



January 16, 2023

Submitted via email to BLM_CO_Thompson_Divide@blm.gov

Doug Vilsack
State Director
Bureau of Land Management
Colorado State Office
2850 Youngfield Street
Lakewood, Colorado 80215

Re: Thompson Divide Area Proposed Withdrawal, Docket Number LLCO923000-L1440000-ET0000COC-080815

Dear Director Vilsack:

Western Energy Alliance opposes the proposed withdrawal of 224,793.73 acres in the Thompson Divide area from oil and natural gas leasing for a 20-year term. We urge the Interior Secretary, through the BLM process, to instead recognize that a withdrawal is not necessary for reasons of history; the extremely protective manner in which BLM regulates oil and natural gas operations; the current status of the White River National Forest plan; and lack of authority for large-tract withdrawals.

Furthermore the White River Forest Plan finalized in 2016 does not provide the necessary consent to allow for drilling in the Thompson Divide Area. In other words, the USDA Forest Service (USFS), the federal surface owner, has withheld consent for oil and natural gas development for the life of the plan. Since BLM may not offer any federal minerals under USFS surface without the consent of USFS, what is the urgency or need for the withdrawal?

Western Energy Alliance represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Colorado and across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

The withdrawal goes far beyond what is necessary, "to protect agricultural, ranching, wildlife, air quality, recreational, ecological and scenic values resources", since BLM-managed development is heavily regulated to ensure the protection of these very same resource values. We remind BLM that the requirements of the Energy Policy Act of 2005 as well as the Energy Policy Conservation Act Amendments of 2000 require federal land management agencies to ensure that lease stipulations are applied consistently using the least restrictive stipulations necessary to protect other resource values. A withdrawal is certainly not the least restrictive means to protect other resource values.

In addition, BLM manages multiple-use public lands specifically so that multiple uses like agriculture and recreation coexist with oil and natural gas development. As you know, using data from BLM's

[oil and gas statistics page](#), oil and natural gas activities occupy a very small portion of public lands. Of the 700 million acres of mineral estate that BLM manages, only 24.9 million acres are leased. Using historic metrics of five acres per well, an overestimation given that modern development clusters multiple wells per well pad, that means the 88,887 producible wells that BLM currently manages create less than 444,500 acres of surface disturbance, equating to about 0.06% of the federal land and mineral estate. That is an excellent balance that enables minimal disturbance to other multiple uses like agriculture and recreation. Were USFS to again give its consent for oil and natural gas leasing and development in the area, the federal government would have the opportunity with the subsequent land use planning process to implement more stipulations on leases, but a withdrawal is an extreme option.

The coexistence of these multiple uses is reflected in the very history of the area. There has been oil and natural gas activity in the area since the late 1940s, including leasing, drilling, and production. There is an operating gas storage field, the Black Hills Wolf Creek Storage Field, that serves citizens of the Roaring Fork Valley with life-sustaining natural gas to heat their homes and cook their food. There are wells into which natural gas is injected in the summer and then withdrawn in the winter. There are roads that are used by natural gas delivery trucks during the summer recreation and growing seasons. The area is one in which industrial and agricultural activities coexist. The fact that scenic values have been preserved since the 1940s and the land is still considered pristine undermines the arguments of those who strive against balance and wish for absolutely no oil and natural gas activity.

Best Available Information

The Mineral Leasing Act, Federal Land Policy Management Act (FLPMA), and the Energy Policy Act of 2005 contain language that affirm that federal mineral resources are to be managed for sustained yield and the greatest benefit for the American taxpayer, as well as for the benefit of national energy independence and energy security. As BLM moves forward with the National Environmental Policy Act (NEPA) process related to this proposed withdrawal, it must accurately describe the federal mineral resources that would be affected by the proposed action, especially given the preponderance of evidence that suggests that the resources along with the associated production and royalty revenues are very significant. The White River National Forest plan on oil and natural gas leases completed in 2016 lacked consideration of the best available scientific information on the oil and natural gas potential in the Thompson Divide Area. We urge BLM not to repeat that mistake as it embarks on the withdrawal NEPA process.

Use of the best available information on oil and natural gas potential is necessary in order to assess the full impact on the West Slope economy. On June 8, 2016, the U.S. Geological Survey (USGS) issued the “Assessment of Continuous (Unconventional) Oil and Gas Resources in the Late Cretaceous Mancos Shale of the Piceance Basin, Uinta-Piceance Province, Colorado and Utah, 2016.”¹ USGS determined that the Mancos Shale holds an estimated 66 trillion cubic feet of technically recoverable shale gas, making it the second largest continuous shale gas resource,

¹ [Assessment of Continuous \(Unconventional\) Oil and Gas Resources in the Late Cretaceous Mancos Shale of the Piceance Basin, Uinta-Piceance Province, Colorado and Utah](#), Hawkins, S.J. et. al, 2016.

behind the Marcellus and ahead of the Barnett.² In addition, USGS estimates the Mancos contains 45 million barrels of natural gas liquids and 74 million barrels of recoverable oil.

The Secretary Lacks the Authority for Large-Tract Withdrawals

The Secretary, claiming authority under Section 204 of the Federal Land Management Policy Act (FLPMA), proposes to withdraw an area of 224,793.73 acres, yet the Secretary's FLPMA authority to withdraw federal land in amounts over 5,000 acres is limited by Congress. 43 U.S.C. §1714(c)(1). We call your attention to pages 12 – 14 of the letter by Welborn Sullivan Meck & Tooley, P.C. (WSMT) regarding "Enduring Resources IV, LLC comments on Bureau of Land Management, 'Proposed Chaco Area Withdrawal, Environmental Assessment, DOI-BLM-NMFO10-2022-0011,' (November 2022)," submitted as part of the referenced docket and attached here as Appendix A.

The WSMT letter outlines the legal issues surrounding withdrawals that exceed 5,000 acres and concludes that the Secretary lacks the authority to propose or make a large-tract withdrawal the size of the proposed Chaco Area. Although written for the concurrent proposed withdrawal of Chaco, the case law and legal arguments are exactly the same with respect to the proposed withdrawal in the Thompson Divide Area. We incorporate by reference WSMT's analysis regarding how a withdrawal the size of the Thompson Divide Area exceeds the Secretary's authority.

We urge BLM to provide a more nuanced, balanced approach to the proposed withdrawal as it conducts the NEPA analysis. We urge the Interior Secretary to desist with the withdrawal.

Sincerely,



Kathleen M. Sgamma
President

² "Natural Gas: USGS finds huge reserves in Colo.'s Mancos Shale," *E&E News, EnergyWire*, Nathaniel Gronewold, June 9, 2016.

Appendix A

December 9, 2022

VIA BLM E-PLANNING PORTAL
(<https://eplanning.blm.gov/eplanning-ui/project/2016892/510>)

Sarah Scott
Bureau of Land Management
Farmington Field Office
6251 College Blvd., Suite A
Farmington, New Mexico 87402

Re: **Enduring Resources IV, LLC** comments on Bureau of Land Management, “Proposed Chaco Area Withdrawal, Environmental Assessment, DOI-BLM-NM-FO10-2022-0011,” (November 2022)

Dear Ms. Scott:

These comments on the “Proposed Chaco Area Withdrawal, Environmental Assessment” (November 2022) (“Withdrawal EA”) are filed on behalf of Enduring Resources IV, LLC (“Enduring”). On May 6, 2022, Enduring filed comments on the “Notice of Proposed Withdrawal,” 87 *Federal Register* 785 (Jan. 6, 2022). (“Notice comments”). Attached.¹ On May 27, 2020, Enduring filed comments on the Bureau of Land Management (“BLM”), “Mancos-Gallup Resource Management Plan Amendment (“RMPA”) Draft Environmental Impact Statement (“RMPA DEIS”). Enduring incorporates by reference herein its comments on the RMPA DEIS.

The heart of today’s comments and the comments previously filed is the same. The proposed action of the BLM and the Secretary of the Interior to withdraw federal oil and gas from a ten-mile area around the Chaco Culture National Historical Park (“CCNHP”) will harm the Navajo allottees by preventing the development of a *significant* amount of their fee oil and gas minerals. The Secretary should adopt the Navajo Nation proposed five-mile withdrawal as the alternative that will better balance the interests of the Navajo allottees and the interest to extend the protections for the CCHNP.

Summary

The Secretary proposes to withdraw 336,424 acres of federal minerals in a larger area of over 958,800 acres of mixed ownership including allottee fee lands. For the last three years, Secretary

¹ Enduring references its May 2022 Notice comments, exhibits and figures throughout this comment letter and has included that earlier comment letter as an attachment to avoid duplication of exhibits and figures. Enduring adds three new exhibits today, Exhibits A-C.

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Haaland, as both a congressional representative and a Cabinet officer,² has supported a ten-mile withdrawal of federal mineral and asserted the “federal minerals” only withdrawal would not harm the allottees’ mineral interests. *See, e.g.*, BLM Fact Sheet, “Protecting the Legacy and Culture of the Chaco Canyon Landscape” (November 2021) (“The segregation and proposed withdrawal would not affect existing rights of allottees or lease holders.”).

Now, in the Withdrawal EA, the BLM at last discloses that the withdrawal will indeed harm the allottees’ mineral interests, but endeavors to downplay that impact with conclusions not supported by data. The BLM claims the proposed withdrawal would prevent the development of only 47 wells (4,134,746 barrels of oil and 75,188,327 mcf natural gas). Withdrawal EA Table 2-1; BLM, Mineral Potential Report at p. 5.

Rather than BLM’s “low-ball” estimate of the potential of this area, Enduring demonstrates that the proposed withdrawal **will prevent the development of 233 horizontal wells or over 86,000,000 barrels of oil and 25,850,000 mcf of natural gas**. Based on these estimated production numbers and a royalty rate of 16.66% the combined royalties forgone would be **\$51,122,997 per year for a total of \$1,022,459,948 for the 20-year withdrawal**. The **forgone royalties for the Navajo allottees tracts** would be **\$194,267,390** over the **20-year** withdrawal. Thus, the BLM’s predicted impacts in the Withdrawal EA on revenue, jobs and environmental justice communities, primarily the Navajo allottees, are much greater than disclosed in the Withdrawal EA. This flawed analysis is the crux of the Withdrawal EA and unless corrected will ill-inform the Secretary’s withdrawal decision.

The U.S. Department of the Interior bears a legal responsibility to act as a fiduciary to Indian Tribes and allottees; a role the BLM understands requires the agency to “maximize economic gain for tribes/allottees. . . .” Yet, here, the Secretary, rather than maximizing economic gain for the allottees, proposes to foreclose their ability to develop their minerals. The Secretary is required to respect recognized Tribes as sovereigns and to consult meaningfully on actions that implicate that sovereignty. Without a credible reason, the Secretary and BLM do not analyze the Navajo Nation 2019 resolution³ in support of a five-mile withdrawal as an Alternative. Nor does the BLM

² [Statement of Representative Haaland](#) introducing the Chaco Cultural Heritage Act, S.1079 (H.R. 2181), “It is important that we protect Chaco Canyon, both because it is a sacred place that should be valued the same way we value other sacred places, but also because public lands must be protected. However, time and again this special place has been put up to be exploited by big oil companies. . . .By keeping Chaco from being destroyed by the fossil fuel industry, future generations will have access to this special place,” (April 9, 2019). *See also* [Congressional Record, Vol. 165, Issue 172](#), (October 30, 2019) Statement of Representative Haaland, in support of HR 2181 and Susan Montoya Bryan, *Albuquerque Journal*, “[Native American leaders say Chaco prayers being answered](#),” (November 25, 2021) “Haaland, who is from Laguna Pueblo and is the first Native American to lead a Cabinet agency, joined tribal leaders at Chaco on Monday to celebrate the beginning of a process that aims to withdraw federal land holdings within 10 miles of the park boundary, making the area off-limits to oil and gas leasing for 20 years . . . Navajo leaders support preserving parts of the area but have said individual allottees stand to lose an important income source of the land is made off-limits to development. . . Noticeably absent from Monday’s celebration were the highest elected leaders of the [Navajo Nation] tribe’s legislative and executive branches.”

³ The Nabiki'yati' Committee of the Navajo Nation Council officially adopted Resolution No. NABIJA 05-20 on November 25, 2019, expressing their support of a five-mile buffer and rejection of a ten-mile buffer; *see also* Notice comments (May 6, 2022) at page 5 and exhibit 9. The Navajo Nation sent a copy of the resolution to the Senate Energy Committee and to the Department. *Id.* exhibits 10 and 11.

consider other protective measures short of a ten-mile withdrawal. Finally, Enduring will argue that under the Constitution, the Secretary lacks authority to make this, or any other, large-tract, withdrawal of public lands and minerals.

Enduring Comments on Withdrawal EA

Withdrawal EA “Purpose and Need” and Alternatives are Flawed. The National Environmental Policy Act (“NEPA”) regulations direct that an agency, when preparing an environmental assessment, “shall include brief discussions of the need for the proposal, of alternatives as required by [NEPA] section 102(2)(E), of the environmental impacts of the proposed action and alternatives . . .” 40 CFR §1508.09. NEPA Section 102.2(E) directs the agency to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which *involves unresolved conflicts concerning alternative uses of available resources.*” 42 USC § 4332 (2)(E). Emphasis added.

The impact of the withdrawal on the allottee mineral-owners and the Navajo Nation five-mile withdrawal resolution represent a significant “unresolved conflict” concerning alternative uses of the available resources being considered for withdrawal. BLM has failed to meet its NEPA requirements in the Withdrawal EA.

“Purpose and Need” Statement. In the Withdrawal EA, the BLM describes the “purpose of the proposed withdrawal is to protect the public lands and the greater connected landscape containing rich Puebloan, Tribal Nations, and cultural legacies . . .from the industrial impacts associated with oil and gas development activities . . . subject to valid existing rights.” BLM states, “[t]he need for action arises from the increasing threats that exploration and development pose to these sensitive cultural resources.” BLM adds these lands are “deeply sacred and irreplaceable landscapes for the pueblos and Tribal Nations . . . [t]heir ancestral history is linked to the CCNHP and its surrounding landscape, and their past and present lifeways honor these ancestral traditions and customs.” BLM then analyzes the minimum of two alternatives: the “No Action” and the “Proposed Action.”

In the “Purpose and Need” statement, the BLM does not include an acknowledgment or analysis of the “unresolved conflict concerning alternative uses” of the allottee minerals that will be isolated by the federal mineral withdrawal. There is no mention of the allottees and their checkerboard mineral interests, the 2019 Navajo Nation resolution in support of a five-mile buffer and the need to resolve this alternative use conflict.

The BLM’s failure to identify and discuss the “unresolved conflict” is difficult to understand. Commenters on the Withdrawal EA expressed a concern on “how [] the BLM [will] ensure the EA’s purpose and need are better aligned with overall tribal interests and mineral rights.” Withdrawal EA, Appendix B. ¶ 3.1.5. Moreover, this resource conflict has been known by the Secretary and the BLM since at least 2019 when Congress was considering similar withdrawal legislation (S 2907 and HR 2181, 115th Congress) and the Navajo Nation allottees expressed opposition to *any* federal withdrawal in this area. See Notice comments at pp. 5-6 and exhibits 2-11.

Nor does BLM's "Purpose and Need" adequately consider the numerous regulatory protections already in use and available to BLM to protect the "public lands and greater connected landscape" from oil and gas development and explain why the proposed large-scale withdrawal of federal minerals is the better option. The "Purpose and Need" statement simply asserts that there are "industrial impacts associated with oil and gas development activities" and "increasing threats that exploration and development pose to these sensitive cultural resources." Withdrawal EA at pp. 1-6.

Yet, in the Withdrawal EA Background, Section 1.1, the BLM notes, "Much of the Chaco Canyon area is protected as CCHNP. The park and six other nearby sites were designated as a [] UNESCO World Heritage Site ("WHS") in 1987. . . ." The BLM describes 21 outliers on "'BLM-administered surface' of which 19 have 'additional protections' as in either an Area of Critical Environmental Concern ("ACEC"), a Chaco Culture Archeological Protection Site ("CCAPS") or a UNESCO WHS. . . . Of these 21, nine would be incorporated into the proposed withdrawal boundaries." Withdrawal EA at p. 1-1 and Table 1-1. The BLM also describes "various 'roads' that often emanate from Great House" and states, "[o]n BLM-administered lands, road segments often fall within, and receive protections from the ACEC, CCAPS, or WHS associated with outliers." ACECs specific to Chacoan roads protect three "roads" and are in the proposed withdrawal area. Withdrawal EA at p. 1-2. In addition, there are two wilderness areas either wholly or partially within the proposed withdrawal area. Map 1-1, Table 1-4. BLM does not discuss how these existing measures and new, similar measures could protect the cultural resources in the proposed withdrawal area, allow the allottees to develop their minerals and, thus, resolve this resource conflict.⁴

Alternatives. Following these omissions in the "Purpose and Need" statement, BLM fails to examine a reasonable range of alternatives, despite the fact that commenters specifically requested that BLM consider "a five-mile buffer alternative" and "an alternative that balances the socioeconomic interest of impacted stakeholders with the need to preserve the landscape." Withdrawal EA, Appendix B. ¶ 3.1.13. BLM largely ignores the fact that the Navajo Nation proposed an alternative five-mile buffer that would resolve the resource conflict by better balancing the mineral interests of the allottees with the desire for enhanced protection of the CCHNP.

BLM responds that the alternative to withdraw "a subset" of the withdrawal area "was not analyzed in detail because a partial withdrawal is contained within the proposed action" and the Secretary "has the authority to approve or deny the proposed action in part or in whole based on this analysis." Withdrawal EA at ¶2.3.3, p. 2-8. This "stating the obvious" reply by BLM misses the point. BLM's choice not to analyze in detail the Navajo Nation five-mile proposal deprives the Secretary of the information she needs to resolve the "unresolved conflict" in the withdrawal area. Instead, this information is either not included or buried so deep in the EA that the Secretary cannot

⁴ In the Mancos-Gallup RMPA-DEIS in the Chapter 2 analysis of Alternatives, BLM Table 2-2, pp. 2-29 to 2-45 BLM describes in detail the many other management tools BLM can use to balance protection of cultural resources with those of the allottee mineral owners in a buffer of less than ten miles.

readily compare the impacts of the ten-mile buffer to a five-mile or other subset buffer. By this omission, BLM “stacks the deck” in favor of the proposed alternative.

BLM needs to address why providing only a “no action” and a “proposed action” alternative selection without a detailed analysis of the Navajo Nation alternative is “reasonable” (42 USC § 4332(2)(E)), meets the FLPMA large-tract withdrawal requirements (43 U.S.C. §1714(c)(2)) and complies with the Department’s Trust responsibilities to the sovereign Navajo Nation.

What makes BLM’s failure to analyze in detail a five-mile alternative so egregious is that BLM had done a very similar detailed analysis as recently as 2020. In looking at the same area in the Mancos-Gallup RMPA-DEIS, BLM recognized that there are several alternatives for a CCHNP buffer of less than 10 miles that “balance[] community needs and development.” RMPA DEIS Chapter 2.

BLM examined in detail *six* subsets of the ten-mile buffer in the Mancos-Gallup RMPA-DEIS, Chapter 2, Alternative C, and selected alternative C (“balance community needs and development”) as their preferred alternative. These subsets of Alternative C balance allottee resource development with enhanced protections of CCHNP. In Chapter 2, Alternative C, BLM explains,

This alternative (and its six sub-alternatives) focuses on a strategy that balances community needs and development, while enhancing land health. It places a particular emphasis on the Tribal and local perspective of the landscape and facilitates resource development, while minimizing impacts on the traditional, historical, socioeconomic, and cultural lifeways of the planning area. Goals and objectives focus on socioeconomics, human health and environment, cultural uses, communities, recreation opportunities, and tourism. . . . The sub-alternatives for BLM Alternative C apply only to oil and gas leasing management around the CCNHP boundary, specifically leasing closures or NSO stipulations, as follows
. . . .

Mancos-Gallup RMPA-DEIS at pp. 2-6-7.⁵

BLM’s discussion of the Mancos-Gallup RMPA Alternative C buffers provides a good illustration of the value of such a detailed analysis to the Secretary as she considers this withdrawal. For example, the BLM discussed the “rationale for CCNHP restriction zones,” and found that “[p]art of the integrity of these historic properties is related to association, setting and feeling; therefore, potential adverse effects can be related to the visual and auditory environment.” RMPA DEIS, App H, at page H-1. The BLM found the “natural soundscapes encountered at CCNHP “exceptional.” Nonetheless, BLM determined based on a National Park Service (“NPS”), “Acoustic Monitoring Report,” that the sound of drilling would attenuate to the minimum ambient

⁵ The difference in the impact to mineral interests, including those of allottees, from various-sized buffer areas surrounding the CCHNP is well summarized in the Mancos-Gallup RMPA-DEIS Table 2-1, pp. 2-9 to 2-10 and in Table 2-2, pp. 2-19 to 2-59, BLM summarizes its detailed DEIS analysis of the resource impacts of the several alternatives.

sound level in the Park at 1.75 miles away from any well location. *Id.* at p. H-2. The NPS also found that “lighting from drilling rigs without shielding is visible from 8 miles away . . . while mitigation for lighting can reduce this distance to five miles. *Id.* BLM also referenced *Haymes* (2018) for the proposition that “under normal circumstances, oil and gas development does not result in permanent impacts on the visual or auditory environment for historic properties.” *Id.* H-2.

Moreover, by failing to consider the Navajo Nation five-mile proposal as an alternative, BLM hinders the Secretary in the fulfillment of her trust responsibilities, consultation duties and government-to-government relationship with the Navajo Nation. As recently as November 30, 2022 at the White House Tribal Nations Summit, the President underscored his administration’s commitment to Native Tribes, “I made a commitment that my administration would prioritize and respect nation-to-nation relationships. And I’m going to make sure that happens.” The failure of BLM to analyze in detail the Navajo Nation proposal as an alternative is not consistent with this presidential commitment.

The Navajo Nation is the largest, federally recognized tribal nation. The proposed withdrawal area encompasses Navajo Trust land, includes four Navajo Nation Chapter Houses and is immediately adjacent to five other Chapter Houses. Significant allottee fee lands are within the proposed withdrawal. EA Withdrawal Map 1-1. The Navajo Nation has provided a reasonable compromise that would protect allottee mineral interests and the desire to add to the Chaco Area protections.

The Biden administration describes a “respect for Tribal sovereignty and self-governance. . . . [When] federal officials speak with and listen to Tribal leaders in formulating federal policy that affects Tribal Nations.” White House, “Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships” (January 26, 2021).⁶ The withdrawal proposal is a federal policy that, in particular, affects the Navajo Nation and the allottees, yet the Secretary and the BLM are not “speaking” or “listening” to the Navajo Nation when they fail to analyze in detail the five-mile withdrawal as an alternative. This does not respect Navajo Nation “sovereignty and self-government” and will lead to flawed decision-making by the Secretary in this withdrawal action.

The Impacts Analysis of Resource Issues 2, 3 and 4 and Cumulative Impacts Grossly Minimizes Impacts.

BLM selected four resource issues of which three⁷ are relevant to the proposed withdrawal of federal fluid minerals. These three resource issues are interrelated and share a framework in the Mineral Potential Report. Because BLM’s “low potential” estimate in the Mineral Potential Report is so far off the mark, the BLM’s analysis of impacts is significantly flawed.

⁶ See also U.S. Department of the Interior, “A Detailed Plan for Improving Interior’s Implementation of EO 13175,” (April 2021).

⁷ Resource Issue 2 – the availability of fluid minerals in the withdrawal area; Issue 3 – the effect of the withdrawal on mineral revenue, local employment and “ecosystem services;” and Issue 4 – would the proposed withdrawal from leasing disproportionately affect EJ, such as Navajo Allottees. Table 2-1.

Enduring Resources has been working in the San Juan Basin since 2017 with a focus in the Mancos-Gallup formations and holds one of the largest leaseholds in the area. The Company holds significant federal leases (117,959 net acres representing 59% of Enduring's leasehold) and allottee leases (47,926 net acres representing 24% of Enduring's leasehold). Some of these existing leases are in or immediately adjacent to the withdrawal area. Over 91% of the Enduring's allottee leasehold is developed.

Enduring Resources is the highest-producing company operating in this area and has several producing and proposed units partially in the withdrawal area. Development of this leasehold requires large federal units, horizontal laterals of 1-2 miles, complex infrastructure and wells that average \$6 -10 million per well. In 2018, Enduring invested \$25 million to construct a water handling system to manage and recycle the water used to complete its wells. In order to make investments of this magnitude it is essential to have a complete understanding of the target reservoir.

Based on our experience in this area, review of the geophysical and other data we rely on to make investments in the development of a lease, BLM has grossly underestimated the fluid mineral resource potential in the proposed withdrawal area. Contrary to BLM's argument that the potential is low, Enduring knows that the developable fluid mineral resource north of CCHNP is substantial. As explained in detail below, rather than 47 wells,⁸ over 233 wells will be forgone along with significant oil and gas and mineral revenues to the federal government and allottees.

Resource Issue 2 Impacts: Fluid Mineral Resource Potential. BLM bases its analysis of fluid mineral potential on the 2018 Mancos-Gallup RMPA Reasonably Foreseeable Development Scenario ("2018 RFDS") and the 2022 Mineral Potential Report ("Report"). In the Report, BLM describes the withdrawal area as located in a high-producing oil and gas basin. "The withdrawal area lies within the San Juan Basin, a prolific oil and natural gas basin that has been developed over the last 100 years." Report (at pp. 8, 33-4). "The proposed withdrawal area overlaps nearly all of the potentially productive strata within the Central Basin and Chaco Slope portions of the San Juan Basin." Report at pp. 37 and 38 (the 2018 RFD "indicates that there is occurrence potential for oil and gas throughout the withdrawal area."). BLM states there are 259,852.22 acres of unleased Federal oil and gas in the withdrawal area. There are 80 valid federal leases (94,523.74 acres), all but two "held by production," 25 state leases (7,680.47 acres) and 104 Navajo Allotted Leases (16,101.33 acres). Report, at p. 41. There are over 1,000 wells in the proposed withdrawal area of which 333 wells are active. *Id.*

BLM and Enduring agree that "[t]he most productive oil-bearing formation in the area, outside of the Dakota sandstone, is the Gallup and associated Gallup zone of the Mancos northeast of the true Gallup truncation line." Report at p. 42. BLM and Enduring agree that the Fruitland outcrop corresponds to the edge of the basin and the extent of the productive Mancos-Gallup Formation. *Id.*

⁸ Mineral Potential Report at p. 5; *see also* Withdrawal EA Resource Issue 2 at p. 2-9.

Where BLM and Enduring Resources differ is in BLM's statement that the "[f]uture for oil and gas wells on Federal mineral estate within the withdrawal area is limited" Report at 42, *see also* pp. 38, 43-45. Significantly, this BLM conclusion of low potential contradicts the findings in the 2018 RFDS that suggest oil and gas potential is very high in over 95% of the withdrawal area and that only in the southernmost tip of the withdrawal area does the RFDS suggest oil and gas potential is low.⁹ In reaching its new conclusion of "low potential," BLM makes three errors. First, BLM does not accurately consider the oil saturation and the porosity of the reservoir rocks (SoPhiH¹⁰ calculation) to estimate correctly the fluid minerals potential in this area. Second, BLM analyzes productivity based on a lease-by-lease development basis rather than the industry standard in the basin of large unit development. Third, BLM overestimates the influence of high water cuts and its potential on infill drilling.

SoPhiH Analysis. In understanding the potential of a reservoir for development, Enduring relies on a SoPhiH measurement. This is because SoPhiH is the primary measurement of reservoir quality needed to calculate an oil-in-place volume. In addition to its development of the Mancos-Gallup, Enduring also has successfully developed and produced in the Mancos silt interval. We know that in areas where the Mancos Silt and Gallup is mapped as having a SoPhiH value above 1, wells drilled and completed in these intervals produce significant volumes of oil.

North of the CCHNP, where Enduring has mapped a SoPhiH>1, the oil-in-place is calculated as being greater than 4 million barrels of oil per section. Exhibit A (map illustrating areas with SoPhiH>1 in the withdrawal area). Moreover, based on Enduring's experience in the Kimbeto Wash and Greater Lybrook Units, both partially within the withdrawal area (Exhibit A), a reasonable recovery factor for Mancos Silt/Gallup horizontal wells is 10% of the oil-in-place. Therefore, assuming current 1200' well spacing (four wells per section), four horizontal wells with a lateral length of 1-mile drilled in a section with greater than 4 million barrels of oil per section can be expected to produce >100,000 barrels of oil per well. Again, based on actual results in the Kimbeto Wash and Greater Lybrook Units a conservative gas to oil ratio in this area is 300bcf/bbl.

In Enduring's experience, reserves below SoPhiH>1 would be doubtful to be drilled. Based only on the development potential on unleased acreage within the proposed withdrawal area with a SoPhiH>1, Enduring estimates that 233 total horizontal wells including 39 Mancos Silt wells and 194 Gallup wells would be forgone as a result of the 10-mile withdrawal. Based on reserve reports from adjacent and nearby wells in the Kimbeto Wash and Greater Lybrook Units, Enduring can conservatively estimate that a 50 well/year industry (several companies) drilling program to develop the 233 wells (five wells per pad) could be expected to produce over 86,000,000 barrels of oil and 25,850,000 mcf of natural gas. Enduring's calculations that support these conclusions are contained in Exhibit B (spreadsheet).¹¹

⁹ *See* Report, Figure 10, mapping the oil potential in the withdrawal area based on the 2018 RFDS.

¹⁰ SoPhiH is the Oil Saturation x Average Porosity of the oil saturated reservoir rock x thickness of saturated reservoir rock.

¹¹ The Exhibit B spreadsheet contains four tabs. **Tab 1**, costs calculated using figures from the Withdrawal EA Table 4.6 and App. C, Economic Modeling, Table C-3 (modified to reflect a more typical 5-well pad development); **Tab 2**, estimated production summary by year; **Tab 3**, estimated production by well; and **Tab 4**, oil and natural gas pricing from U.S. Department of Energy, EIA. *See* Withdrawal EA at p. 4-10, note 3.

Development plan error. BLM’s second error in using a lease-by-lease development scenario, rather than a large unit development scenario to calculate developable reserves. This has the effect of raising costs and lowering the amount of recovery. The estimates described by Enduring in Exhibit B are based on current practice in this part of the San Juan basin to use large units combining federal, state and allottee acreages to economically and efficiently develop the wells using long horizontal wells. A one and a half mile horizontal well costs approximately \$6.4 million. Providing the necessary access roads, pipelines, water handling facilities and power lines for this undeveloped withdrawal area¹² would add several million dollars to that cost. In order to justify the investment required to construct multi-well pads, surface facilities, water recycling facilities and pipelines, operators must pool allottee leases with adjacent federal and state leases in large federal units managed by the BLM. Yet, in the Report BLM uses an unrealistic lease-by-lease development scenario that ignores the realities of actual development practices in the withdrawal area and drives up the costs to support its new, “low potential” assessment of the withdrawal area.

BLM agrees that development of the Mancos-Gallup requires the use of horizontal drilling. “Since 2012, applications for permit to drill processed by the Farmington Field Office have been almost exclusively horizontal wells targeting the Gallup zone of the Mancos” Report, at p. 35-36, 41-42. BLM also recognizes that development in this area “may involve drilling horizontal wells over a mile in length which may necessitate drilling through several leaseholds in the “checkerboard” land ownership area.” BLM Withdrawal Petition (Nov. 2021) at p. 6. Without federal leases and the ability to use horizontal drilling in contiguous tracts in a combined federal unit development of the resource will not occur.¹³ See, e.g., Enduring May 2022 Comments, Figure B (illustrating horizontal well development).

Another example is a proposed plan of development for an Enduring unit, the Lone Mesa Mancos Unit, that is located partially within the withdrawal area. See Exhibit A map for location of the Lone Mesa Mancos Unit. This proposed plan of development (see Exhibit C) illustrates a realistic development scenario, where Enduring has proposed a communitization agreement consisting of all allottee leases in order to create a single tract for purposes of a large federal unit, that maximizes the area to be developed through long laterals and related infrastructure.

High water cut error. BLM’s third error is to extrapolate a high water cut from one well to the entire northern part of the withdrawal area in order to again increase costs and lower development potential in an area BLM had once classified as medium to high development potential. See Report Figure 10, 2018 RFDS.

¹² “The southern portion of the planning area, near Lybrook and Cuba, contains remote areas that lack infrastructure, such as water, oil, and gas pipelines; power lines; and resource, local, and collector roads. These facilities are necessary to develop the Mancos/Gallup Formations in the area. . . . Checkerboard land ownership in the area of the Mancos/Gallup Formations, particularly in individual Indian allotment lands, is creating further difficulties for adding infrastructure and facilitating development. This is because it is more difficult to permit a road or pipeline that crosses both federal and individual Indian allotment land than it is to permit one that crosses only BLM-managed land. Permission for the road or pipeline must be granted by each party whose land would be crossed, and both BIA and BLM permits must be secured.” Mancos-Gallup RMPA DEIS Section 3.5.2, p. 3-169.

¹³ See also Notice comment at pp. 3-4. “Vertical drilling of the Allottee lease parcels is not a viable option.” Contrast Notice comment Figure C and Figure D.

BLM argues that all Mancos wells north of the CCHNP, to Nageezi and Counselor, should now be viewed as low potential due to “an increase in water production from wells and a decrease in oil and natural gas production. . . .Wells near the withdrawal boundary yield about 80% water in the production stream, hindering economic justification for infill drilling.” Report, at p. 43. BLM explains its change in resource potential from the previously identified medium potential to low potential as “due to the high water cut in production.” *Id.*

To Enduring’s knowledge, there is only one well in the area north of CCHNP with a water cut in the 80% range, the Enduring West Lybrook Unit 767H. This well is an anomaly and is offset by tens of adjacent wells with much lower water cuts. BLM’s decision to write off the entire withdrawal area north of CCHNP based on one data point from an anomalous well is arbitrary. Moreover, a high water cut well can be economically developed with water disposal systems that are commonly in use in the San Juan and Permian basins in New Mexico.

Resource Issue 3: revenue impacts analysis. Lost royalty revenues are significantly greater than what BLM estimates. Based on Enduring’s estimated production numbers and a royalty rate of 16.6% (for BLM and allottee leases) the combined royalties forgone are estimated at \$1,022,459,948 for the 20-year withdrawal period or an average yearly amount of \$ 51,122,997. *See Exhibit B, Tabs 2 and 3.*

Looking at the allottees alone, Enduring believes approximately 56,320 acres, outside of currently existing Mancos/Gallup units, can be developed in the proposed withdrawal area. Of that, 10,720 acres or 19% of those acres are Navajo allottee tracts and the remaining 45,600 acres (81%) are Federal/other. Thus, the total lost royalty for allottees would be \$194,267,390. *See Exhibit B, Tab 2.* This amount of royalty spread over two decades would make a profound difference to the lives of the allottees and, in particular, to their elders who live at or below the poverty line. *See, e.g., Withdrawal EA at p. 4-19 (“Many Navajo Allottees depend economically on the development of minerals within the area.”); Notice comments at p. 2.*

Although Enduring has not estimated how this increased development would affect jobs and other non-royalty income, it makes sense that development at the level projected by Enduring would also increase the number of jobs and related revenue that would be forgone beyond the amounts predicted by BLM.

Resource Issue 4: environmental justice impacts. Enduring believes that the impacts of the withdrawal will fall heavily on the allottees and that the environmental justice (“EJ”) “disproportionate effect” metric is an inappropriate measure to use for Navajo allottees to whom the Secretary bears an enhanced fiduciary responsibility.

BLM claims that because the proposed withdrawal is of federal minerals only, “the impacts of the proposed withdrawal are therefore necessarily indirect with respect to Indian Allottees.” Withdrawal EA at p. 4-19. However, as BLM grudgingly recognizes, without the federal minerals, no large units with the related infrastructure and economies of scale will be formed. Withdrawal EA at p. 4-19 (“individual allotments may not be developed as efficiently . . . withdrawing the federal mineral estate may affect development of Navajo allotted lands.”). BLM concludes,

“[o]verall, the proposed withdrawal’s impacts on EJ communities . . . would not be disproportionate compared with the effects of the proposed withdrawal on non-tribal lands. Moreover, the beneficial effects of improved air quality, noise and cultural resources protection would offset impacts to some degree through enhancements to the quality of life and public health.” Withdrawal EA at 4-22.

BLM’s EJ impacts analysis is infected by their inaccurate mineral potential analysis in Resource Issue 2. As demonstrated by Enduring’s calculations, the area north of CCHNP and within the five-mile withdrawal area proposed by the Navajo Nation and allottees, is a high potential area. As shown in Enduring’s royalty calculations for Resource issue 3, the ten-mile withdrawal will cost the allottees close to \$200 million in lost revenue over 20 years. There is a disproportionate impact on these allottees, because, as Enduring has described in both its Notice comments and here, without federal leases and the ability to form large federal units to support long lateral development, the resources owned by the allottees cannot and will not be developed. The allottees have no options without the federal leases.

Moreover, BLM does not explain how this “disproportionate impact” EJ standard comports with the long-established fiduciary responsibilities owed by the Secretary to allottees. For that reason, BLM’s EJ impacts analysis is inadequate.

Allottees are owed more consideration than what BLM provides in its EJ analysis. Native Americans are not just any minority community – under well-established law, Indian Tribes are both sovereign nations and dependents of the Federal government. As early as 1831, the U.S. Supreme Court held: “The trust responsibility consists of the highest moral obligations that the United States must meet to ensure protection of tribal and individual Indian lands, assets, resources,¹⁴ and treaty and similarly recognized rights.” *Cited*, U.S. Department of the Interior, Secretarial Order No. 3335, “Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries,” (2014) (“Secretarial Order”) at p. 1.

The Secretarial Order includes seven “guiding principles” two of which are particularly relevant to Interior’s role in the Withdrawal.

Principle 1: “Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests;” and

Principle 2: “Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.”¹⁵

¹⁴ The U.S. Department of the Interior, Departmental Manual (“DM”), includes allottee mineral interests as Indian trust assets. 303 DM 2.5.

¹⁵ Restricted land, or restricted fee land, is a land ownership status in which an individual or Tribe holds title, but there are restrictions on use and/or disposition of the land. This is the status of allotment lands—they are held in fee by Allottees but may not be sold.

The Bureau of Indian Affairs (“BIA”)¹⁶ and BLM¹⁷ policies and regulations reflect the commitments of the Secretarial Order. “The general goal is to maximize economic gain for tribes/or allottees. . . BLM employees should be aware that revenues from minerals might be the only income for an individual Indian beneficiary.” H-1780. In sum, a fiduciary acts in the interests of others not their own interest.

The Navajo Nation and the allottees have offered a reasonable compromise in proposing that the Secretary select a five-mile withdrawal area rather than the proposed ten-mile withdrawal proposal. The Navajo Nation proposal is based on the geology of the withdrawal area, where oil and gas development any closer than six miles from the Park boundary is highly unlikely, if not impossible. *See supra* discussion of Resource Issue 2. The proposed five-mile withdrawal area would provide enhanced protection to the Park and, most importantly, allow the Secretary to implement the commitments made in the Secretarial Order to “[r]espect tribal sovereignty and self-determination . . . to make important decisions about their own best interests,” and to “protect” allottee mineral interests. Secretarial Order, Principles 1 and 2. These are good principles, recently reinforced by President Biden at the 2022 Tribal Nations Summit, but to have real meaning and impact for the Navajo Nation and allottees they must be applied by the Secretary in the withdrawal decision.

Withdrawal EA Cumulative Impacts Analysis. BLM’s cumulative impacts analysis is flawed. BLM states that the withdrawal would restrict approximately 338,690 acres from development of fluid minerals. “No other actions that would add to the total area withdrawn or restricted from mineral development of mineral resources in this area of New Mexico are reasonably foreseeable at this time.” Withdrawal EA at p. 4-23. Enduring would point out that for the technical (large combined units with long laterals) and financial (efficiencies of scale) reasons described above in the comments on Resource Issue 2, the withdrawal of the federal lands will have the predictable impact of prohibiting the development of the entire 958,824 acres of the proposed withdrawal area.

The Secretary Lacks the Authority for Large-tract Withdrawals including the Proposed Chaco Area Withdrawal.

The Secretary, claiming authority under Section 204 of the Federal Land Management Policy Act (“FLPMA”), proposes to withdraw federal minerals from an area of mixed ownership encompassing 965, 670 acres of which 336, 424 acres are federal minerals. 43 U.S.C. §1714(c). The Secretary’s FLPMA authority to withdraw federal land in amounts over 5,000 acres is limited by Congress. 43 U.S.C. §1714(c)(1).

Congress retained a legislative veto over any such FLPMA large-tract withdrawal. *Id.* The U.S. Supreme Court determined that legislative vetoes are unconstitutional. *INS v. Chada*, 462 U.S. 919 (1983). Since FLPMA’s legislative veto provision is integral to the Secretary’s limited large-tract

¹⁶ BIA regulations at 25 CFR Parts 211, 212 and 225.

¹⁷ “This puts BLM in the role of a fiduciary, and the BLM has the responsibilities of a fiduciary in managing trust assets and making decisions that may impact trust assets.” BLM Handbook 1780, “Improving and Sustaining BLM-Tribal Relations.” (“H-1780”).

withdrawal authority, the provision’s unconstitutionality under *Chada*, makes the entire large tract withdrawal provision invalid. A withdrawal the size of the Chaco Area is left to Congress.¹⁸

Under Article IV, § 3, cl.2 of the Constitution, the “power over the public land . . . entrusted to Congress is without limitations.” *Kleppe v. New Mexico*, 426 U.S. 529, 539-40 (1976). In 1976, in FLPMA, Congress reasserted its constitutional authority over withdrawals. FLPMA asserts “the policy of the United States that . . . the Congress exercise its constitutional authority to withdraw . . . Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action.” 43 U.S.C. § 1701(a)(4).¹⁹

FLPMA section 204 delimits the scope of the Secretary’s withdrawal authority: the “Secretary is authorized to make . . . withdrawals but *only* in accordance with the provisions and limitations of this section.” This includes limiting her delegation authority to make withdrawal decisions. 43 U.S.C. §1714(a) (emphasis added). Section 204 (e) provides the Secretary with authority to make “emergency” withdrawals under certain circumstances, effective for no more than three years. 43 U.S.C. § 1714(e). Section 204(d) provides general authority for a “withdrawal aggregating less than five thousand acres . . . by the Secretary on his own motion” and without legislative oversight. 43 U.S.C. § 1714(d).

In contrast, for withdrawals of over 5,000 acres, like the proposed Chaco Area withdrawal, “Congress erected a complex procedural maze, topped by a legislative veto provision.” George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* § 14:15 (2d ed. 2022). The Secretary, upon withdrawing more than 5,000 acres, “shall notify both Houses of Congress of such a withdrawal.” 43 U.S.C. § 1714(c)(1). *Id.* The Secretary must provide Congress with notice and detailed information on the withdrawal. 43 U.S.C. § 1714(c)(2); 43 C.F.R. §2310.3-04(a). Public notice and a hearing must precede notice to Congress. 43 U.S.C. §1714(b), (h). A withdrawal of over 5,000 acres may not exceed twenty years. 43 U.S.C. § 1714(c)(1). In addition, Congress provided for a one-house veto of a large-tract withdrawal. 43 U.S.C. § 1714(c)(1) (“The withdrawal shall terminate and become ineffective at the end of ninety days . . ., if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal.”).

The *Chada* decision establishes it is likely that the FLPMA legislative veto of large tract withdrawals will be found unconstitutional. The question is what is the impact to the effectiveness of the large-tract withdrawal provision without the legislative veto? Neither the Tenth Circuit, nor any circuit other than the Ninth Circuit²⁰ has addressed the extent of the severability of FLPMA’s

¹⁸ Indeed, although previous Chaco-area withdrawal legislation has never been enacted, the New Mexico delegation has just reintroduced the withdrawal legislation. Chaco Cultural Heritage Area Protection Act S. 5124 and H.R. 2181 (Nov. 2022).

¹⁹ FLPMA section 704(a) first “repeals[s]” 29 statutes and expressly revokes the “implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459).”

²⁰ In *Yount v. Salazar*, 933 F. Supp. 2d, 1215, 1235 (D. Ariz. 2013), *aff’d* 877 F.3d 845 (9th Cir. 2017), the district court held that the legislative veto was unconstitutional, but could be severed from the rest of the large-tract withdrawal provision. The Ninth Circuit affirmed. *National Mining Ass’n v. Zinke*, 877 F.3d 845, 861-66 (9th Cir. 2017), *cert denied*, 139 S.Ct. 57 (2018).

unconstitutional legislative veto. The Ninth Circuit found that the legislative veto could be narrowly severed and leave the rest of the Secretary's large-tract withdrawal authority intact. Legal scholars argue that contrary to the view of the Ninth Circuit the entire FLPMA large-tract withdrawal provision is invalid and must be severed from FLPMA.²¹

Enduring asserts the better view is that because the FLPMA congressional veto provision is integral to the delegation of authority to the Secretary to withdraw tracts of land in excess of 5,000 acres, the entire large-tract withdrawal provision is invalid. Accordingly, the Secretary lacks the authority to propose or make a withdrawal the size of the Chaco Area Withdrawal.

Conclusion

For the reasons stated *supra*, BLM's Withdrawal EA is significantly flawed. BLM's failure to analyze in detail the Navajo Nation five-mile proposal does not provide the Secretary with the information she needs to make her withdrawal decision. BLM does not adequately address the "unresolved conflict" between the proposed withdrawal and the Navajo Nation and allottees' five-mile proposal. BLM's analysis of the impacts to Resource Issues 2-4 is significantly in error and skews the information provided to the Secretary to support the proposed action. BLM also fails to analyze the requirements of the Secretary's trust responsibilities in making this withdrawal decision.

Because of the area's geology, a natural "buffer," six miles from the CCHNP boundary, will prevent mineral development closer to the CCHNP – there is no Mancos-Gallup oil within six miles of the CCHNP boundary. The Navajo Nation compromise five-mile "no federal leasing" buffer would allow development of significant allottee (and federal) minerals while protecting resource values at the CCHNP, but the ten-mile Withdrawal will eliminate the development of any allottee minerals. The royalty loss to the allottees, people living in poverty, is significant and can and should be avoided. The Secretary should select the Navajo Nation proposal of a five-mile withdrawal to protect the interests of the allottees as she is encouraged to do under her long-standing fiduciary responsibilities to the Navajo allottees.

²¹ See, e.g., George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* §§ 4:2 to 4:4 (2d ed. 2022) and Robert L. Glicksman, "Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act of 1976 after the Legislative Veto Decisions," 36 *Hastings L.J.* 1, 79-83 (1984) (concluding that severing all of section 204(c) "seems closest to the scheme Congress itself would have chosen had it known that the legislative veto was invalid").