



## Tenth Circuit Decision Underscores Need for Due Diligence on Underlying Assumption Used by BLM for Permitting

By [Michael Cross](#)

On May 7, 2019, the United States Court of Appeals for the Tenth Circuit issued a decision in *Dine Citizens Against Ruining Our Environment v. Bernhardt*, ruling that the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) by failing to properly consider the cumulative impacts on water resources in permits to drill horizontal Mancos Shale wells in the San Juan Basin, (2019 U.S. App. LEXIS 13602 May 7, 2019). *Dine* highlights that operators need to conduct due diligence during permitting to ensure that BLM relies on up-to-date data and assumptions, particularly when BLM tiers to older underlying NEPA documents for permitting that may not account for changes in potential resource impacts from technological advances, such as extended horizontal drilling.

*Dine* involved several environmental non-governmental organizations' (NGO) challenge to BLM's issuance of applications for permit to drill (APD) in 2015, within the general region containing Chaco Canyon. Plaintiffs alleged that BLM violated NEPA and the National Historic Preservation Act (NHPA). The District Court for the District of New Mexico dismissed the claims in April 2018, and the NGOs appealed.

The Tenth Circuit denied the NGOs' appeal as to their NHPA claims, noting that the applicable programmatic agreements defined the area of potential effects (APE), and no historic properties were identified within the APE. The Court also denied the NGOs' claim that BLM failed to consider the cumulative impacts of air pollution.

The Tenth Circuit, however, agreed with the NGOs' allegation that BLM failed to take the necessary hard look at impacts to water resources. The crux of the Tenth Circuit's decision is the differences between the assumptions BLM utilized in the 2003 Farmington Proposed Resource Management Plan and the Final Environmental Impact Statement (2003 EIS) compared to the reasonably foreseeable development scenario (RFDS) promulgated by BLM in 2014. The 2003 EIS analyzed the impact to water resources from vertical wells, while the 2014 RFDS estimated that full development of the Mancos Shale would result in 3,960 new wells, most—if not all—of which would be horizontally drilled and hydraulically fractured. In approving the permits for horizontal wells, BLM tiered to and relied on the cumulative impact analysis conducted for the 2003 EIS.

The NGOs alleged that the environmental impacts of the approved horizontal wells were different from, and greater in magnitude than, the impacts of vertical wells considered in the 2003 EIS for the governing federal land use plan. The Tenth Circuit agreed and ordered the District Court to vacate the challenged APDs.

The Court's decision highlights two critical elements of BLM project-level oil and gas decisions: (1) what classifies as reasonably foreseeable, and (2) due diligence on utilizing appropriate data and assumptions when tiering to older programmatic NEPA documents to satisfy NEPA requirements for permits.<sup>1</sup>

First, the Tenth Circuit stated that BLM needed to consider the cumulative impacts of all 3,960 horizontal wells in the Mancos Shale. The Tenth Circuit rejected arguments that BLM did not need to consider the cumulative impacts of all the predicted wells, since no operator had proposed to drill all of those wells. Instead, once BLM issued the 2014 RFDS, the Court found that drilling all 3,960 horizontal Mancos Shale Wells were reasonably foreseeable future actions.

Second, the Tenth Circuit determined that the water usage assumed in the 2003 EIS was dramatically less than the usage necessary to drill horizontal wells. Although BLM argued that water use could be decreased through "new strategies and technologies," the agency did not point to any evidence in the record contradicting the discrepancy in water use between horizontal and vertical wells. Simply put, BLM could not rely on vintage 2003 vertical well assumptions for 2014 horizontal well analyses for purposes of permitting.

The ability for the agency to tier to underlying programmatic NEPA documents prevents duplicative environmental analyses and helps expedite the federal permitting process. However, if a Court finds that the assumptions or information used to complete this analysis are outdated, inaccurate, or incomplete, then BLM will be precluded from tiering to that document. If BLM cannot tier to existing NEPA analyses, the agency will be required to conduct additional NEPA analysis prior to approving permits. In short, failure to conduct due diligence may expose the agency, and operators, to future litigation risk and administrative challenges.

For more information or updates on the Tenth Circuit's decision or BLM analysis considerations, please contact [Michael Cross](#).

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<sup>1</sup> NEPA's implementing regulations allow an agency to utilize a tiered approach when preparing NEPA documents. Courts have specifically held that agencies are encouraged to tier environmental analyses to "eliminate repetitive discussions of the same issues and to focus on the actual issues ripe" for decision at each level of environmental review.