Nos. 23-3624 & 23-3627

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al.,
*Plaintiffs/Appellants*,
v.
BUREAU OF LAND MANAGEMENT, et al.,
*Defendants/Appellees*,
and
CONOCOPHILLIPS ALASKA, INC., et al.,
*Intervenor-Defendants/Appellees*.

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
*Plaintiffs/Appellants*,
v.
BUREAU OF LAND MANAGEMENT, et al.,
*Defendants/Appellees,*
and
CONOCOPHILLIPS ALASKA, INC., et al.,
*Intervenor-Defendants/Appellees*.

Appeals from the United States District Court for the District of Alaska
Nos. 3:23-cv-58 & 3:23-cv-61 (Hon. Sharon L. Gleason)

**FEDERAL APPELLEES' ANSWERING BRIEF**

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## GLOSSARY

| | |
|---|---|
| ANILCA | Alaska National Interest Lands Conservation Act |
| BLM | Bureau of Land Management |
| CBD | Center for Biological Diversity (and other Plaintiffs/Appellants in No. 23-3624) |
| ConocoPhillips | ConocoPhillips Alaska, Inc. |
| EIS | Environmental Impact Statement |
| ESA | Endangered Species Act |
| FWS | United States Fish and Wildlife Service |
| FSEIS | Final Supplemental Environmental Impact Statement |
| GHG | Greenhouse gas |
| IAP | Integrated Activity Plan |
| NEPA | National Environmental Policy Act |
| NMFS | National Marine Fisheries Service |
| NPR-A | National Petroleum Reserve in Alaska |
| NPRPA | Naval Petroleum Reserves Production Act |
| ROD | Record of Decision |
| SEIS | Supplemental Environmental Impact Statement |
| SILA | Sovereign Iñupiat for a Living Arctic (and other Plaintiffs/Appellants in No. 23-3627) |
| TLSA | Teshekpuk Lake Special Area |

# INTRODUCTION

The Naval Petroleum Reserves Production Act ("NPRPA") directs the Secretary of the Interior to: (1) undertake "an expeditious program of competitive leasing of oil and gas in the [National Petroleum Reserve in Alaska ("NPR-A")]," while mitigating significant adverse effects to surface resources; and (2) provide maximum protection to significant surface values within special areas of the NPR-A. 42 U.S.C. §§ 6506a(a)-(b), 6504(a). Consistent with that authority, in March 2023, the Bureau of Land Management ("BLM") approved the Willow Master Development Plan ("Willow Project"), which authorized Intervenor-Defendant ConocoPhillips Alaska, Inc. ("ConocoPhillips") to construct and operate infrastructure necessary to produce and transport oil and gas from its leases located in the NPR-A. The Willow Project, as approved, is substantially scaled back from ConocoPhillips's proposal, with fewer drill sites and wells, lower anticipated oil production and reduced greenhouse gas emissions, and less surface infrastructure. The Project thus "strikes a balance, allowing for development to occur in the NPR-A consistent with the terms of existing leases while at the same time requiring the implementation of robust protections for surface resources, as well as measures to limit greenhouse gas emissions and thereby reduce climate impacts." 3-SER-613.

Before approving the Project, BLM prepared an environmental impact statement ("EIS") and a supplemental EIS ("SEIS") pursuant to the National Environmental Policy Act ("NEPA"), which analyzed the environmental impacts of the Project. BLM also consulted on the effects of the proposed action with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") pursuant to Section 7 of the Endangered Species Act ("ESA").

Two sets of environmental groups—led by Sovereign Iñupiat for a Living Arctic ("SILA") and the Center for Biological Diversity ("CBD")—sued BLM, FWS, and NMFS. Plaintiffs allege that Defendants failed to comply with NEPA, the NPRPA, the Alaska National Interest Lands Conservation Act ("ANILCA"), and the ESA. In a thorough, 109-page decision, the district court granted summary judgment to Defendants. The court held that BLM's 2023 SEIS and Defendants' Section 7 consultations remedied all errors identified by the court in its 2021 decision that had vacated BLM's 2020 approval of the Project. Both the district court and this Court denied Plaintiffs' motions for an injunction pending appeal.

This Court should affirm. BLM thoroughly analyzed the environmental impacts of the Willow Project and considered a reasonable range of alternatives, consistent with the requirements of NEPA, the NPRPA, and ANILCA. Defendants also carefully analyzed the effects of the action on listed species and their designated critical habitat, satisfying their obligations under the ESA.

## STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under NEPA, 42 U.S.C. §§ 4321-47; the NPRPA, 42 U.S.C. §§ 6501-08; ANILCA, 16 U.S.C. §§ 3101-3233; the ESA, *id.* §§ 1531-44; and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. CBD-7-ER-1611-23; Docket Nos. 1, 88 (3:23-cv-00058-SLG).

The district court's judgment on November 9, 2023, was final because it disposed of all claims against all defendants. CBD-1-ER-2-3. Plaintiffs timely filed their notices of appeal on November 14, 2023. CBD-7-ER-1633-45; SILA-2-ER-276-80; *see also* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

1. Whether BLM considered a sufficient range of alternatives pursuant to NEPA, where BLM considered and approved an alternative that will produce less oil and involves less surface infrastructure than ConocoPhillips's proposal and evaluated numerous other alternative components, including those proposed by Plaintiffs.

2. Whether BLM sufficiently analyzed the indirect, growth-inducing effects stemming from the Willow Project, where it conducted a thorough analysis

of the Project's climate change impacts, including an analysis of reasonably foreseeable future actions caused by the Project.

3. Whether BLM properly applied the dual directives in the NPRPA—that it expeditiously lease oil and gas in the NPR-A while protecting significant surface resources—where it analyzed and approved a scaled-back version of the Project and imposed protective mitigation measures.

4. Whether BLM complied with ANILCA Section 810's framework, by first determining that the Project may significantly restrict subsistence uses and then determining that the selected alternative would involve the minimal amount of public lands necessary to accomplish the Project's purpose.

5. Whether BLM, FWS, and NMFS satisfied their ESA Section 7 consultation obligations where they addressed ongoing and projected climate impacts on listed species and reasonably determined that current science does not allow them to draw causal links between Project-specific greenhouse emissions and Project-specific effects on listed species.

## PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

## STATEMENT OF THE CASE

### A. Statutory and regulatory background

#### 1. The Naval Petroleum Reserves Production Act

The 23 million acres that comprise the National Petroleum Reserve in Alaska were originally designated a naval petroleum reserve by executive order in 1923. *See N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006). In 1976, Congress enacted the NPRPA, Pub. L. No. 94-258, 90 Stat. 303, and placed the area under the Department of the Interior's jurisdiction. In response to the 1979 oil crisis and reflecting a desire to quickly move from federal to private oil development, Congress amended the NPRPA in 1980, directing the Secretary of the Interior to undertake "an expeditious program of competitive leasing of oil and gas in the [NPR-A]." Department of the Interior Appropriations Act for Fiscal Year 1981, Pub. L. No. 96-514, 94 Stat. 2957, 2964-65 (1980).

Congress directed that activities taken pursuant to the NPRPA "shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR-A]." 42 U.S.C. § 6506a(b). Congress also directed that oil and gas activities within certain special areas, including the Teshekpuk Lake Special Area ("TLSA"), "be conducted in a manner which will assure the maximum protection of [significant] surface values."

*Id.* § 6504(a). Thus, "[t]he NPRPA directs BLM to lease [NPR-A] land to private entities for oil and gas development, while taking such measures as BLM deems necessary or appropriate to mitigate adverse environmental impacts," *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1081 (9th Cir. 2020), including maximum protection in special areas.

BLM's oil and gas program in the NPR-A consists of three basic stages: leasing, exploration, and development. At the leasing stage, and through the development of an "integrated activity plan" ("IAP"), BLM determines which lands to make available for leasing, which lands to defer or make unavailable, and what special stipulations and other mitigation to apply programmatically to oil and gas activities to protect surface resources. Once BLM adopts such a plan, it may offer for sale and ultimately issue oil and gas leases in any area in which such leasing has been authorized, following the process outlined in 43 C.F.R. Part 3130.

The leasing stage is just the first step toward development in the NPR-A. Before any lessee may *explore* for oil and gas, it must obtain authorization under procedures set forth in 43 C.F.R. Part 3150 (governing geophysical surveys) and 43 C.F.R. Part 3160 (governing drilling operations). If a lessee discovers oil or gas, it may seek approval to *develop* the resources by applying for a permit to drill that includes a drilling plan and a surface use plan of operations. *Id.* § 3162.3-1. At that

stage, BLM may require additional project-specific stipulations to further protect surface resources. *Id.* § 3131.3.

### 2. National Environmental Policy Act

NEPA ensures that federal agencies take a "hard look" at the environmental impacts of proposed major federal actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); 42 U.S.C. § 4332(2)(C). The statute mandates no specific substantive results, *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002); it "merely prohibits uninformed—rather than unwise—agency action," *Robertson*, 490 U.S. at 351.

For "major Federal actions significantly affecting the quality of the human environment" an agency must prepare an EIS, 42 U.S.C. § 4332(C), which serves the dual purposes of informing agency decision-makers of the significant environmental effects of a proposed major federal action and ensuring that relevant information is made available to members of the public so that they "may also play a role in both the decisionmaking process and the implementation of that decision," *Robertson*, 490 U.S. at 349. If a reviewing court concludes that an EIS "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences," and that its "form, content and preparation foster both informed decision-making and informed public participation[,]" then NEPA is

satisfied. *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1150-51 (9th Cir. 1997) (quotation and citations omitted).

### 3. Alaska National Interest Lands Conservation Act

Section 810(a) of ANILCA, 16 U.S.C. § 3120(a), establishes a two-step process for federal agencies to evaluate the effects of federal land use on subsistence resources. It creates a "procedural mechanism which insures . . . local input into the administrative decision-making process" with respect to subsistence uses and needs, *Kunaknana v. Clark*, 742 F.2d 1145, 1150-51 (9th Cir. 1984), and it identifies specific determinations the agency must make before proceeding with actions that may significantly restrict subsistence uses, *id.*; *see also infra* p. 48.

### 4. The Endangered Species Act

Section 7 of the ESA mandates that federal agencies must ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). To satisfy this substantive mandate, federal agencies must consult with FWS and NMFS (collectively, "the Services") whenever the agency's action "may affect" a threatened or endangered species or designated critical habitat that falls under that Service's respective jurisdiction. 50 C.F.R. § 402.14(a).

If an action agency determines its proposed action "may affect" but "is not likely to adversely affect" a listed species or critical habitat, the action agency may

consult informally with the consulting agency. *Id.* § 402.13(c). If it concurs with the "not likely to adversely affect" determination, the consulting agency issues a Letter of Concurrence and concludes consultation. *Id.* If, however, a proposed federal action "may affect" and "is likely to adversely affect" a listed species or critical habitat, the action agency must engage in formal consultation with the consulting agency, which culminates in the consulting agency issuing a "biological opinion" ("BiOp"). 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(a). Among other things, a BiOp must contain "[a] detailed discussion of the effects of the action on listed species or critical habitat" and the consulting agency's opinion on whether the proposed action is "likely to jeopardize the continued existence" of the species. *Id.* § 402.14(h).

### B. Factual background

#### 1. BLM's Planning for the NPR-A

In 2012, BLM issued a combined IAP/EIS, which analyzed development scenarios and environmental consequences for all BLM-managed federal lands and oil and gas resources within the NPR-A. 3-SER-758. BLM issued a Record of Decision ("ROD") approving that IAP in 2013. *Id.* BLM issued a revised IAP/EIS in 2020, and after the 2020 plan was challenged in court, BLM issued a new ROD for the IAP/EIS in 2022 ("2022 IAP"). *See id.* The 2022 IAP, nearly identical to the 2013 IAP, makes 52 percent of the NPR-A available for oil and gas leasing and

adopts lease stipulations and required operating procedures applicable to oil and gas activities like the Willow Project. 9-SER-2499; 3-SER-639.

### 2. The Willow Project

#### a. The 2020 EIS and 2021 District Court Decision

BLM issued multiple "non-NSO" leases—that is, leases that were *not* "no surface occupancy" leases[1]—in the Willow area to ConocoPhillips between 1999 and 2017, and after exploration drilling, ConocoPhillips announced discovery of oil and gas prospects in the Willow area in 2017. 9-SER-2301. In 2018, ConocoPhillips submitted its initial request that BLM approve its plan to develop oil and gas resources on the leases. CBD-5-ER-911. ConocoPhillips's proposal included five drill sites, a processing facility, gravel roads, and other infrastructure. *Id.* In 2020, BLM issued the Willow Master Development Plan EIS ("2020 EIS") and FWS issued a BiOp, both analyzing the proposal. *See Sovereign Iñupiat for a Living Arctic v. BLM* ("*SILA*"), 555 F. Supp. 3d 739, 752-53 (D. Alaska 2021). BLM subsequently issued a ROD ("2020 ROD"), which adopted ConocoPhillips's

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[1] This Court has explained that non-NSO leases contain stipulations that "authorize the government to impose reasonable conditions on drilling, construction, and other surface-disturbing activities…[but] they do not authorize the government to preclude such activities altogether." *Conner v. Burford*, 848 F.2d 1441, 1444 (9th Cir. 1988). Under that precedent, ConocoPhillips possesses certain rights to develop its leases, subject to reasonable regulation, including mitigation measures. *See* CBD-1-ER-16-17 n.58; CBD-1-ER-24 n.89.

proposal of a project with five drill sites but deferred approval on two of those sites at ConocoPhillips's request. *Id.*

Two sets of nearly the same plaintiff groups as in the instant suit challenged the 2020 EIS, BiOp, and ROD, alleging—among other things—that the environmental analysis in the 2020 EIS did not comply with NEPA and that the 2020 BiOp violated the ESA. In August 2021, the district court granted plaintiffs summary judgment in part. *Id.* at 805. The district court concluded that BLM violated NEPA by excluding foreign greenhouse gas ("GHG") emissions from its analysis, by developing alternatives based on the view that ConocoPhillips had the right to "extract all possible oil and gas from its leases," and by failing to consider the NPRPA's statutory directive that it give "maximum protection" to surface values within the TLSA. *Id.* The court also held that the BiOp's incidental take statement lacked the requisite specificity with respect to mitigation measures for the polar bear and that its findings were arbitrary and capricious. *Id.* at 800-03. The district court vacated BLM's approval of the Willow Project and FWS's BiOp, and no party appealed.

**b. The 2023 FSEIS**

Following the district court's 2021 decision, BLM began preparing an SEIS to address the identified deficiencies. 87 Fed. Reg. 6,890-91 (Feb. 7, 2022); 3-SER-603-02. BLM published a Draft SEIS in July 2022, held numerous public

meetings, and received extensive public comment. 3-SER-760. BLM released the Final SEIS ("FSEIS") in February 2023.

In the FSEIS, BLM considered numerous new alternative concepts and analyzed four action alternatives in detail, including a new action alternative, Alternative E, which would approve three drill sites (sites BT1, BT2, and BT3), defer approval of a fourth (BT5), and disapprove a fifth (BT4). CBD-5-ER-914-18. BLM also considered different methods for the delivery of construction components to the remote area. CBD-5-ER-915; CBD-5-ER-931.

The 2023 FSEIS also substantially expanded the discussion of GHG emissions and climate change. *See* 3-SER-790-811 (new text highlighted in yellow). The FSEIS presented quantified predictions for multiple GHG emissions streams related to the Willow Project for each action alternative and quantified downstream combustion GHG emissions resulting from the predicted change in domestic and foreign oil consumption. 3-SER-803 (Table 3.2.7); 3-SER-804 (Table 3.2.8). BLM's climate change analysis included discussions of observed, 3-SER-791-92, and projected, 3-SER-792-93, climate trends in the Arctic and North Slope, and extensively discussed the Project's climate impacts. The FSEIS presented BLM's predicted climate effects of each alternative, 3-SER-799-800, and the "social cost of greenhouse gases" for each action alternative, first by calculating direct and indirect GHG emissions per alternative, 3-SER-803-04, and

then translating this to social cost comparisons (in dollars) per alternative, 3-SER-805-11. BLM also identified lease stipulations and required operating procedures "intended to mitigate climate change impacts from development activity," including ambient air monitoring and restrictions to protect vegetation and tundra. 3-SER-795-96. In providing cooperating agency feedback on a preliminary version of the SEIS, the U.S. Environmental Protection Agency explained that the SEIS contained "the most transparent analysis [it] has seen" regarding GHG emissions and their social cost. 6-SER-1690.

#### c. Consultation with FWS and NMFS

In 2022, BLM requested ESA Section 7 consultation with FWS and NMFS regarding the potential effects of its proposed action of approving the Willow Project on ESA-listed species, including the polar bear (with FWS) and ice seals (bearded seal and ringed seal which depend on sea ice, with NMFS), and any designated critical habitat. 9-SER-2481; 8-SER-2248-49. On January 13, 2023, FWS issued its BiOp, which concluded formal consultation with BLM. With respect to the polar bear, FWS determined that the Willow Project was not likely to jeopardize the continued existence of the polar bear or adversely modify its designated critical habitat. 7-SER-1872-75. While acknowledging that various project-related activities would "intermittently [and] incidentally expose small numbers of polar bears of the [South Beaufort Sea] stock to disturbance," FWS

explained how "effects from these exposures would be limited to temporary changes in behavior that would not be biologically significant." 7-SER-1873.

On March 2, 2023, NMFS agreed with BLM's "not likely to adversely affect" determination with respect to ice seals and issued a Letter of Concurrence, thus concluding informal consultation with BLM. 2-SER-534-85.

#### d. 2023 ROD

BLM approved the Willow Project in a ROD in March 2023. 3-SER-629. The ROD approved the development of three drill sites (sites BT1, BT2, and BT3), as described in Alternative E, and the delivery of components using a river crossing (the Colville River Crossing module delivery option). 3-SER-604-06. Unlike Alternative E in the FSEIS, which deferred approval of a fourth drill site (BT5) and disapproved the fifth drill site (BT4), the ROD disapproved both sites. 3-SER-604. It explained that disapproving both BT4 and BT5 "reduces the overall period of construction activities, which tend to involve more intense impacts to subsistence activities and wildlife including caribou." 3-SER-613.

Alternative E and the Colville River Crossing allow less construction of surface infrastructure and "would result in fewer overall environmental impacts—including impacts to important surface resources, subsistence uses and resources, and the climate—than the other action alternatives and module delivery options and therefore is considered by BLM to be the environmentally preferred

alternative." 3-SER-610-11. The modification of Alternative E selected in the ROD, to disapprove rather than defer the fourth drill site (BT5), further reduced infrastructure and impacts to surface resources, subsistence uses and resources, and the climate. 3-SER-611; 3-SER-613. The ROD explained that the selected alternative "reflects careful consideration of the Secretary's statutory directive to provide maximum protection to significant surface values within the NPR-A (i.e., Special Areas)" by requiring "less surface infrastructure, primarily within the TLSA," resulting in reduced "impacts to wetlands and vegetation, hydrology, gravel resources, and wildlife" and diminishing "potential impediments to the movement of caribou and subsistence users." 3-SER-611.

### C. Proceedings below

#### 1. Preliminary Injunction Proceedings

Plaintiffs filed their complaints in March 2023, and each moved for a temporary restraining order and preliminary injunction to enjoin ConocoPhillips's planned construction in March and April of 2023. Docket No. 23 (No. 3:23-cv-00058-SLG); Docket No. 24 (No. 3:23-cv-00061-SLG). The district court expedited consideration of the motions, and denied them on April 3, 2023. *See* Docket No. 10-22 (23-3627).

Plaintiffs appealed, and this Court denied their motions for an injunction pending appeal. *See* Docket No. 10-23 (23-3627). Plaintiffs subsequently dismissed their appeals.

### 2. Summary Judgment Order and Appeal

The parties proceeded to merits briefing and jointly requested a decision from the district court by November 10, 2023. *See* Docket No. 86 (Case No. 3:23-cv-00058-SLG).

On November 9, 2023, the district court rejected all of Plaintiffs' claims in both cases. *See* CBD-1-ER-4-112. First, the court held that BLM considered "the requisite reasonable range of alternatives based on the Project's purpose and need." CBD-1-ER-21. The court concluded that "BLM did not misapprehend its authority" under the NPRPA, including the directive that "maximum protection" be accorded to significant surface values in Special Areas. CBD-1-ER-22-23. The court noted that the BLM "may have elected to prohibit all infrastructure in the TLSA" at or before the leasing stage, but recognized that the sale of the non-NSO leases to ConocoPhillips constrained BLM's ability to do so. CBD-1-ER-24. As for Plaintiffs' assertion that BLM again considered only alternatives that would allow the lessee to extract "all possible oil," the court held that the FSEIS "remedie[d] this deficiency" from the 2020 EIS. CBD-1-ER-27-28.

The district court next held that Plaintiffs' assertions about deficiencies in the FSEIS's GHG emissions analysis were "unfounded." CBD-1-ER-40. First, the court explained that BLM "rectified" the 2020 EIS's failure to include foreign GHG emissions in its analysis. CBD-1-ER-38. Then, the court rejected Plaintiffs' claims that BLM violated NEPA by failing to consider GHG emissions from West or Greater Willow—a potential future development site with two exploration wells. CBD-1-ER-40.

Turning to Plaintiffs' NPRPA claims, the district court first rejected SILA Plaintiffs' claim that BLM failed to consider a reasonable range of alternatives and arbitrarily limited its authority "for the same reasons that it . . . upheld BLM's alternatives analysis under NEPA." CBD-1-ER-45. The court then explained that CBD Plaintiffs did "not causally link how GHG emissions from the Willow Project would specifically harm NPR-A surface resources," noting that BLM exercised its "broad discretion" in protecting NPR-A surface resources through numerous operating procedures, design features, and mitigation measures. CBD-1-ER-46-50. The court concluded that BLM "provided a well-reasoned explanation" for not adopting specific mitigation measures identified by Plaintiffs. CBD-1-ER-50.

On Plaintiffs' ANILCA claims, the district court held that BLM complied with its obligations for both Tier-1 and Tier-2 evaluations. The court explained that BLM reasonably determined that Alternative E involves the minimal amount of

public lands necessary to accomplish the purpose of the proposed action and ensured that reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources. CBD-1-ER-53-59.

Finally, the district court held that BLM, FWS, and NMFS complied with the ESA. CBD-1-ER-83-112. The court analyzed Plaintiffs' various challenges to FWS's determination that Willow's disturbances were not likely to injure polar bears and concluded that the Service's determination was not arbitrary or capricious. CBD-1-ER-87-95. The court likewise rejected Plaintiffs' assertion that Defendants violated the ESA by failing to consider how Willow's GHG emissions could affect polar bears and ice seals, concluding that Defendants "applied the correct standard to determine whether Willow's GHG emissions were an effect of the action and provided a reasoned basis for concluding that they were not." CBD-1-ER-102-03. The court added that Plaintiffs had "not shown any available scientific evidence that links Willow's projected GHG emissions to a reasonably certain decrease in sea ice impacting polar bears" in Willow's Action Area, or shown that FWS disregarded available scientific evidence. CBD-1-ER-111.

Plaintiffs filed their notices of appeal on November 14, 2023, and moved in the district court for an injunction pending appeal on November 15 and November 17, 2023. The district court denied the motions on December 1, 2023, concluding that Plaintiffs had failed to establish any of the factors for an injunction pending

appeal. Docket No. 10-32 (23-3627). Plaintiffs then moved for an injunction pending appeal in this Court. Docket No. 10 (23-3624 & 23-3627). This Court denied the motions on December 18, 2023, and ordered expedited briefing and hearing of the appeals. Docket No. 37 (23-3624).

## SUMMARY OF ARGUMENT

The Court should affirm. Especially in light of the deferential standard of review, each of Plaintiffs' claims fails as a matter of law.

1. BLM satisfied NEPA by considering a reasonable range of alternatives and analyzing Willow's indirect effects.

a. *First*, BLM revised its alternatives analysis in response to the district court's 2021 remand. BLM considered several new alternative components, evaluated a new alternative in detail, and ultimately approved a scaled-back version of the Willow Project that permits fewer drill sites, and substantially less infrastructure in special areas, than ConocoPhillips had proposed.

*Second*, BLM did not misapprehend its authority or believe that it must allow ConocoPhillips to extract all possible oil or all economically feasible oil from its leases. Plaintiffs' arguments to the contrary ignore the substantive revisions in the FSEIS and erroneously equate BLM's decision to analyze full field development in a master development plan with the purported notion that BLM

determined it must authorize ConocoPhillips to extract all economically feasible oil.

*Third*, as part of its alternatives screening process, BLM considered numerous new alternative components—including one that would have prohibited all infrastructure in the TLSA—and reasonably explained why it adopted some of them and eliminated others from detailed study. Plaintiffs assert BLM should have evaluated an additional alternative with some unspecified lesser amount of development, but BLM's robust analysis satisfies NEPA.

b. BLM sufficiently analyzed Willow's indirect effects, including its growth-inducing impacts. The FSEIS provides a thorough analysis of Willow's downstream GHG emissions and specifically includes Greater Willow in its discussion of reasonably foreseeable future actions. Moreover, the FSEIS tiers to prior IAPs, which estimate GHG emissions from various levels of future development scenarios, and the FSEIS uses the higher-end projections, thus capturing Willow's full potential growth-inducing impacts.

2. BLM complied with the NPRPA, both in identifying and screening alternatives and in approving the Project. The NPRPA directs the Secretary of the Interior to undertake an expeditious program of competitive oil and gas leasing in the NPR-A, while providing maximum protection for significant surface resources in special areas and implementing measures she deems necessary to protect surface

resources elsewhere in the NPR-A. BLM struck a reasonable balance between those directives, allowing for development consistent with the terms of existing leases while requiring the implementation of robust protections for surface resources.

3. BLM made the appropriate determinations under ANILCA Section 810. BLM first determined that all action alternatives may significantly restrict subsistence uses, and then concluded that Alternative E—as modified in the ROD—would involve the minimal amount of public lands necessary to accomplish the purpose of the Project. BLM also imposed numerous measures to minimize adverse impacts upon subsistence uses and resources.

4. Defendants satisfied their consultation duties under the ESA. BLM extensively analyzed the Project, determined that its approval "may affect" several listed species, and thus initiated consultation with FWS and NMFS. BLM was not required to separately determine whether subcomponents of the Project—such as Willow's GHG emissions—"may affect" listed species or critical habitat because it had appropriately made that threshold determination for the Project as a whole.

Moreover, Defendants reasonably determined that they could not identify any "effects of the action" flowing from Willow's GHG emissions. Defendants rationally explained that current science does not allow them to draw causal links between project-specific GHG emissions and subsequent project-specific effects

on listed species. Plaintiffs' arguments misconstrue Defendants' analyses and the requirements of ESA Section 7 consultation.

5. As the record shows, Defendants fully satisfied their statutory obligations. Nevertheless, if the Court finds error in Defendants' analyses, it should remand without vacatur or remand to the district court to consider remedy after additional briefing on relevant equitable considerations.

## STANDARD OF REVIEW

This Court reviews the district court's summary judgment ruling de novo. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc).

This Court reviews Plaintiffs' claims under the deferential standard of the APA. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Under the APA, a court may set aside agency action if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA's standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1146 (9th Cir. 2016) (cleaned up). This scope of review "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463

U.S. 29, 43 (1983). Review is most deferential where a court reviews scientific judgments and technical analyses within the agency's expertise. *Westlands*, 376 F.3d at 871.

## ARGUMENT

### I. BLM's revised analysis in the FSEIS satisfied NEPA.

As the district court concluded, BLM's new analysis in the FSEIS complied with NEPA. Applying appropriate screening criteria to its alternatives analysis, BLM considered a broad range of alternatives and alternative components, and approved a scaled-back Project that produces less oil and provides greater protection of surface resources than ConocoPhillips proposed. BLM also added a thorough analysis of Willow's climate impacts and thoroughly analyzed Willow's indirect effects.

#### A. BLM's alternatives analysis satisfied NEPA.

Both sets of Plaintiffs assert that BLM failed to consider a reasonable range of alternatives pursuant to NEPA. *See* SILA Br. at 21-33; CBD Br. at 17-27. Their arguments focus primarily on BLM's statutory authority under the NPRPA. As the district court concluded, however, BLM's alternatives analysis in the FSEIS satisfied NEPA and the NPRPA. *See* CBD-1-ER-35; CBD-1-ER-50. Plaintiffs ignore BLM's thorough process of identifying, screening, and considering alternatives and the substantial revisions made in response to the district court's

2021 order. Essentially, Plaintiffs believe that BLM should have adopted an alternative disapproving the Willow Project or prohibiting development in the TLSA. But the NPRPA did not require BLM to adopt either of those two alternatives, and NEPA did not require BLM to evaluate in detail an action alternative that prohibits development in the TLSA altogether.

### 1. BLM's range of alternatives was reasonably shaped by the Project's purpose and need and the NPRPA.

NEPA's implementing regulations[2] direct an agency to "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a) (2019). An agency's choice of alternatives is governed by a "rule of reason," under which it "need not consider an infinite range of alternatives, only reasonable or feasible ones." *Westlands*, 376 F.3d at 868 (quotation omitted). NEPA does not require an agency to discuss "[a]lternatives that are unlikely to be implemented," *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993), alternatives that are "inconsistent with the [agency's] basic policy objectives," *id.* (quotation omitted), or "alternatives similar to alternatives actually considered," *Kempthorne*, 457 F.3d at 978. The "touchstone for [a court's] inquiry is whether an EIS's

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[2] The NEPA regulations were amended in 2020 and 2022. *See* 85 Fed. Reg. 43,304 (July 16, 2020); 87 Fed. Reg. 23,453 (Apr. 20, 2022). Because BLM began this NEPA process before those amendments' effective dates, BLM applied—and this brief cites—the regulations in effect before the amendments, codified at 40 C.F.R. Parts 1500-08 (2019). 5-SER-1225.

selection and discussion of alternatives fosters informed decision-making and informed public participation." *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 575 (9th Cir. 1998) (quotation omitted). And the range of alternatives that an agency must consider "is based on the purpose and need of the proposed agency action." *Audubon Soc'y of Portland v. Haaland*, 40 F.4th 967, 981 (9th Cir. 2022).

As set forth above, the NPRPA directs the Secretary of the Interior to undertake "an expeditious program of competitive leasing of oil and gas in the [NPR-A]." 42 U.S.C. § 6506a(a). The NPRPA also requires that oil and gas activities within designated special areas of the NPR-A provide "maximum protection" of surface values:

> Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.

*Id.* § 6504(a).[3] A separate section of the NPRPA applies more broadly throughout the NPR-A and requires mitigation of significant effects:

> Activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems

[3] When Congress amended the NPRPA in 1980, it stated "that any exploration *or production* undertaken pursuant to this section shall be in accordance with section 6504(a) of this title." 42 U.S.C. § 6506a(n)(2) (emphasis added).

> necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR-A].

*Id.* § 6506a(b).

BLM stated that the purpose of the proposed action in the FSEIS is "to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources in the Willow reservoir located in the Bear Tooth Unit (BTU), while providing maximum protection to significant surface resources within the NPR-A, consistent with BLM's statutory directives." CBD-5-ER-911-12. BLM's statement aligns with the "two directives in the NPRPA," CBD-1-ER-16-17 (citing 42 U.S.C. §§ 6506a(a), 6506a(b), 6504(a)), and Plaintiffs concede that the statement is reasonable, CBD-1-ER-19; SILA Br. at 29 (describing the statement as "reasonable on its face").

**2. BLM considered a broad range of alternatives in the FSEIS and complied with the district court's 2021 order on remand.**

To begin, BLM's new alternatives analysis in the FSEIS "remedie[d]" the only deficiencies identified in the 2021 summary judgment order. CBD-1-ER-27-28. In the 2021 order, the district court held that BLM's 2020 EIS (1) "failed to consider the statutory directive that 'maximum protection' be given to surface values within the TLSA," and (2) improperly "developed its alternatives analysis based on the view that ConocoPhillips has the right to extract all possible oil and gas on its leases." *SILA*, 555 F. Supp. 3d at 770. The court rejected BLM's prior

argument that ConocoPhillips's lease rights precluded the agency from considering alternative configurations or locations of drill pads, explaining that BLM's position was "inconsistent with its own statutory responsibility to mitigate adverse effects on the surface resources." *Id.* at 768-69 (citing 42 U.S.C. § 6506a(b)). The court explained that "infrastructure is allowed, and indeed anticipated, within the TLSA." *Id.* But it concluded that BLM's explanation erroneously "presupposes the preclusion of any alternative development scenarios within the TLSA based on the lease terms." *Id.* The district court directed BLM to "reassess its alternatives analysis consistent with the terms of this order." *Id.* at 770.

As the district court explained in its 2023 summary judgment order, BLM followed the court's directive and "did not misapprehend its authority" in the 2023 FSEIS and ROD. CBD-1-ER-22.

The FSEIS contains 266 pages discussing how BLM developed alternatives. *See* 5-SER-1209-1449; 6-SER-1452-76 (Appendix D). BLM and cooperating agencies generated and considered an extensive list of "alternative components"—essentially, different project design features, configurations, and timelines. Among the numerous alternative components considered by BLM for the first time in the SEIS, alternative components number 36 and number 44 would, respectively, reroute the Project's access road outside of the Colville River Special Area (leaving no facilities there), and prohibit all infrastructure in the TLSA. 5-SER-

1260-61. BLM developed an entirely new Alternative (Alternative E) that reduced impacts over alternatives considered in the 2020 EIS and specifically eliminated an entire drilling pad and its associated infrastructure from within the TLSA. CBD-5-ER-917-18.

BLM ultimately approved a modified version of Alternative E that further scales back the Project by authorizing only three drilling pads, specifically denying ConocoPhillips's request for a fourth and fifth pad. 3-SER-610-14. Compared to ConocoPhillips's proposal (Alternative B in the FSEIS), Alternative E—as modified in the ROD—"significantly reduces the footprint of project infrastructure and the level of construction and operational activities, both within and outside of the sensitive TLSA, and thereby substantially reduces impacts to a broad range of surface resources." 3-SER-613 (noting that reduced length of road and pipelines will also reduce adverse impacts to caribou). The slimmer project profile works in concert with broader required operating procedures adopted in the programmatic 2022 IAP ROD,[4] including specific measures to eliminate or reduce adverse effects within the TLSA. 3-SER-611-12; *see also* 3-SER-639; 9-SER-2499-504 (2022 IAP

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[4] Some of the same Plaintiff organizations challenged the 2020 IAP/EIS, and many of them supported the 2013 ROD and its reinstitution through the 2022 IAP ROD. *See* Docket No. 10-21 (23-3627), ¶ 16. This realignment represents another significant difference between the present challenge and litigation challenging the 2020 Willow decision.

ROD). The district court thus properly rejected Plaintiffs' argument that BLM "repeated" its earlier error. *Contra* SILA Br. at 24; CBD Br. at 21.

**3. BLM properly understood its statutory authority and ultimately approved an alternative that produces less oil than ConocoPhillips's proposal.**

Attempting to brush aside BLM's significant new analysis, Plaintiffs assert that BLM applied a "constrained view" of its legal authority and as a result, "unlawfully limited the range of alternatives" considered. SILA Br. at 23, 28; *see also* CBD Br. at 19-21 (asserting that BLM assessed a "narrow range of alternatives" and believed it must "maximize Willow's oil recovery"). Plaintiffs suggest that BLM considered only "three slight variations" of ConocoPhillips's proposal, SILA Br. at 20, and failed to consider alternatives that would meaningfully reduce Willow's impacts, CBD Br. at 19. These arguments ignore substantive revisions in the FSEIS and the fact that BLM analyzed and ultimately approved a version of the Project that does not allow ConocoPhillips to fully develop all its Willow leases.

In the FSEIS, BLM reevaluated and revised its alternatives screening criteria to address the district court's 2021 ruling that ConocoPhillips does "not have the unfettered right to extract 'all possible' oil and gas from its leases," and to evaluate whether an alternative concept would reduce infrastructure and environmental impacts relative to ConocoPhillips's proposal, including within the TLSA. 5-SER-

1251. BLM explained that the FSEIS "does not assume that ConocoPhillips has the right to extract all possible oil and gas from its leases" and recognized that BLM "may condition Project approval to protect surface resources even if doing so reduces the amount of oil and gas that can be profitably produced." 5-SER-1193. This is "certainly a distinguishable difference from BLM's previous 'all possible oil' standard" in the 2020 EIS. *See* CBD-1-ER-28.

In the 2020 EIS, "[e]ach action alternative considered the same drill site locations and would produce the same amount of oil." *SILA*, 555 F. Supp. 3d at 768 n.156. The 2023 FSEIS, by contrast, meaningfully varied the action alternatives, including the number and total surface area of drill site gravel pads (ranging from 62.8 to 88.3 acres); infield pipelines (ranging from 30.2 to 47.0 miles); gravel roads (ranging from 27.2 to 37.4 miles); ice roads (ranging from 431.2 to 962.4 miles); and infrastructure in special areas (ranging in the TLSA from 61.2 acres/4.9 miles of pipeline to 179.6 acres/12.2 miles of pipeline). *See* CBD-5-ER-932-37 (Table 2.7.1). *Contra* SILA Br. at 9 (suggesting that Alternative E "largely included the same infrastructure, mitigation, and design features as ConocoPhillips' original 2018 proposal").

BLM also considered alternatives that produce less oil and approved an alternative that ultimately "preclude[s] development on several of ConocoPhillips' leases," as CBD Plaintiffs concede. *See* CBD Br. at 25 (citing maps showing that at

least three leases "would not recover any oil under modified Alternative E"). First, BLM thoroughly analyzed the no-action alternative, under which no oil would be produced. *See*, *e.g.*, 3-SER-799. BLM also analyzed a new alternative in the FSEIS (Alt. E) estimated to result in production of 613.5 million barrels of oil, less than the 628.9 million barrels resulting from ConocoPhillips's proposal (Alt. B). 3-SER-809-11. BLM ultimately approved an alternative in the ROD (modified Alt. E) that is projected to result in the development of even less oil: 576 million barrels. *See* 3-SER-614; *see also* 3-SER-612 (modified Alt. E is projected to include up to 199 wells, substantially fewer than the 251 wells anticipated under the other action alternatives). Modified Alternative E is also projected to have lower direct and indirect GHG emissions than the other action alternatives studied in detail. *See* 3-SER-613-14; 3-SER-803-04.

BLM's alternatives analysis was reasonable and consistent with its evaluation of a lessee's master development plan. BLM explained that the purpose of a master development plan, such as that for the Willow Project, is to "evaluate the impacts of full field development to ensure that [NEPA] analyses are not segmented."[5] 5-SER-1194; *see also* 5-SER-1196 ("The purpose of a master

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[5] "Segmentation" involves "an attempt to circumvent the NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project." *Webster v. U.S. Dep't of Agriculture*, 685 F.3d 411, 426 (4th Cir. 2012) (quotation omitted).

development plan is to evaluate the full development of an oil prospect to disclose all impacts related to the proposed project."). "Full field development" means development that does "not strand such a large quantity of oil and gas that, standing alone, is economic to develop," meaning "BLM would expect to receive a future permit application to develop it." 5-SER-1193-94.

Plaintiffs attempt to minimize BLM's revisions in the FSEIS by incorrectly equating the prior "all possible oil" standard with "full field development." *See* SILA Br. at 23-24 (calling these standards "nearly identical" and "functionally the same"); CBD Br. at 20-22 (suggesting that BLM erroneously believed that it had "an obligation to fully extract the oil on every lease"). But BLM did not believe that it "must allow ConocoPhillips to extract all economically viable oil from its leases." CBD Br. at 15. If it had, it would not have approved Alternative E—as analyzed in the FSEIS or as modified in the ROD—because Alternative E permits less oil recovery than ConocoPhillips's proposal and the other action alternatives studied in detail. *See* 3-SER-810; 3-SER-614. Rather, consistent with the purpose of a master development plan, BLM "evaluate[d] the impacts of full field development," but then approved a scaled-back Project that does not allow ConocoPhillips to extract all economically viable oil from several of its leases. *See* 5-SER-1194; 3-SER-613..

Moreover, contrary to SILA Plaintiffs' assertions, the district court did not misinterpret BLM's "authority to prohibit significant impacts after lease issuance." *See* SILA Br. at 26. The district court explained that "BLM 'may condition Project approval to protect surface resources even if doing so reduces the amount of oil and gas that can be profitably produced.'" CBD-1-ER-28 (quoting 5-SER-1193). As the record shows, that is exactly what BLM did. Consistent with the NPRPA's statutory mandates and this Court's characterization of ConocoPhillips's non-NSO lease rights, *see Conner*, 848 F.2d at 1444, BLM considered alternatives with varying levels of oil production and ultimately approved a Project that will produce less oil and provide greater protection to surface resources.

#### 4. BLM's screening of alternatives satisfied NEPA.

In the FSEIS, BLM considered 64 alternative components, including 27 new alternative components. Consistent with NEPA regulations, BLM reasonably explained why it ultimately included some components but declined to include others within the action alternatives analyzed in detail. *See generally* 5-SER-1251-72; 40 C.F.R. § 1502.14(a) (an agency must "briefly discuss" the reasons for eliminating alternatives from detailed study). Although Plaintiffs wish that BLM would have further considered some components with less or no development in the TLSA, *see* SILA Br. at 31-32; CBD Br. at 24-25, it was reasonable for BLM to decline to do so.

For example, alternative component No. 44 would have prohibited all infrastructure in the TLSA by eliminating drill site BT4 and shifting drill site BT2 south to just outside the TLSA. 5-SER-1268; CBD-5-ER-1066. Plaintiffs suggest that BLM arbitrarily declined to evaluate this component in more detail solely because it would strand an economically viable quantity of recoverable oil. *See* SILA Br. at 31; CBD Br. at 24. CBD Plaintiffs also contend that BLM "cursorily consider[ed] and then eliminat[ed] protective alternative components," including No. 44. CBD Br. at 24-25. These assertions ignore BLM's fuller explanation for considering but eliminating this and other alternative components from further analysis.

BLM declined to carry forward alternative component No. 44 for multiple reasons. BLM explained that eliminating infrastructure in the TLSA would "completely eliminate access to oil and gas resources in several" Willow leases in the TLSA that could only be reached by a drill site located within the TLSA. 5-SER-1268. Eliminating infrastructure would also "substantially reduce access" to oil and gas resources in additional leases that could only be reached in part from a drill site location just outside of the TLSA. *Id.* And it would "create significant overlap in drilling reach between drill sites BT1 and BT2," as BT2 moved outside of the TLSA would be substantially closer to BT1. *Id.* An alternative with no infrastructure in TLSA is not reasonable or feasible for the Project due to the limits

of available drilling technology and the fact that approximately 67 percent of ConocoPhillips's Willow Project "leases by surface area are located in the TLSA." *Id.* BLM reasoned that this alternative component would not meet the Project's purpose and need and thus eliminated it from detailed evaluation. *Id.*

BLM's explanation for removing alternative component No. 44—and others—from further consideration satisfied NEPA's requirements.[6] *See* CBD-1-ER-29-30. As the district court explained in 2021 and reiterated in the 2023 order, "infrastructure is allowed, and indeed anticipated, within the TLSA." CBD-1-ER-24-25 (quoting *SILA*, 555 F. Supp. 3d at 769). And "[t]he alternatives that BLM analyzed are fully consistent with an interpretation of the purpose and need statement that recognizes the rights and responsibilities of the lessee." CBD-1-ER-23-24; *see also supra* n.1 (explaining non-NSO leases); *Kempthorne*, 457 F.3d at 978-79 ("BLM's explanation that [plaintiff's preferred alternative] as a whole was inconsistent with the . . . project and statutory mandates, coupled with its willingness to incorporate several recommendations into the Preferred Alternative, constituted a sufficient explanation for its refusal to adopt" plaintiff's entire

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[6] BLM also considered a new alternative component (No. 46) that would have removed drill site BT4 and kept drill site BT2 in the TLSA but south of Fish Creek. 5-SER-1268-69; *see* SILA Br. at 31. BLM determined that this alternative concept would "not meet the Project's purpose and need and would strand an economically viable amount of oil based on BLM's review of available geologic data and the fact that [ConocoPhillips] has proposed building a road and pad to extract it in its proposed action." 5-SER-1268-69.

proposal). BLM's explanation is also readily distinguishable from CBD Plaintiffs' cited authority, in which the agency "summarily dismissed" alternatives with "no explanation." *See Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 877 (9th Cir. 2022).

Still, consistent with BLM's statutory authority in the NPRPA, the 2023 FSEIS and ROD contain significant elements designed to avoid, reduce, or otherwise mitigate impacts in the TLSA. *See* 3-SER-604; 3-SER-612-13; 3-SER-633-705 (identifying lease stipulations, required operating procedures, design features, and additional adopted mitigation measures); 6-SER-1608-69. For example, BLM will develop compensatory mitigation for impacts on the TLSA and its caribou herd, including protecting surface areas, ensuring a buffer along all shores of the lake, and moving infrastructure farther from calving areas. 3-SER-668 (Measure 27). As the district court found, "the alternatives analysis undertaken in the Final SEIS strikes an appropriate balance between the NPRPA's two directives of conducting an expeditious oil and gas leasing program in the NPR-A while protecting significant surface resources."[7] CBD-1-ER-32.

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[7] The district court's conclusion aligns with *Kempthorne*. *Contra* SILA Br. at 27. In *Kempthorne*, this Court explained that with "non NSO leases" the "government can condition permits for drilling on implementation of environmentally protective measures," and it "assume[d]" the government "can deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available." 457 F.3d at 976. But this Court emphasized that the government could not, "consistent with current statutory

Plaintiffs concede that BLM considered alternatives—and ultimately approved one—that produce less oil and involve less surface infrastructure than ConocoPhillips proposed. CBD Br. at 25-26. But Plaintiffs appear to assert that BLM should have analyzed additional, unspecified variants somewhere between the no-action alternative and Alternative E. *See* CBD Br. at 27; SILA Br. at 32-33.

This Court has rejected similar arguments in NEPA cases. *See, e.g.*, *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004-05 (9th Cir. 2013) (rejecting argument that BLM was required to consider additional "mid-range alternative[s]"); *Westlands*, 376 F.3d at 871-72 (concluding range of alternatives was reasonable and holding that "EIS was not required to consider more mid-range alternatives to comply with NEPA"). The Court should reject Plaintiffs' argument too. As the district court correctly concluded, Plaintiffs failed to show that their suggested alternatives—including an alternative that eliminated infrastructure from the TLSA—were viable in light of the objectives of the NPRPA or were "necessary to foster an informed decision and public participation." CBD-1-ER-32-33.

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imperatives, forbid all oil and gas development" in an entire planning area within the NPR-A. *Id.* Consistent with that interpretation, here the FSEIS and ROD contain numerous required operating procedures, design features, and other mitigation measures designed to mitigate adverse impacts in the TLSA. *See* 6-SER-1608-69; CBD-1-ER-47. In contrast, under Plaintiffs' proposed alternative—prohibiting infrastructure in the TLSA—ConocoPhillips would be prohibited from extracting oil from a significant number of its leases. 5-SER-1268. That goes well beyond "condition[ing] permits."

In sum, BLM considered a reasonable range of alternatives and explained why Plaintiffs' preferred alternative was not workable.

### B. BLM's analysis of greenhouse gas emissions satisfied NEPA.

The district court properly rejected Plaintiffs' argument that the FSEIS's analysis of GHG emissions from potential future development was inadequate. CBD-1-ER-45.

"NEPA requires agencies to evaluate the direct and indirect effects of the proposed action." *Ctr. for Biological Diversity v. Bernhardt* ("*Liberty*"), 982 F.3d 723, 737 (9th Cir. 2020). "Indirect effects" are those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," and "may include growth inducing effects." 40 C.F.R. § 1508.8(b).

As an initial matter, the district court determined—and no party disputes—that the FSEIS "rectified" the 2020 EIS's failure to estimate foreign GHG emissions caused by eventual production of oil from Willow. CBD-1-ER-37-39. In response to the district court's 2021 order, BLM undertook a thorough analysis of climate change impacts, including by quantifying Willow's domestic and foreign downstream GHG emissions, and thus complied with this Court's ruling in *Liberty*, 982 F.3d at 740; *supra* pp.12-13.

Changing tack, CBD Plaintiffs state that "Willow will facilitate future oil development in the [NPR-A]" and "cause additional downstream [GHG] emissions

beyond those from oil produced by Willow itself." CBD Br. at 27. Plaintiffs assert that BLM failed "to specifically disclose and assess" these downstream GHG emissions in the FSEIS. *Id.* at 28.

The district court correctly rejected similar arguments in its 2021 order. *SILA*, 555 F. Supp. 3d at 781. And it again correctly concluded that these renewed assertions were "unfounded" when applied to the FSEIS, which presents an even more thorough discussion of Willow's growth-inducing impacts, CBD-1-ER-40.

As CBD Plaintiffs acknowledge, CBD Br. at 30, the FSEIS discusses potential future "development opportunities to the south and west of the Project area" and notes that Willow Project infrastructure may make exploration and development of these areas "easier and more economically viable." 4-SER-1157. The FSEIS identifies Greater or West Willow specifically as a "growth inducing impact" of the Willow Project and as a "reasonably foreseeable future action." *Id.*[8]

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[8] CBD Plaintiffs assert that their argument has "consistently been[] that BLM failed to analyze downstream [GHG] emissions from any reasonably foreseeable future oil production induced by Willow," including Greater Willow and "much larger volumes from other areas." CBD Br. at 32-33. But as they acknowledge, *id.* at 30, the FSEIS identifies only Greater Willow as a reasonably foreseeable future action that may be facilitated by Willow, *see* 4-SER-1157 (explaining that "there is not enough information about [other] prospects or the potential quantities of oil to make their development highly probable"). CBD Plaintiffs have not argued that BLM should have identified other prospects as reasonably foreseeable future actions.

Greater Willow is "an oil and gas discovery with two exploration wells" in "areas [that] represent the general potential for future activity, but there is no certainty as to whether, how, or when this discovery could be developed." 5-SER-1161. Still, as the district court noted, the FSEIS "appropriately analyzed the indirect and cumulative GHG emissions impacts of the Willow Project," including the impacts of Greater Willow. CBD-1-ER-45. Specifically, the FSEIS discloses the "[p]rojected cumulative GHG emissions from all of the cumulative sources" and "potential future development" resulting from BLM's leasing program in the NPR-A. 5-SER-1163. The FSEIS explicitly includes Greater Willow in its modeling of cumulative impacts to air quality, 5-SER-1165-66, and in its discussion of Willow's growth-inducing impacts, 4-SER-1157.

Moreover, the FSEIS tiers to the 2012 and 2020 IAP/EISs. *See* CBD-5-ER-911. "Tiering refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses (such as . . . site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28. The 2012 and 2020 IAP/EISs estimate GHG emissions from various levels of future development scenarios in the NPR-A, including estimates for downstream GHG emissions from developments like Greater Willow. 10-SER-2706-11; CBD-1-ER-41-42. The

FSEIS uses the "higher end" of projected emissions from future NPR-A development, 5-SER-1163, thus capturing the full potential growth-inducing impacts from the Willow Project, *see* CBD-1-ER-42. CBD Plaintiffs are thus wrong that BLM "ignore[d] this foreseeable effect entirely." CBD Br. at 31 (quoting *Liberty*, 982 F.3d at 740).

CBD Plaintiffs assert that tiering to the 2020 IAP EIS is insufficient because the IAP EIS "analyzes potential cumulative emissions from many projects across the entire" NPR-A and thus "hides the effects induced by Willow itself." *Id.* at 32. But the FSEIS *did* analyze "growth inducing impacts" of the Project, including potential impacts from Greater Willow, and then tiered to the 2020 IAP EIS to capture the full potential of induced growth. *See* 4-SER-1157. Thus, consistent with this Court's precedent, the FSEIS "contains 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences' of Willow's growth-inducing impacts," including Greater Willow, and allows "for meaningful public participation and informed decision-making about the Willow Project." CBD-1-ER-44 (quoting *City of L.A. v. F.A.A.*, 63 F.4th 835, 849 (9th Cir. 2023)). Plaintiffs do not explain how additional analysis would further these "twin aims" of NEPA. *See Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983).

Plaintiffs' cited cases are readily distinguishable. *See* CBD Br. at 28 (citing *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846 (9th Cir. 2005), and *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), as requiring an agency to "assess the impacts of future development its action will facilitate"). Most fundamentally, these cases involve consideration of "growth-inducing effects" in the wholly different context of assessing whether the impacts of the proposed action at issue were significant and therefore rendered unlawful the agency's decision to prepare an environmental assessment rather than an EIS. Because BLM prepared an EIS here, the holdings of *Ocean Advocates* and *City of Davis* do not apply.

Given Greater Willow's nascent but uncertain status, the FSEIS does more than NEPA requires in analyzing any potential future impacts. The Court should reject Plaintiffs' NEPA-related GHG emissions arguments.

## II. BLM did not violate the NPRPA.

Both groups of Plaintiffs contend BLM violated the NPRPA, though on different grounds. *See* SILA Br. at 22-28; CBD Br. at 33-37. Both arguments fail.

SILA Plaintiffs' NPRPA argument is closely intertwined with their NEPA alternatives argument. They assert that BLM violated the NPRPA's "mandates to provide maximum protection for Special Areas and protect surface resources" by

"improperly limiting its consideration of alternatives to only those that would allow for full-field development of ConocoPhillips' leases." SILA Br. at 22.[9]

As set forth above, the NPRPA contains multiple directives. First, it directs the agency to undertake "an expeditious program of competitive leasing of oil and gas in the [NPR-A]." 42 U.S.C. § 6506a(a). Second, it requires that oil and gas activities within designated special areas be conducted in a such a way as to "assure the maximum protection of such surface values." *Id.* § 6504(a). Finally, it provides that activities in the NPR-A more broadly shall include conditions, restrictions, and prohibitions that the agency "deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources." *Id.* § 6506a(b).

This Court has repeatedly recognized BLM's discretion to impose mitigation measures pursuant to the NPRPA. *See N. Alaska Env't Ctr.*, 983 F.3d at 1081; *Kunaknana*, 742 F.2d at 1149 ("[T]he Secretary was given the discretion to

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[9] SILA Plaintiffs claim certain provisions of the NPRPA and BLM regulations obligate BLM to "restrict and even prohibit activities on existing leases, including by denying drilling permits," SILA Br. at 26, and "grant BLM considerable discretion to suspend operations and production on existing leases or units," *id.* at 14. But two of the provisions they cite—42 U.S.C. § 6506a(k)(2) and 43 C.F.R. § 3135.2(a)—apply at the operational stage, where there are ongoing activities, not at the application for a permit to drill stage, as implicated here. And the third provision, 43 C.F.R. § 3162.3-1, applies at the application stage but pertains to deficiencies in the application, not to BLM's ability to restrict or prohibit activities on existing leases.

provide rules and regulations under which leasing would be conducted and was to develop restrictions necessary to mitigate adverse impact on the NPR-A." (emphasis deleted)). Such discretion is apparent from the statutory text, and courts decline to interpret similar provisions to "maximize" protection or "minimize" impacts in a statute with competing objectives as imposing some quantifiable threshold against which to judge agency action. *Cf. Klamath Siskiyou Wildlands Ctr. v. Gerritsma*, 962 F. Supp. 2d 1230, 1235 (D. Or. 2013) (finding BLM's determination that a decision "is reasonably designed to minimize" impacts from vehicle use "is entitled to deference"), *aff'd*, 638 F. App'x 648 (9th Cir. 2016); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) (interpreting statute, which requires management of land so as not to impair its suitability for wilderness, as providing discretion to the agency); *Nat'l Wildlife Fed. v. NMFS*, 524 F.3d 917, 928-29 (9th Cir. 2008).

Consistent with the NPRPA's requirements and BLM's discretion, the FSEIS and ROD contain numerous required operating procedures, design features, and other mitigation measures specifically designed to provide maximum protection to surface resources in special areas, including the TLSA, and to avoid or mitigate reasonably foreseeable and significantly adverse impacts to other NPR-A surface resources. *See supra* p. 36; 3-SER-604; 3-SER-611-12; 3-SER-633-705. SILA Plaintiffs do not engage with these measures, instead repeating

their argument that BLM rejected certain alternatives—including one that eliminated all infrastructure in the TLSA—based on an allegedly flawed interpretation of its authority. *See* SILA Br. at 23-25. But BLM did not misinterpret its authority, and it reasonably balanced the NPRPA's multiple directives. This Court should reject this argument for the same reasons that it should uphold BLM's alternatives analysis under NEPA, as discussed in detail above. *See* CBD-1-ER-45.

CBD Plaintiffs' argument likewise fails. CBD asserts that "BLM took modest steps to limit Willow's [GHG] emissions, but it stopped short." CBD Br. at 35. Specifically, Plaintiffs argue that BLM should have imposed additional "measures to meaningfully limit the Project's *indirect*, or downstream, emissions." *Id.* As examples, Plaintiffs cite limiting Willow's lifetime from 30 to 20 years or adopting an alternative that delays production or reduces total oil production. *Id.*

As the district court correctly noted, *see* CBD-1-ER-48-49, BLM specifically considered the suggestion that Willow cease production 20 years after drilling the first well as a way to reduce downstream GHG emissions, 3-SER-685. BLM declined to adopt this suggestion, explaining that "[a]ll project alternatives are designed and evaluated based on a full 30-year field life consistent with the Master Development Plan for the Bear Tooth Unit." *Id.*; *see also* CBD-5-ER-928 (explaining that the timeline depends "on several factors including permitting and

other regulatory approvals, Project sanctioning, and purchase and fabrication of long-lead time components"). BLM noted, however, that the selection of Alternative E "would reduce both the scope and scale of development and resulting production, thereby reducing GHG emissions." 3-SER-685.

Moreover, contrary to CBD Plaintiffs' assertions, *see* CBD Br. at 33, BLM adequately explained how its selection of Alternative E, as modified in the ROD, satisfies the NPRPA's mandates, including the "Secretary's statutory directive to provide maximum protection to significant surface values within the NPR-A," *see* 3-SER-611-14. The ROD explains that Alternative E requires less surface infrastructure than the other action alternatives and shortens the overall construction period, "thereby substantially reduc[ing] impacts to a broad range of surface resources," including impacts to wetlands, vegetation, hydrology, wildlife, and subsistence users. *Id.* Alternative E also reduces the Project's indirect and direct GHG emissions and thus reduces climate impacts, which BLM noted "is especially important in the NPR-A." 3-SER-613.

In sum, BLM carefully considered the two mandates of the NPRPA, allowing for development to occur consistent with the terms of existing leases while requiring implementation of robust protections for surface resources. *Id.* And applying its discretion to mitigate significant adverse effects in the NPR-A, *see* *Kunaknana*, 742 F.2d at 1149, BLM adopted numerous mitigation measures and

provided "well-reasoned explanation[s]" for not adopting others proposed by Plaintiffs, *see* CBD-1-ER-50.

## III. BLM complied with ANILCA Section 810.

SILA Plaintiffs' argument that BLM violated Section 810 of ANILCA, 16 U.S.C. § 3120(a), is largely dependent on their NEPA and NPRPA claims. Plaintiffs assert that, because BLM applied "an overly restrictive interpretation of its authority under the [NPRPA]," BLM "wrongly cabined its [ANILCA] Section 810 obligations" and "failed to consider more protective alternatives, minimize its use of public lands, and take reasonable steps to reduce impacts to subsistence." SILA Br. at 33-34, 42. As set forth above, *see supra* Parts I.A and II, BLM did not misconstrue its authority under the NPRPA, and thus Plaintiffs' argument fails. In any event, the record demonstrates that BLM fully complied with Section 810 and did not act arbitrarily or capriciously.

ANILCA Section 810 "does not prohibit all federal land use actions which would adversely affect subsistence resources." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 (1987). Rather, it "sets forth a procedure through which such effects must be considered and provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized." *Id.*

To this end, Section 810 establishes a two-step process. *See Kunaknana*, 742 F.2d at 1150-51; *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 443 F. Supp. 3d 995, 1015 (D. Alaska 2020). At Tier 1, the threshold question is whether the agency's action "would significantly restrict subsistence uses[.]" 16 U.S.C. § 3120(a). To make that finding, the agency considers the effect of such action "on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." *Id.* If an agency determines that the proposal will significantly restrict subsistence uses, it may not authorize the action unless it satisfies the Tier 2 requirements. Tier 2 requires the agency to give notice, hold a hearing, *see id.* § 3120(a)(1) & (2), and determine that:

> (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

*Id.* § 3120(a)(3).

BLM's Section 810 analysis and determinations are found in Appendix G of the FSEIS, 6-SER-1533-1607, and Appendix B of the ROD, 3-SER-707-15, respectively. Consistent with the requirements of Tier 1, FSEIS Appendix G

contains a thorough analysis of all four action alternatives (including Alternative E), the no-action alternative, the three module delivery options, and the "cumulative case"—a comprehensive discussion of impacts of the Willow Project and other reasonably foreseeable future actions. *See*, *e.g.*, 6-SER-1535-36; 6-SER-1599. As set forth above, Alternative E reduces infrastructure within the TLSA relative to the previously analyzed alternatives in order to protect caribou movement and migration and reduce the effects of development on the traditional subsistence way of life of the community of Nuiqsut. 3-SER-712. For each alternative, BLM evaluated the effects on subsistence uses and needs, the availability of other lands, and other alternatives that would reduce or eliminate the use of public lands needed for subsistence purposes. *See* 6-SER-1533-1607.

BLM concluded that all action alternatives, including Alternative E, may significantly restrict subsistence uses due to altered distribution of caribou and furbearers and limitations on subsistence user access near the Willow area. *See* 3-SER-711. BLM noted, however, that Alternative E would result in fewer impacts within the TLSA, a key habitat and migratory area for caribou, by reducing infrastructure there by 43% and relocating infrastructure (including roads, pipelines, and the nearest drill site) farther from calving and mosquito-free areas that are particularly important for caribou. 3-SER-711-12. Contrary to Plaintiffs' contentions, *see* SILA Br. at 40-41, these reductions were not meaningless.

Appendix B of the ROD summarizes the Section 810 evaluation and presents BLM's Tier-2 determinations specific to the alternative selected by the ROD. *See* 3-SER-711-14. BLM determined that modified Alternative E, as adopted by the ROD, would involve the minimal amount of public lands necessary to accomplish the Willow Project's purpose and took reasonable steps to minimize adverse impacts on subsistence uses. 3-SER-711-13. *Contra* SILA Br. at 42. BLM's modifications to Alternative E would "further reduce[] impacts to subsistence uses by disapproving drill site BT5," as compared to the version of Alternative E that BLM studied at Tier 1, which disapproved drill site BT4 but deferred approval of BT5. 3-SER-713. Elimination of these drill sites reduces impediments to caribou movement and subsistence user access that were the basis of BLM's positive "may significantly restrict subsistence uses" finding. 3-SER-714. The ROD also imposes numerous protective and mitigation measures designed to reduce impacts. *See* 3-SER-633-705 (identifying and discussing mitigation measures). While the no-action alternative would result in fewer impacts than Alternative E, it would not accomplish the purpose and need of the proposed action because it would not allow for any production of oil discovered on ConocoPhillips's leases. 6-SER-1541; 3-SER-712; *see also Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1229-30 (9th Cir. 1999) ("The measure of what is

'necessary' and what must be 'minimal' in the statutory language is 'the purposes of such . . . disposition,' not minimization of impact on subsistence.").

Thus, contrary to SILA Plaintiffs' contentions, the record shows that BLM did consider "alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." 16 U.S.C. § 3120(a). BLM considered ConocoPhillips's proposal (Alternative B) alongside Alternative E (which entails less surface infrastructure) and alongside numerous alternative components, including one that would eliminate infrastructure in the TLSA.[10] *See* 6-SER-1565; 6-SER-1571-74.

BLM's thorough consideration of alternatives also distinguishes the cases Plaintiffs cite. *See* SILA Br. at 39. In *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995), this Court held that the agency violated ANILCA and NEPA because it failed to consider any alternatives when it reassessed a timber project after the cancellation of a previous contract that had limited the initial range of alternatives considered. And in *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1311-13 (9th Cir. 1990), the Court rejected, on a

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[10] Contrary to SILA's argument, *see* SILA Br. at 38-39, the district court appropriately considered alternatives as part of the Tier-1 inquiry, *see* CBD-1-ER-53; *Kunaknana*, 742 F.2d at 1150-51 ("plain meaning" of Section 810 shows "Congress intended a two-step process"). In any event, BLM was not required to consider alternatives that would not accomplish the purpose and need at any stage in the process. *See Hoonah Indian Ass'n*, 170 F.3d at 1229-30.

preliminary injunction appeal, the agency's argument that a 1956 timber contract preempted subsequent Congressional enactments—NEPA and ANILCA—and prevented the agency from considering any alternative with less timber harvesting.

Similarly, Plaintiffs' cursory argument about BLM's Tier-2 determinations is without merit. Without engaging with BLM's explanations, Plaintiffs repeat their theory that BLM "misinterpret[ed] its statutory authority" in the NPRPA and assert that BLM's Tier-2 determinations are "unsubstantiated." SILA Br. at 42. But, as set forth above, BLM reasonably concluded that modified Alternative E would involve the minimal amount of public lands necessary to accomplish the purpose and need of the Project. *See* 3-SER-712-13; 16 U.S.C. § 3120(a)(3)(B). And BLM incorporated various mitigation measures into Alternative E to minimize impacts. 3-SER-713-14; *see also* CBD-1-ER-56-58. For example, Alternative E includes construction of subsistence boat ramps, avoidance of overwintering fish habitat, and measures to ensure caribou crossings. *See* 3-SER-713; 3-SER-633-705. Plaintiffs suggest no other potential mitigation measure that BLM ignored. *See* SILA Br. at 42 (vaguely asserting that BLM "could have considered other reasonable measures to minimize Willow's impacts to subsistence").

In sum, BLM performed all procedures required under ANILCA Section 810 and its conclusions are reasonable and supported by the FSEIS and ROD. Plaintiffs fail to show that BLM's analysis or conclusions were arbitrary or capricious.

## IV. Defendants' analyses and determinations satisfy the ESA.

SILA Plaintiffs do not appeal the district court's holding that Defendants complied with the ESA, and CBD Plaintiffs only raise a subset of the ESA claims they raised below. Specifically, CBD Plaintiffs argue that Defendants "never reach[ed] the decision point" of whether "Willow's [GHG] emissions" were "likely to adversely affect" polar bears and ice seals and assert that Defendants "arbitrarily refused to assess in an ESA-required consultation the additional impacts of Willow's [GHG] emissions on" listed species. CBD Br. at 37. But the record shows that Defendants appropriately evaluated the threats of climate change and Willow's contribution through GHG emissions. Defendants' Section 7 determinations are reasonable, consistent with the ESA, and supported by the administrative record.

### A. BLM appropriately considered the impacts of the Willow Project as a whole when assessing whether the Project may affect listed species.

ESA Section 7 requires federal agencies to consult with FWS and NMFS whenever the agency's action "may affect" a listed species or designated critical habitat. 50 C.F.R. § 402.14(a). When an agency determines that a proposed action

"may affect" but "is not likely to adversely affect" listed species or critical habitat, it may informally consult with FWS or NMFS about the effects of the action. *Id.* §§ 402.02, 402.13, 402.14(b)(1). If an agency determines, however, that a proposed action both "may affect" and "is likely to adversely affect" a listed species or critical habitat, that agency must consult formally with FWS or NMFS to determine the "effects of the action." *Id.* § 402.14(a), (g). The "effects of an action" are defined as "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action." *Id.* §§ 402.14(g)(3)-(4), 402.02; 7-SER-1923. The ESA's implementing regulations further explain that a "consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." 50 C.F.R. § 402.02.

Here, BLM determined that its proposed action of approving the Willow Project "may affect" *and* "is likely to adversely affect" two listed species, including polar bears, and thus it initiated formal consultation with FWS with respect to those species. *See* 9-SER-2490. BLM also determined that the Project "may affect, but is not likely to adversely affect," ten listed marine mammal species, including two species of ice seals, and accordingly initiated only informal consultation with NMFS. 8-SER-2014; 8-SER-2248-49.

CBD Plaintiffs argue that BLM violated ESA Section 7 by failing to make an additional and separate determination of whether GHG emissions from the Project were likely to adversely affect polar bears and ice seals. *See* CBD Br. at 42-43; *see also id.* at 45 (stating that "[t]here can be no doubt" that Willow's GHG emissions "'may' affect climate-threatened polar bears and ice seals"). But ESA regulations require an action agency to determine whether a "proposed action" may affect listed species or critical habitat, *see* 50 C.F.R. § 402.14(a), (c)(1)(i), not individual subcomponents of the action in isolation (like GHG emissions). BLM accordingly properly considered the Willow Project as a whole in making its threshold determinations that Project "may affect" listed species under the ESA.

**B. Consistent with ESA Section 7(a)(2), BLM consulted with FWS and NMFS, and Defendants did not err in analyzing climate impacts.**

As part of the formal consultation with FWS and informal consultation with NMFS, Defendants appropriately evaluated the "effects" of approving the Willow Project, which are the "consequences to listed species or critical habitat" that "would not occur but for the proposed action and [are] reasonably certain to occur." 50 C.F.R. §§ 402.14(a), (g), 402.02. Without engaging with this standard, Plaintiffs assert that Defendants were obligated to evaluate the "plausible" effects of Willow's downstream GHG emissions on polar bears and ice seals. CBD Br. at 45. But Defendants reasonably determined that "the current state of climate science

does not allow [their experts] to draw causal links between contributions from project-specific GHG emissions to global climate change, and subsequent project-specific effects on listed species and designated critical habitat," and that these emissions were thus not required to be identified as "effects of the action" under ESA Section 7. 7-SER-1919. Defendants' conclusion is consistent with the ESA and its implementing regulations, past practice, and the best available science.

#### 1. Defendants properly consulted on and analyzed the "effects of the action."

Although the ESA does not require action or consulting agencies to solicit or consider public comment on the scope of Section 7 consultations, *see Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 660 n.6 (2007), BLM received ESA-related comments from Plaintiff CBD during the supplemental NEPA process, 7-SER-1926-48. Among other things, CBD claimed that the Willow Project "may affect hundreds of threatened and endangered species and their critical habitats due to the resulting increase in carbon emissions" and "BLM must therefore consult [on those species] under the ESA prior to permitting" the Project. 7-SER-1947.

Because BLM had already initiated consultations with both Services when it received CBD's comments, BLM's review of CBD's comments focused on whether any information provided therein warranted expanding the scopes of the ongoing consultations. After considering this information and applying relevant

ESA standards, BLM reasonably concluded, and the Services concurred, that the existing scopes of the ongoing Section 7 consultations were appropriate. 7-SER-1919-25; 6-SER-1684-85.

Defendants did not err in analyzing the "effects of the action," or the Willow Project's contribution to climate change. BLM acknowledged that the Willow Project is "anticipated to result in a marginal increase in global GHG emissions that would contribute to climate change and, potentially, a marginal seasonal decrease in sea ice extent somewhere in the Arctic." 7-SER-1923. However, BLM concluded that this information about marginal seasonal decreases in sea ice did not permit the identification of any additional "effects of the action," within the meaning of the ESA. *Id.* Citing studies showing a lack of linear relationship between sea ice loss and impact to polar bears, as well as the limits of existing information, BLM explained that "[a] simple calculation of sea ice loss would not be adequate to further help the analysis of polar bear food resources or seal impacts to a level of precision that has not already been addressed in the SEIS and [biological assessments]." 7-SER-1924. BLM explained that more information would be required to establish a relationship between marginal sea ice loss and resulting consequences to marine mammals, including where in the Arctic the reduction in sea ice would occur, the type of sea ice affected, and whether marine mammals use that particular area of sea ice and for what purposes. *Id.*

Both Services concurred with BLM's analysis of the effects of the action and that the existing scopes of the ongoing ESA Section 7 consultations were appropriate. *See* 7-SER-1919; 6-SER-1684. FWS explained that quantifying a marginal decrease in seasonal sea ice in unknown spots somewhere in the millions of square miles of the circumpolar Arctic, "without more specific information (e.g., location and type of affected sea ice, use [if any] of that sea ice by listed species and their prey/forage, etc.)," does not enable its expert biologists to identify any "reasonably certain to occur" consequences to any listed species or critical habitat, and thus fails to reveal any additional "effects of the action" under 50 C.F.R. § 402.02. 7-SER-1919. NMFS, which reviewed FWS's response to BLM's Memorandum, *see* 6-SER-1694; 6-SER-1696, agreed that "the scope of the ESA Section 7 consultation with respect to GHG emissions is appropriate," 6-SER-1684.[11]

While Defendants appropriately determined that project-specific GHG emissions cannot be identified as "effects of the action" under ESA Section 7, Defendants thoroughly assessed climate change impacts as appropriate and relevant to other aspects of the consultation, such as in discussions of the

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[11] The district court concluded that "any deficiency on NMFS's part in explaining its agreement with BLM's conclusion would be harmless error," because BLM's underlying "conclusion was not arbitrary and capricious." CBD-1-ER-107-08.

environmental baseline and assessment of the "status of the species." *See*, *e.g.*, 9-SER-2487-92. BLM acknowledged the impact on sea ice—habitat needed by polar bears and ice seals—from global climate change, and Willow's contribution to climate change. *See*, *e.g.*, 9-SER-2487-89; 8-SER-2013; CBD-5-ER-940-45. The agency detailed the increasing threat of climate change on ice-dependent listed species. 9-SER-2487-92; 8-SER-2013. BLM estimated that Willow could contribute to climate change by increasing global GHG emissions by approximately 9,268 thousand metric tons per year of CO2 equivalent for 30 years, which constitutes approximately 0.141% of the total annual GHG emissions in the United States. 3-SER-771. BLM based its estimate on both direct and indirect emissions—*i.e.*, the relatively small contribution of direct emissions from Willow's construction and operations and the larger indirect GHG emissions ascribable to Willow from the processing, transport, and subsequent combustion of oil from downstream consumers. 3-SER-802-05.

BLM next acknowledged the trend of diminishing summer sea ice in the Arctic. 3-SER-791-92. Based on the latest science, BLM explained that Arctic summer sea ice varies approximately linearly with global surface temperature and the minimum annual Arctic sea ice area will likely fall below 1 million square kilometers at least once before 2050. 3-SER-792. BLM also noted that the 15 lowest September sea ice extents in the satellite record (since 1979) have all

occurred in the last 15 years and that certain scientists estimated the sensitivity of September Arctic sea-ice loss from the period 1953 to 2015 to be 3.0 ± 0.3 square meters per metric ton of global anthropogenic CO2 emissions. 3-SER-791 (citing Notz and Stroeve (2016)). BLM also acknowledged that sea-ice loss has potential adverse impacts on sea ice-dependent species. 9-SER-2487-92; 8-SER-2013. But, as explained above, this generalized information about marginal seasonal decreases in sea ice did not permit the identification of additional "effects of the action" here—*i.e.*, it is not possible to connect Willow's GHG emissions to reductions in sea ice that are consequential to the species at issue.

During formal consultation, FWS also considered the generalized impacts of climate change, including in defining the environmental baseline for listed species. *See*, *e.g.*, 7-SER-1797; 7-SER-1803; 7-SER-1814-15; 7-SER-1821-22. For polar bears specifically, FWS addressed potential effects on bears from loss of sea ice, including bear redistribution; effects on polar bear prey species; and demographic responses in bears. 7-SER-1803-05. FWS also considered climate change impacts to polar bear critical habitat. 7-SER-1827. After formally consulting with BLM on all aspects of the Willow Project, FWS, in its expert opinion, concluded that, when considered together with the species' environmental baseline and cumulative effects of other non-federal actions in the action area, the Project would not likely

jeopardize the polar bear or adversely modify designated critical habitat. 7-SER-1872-75.

NMFS, in its Letter of Concurrence, addressed climate change in its discussion of the status of listed species and designated critical habitat. 2-SER-565. NMFS cited to its BiOp for the 2020 NPR-A IAP for a more detailed discussion of potential impacts of climate change on listed species. *Id.* Based on this analysis, NMFS concurred that the Project would "not likely adversely affect" ice seals or designated critical habitat, completing informal consultation with BLM. 2-SER-574-75.

Thus, applying their expertise, the Services considered climate change impacts as part of their Section 7 consultations, where appropriate—most notably in the environmental baselines and status of the species discussions—and appropriately evaluated the "effects of the action."

**2. Defendants' determination is consistent with ESA regulations and past practice.**

Defendants' consultations are consistent with the ESA, its regulations, and the Services' past explanations and are owed deference, particularly given their scientific nature. *See Safari Club Int'l v. Haaland*, 31 F.4th 1157, 1173 (9th Cir. 2022). In arguing otherwise, Plaintiffs misconstrue the applicable standards.

First, Plaintiffs confuse the threshold "may affect" standard (which triggers a duty to consult) with the standards governing what Defendants must evaluate

during consultation. Plaintiffs contend that "[t]here can be no doubt" that Willow's GHG emissions "'may' affect climate-threatened polar bears and ice seals such that the Services should have considered these effects in the consultations on Willow," adding that "the available science indicates that such effects are certainly 'plausible.'" CBD Br. at 45. Similarly, Plaintiffs assert that FWS "treated BLM's memo as a 'no effect' determination for Willow's [GHG] emissions." *Id.* at 48.

As set forth above, once formal consultation is underway, the action agency and consulting agency need only evaluate the "consequences to listed species or critical habitat" that "would not occur but for the proposed action" and are "reasonably certain to occur." 50 C.F.R. § 402.02; *id.* § 402.14(c)(1)(iv) (describing required contents of a biological assessment); *id.* § 402.14(g)(3) (describing what the Services must evaluate); *id.* § 402.14(h) (describing required contents of a BiOp).[12] Here, with respect to polar bears, BLM rendered a "may affect, likely to adversely affect" determination for the Willow Project as a whole and initiated formal consultation with FWS. During that formal consultation, BLM and FWS properly focused on identifying "effects of the action" and were not required to revisit the "may affect" or "likely to adversely affect" standards, much

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[12] CBD Plaintiffs omit key language from these regulations when describing "effects of the action" and "reasonably certain" consequences. *See* CBD Br. at 41 (omitting "to listed species or critical habitat" and "caused by the proposed action").

less apply them to subcomponents of the proposed action such as GHG emissions. *Contra* CBD Br. at 48-49. Plaintiffs' attempt to transpose the threshold "may affect" standard into the meat of consultation process, and thus to expand the list of required contents for biological assessments and BiOps, must be rejected.

For similar reasons, Plaintiffs are wrong that NMFS "agreed no consultation at all was necessary for Willow's [GHG] emissions" or that NMFS "allow[ed] BLM to avoid consultation on this issue." CBD Br. at 47-48. BLM and NMFS consulted informally on the Willow Project as a whole, and this informal consultation "include[d] all discussions [and] correspondence" between the two Agencies, *see* 50 C.F.R. § 402.13(a), including BLM's biological assessment, discussions between Defendants on mitigation measures, BLM's Memorandum, and NMFS's Letter of Concurrence, *see* 8-SER-1993-98; 8-SER-1999-2017; 2-SER-534-85; 7-SER-1922-55. When NMFS responded to BLM's Memorandum, the agencies were already engaged in consultation, and these documents demonstrate they appropriately considered Willow's GHG emissions.

Plaintiffs incorrectly suggest that their cited authorities support their arguments. Plaintiffs state that "consultations are routinely required or completed" where agencies lack "precise information about the action's impacts." CBD Br. at 51. Similarly, they note that a court has "rejected a 'no effect' determination" that was based on a purported "lack of a reasonable causal connection" between the

agency action and effects to listed species. *Id.* at 52 (citing *Growth Energy v. EPA*, 5 F.4th 1, 30-32 (D.C. Cir. 2021)). But again, Defendants *did* consult here based on affirmative "may affect" determinations, and their consultations considered Willow's GHG emissions and their relationship to generalized climate change impacts. Defendants applied the appropriate ESA standards.

Defendants' determination that the scope of their consultations was appropriate is also supported by FWS's decision to list the polar bear as a threatened species under the ESA in 2008. 73 Fed. Reg. 28,212 (May 15, 2008); 7-SER-1799. The rationale for listing was the threat posed by future loss of sea ice, with FWS noting that increased global temperatures are "very likely due to the observed increase in anthropogenic GHG concentrations" and that the Arctic was likely to be "ice free" in the summer at some time in the 21st century. 73 Fed. Reg. at 28,212, 28,230, 28,245.

In the listing, FWS specifically addressed the "Regulatory Implications for Consultations under Section 7 of the Act" for projects that emit GHGs and specifically for "oil and gas development activities conducted on Alaska's North Slope." *Id.* at 28,299-300. FWS explained that the Section 7 effects analysis is limited to effects to listed species or critical habitat that are "reasonably certain to occur" and would not occur "but for" the action under consultation. *Id.* FWS noted this causal connection is missing between specific sources of GHG emissions and

effects posed to polar bears or their habitat. *Id.* (explaining that there is insufficient data "to establish the required causal connection" between a specific agency action and a specific listed species or to establish that impacts are "reasonably certain to occur"); *see also In re: Polar Bear Endangered Species Act Listing and 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 230-32 (D.D.C. 2011) (affirming FWS's conclusion that climate modeling does not currently allow the agency to draw a causal connection between GHG emissions from a specific source and the impact on a particular polar bear).[13]

Defendants' consideration of Willow's GHG emissions during the consultation processes distinguishes this case from *Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101 (9th Cir. 2012). There, the Court found "no indication at all that FWS applied its expertise to the question of whether groundwater withdrawals may adversely affect listed fish species." *Id*. at 1124. *Contra* CBD Br. at 53. Here, Defendants addressed Plaintiffs' specific

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[13] Based on the same reasoning, other federal agencies recently reached similar conclusions. *See*, *e.g.*, 80 Fed. Reg. 64,661, 64,641 (Oct. 23, 2015) (explaining that EPA's rules regarding vehicle fuel standards or implementing the Clean Power Plan were not subject to consultation under ESA section 7(a)(2) because "'any potential for a specific impact on listed species in their habitats associated with these very small changes in average global temperature and ocean pH is too remote to trigger the threshold for ESA section 7(a)(2)'"); *see also* 87 Fed. Reg. 64,700, 64,704 (Oct. 26, 2022) (concluding that "based on the best scientific data available [FWS is] unable to draw a causal link between the effects of specific GHG emissions and take of the emperor penguin").

comments, considered the latest science, applied their expertise, and rationally explained why the scopes of their consultations were appropriate and why they could not identify any "effects of the action" flowing from Willow's GHG emissions per applicable ESA standards.

**3. Defendants considered the best available science.**

Plaintiffs suggest that Defendants relied on outdated science and thus failed to consider the "best available science" in reaching their determinations on the scope of the Section 7 consultations. *See* CBD Br. at 45-46; *id.* at 49-50 (asserting Defendants improperly relied on a 2008 legal memorandum from the Solicitor for the Department of the Interior, which they contend has limited "applicability or relevance 15 years later"). But Plaintiffs point to no scientific evidence that Defendants disregarded and that was "better than the evidence [they] relied on." *See* CBD-1-ER-111-12 (quoting *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 995 (9th Cir. 2014)).

The ESA requires an agency to "'use the best scientific and commercial data available' when formulating a BiOp." *Locke*, 776 F.3d at 995 (quoting 16 U.S.C. § 1536(a)(2)). "The purpose of the best available science standard is to prevent an agency from basing its action on speculation and surmise." *Id.* An agency complies with this standard "so long as it does not ignore available studies, even if it disagrees with or discredits them." *Id.* Moreover, "what constitutes the best

scientific and commercial data available is itself a scientific determination deserving of deference," and thus "a court should be especially wary of overturning such a determination on review." *Id.* (quotation omitted).

In agreeing that the existing scope of the Section 7 consultations was appropriate, FWS acknowledged that "climate science has advanced since [2008]," but explained that "the level of reliability and granularity provided by existing models is still insufficient to identify project-specific effects to listed species or designated critical habitat." 7-SER-1919. Plaintiffs cite no scientific data that refutes this conclusion. As the district court concluded, "Plaintiffs have not shown any available scientific evidence that links Willow's projected GHG emissions to a reasonably certain decrease in sea ice impacting polar bears in the Action Area." CBD-1-ER-111. And Plaintiffs cite no instance where a federal agency has asserted the ability to link project-specific emissions to reasonably certain consequences to listed species or critical habitat, nor any case finding an ESA Section 7 consultation to be deficient for a failure to make such links.

Plaintiffs attempt to invent a causal link by pointing to a scientific study (Notz & Stroeve 2016) that quantifies potential loss of sea ice from certain amounts of GHG emissions. CBD Br. at 45-46 (asserting that "there is a direct link

between increased [GHG] emissions and increased ice-free days").[14] But, as the district court noted, both BLM's Memorandum and FWS's response discuss the Notz study's conclusion—that it is possible to estimate a "project-caused decrease in sea ice" generally. CBD-1-ER-110 n.445. Defendants expressly considered models that correlate discrete volumes of GHG emissions with marginal seasonal decreases in Arctic sea ice. After considering the outputs of these models in conjunction with relevant ESA standards, Defendants reasonably concluded that information about marginal seasonal decreases in sea ice occurring somewhere in the Arctic does not reveal specific consequences for the affected species and thus does not permit the identification of any additional "effects of the action." 7-SER-1919; 7-SER-1923-24; 6-SER-1684. Defendants instead comprehensively described key overarching issues like the contribution of GHG emissions to climate change and the projected impacts to sea ice and ice-dependent species. *See*, *e.g.*, 3-SER-791-92; 9-SER-2487-92; 8-SER-2013.

At bottom, Plaintiffs simply disagree with Defendants' expert scientific determinations. But deference to an agency's analysis and decision is especially strong where the challenged decisions involve technical or scientific matters within

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[14] Plaintiffs also cite a study (Molnar *et al.* 2020) that addresses polar bear fasting. CBD Br. at 46. This study appears to be irrelevant because there is no basis for concluding that Willow would cause additional fasting in bears. Plaintiffs fail to show Defendants "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

the agency's area of expertise. *See Safari Club*, 31 F.4th at 1173. Mere disagreement with Defendants' expert scientific determinations does not provide grounds for invalidating agency action. *See Locke*, 776 F.3d at 995. Plaintiffs fail to demonstrate that Defendants ignored any science or that their scientific conclusions are "so implausible that [they] could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

## V. As to remedy, if necessary, the Court should remand without vacating or remand to the district court to consider vacatur.

As the record shows, Defendants complied with the district court's 2021 remand order and satisfied their statutory obligations. Nevertheless, if the Court finds error in Defendants' analyses, it should remand without vacatur. Vacatur is an equitable remedy, the issuance of which is not automatic, but instead "depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *Cal. Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

To the extent the Court has any doubts that remand without vacatur is appropriate, it should remand to the district court to consider remedy after additional briefing on these equitable considerations. *See*, *e.g.*, *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022).

## CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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January 12, 2024
DJ# 90-1-4-17039, 90-1-4-17040

## Form 8. Certificate of Compliance for Briefs

**9th Cir. Case Numbers** 23-3624 and 23-3627

I am the attorney or self-represented party.

**This brief contains 15,388 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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**Date** January 12, 2024

# ADDENDUM

16 U.S.C. § 3120 .......................................................................................... 1a

16 U.S.C. § 1536(a) ..................................................................................... 3a

16 U.S.C. § 1536(b) ..................................................................................... 3a

42 U.S.C. § 6504 .......................................................................................... 6a

42 U.S.C. § 6506a ........................................................................................ 8a

40 C.F.R. § 1502.14 .................................................................................... 14a

40 C.F.R. § 1508.8 ...................................................................................... 15a

50 C.F.R. § 402.02 ...................................................................................... 16a

50 C.F.R. § 402.13 ...................................................................................... 20a

50 C.F.R. § 402.14 ...................................................................................... 22a

United States Code Annotated
Title 16. Conservation
Chapter 51. Alaska National Interest Lands Conservation (Refs & Annos)
Subchapter II. Subsistence Management and Use (Refs & Annos)

16 U.S.C.A. § 3120

§ 3120. Subsistence and land use decisions

Currentness

**(a) Factors considered; requirements**

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes. No such withdrawal, reservation, lease, permit, or other use, occupancy or disposition of such lands which would significantly restrict subsistence uses shall be effected until the head of such Federal agency--

**(1)** gives notice to the appropriate State agency and the appropriate local committees and regional councils established pursuant to section 3115 of this title;

**(2)** gives notice of, and holds, a hearing in the vicinity of the area involved; and

**(3)** determines that (A) such a significant restriction of subsistence uses is necessary, consistent with sound management principles for the utilization of the public lands, (B) the proposed activity will involve the minimal amount of public lands necessary to accomplish the purposes of such use, occupancy, or other disposition, and (C) reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions.

**(b) Environmental impact statement**

If the Secretary is required to prepare an environmental impact statement pursuant to section 4332(2)(C) of Title 42, he shall provide the notice and hearing and include the findings required by subsection (a) as part of such environmental impact statement.

**(c) State or Native Corporation land selections and conveyances**

Nothing herein shall be construed to prohibit or impair the ability of the State or any Native Corporation to make land selections and receive land conveyances pursuant to the Alaska Statehood Act or the Alaska Native Claims Settlement Act.

**(d) Management or disposal of lands**


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After compliance with the procedural requirements of this section and other applicable law, the head of the appropriate Federal agency may manage or dispose of public lands under his primary jurisdiction for any of those uses or purposes authorized by this Act or other law.

**CREDIT(S)**

(Pub.L. 96-487, Title VIII, § 810, Dec. 2, 1980, 94 Stat. 2427.)

Notes of Decisions (18)

16 U.S.C.A. § 3120, 16 USCA § 3120
Current through P.L. 118-30. Some statute sections may be more current, see credits for details.

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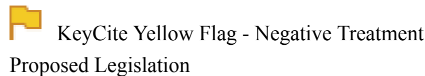
KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 16. Conservation
Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

Currentness

**(a) Federal agency actions and consultations**

**(1)** The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

**(2)** Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

**(3)** Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

**(4)** Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

**(b) Opinion of Secretary**

**(1)(A)** Consultation under subsection (a)(2) with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.


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**(B)** In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

**(i)** if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

**(I)** the reasons why a longer period is required,

**(II)** the information that is required to complete the consultation, and

**(III)** the estimated date on which consultation will be completed; or

**(ii)** if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

**(2)** Consultation under subsection (a)(3) shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

**(3)(A)** Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a), the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.

**(B)** Consultation under subsection (a)(3), and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a)(2), and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

**(4)** If after consultation under subsection (a)(2), the Secretary concludes that--

**(A)** the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

**(B)** the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and



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**(C)** if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

**(i)** specifies the impact of such incidental taking on the species,

**(ii)** specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

**(iii)** in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

**(iv)** sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

**(c) Biological assessment**

**(1)** To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

**(2)** Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

**(d) Limitation on commitment of resources**

After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.


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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 78. National Petroleum Reserve in Alaska

42 U.S.C.A. § 6504

§ 6504. Administration of reserve

Effective: August 8, 2005
Currentness

**(a) Conduct of exploration within designated areas to protect surface values**

Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.

**(b) Continuation of ongoing petroleum exploration program by Secretary of Navy prior to date of transfer of jurisdiction; duties of Secretary of Navy prior to transfer date**

The Secretary of the Navy shall continue the ongoing petroleum exploration program within the reserve until the date of the transfer of jurisdiction specified in section 6503(a) of this title. Prior to the date of such transfer of jurisdiction the Secretary of the Navy shall--

**(1)** cooperate fully with the Secretary of the Interior providing him access to such facilities and such information as he may request to facilitate the transfer of jurisdiction;

**(2)** provide to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives copies of any reports, plans, or contracts pertaining to the reserve that are required to be submitted to the Committees on Armed Services of the Senate and the House of Representatives; and

**(3)** cooperate and consult with the Secretary of the Interior before executing any new contract or amendment to any existing contract pertaining to the reserve and allow him a reasonable opportunity to comment on such contract or amendment, as the case may be.

**(c) Commencement of petroleum exploration by Secretary of the Interior as of date of transfer of jurisdiction; powers and duties of Secretary of the Interior in conduct of exploration**

The Secretary of the Interior shall commence further petroleum exploration of the reserve as of the date of transfer of jurisdiction specified in section 6503(a) of this title. In conducting this exploration effort, the Secretary of the Interior--


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**(1)** is authorized to enter into contracts for the exploration of the reserve, except that no such contract may be entered into until at least thirty days after the Secretary of the Interior has provided the Attorney General with a copy of the proposed contract and such other information as may be appropriate to determine legal sufficiency and possible violations under, or inconsistencies with, the antitrust laws. If, within such thirty day period, the Attorney General advises the Secretary of the Interior that any such contract would unduly restrict competition or be inconsistent with the antitrust laws, then the Secretary of the Interior may not execute that contract;

**(2)** shall submit to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives any new plans or substantial amendments to ongoing plans for the exploration of the reserve. All such plans or amendments submitted to such committees pursuant to this section shall contain a report by the Attorney General of the United States with respect to the anticipated effects of such plans or amendments on competition. Such plans or amendments shall not be implemented until sixty days after they have been submitted to such committees; and

**(3)** shall report annually to the Committee on Energy and Natural Resources of the Senate and the Committee on Natural Resources of the House of Representatives on the progress of, and future plans for, exploration of the reserve.

**CREDIT(S)**

(Pub.L. 94-258, Title I, § 104, Apr. 5, 1976, 90 Stat. 304; Pub.L. 98-366, § 4(b), July 17, 1984, 98 Stat. 470; Pub.L. 103-437, § 15(q), Nov. 2, 1994, 108 Stat. 4594; Pub.L. 109-58, Title III, § 347(c), Aug. 8, 2005, 119 Stat. 708.)

42 U.S.C.A. § 6504, 42 USCA § 6504
Current through P.L. 118-30. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 78. National Petroleum Reserve in Alaska

42 U.S.C.A. § 6506a

§ 6506a. Competitive leasing of oil and gas

Effective: August 8, 2005
Currentness

**(a) In general**

The Secretary shall conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act.

**(b) Mitigation of adverse effects**

Activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska.

**(c) Land use planning; BLM wilderness study**

The provisions of section 1712 and section 1782 of title 43 shall not be applicable to the Reserve.

**(d) First lease sale**

The; [1] first lease sale shall be conducted within twenty months of December 12, 1980: *Provided*, That the first lease sale shall be conducted only after publication of a final environmental impact statement if such is deemed necessary under the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

**(e) Withdrawals**

The withdrawals established by section 6502 of this title are rescinded for the purposes of the oil and gas leasing program authorized under this section.

**(f) Bidding systems**

Bidding systems used in lease sales shall be based on bidding systems included in section 205(a)(1)(A) through (H) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629).

**(g) Geological structures**


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Lease tracts may encompass identified geological structures.

**(h) Size of lease tracts**

The size of lease tracts may be up to sixty thousand acres, as determined by the Secretary.

**(i) Terms**

**(1) In general**

Each lease shall be issued for an initial period of not more than 10 years, and shall be extended for so long thereafter as oil or gas is produced from the lease in paying quantities, oil or gas is capable of being produced in paying quantities, or drilling or reworking operations, as approved by the Secretary, are conducted on the leased land.

**(2) Renewal of leases with discoveries**

At the end of the primary term of a lease the Secretary shall renew for an additional 10-year term a lease that does not meet the requirements of paragraph (1) if the lessee submits to the Secretary an application for renewal not later than 60 days before the expiration of the primary lease and the lessee certifies, and the Secretary agrees, that hydrocarbon resources were discovered on one or more wells drilled on the leased land in such quantities that a prudent operator would hold the lease for potential future development.

**(3) Renewal of leases without discoveries**

At the end of the primary term of a lease the Secretary shall renew for an additional 10-year term a lease that does not meet the requirements of paragraph (1) if the lessee submits to the Secretary an application for renewal not later than 60 days before the expiration of the primary lease and pays the Secretary a renewal fee of $100 per acre of leased land, and--

**(A)** the lessee provides evidence, and the Secretary agrees that, the lessee has diligently pursued exploration that warrants continuation with the intent of continued exploration or future potential development of the leased land; or

**(B)** all or part of the lease--

**(i)** is part of a unit agreement covering a lease described in subparagraph (A); and

**(ii)** has not been previously contracted out of the unit.

**(4) Applicability**

This subsection applies to a lease that is in effect on or after August 8, 2005.


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**(5) Expiration for failure to produce**

Notwithstanding any other provision of this Act, if no oil or gas is produced from a lease within 30 years after the date of the issuance of the lease the lease shall expire.

**(6) Termination**

No lease issued under this section covering lands capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same due to circumstances beyond the control of the lessee.

**(j) Unit agreements**

**(1) In general**

For the purpose of conservation of the natural resources of all or part of any oil or gas pool, field, reservoir, or like area, lessees (including representatives) of the pool, field, reservoir, or like area may unite with each other, or jointly or separately with others, in collectively adopting and operating under a unit agreement for all or part of the pool, field, reservoir, or like area (whether or not any other part of the oil or gas pool, field, reservoir, or like area is already subject to any cooperative or unit plan of development or operation), if the Secretary determines the action to be necessary or advisable in the public interest. In determining the public interest, the Secretary should consider, among other things, the extent to which the unit agreement will minimize the impact to surface resources of the leases and will facilitate consolidation of facilities.

**(2) Consultation**

In making a determination under paragraph (1), the Secretary shall consult with and provide opportunities for participation by the State of Alaska or a Regional Corporation (as defined in section 1602 of Title 43) with respect to the creation or expansion of units that include acreage in which the State of Alaska or the Regional Corporation has an interest in the mineral estate.

**(3) Production allocation methodology**

**(A)** The Secretary may use a production allocation methodology for each participating area within a unit that includes solely Federal land in the Reserve.

**(B)** The Secretary shall use a production allocation methodology for each participating area within a unit that includes Federal land in the Reserve and non-Federal land based on the characteristics of each specific oil or gas pool, field, reservoir, or like area to take into account reservoir heterogeneity and area variation in reservoir producibility across diverse leasehold interests. The implementation of the foregoing production allocation methodology shall be controlled by agreement among the affected lessors and lessees.

**(4) Benefit of operations**

Drilling, production, and well reworking operations performed in accordance with a unit agreement shall be deemed to be performed for the benefit of all leases that are subject in whole or in part to such unit agreement.


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**(5) Pooling**

If separate tracts cannot be independently developed and operated in conformity with an established well spacing or development program, any lease, or a portion thereof, may be pooled with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary of the Interior (in consultation with the owners of the other land) to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed to the agreement.

**(k) Exploration incentives**

**(1) In general**

**(A) Waiver, suspension, or reduction**

To encourage the greatest ultimate recovery of oil or gas or in the interest of conservation, the Secretary may waive, suspend, or reduce the rental fees or minimum royalty, or reduce the royalty on an entire leasehold (including on any lease operated pursuant to a unit agreement), whenever (after consultation with the State of Alaska and the North Slope Borough of Alaska and the concurrence of any Regional Corporation for leases that include land that was made available for acquisition by the Regional Corporation under the provisions of section 1431(o) of the Alaska National Interest Lands Conservation Act) in the judgment of the Secretary it is necessary to do so to promote development, or whenever in the judgment of the Secretary the leases cannot be successfully operated under the terms provided therein.

**(B) Applicability**

This paragraph applies to a lease that is in effect on or after August 8, 2005.

**(2) Suspension of operations and production**

The Secretary may direct or assent to the suspension of operations and production on any lease or unit.

**(3) Suspension of payments**

If the Secretary, in the interest of conservation, shall direct or assent to the suspension of operations and production on any lease or unit, any payment of acreage rental or minimum royalty prescribed by such lease or unit likewise shall be suspended during the period of suspension of operations and production, and the term of such lease shall be extended by adding any such suspension period to the lease.

**(l) Receipts**

All receipts from sales, rentals, bonuses, and royalties on leases issued pursuant to this section shall be paid into the Treasury of the United States: *Provided*, That 50 percent thereof shall be paid by the Secretary of the Treasury semiannually, as soon


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thereafter as practicable after March 30 and September 30 each year, to the State of Alaska for: (1) planning; (2) construction, maintenance, and operation of essential public facilities; and (3) other necessary provisions of public service: *Provided further*, That in the allocation of such funds, the State shall give priority to use by subdivisions of the State most directly or severely impacted by development of oil and gas leased under this Act.

**(m) Explorations**

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the National Petroleum Reserve in Alaska which do not interfere with operations under any contract maintained or granted previously. Any information acquired in such explorations shall be subject to the conditions of 43 U.S.C. 1352(a)(1)(A).

**(n) Environmental impact statements**

**(1) Judicial review**

Any action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) concerning oil and gas leasing in the National Petroleum Reserve--Alaska shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.

**(2) Initial lease sales**

The detailed environmental studies and assessments that have been conducted on the exploration program and the comprehensive land-use studies carried out in response to sections [2] 6505(b) and (c) of this title shall be deemed to have fulfilled the requirements of section 102(2)(c) [3] of the National Environmental Policy Act (Public Law 91-190), with regard to the first two oil and gas lease sales in the National Petroleum Reserve-Alaska: *Provided*, That not more than a total of 2,000,000 acres may be leased in these two sales: *Provided further*, That any exploration or production undertaken pursuant to this section shall be in accordance with section 6504(a) of this title.

**(o) Regulations**

As soon as practicable after August 8, 2005, the Secretary shall issue regulations to implement this section.

**(p) Waiver of administration for conveyed lands**

**(1) In general**

Notwithstanding section 1613(g) of Title 43--

**(A)** the Secretary of the Interior shall waive administration of any oil and gas lease to the extent that the lease covers any land in the Reserve in which all of the subsurface estate is conveyed to the Arctic Slope Regional Corporation (referred to in this subsection as the "Corporation");


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**(B)(i)** in a case in which a conveyance of a subsurface estate described in subparagraph (A) does not include all of the land covered by the oil and gas lease, the person that owns the subsurface estate in any particular portion of the land covered by the lease shall be entitled to all of the revenues reserved under the lease as to that portion, including, without limitation, all the royalty payable with respect to oil or gas produced from or allocated to that portion;

**(ii)** in a case described in clause (i), the Secretary of the Interior shall--

**(I)** segregate the lease into 2 leases, 1 of which shall cover only the subsurface estate conveyed to the Corporation; and

**(II)** waive administration of the lease that covers the subsurface estate conveyed to the Corporation; and

**(iii)** the segregation of the lease described in clause (ii)(I) has no effect on the obligations of the lessee under either of the resulting leases, including obligations relating to operations, production, or other circumstances (other than payment of rentals or royalties); and

**(C)** nothing in this subsection limits the authority of the Secretary of the Interior to manage the federally-owned surface estate within the Reserve.

**CREDIT(S)**

(Pub.L. 94-258, Title I, § 107, formerly Pub.L. 96-514, Title I, Dec. 12, 1980, 94 Stat. 2964; Pub.L. 98-620, Title IV, § 402(41), Nov. 8, 1984, 98 Stat. 3360; Pub.L. 105-83, Title I, § 128, Nov. 14, 1997, 111 Stat. 1568; renumbered Pub.L. 94-258, Title I, § 107 and amended Pub.L. 109-58, Title III, § 347(a)(2), (b), Aug. 8, 2005, 119 Stat. 704.)

Notes of Decisions (4)

**Footnotes**

1 So in original.

2 So in original. Probably should read "section".

3 So in original. Probably should be "102(2)(C)".

42 U.S.C.A. § 6506a, 42 USCA § 6506a
Current through P.L. 118-30. Some statute sections may be more current, see credits for details.

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Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1502. Environmental Impact Statement (Refs & Annos)

This section has been updated. Click here for the updated version.

40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

Effective: [See Text Amendments] to September 13, 2020

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

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# Code of Federal Regulations - 2019

Code of Federal Regulations
Title 40. Protection of Environment
Chapter V. Council on Environmental Quality
Part 1508. Terminology and Index (Refs & Annos)

40 C.F.R. § 1508.8

§ 1508.8 Effects.

Currentness

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 et seq.), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Current through July 5, 2019; 84 FR 32098.
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40 C. F. R. § 1508.8, 40 CFR § 1508.8

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Prior Version Held Invalid Northern New Mexico Stockman's Association v. United States Fish & Wildlife Service, D.N.M., Oct. 13, 2020

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart A. General

50 C.F.R. § 402.02

§ 402.02 Definitions.

Effective: October 28, 2019
Currentness

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.


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Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

Director refers to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant.


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Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as:

(1) Multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas; and

(2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

Proposed critical habitat means habitat proposed in the Federal Register to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.



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**Credits**

[73 FR 76286, Dec. 16, 2008; 74 FR 20422, May 4, 2009; 80 FR 26844, May 11, 2015; 81 FR 7225, Feb. 11, 2016; 84 FR 45016, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (286)

Current through Jan. 10, 2024, 89 FR 1743. Some sections may be more current. See credits for details.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Negative Treatment Vacated by In re Washington Cattlemen's Association, 9th Cir.(Cal.), Sep. 21, 2022

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.13

§ 402.13 Informal consultation.

Effective: October 28, 2019
Currentness

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non–Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

(c) If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(1) A written request for concurrence with a Federal agency's not likely to adversely affect determination shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs.

(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60–day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

**Credits**
[73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 84 FR 45016, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.


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AUTHORITY: 16 U.S.C. 1531 et seq.

Notes of Decisions (17)

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Negative Treatment Vacated by In re Washington Cattlemen's Association, 9th Cir.(Cal.), Sep. 21, 2022

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Code of Federal Regulations
Title 50. Wildlife and Fisheries
Chapter IV. Joint Regulations (United States Fish and Wildlife Service, Department of the Interior and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce); Endangered Species Committee Regulations
Subchapter A
Part 402. Interagency Cooperation—Endangered Species Act of 1973, as Amended (Refs & Annos)
Subpart B. Consultation Procedures

50 C.F.R. § 402.14

# § 402.14 Formal consultation.

Effective: October 28, 2019
Currentness

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) Initiation of formal consultation.

(1) A written request to initiate formal consultation shall be submitted to the Director and shall include:


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(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (i.e., the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).



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(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) Duration and extension of formal consultation. Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) Additional data. When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:


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(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1)–(3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45–day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45–day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10–day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) Biological opinions.

(1) The biological opinion shall include:



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(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) A detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy" biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion).

(2) A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

(i) Incidental take.

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:



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(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species (A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.



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(j) Conservation recommendations. The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) Incremental steps. When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) Expedited consultations. Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) Expedited timelines. Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) Federal agency responsibilities. To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) Service responsibilities. In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and


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(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

(m) Termination of consultation.

(1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

**Credits**
[54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015; 84 FR 45016, Aug. 27, 2019; 84 FR 50333, Sept. 25, 2019]

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Notes of Decisions (357)

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