No. 23-3624 (consolidated with No. 23-3627)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,
Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT *et al.*,
Defendants-Appellees,

CONOCOPHILLIPS ALASKA, INC. *et al.*,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska

Nos. 3:23-cv-00061-SLG, 3:23-cv-00058-SLG
Hon. Sharon L. Gleason

PLAINTIFFS-APPELLANTS' REPLY BRIEF

Erik Grafe
Jeremy C. Lieb
Carole A. Holley
EARTHJUSTICE
441 W 5th Avenue,
St. 301
Anchorage, AK 99501
T: 907.277.2500

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751

Attorneys for Plaintiffs-Appellants Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, and Greenpeace, Inc.

Kristen Monsell
CENTER FOR
BIOLOGICAL
DIVERSITY
1212 Broadway,
St. #800
Oakland, CA 94612
T: 510.844.7100

Attorneys for Plaintiff-Appellant Center for Biological Diversity

Cecilia Segal
NATURAL RESOURCES
DEFENSE COUNCIL
111 Sutter St., 21st floor
San Francisco, CA 94104
T: 415.875.6100

Michelle Wu
NATURAL RESOURCES
DEFENSE COUNCIL
40 West 20th St., 11th Floor
New York, NY 10011
T: 646.889.1489

Attorneys for Plaintiff-Appellant Natural Resources Defense Council

January 19, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

LEGISLATIVE HISTORY

STATEMENT REGARDING ADDENDUM

Relevant statutory and regulatory authorities are contained in the addenda to Plaintiffs' opening brief and Defendants' and Intervenor Kuukpik's answering briefs.

ARGUMENT

I. BLM violated NEPA by failing to consider a reasonable range of alternatives.

A. The SEIS evaluated only alternatives that allow ConocoPhillips to access all economically viable oil on its leases.

ConocoPhillips acknowledges that BLM limited its alternatives in the SEIS to those that would allow full field development. Dkt. 115.1 (CPAI Br.) 22(citiing 5-SER-1193). Defendants, departing from their previous position, Dkt. 20.1 at 25-28, now argue that the SEIS did not so limit itself. They admit "BLM 'evaluate[d] the impacts of full field development'" in the SEIS, but assert BLM's development of Alternative E shows BLM "did not believe that it 'must allow ConocoPhillips to extract all economically viable oil from its leases'" because that alternative permits less oil recovery than the others. Dkt. 104.1 (Fed. Br.) 32. Defendants are wrong.

The record demonstrates that BLM chose to analyze alternatives on the basis that they all allowed full field development. Even newly developed Alternative E, despite permitting less oil development than Alternatives B, C, and D, was subject to the same constraint. *See* 5-ER-917 ("Alternative E evaluates the full development of the Willow reservoir…."). Defendants do not argue that

Alternative E stranded an economically viable amount of oil—which is how BLM defined full field development, 4-ER-877—or that it prohibited ConocoPhillips from extracting oil from a significant number of its leases—how Defendants alternatively describe the limit of BLM's authority, Fed. Br. 37 n.7.

The record also shows that BLM rejected more environmentally protective alternatives because they would not allow full field development. As described in the draft SEIS, BLM "screened" alternatives (*i.e.*, decided which alternatives to develop fully) based on the criteria that (i) "BLM must allow access to at least some of the subsurface resource under all of [ConocoPhillips'] leases with a demonstrated development potential"; and (ii) "BLM may not permit a development proposal that would strand an economically viable quantity of oil, however, this does not require 100% resource extraction," described as "fully develop." 4-ER-876–877. BLM reiterated these criteria in the final SEIS in response to Plaintiffs' comments that they were not valid. 5-ER-1002 (response to comment 6501-193), 1012 (response to comment 6501-238). It applied them to reject developing alternatives that would have further reduced impacts to Reserve surface resources, including by emitting fewer greenhouse gases. 5-ER-1048–1049 (rejecting components 43, 44, 46 because they "would strand an economically viable quantity of recoverable oil"); 5-ER-1055–1056 (same); *see also* Dkt. 46.1 (CBD Br.) 19-20.

Defendants pull quotes from the same responses to comments cited above to suggest Plaintiffs are wrong about BLM's full field screen. Fed. Br. 30; *see also* CPAI Br. 22. These assertions did not change the outcome: when it came to developing alternatives, BLM explicitly limited itself to assessing only full field development options—as explained in the paragraphs from which Defendants and ConocoPhillips pluck the language they cite.

Defendants are further incorrect that BLM rejected more protective alternatives, like an alternative with 30 percent fewer emissions and no infrastructure in the Teshekpuk Lake Special Area (component 44), for "multiple reasons." Fed. Br. 34. In Defendants' example regarding component 44, *id.*, four of the five reasons BLM gave are different ways of saying that the proposed alternative would not allow full field development: (i) it would "completely eliminate access to oil and gas resources in several" leases; (ii) it would "substantially reduce access" to oil on other leases; (iii) it was not feasible because of the limits of directional drilling to reach all the oil; and (iv) 67 percent of ConocoPhillips' leases by surface area are in the Special Area—a fact only relevant if BLM believes it must allow development of those leases. *See* 5-ER-1055. The fifth reason, that moving the BT2 well site out of the Special Area would cause it to overlap with the BT1 well site, is pure obstinacy—new alternatives are designed by moving well sites around. The full field constraint

plainly played a significant role in BLM's rejection of this and several other alternatives that would have more substantially limited Willow's greenhouse gas emissions and surface impacts.

B. The SEIS's full field constraint is arbitrary.

Defendants' and Intervenors' several arguments defending the full field constraint are unpersuasive. Both Defendants and ConocoPhillips argue the constraint is different than the prior "all possible oil" standard found unlawful by the district court in 2021. Fed. Br. 32; CPAI Br. 31-32. Whatever its difference from the prior standard, the current standard suffers from the same flaw: there is no authority that cabins BLM's discretion to approve less than full field development, and it was thus arbitrary for BLM to decline to develop alternatives that would better meet its obligation to protect the Reserve's resources using the full field principle. CBD Br. 20-24.

Defendants suggest that *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006), supports the full field constraint. Fed. Br. 36-37 n.7. But *Kempthorne* is not so restrictive. It states that tBLM cannot "forbid all oil and gas development" entirely within an 8.8-million-acre management area of the Reserve. 457 F.3d at 973-74, 976 (referring to the Northwest Planning Area). A decision about a unitized field that affects a much smaller area and allows a lessee to recover most of the targeted reservoir, even if it

precludes development on some individual leases, falls well within *Kempthorne*'s limit. It is also consistent with BLM's obligation to protect the Reserve and its "authority to set or modify the quantity, rate, and location of development and production" on unitized leases. 43 C.F.R. § 3137.21(a)(4).

Defendants also cite *Conner v. Burford*, 848 F.2d 1441, 1444 (9th Cir. 1988), to justify BLM's approach. Fed. Br. 10 n.1; *see also* CPAI Br. 30. But the surface-occupancy nature of the leases here does not automatically entitle ConocoPhillips to *all* economically viable oil; to the contrary, *Conner* recognizes that BLM can limit lease activity to avoid environmental impacts. 848 F.2d at 1448-49. In any event, *Conner* concerned the point of commitment at which NEPA requires preparation of an EIS (when the agency loses full discretion over an area by issuing a surface-occupancy lease), not the scope of regulatory authority over lease activities, which is capacious. *Id.* at 1451.

ConocoPhillips argues that evaluating less than full field alternatives would have provided "a false comparison" to full field alternatives. CPAI Br. 14, 22, 24 n.5, 28 n.6. But such alternatives are only a false comparison if BLM cannot choose them. As ConocoPhillips and Defendants correctly identify, fostering informed decision-making is the "touchstone" of an adequate alternatives analysis. *See* CPAI Br. 17; Fed. Br. 24-25. Where, as here, BLM has authority to limit development, CBD Br. 21-23, an EIS must assess alternatives that inform its

decision whether to do so. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 728-30 (9th Cir. 1995) (agency's analysis of alternatives for a forest plan insufficient where agency wrongly constrained all alternatives to meet a timber harvest quota no longer in effect). The SEIS's analysis of only full field development alternatives fails to meet this standard. The No Action Alternative likewise cannot cure BLM's failure to study an alternative that differed in oil recovery by more than three percent. *See Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 813 (9th Cir. 1999) (alternatives analysis deficient where agency "considered only a no action alternative along with two virtually identical alternatives").

Defendants and ConocoPhillips also embrace the related idea that NEPA "segmentation" principles prevented BLM from assessing less-than-full-field development alternatives. Fed. Br. 31; CPAI Br. 27. But BLM's obligation to evaluate the maximum possible impacts of ConocoPhillips' Project in no way excused it from also evaluating alternatives that would have produced lesser impacts, particularly where BLM had the authority to approve such alternatives. *Supra* pp. 5-6. NEPA's mandate that agencies look before they leap required BLM

fully to assess these lesser-impact alternatives in the SEIS. *See 350 Mont. v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022).[1]

Defendants and ConocoPhillips are also wrong that Plaintiffs' argument is similar to "mid-range" alternatives arguments this Court has rejected. Fed. Br. 37; CPAI Br. 28-29; *see also* CPAI Br. 25-26. Unlike those cases, BLM here developed alternatives (and rejected others) based on an arbitrary principle. The argument also ignores the extreme polarity of the alternatives to which BLM limited itself. There is a vast gulf between the zero oil recovery in the No Action Alternative and the 100 to 97 percent of ConocoPhillips' proposed oil recovery in the four action alternatives BLM considered. None of the Defendants or Intervenors address the actually analogous *Center for Biological Diversity v. National Highway Traffic Safety Administration*, in which the Court found insufficient alternatives that differed in magnitude by an equivalent or greater amount. 538 F.3d 1172, 1218 (9th Cir. 2008) (alternatives differed as much as 6.3

[1] Contrary to ConocoPhillips' argument, CPAI Br. 24-25 n.5, *Western Watersheds Project v. Abbey* is analogous. The Court there found an agency violated NEPA when, as BLM did here, it declined to develop protective alternatives (disallowing or limiting grazing) even though no authority prevented it from adopting them. 719 F.3d 1035, 1052-53 (9th Cir. 2013). Likewise *Environmental Defense Center v. Bureau of Ocean Energy Management*, in which the Court found a NEPA violation when an agency, like BLM here, rejected a protective alternative (limiting well fracking to less than five times annually) on a mistaken assumption (that the alternatives it had developed limited fracking to five times annually). 36 F.4th 850, 877-78 (9th Cir. 2022).

percent in miles per gallon). Indeed, ConocoPhillips previously represented that oil production and greenhouse gas emissions were "approximately the same" across Willow's action alternatives. 4-ER-688.

Defendants' and Intervenors' various incantations of the many alternative components BLM declined to develop in detail, *e.g.*, Fed. Br. 27-28, 33, are similarly unavailing. *See California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) (agency's emphasis on "decisional inputs and criteria" was "meaningless" when they generated "only a limited range of outcomes"). None of Alternatives B through E are mid-range, but Plaintiffs' proposed alternatives are. They were viable, and BLM's failure to develop them violated NEPA. *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010).

Bypassing Plaintiffs' argument to the contrary, Defendants and ConocoPhillips merely restate BLM's unexplained and incorrect pronouncement that less than full field alternatives do not meet the purpose and need statement. *See* Fed. Br. 24-25, 35; CPAI Br. 28 n.6. In fact, the statement calls only for "the production and transportation to market of federal oil and gas resources in the Willow reservoir," not full development or indeed any quantum of the reservoir. 3-SER-758. Alternatives, like the one proposed by Plaintiffs to avoid harm to the Teshekpuk Lake Special Area by removing infrastructure there and reducing

greenhouse gas emissions while still allowing access to 70 percent of the oil reservoir, certainly meet this standard.

Finally, none of the Defendants or Intervenors shows that the ROD cured the SEIS's unlawful analysis or rebuts the conclusion that the ROD itself demonstrates the constraint was arbitrary. *See* CBD Br. 25-27. Defendants acknowledge the modified Alternative E approved in the ROD strands oil on several leases, Fed. Br. 29, 32, but fail to address the necessary conclusion that in adopting that modification, the agency effectively disowned the arbitrary constraint it applied in the SEIS. ConocoPhillips' suggestion, CPAI Br. 33-34, that the modification was only an exercise of mitigation authority, unrelated to alternatives, avoids the point—if BLM had authority to impose reductions, it had authority, and an obligation under NEPA, to consider alternatives doing the same. And no one contests that the SEIS's cramped range of alternatives constrained BLM's ability to approve a project in the ROD that would have further limited Willow's greenhouse gas emissions and encroachment into special areas. *See* CBD Br. 26-27; 6-ER-1160, 1167 (agency acknowledging the ROD's modification constituted only a "minor variation").

Defendants and several Intervenors generally argue that other mitigation measures adopted in the ROD are adequate substitutes for BLM's faulty alternatives. Fed. Br. 36; CPAI Br. 33-34; Dkt. 125.1 (ASRC Br.) 27-28. But they

do not show that these measures accomplish the same level of protection for special areas or as meaningful a reduction of Willow's oil production as other possible alternatives, had BLM not imposed its full field constraint. To the contrary, BLM concluded that approving Willow (even with the touted mitigation measures) would have significant adverse effects on critical Reserve values. *See, e.g.*, 5-ER-942–943, 960, 1146–47.

II. BLM failed to assess downstream emissions from reasonably foreseeable future oil development caused by Willow.

Contrary to Defendants' and ConocoPhillips' arguments, downstream greenhouse gas emissions from reasonably foreseeable oil development *induced by Willow* are not disclosed or analyzed anywhere in the SEIS or the tiered-to 2020 IAP EIS.[2]

The distinction between indirect effects and cumulative impacts analyses is not about under what EIS heading they appear. *Contra* CPAI Br. 35. These are fundamentally different analyses with different purposes: one looks at effects *caused by* the action, while the other looks at those effects when *added to* the effects of *other* actions. CBD Br. 28-29 (citing 40 C.F.R. §§ 1508.7, 1508.8(b)).

[2] The district court did not consider this or any similar argument in the 2021 case. *See Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F.Supp.3d 739, 781 (D. Alaska 2021); *contra* Fed. Br. 39; CPAI Br. 38. There, the court found unpersuasive a different argument not tied to greenhouse gas emissions made by other plaintiffs about deficiencies in the 2020 EIS's cumulative impacts analysis because the analysis was contained elsewhere in the EIS. *Id.*

Both must be included in an EIS. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1136-39, 1141 (9th Cir. 2011). This difference is important: subsuming an assessment of indirect effects within an analysis of broader cumulative impacts would hide "indispensable" information from the decisionmaker and public about the full suite of impacts that will be caused by the decision at hand. *See City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975).

Defendants' and ConocoPhillips' are wrong to argue, the reasonably foreseeable greenhouse gas emissions from additional oil development Willow will induce is not disclosed anywhere in the SEIS. Both parties correctly note that the SEIS includes a section titled "Growth Inducing Impacts." Fed. Br. 40-41; CPAI Br. 36. Though in this single-paragraph section, 5-ER-985, BLM acknowledges Willow will likely lead to additional oil development, it does not analyze the effects, including downstream emissions, that would necessarily result from such development. Defendants also point to the SEIS's inclusion of West Willow in its modeling of cumulative impacts to air quality. Fed. Br. 40. But this section, too, does not disclose or analyze downstream greenhouse gas emissions from West Willow or address any other induced oil development at all. 5-SER-1165–1166. And while BLM's broader cumulative impacts analysis also discusses West Willow, it estimates only that Project's direct emissions, not its much larger downstream emissions. 4-ER-1163; CBD Br. 31.

Because downstream emissions from Willow-induced projects are demonstrably not found in the SEIS, Defendants and ConocoPhillips are left to argue that they are encompassed by the 2020 IAP EIS's hypothetical, Reserve-wide oil development scenarios, referenced in the SEIS's cumulative impacts discussion. Fed. Br. 40-41; CPAI Br. 37. But those scenarios cannot substitute for analysis of Willow's indirect effects. The scenarios do not identify, much less estimate the downstream emissions from, development likely to be caused by Willow. 10-SER-2706–2711. This generalized analysis therefore does not provide information about the effects Willow will cause by inducing further development.[3] *See Barnes*, 655 F.3d at 1136-38; CBD Br. 32. *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1112 (9th Cir. 2015), which ConocoPhillips cites for the proposition that the SEIS's cumulative impacts analysis reasonably grouped projects' effects together, CPAI Br. 36-37, is thus beside the point.

The only question remaining is whether such induced effects are reasonably foreseeable. No party disputes that the West Willow development and its downstream greenhouse gas emissions are. ConocoPhillips argues that

[3] Although it would not save BLM's analysis if it did, the 2020 IAP EIS development scenario does not even encompass all the oil development Willow is likely to facilitate. *Contra* Fed. Br. 40-41; CPAI Br. 37. The scenario's estimated 2.6 billion barrels across the entire Reserve over decades, 10-SER-2707, is less than the three billion barrels ConocoPhillips has identified near Willow, 4-ER-863, and it estimates Willow at only 300 million barrels, 10-SER-2712, about half the current estimate, 6-ER-1170.

development of additional oil other than at West Willow is not, however, because specific development projects have not yet been identified or proposed and additional federal permitting would be required. CPAI Br. 40. The argument is incorrect and, if accepted, would undercut the purpose of the indirect effects requirement—to consider impacts from projects that are not yet proposed but would be induced by the project at issue. 40 C.F.R. § 1508.8(b).

First, ConocoPhillips' argument is belied by its own representation to investors, in which it apparently deemed the development of the up to three billion barrels in these "prospects and leads" foreseeable enough to further entice investment in Willow. 4-ER-863 (additional prospects "that could leverage Willow infrastructure" offer "significant long-term upside"); *see also* 4-ER-858 (map showing additional discoveries and prospects). And while BLM said it did not have enough information to conclude development of these prospects was "highly probable," that is not the relevant inquiry. 5-ER-985. BLM was obligated to analyze Willow's reasonably foreseeable—not highly probable—effects, and it clearly viewed these prospects as fitting that characterization. *See id.* (recognizing that Willow made the prospects' development more likely); 5-ER-1034 (requiring that Willow alternatives function to support "reasonably foreseeable future development").

Second, that any future development would require subsequent actions by leaseholders or be subject to federal permitting processes cannot, categorically, remove it from the indirect effects analysis, as ConocoPhillips argues, CPAI Br. 41. Even where such additional steps exist, the relevant inquiry remains whether the project at hand makes the future development and its impacts reasonably foreseeable. Tellingly, BLM itself concluded that West Willow is reasonably foreseeable, despite requiring a development proposal and additional federal permits. 5-ER-987.[4]

Center for Environmental Law and Policy v. U.S. Bureau of Reclamation, 655 F.3d 1000 (9th Cir. 2011), is not to the contrary. There, the Court explained that "[a]gencies need not account for potential growth effects that might be caused by a project if the project is exclusively intended to serve a much more limited need." *Id.* at 1011 (citing *Seattle Cmty. Council Fed'n v. FAA*, 961 F.2d 829, 835-36 (9th Cir. 1992)). The Court concluded that the project had such a limited purpose—to draw down a specified amount of water—and the federal agency itself would have to propose any future withdrawals. *Id.* at 1003-04, 1012. Here, by contrast, Willow is specifically intended to support future expanded private development, and BLM made facilitating that future development a necessary

[4] Contrary to Defendants' suggestion, Fed. Br. 39 n.8, Plaintiffs have consistently argued that Willow will facilitate reasonably foreseeable additional oil development beyond West Willow. CBD Br. 32-33.

component of any alternative it considered. 4-ER-858, 863; 5-ER-1034; CBD Br. 29-30.

Finally, Defendants assert, without any authority, that two cases cited by Plaintiffs are inapplicable because they involved consideration of growth inducing effects in the context of an environmental assessment rather than an EIS. Fed. Br. 42. But NEPA's implementing regulations contain only one definition of indirect effects. 40 C.F.R. § 1508.8(b). It is the same whether an agency prepares an environmental assessment or an EIS. The cases are fully applicable.

III. BLM violated the Reserves Act.

BLM shirked its duties under the Reserves Act when it failed to explain its decision to approve Willow without taking any meaningful steps to reduce the Project's significant downstream greenhouse gas emissions and its consequent harms to the Reserve's surface resources. *See* 42 U.S.C. §§ 6504(a), 6506a(b), 6506a(n)(2); 5 U.S.C. § 706(2)(A).

Only Defendants engage with Plaintiffs' failure-to-explain argument. But they do little more than repeat BLM's *ipse dixit* that modified Alternative E satisfies the Reserves Act's mandates because it reduces Willow's greenhouse gas emissions, and thus its climate impacts, as compared to the evaluated alternatives. *See* Fed. Br. 46. That fails to address the disconnect between BLM's acknowledgment that reducing climate impacts "is especially important" in the

Reserve, 6-ER-1169, and the agency's unwillingness to do anything that would decrease Willow's downstream emissions by more than five percent despite available options, CBD Br. 35-36.

Defendants similarly repeat BLM's conclusory rationale for declining to consider a 20-year Project term, Fed. Br. 45-46—a rationale that simply defers to ConocoPhillips' proposed timeline and relies on (unmodified) Alternative E as sufficient to mitigate Willow's climate impacts. Having recognized Willow's significant climate impacts and adopted certain measures to mitigate the Project's direct greenhouse gas emissions, BLM failed entirely to explain why it deemed more meaningful reductions of Willow's downstream emissions than those achieved by modified Alternative E neither "necessary" nor "appropriate" to mitigate climate harms to the Reserve's surface resources or to afford "maximum protection" to its special areas. 42 U.S.C. §§ 6504(a), 6506a(b), 6506a(n)(2); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (an agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" (citation omitted)); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016) ("conclusory statements do not suffice").

Defendants and Intervenors cannot distract from BLM's error by emphasizing BLM's discretion to fashion mitigation measures or the various

measures adopted here to protect surface resources. *See* Fed. Br. 44-46; CPAI Br. 42-43; Dkt. 107.1 (NSB Br.) 19-20, 24; ASRC Br. 26-28. Even when the Reserves Act affords BLM discretion, the "exercise of discretion within that statutory framework must be reasonable and reasonably explained." *Biden v. Texas*, 597 U.S. 785, 806-07 (2022). As Plaintiffs described, *supra* pp. 15-16; CBD Br. 33-37, BLM fell short of that standard here. And not one of the measures identified is intended to mitigate harms to surface resources from Willow's downstream emissions.

Intervenors otherwise defend BLM's actions by disputing that the Reserves Act imposed any obligation on the agency to address the impacts of Willow's downstream emissions on the Reserve's surface resources. These arguments—which Defendants notably do not join—miss the mark.

ConocoPhillips and North Slope Borough first claim that Plaintiffs fail to "link" Willow's downstream emissions to surface resource impacts, as the statute requires. CPAI Br. 43-45; NSB Br. 19, 23-24. The record shows otherwise. BLM agreed that Willow's greenhouse gas emissions are "significant." 5-ER-959. It then admitted that these emissions would "contribute to climate change impacts" in the Arctic and on the North Slope, including impacts to surface resources such as thawing permafrost and increased risk of wildfires. 5-ER-960 (referencing SEIS section 3.2.1.2); *see also* 5-ER-942–943 (section 3.2.1.2).

ConocoPhillips tries to downplay this evidence by referencing a 2008 EPA letter about unrelated projects, CPAI Br. 44, but ignores that EPA specifically weighed in on *this* Project: it determined that Willow "has the potential to have significant … climate impacts," 4-ER-774, "recommend[ed] such impacts be avoided or mitigated," *id.*, and identified two such mitigation measures, 4-ER-776, 790—both of which BLM rejected, 6-ER-1241, 1233; *see also* 4-ER-776 (citing climate impacts to Alaska and oil development's contributions to the climate crisis and recommending that BLM "identify means to further reduce" Willow's emissions). EPA further warned against characterizing Willow's "substantial project-scale [greenhouse gas] emissions" in a way that might "diminish[] the significance of the notable climate damages caused" and be "misleading" given the need to "reduce incremental … emissions from a multitude of sources" to effect climate policy. 4-ER-779. Whether its emissions are cast as gross or net, *see* CPAI Br. 43-44, Willow's climate harms to the Reserve's surface resources are clearly both "reasonably foreseeable" and "significantly adverse," requiring BLM to consider whether and how to mitigate them. 42 U.S.C. § 6506a(b); *see also id.* §§ 6504(a), 6506a(n)(2).

ConocoPhillips and North Slope Borough next point to the Reserves Act's oil lease sale mandate and insist that any environmental protection—particularly mitigation of greenhouse gas emissions—is subservient to oil production. *See*

CPAI Br. 42-43; NSB Br. 12-15, 19-20; *see also* ASRC Br. 21-26; Dkt. 128.1 (Alaska Cong. & Leg. Amicus Br.) 4-5, 10-11. Not so. As Plaintiffs detailed, CBD Br. 7-10; *see also* Dkt. 65.2 (Cong. Amicus Br.) 12-18, the Reserves Act requires a leasing program and authorizes private exploration and development, but only if it can be done in a manner that safeguards the Reserve's invaluable surface resources. That protective mandate informed Congress's decision to entrust the Department of the Interior (instead of the Navy) with managing the Reserve's public lands from the outset, and continued to govern in an even clearer way when Congress created the private leasing program. *See* H.R. Rep. No. 94-942 at 21 (1976) (directing the agency to "take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the [R]eserve"); Pub. L. No. 96-514, 94 Stat. 2957, 2964-65 (1980) (enacting 42 U.S.C. § 6506a(a) together with §§ 6506a(b) and 6506a(n)(2)).

Intervenors make three arguments based on the statutory text to further their view that the Reserves Act does not contemplate the mitigation of downstream greenhouse gas emissions. Each is inconsistent with BLM's own interpretation, *see* 6-ER-1167, 1169–1170, and each is easily disposed of. First, ConocoPhillips baldly asserts that 42 U.S.C. § 6506a(b)—which instructs BLM to mitigate adverse effects to surface resources—refers only to harms from on-the-ground

development activities. CPAI Br. 43. The statute's plain text is devoid of any such limitation.

Second, ConocoPhillips and Arctic Slope Regional Corporation cite 42 U.S.C. § 6504(a), which instructs BLM to assure "maximum protection" to special areas "to the extent consistent with" the Reserves Act's exploration requirements. *See* CPAI Br. 42; ASRC Br. 23-25. But this qualifying phrase, referencing the now defunct federal exploration program, *supra* pp. 18-19, does not accomplish what Intervenors wish it to; it does not transform oil development into the Reserves Act's primary purpose, allowing BLM to permit such development regardless of the environmental ramifications. Rather, the governing provision Congress added in 1980 incentivized private exploration and development but did not *mandate* any level of oil production, *see generally* 42 U.S.C. § 6506a, and further makes clear that "*any* production" is subject to the "maximum protection" provision, *id.* § 6506a(n)(2) (emphasis added); *see also* CBD Br. 21-22 (detailing BLM's authority to limit, reject, or suspend development to protect surface resources).

Finally, North Slope Borough's solitary suggestion that the "maximum protection" duty applies only to exploration activities, citing the statute as originally enacted in 1976, NSB Br. 15-17; *contra* Fed. Br. 25 n.3, is baseless because it conflicts with this 1980 enactment. That the requirement appears in a

provision concerning environmental studies for initial lease sales, NSB Br. 16 n.3, is irrelevant.

IV. The agencies unlawfully failed to consider Willow's greenhouse gas emissions in the ESA consultations.

Defendants argue the ESA consultations on Willow need not address the Project's greenhouse gas emissions because the science is not precise enough to measure their effects. Such arguments misapply the governing standard and cannot save the Services' failure to fulfill their obligation to consult on Willow's climate impacts on polar bears and ringed and bearded seals based on the best available science.

A. NMFS flouted the ESA's consultation process.

NMFS failed to follow the consultation process for Willow's greenhouse gas emissions. As the ESA's implementing regulations clearly explain, once an action agency makes a "may affect" determination, it can avoid formal consultation, culminating in a biological opinion, only where the agency obtains "*the written concurrence of [NMFS]*, that the proposed action is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(a), (b)(1) (emphasis added). Contrary to Defendants' suggestion, Fed. Br. 58, 61, NMFS's single sentence addressing the issue does not even *say* that NMFS concurred that Willow's greenhouse gas emissions are "not likely to adversely affect" ice seals or their critical habitats. *See* 7-ER-1547. Rather, NMFS refrained from

"commenting on the conclusions that BLM ha[d] drawn." *Id.* This does not satisfy the requirement for a written concurrence sufficient to avoid formal consultation. *See* 50 C.F.R. § 402.14(b)(1); CBD Br. 41-42 (describing importance of following the consultation process).

Moreover, the agency arbitrarily failed to engage with any of the relevant science or explain its conclusion at all. *See* CBD Br. 42-48; *see also Gerber v. Norton*, 294 F.3d 173, 186 (D.C. Cir. 2002) (permit unlawful where FWS "did not make the independent finding required by the ESA"). NMFS's unexplained decision cannot be harmless, *contra* Fed. Br. 58 n.11, because NMFS ignored how Willow will contribute to the primary threat to the bearded and ringed seals' continued existence and possible mitigation to address that threat. *See NRDC v. USFS*, 421 F.3d 797, 807 (9th Cir. 2005) (harmless error doctrine applies only when an agency's mistake "*clearly* had *no bearing* on the procedure used or the substance of decision reached" (citation omitted)).

B. FWS flouted the ESA's consultation process.

FWS also failed to follow the consultation process for Willow's greenhouse gas emissions. Despite conducting formal consultation on Willow's non-climate impacts on polar bears, that consultation arbitrarily excludes Willow's emissions.

Defendants' briefing never disputes that Willow's greenhouse gas emissions "may affect" polar bears. Instead, Defendants and Intervenors rely on the "effects

of the action" definition to argue FWS can ignore Willow's contribution to the primary threat to polar bears because BLM determined the science is not granular enough to predict "reasonably certain" effects on polar bears, and FWS agreed. Fed. Br. 56-58 (citing 50 C.F.R. § 402.02); *see also* NSB Br. 46-47; CPAI Br. 61. That arbitrarily raises the bar for consultation higher than the ESA sets it. FWS's error, like NMFS's, is consequential: FWS never assessed the extent to which Willow's significant emissions will harm polar bears or identified how the emissions could be mitigated to minimize such harms. *See, e.g.*, 16 U.S.C. § 1536(b)(3)(A), (b)(4); 6-ER-1340, 1343–1344 (mitigation measures for noise disturbance).

This Court has squarely held that when FWS is engaged in formal consultation, impacts meeting the "may affect" threshold are "relevant factor[s]" that "should ... be analyzed in the Biological Opinion" in some manner, even if FWS ultimately concludes the impacts are insignificant and thus not likely to adversely affect the species. *CBD v. BLM*, 698 F.3d 1101, 1122-24 (9th Cir. 2012) (citations omitted). Like the groundwater withdrawals at issue in that case, here, Willow's greenhouse gas emissions are a relevant factor that FWS had to consider in its biological opinion because the science shows effects to polar bears from those emissions are at least "plausible." *See id.*; CBD Br. 45-46; *see also*

50 C.F.R. § 402.14(g)(1) ("during formal consultation" FWS must "review all relevant information").

Defendants fail to square their reliance on FWS's application of the "effects of the action" definition to excuse FWS's failure to consult on Willow's emissions with the low bar this controlling holding sets for FWS's consultation obligations. Instead, they point to a hastily prepared FWS email to claim *CBD v. BLM* is irrelevant because the email shows "Defendants" here considered the issue. Fed. Br. 65-66. Defendants obfuscate the roles of each agency. While one could perhaps infer that BLM's *own staff* did not identify any effects to polar bears caused by the sea ice loss BLM acknowledges Willow will cause, the "Biological Opinion provides no indication at all that FWS applied its expertise to the question." *CBD v. BLM*, 698 F.3d at 1124*; contra* Fed. Br. 58. Plaintiffs thus do not "simply disagree with Defendants' expert scientific determinations," Fed. Br. 68, because no such determination by FWS exists. *See Pub. Emps. for Env't Resp. v. Beaudreau*, 25 F.Supp.3d 67, 107 (D.D.C. 2014) (FWS violated ESA "by improperly delegating" to the action agency FWS's consultation obligations); *CBD v. NHTSA*, 538 F.3d at 1224-25 (A "bald conclusion … cannot carry the day.").

The fallacy of Defendants' position is illustrated by that fact that FWS *did* evaluate Willow's other potential effects in the biological opinion—including those it ultimately concluded would not have measurable effects on particular

species. *See, e.g.*, 7-ER-1444, 1448 (evaluating whether Project activities "could potentially disturb polar bears" and concluding that while "polar bears could be disturbed by aircraft operations..., measurable effects or injury would be unlikely"); 6-ER-1373 (engaging with scientific information to conclude that "impacts to Alaska-breeding Steller's eiders from [oil] spills" from Willow "are not anticipated").

Even assuming FWS's email could take the place of the analysis required in the biological opinion itself, and even assuming the "effects of the action" is the relevant standard, FWS's approach is inconsistent with the ESA. FWS failed to address the best available science demonstrating that Willow will cause sustained Arctic sea ice loss in September, 4-ER-840–844, and the numerous harms to polar bears from increased summer sea ice loss, *see, e.g.*, 75 Fed. Reg. 760,86, 76,111 (Dec. 7, 2010); 4-ER-793; 4-ER-799, and to make projections accordingly. CBD Br. 50-54; *Conner*, 848 F.2d at 1454. And while FWS claimed it cannot determine the effects on polar bears without detailed information about the location of sea ice loss, *e.g.*, Fed. Br. 57, that confuses the question of the likelihood of an effect's occurrence with its scale—a question that consultation is supposed to answer. *See, e.g.*, *Cal. ex rel. Lockyer v. USDA*, 459 F.Supp.2d 874, 912 (N.D. Cal. 2006)

("Uncertainty about the precise impacts does not mean that potential effects should not be addressed."), *aff'd*, 575 F.3d 999 (9th Cir. 2009).[5]

ConocoPhillips' argument, CPAI Br. 56-58, that Willow's emissions are very small compared to *all* emissions, also goes to the scale of the impact, not the likelihood of it occurring. It is up to FWS to do the analysis and *then* determine the extent of impacts. *Cf.* 7-ER-1425–1426 (biological opinion analyzing the effects of 2.2 square kilometers of spectacled eider habitat loss caused by Willow).

Defendants cannot rescue FWS's failure to consider Willow's emissions by pointing to the biological opinion's environmental baseline and cumulative effects discussion. *Contra* Fed. Br. 60-61. The environmental baseline is "the condition of the listed species or its designated critical habitat ... *without the consequences ... caused by the proposed action*," and cumulative effects "are those … *not involving Federal activities*…." 50 C.F.R. § 402.02 (emphasis added). Thus, these portions of the biological opinion by definition do not consider Willow's impacts. Defendants' position creates the perverse situation where the biological opinion

[5] *Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (cited at CPAI Br. 62), is inapposite. There, the Court determined that the Navy did not have to consult based on the agency's determination the risks of accidental explosions were "between one in 100 million and one in one trillion." *Ground Zero*, 383 F.3d at 1090, 1092. Here, BLM acknowledged Willow will increase emissions and sea ice loss.

concedes that climate change is the gravest threat to polar bears and evaluates effects from *other* climate-related activities on the species, but then ignores Willow's own contribution to climate change on top of those threats. This undermines ESA consultation's very purpose: that FWS carefully consider the role agency actions may play in a species' demise. *See Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008).

C. Past practice cannot save current failures.

Defendants' and Intervenors' insistence that the agencies can ignore Willow's climate impacts on polar bears and ice seals because it is consistent with FWS's past practice, Fed. Br. 61-66; CPAI Br. 47-52; NSB Br. 50-54, only underscores the extent to which the agencies have deviated from the ESA's decision-making standard. Plaintiffs explained how FWS's longstanding practice based on a 2008 legal memorandum (the M-Opinion) contravenes the ESA. CBD Br. 49-54; *see also Judulang v. Holder*, 565 U.S. 42, 61 (2011) ("Arbitrary action becomes no less so by simple dint of repetition."). Defendants do not defend reliance on the now 15-year-old M-Opinion, tacitly conceding that at least part of the basis for FWS's decision is unsustainable.

Defendants' and Intervenors' reliance on the polar bear listing, Fed. Br. 64-65; CPAI Br. 48-49; NSB Br. 50-51, also fails. The statements they cite were

likewise expressly based on the science in *2008*. *See, e.g.*, 2-SER-336 (basing conclusions on "the best scientific data *available today*" (emphasis added)).[6]

Despite 15-years' worth of new science—including science enabling agencies to estimate the lifecycle greenhouse gas emissions from particular projects and science linking a certain amount of emissions to a certain amount of sea ice loss, *see* 2-SER-336 (identifying these former data gaps)—the record nowhere shows that the Services even considered the new science. They certainly did not *explain* any such consideration, exactly what consultations are designed for.

ConocoPhillips, but not Defendants, makes various policy arguments for why the Services should be permitted to ignore the effects of Willow's emissions on polar bears and ice seals. *See* CPAI Br. 62. However, Plaintiffs' claims here are based on BLM's admissions that this massive fossil fuel project will have significant climate impacts; and the science showing the link between carbon emissions and sea ice loss and harms to polar bears and seals from increased sea ice loss. While the Services may be able to articulate a reasonable, science-based limit for consultations on certain actions involving carbon emissions, they have not

[6] Defendants and Intervenors also reference EPA decisions not to consult on the climate impacts of rules aimed at reducing carbon emissions. Fed. Br. 65 n.13; CPAI Br. 50-51; NSB Br. 53. But like the Services here, EPA did not even cite, let alone engage with, any relevant science. *See* 2-SER-348.

done so here. *See* CBD Br. 47 n.6. ConocoPhillips' arguments also ignore Congress's intent that agencies "insure" their actions are not likely to contribute to species' extinction, including from incremental impacts. 16 U.S.C. § 1536(a)(2); *see also Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803, 818 (9th Cir. 2018) ("The ESA accomplishes its purpose in incremental steps....").

D. Plaintiffs have standing for this claim.

The district court correctly found that Plaintiffs have standing to challenge the agencies' failure to consult on the impacts of Willow's greenhouse gas emissions on polar bears and ice seals. 1-ER-68–75. Plaintiffs have (1) suffered "an injury-in-fact" (2) "fairly traceable" to the agencies' failures that is (3) "likely" redressable "by a favorable court decision." *CBD v. FWS*, 807 F.3d 1031, 1043 (9th Cir. 2015). "[T]he presence of one [Plaintiff] with standing is sufficient…." *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

Plaintiffs have demonstrated injury-in-fact. Plaintiffs' declarations document their members' aesthetic, cultural, and other interests in polar bears and ringed and bearded seals; their future plans to use and enjoy these animals; and how Willow harms their interests. *See, e.g.*, 2-ER-114, 136–137, 161, 164, 165–166 (¶¶9, 49-50, 96, 101, 103); 2-ER-273–274, 276–278 (¶¶27-28, 32, 35); 3-ER-362–363 (¶16); 3-ER-376–377, 390–393 (¶¶13, 16-18, 55-60); 2-ER-292–294, 295–297 (¶¶16-17, 19-20, 23-27); *see also, e.g.*, 7-ER-1448–1449, 1461–1462,

1468–1469 (acknowledging Willow will disturb polar bears). These interests in "us[ing] or observ[ing] an animal species … [are] undeniably [] cognizable interest[s] for purposes of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992).

The State erroneously asserts that Plaintiffs' members must have interests in observing or using polar bears within the Project area. *See* Dkt. 113.1 (SOA Br.) 8-9. This argument makes little sense for a wide-ranging species like the polar bear and is contrary to Circuit precedent. *See Nat'l Wildlife Fed'n*, 886 F.3d at 822 (finding irreparable harm to a plaintiff's aesthetic interests where "'[f]ewer salmon mean fewer opportunities to see them'" while recreating in Idaho's rivers).

Regardless, Plaintiffs' members have demonstrated interests in polar bears and ice seals in areas Defendants admit Willow will affect, including the Colville River and Oliktok Point. *See, e.g.*, 2-ER-136–137, 165–166 (¶¶49-51, 103); 2-ER-273–274 (¶¶27-28); 3-ER-362–363, 369 (¶¶16, 27); *see also* 6-ER-1368–1369 (terrestrial action area); 7- ER-1508–1509 (marine action area). These injuries are not based on connections to the broader ecosystem, *contra Lujan*, 504 U.S. at 565, but on their interests in the same populations of bears and seals Willow will impact. *See, e.g.*, 2-ER-271–275 (¶¶25-30); 3-ER-369, 371 (¶¶27, 31-33).

Plaintiffs have also demonstrated causation and redressability. *Contra* CPAI Br. 52-60. Plaintiffs' members' injuries stem not only from the impacts of

Willow's greenhouse gas emissions on polar bears and ringed and bearded seals, but also from Willow's non-climate impacts. *See, e.g.*, 2-ER-161, 165–166 (¶¶96, 103); 2-ER-267–268, 274–275 (¶¶18, 30); 3-ER-362–363 (¶16); 2-ER-295–296 (¶¶24-25). Because Plaintiffs have such injuries, redressable by vacatur of the consultations, CBD Br. 17, Plaintiffs "may seek to invalidate the action … 'by identifying all grounds on which the agency may have [violated] its statutory mandate.'" *Mont. Env't Info. Ctr. v. BLM*, 615 F. App'x. 431, 432 (9th Cir. 2015) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006)); *see also WildEarth Guardians v. BLM*, 870 F.3d 1222, 1231-32 (10th Cir. 2017) (similar).[7]

Regardless, Plaintiffs have sufficiently established causation and redressability based on injuries related to the agencies' failure to consult on Willow's emissions. Violating the ESA's consultation requirements is a "procedural injury [that] lessens a plaintiff's burden [to demonstrate] causation and redressability." *CBD v. FWS*, 807 F.3d at 1044 (citation omitted). Plaintiffs "need only demonstrate that compliance with Section 7(a)(2) *could* protect [their] concrete interests." *NRDC v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (citation

[7] It is irrelevant that Plaintiffs have not appealed the issue of whether FWS's biological opinion failed to contain an incidental take statement for polar bear take from Willow's noise pollution. CPAI Br. 53 n.6. This was a "separate *argument*[] in support of a single claim"—that FWS's Willow consultation was unlawful. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); *see also* 7-ER-1619–1622 (amended complaint).

omitted). This requirement is met. ESA consultation addressing Willow's emissions on top of those already threatening polar bears and ice seals could yield emission-reduction measures, such as denying another well pad, *see* 16 U.S.C. § 1536(b)(3)(A), (b)(4)(C)(i)-(ii); 50 C.F.R. § 402.13(b), thereby protecting Plaintiffs' interests far better than the agencies' (unlawful) head-in-the-sand approach.

ConocoPhillips misapplies *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013). CPAI Br. 54-58. First, that case did not assert any procedural violation; thus, the relaxed standards of causation and redressability did not apply. *Bellon*, 732 F.3d at 1145. Second, *Bellon* recognized that "[a] causal chain does not fail simply because it has several links...." *Id.* at 1141-42 (citation omitted). Here the chain consists of few unattenuated links: (1) Willow's greenhouse gas emissions will exacerbate the existing threat to polar bears' and ice seals' continued existence; (2) the agencies approved Willow without consulting on these additive impacts; and (3) these failures mean the agencies never grappled with Willow's contribution to the single greatest threat to these species or identified ways that harm could be mitigated. *See CBD v. FWS*, 807 F.3d at 1044.

ConocoPhillips' reliance on its own expert to opine on what certain science shows about Willow's impacts to polar bears or ice seals, CPAI Br. 56-58, "confuse[s] the merits of Plaintiffs' claim with the threshold requirement of

standing," *Pub. Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989). Plaintiffs need not show how the agencies' "procedural breach" harms polar bears and ice seals. CPAI Br. 59. It "is the objective and purpose of the consultation process" to answer the question of how Willow's emissions affect these species. *Cottonwood Env't Law Ctr. v. USFS*, 789 F.3d 1075, 1082 (9th Cir. 2015).

Nor are Plaintiffs required to show exactly where Arctic sea ice loss from Willow will occur. CPAI Br. 51-52, 54, 56-57. *Bellon*'s references to the need to show "localized climate impacts," 732 F.3d at 1143, were based on the nature of the plaintiffs' injuries, such as flooding of their property. *Id.* at 1140-42. Here, Plaintiffs' members' interests are in migratory species threatened by sea ice loss; additional loss of that habitat anywhere can affect the species, and Plaintiffs' members' ability to use and enjoy them in any area they plan to do so. *See, e.g.*, 2-ER-277–278 (¶35); 3-ER-362–363, 371 (¶¶16, 31); 3-ER-391–392 (¶59); 2-ER-296–297 (¶¶26-27); *see also Melone v. Coit*, No. 1:21-cv-11171-IT, 2023 WL 5002764, at *4 (D. Mass. Aug. 4, 2023) (whether the plaintiff observes whales in "Massachusetts" or "Florida" is irrelevant where it is the same population … that

migrate[s] from one location to the other" and will be impacted by the action at issue).[8]

ConocoPhillips' reliance on the actions of third parties, CPAI Br. 58-59, does not undermine causation or redressability. ConocoPhillips cannot develop Willow without the agencies' approval, and it is their behavior Plaintiffs seek to alter. *CBD v. FWS*, 807 F.3d at 1044 (injury redressable where FWS could impose more stringent mitigation measures to guide third-party behavior following lawful consultation). *WildEarth Guardians v. U.S. Forest Service*, 70 F.4th 1212, 1216-18 (9th Cir. 2023)—where a state could still engage in the underlying action without the federal government's approval—is therefore inapposite. *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, 5 F.4th 997, 1014-15 (9th Cir. 2021), and *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 669-72 (D.C. Cir. 1996)—where the plaintiffs challenged government policies that would not directly impact them—are similarly inapt. ConocoPhillips' related attempt to characterize Willow's downstream carbon emissions as "speculative," CPAI Br.

[8] In *WildEarth Guardians v. Salazar*, 880 F.Supp.2d 77, 95 (D.D.C. 2012), the court provided no specific analysis why it believed the plaintiff did not have standing for their ESA claims, instead simply cross-referencing its decision regarding their NEPA claims. On appeal, the D.C. Circuit rejected the portion of the opinion prohibiting the plaintiffs from raising their climate claims under NEPA, without separately examining whether the plaintiffs could sue under the ESA. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 317-18 (D.C. Cir. 2013); *contra* CPAI Br. 54.

57, fails given BLM's conclusion that Willow will increase greenhouse gas emissions—a conclusion ConocoPhillips has not challenged.

ConocoPhillips also incorrectly claims that Plaintiffs cannot show redressability because climate change has many causes. CPAI Br. 59-60. "So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant." *WildEarth Guardians*, 795 F.3d at 1157; *see also Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (an injury is fairly traceable to and redressable by the defendants if they can take a "small incremental step" to reduce the overall injury). Here, BLM admits Willow will "contribute to climate change impacts." 5-ER-960. The agencies' failure to properly examine those impacts on polar bears and ice seals is the source of Plaintiffs' harms. Remedying them will not require "'a host of complex policy decisions,'" CPAI Br. 60 (citation omitted), but rather the normal Administrative Procedure Act remedy—vacatur of the unlawful agency decisions.

V. Vacatur is warranted.

A. No unusual circumstances merit remand without vacatur.

Defendants and Intervenors fail to identify any rare circumstances that would warrant remand without vacatur, such as harm to the environment or a conflict with any statutory purpose. *See, e.g.*, *Cal. Cmtys. Against Toxics v. EPA*,

688 F.3d 989, 994 (9th Cir. 2012); *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 664 (9th Cir. 2022).

The State's assertion that vacatur could cause environmental harm is unsupported. SOA Br. 17-18. It provides no evidence that ConocoPhillips would be unable to halt construction activities without causing environmental damage or complying with applicable mitigation measures, and its contention that the gravel road is *better* for wildlife and vegetation, *id.* at 18, is belied by the record. 4-SER-914–916; 6-SER-1558–1560. The State next claims that vacatur would be contrary to the Reserves Act's energy security purpose. SOA Br. 19-20. But the Act does not call for development regardless of its consequences; BLM is obligated to protect the Reserve's surface resources, *supra* p. 19, and the purpose of remand is to ensure compliance with these obligations. The Alaska politicians' similar view, Alaska Cong. & Leg. Amicus Br. 9-10, rests on an impression that Willow will not worsen climate change and its resultant security risks, a view directly contrary to the record. 3-SER-803-804 (showing Willow's significant domestic and global carbon emissions of nearly 200 million metric tons derived from market substitution modeling); *see also* Cong. Amicus Br. 9-12 (describing such security risks).

Intervenors also fail to show that the agency's errors are not serious, wrongly claiming it is premature to assess this factor. CPAI Br. 64; Dkt. 111.1

(Kuukpik Br.) 39 . But the parties have fully briefed the merits and thus are well able to discuss the seriousness of the errors at issue. And unlike the cases Intervenors cite, where the agency on remand could potentially cure lesser errors, *see, e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993); *Nat'l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 929-30 (9th Cir. 2020); *Cal. Cmtys. Against Toxics*, 688 F.3d at 993, here, the errors are serious and their correction could lead to a substantially different decision. *See, e.g., CBD v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020) (inadequate analysis of greenhouse gas emissions exactly the kind of NEPA failing that should cause an agency to reconsider); *see also* CBD Br. 56-57.

Defendants' and Intervenors' main argument is that the Court should remand for the district court to determine the appropriate remedy. Fed. Br. 69; ASRC Br. 29; Kuukpik Br. 39; SOA Br. 10; NSB Br. 63; CPAI Br. 64. They point to *350 Montana*, a case where the Court concluded that the record was unclear on key issues, requiring "[a]dditional factfinding" by the district court. 50 F.4th at 1273. Here, Defendants and Intervenors have identified no such factual questions, and additional development of the record by the district court is therefore unnecessary.

Intervenors' arguments, discussed below, about disruptive consequences, largely financial, are not unusual and do not by themselves present the rare or limited circumstances in which remand without vacatur might be justified.

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032, 1051 (D.C. Cir. 2021); *Cal. Cmtys. Against Toxics,* 688 F.3d at 993-94 (cited at SOA Br. 17) (declining to vacate because, in addition to financial consequences, vacatur would risk the power supply and pollute the air).

B. Financial harm does not warrant remand without vacatur.

The potential financial harms Intervenors identify are either baseless or a normal consequence of vacatur. First, Intervenors provide no reason why vacatur would cause Willow's cancellation and the harms they point to in this regard are illusory. ASRC Br. 30-32; NSB Br. 64; Kuukpik Br. 39, 44-45; SOA Br. 13-15; *see also* Alaska Cong. & Leg. Amicus Br. 14. The bulk of Intervenors' claims of disruption, such as loss of income and taxes, will only be deferred if BLM concludes, on remand, that it should approve the Project in some form. Such delay is not unusual. *See Nat'l Fam. Farm Coal.*, 960 F.3d at 1145 (vacatur appropriate despite interim economic harm to stakeholders).

Second, to the extent ConocoPhillips and other companies suffer financial harm due to the delay itself, this, too, is a normal consequence of vacatur. In other contexts, this Court has recognized that "[p]lacing significant weight on financial obligations that Defendants knowingly undertook would, in effect, reward them for self-inflicted wounds." *Sierra Club v. Trump*, 929 F.3d 670, 706 (9th Cir. 2019), s*tay granted on other grounds by Trump v. Sierra Club*, 140 S. Ct. 1 (2019);

Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1093 (9th Cir. 2014) (company assumes risk of permitting outcomes). While Intervenors complain of costs associated with canceled construction contracts, *see* CPAI Br. 64-65; ASRC Br. 30-31, that is the natural result of having entered into those contracts in full knowledge of the litigation risk.

Intervenors also point to the delayed benefit of mitigation measures, such as a subsistence ramp, NSB Br. 40-41, and protections for Teshekpuk Lake, Kuukpik Br. 42-43. But these are simply mitigation for the inevitable harmful impacts that would flow from Willow itself and cannot be considered a net benefit that would be lost during remand.

C. The harm from other delayed benefits during remand is unavoidable if remand is to serve its purpose.

Intervenors are correct that vacatur will make some jobs unavailable while construction is on hold. ASRC Br. 32; Kuukpik Br. 44; NSB Br. 64. Although real and meaningful, especially in small communities where even seasonal jobs are hard to come by, this harm is a necessary consequence of vacatur, if remand is to have any value at all.

As to harm to subsistence practices, although Intervenors also correctly point out that vacatur could impede the opportunity for some residents to access subsistence resources using Willow's gravel roads, NSB Br. 65; Kuukpik Br. 41; SOA Br. 18, the record demonstrates that Willow's roads and construction

activities are likely to cause serious harm overall to subsistence hunting. *See, e.g.*, 6-SER-1558–1560, 1573–1574.

Notwithstanding these harms, absent vacatur, "a serious risk arises" that future agency actions will be "skewed toward" development should the Court remand Willow's approval at the conclusion of this case. *See Davis v. Mineta*, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002); *see also N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (recognizing the "real dangers" of the "bureaucratic momentum" from commitment of resources to a project). Indeed, ConocoPhillips acknowledged below that it intends to build out nearly half the entire Project footprint during the pendency of the appeal. *See* CR 197 at 18. Vacatur is thus necessary to ensure that remand does not "become a hollow exercise." *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971).

CONCLUSION

For the foregoing reasons, the Court should declare BLM and the Services' actions unlawful and vacate their review and approval of the Project.

Respectfully submitted this 19th day of January, 2024.

s/ Erik Grafe

Erik Grafe (Alaska Bar No. 0804010)
Jeremy C. Lieb (Alaska Bar No. 1810088)
Carole A. Holley (Alaska Bar No. 0611076)
Eric P. Jorgensen (Alaska Bar No. 8904010)
EARTHJUSTICE

Attorneys for Plaintiffs-Appellants Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, and Greenpeace, Inc.

s/ Kristen Monsell

Kristen Monsell (California Bar No. 304793)
CENTER FOR BIOLOGICAL DIVERSITY

Attorneys for Plaintiff-Appellant Center for Biological Diversity

s/ Cecilia Segal

Cecilia Segal (California Bar No. 310935)
Michelle Wu (New York Bar No. 5633664)
NATURAL RESOURCES DEFENSE COUNCIL

Attorneys for Plaintiff-Appellant Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE FOR BRIEFS PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND FORM 8

9th Cir. Case Number 23-3624 (consolidated with No. 23-3627)

I am the attorney or self-represented party.

This brief contains 9,054 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[x] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Erik Grafe* **Date:** January 19, 2024