Vacating Vacatur: How Remedies Are Fashioned Under the National Environmental Policy Act

INTRODUCTION

Native communities often face the degradation of their sacred land.[1] This is unsurprising, as there is a long history of American state and federal governments refusing to give Native American tribes the right to self-determination and depleting the political power of Tribal governments.[2] This power imbalance manifests itself in oil and gas transactions because parties who seek to profit off of oil and gas production on Native land can negotiate directly with state governments or federal agencies, rather than the tribes themselves.[3] A community-based organization, Diné Citizens Against Ruining our Environment, is working diligently to stop outside developers from disrupting Native communities with these kinds of transactions.[4]

Courts have the power to act as a backstop by vacating agency decisions that would otherwise promulgate these injustices. In *Diné Citizens v. Haaland*, groups representing the Navajo Nation alleged that the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) in its assignment of applications for permits to drill (APDs) into oil and gas wells in the San Juan basin and requested that the court vacate these APDs.[5] The court reviewed the environmental assessments (EAs) that BLM drafted about the impacts that the APDs would have on greenhouse gas (GHG) emissions, water resources, and air quality and ultimately decided that BLM acted arbitrarily and capriciously in some of their environmental impact calculations.[6] Instead of vacating BLM's APDs, the court remanded back to the district court for review.[7]

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1. Alexis Zendejas, *Deserving a Place at the Table: Effecting Change in Substantive Environmental Procedures in Indian Country*, 9 ARIZ. J. ENV'T L. & POL'Y 90, 97 (2019).
2. *Id.* at 98.
3. *Id.* at 104.
4. *See* Press Release, Ctr. for Biological Diversity, *18 Navajo Chapters Oppose Huge Pumped Storage Projects Threatening Arizona's Black Mesa* (July 14, 2023), https://biologicaldiversity.org/w/news/press-releases/18-navajo-chapters-oppose-huge-pumped-storage-projects-threatening-arizonas-black-mesa-2023-07-14/.
5. Diné Citizens Against Ruining Our Environment [hereinafter Diné Citizens] v. Haaland, 59 F.4th 1016, 1025 (10th Cir. 2023).
6. *Id.*
7. *Id.*

While the Tenth Circuit properly applied NEPA, it fashioned the wrong remedy. Failing to vacate the APDs was a missed opportunity to operate an effective check on agencies taking advantage of NEPA's broad language. NEPA and the standard of judicial review associated with NEPA challenges do not adequately protect natural lands, meaning that appellate courts should vacate decisions that clearly violate NEPA.

I. BACKGROUND

A. Statutory Background: NEPA

The National Environmental Policy Act (NEPA), signed in 1970, was the United States' first major environmental law.[8] NEPA requires agencies to "consider every significant aspect of the environmental impact of a proposed action, so as to inform the public that the agency has indeed considered environmental concerns in its decision-making process."[9] To satisfy this, federal agencies must prepare detailed statements about how their proposed actions or projects would impact the "quality of the human environment," and the alternatives that exist.[10] The black letter language of NEPA does not explicitly state what facts or methodologies should go into EAs. While NEPA "provides a process for agencies to follow in decision-making," it "does not impose a substantive outcome," meaning that agencies are not compelled to pursue environmentally conscious alternatives when finalizing their actions.[11]

NEPA does not provide a mechanism for judicial review, so plaintiffs must bring NEPA challenges against agencies that they believe to be noncompliant through the Administrative Procedure Act (APA).[12] One agency often subjected to these challenges is the BLM. BLM is responsible for maintaining public lands, a process that includes managing the energy development of a tract of land.[13] BLM is required to develop EAs when its actions—such as APDs—would have uncertain effects on the land.[14]

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8. LINDA LUTHER, CONG. RSCH. SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA): BACKGROUND AND IMPLEMENTATION 1 (updated 2011), https://crsreports.congress.gov/product/pdf/RL/RL33152.

9. Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553 (1978); *accord* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 540 F. Supp. 3d 45, 51 (D.D.C. 2021).

10. KRISTEN HITE, CONG. RSCH. SERV., IF11932, NATIONAL ENVIRONMENTAL POLICY ACT: JUDICIAL REVIEW AND REMEDIES (Sept. 22, 2021), https://crsreports.congress.gov/product/pdf/IF/IF11932.

11. *NEPA Environmental Review Requirements*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (last visited Apr. 7, 2024), https://eelp.law.harvard.edu/tracker/nepa-environmental-review-requirements/.

12. HITE, *supra* note 10.

13. *Our Mission*, BUREAU OF LAND MGMT., https://www.blm.gov/about/our-mission (last visited Apr. 7, 2024).

14. LUTHER, *supra* note 8, at 12, 19.

B. Leadup to Litigation

Diné Citizens Against Ruining Our Environment (Diné Citizens) is a Navajo Nation-based non-profit that defends the natural world in the New Mexico and Arizona area.[15] This area is an important spiritual and cultural hub for many Southwest tribes, including the Navajo Nation of New Mexico.[16] In 2021, Diné Citizens joined several environmental advocacy groups ("Citizen Groups") to bring a lawsuit against BLM, *Diné Citizens v. Bernhardt*, in the District Court of New Mexico about the APDs that BLM approved related to oil and gas wells in the Mancos Shale area.[17] It alleged that BLM authorized the drilling without adequately considering the indirect and cumulative environmental impacts that these APDs would have.[18]

II. *DINÉ CITIZENS V. HAALAND*

A. The District Court Case

The district court case, *Diné Citizens v. Bernhardt*, began in 2021 when Citizen Groups filed a Petition for Review of Agency Action in the United States District Court for the District of New Mexico.[19] At the time of filing, BLM had issued an EA addendum aimed at correcting defects in their prior EAs.[20] Once the addendum was available to Citizen Groups, it filed an Amended and Supplemented Petition for Review of Agency Action that challenged the eighty-one EAs and the 370 APD approvals analyzed in the addendum.[21] It sought judicial review of BLM's decision to approve the APDs in order to get the APDs vacated and enjoin BLM from approving any pending or future APD for horizontal drilling or hydraulic fracturing in the area.[22] BLM argued that any APD that had not yet been approved was not fit for court review, and it was not required to vacate the approved APDs while it conducted its supplementary analysis for the addendum.[23] It claimed that all its EAs were made in good faith using thorough analysis methods.[24]

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15. *About Us*, DINÉ C.A.R.E. (2023), https://www.dine-care.org/about-us.

16. *See generally* DINÉ CITIZENS, *Citizens Working Together – Some Barriers to Overcome* (1994) (articulating the struggle of pursuing true recognition, spiritual or otherwise, of the importance of Native lands).

17. *See* Diné Citizens v. Bernhardt, No. 1:19-CV-00703-WJ-JFR, 2021 WL 3370899, at *1 (D.N.M. Aug. 3, 2021). Note that this case is different from a Tenth Circuit decision in 2019 of the same name, 923 F.3d 831 (10th Cir. 2019).

18. *See Bernhardt*, at *1.

19. Diné Citizens v. Haaland, 59 F.4th 1016, 1027 (10th Cir. 2023).

20. *See id.* at 1024 (noting that BLM issued the addendum to correct five EAs with known defects and eighty-one other EAs with potential defects but not specifying the court holding that BLM's addendum was in response to).

21. *Id.* at 1027.

22. *Id.*

23. *See id.* at 1025–30.

24. *See id.* at 1034–40.

The district court ruled against Citizen Groups.[25] It refused to look at any unapproved APDs that were challenged, stating that they were "not ripe for consideration by the Court."[26] After looking at the approved APDs, the district court concluded that BLM took the requisite "hard look" at the true environmental impacts of the APD approvals.[27] The district court also held that BLM issued the EAs in good faith and retained the power to maintain, modify, and revoke the approval of the APDs.[28] The district court denied a request for preliminary injunctive relief to stop the drilling and dismissed Citizen Groups' claims with prejudice.[29]

B. The Tenth Circuit Case

Just as in *Bernhardt*, Citizen Groups alleged in *Diné Citizens v. Haaland* that all the EAs—including the new one—failed to account for the cumulative and indirect effects of GHG emissions, as well as impacts to air quality and water quality that would result from the drilling.[30] The Tenth Circuit agreed with the district court ruling that a deferential standard towards agency decisions was appropriate because NEPA challenges are brought under the APA, meaning that claims must be reviewed de novo.[31] This deferential standard means that the Tenth Circuit refuses to overturn an agency's decision unless it finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[32] These terms were further defined in *Wyoming v. United States Department of Agriculture*, which defined this as the agency entirely failing to "consider an important aspect of the problem, offer . . . an explanation for its decision that runs counter to the evidence before the agency, or if the agency action is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[33] The court divided its review of environmental impacts into roughly four categories: GHG emissions, cumulative impacts to water resources, impact on air quality and health, and impact from hazardous air pollutants (HAPs).[34]

The Tenth Circuit found that BLM took the requisite hard look at their cumulative impacts on water resources, air quality, and health.[35] Citizen Groups argued that BLM should have accounted for New Mexico's precarious

25. Diné Citizens v. Bernhardt, No. 1:19-CV-00703-WJ-JFR, 2021 WL 3370899, at *30 (D.N.M. Aug. 3, 2021).

26. *Id.* at *7 (citing Nat'l Wildlife Fed'n v. EPA, 945 F. Supp. 2d 39, 47 (D.D.C. 2013)).

27. *Id.* at *30.

28. *Id.* at *6.

29. *Id.* at *31.

30. Diné Citizens v. Haaland, 59 F.4th 1016, 1027 (10th Cir. 2023).

31. *Id.* at 1029.

32. *Id.* (citing Utah Env't Cong. v. Bosworth, 443 F.3d 732, 739 (10th Cir. 2006) and 5 U.S.C. § 706(2)(A)).

33. Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1227 (10th Cir. 2011) (internal quotation marks omitted).

34. *See Haaland*, 59 F.4th at 1034–47.

35. *See id.*

groundwater conditions and the wells' impacts on the Navajo Nation specifically, citing that 40 percent of the Navajo Nation lacks water.[36] The court, believing that this claim was "not supported by the record," ignored Citizen Groups' policy arguments and focused on whether the analysis that BLM used for calculating water usage—resulting in a percentage increase of estimated water usage of only 0.12 percent to 1.3 percent—was sufficient.[37] BLM took a different approach with its air quality analysis by comparing the proposed pollutant outputs of the APDs with two air quality standards.[38] Although Citizen Groups pointed out that BLM failed to differentiate between long-term effects and short-term effects and mischaracterized the pollution as a "temporary nuisance," the court found that BLM's benchmarking of its emissions against industry standards was sufficient.[39]

The court found that BLM failed to take a hard look at the remaining environmental impacts. It found that BLM unreasonably calculated GHG emissions by using only one year of data to project emissions for twenty years.[40] The court held that BLM should have used the carbon budget method, a more scientifically precise method for GHG calculations, in tracking its emissions.[41] The court also found that BLM's analysis of hazardous air pollutants (HAPs) was not adequate because it did not include the specific quantity of HAPs that would be emitted from drilling and construction or account for the "cumulative impact to HAP emissions."[42]

The Tenth Circuit reversed the district court's holding that the EA addendum was sufficient, yet rendered only the new APDs approved by BLM invalid.[43] It remanded back to the district court for a remedy regarding the remaining APDs; the district court has not yet fashioned a remedy.[44]

III. LEGAL ANALYSIS

A. Fashioning the Wrong Remedy

The Tenth Circuit properly applied NEPA in its evaluation of Citizen Groups' and BLM's arguments, however, it erroneously applied precedent from the D.C. Circuit in favoring a balancing test when it should have applied precedent from the Supreme Court prescribing vacatur as the only appropriate remedy. By remanding, the Tenth Circuit left it up to the district court to apply a balancing test to determine the appropriate remedy, increasing the likelihood that the APDs are approved without thorough environmental review.

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36. *Id.* at 1044-45.
37. *Id.* at 1045-46.
38. *Id.*
39. *Id.* at 1036-37.
40. *Id.* at 1043-44.
41. *Id.* at 1047.
42. *Id.*
43. *Id.* at 1050.
44. *Id.*

The Tenth Circuit applied a balancing test from the D.C. Circuit case *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 153 (D.C. Cir. 1993).[45] In *Allied-Signal*, the court held that vacatur can be prescribed only after weighing the seriousness of the agency's deficiencies against the administrative disruptions that vacatur would bring.[46] The Tenth Circuit relied on an Eleventh Circuit case, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers (Black Warrior Riverkeeper)*, in deciding to apply the *Allied-Signal* test. In *Black Warrior Riverkeeper*, the court held that potential disruption to the mining industry was a relevant factor in determining whether vacatur is appropriate and that district courts were best positioned to make this decision.[47] This case dealt with a federal agency's miscalculations of environmental impact resulting from surface mining operations.[48] The U.S. Army Corps of Engineers admitted that it committed an error in its calculation; however, the court was not able to determine how significant this error was under the requirements of the Clean Water Act and NEPA and wanted the Corps to determine the significance of the error on remand.[49]

The Tenth Circuit also considered *DHS v. Regents of the University of California (DHS)* in deciding on a remedy.[50] In *DHS*, the Supreme Court upheld a challenge to the Department of Homeland Security's recission of the Deferred Action for Childhood Arrivals (DACA) program under the APA, vacating the recission because it had discounted the effects on DACA recipients' families and the American labor force.[51] In *DHS*, the Court found that the district court was correct in giving DHS a choice between either explaining the rationale of the initial recission further or creating a new agency action altogether.[52] The basis for this was to prevent "impermissible" post hoc rationalizations that would let agencies avoid providing contemporaneous reasonings for their actions.[53] The Tenth Circuit concluded that applying *DHS* to this case was not appropriate because *DHS* was not a case about remedies and did not contain a robust discussion of whether vacatur was the only available remedy under NEPA.[54]

The Tenth Circuit's deference to the *Allied-Signal* test was inappropriate. Unlike in *Black Warrior Riverkeeper*, where neither the U.S. Army Corps of Engineers nor the court were able to quantify the significance of the Corps' error, the Tenth Circuit in *Diné Citizens* clearly adjudged and stated the merits and

45. *Id.* at 1024.
46. *Id.* at 1049.
47. Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1289 (11th Cir. 2015).
48. *Id.*
49. *Id.*
50. *Haaland*, 59 F.4th at 1048.
51. Dep't of Homeland Sec. [DHS] v. Regents of the Univ. of Cal., 591 U.S. 1, 3 (2020).
52. *Id.* at 4.
53. *Id*.
54. *See Haaland*, 59 F.4th at 1049.

deficiencies of BLM's methodologies in the EAs.[55] The inability to quantify the deficiency in the analysis led the *Black Warrior Riverkeeper* court to deem the record "incomplete," which is how it justified remanding rather than vacatur. In a dissenting opinion, District Court Judge Totenberg recognized that many D.C. Circuit cases where vacatur was not granted for environmental administrative challenges were "consistent with the statutory goals at issue" because balancing considerations arose when the agency's enforcement of environmental protections had to be weighed against conflicting policy or statutes; this is unlike the legislative context presented in *Diné Citizens*.[56] Given that the scientific record from the EAs in *Diné Citizens* was not found to be incomplete and vacating the APDs would not go against any statutes, the Tenth Circuit should have recognized that the facts of this case were not aligned with the Eleventh Circuit's logic in *Black Warrior Riverkeeper*.

The Tenth Circuit should have disregarded cases from its sister circuits and followed the Supreme Court's logic in *DHS*. Both *DHS* and *Diné Citizens v. Haaland* involved agencies violating the APA for failure to include relevant information in their memorandums, thereby inadequately justifying their decisions.[57] While DHS's relationship to DACA is quite different from BLM's assignment of APDs,[58] both courts were tasked with reviewing the process that the agency followed under the language of the APA and whether it was enough.[59] However, the Tenth Circuit found instead that *DHS* was a narrow holding that only addressed the "importance of following procedures," not the necessity for vacatur.[60]

Further, the Tenth Circuit should have read the Supreme Court's limited discussion of vacatur in *DHS* to mean that vacatur is the obvious remedy when an agency decision is found to be arbitrary or capricious. The Tenth Circuit came to the opposite conclusion, finding instead that the lack of discussion about vacatur in *DHS* meant that the Court was not precluding the Tenth Circuit from fashioning their own remedy.[61] Citizen Groups argued that the purpose of vacatur is to not only punish agencies for acting arbitrarily and capriciously, but also to remind agencies that they cannot treat the EAs as merely bureaucratic tasks.[62] Citizen Groups stated that vacatur is the only remedy that "serves

55. Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1289 (11th Cir. 2015); *see Haaland*, 59 F.4th at 1034–48.

56. *Black Warrior Riverkeeper*, 781 F.3d at 1296 n.6.

57. *Compare Haaland* (agency failed to articulate meaningful consideration of relevant environmental implications), *with* DHS v. Regents of the Univ. of Cal., 591 U.S. 1 (cabinet department failed to provide adequate lawful reasoning for nonenforcement)

58. *Compare DHS*, 591 U.S. at 21-22 (presenting an openly hostile attitude of DHS toward DACA), *with Haaland*, 59 F.4th at 1047-48 (presenting BLM as an errant administrator in its responsibilities under NEPA).

59. *Compare DHS*, 591 U.S. at 30-31, *with Haaland*, 59 F.4th at 1041–41.

60. *Haaland*, 59 F.4th at 1049.

61. *Id.*

62. Brief of Plaintiff-Appellant at 25, Diné Citizens v. Haaland, 59 F.4th 1016 (2021), No. 21-2116, 2021 WL 6048805, at *25.

NEPA's fundamental purpose," and a remand without vacatur would not provide adequate relief.[63] The court ignored these arguments and remanded the case to the district court to apply the *Allied-Signal* test.[64]

B. Implications of Remand

At the Tenth Circuit level, Citizen Groups faced a panel of judges who were receptive to nuances in scientific calculations and enjoined BLM from approving any further APDs until the EAs were fixed. However, by not prescribing vacatur, the Tenth Circuit sent the decision back to the same district court that found all of BLM's methodologies to be sufficient in the first place, making it possible that the district court will not vacate any APDs. This means that plaintiffs like Diné Citizens and the rest of Citizen Groups must keep suing to get the agency actions vacated, since vacatur is not a guaranteed remedy.

NEPA's lack of explicit guidance on what an EA should prioritize means that bringing a NEPA challenge is likely to be a litigious process. In fact, Diné Citizens is often the plaintiff in cases against BLM; in a separate 2019 case also titled *Diné Citizens v. Bernhardt*, the District Court of New Mexico "declined to stop the BLM from approving any drilling permits until the agency complied with the law," pushing Diné Citizens to partner with the Natural Resources Defense Council (NRDC) to appeal the decision to the Tenth Circuit and win.[65] The basis for agency decision-making comes from documents such as circulars, memorandums, and executive orders (EOs). However, these guidelines include language requiring agencies to consider the "adverse effects" of their actions on local communities from an environmental justice standpoint, "[t]he rule does not prohibit agencies from approving proposed actions with unmitigated adverse environmental effects."[66] Negligent execution of procedural duties is easy to get away with because the law does not provide a proactive inspection mechanism; this puts the onus on plaintiffs to challenge the agency's actions and increases the importance of heavy-handed remedies like vacatur.[67]

CONCLUSION

Diné Citizens v. Haaland is simply one of the latest in a long list of NEPA-related cases about the inadequacy of the environmental assessments that agencies are required to evaluate. Agencies are currently protected by both broad statutory discretion and courts' deference under the presumption that they are best positioned to decide whether to vacate their own decisions. It remains to be

63. *Id.* at *52.

64. *Haaland*, 59 F.4th at 1050.

65. *Diné Citizens Against Ruining Our Environment et al. v. U.S. Bureau of Land Management et al.*, NAT. RES. DEF. COUNCIL (Jan. 20, 2021), https://www.nrdc.org/court-battles/dine-citizens-against-ruining-our-environment-et-v-us-bureau-land-management-et (updated Feb. 1, 2023).

66. Hannah Perls, *Key Changes in CEQ's Phase 2 Regulations Implementing NEPA* (Aug. 8, 2024), https://eelp.law.harvard.edu/nepa-phase2-final/.

67. Zendejas, *supra* note 1, at 103.

seen how the overruling of *Chevron v. Natural Resources Defense Council* in 2024 will impact remedies under NEPA and whether vacatur as the default remedy for NEPA violations has been vacated for good.

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