UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

WESTERN WATERSHEDS PROJECT, *et al.*, Plaintiffs, vs. DEBRA HAALAND, Secretary of the Interior, *et al.*, Defendants, and STATE OF WYOMING, *et al.,* Defendant-Intervenors	Case No.: 1:18-cv-00187-REP **MEMORANDUM DECISION AND ORDER RE:** **WESTERN ENERGY ALLIANCE'S MOTION FOR RELIEF FROM STAY ON BEHALF OF EOG RESOURCES, INC.** **(Dkt. 499)** **PLAINTIFFS' MOTION FOR CLARIFICATION AND ENFORCEMENT OF THE "PHASE TWO" DECISION** **(Dkt. 502)** **PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY TO WEA'S MOTION FOR RELIEF** **(Dkt. 506)**

Pending before the Court are: (i) Western Energy Alliance's Motion for Relief From Stay on Behalf of EOG Resources, Inc. (Dkt. 499); (ii) Plaintiffs' Motion for Clarification and Enforcement of the "Phase Two" Decision (Dkt. 502); and (iii) Plaintiffs' Motion for Leave to File Surreply to WEA's Motion for Relief (Dkt. 506). Having carefully considered the record and otherwise being fully advised, the Court enters the following Memorandum Decision and Order:

I. PROCEDURAL BACKGROUND

Due to the magnitude and scope of this action, the case was organized to be litigated in phases, with each phase addressing a subset of the federal lease sales being challenged. For example, Phase One dealt specifically with Instruction Memorandum ("IM") 2018-034 and a

subset of five oil and gas leases that applied IM 2018-034 (Plaintiffs' Fourth and Fifth Claims for Relief), while Phase Two addressed four separate Bureau of Land Management ("BLM") lease sales conducted in greater sage-grouse habitat.

Relevant here, the Court's June 9, 2021 Memorandum Decision and Order (the "Phase Two Decision") found that BLM violated the National Environmental Policy Act ("NEPA") by approving the Phase Two lease sales without properly considering a reasonable alternative or studying the lease sales' effects on greater sage-grouse. 6/9/21 MDO at 50 (Dkt. 389) ("BLM (i) failed to consider the reasonable alternative of deferring priority sage-grouse habitat; (ii) failed to take a hard look at the direct and indirect impacts to greater sage-grouse; and (iii) failed to take a hard look at the cumulative impacts on greater sage-grouse."). The Phase Two lease sales were in turn "remanded without vacatur," with the Court ordering:

> Consistent with NEPA and the [Administrative Procedure Act], BLM must address the deficiencies identified by the Court; until the concerns referenced in this Memorandum Decision and Order are sufficiently addressed, BLM may not authorize new drilling/surface disturbing activities on the leased parcels.

Id. at 47, 50-51; *see also id*. at 49 ("[D]espite their NEPA-related shortcomings, the Court will not vacate the Phase Two lease sales. Instead, the Court will enjoin BLM from (i) issuing any new APDs [(application for permit to drill)] for the Phase Two leases, and (ii) any further surface disturbing activities thereon, remanding the EAs to BLM to substantiate the conclusions drawn in its EAs or revise them as necessary. Unless and until the concerns referenced in this Memorandum Decision and Order are sufficiently addressed, BLM may not authorize new drilling/surface disturbing activities on the leased parcels.").

In line with its handling of the Phase One lease sales (originally vacated but later suspended pending appeal), the Court recognized "the possible need to continue limited operations under appropriate circumstances to preserve the status quo where development is

already underway." *Id*. at 49-50, n.22 (citing 5/12/20 MDO at 10-11, n.6 (Dkt. 226)).[1] And also like the Phase One lease sales, the Court explained that "[a]ny party seeking to modify the suspended status of any applicable Phase Two lease must include 'information about the nature and need for such work to allow other parties to respond to the motion and for the Court to make an informed decision upon the request.'" *Id*. (quoting 5/12/20 MDO at 10-11, n.6 (Dkt. 226)).

Federal Defendants and Defendant-Intervenors appealed the Phase Two Decision in August 2021. Those appeals are stayed before the Ninth Circuit pending resolution of the Phase One appeals by the same parties. 4/21/22, 6/2/23, 10/4/23, and 12/28/23 Orders, Ninth Circuit Dkt. No. 21-35648 (Dkt. 11-14) (holding case in abeyance and administratively closing court's docket until, as of now, March 13, 2024).

II. DISCUSSION

A. Western Energy Alliance's Motion for Relief From Stay (Dkt. 499)

Western Energy Alliance ("WEA") seeks relief from the Phase Two Decision so that its member, EOG Resources, Inc. ("EOG"), can drill two wells into a lease that is subject to the

[1] On February 27, 2020, the Court vacated the Phase One lease sales. 2/27/20 MDO at 57-60, 62 (Dkt. 174). Several months later, however, the Court granted various motions for stay pending appeal and instead suspended the Phase One lease sales. 5/12/20 MDO at 6-10 (Dkt. 226) ("In sum, the Court is persuaded by the arguments regarding the potential for injury in the absence of a stay pending appeal. A stay which leaves things in place, not to move forward nor to move backward, achieves a sensible and fair balance of the competing interests at this stage of the case. The Phase One lease sales are not to be undone at this time, but are suspended during this time – there will be no further work developing such leases or obtaining production from such leases in any way pending appeal."). To account for this state of flux, the Court allowed for the possibility of limited work to preserve the status quo. *Id*. at 10-11, n. 6 ("The Court is mindful that some work, to include ordinary maintenance and repair, may be necessary to preserve the status quo at locations where leasehold development is already underway. Therefore, the Court will consider motions from any party requesting additional detail as to what work, if any, to maintain the suspended status quo will be permitted. Any such motion should be accompanied by information about the nature and need for such work to allow other parties to respond to the motion and for the Court to make an informed decision upon the request."). On a handful of occasions since then, the parties agreed to certain modifications consistent with this protocol. *See* 8/13/20 Order (Dkt. 285); 9/30/20 Order (Dkt. 325); 1/14/22 Order (Dkt. 435).

Phase Two Decision (the "Subject Lease"). EOG operates the Carducci Drilling and Spacing Unit ("DSU") where the Subject Lease lies. Mem. ISO Mot. for Relief at 4 (Dkt. 499-1). According to WEA, EOG submitted a total of 16 federal permits to develop the Carducci DSU and, on October 6, 2020 (before the Phase Two Decision), BLM approved eight of those permits to be drilled on its east side. *Id*. at 5. BLM deferred the remaining eight permits (to be drilled on the Carducci DSU's west side) due to federal lease sale litigation related to greenhouse gas emissions before the U.S. District Court for the District of Columbia. *Id*. EOG intends to eventually utilize three of the eight approved APDs (the "Eastern Carducci APDs"). *Id*.[2]

Adjacent to the Carducci DSU are the Cooper and Hurley DSUs: the Cooper DSU to the Carducci DSU's northwest and the Hurley DSU to its west. On July 1, 2022, BLM approved the Cooper 3130-17H APD (the "Cooper APD") and the Hurley 0607-17H APD (the "Hurley APD"). *Id*. at 6. With the uncertainty surrounding the deferred APDs on the Carducci DSU's western half, EOG decided to try and utilize the Cooper and Hurley APDs to develop that area instead. *Id*. ("By shifting the bottomhole locations[3] of the approved APDs from the Cooper and Hurley DSUs to the Carducci DSU, EOG could continue to fully develop the Carducci DSU, prevent waste of oil and gas resources, and maximize efficient development and drainage of its leased oil and gas resources."). Except the proposed wellbore trajectories and bottomhole locations for those APDs would penetrate the Subject Lease. *Id*.

To carry out this workaround, on July 25, 2023, EOG submitted name change sundries to BLM – changing the names of the Cooper APD to Carducci 0508-40H APD and the Hurley APD

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[2] The Eastern Carducci APDs will be drilled from the Geneva DSU on an approved surface location north and off-site of the Subject Lease. Mem. ISO Mot. for Relief at 5 (Dkt. 499-1). EOG's ability to actually utilize the Eastern Carducci APDs is the subject of the Plaintiffs' Motion for Clarification. *See infra*.

[3] The wells' terminal point or end. Bowzer Decl. at ¶ 12 (Dkt. 499-2).

to Carducci 0508-41H APD (the "Western Carducci APDs"). *Id.* In conjunction with the requested APD name changes, EOG also submitted Sundry Notices to change the bottomhole locations of the Western Carducci APDs to the Carducci DSU. *Id.* BLM approved the APD name changes the next day. *Id.* But on August 14, 2023, BLM denied the Sundry Notices because the redirected wellbores would traverse through and perforate the subsurface of the Subject Lease in violation of the Phase Two Decision. *Id.*

With no present ability to develop the Carducci DSU's west side, EOG seeks relief from the Phase Two Decision to drill the Western Carducci APDs through the Subject Lease. *Id.* at 8. The requested relief is shown on the map below – specifically the well paths in red.

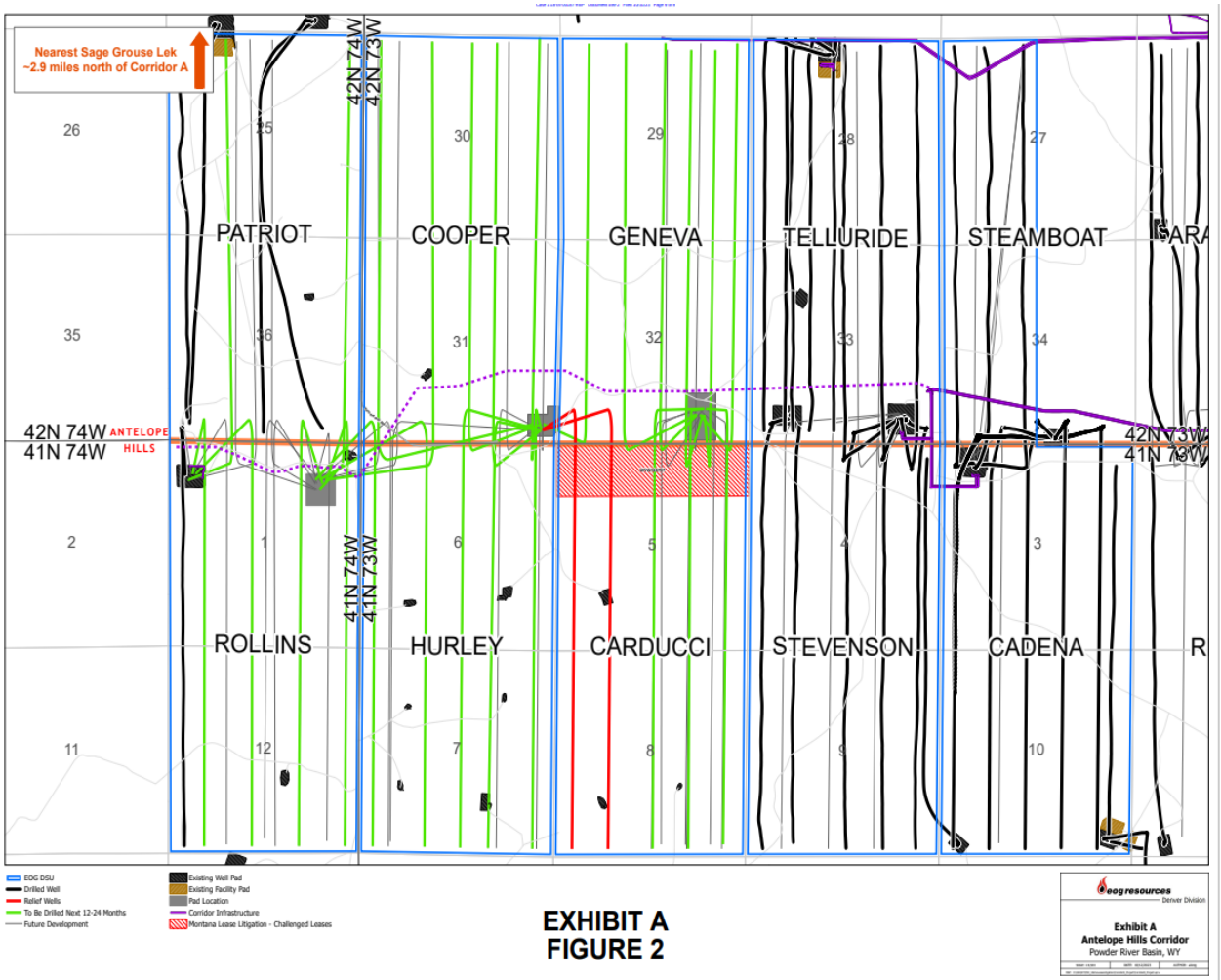

EXHIBIT A
FIGURE 2

Figure 2 to Bowzer Decl. (Dkt. 499-2).

Though expressly styled as a "Motion for Relief From Stay," WEA seeks a partial stay pending appeal of the Phase Two Decision so that EOG can move forward with its plan to develop the two Western Carducci APDs through a challenged Phase Two lease. A court has discretion to grant a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 433 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34. Four factors come into play: (i) "whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits" of the appeal; (ii) "whether the applicant will be irreparably injured absent a stay"; (iii) "whether issuance of the stay will substantially injure the other parties interested in the proceeding"; and (iv) "where the public interest lies." *Id*. at 434 ("There is substantial overlap between these and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.") (internal citation omitted). The first two factors are the "most critical." *Id*. The chance of success on the merits must be "better than negligible." *Id*. (citation omitted). The second factor is not satisfied if the applicant only shows a "possibility of irreparable injury." *Id*. (citation omitted). For the reasons that follow, a stay of the Phase Two Decision is not warranted.

First, WEA has not shown that its appeal of the Phase Two Decision is likely to succeed on the merits. The Phase Two Decision discusses BLM's NEPA violations relative to the Phase Two lease sales. This might suggest that the Court is already persuaded that Plaintiffs' arguments on these issues – not WEA's – should prevail on appeal. But as with any trial court decision, that does not mean that an appeal is doomed from the start or even has only a slight chance of success. *See* 5/12/20 MDO at 7-8 (Dkt. 226). Critically, however, WEA does not squarely confront this "irreducible minimum requirement" for a stay pending appeal. *City &*

Cnty. of San Francisco v. USCIS, 944 F.3d 773, 789-90 (9th Cir. 2019). "The analysis ends if the moving party fails to show a likelihood of success on the merits." *Id*. at 790.

What WEA *does* do is argue that the Court's authorization of the Western Carducci APDs will not negatively affect the Subject Lease's already-poor greater sage-grouse habitat, existing leks (sage-grouse breeding grounds) occurring in far proximity to the involved well pad locations, or BLM-designated priority habitat, because there will be no surface disturbance to the Subject Lease by EOG's proposed drilling. Mem. ISO Mot. for Relief at 1, 5-9 (Dkt. 499-1); *see also* Reply ISO Mot. for Relief at 5-7 (Dkt. 504). To the extent these claims are offered to show a likelihood of the Phase Two appeal's success on the merits, the Court cannot agree – at least not on the record now before it and not when considering Plaintiffs' response thereto.

The Subject Lease is in designated sage-grouse habitat. Good Decl. at ¶ 4 (Dkt. 279-2); *see also* Ex. 1 to Good Decl. (identifying the Subject Lease as WYW-185797, with preliminary parcel number 144). "Oil and gas development is one of the 'greatest threat[s]' to greater sage-grouse." 6/9/21 MDO at 3 (Dkt. 389) (quoting 80 Fed. Reg. 59,858, 59,888-90). Plaintiffs stress that noise, disturbance, and traffic from EOG's proposed drilling and well operations risk disruption to sage-grouse populating a large cluster of leks less than three miles away (as well as surrounding habitats). Opp. to Mot. for Relief at 9-10 (Dkt. 503). These activities, they say, also may inhibit sage-grouse seasonal migrations between those leks and surrounding nesting, brood rearing, or winter habitat, thus preventing sage-grouse from reaching optimal habitat in an area already experiencing significant oil and gas activity. *Id*. at 10.[4] Generally speaking, EOG's requested relief feeds into and compounds Plaintiffs' insistence up to this point that the Phase

[4] On this point, Plaintiffs criticize WEA's claim that "BLM's NEPA review did not identify any potential sage-grouse issue." Reply ISO Mot. for Relief at 7 (Dkt. 504). That is because, Plaintiffs respond, the NEPA review (pertaining to the Cooper and Hurley APDs) never even analyzed sage-grouse impacts. Surreply in Opp. to Mot. for Relief at 4-5 (Dkt. 506-1).

Two lease sales themselves threaten substantial loss and fragmentation of the greater sage-grouse's remaining habitat.

With these considerations in mind, it is difficult for the Court to accept and fully endorse WEA's claim that "the decision to offer this parcel for lease does not impact greater sage-grouse or their habitat" as support for its predictive success on appeal. Reply ISO Mot. for Relief at 5 (Dkt. 504). Indeed, the Court explicitly tasked BLM to analyze this unsettled question more fully on remand and will not further inject itself – beyond the Phase Two Decision – into that process in the meantime. 6/9/21 MDO at 49-51 (Dkt. 389). In short, adopting WEA's argument at this stage would effectively skip ahead of, and largely obviate the need for, BLM's anticipated work on remand – something already ordered by the Court. In sum, WEA has not made the requisite showing that its appeal of the Phase Two Decision is likely to succeed on the merits.

Second, WEA has not shown that it will be irreparably injured absent a stay. WEA argues that EOG's economic and property interests will be harmed if it is not permitted to drill the Western Carducci APDs, "including lost revenue from the [s]ubject [w]ells, loss of development investment, lost resources due to inefficient geologic development, and harm to EOG's relationship with its investors, surface owners, and other mineral interest owners with interests in the [s]ubject [w]ells." Mem. ISO Mot. for Relief at 10-12 (Dkt. 499-1); *see also* Bowzer Decl. at ¶¶ 21-23 (Dkt. 499-2). These alleged harms, however, are not enough.

To begin, irreparable harm is "harm for which there is no adequate legal remedy, such as an award for damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Here, WEA complains mostly about prospective lost revenues or the delay in finally realizing those revenues. Mem. ISO Mot. for Relief at 11 ("Without the requested relief, value is lost. The delayed revenue streams negatively impact the economics of the two Western Carducci wells. EOG calculated an estimated loss of value, assuming no change in production volumes.").

But purely monetary injury is not generally considered irreparable. *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980); *but see Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985) ("The threat of being driven out of business is sufficient to establish irreparable harm.").[5] Nor is a claim for the loss of the time value of money associated with any alleged delay considered irreparable. *E.g.*, *Schroeder v. City of Chicago*, 927 F.2d 957, 960 (7th Cir. 1991) ("But a loss of the time value of money, consequent on delay in receiving money to which one is entitled, is not considered an irreparable harm, even though it is a real loss, and even if there is no way to recovery it."). In any event, nothing prevents the Western Carducci APDs from being developed and the proceeds recovered therefrom if and when WEA prevails on its appeal of the Phase Two Decision.[6]

It is additionally inescapable that the Phase Two Decision did not immediately stop the Western Carducci APDs' development. To be sure, the applications were not even in existence at that time, but later fashioned as a way to get around the Phase Two Decision and develop the western half of the Carducci DSU more quickly. In other words, it was EOG's decision to reconfigure two wells from the already-approved Cooper and Hurley APDs – which would not have violated the Phase Two Decision as originally permitted – that created the predicament that

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[5] WEA does not claim that EOG's economic harm in not being immediately able to develop the Western Carducci APDs will cause it to go out of business. *See* Johnson Decl. at ¶¶ 5-6 (Dkt. 503-1) (referencing EOG's net income of $7.883 billion over the last four quarters).

[6] WEA likewise claims as irreparable harm the similar burden to third parties by the Phase Two Decision's pending status. Mem. ISO Mot. for Relief at 11 (Dkt. 499-1) ("These costs would not be borne solely by the party to whom the Court assigned the responsibility for the remand – BLM. EOG, private mineral owners, private surface owners, service providers, and state and local governments, also will bear the burden of economic losses from uncertainty and delay."). Regardless, "monetary injury to third parties . . . or to the economy in general provides an even weaker justification for a finding of irreparable harm. After all, the *Nken* irreparable harm standard is whether the *applicant* will be irreparably injured absent a stay." *Doe #1 v. Trump*, 957 F.3d 1050, 1060 (9th Cir. 2020) (internal quotation marks omitted; emphasis in original).

WEA now asks the Court to resolve in its favor. This decision to forego the anticipated revenues from the Cooper and Hurley APDs and proceed with the inchoate Western Carducci APDs was EOG's choice.[7] Any resultant harm from that choice is self-inflicted and not properly understood as irreparable. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (self-inflicted harms "severely undermine[ ]" a claim for equitable relief and "are not irreparable injury") (internal quotation marks omitted).[8]

Against this backdrop, the possible hardship asserted by WEA in not staying the Phase Two Decision is cast principally in economic terms and only speculative. These injuries, however, are not irreparable and thus cannot apply to support WEA's requested relief.

Third, WEA has not shown that the balance of harms and public interest favor a stay.[9] To be clear, in requesting a stay of the Phase Two Decision, WEA is correspondingly requesting that it be allowed to proceed with drilling two new wells into the Carducci DSU that the Phase Two Decision otherwise prohibits and, tellingly, which BLM already rejected because the

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[7] In this respect, WEA does not explain EOG's alleged "lost resources due to inefficient geologic development" if the Phase Two Decision holds, as compared to the development of the original Cooper and Hurley APDs. Mem. ISO Mot. for Relief at 10 (Dkt. 499-1).

[8] Further, WEA waited until October 31, 2023 to bring its Motion Relief From Stay – after finalizing its plans for the Western Carducci APDs in June 2023 and, later, when BLM denied the Sundry Notices in August 2023. Though not an egregious delay, it is nonetheless a factor in weighing the propriety of the requested relief. *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (delay before seeking a preliminary injunction "implies a lack of urgency and irreparable harm."); *cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party must generally show reasonable diligence.").

[9] If an applicant satisfies the first two factors supporting a stay pending appeal (likelihood of success on the merits and irreparable injury), the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. *Supra*. These factors merge when the Government is the opposing party. *Nken*, 556 U.S. at 435. Here, Federal Defendants do not take a position on WEA's Motion for Relief From Stay. Mot. for Relief at 2 (Dkt. 499). Even so, Federal Defendants are an opposing party to some extent (at the very least in having opposed Plaintiffs' dispositive motion regarding Phase Two) and, therefore, the Court merges the two factors together.

redirected wells would penetrate the Subject Lease. Allowing this drilling to occur despite these considerations would be tantamount to ignoring (i) the NEPA-related shortcomings identified in the Phase Two Decision relative to the Phase Two lease sales, and (ii) the relief entered therein. The NEPA violations identified in this action harm the environment and do not disappear by paradoxically permitting proscribed drilling without the benefit of BLM's anticipated analysis on remand. *See Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989) ("To repeat, the harm at stake in a NEPA violation *is* a harm to the *environment*, not merely to a legalistic 'procedure,' nor, for that matter, merely to psychological well-being.") (emphasis in original); *see also* 5/12/20 MDO at 9 (Dkt. 226) ("[F]ederal laws . . . do not excuse violations based upon how expensive the consequences might be . . . ."). The balance of hardships therefore favors Plaintiffs in this setting.

Similarly, it cannot be said – as WEA attempts to do – that "it is in the public interest that EOG be allowed to complete the [ ] wells and produce from the subject [ ] lease consistent with federal and state laws and regulations pending appellate review." Mem. ISO Mot. for Relief at 13 (Dkt. 499-1). Just the opposite: the Ninth Circuit has recognized the well-established "public interest in preserving nature and avoiding irreparable environmental injury." *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008); *see also Earth Island Inst. v. United States Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("The preservation of our environment, as required by NEPA . . ., is clearly in the public interest."). To that end, "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward." *S. Fork Bank Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (suspending projects pending consideration of environmental impacts under NEPA "comports with the public interest"). Staying the Phase Two Decision to allow EOG's requested drilling without an adequate showing that NEPA's

requirements have been met is therefore contrary to NEPA's mandate and contrary to the public interest.

In sum, a stay pending appeal is an exercise of judicial discretion; it is an extraordinary remedy and depends on the circumstances of the particular case. *U.S. v. Mitchell*, 971 F.3d 993, 999 (9th Cir. 2020); *see also Nken*, 556 U.S. at 427 ("A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.") (internal quotation marks and citations omitted). WEA has not carried its burden of demonstrating a likelihood of success on the merits of the Phase Two appeal or that it is probable that it, through EOG, will suffer irreparable harm absent a stay of the Phase Two Decision. The balance of harms and the public interest also combine to disfavor a stay. Under *Nken*, then, a stay of the Phase Two Decision pending its appeal is not merited.

But within its reply briefing, WEA focuses more on the Court's ability to grant the requested relief using the Phase Two Decision's allowance – upon application to the Court – for "limited operations under appropriate circumstances to preserve the status quo where development is already underway." Reply ISO Mot. for Relief at 1 (Dkt. 504) ("Thus, the relief falls squarely within Footnote 22 of the Phase Two Decision [ ]") (citing 6/9/21 MDO at 49-50, n.22 (Dkt. 389)).[10] In essence, WEA argues that the status quo contemplated within the Phase

[10] Plaintiffs take issue with what they describe as WEA's improper attempt to modify the Phase Two Decision after it had already been appealed. Surreply in Opp. to Mot. for Relief at 2 (Dkt. 506-1) (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Still, Plaintiffs recognize an exception under Rule 62(c) that, like the Phase Two Decision's Footnote 22, turns on preserving the status quo. *Id*. (citing *Prudential Real Est. Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) ("A district court lacks jurisdiction to modify an injunction once it has been appealed except to maintain the status quo among the parties."). In either case, the focus is on the status quo.

Two Decision is EOG's *historical* plan for developing the Subject Lease as part of its greater development plans for the area. *Id*. at 4 ("Here, [WEA]'s requested relief for member company EOG falls squarely within the parameters of the Phase Two Decision and Order. EOG's proposed wells are part of on-going planning, permitting and development operations dating back to at least 2019."). This argument also is without merit.

The Court does not dispute EOG's plans to develop the Carducci DSU since acquiring the Subject Lease in 2017 (before the Phase Two Decision). But those earlier-in-time plans do not reflect the status quo as of the Phase Two Decision.[11] The status quo in this instance is more appropriately considered to be the state of development *at that moment in time*, to include the condition of the at-issue leases. Viewed in this way, when the Court issued the Phase Two Decision, there was no development on the western half of the Carducci DSU capable of ordinary maintenance and repair. That was the status quo as of the Phase Two Decision, which presumably explains why EOG went to BLM in July 2023 (two years after the Phase Two Decision) and why, now, WEA is seeking relief from the Phase Two Decision.

The relief WEA seeks here is inconsistent with maintaining the existing leasehold developments and, as a result, is inconsistent with the status quo. WEA essentially proves this point by admitting that it wants EOG to begin drilling wells into the Subject Lease. *See, e.g.*, Mot. for Relief at 1 (Dkt. 499) ("The relief is requested to allow EOG to drill two wells into one federal oil and gas lease sold at one of the BLM lease sales subject to remand . . . ."); Mem. ISO Mot. for Relief at 6 (Dkt. 499-1) ("By shifting the bottomhole locations of the approved APDs from the Cooper and Hurley DSUs to the Carducci DSU, EOG could continue to fully develop

[11] Plaintiffs contend that the status quo is measured at the time the appeal is filed. Surreply in Opp. to Mot. for Relief at 2 (Dkt. 506-1). Because the distinction yields no material difference in the outcome of the at-issue Motions, the Court stakes no ground on the proper measuring stick from which the status quo is assessed.

the Carducci DSU[.]"); *id*. at 8 ("EOG seeks judicial relief to modify the stay order to allow BLM to authorize the two Western Carducci APDs, so that EOG can proceed immediately with its development plans[.]"); *id*. ("EOG seeks relief from the Phase Two Decision to drill the two Western Carducci APDs, perforating the Subject Lease to produce the leased minerals[.]"). The permitting for this drilling, alongside the drilling itself, would be new and consequently upend, rather than preserve, the status quo. A contrary holding disregards the concerns raised within the Phase Two Decision, as well as its directives moving forward.

There is no basis to stay the Phase Two Decision. The *Nken* factors are not satisfied and the relief requested does not preserve the status quo. WEA's Motion for Relief is denied.

B. Plaintiffs' Motion for Clarification (Dkt. 502)

WEA's Motion for Relief From Stay alerted Plaintiffs to EOG's plans to utilize the Eastern Carducci APDs to drill three wells in the eastern half of the Carducci DSU. Mem. ISO Mot. for Clarif. at 4 (Dkt. 502-1) (citing Figure 2 to Bowzer Decl. (Dkt. 499-2) (specifically the well paths in green within the Carducci DSU (supra))). Because the Eastern Carducci APDs were issued on October 6, 2020, they should have expired on October 6, 2022. 43 C.F.R. § 3171.14(a) ("An APD approval is valid for [two] years from the date it was approved, or until lease expiration, whichever occurs first."). But as Plaintiffs recently learned, BLM extended some 45 APDs that predated the Phase Two Decision (but were not drilled before their two-year term expired), including the Eastern Carducci APDs. Mem. ISO Mot. for Clarif. at 5 (Dkt. 502-1); *see also* 43 C.F.R. § 3171.14(a) ("If the operator submits a written request before the expiration of the original approval, the BLM . . . as appropriate may extend the APD's validity for up to [two] additional years."). According to Plaintiffs, BLM's extension of these APDs violates the plain language and spirit of the Phase Two Decision's order that BLM "not authorize new drilling/surface disturbing activities on the leased parcels." *See generally* Mem. ISO Mot.

for Clarif. (Dkt. 502-1) (citing 6/9/21 MDO at 49 & 51 (Dkt. 389)). They in turn ask the Court to clarify that (i) BLM cannot authorize new drilling of the Phase Two leases by extending expiring APDs; and (ii) prohibit use of already-extended APDs. *See id*.

A court has the authority to clarify its prior orders. *F.V. v. Jeppesen*, 466 F. Supp. 3d 1110, 1115 (D. Idaho 2020). "The Supreme Court has long recognized that, when questions arise as to the interpretation or application of an injunction order, a party should seek clarification or modification from the issuing court, rather than risk disobedience and contempt." *Id*. (internal quotation marks omitted); *see also Mountain View Hosp., LLC v. Sahara, Inc.*, 2012 WL 397704, at *2 (D. Idaho 2012) ("Where the parties have identified a ruling by the Court that is ambiguous, contradictory, or otherwise uncertain, so as to impede the forward progress in the case, clarification is warranted and will be provided.").

Federal Defendants and Defendant-Intervenors lodge a litany of objections to Plaintiffs' requested relief. They variously argue that (i) a clarification is unnecessary; (ii) Plaintiffs waived their ability to challenge approved APDs; (iii) the plain language of the Phase Two Decision does not prohibit BLM's conduct in extending APDs; and (iv) Plaintiffs are improperly seeking reconsideration or new injunctive relief. *See generally* Fed. Defs.' Opp. to Mot. for Clarif. (Dkt. 508); AEC's & Wyoming's Joinder in Fed. Defs.' Opp. to Mot. for Clarif. (Dkts. 509 & 510); Def.-Intervs.' Opp. to Mot. for Clarif. (Dkt. 511). Each of these arguments is without merit.

First, there is a need to clarify the Phase Two Decision right now. It may be the case, as Federal Defendants urge, that disputes over extended APDs in the coming months are unlikely, given the status of the above-referenced 45 APDs, coupled with the Phase Two Decision's Footnote 22 protocol regarding modifications. Fed. Defs.' Opp. to Mot. for Clarif. at 2, 9 (Dkt. 508) (noting that two APDs have already been drilled, 15 APDs have already expired, and an

additional 23 APDs are set to expire early next year, leaving only five APDs that could be drilled at a later date (assuming EOG drills the three Eastern Carducci APDs as referenced in WEA's Motion for Relief From Stay)). But this overlooks how Plaintiffs only accidentally came across EOG's plans to drill the Eastern Carducci APDs, and were similarly unaware of two other APDs already being drilled. Reliance on the Phase Two Decision's Footnote 22 did not previously prevent the current issue so, rhetorically speaking, why would it now and into the future? Clarification from the Court will "settle the pond" on this unresolved and important point. The parties are still permitted to file motions to modify or stipulate to modifications (as they have impressively done in the past).[12]

Second, Plaintiffs simply seek clarification of the Phase Two Decision and they have not waived their ability to do so. Defendant-Intervenors argue that Plaintiffs' clarification efforts are really a ruse to challenge BLM's APD approvals and that Plaintiffs waived that claim because they neither challenged those APDs previously, nor participated in the attendant administrative review process. Def.-Intervs.' Opp. to Mot. for Clarif. at 7-10 (Dkt. 511). But Plaintiffs are not challenging any BLM decision to approve an APD. They are challenging the extensions that revive certain APDs that otherwise would have expired; extensions that, Plaintiffs say, authorized new drilling in direct violation of the Phase Two Decision (and for which there is no administrative review process from which waiver can even take root). Reply ISO Mot. for Clarif. at 8 (Dkt. 512). Plaintiffs are entitled to seek clarification of the Phase Two Decision to pull that argument's thread.

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[12] Federal Defendants' claim that resolution of the pending Phase One and Phase Two appeals may soon moot this issue also comes up short. Fed. Defs.' Opp. to Mot. for Clarif. at 9 (Dkt. 508). As the Court understands things, the Phase Two appeal is awaiting the Phase One appeal's resolution, and has not yet been fully briefed. *See* Reply ISO Mot. for Relief at 2 (Dkt. 504); Reply ISO Mot. for Clarif. at 4 (Dkt. 512). Moreover, while everyone is expecting word on the Phase One appeal any day, its impact on Phase Two and this issue is unclear.

Third, when considered holistically, the Phase Two Decision prohibits BLM from authorizing new drilling via APD extensions. It is true that this specific scenario was not contemplated within the Phase Two Decision, nor could it have been given the extent of the parties' arguments in that moment. Now, with the passage of time and not yet hearing from the Ninth Circuit on the Phase Two appeal, the issue presents itself in a way that was not fully appreciated over three years ago. Even so, the Phase Two Decision's language helps answer the question when it enjoined BLM from "authoriz[ing] new drilling/surface disturbing activities on the leased parcels." 6/9/21 MDO at 49, 51 (Dkt. 389).

Both sides submit that this language dovetails with their respective interpretations. For example, Plaintiffs argue that granting an APD extension allows, i.e., authorizes, leaseholders to conduct new drilling in violation of the Phase Two Decision. Mem. ISO Mot. for Clarif. at 2, 7-9 (Dkt. 502-1). Federal Defendants and Defendant-Intervenors counter that (i) APD extensions merely extend the period of an already-approved APD and therefore do not authorize any new drilling at all, and that (ii) lateral (rather than vertical) drilling from off-site well pads creates no surface disturbances and thus does not amount to drilling "on" the subject leases anyway. Fed. Defs.' Opp. to Mot. for Clarif. at 5-7 (Dkt. 508); Def.-Intervs.' Opp. to Mot. for Clarif. at 2-6, 10 (Dkt. 511). The Court agrees with Plaintiffs.

There is no dispute that, until BLM addresses the deficiencies in its NEPA analysis, the Phase Two Decision prevents BLM from issuing new APDs for the Phase Two leases and any surface disturbing activities thereon. 6/9/21 MDO at 49 (Dkt. 389). The Court need not decide whether extending APDs like the planned Eastern Carducci APDs fits within these restrictions because the Phase Two Decision does not stop there. It importantly goes on to add (twice) that, until the NEPA-related concerns are sufficiently addressed, "BLM may not authorize new drilling" on the leased parcels. *Id*. at 49, 51. BLM does not claim to have remedied its NEPA

deficiencies. So, by extending APDs that otherwise would have expired, BLM is authorizing new drilling that would not have taken place but for the extension. BLM's own guidance suggests as much by highlighting the discretionary nature of the requested authorization. *See* IM 2023-011, attached as Ex. 1 to Fed. Defs.' Opp. to Mot. for Clarif. (Dkt. 508-2) (IM to BLM offices for evaluating APD extensions, stating: APD extensions "are *discretionary authorizations* and should only be approved when the permit extension serves the public interest.") (emphasis added); *see also* Norelius Decl. at ¶ 7 (Dkt. 508-1) ("BLM field office staff review the request and could approve the APD extension request for the time frame requested, approve for a shorter time than requested, reject, deny or request clarifying information prior to making a decision."). In this context, extending APDs is at odds with the Phase Two Decision.[13]

Footnote 22 of the Phase Two Decision illustrates this point. There, the Court noted the "suspended status" of the Phase Two leases pending remand to BLM. 6/9/21 MDO at 49-50, n.22 (Dkt. 389). Despite this, the Court acknowledged "the possible need to continue *limited operations* under appropriate circumstances to preserve the status quo where development is already underway." *Id*. (emphasis added). This "safety valve" was not an affirming nod to extending APDs or somehow an endorsement of the very drilling that concerned the Court until BLM satisfied its NEPA obligations. Rather, it was intended to keep things in place and operational – the status quo – so that drilling could resume once BLM completed its work on remand. *Id*. (citing 5/12/20 MDO at 10-11, n.6 (Dkt. 226) (relating to Phase One lease sales during appeal: "The Court is mindful that some work, *to include ordinary maintenance and*

[13] Though not dispositive of the matter, the Court notes how Federal Defendants reference how "new drilling has occurred in relatively few instances" to show the lack of any real need to clarify the Phase Two Decision (discussed *supra*). Fed. Defs.' Opp. to Mot. for Clarif. at 2 (Dkt. 508). It is possible that, while referenced within a discussion pertaining to extending APDs, Federal Defendants are talking about a different aspect of the case. But if not, this word choice emphasizes how extending APDs can be understood to lead to new drilling.

repair, may be necessary to preserve the status quo at locations where leasehold development is already underway.") (emphasis added)). And even then, only *after* securing relief from the Court, suggesting that the unilateral continuation of even limited operations was not permitted before that time. *Id*. ("Any party seeking to modify the suspended status of any applicable Phase Two lease must include 'information about the nature and need for such work to allow other parties to respond to the motion and for the Court to make an informed decision upon the request.'") (quoting 5/12/20 MDO at 10-11, n.6 (Dkt. 226)).

This interpretation also aligns with the relief that Federal Defendants originally requested (in the event the Court found a NEPA violation). That is, Federal Defendants argued that, if BLM violated NEPA, the Court should not vacate the Phase Two leases, "*but instead should suspend the oil and gas leasing decisions without vacating them*." Mem. ISO Mot. for Partial S.J. (Phase Two) at 48 (Dkt. 278-1) (emphasis added); *see also id*. at 49 ("Harm to the environment could be avoided during any remand period by enjoining surface disturbing activities *and suspending rather than vacating the leases*.") (emphasis added);[14] *id*. at 50 ("Accordingly, Defendants request that, if the Court finds a legal violation, *it order a suspension*

[14] In support of their claim that the Phase Two leases should be suspended rather than vacated, Federal Defendants cited to *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 85 (D.D.C. 2019). Mem. ISO Mot. for Partial S.J. (Phase Two) at 49 (Dkt. 278-1). They now cite to *WildEarth Guardians* again, arguing that the Court's Phase Two Decision similarly only "prohibited new APDs and 'new drilling *on* the leased parcels'" – not APD extensions or lateral drilling. Fed. Defs.' Opp. to Mot. for Clarif. at 6-7 (Dkt. 508) (emphasis in original) (quoting *WildEarth Guardians*, 368 F. Supp. at 85 ("Until BLM sufficiently explains its conclusion that the Wyoming Lease Sales did not significantly affect the environment, BLM may not authorize new drilling on the leased parcels.")). There are similarities between this action and *WildEarth Guardians*. Significantly, though, the district court there considered the prohibitions to include "*any further activity* on the Wyoming leases until it was satisfied that BLM had addressed the deficiencies in its analysis." *WildEarth Guardians v. Bernhardt*, 2019 WL 3253685, at *1 (D.D.C. 2019) (emphasis added). This insight is not dispositive but tracks the Court's position relative to the scope of the Phase Two Decision here.

of operations and allow operators to submit requests to continue operations under appropriate circumstances rather than ordering the leases vacated.") (emphasis added). This is what the Court ordered within the Phase Two Decision: it remanded the Phase Two lease sales without vacatur (notwithstanding Plaintiffs' request to do so) and enjoined BLM from authorizing new drilling until it completed its NEPA review. 6/9/21 MDO at 49, 51 (Dkt. 389).[15]

That the APD extensions involve lateral drilling does not change things. New drilling is new drilling, and it is prohibited on the Phase Two leases until BLM completes its revised NEPA analysis. This means that, despite using the preposition "on" when describing the prohibited drilling in the interim, the Phase Two Decision is understood to preclude drilling into or through a Phase Two lease – whether horizontal or vertical. There is no room for – or point in – insisting on hyper-technical distinctions about the manner in which drilling occurs when considering that, in either case, the lease is penetrated. This is the very reason why BLM did not permit EOG to drill two new wells into the Carducci DSU. *Supra* (describing how BLM rejected the redirected wells because they penetrated the Subject Lease in violation of the Phase Two Decision). Whether the drilling follows a new APD or an extended APD makes no practical difference.

Fourth and finally, Plaintiffs are not seeking reconsideration or new injunctive relief. They are attempting to confirm their understanding of the Phase Two Decision's application over time by asking for clarification from the Court. This is not improper. "[A] court retains

[15] Federal Defendants and Defendant-Intervenors submit that Federal Defendants actually advocated for allowing APD extensions as part of a more tailored injunction and that, by not vacating the Phase Two leases and precluding only new APDs and surface disturbing activities, the Court actually accepted that argument in the Phase Two Decision. Fed. Defs.' Opp. to Mot. for Clarif. at 6 (Dkt. 508); Def.-Intervs.' Opp. to Mot. for Clarif. at 4 (Dkt. 511). The Court disagrees. Not only did Federal Defendants originally advocate in favor of suspension (*see supra*), their argument for a more tailored injunction in greater sage-grouse habitat (presented for the first time in their reply briefing) was never adopted by the Court, particularly when considering that the majority of Phase Two leases are in greater sage-grouse habitat. Reply ISO Mot. for Clarif. at 6-7, n.3 (Dkt. 512).

jurisdiction to supervise a required course of conduct[,]" including when, "'as new facts develop[,] additional supervisory action by the court is required.'" *In re Icenhower*, 755 F.3d 1130, 1138 (9th Cir. 2014) (quoting *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976)); *see also* Reply ISO Mot. for Clarif. at 4 (Dkt. 512) (citing *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 480 n.14 (9th Cir. 1994) (finding that district court did not lack jurisdiction to issue an order clarifying its original injunction and to supervise compliance in light of new facts)). When Plaintiffs recently learned that BLM was extending APDs, they conferred with Federal Defendants to discuss their concerns about potential violations of the Phase Two Decision and to see if an agreement might be reached. Mem. ISO Mot. for Clarif. at 5 (Dkt. 502-1). It was entirely appropriate for Plaintiffs – or any party – to seek clarification from the Court when those discussions did not yield a mutual understanding moving forward.

At bottom, the Phase Two Decision supplied a remedy for BLM's NEPA violations. It required BLM to substantiate its decision on remand before authorizing new drilling on the Phase Two leases. This commonsensical approach comports with NEPA's objective to achieve informed agency action. To this end, extensions of APDs authorize new drilling and are similarly precluded under the terms of the Phase Two Decision. Plaintiffs' Motion for Clarification is granted.

III. ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. WEA's Motion for Relief From Stay on Behalf of EOG Resources, Inc. (Dkt. 499) is DENIED;

2. Plaintiffs' Motion for Clarification and Enforcement of the "Phase Two" Decision (Dkt. 502) is GRANTED. BLM's decision extending an expiring APD authorizes new drilling

in violation of the Phase Two Decision. Use of already-extended APDs is prohibited consistent with the terms of the Phase Two Decision.

3. Plaintiffs' unopposed Motion for Leave to File Surreply to WEA's Motion for Relief (Dkt. 506) is GRANTED.

DATED: January 5, 2024

Honorable Raymond E. Patricco
Chief U.S. Magistrate Judge