

**CASE NO. NO. 18-2089
IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT, *et al.*,

Plaintiff - Appellants,

vs.

RYAN ZINKE, *et al.*,

Defendants - Appellees,

and ENDURING RESOURCES IV, LLC, *et al.*,

Intervenor-Defendants-Appellees.

On Interlocutory Appeal from the United States District Court
For the District of New Mexico Civil Action No. 1:15-cv-00209-JB-SCY,
Honorable James O. Browning, District Judge

**BRIEF OF *AMICI CURIAE* NAVAJO ALLOTTEES ALICE BENALLY,
LILLY COMANCHE, VIRGINIA HARRISON, SAMUEL HARRISON,
DOLORA HESUSE, VERNA MARTINEZ, AND LOIS PHOENIX**

Jennifer H. Weddle
Troy A. Eid
Harriet McConnell Retford
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6500

Counsel for Amicus Navajo Allottees

TABLE OF CONTENTS

STATEMENT OF THE IDENTITIES AND INTERESTS OF THE *AMICI CURIAE*.....1

SUMMARY OF ARGUMENT3

ARGUMENT4

 I. Oil and gas development in the Chaco Canyon Area provides desperately needed royalty money and economic opportunity to local residents.....4

 II. The local community had ample opportunity to participate in BIA’s decisionmaking, both when the 2003 RMP was adopted and when the APD’s were approved.....10

 III. Allottees should be accorded the same respect as any other property owner and permitted to benefit from the mineral rights on their land.....11

CONCLUSION12

TABLE OF AUTHORITIES

Cases

County of Yakima v. Confederated Tribes and Bands of Yakima Nation,
502 U.S. 251 (1992).....11

New Mexico ex rel. Richardson v. BLM,
565 F.3d 683 (10th Cir. 2009)6

Solem v. Bartlett,
465 U.S. 463 (1984).....11

Statutes

Fed. R. Evid. 2016

Other Authorities

Alastair Lee Bitsoi, *Agreement gets oil flowing from Navajo land*,
Navajo Times, March 6, 2014, available at
<http://www.navajotimes.com/news/2014/0314/030614oil.php>.....7

Cohen’s Handbook of Federal Indian Law § 1.04.....12

Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates, Completed by Arizona Rural Policy Institute Center for Business Outreach, W.A. Franke College of Business, Northern Arizona University on behalf of the Navajo Nation, available at
https://gotr.azgovernor.gov/sites/default/files/navajo_nation_0.pdf.....4, 5, 6

Federal Reserve Bank of Minneapolis, Center for Indian Country Development, Navajo Nation Reservation Profile, available at
<https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/navajo-nation-reservation>.....8

Office of Inspector General, Bureau of Indian Affairs’ Federal Indian Minerals Office, Report No.: 2015-EAU-079 (February 2017), available at
https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_BIAFederalIndianMineralsOffice_02032017_Public.pdf.....7

Press Release, BLM and BIA Update Scoping Meeting Schedule for Mineral Leasing and Development Effort in Northwest New Mexico, October 26, 2016, available at <https://www.blm.gov/press-release/blm-and-bia-update-scoping-meeting-schedule-mineral-leasing-and-development-effort>11

Sharon Pinto, *Bureau of Indian Affairs Navajo Region Report to the 23rd Navajo Nation Council*, January 22, 2018, available at http://www.nnols.org/uploads/FileLinks/e09e7cbe7af64047a5abc1e63f463094/Bureau_of_Indian_Affairs.pdf.....7

United States Census Bureau, *Income and Poverty in the United States: 2017* (September 12, 2018), available at <https://www.census.gov/library/publications/2018/demo/p60-263.html>5

United States Department of the Interior, Bureau of Indian Affairs, Navajo Regional Agency, Federal Indian Minerals Office, *Environmental Assessment DOI-BIA EA-18-21172* (April 2018), available at https://www.bia.gov/sites/bia.gov/files/assets/bia/navreg/FIMO_OG%20Lease%20Sale%20EA_Draft_final_02152018.pdf.....5

Cindy Yurth, *Checkmated by Chaco*, Navajo Times, Sept. 19, 2013, available at <http://navajotimes.com/news/chapters/091913nageezi.php>6

Cindy Yurth, *The orphan on the checkerboard*, Navajo Times, April 9, 2013, available at <http://navajotimes.com/news/chapters/050913hue.php>.....6

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Alice Benally, Lilly Comanche, Virginia Harrison, Samuel Harrison, Dolora Hesuse, Verna Martinez, and Lois Phoenix make the following disclosure: Amici Navajo Allottees are not publically traded corporations, have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

Harriet McConnell Retford

Counsel of Record for *Amici Curiae*

Dated: November 13, 2018

**STATEMENT OF THE IDENTITIES AND
INTERESTS OF THE *AMICI CURIAE***

The *amici curiae* are members of the Navajo Nation (“Nation”) and owners of allotments located in the Nageezi, Huerfano, and Counselor chapters of the Navajo Nation, the area where the 382 applications for permit to drill (“APDs”) at issue in this dispute are located.¹ As allottees, we are beneficial owners of lands held in trust for us by the United States, and we are entitled to royalties for any oil and gas development on those lands. We rely on these royalties to meet the daily needs of our families. The Nageezi region is poor and isolated, accessible only by dirt roads and with little economic activity. Royalties from oil and gas development bring much needed cash and opportunity to the region, and are strongly supported by the local community.

Petitioners, particularly Diné Citizens against Ruining our Environment, attempt to portray this litigation as a fight between the Navajo people and big business, but they do not speak for the Indian allottees who live and work in the Nageezi region, who overwhelmingly support the proposed drilling. Petitioners may occasionally visit the area, broadly defined, *see* [App. at Eisenfeld Decl., Dkt. No. 112-1 ¶¶ 5, 14; Nichols Decl., Dkt. No. 112-2 ¶¶ 5, 6; Green Decl., Dkt. No. 112-3 ¶¶ 4-7; Miura Decl., Dkt. No. 112-4 ¶ 3], but it is our home. We file this brief to

¹ Alice Benally, Lilly Comanche, Virginia Harrison, Samuel Harrison, Dolora Hesuse, Verna Martinez, and Lois Phoenix (“Navajo Allottees” or “amici”).

provide the court with a perspective that has not been presented in the briefs of the Federal government, the oil and gas companies, or the environmental Petitioners. Our perspective is as allottees who live within the landscape of our ancestors, who own mineral interests that we want developed and who have actively participated in the federal planning and environmental reviews for the development of our mineral interests.

The Nageezi Chapter, which functions as a participatory democracy, has passed strongly worded resolutions in support of development in this area, including Nageezi Chapter Resolution NC-18-077, *infra*. Furthermore, we have been provided with numerous opportunities to comment on both the Farmington Field Office Resource Management Plan and the APDs at issue in this challenge. We have participated in community meetings held at our local chapter houses and have generally found that when we raised specific concerns, those concerns were addressed promptly and appropriately by the Bureau of Land Management and the oil and gas operators.

On July 1, 2018, the Nageezi Chapter passed a Resolution stating:

Navajo Allotment Land Owners are concerned that self-serving special interest organizations are violating the rights of Navajo Allotment Land Owners. That such publicized demonstrations and meetings by these special interest and outside groups have over shadowed the Navajo Allotment Land Owners who [are] currently benefitting from oil and gas development on their allotment lands; and

Navajo Allotment Land Owners do not share opinions of environmentalists voicing their objections on natural resources developments. These over publicized objections by the environmentalists have drowned out and overshadowed Navajo Allotment Land Owners Rights; and

Navajo Allotment Land Owners are truly the impacted people of the Chaco area. These lands were patented and allotted to the Navajo People in New Mexico and handed down through many generations. These lands were given in exchange for land taken by the U.S. Government in exchange for citizenships. Therefore, as Navajo People being land owners, they have the right to lease, develop, or excavate their lands.

Resolution of the Nageezi Chapter, Resolution Number NC-18-07. along with a similar resolution from the Huerfano Chapter, on July 8, 2018, Resolution # HUE-090-18.² The Resolution then goes on to express formal opposition to proposed federal legislation that would limit oil and gas development in the Chaco Canyon area.

At a chapter meeting on June 12, 2018, allotment holders circulated a petition stating that “[t]he environmentalist’s voice is not the voice of the Allottees, when it comes to Oil and Gas progression.” Allottee’s Petition, attached as an Addendum B. The petition was signed by eighty meeting participants.

SUMMARY OF ARGUMENT

Many members of the Navajo Nation benefit directly from the development of oil and gas in this region, and a ruling for Petitioners would endanger their family

² These Resolutions have been attached to this brief as Addendum A.

income. This is particularly troubling because the poverty rate in the region where this drilling is taking place is more than twice the national average and the allottees have few other opportunities to improve their property and earn a living. They have had opportunities to participate in the BLM's decisionmaking, have done so and are not represented by activist groups that claim to speak for the local community.

ARGUMENT

I. Oil and gas development in the Chaco Canyon Area provides desperately needed royalty money and economic opportunity to local residents.

The royalty revenue provided by oil and gas development has made an enormous difference to our community, where *amici* have lived for many generations. The region of the San Juan Basin where the wells at issue are located is a rural and isolated part of the Navajo Nation, approximately fifty miles from Farmington, New Mexico, the nearest town. There are few jobs or other economic opportunities, and many residents still rely on a traditional Navajo lifestyle of grazing sheep and other livestock to support themselves. The money brought in through royalties and employment helps allottees to pay their bills and provide for the daily needs of their families, and enables people to send their children to college and improve their properties, creating new opportunities for the future.

The poverty rate on the Navajo Nation is 38 percent.³ An addition 29% of Navajo Nation residents fall only slightly above the poverty line. *Id.* at 36. And 19% have an income that falls a full 50% or more below the poverty line. *Id.* Almost half of Navajo children, 44%, live in poverty. *Id.* By comparison, the poverty rate for the United States as a whole was 12.3% in 2017, and the median household income was \$61,372.⁴

The medium household income on the Navajo Nation is only \$27,389, *Demographic Analysis, supra* note 1, at 29, and per capita income is only \$10,680, *id.* at 33. One-third of Navajo households live on less than \$15,000. *Id.* at 29. And average incomes are lower in this area of New Mexico, where the APDs at issue are located, then on the Navajo Reservation as a whole, *see id.* at 30, although the poverty rate is lower, presumably because the New Mexico area – with fewer

³ *Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates*, Completed by Arizona Rural Policy Institute Center for Business Outreach, W.A. Franke College of Business, Northern Arizona University on behalf of the Navajo Nation, at 34, available at https://gotr.azgovernor.gov/sites/default/files/navajo_nation_0.pdf.

⁴ United States Census Bureau, *Income and Poverty in the United States: 2017* (September 12, 2018), available at <https://www.census.gov/library/publications/2018/demo/p60-263.html>.

economic opportunities for young people – has fewer families with children, *see id.* at 9, 36-37.⁵

It is difficult to exaggerate how isolated these rural areas are and how difficult it can be to obtain basic first-world services. In the Nageezi chapter, where many allottees who benefit from the wells at issue reside, the Navajo Times reported in 2013 that 30% of households lack electricity.⁶ The neighboring Huerfano chapter was only accessible by unpaved roads.⁷ “The chapter does sport 15 churches, two [Bureau of Indian Education] boarding schools, a clinic, and at 90 square miles it’s so large it hosts two land boards, two fire stations and two transfer stations.” *Id.* Neither the Nageezi nor the Huerfano chapter had a convenience store, much less a grocery store. *Id.* For the allottees, however, this isolated, rural country is their

⁵ A recent Environmental Assessment, prepared for lease sales in roughly the same region, estimated the local poverty rate at 21.3%, using an average of the poverty rates measured by county and census tract. United States Department of the Interior, Bureau of Indian Affairs, Navajo Regional Agency, Federal Indian Minerals Office, Environmental Assessment DOI-BIA EA-18-21172 (April 2018), available at https://www.bia.gov/sites/bia.gov/files/assets/bia/navreg/FIMO_OG%20Lease%20Sale%20EA_Draft_final_02152018.pdf. This Court may take judicial notice of government records and materials available on government websites. *New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 702 & n.22 (10th Cir. 2009); Fed. R. Evid. 201.

⁶ Cindy Yurth, *Checkmated by Chaco*, Navajo Times, Sept. 19, 2013, available at <http://navajotimes.com/news/chapters/091913nageezi.php>.

⁷ Cindy Yurth, *The orphan on the checkerboard*, Navajo Times, April 9, 2013, available at <http://navajotimes.com/news/chapters/050913hue.php>.

home, where their families have resided for generations, and, now, thanks to the royalty money, conditions are slowly improving.

As *amici* Delora Hesuse testified to the district court, oil and gas development “helps to support the economies of our local communities and provides jobs to local people, including tribal members.” [App. at Declaration of Hesuse, Dkt. 41-15, at ¶ 2]. “My family has benefited financially and it has helped all of our families to live a life where we can fulfill our financial obligations and not have to worry about how bills were going to be paid.” *Id.* This money has made concrete improvements in peoples’ lives, enabling them to purchase basic necessities that most Americans take for granted: “[S]ome families have purchased new vehicles and mobile homes with the money they're receiving from the oil companies.”⁸

The amount of money now flowing to Navajo Nation members who own allotments is substantial. “FIMO distributed \$96 million in calendar year 2015 to approximately 20,835 individual Indian mineral interest owners on Navajo allotted land.”⁹ In December 2018, \$2,500,00 in oil and gas royalties were distributed to

⁸ Alastair Lee Bitsoi, *Agreement gets oil flowing from Navajo land*, Navajo Times, March 6, 2014, available at <http://www.navajotimes.com/news/2014/0314/030614oil.php>.

⁹ Office of Inspector General, Bureau of Indian Affairs’ Federal Indian Minerals Office, Report No.: 2015-EAU-079 (February 2017) at 1, available at https://www.doioig.gov/sites/doioig.gov/files/FinalAudit_BIAFederalIndianMineralsOffice_02032017_Public.pdf.

allotment owners, with \$1,854,539 and \$1,7018,682 in the proceeding October and November.¹⁰

In 2015, while opposing a preliminary injunction, Intervenor WPX Energy Production, LLC (now Enduring Resources IV, LLC) attested that “in the last several months, the average royalties WPX has paid to Indian allottees and tribes has ranged between \$50,000 to \$100,000 per month” and Intervenor Encana Oil & Gas (USA) attested that “royalties of up to \$126,000 per month are paid to Indian allottees.” [App. at Affidavit of Kenley H. McQueen, Dkt. 41-1; Affidavit of Tom Lawlor, Dkt. 41-3].

There is enormous interest among ordinary Navajo people and allotment owners about participating in oil and gas leasing. For example, when the Federal Indian Minerals Office held information sessions at chapter houses in the Eastern Navajo Agency to go over the basics of oil and gas leasing, more than 300 people attended. Pinto, *supra*, at 5. In 2014, the Navajo Times reported that “nearly 300 Navajo allottees have already signed leases with oil companies to develop their land

¹⁰ Sharon Pinto, *Bureau of Indian Affairs Navajo Region Report to the 23rd Navajo Nation Council*, January 22, 2018 at 7, available at http://www.nnols.org/uploads/FileLinks/e09e7cbe7af64047a5abc1e63f463094/Bureau_of_Indian_Affairs.pdf.

for energy production,” Bitsoi, *supra*, and the number of leases and wells in production has only increased since then.

Oil and gas drilling has also provided employment opportunities for members of the Navajo Nation, including Nageezi chapter members. These are crucial opportunities in a community where the unemployment rate of is more than twenty percent and the labor-force participation rate is less that 45 percent.¹¹ Approximately 135 American Indian workers are employed by Adobe Contractors and HALO Services, who do general construction work for the oil and gas companies. And approximately forty more work for three pipeline construction companies, TRC Construction, Crossfire and West States Energy Contractors. Fifty Native people work for CNJ Oilfield Services and M&R Trucking hauling water to frack the oil and gas wells, and five American Indians are employed by Western Cultural Resource Management to assist with archeological contracting work. And those numbers only represent direct employment. Native and non-native oil and gas employees help to support other local businesses such as the Red Mesa Store in Lybrook, which has majority Native American employment. This oil and gas-related employment is a critical source of jobs and income in this isolated area.

¹¹ Federal Reserve Bank of Minneapolis, Center for Indian Country Development, Navajo Nation Reservation Profile, available at <https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/navajo-nation-reservation>.

A handful of activists, claiming to speak for the Navajo people, should not be able to deprive Navajo Nation members of this opportunity to find employment, lease their own mineral rights, lift themselves out of poverty, and improve their lives.

II. The local community had ample opportunity to participate in BIA's decisionmaking, both when the 2003 RMP was adopted and when the APD's were approved.

The local community had ample opportunity to comment on BLM's decision to issue the disputed Environmental Assessments ("EAs") and APDs, and has had many opportunities to weigh in on oil and gas development issues more broadly.

For example, before approving the Kimbeto Wash Unit, the BLM held a meeting for allottees at San Juan College in Farmington. [App. at AR 0235833]. This was followed by an on-site meeting on December 9, 2015. *Id.*

When the BLM prepared the original 2003 Farmington Resource Management Plan it engaged in extensive community outreach to the members of the Navajo Nation. It conducted formal public scoping meetings in Farmington, Crownpoint, and Cuba, New Mexico, the larger towns bordering this region, and public interviews in local communities, as well as outreach to local and tribal governments. [App. at AR 0001960]. After the draft EIS was published, the BLM held additional public hearings in Farmington, Crownpoint, and Cuba, New Mexico and Durango, Colorado. *Id.* *Amici* were able to attend these meetings and comment on the RMP.

More recently, members of the community have participated in several meetings with the BLM and others regarding oil and gas development, including scoping meetings held in the Huerfano, Counselor, Nageezi, Ojo Encino, and Whitehorse chapter houses in 2016 as part of scoping process for the amended resource management plan under development.¹²

III. Allottees should be accorded the same respect as any other property owner and permitted to benefit from the mineral rights on their land.

Both Petitioners and Respondents go to great lengths to discuss compliance with a wide range of federal land management, leasing, environmental, and historic preservation laws, as well as the duty of the federal government to the tribal community. But many of the people most strongly affected by this legal challenge are private landowners – allottees – who inherited valuable oil and gas rights in an otherwise poverty-stricken region and have the right to benefit from these rights like any other landowner.

“In the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually.” *County of Yakima v. Confederated*

¹² Press Release, BLM and BIA Update Scoping Meeting Schedule for Mineral Leasing and Development Effort in Northwest New Mexico, October 26, 2016, available at <https://www.blm.gov/press-release/blm-and-bia-update-scoping-meeting-schedule-mineral-leasing-and-development-effort>.

Tribes and Bands of Yakima Nation, 502 U.S. 251, 253-54 (1992). It was hoped that by becoming private property owners, Indians would assimilate into the broader society. *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). *Id.* Much of this land promptly fell out of Indian hands. “In 1887, when the Dawes Act provided for allotting tribal lands to individual Indians, the American Indian’s heritage in land totaled 138 million acres, [and] [l]ess than 50 years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands.” Cohen’s Handbook of Federal Indian Law § 1.04.

But some of that land did remain in the hands of the allottees and their heirs, and now carries very valuable mineral rights. It is ironic and outrageous that after so many Indians were forced – without their consent – to bear the risks of private property ownership that their descendants now struggle to reap the rewards of ownership – to make their *own* decisions concerning *their* property. Now, the Amici choose to earn a living from their own land by leasing its valuable mineral resources.

CONCLUSION

This Court should affirm the District Court.

Respectfully submitted,

s/ Jennifer H. Weddle

Jennifer H. Weddle

Troy A. Eid

Harriet McConnell Retford

Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6500
*Counsel for Amici Curiae Navajo Allottees
Alice Benally, Lilly Comanche, Virginia
Harrison, Samuel Harrison, Dolora
Hesuse, Verna Martinez, and Lois Phoenix*

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief complies with the type-volume limitation. The brief is proportionately spaced, in 14-point, Times New Roman font in accordance with Fed. R. App. P. 32(a)(5). The brief contains 2,699 words, excluding sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the count, and it is MS Word 2016.

In accordance with Fed. R. App. P. 29, counsel has contacted all parties in this litigation. Counsel for Respondents Enduring Resources IV, LLC, Encana Oil & Gas (USA), Inc., BP America Production Company, and American Petroleum Institute have consented to the filing of this Amicus brief, and counsel for the remaining parties have not responded. No party has opposed the filing of this brief. No party's counsel has authored the brief in whole or in part. No party's counsel has contributed money that was intended to fund preparing or submitting the brief.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Harriet McConnell Retford

Harriet McConnell Retford
Counsel of Record for *Amici Curiae*

Dated: November 13, 2018

ADDITIONAL CERTIFICATION

The undersigned hereby certifies the following:

1. All required privacy redactions have been made.
2. The hard copies of the foregoing brief to be submitted to the clerk's office are exact copies of this ECF filing.
3. This ECF submission was scanned for viruses with McAfee Endpoint Security (updated November 13, 2018), and according to the program, the file is free of viruses.

s/ Harriet McConnell Retford _____

Harriet McConnell Retford
Counsel of Record for *Amici Curiae*

Dated: November 13, 2018

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of November, the foregoing **BRIEF OF AMICI CURIAE NAVAJO ALLOTTEES ALICE BENALLY, LILLY COMANCHE, VIRGINIA HARRISON, SAMUEL HARRISON, DOLORA HESUSE, VERNA MARTINEZ, AND LOIS PHOENIX** was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Jennifer Weddle