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

No. 3:23-cv-00061-SLG
Hon. Sharon L. Gleason

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, Greenpeace, Inc., and Natural Resources Defense Council hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

This appeal concerns the Bureau of Land Management's (BLM) approval of the Willow Master Development Plan ("Willow" or "Project"). Willow is an enormous new oil drilling project on vibrant but sensitive federal land in America's Arctic that would lock in oil production, and unsustainable climate pollution, for decades to come. It would cause the release of more than 239 million metric tons of greenhouse gas emissions over its lifetime—the carbon equivalent of adding 1.8 million gas-powered cars to the road for thirty years.[1] BLM itself acknowledges that Willow's climate impact is significant; that climate change is already adversely affecting the National Petroleum Reserve-Alaska ("Reserve"); and that U.S. climate policy calls for the urgent reduction of greenhouse gas emissions. In addition to its climate harms, the Project's infrastructure will damage a biologically rich and culturally important area already suffering the effects of permafrost thaw and sea ice loss.

After the district court vacated a prior approval, BLM approved the Project anew in March 2023, without meeting its legal obligations to grapple fully with the Project's climate impacts. BLM refused to consider any Project alternatives that would meaningfully constrain Willow's oil production and resulting greenhouse gas emissions. It obscured Willow's full climate repercussions by omitting from

[1] *See* https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.

its analysis the downstream greenhouse gas emissions of other reasonably foreseeable future oil production that Willow—as a hub for further development—is designed to facilitate. It failed to explain how its decision not to meaningfully reduce the effects of Willow's downstream carbon emissions fulfills its statutory obligation to protect the Reserve's surface resources. BLM, the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) (collectively, "the Services") also failed to conduct a consultation required by the Endangered Species Act (ESA) on the impacts of Willow's greenhouse gas emissions on polar bears, ringed seals, and bearded seals—Arctic species threatened by climate change.

These serious defects prevented decisionmakers and the public from understanding Willow's true carbon footprint and its consequences for the Reserve and beyond and resulted in a lack of action to address them. The Court should set aside the federal government's unlawful review and approval of the Project and remand for further analyses.

JURISDICTIONAL STATEMENT

Plaintiffs' claims arise under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-47; the Naval Petroleum Reserves Production Act ("the Reserves Act"), 42 U.S.C. §§ 6501-08; the ESA, 16 U.S.C. §§ 1531-44; and the Administrative Procedure Act, 5 U.S.C. §§ 701-06. 7-ER-1611–1623 (¶¶171-

226). The district court had subject-matter jurisdiction to hear these claims and award appropriate relief under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), and 28 U.S.C. §§ 2201-02 (declaratory judgment). The district court issued a final order and judgment dismissing Plaintiffs' claims with prejudice on November 9, 2023. 1-ER-4–112; 1-ER-2–3.

Plaintiffs filed their timely notice of appeal of the district court's order and judgment on November 14. 7-ER-1633–1645; *see also* Fed. R. App. P. 4(a)(1)(B)(ii). This Court has jurisdiction over Plaintiffs' appeal of the district court's final order and judgment, which disposes of all parties' claims, under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did BLM violate NEPA when it evaluated an unreasonably narrow range of action alternatives premised on the arbitrary constraint that all alternatives must allow for full oil field development?

2. Did BLM violate NEPA when it failed to analyze Willow's indirect, growth-inducing effects stemming from the reasonably foreseeable future oil development and consequent downstream greenhouse gas emissions Willow will facilitate?

3. Did BLM violate the Reserves Act when it failed to adequately explain or justify how its decision to approve Willow, without meaningfully

limiting the Project's oil production and ensuing climate harm, satisfied the agency's substantive duties under the Act to protect the Reserve's surface resources?

4. Did BLM, NMFS, and FWS violate the ESA when they failed to consult on the greenhouse gas emissions caused by Willow, and did BLM violate the ESA when it relied on unlawful consultations that did not consider such effects in approving Willow?

STATEMENT REGARDING ADDENDUM

All pertinent statutes, regulations, and other legislative and executive materials are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

I. Background

A. Willow will cause significant harm to the climate and the Reserve.

Willow would develop several oil and gas leases held by ConocoPhillips Alaska, Inc. (ConocoPhillips) within the Bear Tooth Unit in the northeastern portion of the Reserve. *See* 5-ER-911; 6-ER-1162. If completed, it will include 199 wells placed across three drill sites, a central processing facility, an operations center, an airstrip, and a network of gravel roads, ice roads, and pipelines. 6-ER-1161. It will produce 576 million barrels of oil over its thirty-year lifespan. *See* 6-ER-1170, 1241. Together, construction and operation of this massive

Project will accelerate climate change and cause lasting and devastating impacts to a fragile ecosystem and the many wildlife species and people who rely on it.

Fossil-fuel combustion is the primary driver of the climate crisis. *See* 5-ER-944; 4-ER-777. And this crisis is already here. *See* 4-ER-776–777, 779. Climate change impacts are especially pronounced in Alaska's Arctic, which is warming at nearly four times the rate of the rest of the planet. 4-ER-845; *see also* 4-ER-867–868. Increased average temperatures, decreased sea ice and snow cover, and thawing permafrost are well documented; those conditions are only expected to worsen. 5-ER-941–943; *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016) (finding "no debate" that temperatures will continue to increase and effects will be "particularly acute in the Arctic").

Willow's significant carbon footprint will exacerbate the climate crisis—contributing to impacts felt both globally and in the North Slope in Alaska's Arctic. 4-ER-721–725; *see also* 4-ER-776–779. "[T]o avoid the worst impacts of climate change," scientists and policymakers agree that urgent and significant reductions in greenhouse gas emissions are necessary. 4-ER-776. Yet Willow will result in more than 239 million metric tons of direct and indirect greenhouse gas emissions over its lifetime. 6-ER-1170. Willow will cause additional greenhouse gas emissions by spurring further development in the Reserve, unlocking potentially *billions* more barrels of oil for consumption. 4-ER-863; 4-ER-777–778.

These emissions threaten further climate harm to the Reserve and its resources. The Reserve is an extraordinary, ecologically sensitive landscape home to numerous species, including polar bears, caribou, and millions of migratory birds. 4-ER-714–715. It is also central to the traditional practices of Alaska Native peoples. 5-ER-975–983; 5-ER-1134–1136. Climate change is already putting these resources and practices at risk. For example, climate change "is believed to be one of the key factors in causing [a] 56% decline in populations of migratory caribou . . . in the Arctic over the last two decades," diminishing a critical food resource for subsistence hunters. 4-ER-784. Climate change is also destroying the sea ice that polar bears, bearded seals, and ringed seals need to survive. *See* 6-ER-1392–1394 (polar bear); 7-ER-1556–1557 (bearded seal); 7-ER-1564 (ringed seal). All three species are protected as threatened under the ESA because of existing and projected sea ice loss. Unless current emissions trends are curbed, most of the world's polar bear populations will go extinct within this century, including both Alaska populations, which could be extinct as soon as 2050. *See, e.g.*, 4-ER-793–798; 4-ER-799–805. The Project will compound these harms.

Willow will also cause substantial near-term harm to the Reserve, including to the Teshekpuk Lake Special Area—one of the most productive wetland complexes in the Arctic, providing key calving, foraging, and insect-relief grounds

for caribou, 4-ER-714—and the Colville River Special Area—the largest river delta in northern Alaska, providing critical nesting and hunting areas for peregrine falcons, golden eagles, and rough-legged hawks, 4-ER-715. To date, oil and gas development in the Reserve has largely been limited to areas closest to existing infrastructure on state lands. Willow and its network of pipelines, well pads, and roads will change that, pushing such development farther west and into the Teshekpuk Lake and Colville River Special Areas. *See* 4-ER-716–717; 5-ER-907, 930. Among other impacts, industrialization of these areas will disturb and displace caribou, "significantly restrict[ing]" Alaska Native peoples' subsistence activities. 5-ER-1146–1147; *see also* Dkt. 10.1 at 13-19.

B. Congress recognized and protected the Reserve's ecological and subsistence values through the Reserves Act.

The Reserves Act reflects Congress's intent to safeguard the Reserve's invaluable surface resources, even while providing for oil and gas development. In the early 1900s, the federal government established four naval petroleum reserves—including Naval Petroleum Reserve No. 4 on Alaska's North Slope—to ensure a future oil supply for national defense. *See* H.R. Rep. No. 94-81, pt. 1 at 5-6 (1975); Exec. Order 3797-A (1923). In 1976, Congress revised the status of these reserves through the Reserves Act, as the nation sought to meet its increasing total energy needs beyond national defense. As to Reserve Nos. 1, 2, and 3—all of which were producing some oil already, H.R. Rep. No. 94-81, pt. 2 at 7 (1975)—

Congress directed the Secretary of the Navy "to further explore, develop, and operate" them, "produc[ing] such reserves at the maximum efficient rate" for up to six years. Pub. L. No. 94-258, § 201(3), 90 Stat. 303, 308 (1976).

But Congress treated Reserve No. 4 differently: it transferred jurisdiction over that reserve, which had remained "largely unexplored and almost completely undeveloped," H.R. Rep. No. 94-81, pt. 2 at 7-8, from the Secretary of the Navy to the Secretary of the Interior, redesignating it as the National Petroleum Reserve Alaska. Pub. L. No. 94-258, §§ 102-103, 90 Stat. at 303 (codified at 42 U.S.C. §§ 6502-6503(a)). In doing so, Congress recognized that the Reserve—home to an "historic and current calving ground of the Arctic caribou herd," the "best waterfowl nesting area on the North Slope," and "highly scenic" lands—was better managed as public lands by the Department of the Interior. H.R. Rep. No. 94-81, pt. 1 at 8-9; *see also id.* at 9 (noting that "the Navy should not retain exclusive jurisdiction over 22 million acres of Alaska public lands in the guise of an essentially unexplored petroleum reserve").

More importantly, unlike the other three naval petroleum reserves, Congress expressly prohibited any development or production on the Reserve until it authorized such activities. Pub. L. No. 94-258, § 104(a), 90 Stat. at 304. And though Congress required the Department of the Interior to further explore the Reserve, it mandated that "[a]ny exploration" within designated areas containing

"significant subsistence, recreational, fish and wildlife, or historical or scenic value"—such as the Teshekpuk Lake and Colville River Special Areas—"assure the maximum protection of such surface values" consistent with the Act's exploration requirements. *Id.*, § 104(b), 90 Stat. at 304 (codified at 42 U.S.C. § 6504(a)); *see also* H.R. Rep. No. 94-942 at 21 (1976) (explaining that the Act requires exploration to "cause the least adverse influence on fish and wildlife").

Congress reiterated the importance of preserving the Reserve's ecological value in 1980, when it opened exploration to private parties by requiring the Department of the Interior to conduct "an expeditious program of competitive oil and gas leasing." *See* Pub. L. No. 96-514, 94 Stat. 2957, 2964 (1980) (codified at 42 U.S.C. § 6506a(a)). Mindful of the environmental risks, Congress mandated that, in approving such activities, the Department of the Interior impose "such conditions, restrictions, and prohibitions" as it "deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects" on the Reserve's surface resources. *Id.*, 94 Stat. at 2964 (codified at 42 U.S.C. § 6506a(b)). That command echoes Congress's intent in 1976 that the Department of the Interior "take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances through the reserve," and not just in designated special areas. H.R. Rep. No. 94-942 at 21. Congress further required that "any . . . production" be subject to the Act's maximum protection requirements.

Pub. L. No. 96-514, 94 Stat. at 2965 (codified at 42 U.S.C. § 6506a(n)(2)). Congress was therefore clear that private activities on the Reserve must comply with the Act's environmental protection mandates: that is, private production cannot proceed unless "reasonably foreseeable and significantly adverse effects" on surface resources are "mitigate[d]," 42 U.S.C. § 6506a(b), and the "maximum protection" of surface values in designated areas is "assure[d]," *id.* § 6504(a).

C. The federal government's analyses of Willow do not adequately evaluate or mitigate the Project's harms to the climate and the Reserve.

BLM first approved Willow in October 2020. 5-ER-910–911. This Court initially enjoined implementation of that approval pending appeal of a preliminary injunction denial. *Sovereign Iñupiat for a Living Arctic v. BLM*, Nos. 21-35085 & 21-35095, 2021 WL 4228689, at *2 (9th Cir. Feb. 13, 2021). The district court subsequently vacated the approval, holding, in relevant part, that (1) BLM violated NEPA by restricting the Project alternatives it considered based on the mistaken view that ConocoPhillips had a right to extract all the oil from its leases; (2) BLM violated NEPA by failing to assess the Project's full climate consequences; and (3) FWS violated the ESA by relying on unspecified mitigation measures in its biological opinion for the polar bear and by issuing an arbitrary and capricious incidental take statement for the bear. *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739, 762-70, 799-805 (D. Alaska 2021).

On remand, BLM released a draft Supplemental Environmental Impact Statement (SEIS) in July 2022. 4-ER-690. Public comments identified serious deficiencies in the agency's analysis, including BLM's failure to consider alternatives that would substantially reduce Willow's oil production and resultant climate impacts, to impose measures to mitigate Willow's emissions, and to fully examine the climate impacts from reasonably foreseeable future development facilitated by the Project. *See, e.g.*, 4-ER-709–710; 4-ER-726–728, 736–741, 762; 4-ER-777–778, 781–782, 791. The final SEIS, published in February 2023, 4-ER-693, did not correct these defects. The Services concluded their ESA reviews on January 13 and March 2, respectively. 6-ER-1175. NMFS issued a letter of concurrence, concluding that Willow is not likely to adversely affect the Beringia distinct population segment of the bearded seal, the Arctic ringed seal, or their critical habitat. 7-ER-1505. FWS issued a biological opinion, concluding that Willow is not likely to jeopardize the polar bear or adversely modify its critical habitat. 6-ER-1319; 7-ER-1470, 1471.

The Services' consultations do not consider, let alone mitigate, Willow's climate impacts.

BLM signed a Record of Decision (ROD) approving the Project on March 12. 6-ER-1185. Though the ROD adopts a modified Project alternative in an effort to reduce Willow's environmental impacts, 6-ER-1167–1168, it neither cures

the inadequacies of the agencies' underlying reviews nor reconciles Willow's climate impacts with the agencies' legal obligations.

II. Procedural history

Plaintiffs filed this case in the district court on March 15, 2023, two days after BLM published the ROD. CR 1 at 1, 38 (¶160). Plaintiffs alleged that BLM violated NEPA and the Reserves Act and that BLM and the Services violated the ESA, and sought vacatur of the agencies' actions. *Id.* at 41-51 (¶¶169-216), 52.[2] Because ConocoPhillips intended to immediately begin gravel mining and road construction, Plaintiffs filed a motion for a preliminary injunction. CR 24 at 17-21. The district court denied Plaintiffs' motion on April 3. CR 82 at 3. Plaintiffs appealed and sought injunctive relief pending appeal from the district court on April 4. CR 83; CR 84. The district court denied Plaintiffs' motion on April 5, CR 87 at 2, and Plaintiffs filed a motion for injunction pending appeal in this Court on April 6, *CBD v. BLM*, No. 23-35227, Dkt. 5-1. The Court denied Plaintiffs' motion on April 19. *Id.*, Dkt. 29 at 2.

ConocoPhillips subsequently began its planned construction activities. CR 197-11, ¶3. Because the activities that were the subject of Plaintiffs' preliminary injunction motion were scheduled to be completed in late April,

[2] Plaintiffs filed an amended complaint to add their ESA claims against BLM on June 23, 2023. 7-ER-1622–1623 (¶¶219-226).

Plaintiffs dismissed their appeal, *see* Case No. 23-35227, Dkt. 31 at 2, and the parties proceeded to brief the case on the merits in the district court on a schedule that would resolve the merits prior to the next construction season.

On November 9, the district court issued an order and judgment dismissing Plaintiffs' claims and denying Plaintiffs' request for vacatur. 1-ER-4–112; 1-ER-2–3. Plaintiffs appealed. 7-ER-1633–1645.

ConocoPhillips intended to resume significant construction activities as early as December 21, Dkt. 24.16, ¶7, with the goal of completing almost half the Project's entire footprint this winter, *see* CR 197 at 18. Because these activities will cause substantial irreparable harm to Plaintiffs, Plaintiffs moved for an injunction pending appeal in the district court on November 17. CR 190. The district court denied Plaintiffs' motion on December 1. CR 208 at 3. Plaintiffs moved for reconsideration on December 3, CR 209, which the district court denied on December 6, CR 216 at 4.

Plaintiffs filed a motion for injunction pending appeal in this Court on December 6. Dkt. 10.1. A motions panel denied Plaintiffs' motion without prejudice to renewal before the merits panel on December 18, and consolidated the case with Case No. 23-3627. Dkt. 37.1 at 2. The Court expedited these cases under General Order 3.3(g), recognizing their urgent nature. *Id.* at 2-3.

Plaintiffs have renewed their request for injunctive relief pending this Court's final decision on the merits of their appeal concurrently with this opening merits brief.

STANDARD OF REVIEW

This Court "review[s] the district court's summary judgment de novo, applying the same standards that applied in the district court." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). The Administrative Procedure Act provides the standard of review for the claims at issue. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). Under this standard, the Court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Critical to that inquiry is whether there is 'a rational connection between the facts found and the conclusions made . . . .'" *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (citation omitted). The Court must conduct "a thorough, probing, in-depth review," *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citation omitted), and cannot "'rubber-stamp' . . . administrative decisions . . . inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute," *Ocean Advocs. v. U.S.*

Army Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005) (first alteration in the original, citation omitted).

SUMMARY OF THE ARGUMENT

Plaintiffs have standing to bring this challenge.

BLM violated NEPA's requirement to evaluate a reasonable range of alternatives because it predicated its assessment on the flawed premise that it must allow ConocoPhillips to extract all economically viable oil from its leases and assessed only a narrow range of action alternatives that each allowed nearly identical oil production.

BLM violated NEPA's requirement that it assess the indirect, growth inducing effects of its decision to approve Willow because, although it acknowledged that Willow is a hub for future oil development in the Reserve, it failed to assess the downstream greenhouse gas emissions of the development Willow is designed to catalyze.

BLM violated the Reserves Act because it failed to explain or justify how its decision not to meaningfully reduce Willow's downstream greenhouse gas emissions fulfills its statutory mandates to protect the Reserve's surface resources.

BLM, NMFS, and FWS violated the ESA because they failed to consult on the effects of Willow's greenhouse gas emissions on polar bears, bearded seals,

and ringed seals; and BLM unlawfully relied on consultations that failed to consider such effects in approving Willow.

These serious defects centrally undermine the federal government's decision to approve Willow by preventing decisionmakers and the public from understanding the Project's true greenhouse gas emissions and consequences, resulting in a lack of action to address them. The Court should set aside the federal government's unlawful review and approval of the Project and remand for further analyses.

ARGUMENT

I. Plaintiffs have standing to challenge BLM's approval of Willow and the agencies' underlying environmental reviews.

Plaintiffs are a coalition of member-based non-profit organizations committed to protecting the Reserve from the detrimental effects of fossil fuel development. 3-ER-409, 411–417 (¶¶2, 4, 10-23); 3-ER-428, 430–433 (¶¶1-4, 9-15); 3-ER-436–440 (¶¶2-9); 3-ER-447–452 (¶¶2-3, 6-12); 3-ER-459–461 (¶¶3, 8-11). Plaintiffs bring this suit on behalf of their members, including those who use the Project site and surrounding areas of the Reserve and the species dependent on those areas, for recreation, aesthetic value, cultural and subsistence practices, and professional pursuits, and who are harmed by Willow and the federal government's inadequate analyses and approval of it. 2-ER-113b–131, 133, 138–146, 148, 151, 154–165, 169–170, 173–174 (¶¶3, 6, 10, 12-39, 44, 55, 58, 60-65, 67-69, 77, 81,

86-95, 97-100, 103, 109-114, 121); 2-ER-261–279 (¶¶3-39); 3-ER-357a–371 (¶¶2, 5, 8-33); 3-ER-373–374, 376–394 (¶¶3-5, 13-63); 2-ER-287–298 (¶¶3-12, 14-29); 3-ER-399–407 (¶¶1, 3-20); 3-ER-410, 419–425 (¶¶7, 27-31, 33-44); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-84 (2000). An order setting aside the ROD and related review documents would redress these harms by halting Project implementation and allowing BLM and the Services to reconsider their decisions. *See Save Bull Trout v. Williams*, 51 F.4th 1101, 1106-07 (9th Cir. 2022); *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001).

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

BLM's alternatives analysis rests on a flawed premise: that it must allow ConocoPhillips to extract all economically viable quantities of oil from its leases. That premise conflicts with BLM's resource protection mandates under the Reserves Act and led the agency to evaluate an unlawfully narrow set of alternatives in the SEIS that all maximize Willow's oil production while placing damaging infrastructure within the Teshekpuk Lake and Colville River Special Areas.

BLM has neither disputed that its alternatives analysis rests on the full development premise nor defended the lawfulness of this constraint. Instead, it has argued that it complied with NEPA because it considered and rejected, in an

appendix, proposed alternatives that would lessen impacts and ultimately approved a Project that did not allow full field development. But BLM's rejection of proposed alternatives rests on the same flawed conclusion that it must allow full development; and its ultimate decision that (nominally) does *not* allow full development both (i) shows that the SEIS's full development premise is arbitrary and (ii) was itself constrained because it could not stray far from the SEIS's alternatives.

A. The SEIS's range of alternatives is based on an arbitrary constraint.

NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010) (alteration in original) (citing 40 C.F.R. § 1502.14[3]). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Id*. (citation omitted). BLM failed to meet this standard here.

ConocoPhillips proposed a project design (Alternative B) that would allow it to extract 628.9 million barrels of oil over Willow's lifetime. 5-ER-1089. BLM evaluated in detail two other alternatives, C and D, that would likewise produce 628.9 million barrels of oil, and a third, Alternative E, that would produce 613.5

[3] This brief cites the NEPA regulations as codified in 2019. *See* Dkt. 20.1 at 18 n.4.

million barrels—a mere three-percent drop. *See id.*; *see also* 4-ER-688 (ConocoPhillips admitting that oil production and ensuing carbon emissions of each action alternative for Willow are "essentially the same"). To accomplish those levels of production, each alternative placed scores of oil wells and miles of ice roads, pipelines, and gravel roads and other infrastructure within the Special Areas. 5-ER-918, 930, 936; 5-ER-1091–1093; 4-ER-679. That is true even of Alternative E: though it eliminated one drill pad from the Teshekpuk Lake Special Area and deferred another drill pad to the south to reduce surface impacts and slightly reduce greenhouse gas emissions, it compensated by shifting a third pad farther north into the Special Area to retain reservoir access and by increasing the number of wells on certain pads. 5-ER-917–918, 1091; 4-ER-679.

As no party has disputed, *see* 2-ER-334–336; 2-ER-322–323; 2-ER-303–306; 2-ER-311–312; Dkt. 20.1 at 25-28; Dkt. 21.1 at 12-13; Dkt. 24.1 at 14-16, BLM assessed the impact of only this narrow range of alternatives in its SEIS because it limited its analysis to alternatives that would "[f]ully develop" the oil field, meaning those that would not "strand" economically viable quantities of oil. 4-ER-876–877; *see also* 5-ER-1002, 1012 (describing alternatives screening criteria that lessee must "fully develop" the oil field). The agency thus declined to evaluate alternatives that would have meaningfully reduced Willow's oil production and greenhouse gas emissions while offering greater protections to

surface resources—including an alternative that, according to BLM, would have eliminated all infrastructure from the Teshekpuk Lake Special Area and reduced greenhouse gas emissions by 30 percent. 4-ER-682; *see* 4-ER-729–735; 4-ER-781; 4-ER-707–710; 4-ER-658–659; 4-ER-661 (Environmental Protection Agency's (EPA) and Plaintiffs' proposed alternatives). Indeed, BLM repeatedly conveyed this rationale to ConocoPhillips and other stakeholders, asserting that it would not carry forward alternatives that resulted in less than full field development. *See, e.g.*, 4-ER-684; 4-ER-669; 4-ER-674–675; 4-ER-666; 5-ER-1048–1049, 1055 (citing economic viability constraint as justification for eliminating three alternative components from further study).

The economic viability constraint that so significantly narrowed the range of alternatives considered was arbitrary because no authority compels full field development. BLM's alternatives analysis based on this constraint thus violates NEPA. *See CBD v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218-19 (9th Cir. 2008) (agency violated NEPA where the alternatives were all constrained by the agency's misapprehension of its statutory authority and thus hardly differed in terms of fuel consumption, energy use, and environmental effects). In fact, the district court previously held that BLM violated NEPA when it used a similar constraint—that ConocoPhillips "had the right to extract all possible oil and gas

from its leases"—to limit the alternatives evaluated when it first approved Willow in 2020. *Sovereign Iñupiat for a Living Arctic*, 555 F. Supp. 3d at 805.

The district court erred when it reached a different conclusion following BLM's second approval, despite the similar constraint. Nothing in the Reserves Act, its implementing regulations, ConocoPhillips' leases, or the Project's purpose and need statement required BLM to maximize Willow's oil recovery—particularly at the expense of the Reserve's surface resources. The district court effectively moved the "maximum" in the statutory provision, 42 U.S.C. § 6504(a), from protection of Reserve surface values, where Congress put it, to expansion of development, which in fact Congress made subject to the protection mandate, *see id.* § 6506a(n)(2).

In fact, Congress made clear in the Reserves Act that no development could occur unless the Reserve and its resources were protected. *See supra* pp. 7-10. The Act and regulations direct BLM to protect the Reserve's surface resources—particularly in special areas—and authorize BLM to limit, reject, or suspend development projects as needed. *See, e.g.*, 42 U.S.C. §§ 6503(b), 6504(a), 6506a(b); 43 C.F.R. §§ 2361.1(a), (e)(1), 3135.2(a)(1), (3), 3137.21(a)(4), 3137.73(b); *see also* H.R. Rep. No. 94-942 at 20 (vesting Secretary with responsibility to "carefully control[]" fossil fuel activity in the Reserve to "protect[]" the area's "natural, fish and wildlife, scenic and historical values").

True, the Reserves Act and its implementing regulations direct BLM to conduct an "expeditious program of competitive leasing." 42 U.S.C. § 6506a(a); 43 C.F.R. § 3130.0-1 (similar). But that directive—long since met with 19 lease sales offering more than 60 million acres in aggregate since 1980, *see* 88 Fed. Reg. 62,025, 62,028 (Sept. 8, 2023)—is a far cry from an obligation to fully extract the oil on every lease.

ConocoPhillips' lease terms and this Court's caselaw reflect that same authority to limit development. *See* 3-ER-468 (§§ 4, 6) (BLM may "specify rates of development and production in the public interest" and impose measures to "minimize[] adverse impacts" to ecological and cultural resources); *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006) (stating that, while BLM cannot preclude development altogether within an entire Reserve planning area, it "can condition permits for drilling on implementation of environmentally protective measures, and we assume it can deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available");[4] *Conner v. Burford*, 848 F.2d 1441, 1448-49 (9th Cir. 1988) (recognizing that while lessees possess development rights, BLM can limit activity to avoid environmental impacts).

[4] Though *Kempthorne* upheld the alternatives considered there, BLM had not constrained the range of alternatives it assessed based on a misapprehension of its authority, 457 F.3d at 978-79, as it did here.

Contrary to the district court's conclusion, 1-ER-26–27, the regulation BLM relied on in the SEIS to support its economic viability constraint, 43 C.F.R. § 3137.71(b)(1), likewise poses no barrier. As Defendants themselves acknowledged in their brief below, that regulation simply imposes an obligation on ConocoPhillips to describe its plans to fully develop a pooled or "unitized" oil field; it does not speak to ConocoPhillips' lease rights or compel BLM to approve full development. *See* 2-ER-335 n.7. The district court also erred in concluding that BLM's full field development criteria was needed to avoid piecemeal analysis. 1-ER-26–27. BLM's obligation to evaluate the maximum possible impacts of ConocoPhillips' development plan under NEPA in no way excused it from also evaluating alternatives that would have produced lesser impacts.

Nor does the Project's purpose and need dictate full field development. The Project's purpose is "to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources in the Willow reservoir . . . while providing maximum protection to significant surface resources within the [Reserve]." 5-ER-911. Even ConocoPhillips admitted that this purpose is satisfied by an alternative that "allow[s] for *some* development of oil." 7-ER-1631. For example, the alternative component that BLM considered but rejected, which would have removed infrastructure from the Teshekpuk Lake

Special Area while still allowing recovery of 71 percent of the oil reservoir, *supra* pp. 19-20, satisfies this purpose.

In sum, BLM's economic viability constraint is inconsistent with the Reserves Act and unsupported by Willow's purpose and need statement, and it unlawfully limited the agency's alternatives analysis under NEPA. *See Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1218-19 (rejecting alternatives analysis that rested on agency's mistaken view that it lacked statutory authority to adopt more environmentally protective option); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1053 (9th Cir. 2013) (faulting BLM for failing to consider alternatives that would feasibly meet project goals "while better preserving" monument resources).

B. BLM's dismissal of more protective alternatives does not remedy the flaw.

The Court should reject the argument, accepted by the district court, 1-ER-23–27, 32, that BLM satisfied NEPA's alternatives requirement because the SEIS contains an appendix that lists, but does not develop or analyze, a number of proposed alternatives. First, BLM rejected alternatives that would reduce oil production and greenhouse gas emissions and remove infrastructure from the Teshekpuk Lake Special Area on the arbitrary basis that they did not allow full field development. *See* 5-ER-1048–1049 (component numbers 43-46); 5-ER-1055–1056. Second, cursorily considering and then eliminating protective

alternative components is no substitute for conducting a detailed evaluation of the components and their environmental impacts as actual alternatives alongside the other Project alternatives. *See Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 877 (9th Cir. 2022) (summary dismissal of alternatives did not satisfy NEPA obligation to "give full and meaningful consideration to all reasonable alternatives" (citation omitted)); *Abbey*, 719 F.3d at 1052 ("consider[ing] and then dismiss[ing]" alternative components "without detailed analysis" did not "cure" the "inadequacies of the other alternatives analyzed").

C. BLM's ROD demonstrates that the SEIS's full development principle is arbitrary and that it constrained BLM's ultimate choice.

In its ROD, BLM belatedly backed away from the full field development principle that constrained its alternatives development in the SEIS. The Project BLM approved, a modified Alternative E—which disapproved rather than deferred the southern drill pad, 6-ER-1159—did *not* allow ConocoPhillips to fully develop the field. Rather, it precluded development on several of ConocoPhillips' leases. *Compare* 5-ER-1086 (overlay of oil pool and drilling reach of Alternative E), *with* 4-ER-676 (map suggesting leases H-015, H-016, and H-108, at a minimum, would not recover any oil under modified Alternative E (which disapproved drill pad BT5)); Dkt. 20.1 at 24 (Defendants acknowledging that decision precluded oil extraction on some leases). BLM's ultimate decision not to permit full field

development demonstrates that neither the law nor the Project's purpose and need compelled it, and thus demonstrates that it was arbitrary for BLM to consider only full field development alternatives in the SEIS.

The small modifications BLM made in the ROD do not remedy its NEPA violation. BLM recognized that "measures to limit greenhouse gas emissions and thereby reduce climate impacts" are "especially important in the [Reserve], given the significant effects of climate change on the Arctic and the North Slope," 6-ER-1169, and it recognized the importance of limiting direct disturbance to surface resources, 6-ER-1167. But BLM could only go so far in considering changes that would reduce Willow's harms to the climate and to surface resources in light of the limited alternatives analyzed in the SEIS; anything more meaningful than the change it adopted would have required further NEPA analysis. *See* 40 C.F.R. § 1502.9(c)(1)(i); *Russell Country Sportsman v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (an agency may modify a proposed action without issuing an SEIS only if the modified action is a "minor variation of one of the alternatives discussed in the draft EIS," and "qualitatively within the spectrum of alternatives that were discussed in the draft"). Thus, as BLM acknowledged, the approved Project is only a "minor variation," 6-ER-1160, 1167, of the Alternative E assessed in the SEIS: it still produces 92 percent as much oil as ConocoPhillips' proposal and includes infrastructure in both Special Areas, *see* 6-ER-1163, 1165–

1166, 1168–1169, 1171. Had BLM assessed a range of alternatives consistent with its statutory authority—that is, unconstrained by the mistaken view that it must allow full field development—it could have ultimately approved a much more protective version of the Project. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 725, 728-30 (9th Cir. 1995) ("While we cannot predict what impact the elimination of [an inapplicable requirement] will have on the [agency's] ultimate . . . decisions, clearly it affects the range of alternatives to be considered.").

BLM's cramped assessment of alternatives in the SEIS rested on an arbitrary premise—unsupported by governing law—that the agency was required to authorize full development of the oil field underlying ConocoPhillips' leases. The analysis thus violates NEPA and demonstrably limited BLM's ability to adopt a decision that protects the Reserve and its irreplaceable ecological values.

III. BLM violated NEPA by failing to assess downstream emissions from reasonably foreseeable future oil development caused by Willow.

Willow will facilitate future oil development in the Reserve—as much as three billion barrels—and thereby cause additional downstream greenhouse gas emissions beyond those from oil produced by Willow itself. The district court's decision, and Defendants' and Intervenors' arguments below, that the SEIS adequately accounted for these emissions as cumulative impacts by tiering to a programmatic EIS, ignores the distinction between NEPA's separate requirements

to consider indirect effects and cumulative impacts. These downstream greenhouse gas emissions are reasonably foreseeable indirect effects of the Project, which BLM was required to specifically disclose and assess in the SEIS. Its failure to do so violated NEPA.

NEPA requires BLM to assess the reasonably foreseeable "indirect effects" of its actions. 40 C.F.R. § 1508.8(b). Indirect effects include "growth inducing effects and other effects related to induced changes in the pattern of land use." *Id.* In other words, an agency must assess the impacts of future development its action will facilitate. *See City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (development induced by highway interchange); *Ocean Advocs.*, 402 F.3d at 869-70 (increased tanker traffic resulting from refinery dock expansion). This necessarily includes the foreseeable downstream emissions from that future development. *See CBD v. Bernhardt*, 982 F.3d 723, 737-38 (9th Cir. 2020) (*Liberty*) (foreseeable greenhouse gas emissions are indirect effects that must be considered in NEPA analysis); *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1177-79 (D.C. Cir. 2023) (agency must consider greenhouse gas emissions from new oil production facilitated by rail line despite uncertain drilling locations).

There is a clear and meaningful distinction between this requirement to consider indirect effects under 40 C.F.R. § 1508.8(b) and NEPA's separate requirement to consider cumulative impacts under 40 C.F.R. § 1508.7. *See Barnes*

v. U.S. Dep't of Transp., 655 F.3d 1124, 1136-39, 1141 (9th Cir. 2011) (analyzing cumulative and indirect growth-inducing effects separately). Indirect effects are "effects . . . caused by the action" itself, including "growth inducing effects," over which the permitting agency has control. 40 C.F.R. § 1508.8(b). A cumulative impacts analysis evaluates the impacts of an action together with "other past, present, and reasonably foreseeable future actions" regardless of the cause of or authority responsible for those actions. *Id.* § 1508.7. In that respect, an indirect effects analysis is functionally different than a cumulative impacts analysis, which concerns impacts that are additive to—but not caused by—the project at hand. Because indirect effects are caused by the agency's action, understanding them is especially critical. *See City of Davis*, 521 F.2d at 676-77 (analysis of indirect effects "indispensable" when "address[ing] the major environmental problems likely to be created by a project").

The record demonstrates that Willow will cause additional downstream greenhouse gas emissions by facilitating future oil development. ConocoPhillips told its investors it has already "identified up to 3 billion [barrels of oil equivalent] of nearby prospects and leads . . . that could leverage the Willow infrastructure." 4-ER-863; *see also* 4-ER-858 (showing West Willow discovery and Soap, Juniper, and Harpoon prospects on company leases west of Willow). And the company has touted Willow as the "Next Great Alaska Hub" that "unlocks the west." 4-ER-858.

BLM's Integrated Activity Plan (IAP), analyzing Reserve-wide impacts, also shows Willow in a high hydrocarbon potential area, where vast swaths of land have been leased for development. 7-ER-1503, 1504. Recognizing this potential for substantial facilitated development, EPA urged BLM to conduct a "more robust analysis of [ConocoPhillips'] adjacent oil prospects and the reasonably foreseeable actions related to these prospects" that would function as "potential satellite locations that tie into the proposed Willow development." 4-ER-778.

BLM has acknowledged this future development is a "growth inducing impact[]" of Willow. 5-ER-985. The SEIS explains that Willow "may result in additional development opportunities to the south and west of the Project area," that its "existence . . . makes exploration of these areas more attractive," and that it makes development of future discoveries in these areas more likely. *Id.* BLM even made "support[ing] reasonably foreseeable future development" a core consideration of its alternatives analysis. 5-ER-1034; *see also* 5-ER-1037 (rejecting alternative component in part because it "would not support reasonably foreseeable future development"); 5-ER-1083 (including Project component specifically that would accommodate future development). The SEIS characterizes the most imminent facilitated project—West Willow—as a reasonably foreseeable future action, 5-ER-986–987, that "would occur as part of any Willow alternative," 5-ER-1124.

BLM has sufficient information to assess the emissions consequences of these potential induced projects, including their timing, location, and estimated oil production. *See* 5-ER-986–987; 5-ER-1124–1125; 4-ER-777–778; 4-ER-856–858; 4-ER-863.

Given the available information, BLM should not have "ignore[d] this foreseeable effect entirely." *Liberty*, 982 F.3d at 740; *see also City of Davis*, 521 F.2d at 675-76 (once "substantial questions have been raised about [a project's] environmental consequences," the agency "should not be allowed to proceed . . . in ignorance of what those consequences will be"). Yet BLM did just that. It provided no analysis of greenhouse gas emissions from consumption of the billions of additional barrels of other oil development Willow is likely to catalyze. Nor did it "explain[] more specifically why it could not have done so." *Liberty*, 982 F.3d at 740 (citation omitted). For West Willow in particular, the SEIS inexplicably failed to consider downstream emissions despite providing a specific estimate of the future development's oil production—analyzing the 48,500 metric tons of *direct* greenhouse gas emissions from West Willow's drilling activity, but omitting any estimate or analysis of the likely millions of metric tons of emissions that would result from processing and burning the 75 million barrels of oil BLM expects West Willow to produce. 5-ER-987–989, 1124–1125.

Tiering to BLM's programmatic 2020 IAP EIS in the SEIS's discussion of cumulative impacts cannot remedy BLM's failure. The IAP EIS has a different purpose: it analyzes potential cumulative emissions from many projects across the entire 23-million-acre Reserve over many decades under hypothetical scenarios for development. 7-ER-1489–1490, 1496–1498. It is not meant to, and does not, address the potential downstream emissions that Willow will cause by facilitating further development. Indeed, because the IAP EIS's analysis aggregates impacts from many potential projects, it hides the effects induced by Willow itself. It is those induced effects of the decision at hand that must be included in an indirect effects analysis and that are essential for the public and the decisionmaker to understand as a part of the Willow decision. *See Barnes*, 655 F.3d at 1136-38 (rejecting management plan aviation traffic forecast as substitute for analyzing demand induced by new runway); *City of Davis*, 521 F.2d at 676-77. That critical information cannot be found in the IAP EIS.

The district court's decision to the contrary ignored the distinction between cumulative and indirect effects. 1-ER-37–45. The district court also misconstrued Plaintiffs' argument as focused on only the West Willow development. 1-ER-38–39. Plaintiffs' argument is, and has consistently been, that BLM failed to analyze downstream greenhouse emissions from any reasonably foreseeable future oil

production induced by Willow, including not only oil produced at West Willow, but also much larger volumes from other areas. 2-ER-351–356.[5]

BLM's failure to fully disclose and analyze all the reasonably foreseeable greenhouse gas emissions that will flow from its decision to approve Willow deprived the agency and public of essential information that could have affected BLM's ultimate decision, *Liberty*, 982 F.3d at 740, and violated NEPA's requirement to assess indirect effects, *see Barnes*, 655 F.3d at 1136-39.

IV. BLM violated the Reserves Act.

To effectuate Congress's goal of protecting the Reserve's unique ecological values, *supra* pp. 7-10, the Reserves Act requires BLM to limit Willow's "reasonably foreseeable and significantly adverse effects" to the Reserve's surface resources, 42 U.S.C. § 6506a(b), and to afford "maximum protection" to designated areas, *id.* § 6504(a). Despite acknowledging its statutory obligations, the Project's massive downstream greenhouse gas emissions, and the harm to the Reserve's surface resources from such emissions, however, BLM failed to adequately explain or justify how its approval of Willow satisfied the Act's mandates, particularly where options to further limit Willow's climate harms were available.

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[5] The district court's focus on cumulative impacts and only West Willow reflects the arguments made before that court by the plaintiffs in the related *Sovereign Iñupiat for a Living Arctic* case. 3-ER-464–466.

Willow will generate massive greenhouse gas emissions that will cause "reasonably foreseeable and significantly adverse" climate harms to the Reserve's surface resources, such as its wetlands and vegetation, water resources, and wildlife. *Id.* § 6506a(b). Contrary to the district court's finding, 1-ER-46, the record shows that BLM itself linked Willow's emissions to climate harms to the Reserve's surface resources. First, BLM admitted that Willow will contribute significantly to climate change. *See* 5-ER-959; *see also* 6-ER-1170 (describing Willow's expected production and associated carbon emissions). Second, BLM acknowledged that climate harms are "amplified in the Arctic" and on the North Slope. *See* 5-ER-941–942; *supra* pp. 8-10. Third, BLM recognized that climate change will adversely affect the Reserve's surface resources. *See, e.g.*, 5-ER-1016 (noting that the "overall net impacts of climate change" on caribou in Alaska's Arctic "are likely to be negative"); 5-ER-942 (explaining that further warming will lead to thawing permafrost, reduced snow cover and sea ice, and increased risk of wildfires and insect outbreaks in the Arctic and on the North Slope). BLM therefore concluded in the ROD that, "given the significant effects of climate change on the Arctic and the North Slope," it is "especially important" to impose measures to "limit greenhouse gas emissions and thereby reduce climate impacts" from Willow. 6-ER-1169.

Consistent with that conclusion, BLM took modest steps to limit Willow's greenhouse gas emissions, but it stopped short. BLM elected to impose some mitigation measures to address Willow's direct emissions—*i.e.*, emissions resulting from the construction and operation of Project infrastructure. *See, e.g.*, 5-ER-944–947 (defining direct emissions and listing lease stipulations and required operating procedures intended to reduce climate change impacts "associated with the construction, drilling, and operation of oil and gas facilities").

However, it arbitrarily rejected proposed measures to meaningfully limit the Project's *indirect*, or downstream, emissions—*i.e.*, emissions from the transport, processing, and combustion of oil it produces—which are ten times greater. *See* 5-ER-944 (defining indirect emissions); 5-ER-953, Tbl. 3.2.6 (quantifying direct and indirect emissions from Alternative E); *see also* 6-ER-1170 (quantifying indirect emissions from Alternative E as modified and approved). For example, it flatly rejected EPA's suggestion to reduce Willow's lifetime from 30 to 20 years or less, 4-ER-776, proclaiming that "[a]ll project alternatives are designed and evaluated based on a full 30-year field life," 6-ER-1241. It also refused to consider alternatives that would meaningfully reduce total oil production or delay production. *See* 4-ER-730, 734–735 (public comment suggesting these alternatives); *supra* pp. 11, 19-20.

BLM instead relied in the ROD on its approval of a slightly modified Project that reduced downstream emissions by a mere five percent, *supra* pp. 25-27, and pointed to that minor improvement to assert that its approval complied with the Reserves Act. *See* 6-ER-1169–1170 (declaring that the decision "strikes a balance" between development and protection, where the approved Project results in "fewer overall greenhouse gas emissions" than the evaluated alternatives). But declaring that the approved Project was the best of the limited set of options is not sufficient to explain *how* the approved Project satisfies the Act's substantive mandates to protect the Reserve's surface resources, particularly given the availability of options to meaningfully reduce Willow's emissions (by more than a mere five percent). An agency may not offer "mere lip service or verbal commendation of a standard but then fail[] to abide the standard in its reasoning and decision." *NRDC v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016). BLM's error is even more egregious given its own apparent conclusion—in making a final decision that departed from any alternatives analyzed in the SEIS—that none of the SEIS's alternatives was sufficient to meet its statutory obligations. And the SEIS cannot explain the sufficiency of the final decision, because the SEIS did not even consider the option BLM ultimately selected.

Although BLM recognized that the Reserves Act compelled it to take steps to limit Willow's climate's harms, it nowhere explains how, in the face of Willow's

devastating climate impacts, the modest steps it took fulfilled the agency's substantive, ecological protection mandates under the Reserves Act. That violates the Reserves Act and Administrative Procedure Act. *See id.* at 1139 (courts do not defer to agency decisions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute" (citation omitted)); *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1143 (9th Cir. 2015) (agency determination "unsupported by any explained reasoning" is arbitrary and capricious).

V. BLM and the Services' failure to consult on Willow's greenhouse gas emissions violated the ESA.

BLM and the Services arbitrarily refused to assess in an ESA-required consultation the additional impacts of Willow's greenhouse gas emissions on threatened polar bears, bearded seals, and ringed seals already at grave risk due to the cumulative effects of such emissions. Instead, BLM asserted that the science was not precise enough to evaluate such impacts, and the Services agreed—based not on any evaluation of the relevant science to determine whether Willow's greenhouse gas emissions are likely or not likely to adversely affect these species, but on their categorical refusal to perform a consultation on the effects of greenhouse gas emissions.

The failure to consult is particularly glaring considering available information indicating that if current emission trends continue, two-thirds of all

polar bear populations will likely be lost by 2050 (within Willow's lifetime), including both bear populations in Alaska. 4-ER-694–700; 4-ER-793–798; 4-ER-799–805. This means that agency decisions made today involving substantial greenhouse gas emissions are critical to the polar bear's survival. The agencies' failure to consult on the Project's most significant harms to the climate-threatened species Willow will directly affect violated Section 7 of the ESA, 16 U.S.C. § 1536(a)(2).

A. The ESA's consultation process serves vital purposes.

This Court has "described Section 7 as the 'heart of the ESA.'" *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019-20 (9th Cir. 2012) (citation omitted). Section 7(a)(2) requires all federal agencies to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any [listed species] or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2).

The ESA, its implementing regulations, and the Services' Consultation Handbook set forth clear procedural requirements and guidance to ensure these mandates are met. Agencies must "use the best scientific . . . data available" throughout the consultation process. *Id.*

At the first step of consultation, the action agency (here, BLM) must determine "whether any action may affect listed species or critical habitat."

50 C.F.R. § 402.14(a). Whenever any action crosses that low threshold, some form of consultation with the Services is required. *Karuk Tribe*, 681 F.3d at 1027. "*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character" is sufficient to meet the "may affect" threshold. *Id.* (citation omitted). Only when an agency action will truly have "no effect" on listed species is consultation not required. *Id.*

If an agency concludes its activity "may affect" any listed species, it must initiate consultation with the Services on those potential effects. If the agency believes its action "is not likely to adversely affect" any listed species, it can seek the Services' concurrence in writing with that finding. 50 C.F.R. §§ 402.13(c), 402.14(a)-(b). This is known as "informal consultation," *id*. § 402.13(a), and is appropriate when an action's impacts are "expected to be discountable, insignificant, or completely beneficial," 4-ER-814–815, 835–836. The informal consultation process can lead to "modifications to the action" that "avoid the likelihood of adverse effects to listed species or critical habitat." 50 C.F.R. § 402.13(b); *see also* 4-ER-835 (Services' explanation that informal consultation can be used "to try to eliminate any residual adverse effects" on listed species). Critically, in this informal consultation process, the Services must make a determination whether adverse effects are likely and must do so based not just on

the action agency's biological assessment, but on "other pertinent information." 4-ER-835.

Only if the Services conclude that all adverse effects are not likely can they avoid a fuller examination of those effects in a formal biological opinion that analyzes whether the "effects of the action," together with the "environmental baseline" and "cumulative effects," are likely to jeopardize the species' continued existence or destroy or adversely modify critical habitat. *See generally* 50 C.F.R. § 402.14; *see also id.* § 402.02 (defining these terms).

When an agency is already engaged in consultation for particular effects of a project, this Court has instructed that the Services must apply their expertise to determine whether any other impact from that project also "may affect" the species—a very low standard that is met if the available information indicates that consequences to listed species from that impact are "plausible." *CBD v. BLM*, 698 F.3d at 1101, 1121-22 (9th Cir. 2012). This is also consistent with how FWS described its task here: analyzing "*potential* effects of the proposed Project on . . . polar bears." 6-ER1310 (emphasis added).

Once the "may effect" threshold has been cleared, the Services must then determine whether those other effects are likely to adversely affect the species. *See CBD v. BLM*, 698 F.3d at 1124 (holding a biological opinion unlawful where FWS failed to "appl[y] its expertise to the question of whether [an impact from a

project beyond those considered in the biological opinion] may adversely affect listed fish species").

If so, the Services must consider all the "reasonably certain" consequences from such effects in the biological opinion, including those that "occur later in time" and are "outside the immediate area involved in the action"; if not, the Services must substantiate the not likely to adversely affect conclusion. *See* 50 C.F.R. §§ 402.02, 402.13(c), 402.14(g)(3)-(4). Any other rule would allow action agencies to hide potential impacts from consultation simply by failing to mention them in their initial "may affect" determination or by pre-determining a possible effect is not reasonably certain to occur, undermining the process Congress intentionally established. *See City of Tacoma v. Fed. Energy Regul. Comm'n*, 460 F.3d 53, 75 (D.C. Cir. 2006) (describing that the Section 7 consultation process "reflects Congress's awareness that [the Services] are far more knowledgeable than other federal agencies about the precise conditions that pose a threat to listed species").

This Court has repeatedly recognized the importance of complying with the ESA's procedural requirements. *See, e.g.*, *Karuk Tribe*, 681 F.3d at 1019-20. The consultation process "offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly

factored into the decision-making process as intended by Congress." *NRDC v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998).

This Court has also recognized the importance of analyzing incremental impacts to ESA-listed species, as any other approach would allow species to "be gradually destroyed, so long as each step on the path to destruction is sufficiently modest." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). But this "slow slide into oblivion is one of the very ills the ESA seeks to prevent." *Id.*; *see also Friends of Animals v. FWS*, 28 F.4th 19, 32 (9th Cir. 2022) (addressing biological opinions on actions that resulted in the added destruction of 0.04 percent of spotted owl critical habitat). As the Services have similarly explained:

> where numerous actions impact a species . . . a series of biological opinions can be used like building blocks to first establish a concern, then warn of potential impacts, and finally result in a jeopardy call. Successive biological opinions can be used to monitor trends . . . , making predictions of the impacts of future actions more reliable.

4-ER-838.

B. The agencies failed to follow the consultation procedures for Willow's greenhouse gas emissions.

BLM and the Services violated the requirements of the consultation process, never reaching the decision point of "not likely to adversely affect" or "likely to adversely affect" for Willow's greenhouse gas emissions. Instead, the agencies pre-determined the outcome to enable all three of them to ignore their obligations

to consult regarding this effect on polar bears and bearded and ringed seals. But the agencies cannot reasonably "insure" against jeopardy to polar bears or ice seals, or the degradation of their critical habitat, 16 U.S.C. § 1536(a)(2), without making any assessment of the full extent to which Willow will add to the principal threat facing the species.

The continuing decline of Arctic sea ice is the primary threat to polar bears and ice seals. In fact, myriad sources of incremental and cumulative sea ice loss from climate change—driven by human-caused greenhouse gas emissions—is the primary reason each species received ESA protections in the first place. 6-ER-1394, 1397–1398 (polar bear); 7-ER-1556–1557 (bearded seal); 7-ER-1565 (ringed seal). And most of the sea ice off Alaska is designated as critical habitat for these species, meaning protecting these areas is "essential" to the species' conservation. 16 U.S.C. § 1532(5); *see also* 6-ER-1403–1405, 1421 (polar bear); 7-ER-1509, 1534 (bearded and ringed seals).

Willow will substantially increase greenhouse gas emissions. Indeed, BLM repeatedly acknowledged in its NEPA evaluation that Willow's emissions, and its contribution to climate impacts, will be significant. *See* 5-ER-959; *see also* 6-ER-1170 (describing Willow's expected production and associated emissions). Such emissions will increase the sea ice loss driving the species toward extinction. *See* 4-ER-840–844.

While BLM assessed some of Willow's impacts on listed species in its biological assessments sent to the Services, those assessments did "not discuss how Willow's [greenhouse gas] emissions may affect these species." 1-ER-103. Only after receiving public comments pointing out the need for consultation on the full range of impacts, and just weeks before it approved Willow, did BLM assert in a short memorandum to the Services that it need not consult on greenhouse gas emissions. 6-ER-1274–1279. In doing so, BLM did not deny that its approval of the Project (even apart from the indirect effects the agency failed to consider in its NEPA analysis) *will* contribute in some manner to the ongoing loss of sea ice on which polar bears and seals are dependent. Rather, without even saying what kind of legal finding it was making vis-à-vis the ESA regulations (*i.e.*, "no effect," "may affect," or "may affect but not likely to adversely affect"), BLM declared that, because it lacked the scientific "precision" to evaluate "*precise* effects to *individual* animals" in specific areas, it need not consult with the Services on Willow's emissions. 6-ER-1277–1278 (emphasis added).

The Services summarily agreed—without conducting any analysis of their own—that consultation about the effects of Willow's emissions was not necessary. As such, neither FWS nor NMFS included such effects in their consultations analyzing Willow's other impacts. *See* 6-ER-1311 to 7-ER-1480; 7-ER-1505–1546. This flouted the Services' obligations to apply their expertise to the question

of whether, and to what extent, Willow's greenhouse gas emissions are likely to adversely affect polar bears and ice seals.

There can be no doubt that the greenhouse gas emissions from a massive oil project in the Arctic that BLM admits will have significant climate impacts "may" affect climate-threatened polar bears and ice seals such that the Services should have considered these effects in the consultations on Willow. *See supra* p. 43. Indeed, the available science indicates that such effects are certainly "plausible." For example, a leading study (Notz & Stroeve 2016) determined that each metric ton of emissions results in a sustained loss of approximately three-square meters of September Arctic sea ice. 4-ER-840–844; *see also* 6-ER-1416 (FWS noting that "the decline of [summer] sea ice habitat due to changing climate, driven primarily by increasing atmospheric concentrations of greenhouse gases, is the primary threat to polar bears."). This means that the more than 239 million metric tons of greenhouse gas emissions from Willow, 6-ER-1170, will lead to the loss of several hundred square kilometers of sea ice. Another study (Molnar *et al.* 2020)—that neither BLM nor the Services ever mentioned—analyzed how many "days that polar bears can fast before cub recruitment and/or adult survival are impacted and decline rapidly." 4-ER-799–805. The study assesses anticipated increases in ice-free days in different Arctic regions, under different emissions scenarios, to project

when these reproduction and survival thresholds will be exceeded in different polar bear populations. *Id*.

Together, this science, and other information available to the Services, show not only that impacts to polar bears and ice seals from Willow's emissions are plausible, but that there is a direct link between increased greenhouse gas emissions and increased ice-free days, rendering the effects to these species from Willow's emissions reasonably foreseeable.

That Willow's climate impacts on polar bears and ice seals are only a fraction of the *cumulative* greenhouse gas emissions threatening these species with extinction does not excuse the agencies from complying with the consultation process for such effects. The agencies must still evaluate, based on the best available science, the extent of such effects, and whether and how to minimize and mitigate them. *See Conner*, 848 F.2d at 1453 (citation omitted) (holding that under the ESA, the Service must consider "all the possible ramifications of the agency action" based on the best available scientific information). Yet the Services skipped this step entirely. And while the agencies may be able to articulate a reasonable, science-based rationale for limiting consultations on greenhouse gas

emissions in some circumstances as a part of making the likely/not likely adverse effects determinations, they have not done so here.[6]

A closer examination of NMFS's and FWS's responses to BLM's memo, detailed in the following sections, underscores the arbitrary and unlawful nature of the agencies' approach.

C. NMFS's concurrence with BLM regarding Willow's effects on bearded and ringed seals was arbitrary.

The entirety of NMFS's review of Willow's greenhouse gas emissions is the single sentence found in its emailed response to BLM's memo: "Without commenting on the conclusion that BLM has drawn, we agree that the scope of the ESA Section 7 consultation with respect to [greenhouse gas] emissions is appropriate." 7-ER-1547. In other words, it agreed no consultation at all was necessary for Willow's greenhouse gas emissions. This naked conclusion cannot survive basic Administrative Procedure Act review. Indeed, it does not even begin to engage in a reasoned analysis of the facts before the agency, let alone set forth a "satisfactory explanation," *Native Ecosystems Council*, 418 F.3d at 965 (citation

[6] Other federal agencies have established thresholds for greenhouse gas emissions that trigger various statutory requirements. *See, e.g.*, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14,104, 14,115 (Mar. 11, 2022) (Federal Energy Regulatory Commission establishing 100,000 metric tons or more per year of carbon dioxide equivalent as the de facto threshold for significance for NEPA evaluations of liquified natural gas projects).

omitted), for why NMFS deemed it "appropriate" to disregard Willow's climate-related effects on bearded and ringed seals.

Any notion that this error was "harmless," 1-ER-107–108, contravenes this Court's repeated recognition of the importance of following the consultation process (which includes consideration of the best available science), and its instruction that "[t]he failure to respect the [consultation] process mandated by law cannot be corrected with post-hoc assessments of a done deal." *Houston*, 146 F.3d at 1129. NMFS's conclusory, unexplained rationale for allowing BLM to avoid consultation on this issue, and NMFS's resulting failure to consider the issue in its letter of concurrence, were unlawful.

D. FWS's failure to consult on the additive impacts of Willow's greenhouse gas emissions on polar bears was arbitrary.

Because FWS's biological opinion does not at all consider the additive harmful impact to polar bears of Willow's contribution to climate change, Defendants must rely on FWS's email, hastily drafted just two days after BLM sent its memo, as the basis for sidestepping that evaluation. But that email only compounds the arbitrary nature of FWS's approach to this vitally important issue.

FWS's email treated BLM's memo as a "no effect" determination for Willow's greenhouse gas emissions. *See* 6-ER-1273. FWS stated that it could not as a policy matter agree with a "no effect" conclusion, but nevertheless agreed with BLM that such climate effects need not be considered, without ever determining

based on the best current science whether Willow's emissions are likely, or not likely, to adversely affect the polar bear. *See id.* FWS's justifications for its position are inadequate.

First, FWS stated that when it listed the emperor penguin in 2022, FWS was "unable to draw a causal link between the effects of specific [greenhouse gas] emissions and take of the emperor penguin." *Id.* (citation omitted). But "[w]hether [Willow's greenhouse gas emissions] effectuate a 'taking' under Section 9 of the ESA is a distinct inquiry from whether they 'may affect' a species or its critical habitat under Section 7." *Karuk Tribe*, 681 F.3d at 1028. Moreover, that FWS believes there is insufficient evidence to link greenhouse gas emissions to take of penguins in Antarctica for purposes of creating "more specific [take] regulations," 87 Fed. Reg. 64,700, 64,704 (Oct. 26, 2022), says nothing about how Willow's emissions might affect polar bears in the Arctic—a matter the ESA required FWS to address in the Willow-specific consultation.

The second rationale in FWS's email was its "consistently held . . . position since . . . 2008," clearly referring to a legal memorandum authored by then-Solicitor of the Interior, David Bernhardt ("M-Opinion"). The M-Opinion concluded based on statements from the U.S. Geological Survey (USGS) at that time that "it is *currently* beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts at

an exact location." 6-ER-1303 (emphasis added). After discussing whether sufficient causal connections allowed for assessments of specified localized impacts—the nearly identical rationales stated by BLM in its memo—the M-Opinion concluded that:

> Based on the USGS statement, and its continued scientific validity, . . . where the effect at issue is climate change in the form of increased temperatures, a proposed action that will involve the emission of [greenhouse gases] cannot pass the "may affect" test and is not subject to consultation under the ESA . . . .

6-ER-1309.

Whatever its validity at the time it was issued, the M-Opinion by its own words—basing its conclusions on the state of climate science in 2008 and not even mentioning sea ice loss—limits any applicability or relevance 15 years later. It cannot be used as a permanent excuse to avoid conducting any scientific assessment of the effects of greenhouse gas emissions on polar bears, particularly given scientific advances since 2008. Rather than grappling with (or even citing) any of the current science, FWS's email largely echoed the M-Opinion to disclaim any need to consider Willow's most significant threat to polar bears. Specifically, FWS stated "that an estimate of a project-caused decrease in sea ice occurring somewhere in the Arctic, without more specific information . . . does not enable us to predict any 'effects of the action'" on polar bears. 6-ER-1273. In doing so, FWS essentially acknowledged that Willow's emissions will affect polar bears in

some manner, but that it did not have to consider such effects because the "specific" or "precise" effect is not determinable. This rationale unlawfully allowed FWS to avoid consultation on this issue altogether and ignore how Willow will contribute to the single gravest threat to polar bears, flouting the ESA.

In enacting the ESA, Congress recognized that the Services would not always be able to quantify or precisely evaluate the impacts of an action on listed species. That is why the statute requires reliance on the *best available* science, not perfect data, *see* 16 U.S.C. § 1536(a)(2), and why Congress recognized that addressing some types of threats would need surrogates and other qualitative approaches, *see Or. Nat. Desert Ass'n v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007).

As such, consultations are routinely required or completed where the action agency and the Services do not (and will never) have precise information about the action's impacts. National consultations on pesticide registrations are required even though no one could ever predict if, where, or when innumerable third parties might choose to apply them, let alone know for certain that a particular listed species will be present at the exact time a pesticide will be used. *See Ctr. for Food Safety v. Regan*, 56 F.4th 648, 652 (9th Cir. 2022). Likewise, consultations have been required on the potential use of fire retardants nationwide even though the timing and location of wildfires—let alone the specific suppression techniques

used at a given moment—could never be predicted with any granularity or precision. *See*, *e.g.*, *Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1256-57 (D. Mont. 2005). Similarly, the D.C. Circuit rejected a "no effect" determination due to "the lack of a reasonable causal connection" between the approval of the Renewable Fuel Standard (implemented through countless actions of third parties in the Midwest) and impacts to listed species in the Gulf of Mexico a thousand miles downstream. *Growth Energy v. EPA*, 5 F.4th 1, 30-32 (D.C. Cir. 2021).

By requiring consideration of the best available science, the ESA simply does not allow FWS to "use insufficient evidence as an excuse for failing to comply with" its obligation to consider Willow's climate impacts on polar bears. *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001); *see also Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) ("Even if the available scientific . . . data were quite inconclusive, [the agency] may—indeed must—still rely on it" (citation omitted)). Indeed, this Court has already rejected the notion that the Services must wait until they have "highly specified data" regarding the impacts of sea ice loss on a species before acting to protect that species. *Alaska Oil and Gas Ass'n*, 840 F.3d at 683. And it has also already rejected FWS's attempt to avoid analyzing all consequences to listed species from oil and gas leasing based on the lack of information regarding the "precise

location" of activity under those leases where FWS had relevant information regarding the behavior and habitat needs of the impacted species. *Conner*, 848 F.2d at 1453. In doing so, the Court noted the importance of consultations in the face of incomplete information for species with "large home ranges . . . to avoid piecemeal chipping away of habitat." *Id.* at 1454.

The same is true here. That the available information does not show precisely where sea ice loss will occur is no defense to FWS's failure even to consider how such habitat loss could affect polar bears in its consultation. *See, e.g.*, *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1233-34 (E.D. Wash. 2016) ("The fact that there is no model or study specifically addressing the effects of climate change [in a particular area] does not permit the agency to ignore this factor."). That the available studies do not show sea ice loss will occur within the "action area" is likewise no excuse. *Contra* 1-ER-111. The "action area" for purposes of ESA consultation must include "all areas to be affected directly or indirectly by the [] action" under review, 50 C.F.R. § 402.02; it cannot be used to constrain the analysis of reasonably foreseeable impacts from Willow.[7]

[7] This Court's decision in *CBD v. BLM* makes clear the district court was also wrong to agree with FWS that because the agency engaged in formal consultation on some of Willow's impacts on polar bears, it is absolved from independently evaluating whether there are other impacts from Willow that might affect polar bears that should have also been evaluated through the consultation process. *Contra* 1-ER-102; *see supra* p. 40.

In short, here, the ESA required FWS to use whatever information is available "to develop projections" about the impacts of Willow's emissions on polar bears. *Conner*, 848 F.2d at 1454. FWS did not, as its two-day review of BLM's memo illustrates. Its failure to do so was arbitrary, and this Court should remand to the agency with direction to proceed to the next step of the analysis required by the ESA to properly determine whether Willow's emissions are likely to adversely affect polar bears.

E. BLM's reliance on the consultations violates the ESA.

For the above-stated reasons, the Willow ESA consultations are unlawful. Thus, BLM's reliance on the ESA consultations to authorize Willow, *see*, *e.g.*, 6-ER-1175, was also unlawful. *Liberty*, 982 F.3d at 751.

VI. Vacatur is the presumptive remedy and is merited here.

When a court finds an agency's decision unlawful under the Administrative Procedure Act, vacatur is the standard remedy. 5 U.S.C. § 706(2)(A) (courts "shall . . . set aside" unlawful agency action); *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (vacatur "normally accompanies a remand"). Conversely, remand without vacatur is appropriate only in "rare," *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010), or "limited circumstances," *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (citation omitted).

To evaluate whether such rare circumstances exist, courts consider, *inter alia*, whether vacatur risks environmental harm, *see Pollinator Stewardship Council*, 806 F.3d at 532, and whether vacatur would lead to results that are inconsistent with the governing statute, *see Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (per curiam). Courts also "weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Nat'l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020) (citation omitted). These factors warrant vacatur here, and Defendants cannot carry their burden of proving otherwise. *See All. for the Wild Rockies*, 907 F.3d at 1121-22 (burden is on defendants to "overcome" the presumption of vacatur).

First, vacatur would not cause any environmental harm. This is not a situation in which the agencies promulgated standards to protect natural resources or endangered species, such that vacatur of those standards would cause more environmental harm than leaving them in place. *Cf. Cal. Cmtys. Against Toxics*, 688 F.3d at 993-94 (declining to vacate air quality plan in part to avoid pollution from interim use of diesel generators); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (declining to vacate ESA listing decision to prevent the "potential extinction" of a species). Rather, vacatur would simply halt

construction during the remand, preventing further environmental harm from on-the-ground activities.

Second, vacatur is fully consistent with the purposes of NEPA, the Reserves Act, and the ESA. NEPA "emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decisionmaking to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 927 (9th Cir. 2015) (citations omitted). Similarly, BLM is obligated to carefully consider and minimize adverse impacts on the Reserve's surface resources *before* approving oil and gas activities. *See* 42 U.S.C. § 6506a(b). And "the 'language, history, and structure'" of the ESA "'indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.'" *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978)).

Third, BLM's and the Services' errors are serious. For example, BLM's failure to consider a reasonable range of alternatives strikes at "the heart" of the agency's NEPA analysis, *Or. Nat. Desert Ass'n*, 625 F.3d at 1100, and substantially constrained both the outcome of the agency's decision and the public's understanding of how the decision balanced oil production against the need to protect the Reserve's environmental values. *Supra* pp. 25-27. So too with

the agencies' failures to consult on Willow's carbon emissions and their effects on polar bears and ice seals: far from a procedural technicality, that omission undercuts the "heart of the ESA," *Kraayenbrink*, 632 F.3d at 495, by failing to ensure that the ESA's substantive protections for these species are effectuated. *Supra* pp. 41-46. The agencies' other legal errors, detailed above, are equally serious. Given these "fundamental flaws," vacatur is appropriate because it is "unlikely that the same [decision] would be adopted on remand" or because, at least, "a different result may be reached." *Pollinator Stewardship Council*, 806 F.3d at 532. And even if there were uncertainty on this point, it does not "tip the scale." *NRDC v. EPA*, 38 F.4th 34, 52 (9th Cir. 2022).

Finally, ConocoPhillips' and other stakeholders' anticipated assertions of disruptive consequences during a remand period are either baseless or a normal consequence of vacatur. Consequences to ConocoPhillips are purely financial and largely "self-inflicted," resulting from the company's "own decisions about how to proceed in the face of litigation." *Sierra Club v. Trump*, 929 F.3d 670, 706 (9th Cir. 2019), *stay granted on other grounds by Trump v. Sierra Club*, 140 S. Ct. 1 (2019). It and other Intervenors have argued that even a temporary delay in construction would jeopardize the entire Project by putting ConocoPhillips' leases at risk of expiration. But, as the district court recognized, the Reserves Act provides that no lease "shall expire" where the lessee fails to produce oil "due to

circumstances beyond [its] control," *see* CR 82 at 36 n.144 (quoting 42 U.S.C. § 6506a(i)(6)), and vacatur is such a circumstance. Any alleged consequences that would result only if Willow were terminated—such as lost tax revenue from Project operations or weakened energy security—are therefore irrelevant to the vacatur inquiry.

Potential harm to other Intervenors from Project delay, such as near-term job losses, are the kind of economic impacts that, even if significant, do not by themselves present the "rare" or "limited" circumstances in which remand without vacatur might be appropriate. *See, e.g.*, *Nat'l Family Farm Coal.*, 960 F.3d at 1145 (holding seriousness of agency's error "compel[led]" vacatur, despite resulting economic harm to innocent third-party stakeholders); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1051, 1053 (D.C. Cir. 2021) (affirming vacatur given the "seriousness of the NEPA violation," even though shutting down pipeline operations would economically harm company and other entities).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision dismissing Plaintiffs' claims with prejudice; declare that the federal government's approval and underlying environmental reviews of Willow violated

NEPA, the Reserves Act, the ESA, and the Administrative Procedure Act; and vacate and remand those actions to the agencies.

Respectfully submitted this 29th day of December, 2023.

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

9th Cir. Case No. 23-3624

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ADDENDUM