Nos. 20-35291, 20-35293 & 20-35294 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WESTERN WATERSHEDS PROJECT, ET AL.,
Plaintiffs-Appellees,

v.

DAVID BERNHARDT, SECRETARY OF THE INTERIOR, ET AL.,
Federal Defendants-Appellants,

STATE OF WYOMING, AND WESTERN ENERGY ALLIANCE,
Defendants-Intervenors-Appellants.

On Appeal from the United States District Court
for the District of Idaho
No. 1:18-cv-00187-REB
Hon. Ronald E. Bush

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Laurence ("Laird") J. Lucas (llucas@advocateswest.org)
Sarah Stellberg (sstellberg@advocateswest.org)
Andrew R. Missel (amissel@advocateswest.org)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Attorneys for Plaintiffs-Appellees
Western Watersheds Project and
Center for Biological Diversity

RULE 26.1 DISCLOSURE STATEMENT

Plaintiffs-Appellees Western Watersheds Project and Center for Biological Diversity are both non-profit organizations recognized by the IRS as Section 501(c)(3) public charities. They have no public shares and no corporate parent or affiliate with public shares.

Date: December 16, 2020

Advocates for the West

/s/ Laurence ("Laird") J. Lucas
Laurence ("Laird") J. Lucas
Sarah Stellberg
Andrew R. Missel

Attorneys for Appellees Western Watersheds Project and Center for Biological Diversity

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
DNA	Determination of NEPA Adequacy
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
IM	Instruction Memorandum
NEPA	National Environmental Policy Act
RMP	Resource Management Plan

INTRODUCTION

In this case, Plaintiffs-Appellees Western Watersheds Project and Center for Biological Diversity ("Plaintiffs") challenge several actions by Federal Defendants-Appellants Interior Secretary David Bernhardt *et al.* ("Defendants") to "promote and expedite oil and gas leasing on public lands" within the range of the greater sage-grouse, a charismatic bird found only in the American West. 1-FedER-16.[1] Sage-grouse is a declining species particularly threatened by oil and gas development.

The parties stipulated to litigate Plaintiffs' challenges in several "phases," with Phase One addressing claims that the Bureau of Land Management ("BLM") improperly adopted new procedures—through Instruction Memorandum ("IM") 2018-034—to limit public involvement and environmental reviews of oil and gas leases, and unlawfully implemented those new procedures in approving several 2018 oil and gas lease sales (the "Phase One lease sales"). In its February 2020 Phase One Decision, the district court granted partial summary judgment for Plaintiffs, and held IM 2018-034 unlawful along with the Phase One lease sales implementing it. 1-FedER-13–74. Pursuant to the Administrative Procedure Act

[1] "FedER" refers to the Excerpts of Record filed by Defendants, 9th Cir. No. 20-35293, ECF No. 7. "WYER" refers to the Excerpts of Record filed by Wyoming, 9th Cir. No. 20-35291, ECF No. 8. "SER" refers to the Supplemental Excerpts of Record filed herewith by Plaintiffs under Circuit Rule 30-1.2(b).

("APA"), 5 U.S.C. §706(2), the court vacated IM 2018-034 and the lease sales. *Id.*

Defendants, along with intervenors State of Wyoming and Western Energy Alliance ("WEA"), filed these appeals from the Phase One Decision without getting approval for interlocutory appeal under Rule 54(b) or 28 U.S.C. § 1292(b). This Court lacks jurisdiction, as the Phase One Decision did not impose injunctive relief appealable under 28 U.S.C. § 1292(a).

If the Court reaches the merits of the appeals, it must affirm. The Phase One Decision correctly held that IM 2018-0034 was substantively and procedurally unlawful, and that the lease sales implementing it were invalid. The vacatur remedies ordered by the district court properly applied the APA and this Court's case law, and were not an abuse of discretion. Finally, the district court's prior September 2018 decision denying Defendants' motion to transfer venue is not properly challenged in these interlocutory appeals, and in any event was correct.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction because the Phase One Decision only granted partial summary judgment, for which Appellants failed to obtain certification for an interlocutory appeal under Rule 54(b) or 28 U.S.C. § 1292(b).

Their arguments that these interlocutory appeals are proper under 28 U.S.C. § 1292(a)(1) fail because the Phase One Decision is not an "order granting an

injunction," as explained below. Accordingly, the Court must dismiss for lack of jurisdiction.

STATEMENT OF THE ISSUES ON APPEAL

1. Should the Court dismiss these appeals for lack of jurisdiction?

2. If the Court finds it has jurisdiction, should it affirm the district court's Phase One Decision?

3. Even if the Court has jurisdiction to address these appeals from the Phase One Decision, is the district court's September 2018 venue decision beyond the proper scope of these interlocutory appeals; and if not, should the Court affirm the district court's decision denying a venue transfer?

STATEMENT OF THE CASE

Plaintiffs filed their original complaint in April 2018. 6-FedER-1430–1523. It challenged several oil and gas lease sales conducted by BLM in 2017 for violating the National Environmental Policy Act ("NEPA") and the Federal Land Policy and Management Act ("FLPMA"), by approving leases sales in sage-grouse habitats contrary to BLM's own land use plans requiring it to "prioritize" such leases outside of such habitats. 6-FedER-1430–34, 1450–52, 1471–88.

The complaint also challenged two Instruction Memoranda that BLM adopted to expedite oil and gas leasing on public lands that particularly affected sage-grouse habitats. The first was IM 2018-026, which effectively rescinded the

requirement of BLM's plans requiring prioritization of oil and gas development outside of sage-grouse habitats, *see id.*; and the second was IM 2018-034—the Instruction Memorandum at issue here—which replaced BLM's prior IM 2010-117 and curtailed public notice and involvement in the leasing process. *See* 6-FedER-1461–64, 1506–10.

In May 2018, Defendants filed a motion "to sever and transfer," seeking a discretionary transfer of venue of Plaintiffs' claims challenging the two IMs and the 2017 lease sales to several other district courts under Fed. R. Civ. P. 21 and 28 U.S.C. § 1404(a). 6-FedER-1429. While that motion was pending, Wyoming and WEA each moved to intervene, which the court granted in August 2018. 6-FedER-1421–28. The district court denied Defendants' motion to sever and transfer in September 2018, questioning whether venue was proper in the proposed transferee districts and concluding that the convenience and fairness factors nonetheless weighed against transfer. *See* 1-FedER-132–45.

Later in September 2018, the court granted Plaintiffs' motion for a preliminary injunction barring BLM from continuing to apply IM 2018-034 to limit environmental reviews and public involvement in proposed oil and gas lease sales in sage-grouse habitat, finding it likely that Plaintiffs would prevail on their challenges and the balance of harms and public interest favored an injunction. 1-FedER-75–131. That Preliminary Injunction Order directed BLM to continue

following the procedures required by IM 2010-117, BLM's prior IM, for sales in sage-grouse habitats. *Id.* Neither Defendants nor Intervenors appealed that Order.

In October 2018, Plaintiffs filed a First Amended Complaint adding new claims, including against five BLM oil and gas lease sales conducted in June and September 2018 under IM 2018-034 before the Preliminary Injunction Order was issued—*i.e.*, the "Phase One lease sales"—and BLM's August 2018 approval of the Normally Pressured Lance ("NPL") Project to develop 3,500 new oil and gas wells within key sage-grouse habitat in Wyoming. 6-FedER-1288–1418.

In response to the amended complaint, Defendants and Intervenors[2] filed motions to dismiss the NPL Project claims for improper venue under 28 U.S.C. § 1391(e), or for discretionary transfer to the District of Wyoming. *See* SER-64–118. Those motions *only* addressed the NPL Project claims; none raised an improper venue defense to the 2018 Phase One lease sale claims, or asked the district court to transfer those claims. *Id.* The district court granted the motions and transferred the NPL Project claims to the District of Wyoming. 2-FedER-364–81.

On December 13, 2018, the court approved the parties' joint litigation plan to adjudicate Plaintiffs' claims in several phases of partial summary judgment motions, with Phase One addressing Plaintiffs' challenges to IM 2018-034 and the

[2] These included Jonah Energy, the proponent of the NPL Project, which was allowed to intervene only as to Plaintiffs' NPL Project claims. It is not a party to these appeals.

2018 lease sales implementing it. SER-60–63. Later phases would address Plaintiffs' challenges to the other IM and the 2017 lease sales. *Id.*

The district court issued its Phase One Decision in February 2020, granting Plaintiffs' partial summary judgment motion and confirming its Preliminary Injunction Order ruling that IM 2018-034 was unlawfully adopted. 1-FedER-13–16, 29–53. The Phase One Decision also held that the five 2018 lease sales conducted under IM 2018-034 were unlawful. 1-FedER-53–61. Applying the presumptive remedy under the APA, the district court vacated and "set aside" the challenged provisions in IM 2018-034, and thus automatically reinstated the corresponding provisions in IM 2010-117 for future BLM oil and gas leasing in sage-grouse habitats. 1-FedER-62–68. It also vacated the five challenged Phase One lease sales. 1-FedER-69–73.

Defendants and Intervenors filed their notices of appeal in late March and early April 2020, along with motions for stay pending appeal—which only addressed vacatur of the 2018 leases, not IM 2018-034. 2-FedER-146–210; 2-WYER-108–147. On May 12, 2020, the court partially granted the motions and stayed its vacatur of the Phase One lease sales, but suspended operations on the leases pending appeal. 1-FedER-1–12.[3]

[3] The court also denied Plaintiffs' motion for limited reconsideration of the Phase One Decision, declining to expand the geographic scope of its vacatur of IM 2018-034 beyond sage-grouse habitat. 1-FedER-2–6.

Defendants filed their opening brief on July 9, 2020. *See* 9th Cir. No. 20-35293, ECF No. 6 ("Fed. Br."). They do not contest the merits of the rulings that IM 2018-034 was unlawfully adopted, only the remedy order vacating it. *Id.* at 47–52. They also challenge the rulings holding unlawful and vacating the Phase One lease sales, *id.* at 27–47, and the September 2018 decision denying their motion for a discretionary venue transfer, *id.* at 20–27.

Wyoming's opening brief only challenges the Phase One Decision insofar as it held the June and September 2018 Wyoming lease sales to be unlawful and vacating them. *See* 9th Cir. No. 20-35291, ECF No. 7 ("WY Br.").

WEA's opening brief challenges a portion of the Phase One Decision's rulings holding IM 2018-034 unlawful and the rulings holding the Phase One lease sales unlawful, as well as the vacatur remedies. *See* 9th Cir. No. 20-35294, ECF No. 6-1 ("WEA Br."). WEA also purports to challenge the district court's September 2018 order denying Defendants' motion for a discretionary venue transfer. *Id.*

On August 3, 2020, Plaintiffs moved to dismiss all three appeals as improper interlocutory appeals under 28 U.S.C. § 1292(a)(1). 9th Cir. No. 20-35291, ECF No. 14-1; 9th Cir. No. 20-35293, ECF No. 13-1; 9th Cir. No. 20-35294, ECF No. 13-1. A motions panel denied those motions without prejudice to renewal here and consolidated the appeals. 9th Cir. No. 20-35291, ECF No. 19.

LEGAL BACKGROUND

A. FEDERAL LAND POLICY AND MANAGEMENT ACT ("FLPMA").

Enacted in 1976, FLPMA governs BLM's management of the public lands. *See* 43 U.S.C. §§ 1701 *et seq.* In FLPMA, Congress directed that public lands "be managed in a manner that will protect the quality of the scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values . . . ." *Id.* § 1701(a)(8).

To help achieve these purposes, FLPMA requires that land use plans—called Resource Management Plans ("RMPs")—be developed with public input, and followed in subsequent management decisions. *See* 43 U.S.C. § 1712(a), § 1732(a).

In addition, FLPMA Section 309(e) requires that the Secretary of Interior adopt regulations to ensure the public is afforded adequate notice and opportunity to comment upon, and participate in, public land management decisions. *See* 43 U.S.C. § 1739(e) (Secretary "by regulation, shall establish procedures . . . to give . . . the public adequate notice and an opportunity to comment upon . . . and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands").

B. NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA").

NEPA is our "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. Congress adopted NEPA to "encourage productive and

enjoyable harmony between man and his environment," and "to promote efforts which will prevent or eliminate damage to the environment and biosphere," among other purposes. 42 U.S.C. § 4321. At its core, NEPA requires federal agencies to analyze and publicly disclose the environmental impacts of their actions. *Id.* § 4332(2)(C); 40 C.F.R. § 1502.14. The statute's twin aims are to promote informed agency decision-making and "guarantee[] that the relevant information will be made available to the larger [public] audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

Applicable here, the Council on Environmental Quality ("CEQ") in 1978 promulgated regulations implementing NEPA, binding on all federal agencies. *See* 43 Fed. Reg. 55,990 (Nov. 28, 1978), *codified at* 40 C.F.R. §§ 1500–1518.4.[4] The regulations require that federal agencies prepare an Environmental Impact Statement ("EIS") for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i). However, an agency may prepare a less thorough Environmental Assessment ("EA") "[a]s a preliminary step . . . to decide whether the environmental impact of a proposed action is significant

[4] CEQ adopted revised NEPA regulations in September 2020, but those are not applicable to this case. *See* 85 Fed. Reg. 43,304 (Sept. 14, 2020). The citations herein refer to the regulations in effect at the time the challenged actions occurred.

enough to warrant preparation of an EIS." *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (citing 40 C.F.R. § 1508.9(a)).

The NEPA regulations confirm that public participation is an "essential" part of the NEPA process. 40 C.F.R. § 1500.1(b). They direct federal agencies to encourage and facilitate public involvement in the NEPA process "to the fullest extent possible." *Id.* § 1500.2; *see also id.* § 1501.4(b) (agencies must "involve . . . the public, to the extent practicable"); *id.* § 1506.6 ("Agencies shall: . . . (a) Make diligent efforts to involve the public in . . . implementing their NEPA procedures"). They also provide that "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.* § 1500.1(b).

NEPA's requirements "are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act." *California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) (quoting 42 U.S.C. § 4332(1)). "Grudging, *pro forma* compliance will not do." *Id.* (citation and alteration omitted).

C. OIL AND GAS LEASING ON PUBLIC LANDS.

The Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, authorizes BLM to lease federal lands "which are known or believed to contain oil or gas deposits." 30 U.S.C. § 226(a). BLM State Offices issue oil and gas leases primarily through

quarterly auctions, also called "competitive lease sales." *See id.* § 226(b)(1)(A); 43 C.F.R. § 3120.1-2(a).

BLM builds the parcel list for each sale primarily through industry nominations, called "Expressions of Interest." 43 C.F.R. § 3120.1-1. After specific parcels are nominated, BLM conducts a review to ensure each parcel is eligible for leasing under the applicable RMP; that review process can result in parcel rejections, deferrals, and/or stipulations being placed on the leases to protect the environment or other resource values. *See id.* § 3101.1-3. BLM also must conduct a NEPA analysis before deciding whether to issue any nominated lease. *See Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988).[5]

After this review process, and at least 45 days prior to the start of the lease sale, BLM must post a Notice of Competitive Lease Sale ("Sale Notice") announcing the list of parcels included in the auction. *See* 30 U.S.C. § 226(f); 43 C.F.R. § 3120.4-2. Ordinarily, the Sale Notice is posted along with the final NEPA document (EIS, EA, or DNA) supporting the lease sale.

[5] Under the Department of Interior's NEPA regulations, BLM may sometimes approve oil and gas lease sales without new NEPA analysis, relying on "Determinations of NEPA Adequacy" ("DNAs"). *See* 43 C.F.R. § 46.120. DNAs are "NEPA checklist" forms that allow BLM employees to determine whether existing NEPA documents adequately analyzed the proposed action.

STATEMENT OF FACTS

A. The Greater Sage-Grouse.

The greater sage-grouse (*Centrocercus urophasianus*) is North America's largest grouse, best known for spectacular courtship displays where males gather in spring on traditional breeding grounds (known as leks) and strut with their chests puffed out and spiky tails spread, hoping to attract females.[6] As this Court has recognized, the "greater sage grouse is a sagebrush-obligate bird, meaning that it relies on sagebrush for its survival year-round." *Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 565–66 (9th Cir. 2016).

Greater sage-grouse once numbered in the millions across the western U.S and Canada, but loss and fragmentation of their native sagebrush habitats have caused populations to decline precipitously over the last century. 2-FedER-267–69. Current sage-grouse numbers are estimated to be less than 5% of historic population levels, *i.e.*, populations have experienced a 95% or more decline. *Id.*

In 2010, the decline of greater sage-grouse populations and habitats led the U.S. Fish and Wildlife Service to determine that the species "warranted" listing as threatened or endangered under the Endangered Species Act ("ESA"), but further

[6]An illustrative video may be viewed on the U.S. Fish and Wildlife Service website at: https://www.fws.gov/greatersagegrouse/videos/041712_sg_edited_2_480-272.mpg.

listing action was "precluded" at that time by its backlog of other species' listings. *See* 75 Fed. Reg. 13,910 (Mar. 5, 2010).

As that March 2010 finding detailed, human disturbance and habitat degradation in sage-grouse habitats negatively affect sage-grouse survival. *Id.* at 13,924–62. Oil and gas development on public lands is a particular threat because it destroys and fragments the bird's dwindling habitat, when federal lands comprise over 60% of the sage-grouse's range. *Id.* at 13,920, 13,942–48. The March 2010 finding identified BLM RMPs and other federal regulatory mechanisms as being inadequate to protect sage-grouse from these threats. *Id.* at 13,973–80.

In order to avoid a potential ESA listing, BLM (along with the U.S. Forest Service) conducted a large-scale federal land use planning process that resulted in their adoption, in 2015, of 98 revised or amended RMPs and Forest Plans across the sage-grouse range in ten western states. *See* 80 Fed. Reg. 59,858, 59,874 (Oct. 2, 2015) (describing 2015 plans). Those 2015 plans identified priority sage-grouse habitats and implemented a range of new measures to protect them from human-related threats, including by requiring that "priority will be given to leasing and development of fluid mineral resources . . . outside of sage-grouse habitat." *Id.* at 59,876. Citing this prioritization directive and other requirements of the 2015 plans, the Fish and Wildlife Service determined in October 2015 that ESA listing of sage-grouse was not warranted. *Id.* at 59,933–36.

B. Prior BLM Oil and Gas Lease Review Process.

BLM has never promulgated regulations for public notice and involvement in its oil and gas leasing program. Instead, it has used procedures spelled out in Instruction Memoranda—including prior IM 2010-117 and IM 2018-034 at issue here—to govern the oil and gas leasing process.

In 2009, the Department of Interior ("DOI") issued a report which recommended numerous reforms to BLM's lease review process, including greater public participation to improve BLM decisions. *See* SER-251–261. In response, BLM adopted IM 2010-117 to improve the quality and transparency of BLM's environmental reviews and provide meaningful public involvement. *See* 2-FedER-384–397. It recognized that, under federal law, "there is no presumed preference for oil and gas development over other uses." 2-FedER-385.

IM 2010-117 required BLM field offices to provide for public participation in every lease sale, including a 30-day public review and comment period as well as a 30-day protest period. 2-FedER-391–92. It also directed them to extend review timeframes "as necessary, to ensure there is adequate time for the field offices to conduct comprehensive parcel reviews." 2-FedER-388.

C. Adoption of IM 2018-034.

On March 28, 2017, President Trump issued Executive Order ("EO") No. 13783, directing federal agencies to immediately review "all existing regulations,

orders, guidance documents, policies, and any other similar agency actions . . . that potentially burden the development or use of domestically produced energy resources." 82 Fed. Reg. 16,093 (Mar. 28, 2017).

In accordance with EO 13783, DOI released a report in late 2017 identifying "harmful regulations and unnecessary policies" affecting domestic energy production. *See* 82 Fed. Reg. 50,532, 50,534 (Nov. 1, 2017). That report identified the public input requirements of IM 2010-117 as "burdensome" obligations that should be modified. *Id.* at 50,536.

Consistent with the report—and without any public notice or comment—BLM issued IM 2018-034 on January 31, 2018, to overhaul BLM's lease sale review process. *See* 2-FedER-398–402. The IM's stated purpose was to "alleviate unnecessary impediments and burdens" and expedite oil and gas leasing "consistent with Executive Order 13783." 2-FedER-398. The IM superseded existing procedures under IM 2010-117 and made major changes to limit public participation opportunities, including:

(1) replacing the language from IM 2010-117 stating that BLM offices "will" provide for public participation during the NEPA process with a provision that they "may" provide for public participation, *see* 2-FedER-400;

(2) eliminating mandatory 30-day public review and comment periods, *id.*;

(3) shortening the deadline for public protests of proposed lease sales from 30 days to 10 days, 2-FedER-401; and

(4) limiting the parcel review process to six months, meaning that the agency has far less time to take the public's input into account, 2-FedER-399.

IM 2018-034 also eliminated the rotational lease schedule, meaning that state quarterly sales must include all parcels nominated across the state, as opposed to parcels in a rotating set of districts, *id.*, and further discarded the language in IM 2010-117 stating that "there was no presumed preference for oil and gas" over other uses of public lands. *Id.*

D. Application of IM 2018-034 to the Phase One Lease Sales.

BLM began implementing IM 2018-034 immediately after it was adopted, including in the Phase One lease sales at issue here. *See* 1-FedER-53–61 (Phase One Decision, detailing facts of the Phase One lease sales); 6-FedER-1288–89, 1351–60 (First Amended Complaint, same).

For the June 2018 Wyoming sale, BLM's Wyoming office released a Draft EA in October 2017 proposing to offer 163 lease parcels comprising 199,298 acres. *See* SER-4–7 (reciting facts from Administrative Record). BLM originally followed IM 2010-117 in allowing a 30-day comment period, and planned to allow a 30-day protest period. *Id*. Two days after IM 2018-034 was issued, BLM Wyoming staff began discussing how it would impact their lease review schedule,

and acknowledged that applying it to shorten the protest period to 10 days "would be unfair" to commenting parties because it would "unexpectedly give them one third of the normal time for submitting protests." SER-5–6. They considered allowing a 30-day protest period and "commit[ing] to implementing a 10 day protest period for our next Sale Notice posting," but were advised by BLM's Washington D.C. headquarters "that the IM was effective immediately" and the "10 day protest was in effect." *Id.*

For the June 2018 Nevada lease sale, BLM released a Draft EA on January 16, 2018, proposing to offer 166 parcels totaling 313,715 acres. SER-7. Because the Draft EA was released before IM 2018-034, BLM again allowed 30 days for public comment under IM 2010-117, and planned a 30-day protest period. *Id.* But BLM later adjusted its schedule to comply with IM 2018-034, allowing only a 10-day protest period. *Id.* BLM's Nevada staff admitted that the IM would also "sharply reduce" the timeframe for their internal review. *Id*.

A similar pattern was seen in the September 2018 Wyoming lease sale. There, BLM initially posted two Draft EAs covering 124 parcels in two different BLM districts before IM 2018-034 was issued, and allowed 30-day comment periods. SER-9–10. But after IM 2018-034, BLM compiled a second batch of parcels nominated after its prior cut-off date—what it called a "double up"—to comply with the nomination processing deadlines in IM 2018-034. *Id.* On May 24,

2018, BLM posted a Draft EA for the second batch, which included 256 parcels scattered across the entire state and spanning all but two of BLM's Wyoming field offices—more than doubling the size of the September 2018 Wyoming lease sale. *Id.* Applying IM 2018-034, BLM allowed only 14 days for comment on this EA, and a 10-day protest for the entire lease sale. *Id.*

For the September 2018 Nevada lease sale, BLM issued a Notice of Competitive Lease Sale on July 27, 2018, encompassing 144 parcels and 295,174 acres. SER-7–8. The Notice triggered a 10-day protest period, in compliance with IM 2018-034. *Id.* BLM did not release any Draft EA or other NEPA analysis, but instead prepared two cursory DNAs and allowed no public review or comment on them. *Id.* BLM did not even disclose these DNAs to the public until the start of the 10-day protest period. *Id.*

For the September 2018 Utah lease sale, which encompassed 109 parcels and 204,172 acres across Utah, BLM commenced a 15-day comment and scoping period on March 30, 2018, and released two Draft EAs for the Fillmore and Salt Lake Field Offices. SER-8–9. For parcels in the remaining field offices, BLM simply posted a proposed parcel list and sought "scoping comments"; a Draft EA for these lease parcels was never issued for public comment. *Id.* On July 26, 2018, BLM issued a Notice of Competitive Lease Sale, which initiated a 10-day protest period under IM 2018-034. *Id.*

E. September 2018 Preliminary Injunction Order.

Because BLM was applying IM 2018-034 to restrict public notice and input, accelerate lease offerings, and curtail environmental reviews of its oil and gas leasing across greater sage-grouse habitats, Plaintiffs moved for a preliminary injunction on July 7, 2018. SER-143–146. Plaintiffs supported the motion with extensive declarations documenting how BLM's application of IM 2018-034 impaired them in providing meaningful input and threatened irreparable harm. *See* SER-127–142, 147–250.

The court issued its Preliminary Injunction Order on September 21, 2018, enjoining BLM from applying IM 2018-034 for future lease sales, beginning with BLM's December 2018 lease sales, and ordering a return to the procedures previously in effect under IM 2010-117. 1-FedER-75–132.

The court agreed that Plaintiffs were likely to prevail on their claims that IM 2018-034 was unlawfully adopted in violation of FLPMA, NEPA and the APA, and that Plaintiffs and the public faced numerous types of irreparable harm from BLM's implementation of IM 2018-034 to curtail public involvement in its leasing decisions. *Id.* Because the September 2018 lease auctions were imminent, the court exempted those sales from the injunction. *Id.*[7]

[7] The court also rejected Defendants' argument that Plaintiffs lacked Article III standing, citing the extensive declarations filed with the PI Motion. *See* 1-FedER-86–93. Plaintiffs submitted additional standing declarations with their Phase One

Neither Defendants nor Intervenors filed appeals from the Preliminary Injunction Order. To the contrary, on October 26, 2018, BLM filed a "Notice of Compliance with the Court's Preliminary Injunction." SER-124–126.

F. February 2020 Phase One Decision.

As noted above, the Case Management Order approved the parties' stipulation to adjudicate the merits of Plaintiffs' claims in "phased" partial summary judgment stages, with "Phase One" addressing IM 2018-034 and the June and September 2018 lease sales that applied it. SER-60–63.

Plaintiffs submitted their opening Phase One partial summary judgment motion on April 26, 2019, supported by numerous declarations—in addition to those previously filed with their preliminary injunction motion—documenting how BLM's application of IM 2018-034 to the Phase One lease sales foreclosed their participation or impaired the quality of their comments. *See* SER-11–59. Plaintiffs' declarations are notably omitted from Appellants' excerpts of record.

In the Phase One Decision, the district court reiterated and "integrated" its findings and conclusions from the Preliminary Injunction Order. 1-FedER-13–74. Rejecting Defendants' arguments that IM 2018-034 was simply internal policy

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partial summary judgment motion. *See* SER-11–59. Appellants do not contest Plaintiffs' standing here, and the record amply confirms that Plaintiffs satisfy all three Article III standing requirements of injury, causation, and redressability under *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) and other precedents.

"guidance," the court held it was a substantive rule subject to APA notice-and-comment procedures. 1-FedER-40–43. The court also again found, in a detailed analysis, that IM 2018-034 violated the public participation mandates of NEPA and FLPMA and was an arbitrary and capricious policy shift under the APA. 1-FedER-40–53. It also held that application of IM 2018-034 to the Phase One lease sales prevented meaningful public participation in those sales, in violation of NEPA, FLPMA, and the APA. 1-FedER-53–61.

With respect to remedies, the court recognized that the APA normally requires vacatur of agency actions found to be arbitrary, capricious, or not in accordance with law, but that it had equitable discretion to impose remedies short of vacatur. 1-FedER-62–68. Under the test this Court has adopted from *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), the district court weighed the equities and determined that vacatur of IM 2018-034 was appropriate. *Id.* Following normal APA principles that vacatur automatically reinstates the prior rule, the court held that BLM must follow the procedures of prior IM 2010-117, which requires more robust public participation in BLM oil and gas leasing and thus better serves the purposes and requirements of FLPMA and NEPA. *Id.* The court limited that relief to future lease sales in sage-grouse habitats, since that was the geographic focus of Plaintiffs' claims. *Id.*

The court considered the equities and facts presented by the parties in determining to vacate the Phase One lease sales. 1-FedER-69–72. It evaluated Appellants' arguments that the leases should be suspended to avoid adverse economic impacts, but found those concerns were outweighed by the legal errors and need to ensure an objective NEPA analysis on remand. *Id.* "[S]etting aside the Phase One lease sales will not be so disruptive as to merit an exception from the standard remedy of vacatur. Instead, because of the violations already welded into the Phase One lease sale process, vacatur here will avoid harm to the environment and further the purposes of NEPA and FLPMA." 1-FedER-72.

G. Motions for Stay Pending Appeal.

Notably, Appellants did not move for reconsideration of the Phase One Decision, nor did they seek certification from the district court under Rule 54(b) to take any interlocutory appeal, as provided in the Case Management Order.

Instead, they filed motions for a stay pending appeal—which is when Appellants presented their declarations that are the focus of their remedies arguments to this Court, asserting that various harms would occur from vacatur of the Phase One leases. *See* 2-FedER-146–210; 2-WYER-108–147. In May 2020, the court granted a partial stay pending appeal of the order vacating the Phase One leases, suspending any work on them instead during the pendency of these appeals. 1-FedER-1–12.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction and must dismiss these interlocutory appeals because the Phase One Decision did not impose injunctive relief appealable under 28 U.S.C. § 1292(a)(1).

Defendants do not challenge the merits of the Phase One Decision holding that IM 2018-034 is substantively and procedurally unlawful under NEPA, FLPMA, and the APA. Intervenor WEA does not challenge the holding that IM 2018-034 was unlawfully adopted without notice-and-comment rulemaking—an independent ground for the court's conclusion—so this Court must affirm.

Defendants and WEA challenge the reinstatement of IM 2010-117 after IM 2018-034 was vacated, but that reinstatement occurred automatically and the district court did not abuse its discretion in so stating.

For the Phase One lease sales, the court committed no error in holding them unlawful under NEPA, FLPMA, and the APA; and its determination to vacate the lease sales rather than suspend the leases was not an abuse of discretion.

Finally, the Court should reject Defendants' and WEA's improper attempt to challenge the district court's September 2018 order denying a discretionary venue transfer, which did not even address the Phase One lease sales. Appellants waived their venue objection by failing to raise it before the district court in response to the

First Amended Complaint (which added the Phase One lease sales). In any event, they are wrong that venue is improper under 28 U.S.C. § 1391(e).

ARGUMENT

I. THE COURT LACKS JURISDICTION.

A. The Phase One Decision Is a Non-Final Interlocutory Order Which Did Not Grant an Injunction.

Again, the Phase One Decision only granted partial summary judgment; no final judgment has been entered. Appellants never obtained permission to bring an interlocutory appeal of the Phase One Decision under Rule 54(b) or 28 U.S.C. § 1292(b).

Instead, Appellants cite 28 U.S.C. § 1292(a)(1) as the basis for this Court's jurisdiction, asserting the Phase One Decision is an "order granting an injunction." *See* Fed Br. at 2–4; WY Br. at 3; WEA Br. at 14. The Court must reject that claim. The decision is not an "order granting an injunction" under § 1292(a)(1), so this Court lacks jurisdiction.

"Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, [courts] have construed the statute narrowly." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). In a challenge to agency action, as here, a court order awards an "injunction" within the meaning of § 1292(a)(1) only if it "compel[s] the relevant agency to take or refrain from an[] action." *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1078 (9th Cir. 2010).

Specifically, to constitute an "injunction" appealable under § 1292(a)(1), the order must must "compel" the agency such that its failure to perform (or refrain from performing) the action can be enforced through contempt. *Orange Cty. v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821, 825–26 (9th Cir. 1995).

An order that vacates or sets aside an agency rule or decision—without doing more—is not an "injunction" within the meaning of § 1291(a)(1). *Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1186–87 (9th Cir. 2004). This is true even though the order may "prohibit[], as a practical matter," the agency from carrying out further activities in accordance with the vacated rule or decision. *Id.* at 1186. Otherwise, it would be possible to "classify as 'injunctive' all declaratory relief that deems an agency rule unlawful," which "would be contrary to [the] important principle that" § 1292(a)(1) should be construed narrowly. *Id.*

B. The Automatic Reinstatement of IM 2010-117 Does Not Constitute Injunctive Relief.

Here, the Phase One Decision held unlawful and "set aside" the relevant provisions of IM 2018-034, and "replaced" those provisions with "IM 2010-117's corresponding provisions." *See* 1-FedER-65–68, 73–74; *see also* 1-FedER-6 (Stay Order, describing effect of Phase One Decision). Defendants and WEA argue that reinstatement of IM 2010-117 constituted entry of injunctive relief for purposes of § 1292(a)(1), but they are incorrect.

As a matter of law, the portion of the district court's order "setting aside" certain provisions of IM 2018-034 *automatically* restored the corresponding provisions of IM 2010-117, which was the IM immediately preceding IM 2018-034. *See Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005) (the "effect of invalidating an agency rule is to reinstate the rule previously in force"); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("We agree with the parties that vacatur of the 2018 Amendment *automatically* resurrects the 2017 Standard") (emphasis in original). The district court recognized that by vacating portions of IM 2018-034, the corresponding portions of IM 2010-117 would be reinstated automatically. *See* 1-FedER-65 (disagreeing with Defendants' argument that the IMs were mere "guidance" to which automatic reinstatement did not apply). The court's discussion of "replacing" the vacated provisions of IM 2018-034 merely acknowledged the natural consequence of vacating IM 2018-034. Thus, the Phase One Decision did not award Plaintiffs any relief beyond vacatur, and does not constitute an "injunction." *Alsea Valley*, 358 F.3d at 1186–87.

That the district court used the term "enjoin" at some points to describe the effect of the order on IM 2018-034 does not change anything, because it is the "substantial effect rather than [the] terminology" of an order that determines whether it is an "injunction." *Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1165 (9th Cir. 2012) (citation omitted). The

"substantial effect" of the Phase One Decision was to vacate and set aside parts of IM 2018-034, which then caused the corresponding parts of IM 2010-117 to be automatically reinstated.

Notably, the court did *not* order BLM to comply with a policy or rule different from its prior IM 2010-117 that automatically went back into effect, nor did it order BLM to devise a replacement for IM 2018-034, which might be construed as "injunctive." *See Turtle Island*, 672 F.3d at 1165 (treating a consent decree as "injunctive" under § 1292(a)(1) where it required new agency actions "within a specified time frame"); *see also California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1019–20 (9th Cir. 2009) (treating as an injunction an order that set aside a rule and put in its place "a rule that was neither 'previously in force' nor the 'status quo'"). Because the court did not order relief beyond that already afforded by the vacatur of IM 2018-034, it did not "enjoin" anything, regardless of its terminology.

Nor does the fact that the district court geographically limited vacatur of IM 2018-034 to sage-grouse habitats render the order "injunctive." A partial vacatur is still a vacatur, and is distinguishable from an injunction. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010) ("If a less drastic remedy (such as partial or complete vacatur . . .) was sufficient to redress respondents' injury, no recourse to the additional and extraordinary relief of an injunction was

warranted"). By limiting the scope of the vacatur, the district court did not transform its vacatur into an injunction.

C. The "Setting Aside" of the Phase One Lease Sales Does Not Constitute Injunctive Relief.

Neither is the part of the Phase One Decision "setting aside" the 2018 lease sales an "injunction" that authorizes this appeal under § 1292(a)(1). The court's vacatur of the lease sales does not compel Defendants (or any other entity) to take any particular action or refrain from taking any particular action.

Rather, by "setting aside" the lease sales, the Phase One Decision invalidated those sales, rendering the subsequent leases between the federal government and lessees void *ab initio*. *See Sangre de Cristo Dev. Co. v. United States*, 932 F.2d 891, 894–95 (10th Cir. 1991) (holding that a lease was never valid in the first place once the court ruled the agency failed to give valid approval due to noncompliance with NEPA). The leases were invalid from the start because they were issued through lease sales held to be unlawful and set aside. *See Boesch v. Udall*, 373 U.S. 472, 473, 476 (1963) (characterizing a "lease . . . granted in violation of the [Mineral Leasing] Act and regulations promulgated thereunder" as "invalid[] at its inception").[8]

[8] Even if the Phase One Decision is viewed as an order of rescission, it is still not "injunctive" in nature. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998) (discussing rescission and injunction as separate remedies);

Defendants maintain that the order did more, claiming that it "requir[es] cancelation of all 677 leases . . . and the return of millions of dollars of lease revenues." Fed. Br. at 43–44. That is simply not true. The Phase One Decision does not state that BLM must cancel any leases or return any money, and BLM could not be held in contempt for failing to do so. *See Petrello v. White*, 533 F.3d 110, 115–16 (2d Cir. 2008) (holding that an order was not "injunctive" because it did not describe in detail any required actions and did not specify a deadline for compliance); Fed. R. Civ. P. 65(d)(1) (requiring every order granting an injunction to "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required"). As a practical matter, BLM may choose to cancel the leases and return money given that the leases are invalid, but that reality does not transform the order into an injunction. *Alsea Valley*, 358 F.3d at 1186. [9]

Because the Phase One Decision did not grant injunctive relief appealable under § 1292(a)(1), the Court lacks jurisdiction and must dismiss the appeals.

Pettinelli v. Danzig, 644 F.2d 1160, 1163 (5th Cir. Unit B 1981) (discussing this distinction in the § 1292(a)(1) context).

[9] BLM has other options. For instance, it could retain the lease funds and wait for lessees to pursue claims for restitution in the Court of Federal Claims. *See Gould, Inc. v. United States*, 67 F.3d 925, 930 (Fed. Cir. 1995). Or it could reach agreement with lessees in which monies already collected are treated as credits against future lease sale bids. BLM has these options precisely because the Phase One Decision is not an injunction or its practical equivalent.

II. THE COURT MUST REJECT WEA'S CHALLENGES TO THE HOLDINGS THAT IM 2018-034 IS UNLAWFUL.

A. Because WEA Failed to Challenge Each Independent Basis of the District Court's Ruling, the Ruling Must Be Affirmed.

Unlike Defendants and Wyoming, WEA challenges the Phase One Decision ruling that IM 2018-034 was unlawfully adopted. However, in its opening brief, WEA attacks only *two* of the *three* independent bases for the district court's ruling. Specifically, WEA challenges only the holdings that IM 2018-034 improperly constrained public participation and was an arbitrary and capricious reversal of agency position. *See* WEA Br. at 45–53. WEA does *not* challenge the district court's independent holding that IM 2018-034 was a legislative rule improperly adopted without notice-and-comment procedures, as required by the APA and FLPMA. *Id.* Thus, WEA has waived any challenge to that holding. *See e.g.*, *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

WEA's failure to challenge all three independent bases for the district court's overall ruling is fatal to this portion of its appeal, because an appellant seeking to reverse a ruling must challenge *all* independent grounds for that ruling. *See Lebahn v. Nat'l Farmers Union Uniform Pension Plan*, 828 F.3d 1180, 1188 (10th Cir. 2016) (appellate court "must affirm" where the appellant failed to challenge each independent ground supporting a ruling); *see also MacKay v. Pfeil*,

827 F.2d 540, 542 n.2 (9th Cir. 1987) (per curiam) (deeming an appellant's challenge to the district court's entry of summary judgment "abandoned" because the appellant did not attack each basis for the judgment). Because the Phase One Decision's merits ruling on IM 2018-034 is supported by the unchallenged notice-and-comment rationale, this Court cannot rule on WEA's other challenges to it. *See Phelps v. Alameda*, 366 F.3d 722, 730 & 730 n.8 (9th Cir. 2004) (discussing the "longstanding line of Supreme Court precedent refusing to issue an opinion that does not affect the outcome of the case").

B. The District Court Correctly Held IM 2018-034 Unlawful.

Even if the Court reaches WEA's challenges to the rulings that IM 2018-34 was unlawfully adopted, it must affirm. The Phase One Decision correctly held IM 2018-034 unlawful on three separate grounds: (1) BLM promulgated IM 2018-034 without following notice-and-comment procedures required by federal law; (2) the IM improperly constrains public participation in BLM's oil and gas leasing decisions in violation of NEPA and FLPMA; and (3) its issuance was arbitrary and capricious, because BLM did not provide a reasoned basis for jettisoning the prior public participation procedures adopted in IM 2010-117. *See* 1-FedER-40–53.

First, IM 2018-034 was a "substantive rule" adopted without compliance with the APA's notice-and-comment procedures. 5 U.S.C. § 553. Defendants incorrectly argued that IM 2018-034 was exempt from this requirement as a

"general statement of policy," but a "policy statement" must leave the agency "free to exercise discretion to follow, or not to follow, the announced policy in an individual case." *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010) (citation and alteration omitted). IM 2018-034 did not leave BLM officials discretion to act at variance with its terms in an individual case. The directive was effective immediately" and stated it "will be implemented across the BLM as described." 2-FedER-401. The relevant provisions are also definitive on the issues they address: that BLM must complete the parcel review process in six months, need no longer allow public comment in every lease sale, and must provide a protest period of 10 days. 2-FedER-399–401. Hence, IM 2018-034 was a substantive rule that should have undergone notice and comment.[10]

Second, IM 2018-034 is also contrary to BLM's public participation mandates under NEPA and FLPMA. As discussed above, NEPA regulations direct agencies to seek public involvement "to the fullest extent possible," 40 C.F.R. § 1500.2, and "to the extent practicable," *id.* § 1501.4(b). Section 309(e) of FLPMA further requires BLM to give the public "adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in . . . the management of [] the public lands." 43 U.S.C. § 1739(e). As the district court

[10] Again, neither WEA nor the other Appellants challenge the district court's notice-and-comment ruling.

found, "it strains common sense" to say that IM 2018-034 allows public participation to the fullest extent "possible" and "practicable" when its comment and protest periods are dramatically more restrictive than the process BLM implemented only months prior. 1-FedER-45. IM 2018-034 is also inconsistent with NEPA and FLPMA by purporting to make public comment periods merely discretionary. *Compare* 2-FedER-390–91 ("[BLM] field offices will provide for public participation"") *with* 2-FedER-400 ("[BLM] offices may provide for public participation during the NEPA process"). This is inconsistent with NEPA's command that agencies "shall" and "must" involve the public in their NEPA reviews. 40 C.F.R. § 1500.2; *id.* § 1501.4(b); *id.* § 1506.6; *see also Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008) (agencies must "permit members of the public to weigh in with their views and thus inform the agency decision-making process").

Finally, IM 2018-034 was arbitrary and capricious because BLM failed to provide a reasoned explanation for limiting public participation in oil and gas leasing compared to IM 2010-117. Agency action is "arbitrary and capricious" under the APA when the agency has "entirely failed to consider an important aspect of the problem." *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 869 (9th Cir. 2020) (citation omitted). Moreover, when an agency changes its policy, it must include "a reasoned explanation" for disregarding factual findings which underlay

its prior policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

In deeming longer comment and protest periods were an "unnecessary impediment," IM 2018-034 accounted only for the *costs* of following IM 2010-117 while completely ignoring its *benefits*—namely, burdens on the commenting public, impacts to the quality of its decision-making, or its environmental and public interest mandates under NEPA and FLPMA. *See id.*; 2-FedER-398. BLM also ignored the rationale it gave for mandating longer comment and protest periods under IM 2010-117. *Id.* Without considering both costs and benefits of public participation, BLM's adoption of IM 2018-034 was arbitrary and capricious. *See Michigan v. U.S. EPA*, 576 U.S. 743, 753 (2015) ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions") (emphasis in original).

III. THE DISTRICT COURT DID NOT ERR IN VACATING IM 2018-034 AND REINSTATING IM 2010-117.

While they do not appeal the Phase One Decision rulings that IM 2018-034 was unlawfully adopted, Defendants challenge the remedy, arguing the court "abused its discretion in enjoining [BLM] to follow superseded guidance," *i.e.*, IM 2010-117. *See* Fed. Br. at 47–52. They further contend the court "overstepped the proper role of the federal judiciary in seeking to micromanage internal agency procedures that lie within [BLM's] discretion," and wrongly imposed its "own notions of procedural propriety" by imposing "procedures not found in any statute

or regulation, only in superseded guidance." *Id.* at 51–52.[11]

These arguments hinge on the mischaracterization that the district court issued a permanent injunction imposing IM 2010-117 in place of IM 2018-034. Indeed, Defendants' brief devotes several pages to arguing that the court imposed "a mandatory injunction" without making any of the findings for a permanent injunction under *Monsanto*, and further asserting that the court could not enter a permanent injunction based only on the preliminary injunction order. *See* Fed. Br. at 47–52; *see also* WEA Br. at 45 (asserting district court "impos[ed] injunctive relief on BLM to apply IM 2010-117").

As already demonstrated, this characterization of the district court's remedy is erroneous. *See* Argument Section I.B, *supra*. The Phase One Decision did *not* impose any permanent injunction, and thus the court had no obligation to weigh the injunction factors under *Monsanto* and other cases cited by Defendants. Instead, as detailed above, the district court followed normal APA procedures and cases in vacating IM 2018-034 as unlawful, thus automatically reinstating IM 2010-117 as the rule previously in effect. *See* 1-FedER-65–68, 73–74.

Moreover, the court acknowledged its discretion to enter relief short of

[11] WEA makes similar arguments, with more amped-up rhetoric. *See* WEA Br. at 40–46 ("The district court's remedy is an impermissible and unlawful infringement of the judicial branch onto [*sic*] Congress and the Executive Branch in violation of the strict separation of powers under the Constitution").

vacatur. 1-FedER-62–63. It considered the equitable factors under *Allied-Signal* and other cases, but found no evidence of disruptive consequences that might warrant departing from the normal remedy of vacatur. 1-FedER-63–65. Indeed, Defendants and Intervenors never argued against vacatur of IM 2018-034 below, and do not challenge that aspect of the remedy on appeal.

With respect to reinstating IM 2010-117, the Phase One Decision was also correct as a matter of law in noting that vacatur of a rule under the APA results in automatic reinstatement of the prior rule. 1-FedER-66–67 (citing *Paulsen*, 413 F.3d at 1008 (the "effect of invalidating an agency rule is to reinstate the rule previously in force")); *see also Turtle Island*, 672 F.3d at 1165 (reinstatement of prior rule "operates as a matter of law under the vacatur, and it would have occurred even if the Consent Decree had remained silent on the subject").

But the district court further weighed the equities of whether to follow that normal reinstatement rule, and concluded they supported it. 1-FedER-66–67 (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) and *California ex rel Lockyer*, 575 F.3d at 1020). Where the district court correctly identified the legal principles applicable to remedies for unlawful agency actions under the APA, and applied this Court's precedents to the facts before it, it did not abuse its discretion. And it certainly did not violate constitutional separation of powers by implementing a statute—the APA—passed by Congress and signed by

the President, in conducting judicial review and ordering a normal APA remedy.

Defendants partially acknowledge that the Phase One Decision relied on settled APA principles in reinstating IM 2010-117, saying the "court seemed to justify its injunction on the ground that vacatur of a rule has the automatic effect of reinstating a rule previously in force," and citing *Paulsen*. *See* Fed. Br. at 50. But they argue "that principle has no application here" because the "2018 IM and 2010 IM are not rules; they are guidance documents which lack the force of law." *Id.* Defendants are doubly wrong on this point.

First, an agency action need not be a formally-adopted "rule" for automatic reinstatement to take effect. For instance, when the rescission of the Deferred Action for Childhood Arrivals ("DACA") policy was vacated, that policy automatically sprung back into force, even though DACA is not a "rule" with the "force of law." *See Casa de Maryland v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684, 698–701, 706 (4th Cir. 2019) (noting that the court's decision to vacate the rescission of DACA would "restore[] [the policy] to its pre-[rescission] status"), *cert. denied*, – S. Ct. –, 2020 WL 3492650 (June 29, 2020).

Second, as the district court held, IM 2018-034 *is* a rule as opposed to mere policy guidance. *See* 1-FedER-29–40. Neither Defendants nor Intervenors challenge that ruling on appeal; at any rate, the district court was correct. *See supra* Argument Section II.B.

Neither did the district court abuse its discretion by vacating IM 2018-034 such that IM 2010-117 was automatically reinstated, even though that IM was not adopted by notice-and-comment procedures, as Defendants and WEA complain. The Phase One Decision pointed out that the validity of IM 2010-117 was never challenged, that it provided "closer adherence to FLPMA's and NEPA's public involvement mandates," and avoided a "regulatory vacuum" if no oil and gas leasing procedures were in place. 1-FedER-65–66. Again, where the court recognized its equitable discretion, and exercised it to follow the statutory goals and commands of FLPMA and NEPA, it did not abuse its discretion.

Defendants further argue there is no "regulatory vacuum" because "no statute . . . commands" that BLM have regulations on oil and gas leasing. Fed. Br. at 51. That is flatly wrong. FLPMA Sections 309(e) and 310 expressly require that BLM provide for public participation in its land management decisions—which include oil and gas leasing—through regulations promulgated under the APA. *See* 43 U.S.C. §§ 1739(e), 1740; *see also Natural Res. Def. Council v. Jamison*, 815 F. Supp. 454, 468 (D.D.C. 1992) (holding that BLM violated FLPMA Section 309(e) in adopting public participation procedures for coal leasing in an internal Handbook instead of a formal rule). BLM has never adopted such regulations to govern public participation in its oil and gas leasing program, relying instead on Instruction Memoranda such as IM 2010-117 and 2018-034.

Finally, Defendants and WEA are obviously wrong in accusing the court of supposedly imposing procedures of its own making instead of deferring to BLM—it was BLM that adopted IM 2010-117 with those procedures, not the court. It is hardly a violation of separation of powers, or any abuse of discretion, for a court to hold an agency to its own procedures after ruling that it unlawfully attempted to jettison them.

IV. THE DISTRICT COURT DID NOT ERR IN HOLDING THE PHASE ONE LEASE SALES UNLAWFUL.

Appellants do not dispute that BLM followed and applied IM 2018-034 in approving the Phase One sales. But they argue that does not matter, since neither NEPA nor FLPMA requires specific timeframes for public comments or protests. *See* Fed. Br. at 27–37; WY Br. at 22–27. WEA also argues that Plaintiffs had adequate opportunities at the RMP development stage to make their views known. WEA Br. at 17–20, 54–60. None of these arguments has merit.

A. All Phase One Sales Unreasonably and Unlawfully Curtailed Public Involvement Under NEPA, FLPMA, and the APA.

The district court correctly held BLM violated NEPA, FLPMA, and the APA by applying IM 2018-034 to sharply limit public participation in the Phase One lease sales.

One of the twin aims of NEPA is "to encourage and facilitate public involvement in decisions concerning environmental issues." *Trustees for Alaska v.*

Hodel, 806 F.2d 1378, 1383 (9th Cir. 1986). As explained above, NEPA regulations direct agencies to seek public involvement "to the fullest extent possible," 40 C.F.R. § 1500.2, and "to the extent practicable," *id.* § 1501.4(b). Even when issuing an EA, agencies "must permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens*, 524 F.3d at 953. Such "public comment procedures are at the heart of the NEPA review process." *Block*, 690 F.2d at 770; *see also* 40 C.F.R. § 1500.1(b) ("public scrutiny [is] essential to implementing NEPA"). FLPMA Section 309(e) further requires BLM to give the public "adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in . . . the management of [] the public lands." 43 U.S.C. § 1739(e).

The Phase One lease sales violated these mandates. It strains common sense to say that BLM allowed public participation to the fullest extent "possible" and "practicable" when its comment and protest periods for the Phase One lease sales were dramatically more restrictive than the process BLM offices implemented only months prior.

As the district court explained, BLM allowed only a 10-day protest period on each Phase One sale, rather than the 30-day period previously provided. *See* 1-FedER-53–55. BLM offered no public comment period for the September 2018 Nevada sale. *Id.* It permitted just 17 days for comments on the September 2018

Utah lease sales in two of the Utah districts; no comment period was allowed on the other Utah parcels. *Id.*[12] BLM allowed only 14 days for the public to comment on the second batch of September 2018 Wyoming lease parcels that were added—more than doubling the size of that sale—after IM 2018-034 was issued. *Id.* While 30-day comment periods were conducted before IM 2018-034 on the June 2018 sales, the shortened protest period nonetheless erected a barrier to public involvement in these sales. The protest period is the public's first opportunity to review and comment on BLM's final NEPA analysis, and under the issue exhaustion doctrine, issues not sufficiently raised during the protest period are ordinarily waived during subsequent litigation. *See Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2010).

The record reveals no exigent circumstances that might have warranted these newly-expedited timeframes, and fails to support Defendants' claim that this is all the participation that was "possible" and "practicable."

Appellants rely on *Bering Strait Citizens* to argue there is no "one size fits all" requirement for public involvement, and that the facts of the Phase One lease sales show the public had sufficient "information" with which to inform BLM's decisionmaking. *See, e.g.*, Fed. Br. at 30–31. But, as *Bering Strait* itself makes

[12] Defendants indicate that 15-day comment periods were allowed in Utah, not 17 days as reported by the district court. *See* Fed. Br. at 29.

clear, the requirement that agencies provide the public with sufficient information is a means to an end: "[a]n agency, when preparing an EA, must provide the public with sufficient environmental information . . . *to permit members of the public to weigh in with their views and thus inform the agency decision-making process*." 524 F.3d at 953 (emphasis added). An agency that provides the public with mountains of information but then substantially impairs the public's ability to process and comment on that input violates NEPA. Put another way, inadequacy of time, as well as inadequacy of information, can violate NEPA's public participation mandate. *See Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 226 (D.D.C. 2003) (finding two-week comment period insufficient).

Remarkably, Appellants ignore the lengthy discussion in the Phase One Decision of Plaintiffs' declarations explaining how the abbreviated comment and protest periods of the Phase One sales in fact impaired the ability of Plaintiffs and other organizations to meaningfully participate in BLM's decision-making process—including by precluding field visits, limiting the scope of comments, or foreclosing participation altogether. *See* 1-FedER-54–60; SER-127–250.

Plaintiffs' declarants specifically explained, for example, that "due to the shortened comment period, we were unable to provide comments" on parcels added to the September 2018 Wyoming sale, *see* SER-222; and that the tight deadlines for the June 2018 Nevada sale precluded field visits, incorporating field

notes from a botanist, comments on cultural resource impacts, and consultation with Native American tribes. *See* SER-229; *see also* SER-134, -195 (both explaining how Plaintiffs' staff were limited in the detail they could provide on greater sage-grouse impacts due to short comment and protest periods).

The declarations thus belie Appellants' assertion that Plaintiffs failed to demonstrate how more notice and longer periods would have affected their participation. They also refute Appellants' suggestion that Plaintiffs' ability to participate to some degree demonstrates the adequacy of BLM's process.[13]

In addition to NEPA and FLPMA, the lease sales violated the APA's requirement of reasoned decision-making. Agency action is "arbitrary and capricious" under the APA when the agency has "entirely failed to consider an important aspect of the problem." *Bark*, 958 F.3d at 86. The record reveals that BLM's sole consideration in structuring public participation for its leasing decisions was a desire to make it faster and easier for industry to get leases. 2-FedER-398. There is no evidence that BLM considered other "important aspects of the problem"—such as burdens on the commenting public or impacts to the quality of its decision-making. BLM's failure to consider these trade-offs renders the Phase One lease sales arbitrary and capricious. A decision based only on a desire to

[13] Relatedly, Defendants argue any violation was mere "harmless error," Fed. Br. at 38, but they waived this argument by failing to raise it below.

expedite oil and gas leasing is also contrary to FLPMA and NEPA, which reflect a conscious decision by Congress to require meaningful public input regardless of its costs. *See Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1118–19 (D.C. Cir. 1971) ("[A]ll of the NEPA procedures take time. Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered 'to the fullest extent possible'.").

By disregarding the record relied on by the district court in holding the Phase One sales unlawful, Appellants fail to demonstrate any reversible error, and this Court must affirm.

B. The RMP Comment Periods Do Not Justify BLM's Actions.

In an argument that neither Defendants nor Wyoming makes, WEA claims that prior comment and protest periods on the governing RMPs somehow provided Plaintiffs adequate opportunities to provide input to BLM on the Phase One lease sales. *See* WEA Br. at 17–20, 54–60.

The Court may readily reject this diversionary argument, since NEPA requires public notice and comment at the site-specific level, which RMP-level NEPA analysis did not provide. *See Blue Mtns*, 161 F.3d at 1214 ("Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS"). The fact that prior

EISs contained general discussions of oil and gas development does not eliminate BLM's duty to provide site-specific NEPA analysis—and public comment—before approving specific lease sales. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (stating that "any vague prior programmatic statements are no longer enough" under NEPA once specific projects are proposed); *see also* SER-255 (DOI report rejecting argument that the "RMP process provide[s] all of the input needed to make individual leasing decisions"). Again, FLPMA expressly requires public participation in *both* planning *and* management decisions. *See* 43 U.S.C. § 1712(a) (RMP development); *id.* § 1739(e) (management decisions).

V. THE COURT DID NOT ABUSE ITS DISCRETION IN VACATING THE PHASE ONE LEASE SALES.

Appellants likewise have not met their burden to show that the district court abused its discretion in vacating the Phase One lease sales, after a thorough balancing of the equities. As explained below, their arguments fail to address the factual record before the district court when it rendered the Phase One Decision, and misstate the equitable analysis it performed.

A. Vacatur Is the Presumptive, and Proper, Remedy Here.

Vacatur is the presumptive remedy when an agency's decision is unlawful under the APA. *See* 5 U.S.C. § 706 ("reviewing court *shall* . . . (2) hold unlawful and *set aside* agency action" found to be unlawful) (emphasis added). The Ninth Circuit declines to vacate unlawful agency actions only in "rare" and "limited"

circumstances. *Nat'l Family Farm Coal. v. U.S. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010).

Vacatur is a common form of relief for oil and gas leases and permits issued in violation of NEPA and the APA. *See, e.g.*, *WildEarth Guardians v. U.S. BLM*, 457 F. Supp. 3d 880, 896–97 (D. Mont. 2020) (vacating oil and gas leases for NEPA violation); *San Juan Citizens Alliance v. U.S. BLM*, 326 F. Supp. 3d 1227, 1256 (D.N.M. 2018) (same); *Bob Marshall Alliance v. Lujan*, 804 F. Supp. 1292, 1298 (D. Mont. 1992) (cancelling leases for NEPA and ESA violations); *Pit River Tribe*, 469 F.3d at 788 (vacating geothermal lease extensions for NEPA and National Historic Preservation Act violations).

B. The Court Recognized Its Equitable Discretion to Suspend Rather Than Vacate the Lease Sales, But Rejected That Remedy.

The Phase One Decision recognized the "presumptive remedy" of vacatur under the APA, but discussed its equitable discretion to depart from that remedy. *See* 1-FedER-62–63, 69–73. In applying the *Allied-Signal* factors and other equitable considerations, the court explained why they favored vacatur rather than lease sale suspension. *Id.* As explained below, Appellants give short shrift to this analysis, based on mischaracterizations that minimize the seriousness of the legal violations and harms they threaten, and thus fail to show abuse of discretion.

1. Seriousness of Legal Violations.

As for the first *Allied-Signal* factor, BLM's decision to shortcut public

involvement in the Phase One lease sale decisions is not a minor violation, as Appellants assert. *See, e.g.*, Fed. Br. at 40–43 (arguing the "deficiencies identified by the district court are purely procedural" and "Plaintiffs merely wish for additional time to submit better comments"). To the contrary, "public comment procedures are at the heart of the NEPA review process." *Block*, 690 F.2d at 770; *see also Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983) (public involvement is one of NEPA's twin aims); 40 C.F.R. § 1500.1(b) ("public scrutiny [is] essential to implementing NEPA").

WEA similarly argues that vacatur is an improper remedy for a "procedural" violation, WEA Br. at 33, but that is also wrong. The APA mandates that a reviewing court shall "set aside agency action" made "without observance of procedure required by law." 5 U.S.C. § 706(2)(D); *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) (cited by WEA) (courts may set aside agency action for "procedural" violations). Courts routinely vacate agency decisions for procedural violations. *See, e.g.*, *Pit River Tribe*, 469 F.3d at 788 (vacating geothermal leases for violations of procedures required by NEPA and National Historic Preservation Act); *W. Oil & Gas Ass'n v. U.S. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (courts "[o]rdinarily" vacate for a failure to comply with APA notice and comment procedures).

Additionally, the record shows that application of IM 2018-034 to the Phase

One sales hampered or prevented public participation far more seriously than Appellants admit, creating a risk that BLM overlooked environmental impacts that could have been avoided by adequate stipulations or deferral of leasing—a point Appellants disregard. *See* 1-FedER-55–61, 69, 70–71.

Appellants further ignore the district court's reasoning that vacating the lease sales was particularly appropriate in light of the purpose of the underlying statues. *See* 1-FedER-72–73 ("Vacatur will ensure the opportunity for objective evaluation of the lease sales, free of any taint."). NEPA regulations prohibit taking any action that would "[l]imit the choice of reasonable alternatives" until NEPA compliance is achieved. 40 C.F.R. § 1506.1. A NEPA review must "not be used to rationalize or justify decisions already made." *Id.* § 1502.5. The district court found that leaving the leases intact on remand would not fulfill this purpose, given the risk that the agency's remedial NEPA compliance would become a mere bureaucratic formality. 1-FedER-69–72.[14]

Tellingly, Defendants contend here that "a remand would provide only for

[14] Defendants also contend that the Mineral Leasing Act supposedly enacted a Congressional "policy favoring leasing of public lands," which outweighs the "purely procedural" and "not serious" legal violations found by the district court. *See* Fed. Br. at 41–42 (citing 30 U.S.C. § 226(b)(1)(A)). The cited section states no such policy; it merely prescribes how lease sales are to be conducted. In truth, the Act gives BLM discretion whether or not to lease any public land parcels. *See Udall v. Tallman*, 380 U.S. 1, 4 (1965); *W. Energy All. v. Salazar*, 709 F.3d 1040, 1044 (10th Cir. 2013).

elaboration on the ample objections that already informed [BLM's] initial decisions," and that "at least some portion" of the leases "almost certainly" would be leased even with longer comment periods. Fed. Br. at 42. Those arguments confirm the district court's determination that "without a real limitation on the Phase One lease sales as BLM addresses and corrects its NEPA violations, BLM's 'compliance' with NEPA could become a mere bureaucratic formality." 1-FedER-72. The district court appropriately considered this risk of bureaucratic bias. *See Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1128–29 (9th Cir. 1998) (upholding vacatur to "ensure[] that environmental concerns will be properly factored into the decision-making process as intended by Congress" and not "post-hoc assessments of a done deal").[15]

Having considered the full record before it—not just Defendants' contentions minimizing the scope of the legal violations here—the district court did not abuse its discretion in finding that lease suspension would not be adequate. *See* 1-FedER-70–72 & n. 21.

2. Disruptive Consequences of Vacatur

Under the second *Allied-Signal* factor, the district court did not abuse its

[15] Defendants also disregard the fact that the Phase One lease sales all impacted sage-grouse habitats, contrary to BLM's 2015 RMP requirements that oil and gas leasing be prioritized outside of sage-grouse habitats. The District of Montana held the June 2018 Wyoming sale unlawful on these grounds, along with other lease sales not at issue here. *See WildEarth Guardians*, 457 F. Supp. 3d at 896–97.

discretion either in concluding that the potential disruptive effects of lease vacatur do not outweigh the seriousness of BLM's violations. *See* 1-FedER-70–73.

The Ninth Circuit has found remand without vacatur warranted only in rare circumstances, namely where vacatur risks harm to the environment, *Idaho Farm Bureau*, 58 F.3d at 1405–06, or would thwart the statute at issue, *W. Oil & Gas*, 633 F.2d at 813. Appellants heavily emphasize the economic consequences of vacatur, including loss of federal and state lease revenues. But as the district court correctly explained, cases denying vacatur on the basis of economic harm have generally involved far more extreme circumstances. *See* 1-FedER-70–71 (citing *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012), where vacatur would have caused needed power plant to stay off line and caused blackouts and air pollution due to the use of diesel generators). The court also noted that BLM proceeded with the 2018 lease sales with full knowledge of this lawsuit, and that economic harm from the predictable and avoidable result of vacatur should not weigh in its favor. *See* 1-FedER-71–72 n. 22. The district court did not abuse its discretion in weighing these economic harms against competing equitable considerations.[16]

[16] WEA also contends that the district court erred in "vacating the . . . lease contracts" rather than the preceding "decision to offer the parcels," WEA Br. at 33–34, but this argument was never raised below. WEA's characterization of the district court's remedy is also wrong; the district court vacated only the Phase One *lease sales*. *See also Houston*, 146 F.3d at 1129 (making clear the district court had

Additionally, it bears underscoring that the district court weighed the equities based on the factual record before it, not the later-filed declarations that Appellants now rely on to contend that the Phase One Decision "severely underestimated" the financial scope of these impacts, and the "significant consequences" for the lessees. *See* Fed. Br. at 44–46 (citing stay declarations); 2-FedER-150–90 (stay declarations); *see also* WY Br. at 18–19 & 35–37 (citing its stay motion and declaration). In determining whether the district court abused its discretion, this Court's review is limited to the record before the district court at the time of its decision—not these later-filed declarations. *See Old Chief v. United States*, 519 U.S. 172, 182 n.6 (1997) ("It is important that a reviewing court evaluate the trial court's decision from its perspective when it had to rule and not indulge in review by hindsight"); *United States v. Walker*, 601 F.2d 1051, 1055 (9th Cir. 1979) (affidavits not presented to a court at the time of its decision may not be considered on appeal).

Finally, WEA criticizes the district court for its "inconsistent rulings" in vacating the September 2018 lease sales in the Phase One Decision, after declining to enjoin them in the Preliminary Injunction Order. *See* WEA Br. at 37–40. WEA ignores the procedural and timing differences between the two decisions, and

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authority to vacate the leases themselves); 2-FedER-263, 296 (Plaintiffs' complaint challenging and seeking vacatur of the leases as final agency actions).

unique standards applicable to each remedy. Denial of preliminary injunctive relief did not constrain the court's discretion to later determine, upon adjudication of the merits, to impose the normal APA remedy of vacatur for those sales. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (decisions on preliminary injunctions "are not binding at trial on the merits").

In summary, Appellants fail to carry their burden of showing that the district court abused its discretion in determining to follow the normal APA remedy in vacating the Phase One leases, rather than suspending them.[17]

VI. THE COURT MUST REJECT THE VENUE CHALLENGES.

In a final attack, Defendants and WEA challenge the District of Idaho as a proper venue for Plaintiffs' Phase One lease sale claims. *See* Fed. Br. at 20–27; WEA Br. at 61–64. They argue the district court "abused its discretion" in its September 2018 order denying Defendants' discretionary transfer motion, contending that venue does not lie in the District of Idaho under the "real property" exception of 28 U.S.C. § 1391(e)(1)(C). *Id.*

As explained below, Appellants never presented their venue challenges to the district court, and this Court lacks jurisdiction to consider them. In any event, they are wrong that venue is improper under § 1391(e) when Plaintiffs' claims do

[17] If the Court were to conclude otherwise, then Plaintiffs agree with Defendants that the proper remedy is to suspend the Phase One leases pending remand and enjoin surface-disturbing activities during remand. *See* Fed. Br. at 53.

not contest any "right, title or interest" in real property within the scope of § 1391(e)(1)(C).

A. Appellants Waived Any Objection to Venue for the Claims Addressed in the Phase One Decision.

Appellants never presented any motion or argument before the district court challenging venue for the Phase One lease sales under § 1391(e)(1)(C), and therefore waived their right to assert this improper venue defense, as explained below. The Court thus lacks jurisdiction to hear their venue challenge. *See Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1135 (9th Cir. 2005) (stating that this Court "lack[s] pendent jurisdiction to review" a waived venue objection "on interlocutory appeal").

Defendants filed their "motion to sever and transfer" in May 2018 in response to Plaintiffs' original complaint, arguing that Plaintiffs' challenges to the two IMs and the 2017 lease sales should be "severed" from each other and transferred to multiple other districts. *See* SER-262–299. That motion did not address the Phase One lease sales, obviously, since they had not even occurred yet and were not part of the original complaint. *Id.* Moreover, Defendants did not move to dismiss the 2017 lease sale claims or argue that venue was improper under § 1391(e)(1)(C)—they only sought a discretionary venue transfer. *Id.* The September 2018 order denying the motion to sever and transfer thus did not

address any argument that venue is improper in the District of Idaho for the Phase One lease sales. 1-FedER-132–145.

Plaintiffs added the Phase One lease sales in their First Amended Complaint, filed October 17, 2018. 6-FedER-1288–89, 1351–60. That amended complaint also added challenges to the NPL Project. 6-FedER-1288–89, 1361–70. In response to the First Amended Complaint, Defendants and Intervenors did file motions to dismiss for improper venue under § 1391(e)(1)(C)—but those motions *only* addressed the NPL Project claims, not the Phase One lease sale claims. *See* SER-64–123. The court granted those motions in ordering a discretionary transfer of the NPL Project claims. 2-FedER-364–81. But that order did not address venue for the Phase One (or any other) lease sales, because the motions to dismiss did not challenge venue for those claims. *Id.*

Improper venue is a personal defense that is waived if omitted from a defendant's responsive pleading or first Rule 12 motion. Fed. R. Civ. P. 12(b), (g)(2), (h)(1); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). By failing to raise improper venue as to the Phase One lease sale claims in their Rule 12 motions to dismiss the First Amended Complaint, Defendants and WEA waived that objection. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 317–18 (9th Cir. 2017); Fed. R. Civ. P. 12(g), (h)(1)(A).

Defendants argue their waiver was excusable because any venue objection would have been "futile" under the "law of the case" doctrine. Fed. Br. at 22. According to Defendants, at the time it would have been proper to raise a venue objection to the Phase One lease sale claims, the district court had already "twice" rejected the legal theory underlying such objection. *Id*. That argument also fails.

The district court had made at most *one* venue ruling at the time Defendants responded to the First Amended Complaint: the September 2018 order declining a discretionary transfer of *different* lease-sale claims, *i.e.*, the 2017 sales. 1-FedER-132–45. A footnote in that decision concluded that venue was proper in Idaho for those claims, rejecting an argument made only in a surreply by WEA that the "real property" exception of 28 U.S.C. § 1391(e)(1)(C) applied and made venue in the District of Idaho improper. 1-FedER-141n.7. However, that remark was unnecessary to the resolution of Defendants' motion, which did not argue venue was improper, and was thus non-controlling dicta. *See Ducey v. United States*, 830 F.2d 1071, 1072 (9th Cir. 1987) ("Dicta is not given preclusive effect under the law of the case doctrine[.]"). Moreover, "[t]he law of the case doctrine does not preclude a court from reassessing its own legal rulings in the same case," particularly after an amended pleading is filed. *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1042–43 (9th Cir. 2018). Thus, the "law of the case" doctrine did not make it "futile" for Appellants to raise a venue objection to the Phase One

lease-sale claims before the district court, and their failure to do so constitutes a waiver of such an objection.[18]

Where Appellants never presented a timely motion to dismiss the Phase One lease sale claims for improper venue under § 1391(e)(1)(C), and the district court issued no ruling on any such motion, they cannot now ask this Court to cure their own procedural mistakes. Because Appellants waived their challenges to venue over the Phase One lease sales in the District of Idaho, the Court also lacks jurisdiction to address them. *Hendricks*, 408 F.3d at 1135.

B. Appellants' Venue Challenges Are Not Reviewable Under Pendent Jurisdiction.

The Court must dismiss the venue challenges for a second, independent reason: they were not addressed in the Phase One Decision and are not reviewable under the pendent jurisdiction doctrine. Assuming the Court determines the Phase One Decision is properly reviewed on interlocutory appeal, it can review the September 2018 venue order under the doctrine of pendent jurisdiction only if it is "inextricably intertwined" with or "necessary to ensure meaningful review of" the

[18] Defendants' own actions belie their argument that it would have been "futile" to object to venue for the Phase One lease sale claims. In their motion to dismiss or transfer the NPL Project claims, Defendants made the *same* legal argument that they now make in arguing that venue is improper in Idaho, showing they did not believe it to be "futile." *See* SER-69–95.

Phase One Decision. *Melendres v. Arpaio*, 695 F.3d 990, 996 (9th Cir. 2012). Neither prong is met here.[19]

Venue is not related to, much less "inextricably intertwined with," the legal issues involved in the Phase One Decision. *See Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000) ("Two issues are not 'inextricably intertwined' if we must apply different legal standards to each issue."). Neither is review of the venue order "necessary to ensure meaningful review of" the Phase One Decision under the second prong. An issue or ruling is reviewable under that prong only if it "implicates 'the very power the district court used to issue the [order]' [properly] under review." *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1109 (9th Cir. 2016) (quoting *Hendricks*, 408 F.3d at 1134–35). Issues of subject matter jurisdiction and personal jurisdiction are thus reviewable under that prong. *Id.*

But issues concerning proper venue do not implicate a court's power to award relief: "Section 1391's venue requirements are not a qualification upon the power of the court to adjudicate, but [rather] a limitation designed for convenience of litigants." *Costlow v. Weeks*, 790 F.2d 1486, 1487 (9th Cir. 1986) (alteration in

[19] Defendants also suggest that this Court should order the district court to transfer the lease sale claims now pending before the district court as part of Phase Two because those claims are also not proper in Idaho. Fed. Br. at 27. But any issues related to those Phase Two claims are not properly before the Court in this appeal, because they again are not "inextricably intertwined" with or "necessary to ensure meaningful review" of the issues in the Phase One Decision on appeal. *Melendres*, 695 F.3d at 996.

original). In *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006), the Supreme Court rejected the notion that venue implicates a court's power to hear a case or award relief, instead reaffirming that venue is about "litigational convenience."[20]

Thus, review of the venue issue is neither "necessary to ensure meaningful review of" nor "inextricably intertwined" with the Phase One Decision, and the Court lacks pendent jurisdiction to review the venue challenges.

C. Idaho Is a Proper Venue Under 28 U.S.C. § 1391(e)(1)(C).

Even if the Court were to entertain Defendants' venue challenges, it should reject them because the Phase One lease sale claims do not "involve" real property interests within the meaning of § 1391(e)(1)(C). Had the district court been presented with a motion to transfer venue on this ground, it would have properly been denied.

The venue statute in question, 28 U.S.C. § 1391(e), was adopted as part of the Mandamus and Venue Act of 1962 and subsequently amended in 1990. *See*

[20] In *Hendricks*, the Court found a venue ruling reviewable under the "necessary to ensure" prong. 408 F.3d at 1134–35, But the issue there was whether "[a] forum-selection clause precluded preliminary injunctive relief outside Bermuda," not whether venue was improper under § 1391. Moreover, the statements in *Hendricks* that venue implicates the power of district courts to award relief are clearly irreconcilable with the subsequent Supreme Court *Wachovia Bank* precedent and are therefore not binding. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

Stafford v. Briggs, 444 U.S. 527, 534 (1980); *Shell Oil Co. v. Babbitt*, 920 F. Supp. 559, 562–63 (D. Del. 1996) (both discussing § 1391(e) and legislative history).

In its current form, as relevant here, § 1391(e)(1) provides for venue in civil actions against federal agencies or employees in "any judicial district in which . . . (C) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1)(C). Venue is proper under this provision if at least one plaintiff resides in the district. *See Ry. Labor Executives' Ass'n v. ICC*, 958 F.2d 252, 256 (9th Cir. 1991). Here, it is undisputed that Plaintiff Western Watersheds Project resides in the District of Idaho. 6-FedER-1436. Thus, venue is proper in Idaho unless the action "involves" real property under § 1391(e)(1)(C).

Contrary to Appellants' assertions, Plaintiffs' Phase One lease sale challenges do not "involve" real property within the meaning of § 1391(e)(1)(C). Plaintiffs are not disputing any right, title or interest to real property. Instead, they challenge BLM's violations of NEPA, FLPMA, and the APA in conducting the lease sales—and the courts have consistently recognized that such claims do not "involve" real property under § 1391(e)(1)(C). *See, e.g.*, *Earth Island Inst. v. Quinn*, 56 F. Supp. 3d 1110, 1115–16 (N.D. Cal. 2014) (discussing case law and concluding that the term "real property" was intended only to "cover disputes over legal interests in real property").

One of the earliest venue decisions under the new §1391(e) explained this conclusion. In *Natural Resources Defense Council v. Tennessee Valley Authority*, 340 F. Supp. 400 (S.D.N.Y. 1971), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972), an environmental group sued in New York, its place of residence, alleging that TVA violated NEPA in entering into contracts to buy and use strip-mined coal in Tennessee without studying the environmental impacts. *Id.* at 402. TVA moved to dismiss for improper venue, arguing that "real property is involved" because the plaintiffs "sought to have the TVA action in awarding the contracts declared illegal." *Id.* at 403. Rejecting that argument, the court held:

> Gravity being what it is, the vast bulk of human activities take place on the face of the earth. Consequently, almost any dispute over public or private decisions will in some way "involve real property," taken literally. The touchstone for applying § 1391(e)[1] cannot sensibly be whether real property is marginally affected by the case at issue. *Rather, the action must center directly on the real property, as with actions concerning the right, title or interest in real property.*

Id. at 406 (emphasis added).

Likewise, in *Environmental Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 325 F. Supp. 728, 732 (E.D. Ark. 1970), *supplemented*, 325 F. Supp. 749 (E.D. Ark. 1971), the court rejected the agency's motion to dismiss for improper venue under § 1391(e)(1), holding that since the claims focused on environmental law violations, the case did "not put in issue title to, or possession of, such lands or any interest therein."

This interpretation has been consistently followed. *See, e.g.*, *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, No. 12-cv-4407; 2013 WL 120185, *2–3 (N.D. Cal. 2013) (no real property was central to action challenging federal compliance with environmental laws); *Ctr. for Envtl. Law and Policy v. U.S. Bureau of Reclamation*, No. 2:08-cv-1730-RAJ, 2009 WL 10668581, at *2 (W.D. Wash. May 12, 2009) (real property limitation did not apply, where the case did "not present any issues of a property right, title, or interest"); *McCloskey v. U.S. Postal Service*, No. 87-cv-5563, 1988 WL 29291 at *1 (E.D. Pa. 1988) (same); *Delaware v. Bender*, 370 F. Supp. 1193, 1199–1200 (D. Del. 1974) (same).

Even where cases may challenge federal mineral leasing decisions on public lands, the courts still have found no real property is "involved" in the sense intended by § 1391(e)(1)(C), unless the plaintiff's claims seek a determination of an interest in land—rather than, for example, an issue of regulatory interpretation. Thus, in *Ashley v. Andrus*, 474 F. Supp. 495, 496–97 (E.D. Wis. 1979), a plaintiff could bring suit in her home district against DOI for improperly interpreting mineral leasing regulations, even though "a court ruling in plaintiff's favor, would, in effect be determining plaintiff's right to the leasehold" because the "central issue" in the case was the interpretation of certain statutes and regulations "and not the underlying property." *Id.* at 497. *See also Shell Oil*, 920 F. Supp. at 563 (oil producer could sue in Delaware, its state of residence, in a dispute with DOI over

documents and royalties relating to oil and gas production on public lands in California, because real property was only "peripherally" or "marginally" involved); *Santa Fe Int'l Corp. v. Watt*, 580 F. Supp. 27, 28–31 (D. Del. 1984) (venue proper in Delaware for energy companies residing there to challenge DOI determination that the Kuwaiti government could not hold oil and gas leases on public lands, even though existing leases were directly at stake).

The same reasoning applies here. Again, Plaintiffs challenge BLM's compliance with its statutory obligations under NEPA, FLPMA, and the APA in approving the Phase One lease sales, and the district court was not asked to resolve any issues of right or title to the underlying mineral leases.[21]

The two cases on which Appellants principally rely are distinguishable from the facts here. *Landis v. Watt*, 510 F. Supp. 178, 179–80 (D. Idaho 1981) centered on a real property dispute—DOI's rejection or cancellation of 29 oil and gas leases in which the Plaintiff claimed an interest. Likewise, in *Ferguson v. Lieurance*, 565 F. Supp. 1013, 1014–15 (D. Nev. 1983), the court found that the case "center[ed] directly" on real property where the plaintiff challenged DOI's rejection of its oil and gas lease applications and sought an injunction prohibiting the agency from

[21] Defendants' reliance on *Conner*, 848 F.2d 1441, and *Union Oil Co. v. Morford*, 512 F.2d 743 (9th Cir. 1975), is also misplaced. Those cases note that a valid federal oil and gas lease constitutes a "real property" interest—a point Plaintiffs do not dispute. Neither *Conner* nor *Union Oil* addressed the salient question here, which is when a case "involves" real property for federal venue purposes.

issuing the leases to any other party until a new bidding process could occur. In contrast to *Landis* and *Ferguson*, the central issue here is BLM's compliance with its statutory obligations under NEPA and FLPMA, as opposed to a dispute over title to a real property interest.

Finally, Defendant's discussion of the legislative history behind the 1962 Act omits indications that Congress intended the "real property" condition it placed on § 1391(e)(1)(C) to be read narrowly. Congress's goals in expanding venue options under § 1391(e) included greater convenience to plaintiffs, by allowing them to bring actions in their home district, and greater efficiency of judicial administration, by allowing proceedings which "involve problems which are recurrent but peculiar to certain areas" to be heard by judges that are "familiar" with these issues. S. Rep. No. 87-1992, at 3 (1962); *see also Santa Fe Int'l Corp. v. Watt*, 580 F. Supp. 27, 30–32 (D. Del. 1984) (addressing legislative history).

Neither purpose would be served by the expansive interpretation of the "real property" exception that Appellants propose. Because this action involves questions of federal administrative law and compliance with federal environmental statutes that are not tied to the characteristics of any real property, this is not a case which requires the expertise of a judge familiar with local lands or state property laws. Permitting venue in Idaho more closely upholds Congress's intent of broadening venue options for plaintiffs. *See Envtl. Def. Fund*, 325 F. Supp. at 732

("Section 1391(e) . . . was intended to liberalize the venue requirements. It should be interpreted to effectuate this objective.").

In sum, because Plaintiffs' claims do not "involve" resolution of any issues of right or title to the underlying mineral leases, the case does not "involve" real property interests within the meaning of § 1391(e)(1)(C); venue is proper in the District of Idaho; and the district court would not have "abused its discretion" by denying a motion for discretionary venue transfer that raised this challenge.

CONCLUSION

For the foregoing reasons, the Court should dismiss these appeals for lack of jurisdiction. In the alternative, it should affirm the district court's decisions.

Date: December 16, 2020

Respectfully submitted,

/s/ Laurence ("Laird") J. Lucas
Laurence ("Laird") J. Lucas
Sarah Stellberg
Andrew R. Missel
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Attorneys for Plaintiffs-Appellees
Western Watersheds Project and
Center for Biological Diversity

STATEMENT OF RELATED CASES

The following case is related within the meaning of Ninth Circuit Rule 28-2.6:

Montana Wildlife Federation v. Bernhardt, 9th Cir. No. 20-35609 (Bureau of Land Management's appeal from order vacating one of the lease sales at issue in this case).

Western Watersheds Project v. Bernhardt, 9th Cir. Nos. 20-35693 and 20-35781 (consolidated) (Anschutz Exploration Corporation's appeals from the district court orders denying intervention).

Western Watersheds Project v. Bernhardt, 9th Cir. Nos. 20-35780 (consolidated) (Chesapeake Exploration, L.LC.'s appeal from the district court orders denying intervention).

Western Watersheds Project v. Bernhardt, 9th Cir. Nos. 20-35902 (consolidated) (Vermilion Energy USA LLC's appeal from the district court orders denying intervention).

Western Watersheds Project v. Bernhardt, 9th Cir. Nos. 20-35903 (consolidated) (Ballard Petroleum Holdings LLC's appeal from the district court orders denying intervention).

Date: December 16, 2020

/s/ Laurence ("Laird") J. Lucas
Laurence ("Laird") J. Lucas

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s): 20-35291, 20-35293 & 20-35294

I am the attorney for Plaintiffs-Appellees.

This brief contains 15,167 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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