stage while considering a protest or appeal. 43 C.F.R. § 3120.1-3. IM 2018-034 takes that discretion away by mandating the sale of parcels with protests still pending. AR_BLM_0012480. By removing discretion *specifically provided by regulation* to suspend the sale of protested parcels, IM 2018-034 effectively—and unlawfully—amended BLM regulations without adhering to formal rulemaking procedures.[16] *See McLouth Steel Prods. Corp*, 838 F.2d at 1322 (purported interpretive rule that "substantially curtail[ed] EPA's discretion in delisting decisions" provided by statute was legislative rule requiring notice and comment).

D. IM 2018-034 is Substantively Invalid Under FLPMA and NEPA.

While these procedural claims are sufficient grounds to vacate IM 2018-034, IM 2018-034 is also contrary to the substantive public participation mandates under FLPMA and NEPA. BLM claims that IM 2018-034 satisfies FLPMA and NEPA because it "properly affirms the discretion granted by FLPMA and NEPA regarding public involvement." BLM Resp. at 31. But this argument is contradicted by the language of the IM. Contrary to the public participation provisions of FLPMA, 43 U.S.C. § 1739(e), and NEPA, 40 C.F.R. §§ 1500.2(b), (d), 1606.6(a), 1501.4(b), IM 2018-034 impermissibly grants BLM discretion to entirely shut the public out from leasing decisions, by replacing "will" with the discretionary "may." *Compare* AR_BLM_0012479, *with* AR_BLM_002105. As *Western Watersheds II* correctly held,

[16] BLM's "harmless error" argument, BLM Resp. at 35, incorrectly assumes no distinction between delaying the *issuance* of leases pending resolution of protests, as required by IM 2018-034, AR_BLM_0012480, and "suspend[ing] the *offering*" of a parcel for sale, as permitting under 43 C.F.R. § 3120.1-3 (emphasis added). To the contrary, if the *offering* of a parcel was suspended under 43 C.F.R. § 3120.1-3, the parcel would *not* be sold at the particular lease sale, and such sale would need to be delayed until, at a minimum, the following quarterly sale.

"[d]iscretionary public participation opportunities are not consistent with FLPMA and NEPA." 2020 WL 959242, at *17.

Further, IM 2018-034 categorically declares that public comment is not required for lease sales approved through a Determination of NEPA Adequacy (DNA). AR_BLM_0012479. Even assuming a DNA absent public comment could satisfy NEPA—which Guardians disputes—this practice violates FLPMA Section 309(e)'s requirement for public input on *all* management decisions—regardless of whether a *different decision* was previously studied under NEPA.

BLM also argues that the NEPA regulations which require BLM to involve the public "to the fullest extent possible," 40 C.F.R. § 1500.2(b), (d), and to make "diligent efforts to involve the public," 40 C.F.R. § 1506.6(a) are unenforceable "general statements of policy." BLM Resp. at 31 n.12. But while there may be no clearly delineated minimum level of participation required for the EA/FONSI process, courts "clearly have held that the regulations at issue must mean something." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970 (9th Cir. 2003). Yet BLM did not argue that IM 2018-034 meets either the letter or the spirit of these regulations, effectively conceding that the agency is not making "diligent efforts to involve the public," 40 C.F.R. § 1506.6(a), or involving the public "to the fullest extent possible." 40 C.F.R. § 1500.2(b), (d). Instead, BLM remarkably argues 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 (citing *Diné CARE I*, 312 F. Supp. 3d at 1096). But that scoping notice simply identified the locations and acreages of the lease parcels—nothing more. AR_BLM_005794-5836. Such minimal notice, even coupled with a 10-day protest period, does 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." 40 C.F.R. § 1500.2(b), (d).

BLM does acknowledge that the agency must provide public involvement in the preparation of EAs "to the extent practicable." BLM Resp. at 31 n.12 (*citing* 40 C.F.R. §1501.4(b)). And yet in issuing IM 2018-034 and following its provisions for the September 2018 lease sale here, BLM did not explain why allowing public participation to continue under the provisions of IM 2010-117 was not "practicable."[17] 40 C.F.R. § 1501.4(b). Nor has BLM even offered post facto arguments explaining why it is no longer practicable to, for example, allow public participation for all oil and gas lease sales; make draft EAs and DNAs available for 30 day comment periods; post sale notices 90 days prior to the lease sale date; and provide 30 day protest periods, as previously occurred under IM 2010-117. AR_BLM_001203-07. As *Western Watersheds II* noted,

> 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?

2020 WL 959242, at *16.

BLM argues that *Western Watersheds II* "improperly penalizes BLM for … choosing to step back from a prior regulation that limited the agency's discretion in a manner not required by statute." BLM Resp. at 33. But BLM ignores its own past practice of effectively implementing the provisions of IM 2010-117, which provides undisputed evidence that less abbreviated public participation is "practicable" for BLM to provide in its oil and gas leasing process. Absent any

[17] Accordingly, even if the Court disregards as extra-record evidence Guardians' affidavit describing the inadequacy of a 10-day protest period, IM 2018-034 is still invalid because BLM has not contested Guardians' claim that it remains "practicable" to provide the public participation pursuant to IM 2010-117. In any event, the Declaration of Rebecca Fischer is properly before the Court with respect to the issue of Guardians' standing, as it addresses the procedural and practical injury to Guardians' and its members from BLM's promulgation and implementation of IM 2018-034.

explanation from BLM why it is no longer "practicable" for the agency to continue providing the public participation opportunities it allowed for nearly a decade, BLM lacked a reasoned basis for back-tracking from IM 2010-117's public participation provisions, rendering its actions arbitrary, capricious, 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").

VII. VACATUR IS THE APPROPRIATE REMEDY

A. Vacatur.

In light of the serious nature of the NEPA, FLPMA, and APA violations at issue in this case, vacatur is the only remedy that ensures that BLM will not simply treat a remand of its leasing decisions and IM 2018-034 as "a mere bureaucratic formality." *Diné Citizens Against Ruining Our Env't v. United States Office of Surface Mining Reclamation & Enf't* ("*Diné CARE v. OSM"*), No. 12-cv-1275-JLK, 2015 WL 1593995, at *3 (D. Colo. Apr. 6, 2015). Under the APA courts "shall" "hold unlawful and set aside agency action" that is found to be arbitrary or not in accordance with the law. 5 U.S.C. § 706(2). Thus, when a court determines that agency decisions were unlawful under the APA, "the presumption is in favor of vacatur instead of remand without vacatur." *Diné Citizens Against Ruining Our Env't v. Jewell*, 312 F. Supp. 3d 1031, 1110 (D.N.M. 2018), *aff'd in part, rev'd in part and remanded sub nom. Diné CARE II,* 923 F.3d 831; *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 951 F.3d 1217 (10th Cir. 2020) ("Vacatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts.") (internal quotation omitted); *High Country Conservation Advocates v. U.S. Forest Serv.*, 67 F. Supp. 3d 1262, 1263 (D. Colo.) ("Vacatur is

the normal remedy for an agency action that fails to comply with NEPA."); *Diné CARE v. OSM*, 2015 WL 1593995, at *1 (for NEPA violations, "the normal remedy is vacatur").

Intervenors press application of the "*Allied-Signal*" factors to determine whether vacatur is an appropriate remedy for NEPA, FLPMA, and APA violations. API Resp. at 42-43 & n.20, WEA Resp. at 35. The *Allied-Signal* test weighs "the seriousness of the [agency action's] deficiencies" against "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Although the Tenth Circuit has not adopted *Allied-Signal*, some district courts in this Circuit have used it in certain cases. *See, e.g., N.M. Health Connections*, 340 F. Supp. 3d at 1177 (applying the "persuasive" *Allied-Signal* test to vacate agency action); *Diné CARE v. OSM*, 2015 WL 1593995, at *2 (D. Colo. Apr. 6, 2015) (same).

Even if the Court applied *Allied-Signal*—which is not required before ordering vacatur—that test is met here for vacatur of both IM 2018-034 and the challenged lease authorizations. While "vacatur may not be appropriate in all cases," *N.M. Health Connections* 340 F. Supp. 3d at 1175, the burden is on BLM to show that compelling equities demand anything less than vacatur. *See Ctr. for Envtl. Health v. Vilsack*, No. 15-cv-01690-JSC, 2016 WL 3383954, at *13 (N.D. Cal. June 20, 2016) ("[G]iven that vacatur is the presumptive remedy for a procedural violation such as this, it is Defendants' burden to show that vacatur is unwarranted.").

Under the first *Allied-Signal* factor, BLM's deliberate decision to bypass notice-and-comment procedures in adopting IM 2018-034 was a serious violation of NEPA, FLPMA, and the APA. *See, e.g., Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) ("Failure to provide the required notice and to invite public comment . . . is a fundamental flaw that 'normally' requires vacatur of the rule."); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*,

462 U.S. 87, 97 (1983) (public involvement is one of NEPA's twin aims); 40 C.F.R. § 1500.1(b) ("[P]ublic scrutiny [is] essential to implementing NEPA."). BLM's NEPA violations relating to the lease authorizations pose serious threats to the health and welfare of people living, working, and visiting the Greater Carlsbad region because of potential impacts on water quantity, water quality, air quality, and climate from lease development. Unlike BLM's NEPA analysis in *WildEarth Guardians v. Zinke, 3*68 F. Supp. 3d at 84, which the court found legally deficient but likely correctible, the serious nature of the potential environmental and human health impacts that BLM failed to analyze here support vacatur.

The second *Allied-Signal* factor likewise weighs in Guardians' favor as vacating IM 2018-034 would involve minimal disruption to BLM's lease authorization process.[18] The potentially disruptive consequence of lease vacatur is an equitable question analogous to the balancing of equities assessed as part of injunctive relief and, as discussed below, tips in favor of vacatur because irreparable environmental harm outweighs the operators' temporary financial burden from delaying lease development.

Vacatur is common and appropriate relief for oil and gas leases and permits issued in violation of NEPA. *See, e.g., San Juan Citizens Alliance v. BLM*, 326 F. Supp. 3d 1227 (D.N.M. 2018) (vacating oil and gas leases for NEPA violation); *Bob Marshall Alliance v. Lujan*, 804 F. Supp. 1292, 1298 (D. Mont. 1992) (cancelling leases due to NEPA and ESA violation); *Diné CARE II*, 923 F.3d at 859 (vacating BLM drilling permits due to NEPA violations); *Pit River Tribe v. U.S. Forest Serv*., 469 F.3d 768, 788 (9th Cir. 2006) (vacating geothermal lease

[18] Further, following the September 2018 Preliminary Injunction Order in *Western Watersheds I*, BLM returned to IM 2010-117's provisions for lease sales in sage-grouse habitat, without any claimed hardship—let alone the type of serious consequences required to disrupt the presumptive APA vacatur remedy. *See W. Watersheds II*, 2020 WL 959242 at *26.

extensions due to BLM's violation of NEPA and historic preservation laws).[19] Just as in these cases, the *Allied Signal* factors and other equitable considerations tip decidedly toward vacatur of the leases.

Finally, relating to the remedy for Guardians' IM 2018-034 claims, BLM incorrectly asserts that if IM 2018-034 is vacated, BLM cannot be compelled to reinstate IM 2010-117 because "there is no legal authority" supporting reinstatement of a previous guidance document upon invalidation of a subsequent guidance document. BLM Resp. at 37. But reinstatement extends to prior agency "rules"—a category into which IM 2010-117 undoubtedly falls. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) ("The effect of invalidating an agency

[19] BLM and Intervenors argue lease suspension or remand without vacatur are more appropriate remedies, BLM Resp. at 35-37; API Resp. at 37-44; WEA Resp. at 35-39, but the cases they cite are either distinguishable or unpersuasive. *See Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988) (ordering suspension where plaintiffs did not argue for lease vacatur); *Mont. Wilderness Ass'n v. Fry*, 408 F Supp. 2d 1032, 1038 (D. Mont. 2006) (suspending leases where intervening National Monument declaration prohibiting new leasing meant vacatur would permanently stop parcels from being leased, a unique separation-of-powers concern not present here); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193 (D. Colo. 2011) (staying uranium leases where plaintiffs challenged programmatic NEPA review of uranium leasing expansion but failed to demonstrate why issuing leases without further NEPA review was arbitrary and capricious), amended on reconsideration, No. 08-CV-01624-WJM-MJW, 2012 WL 628547 (D. Colo. Feb. 27, 2012); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 84 (D.D.C. 2019) (where BLM failed to take hard look at GHG impacts from lease sales, but "otherwise complied with NEPA," court concluded BLM would likely be able to justify its leasing decisions on remand, declined to vacate, but enjoined issuance of additional APDs on the leased parcels); *WildEarth Guardians v. U.S. Bureau of Land Mgmt.,* 870 F.3d 1222, 1239 (10th Cir. 2017) (declining to vacate coal leases on appeal, but remanding to district court "which may vacate…, or it might fashion some narrower form of injunctive relief based on equitable arguments"); *Citizens for a Healthy Community v. U.S. Bureau of Land Mgmt.*, No. 17-cv-02519-LTB-GPG, 2019 U.S. Dist. LEXIS 222006, at *4-*7 (D. Colo. Dec. 10, 2019) (declining to vacate leases where BLM had already demonstrated substantial progress towards remedying the sole NEPA error by quantifying estimated downstream GHG emissions, demonstrating a "serious possibility that [the Defendant agencies would] be able to substantiate [their] decision[s] on remand;" and where the court suspended approved APDs and enjoined issuance of additional APDs).

rule is to reinstate the rule previously in force.").[20] Therefore, reinstating IM 2010-117 should occur as a matter of law after vacatur of IM 2018-034, regardless of whether the Court explicitly orders reinstatement. *See Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (court's vacatur of new rule "had the effect of reinstating the rules previously in force"); *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (noting that reinstatement of the prior rule "operates as a matter of law under the vacatur, and it would have occurred even if the Consent Decree had remained silent on the subject").

BLM also argues that because IM 2010-117 was also issued without notice and comment rulemaking the Court "may not replace [IM 2018-034] with IM 2010-117 or any other set of procedures." BLM Resp. at 37. But IM 2010-117 has not been found invalid by any court, so the Court should not presume it is unlawful. *See Colorado Health Care Ass'n v. Colorado Dep't of Soc. Servs.*, 842 F.2d 1158, 1164 (10th Cir. 1988). Further, the Court has discretion to leave a procedurally invalid rule in place where "equity demands." *See Fertilizer Inst. v. U.S. E.P.A.*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). Thus, vacatur of IM 2018-034 and reinstatement of IM 2010-117 are the presumptive and appropriate remedies here if the Court finds IM 2018-034 unlawful.

B. Injunctive Relief.

In vacating the lease authorizations and IM 2018-034, the Court need not analyze injunction factors because vacatur provides Guardians with sufficient relief. *Diné CARE II*, 923 F.3d at 859; *N.M. Health Connections*, 340 F. Supp. 3d at 1175. Even if the Court applies the injunction factors when considering relief, including enjoining development on the leases, the

[20] The D.C. Circuit has suggested this principle also extends to prior "practices." *CropLife Am. v. EPA*, 329 F.3d 876, 884–85 (D.C. Cir. 2003); *see also Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (reinstating prior biological opinion).

Monsanto factors tip toward enjoining lease development.[21] First, Guardians provided detailed declarations from its members showing that development on the challenged leases is, and will continue to, 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; Sobel Decl. ¶¶ 11-20, 24-36; Fischer Decl. ¶¶ 12. Thus, lease development will irreparably harm Guardians' members and the environment. *Davis v. Mineta*, 302 F.3d 1104, 1115-16 (10th Cir. 2002), overruled on other grounds by *Diné CARE v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *see also San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240 (D. Colo. 2009). Intervenors allege that any harms from lease development are "speculative" because the area has already experienced some development, API Resp. at 38-39; ignoring the additional magnitude of irreparable harm from new pollution and water use from fracking upwards of 1,600 new wells wells on the challenged leases. AR_BLM_00002672; AR_BLM_001525; AR_BLM_006487.

Second, Guardians' recreational and aesthetic 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, New Mexico v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1440 (10th Cir. 1996) (same). Guardians does not seek money damages. No amount of money could compensate Guardians'

[21] 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).

members for losses to their 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 Intervenors' allegations of delay and speculative financial loss. *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. Intervenors' claim of sweeping industry-wide ramifications, API Resp. at 39-40; WEA Resp. at 37-38, is belied by BLM's assertion that vacatur will impact 8 currently producing wells and 31 already-drilled wells on the leases. BLM Resp. at 36.

Finally, Intervenors' argument that oil and gas development is in the public interest, API Resp. at 40-41; WEA Resp. at 37-38, must be weighed against community health concerns, adverse impacts to natural resources and public lands, and the Congressional mandate for informed decisionmaking. As recognized in *Wyo. Outdoor Council v. U.S. Army Corps of Engineers,* energy needs do not automatically outweigh environmental considerations:

> [M]ineral resources should be developed responsibly, keeping in mind those other values that are so important to the people of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle. The purpose of NEPA…is to require agencies…to take notice of these values as an integral part of the decisionmaking process.

351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005). Here, the public interest would not be disserved by 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, FLPMA, and the APA. *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d at 84 (enjoined issuance of additional drilling permits on the leased parcels).

CONCLUSION

For the reasons set forth above and in Guardians' Opening Brief, this Court should find unlawful and set aside BLM's approval of the Leasing Authorizations and IM 2018-034, and grant Guardians the further relief requested in its Opening Brief at 44.

Respectfully submitted this 27th day of March, 2020.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's Joint Scheduling Order (ECF No. 32) ¶ 9, because this brief contains 12,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated this 27th day of March, 2020.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on March 27, 2020, I electronically filed the foregoing PLAINTIFF'S REPLY BRIEF 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/ *Daniel L. Timmons*
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