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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATURAL RESOURCES DEFENSE COUNCIL *et al.*,

Plaintiffs,

v.

DOUG BURGUM *et al.*,

Defendants,

and

NORTH SLOPE BOROUGH *et al.*,

Intervenor-Defendants.

Case No. 3:20-cv-00205-SLG

**PLAINTIFFS' REPLY BRIEF**

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## INTRODUCTION

Defendants' decisions to maximize oil and gas interests by opening the entire Coastal Plain to leasing violate the APA, Refuge Act, ANILCA, Wilderness Act, ESA, Tax Act and OBBBA. Defendants' and Intervenors' arguments to the contrary rely on fundamental misreadings of the Tax Act and OBBBA. The statutes do not prioritize oil and gas leasing over other management considerations. Nor do they relieve Defendants of their various other substantive and procedural statutory obligations. Defendants thus remain obligated to make compatibility findings, fulfill Refuge purposes, protect wilderness areas, consider alternatives to protect environmental and cultural values in the Refuge, and ensure their actions do not jeopardize endangered species, while establishing an oil and gas program that stays within the parameters of Defendants' authority as set out by Congress. Because Defendants failed to satisfy these core obligations, the Court should grant summary judgment for Plaintiffs and vacate Defendants' unlawful decisions.

## ARGUMENT

### I. Lack of Mootness

Plaintiffs' claims regarding the 2020 Program are not moot. "[A] case is not moot where *any* effective relief may be granted." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006). As such, demonstrating mootness is a heavy burden. *Id.* Defendants have not carried it here.

Plaintiffs' challenges regarding the 2020 Program remain live because there is "a present controversy as to which effective relief can be granted." *Nw. Env't Def. Ctr. v.*

*Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988). Defendants' central premise is that the claims against the 2019 FEIS, 2020 Program, and 2020 BiOp are moot because the decisions have been superseded. Doc. 180 at 29-30. That might have been true if Plaintiffs only sought vacatur of those programmatic decisions. But "that is not the only form of effective relief that [Plaintiffs] seek[] or that the district court may grant." *See Forest Guardians*, 450 F.3d at 462.

In addition to vacatur, Plaintiffs seek declaratory relief that the decisions were unlawful and—more importantly—vacatur of "actions taken by Defendants in reliance on" those unlawful decisions, including the "issuance of leases" in 2021. Doc. 150 at 50-51. As this Court has recognized, relief in this case "may include . . . the recission of leases" issued in 2021. Doc. 69 at 24 n.91. Because those leases remain, effective relief concerning the underlying decisions remains available, and Plaintiffs' claims relating to those decisions are not moot.[1]

Defendants are wrong that "[a]ny obligations or consequences now flow from the 2025 BiOp and ROD." Doc. 180 at 29. No one disputes that the 2021 leases were issued under the 2020 Program. While Defendants suggested in May 2025 that BLM *might* "void" the leases "issued in 2021," Doc. 120 at 5, it did not. Instead, the Department of Interior "terminate[d]" the leases' suspension and "affirm[ed] the leases without

[1] The active 2021 leases also distinguish this case from those cited by Defendants, where a new agency decision eliminated any ongoing effect from the challenged decisions. *See Sovereign Iñupiat for a Living Arctic v. Burgum*, No. 25-cv-00356-SLG, 2026 WL 215560, at *2-3, *5 (D. Alaska Jan. 27, 2026); *Native Vill. of Point Hope v. Salazar*, 680 F.3d 1123, 1131 (9th Cir. 2012).

modification." AR522428. It did so based on a conclusion that the "record before the Department *at the time that the leases were issued* was legally sufficient to support the leases." AR522432 (emphasis added). Thus, the 2021 leases were issued *and reaffirmed* based on the 2020 Program, and their legality should be evaluated based on that record. *Cf. 350 Montana v. Haaland*, 50 F.4th 1254, 1264 (9th Cir. 2022) (challenge not moot when superseding assessment "expressly incorporated" earlier assessment).

Defendants cannot avoid this outcome by claiming the leases were "cancelled but then reinstated pursuant to the 2025 ROD." Doc. 180 at 29; *see also* Doc. 185 at 28-29. There was no occasion for Defendants to "reinstate" the 2021 leases under the 2025 Program. When this Court vacated the lease cancellations, *see Alaska Indus. Dev. & Exp. Auth. v. U.S. Dep't of the Interior*, No. 24-cv-00051-SLG, 2025 WL 903331, at *7-8 (D. Alaska Mar. 25, 2025), the leases were automatically "reinstate[d]" by operation of law, *see Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). There was therefore nothing for Interior to "reinstate" when, months later, it finalized the 2025 Program. Nor could Interior's decision to lift the remaining suspension and affirm the leases "without modification," AR522428, transform leases issued under the 2020 Program into actions only redressable through a challenge to the 2025 Program.

Because the Court can still grant relief as to the 2021 leases, Plaintiffs' claims against the 2019 FEIS, 2020 Program, and 2020 BiOP are not moot.

## II. Violations of the Refuge Act, ANILCA, and Wilderness Act

### A. The Secretary violated the Refuge Act by failing to make and explain compatibility determinations.

No one disputes that the Secretary failed to make a written compatibility finding for both Programs. Defendants and Intervenors instead argue that the Refuge Act's compatibility requirement did not apply. They are wrong.

Congress's mandate to implement an oil and gas program on the Coastal Plain did not override the Secretary's obligation to make a compatibility finding under the Refuge Act. *Contra* Doc. 180 at 37; Doc. 185 at 24. The Tax Act did not supersede the Refuge Act explicitly or otherwise set aside any preexisting Refuge purposes. Nor are the Refuge Act's compatibility requirements irreconcilable with the commands in the Tax Act or OBBBA. *See Me. Cmty. Health Options v. United States*, 590 U.S. 296, 315 (2020). And while Congress mandated aspects of the 2020 and 2025 Programs, it left it to the Secretary to design a compatible program. *See* Doc. 172 at 18-19. It is the choices the Secretary made, beyond Congress's mandate, that necessitated a compatibility finding. *Cf. Cook Inletkeeper v. U.S. Dep't of the Interior*, 740 F. Supp. 3d 767, 778 (D. Alaska 2024) (concluding that lease-sale mandate did not so limit agency discretion "so as to render NEPA inapplicable").

Defendants' and Intervenors' reliance on the distinction between a "purpose" and "use" under the Refuge Act is also misplaced. *E.g.*, Doc. 180 at 37; Doc. 183 at 17. The Tax Act's addition of an "oil and gas program" as a purpose did not supplant the compatibility requirement. Defendants' arguments otherwise ignore the Refuge Act's plain text, which requires a compatibility finding for the "use of any area . . . *for any purpose*." 16 U.S.C. § 668dd(d)(1)(A) (emphasis added). That a new "use" implements a "purpose" is therefore no escape from the Act's compatibility mandate.[2] Indeed, the Act requires that the use must be compatible with the relevant refuge's "major purposes"—plural. *Id.*; *see also id.* § 668ee(1) (defining "compatible use"). Furtherance of a *single* purpose does not suffice.[3] *Cf. Native Vill. of Hooper Bay v. Burgum*, No. 25-cv-00316-SLG, 2026 WL 2409781, at *11 (D. Alaska Aug. 18, 2026) (concluding that "for the purposes" in ANILCA required consideration of all purposes).

The Refuge Act's compatibility mandate for purpose-supporting uses also makes sense. In most cases, where there is little (if any) conflict among refuge purposes, compatibility determinations will be simple. But cases like this—where purposes are in tension—underscore the need for a written compatibility determination to ensure all purposes are honored. *See* Doc. 172 at 19-20.

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[2] *Tulelake Irrigation District v. U.S. Fish & Wildlife Service* is not to the contrary. 40 F.4th 930 (9th Cir. 2022); *contra* Doc. 183 at 17; Doc. 185 at 25 n.59. The *Tulelake* court held that agriculture on leased land was not a refuge purpose. 40 F.4th at 937. The court thus had no occasion to—and did not—opine on whether the Refuge Act requires a compatibility finding for a use that implements one of many refuge purposes. As shown above, the plain text of the Act clearly does.

[3] Defendants' remaining cases are inapposite. *Fund For Animals v. Clark* merely confirmed that non-economic activities by refuge managers are not "uses" requiring a compatibility determination. 27 F. Supp. 2d 8, 11-12 (D.D.C. 1998). And *Town of Superior v. U.S. Fish & Wildlife Service* held that land exchanges regulated under a separate part of the Refuge Act are not a "use" subject to the compatibility mandate. 913 F. Supp. 2d 1087, 1111-12 (D. Colo. 2012).

The Refuge Act's limited exceptions to the compatibility determination do not apply here. *Contra* Doc. 180 at 38. The Act's exception for activities "permitted . . . by express provision of the law," 16 U.S.C. § 668dd(c), does not apply because neither Program was mandated by the Tax Act or OBBBA. *Supra* p. 4. The Refuge Act's exception for activities "performed by persons authorized to manage" a refuge, *see* 16 U.S.C. § 668dd(c), is also inapposite: it is the *lessees*—not the Defendants that manage the Refuge—who will undertake the new activities under the Programs.

Unable to find support in the Refuge Act itself, Defendants and Intervenors resort to Service policy guidance. Doc. 180 at 38; Doc. 183 at 18. Agency guidance cannot supplant a statutory obligation. *See Bittner v. United States*, 598 U.S. 85, 97 (2023). But even if guidance could, it would not do so here. Even assuming the Service lacks control over activities under the Programs, *see* Doc. 183 at 18, the Secretary does not. And because the Refuge Act places the ultimate responsibility for compatibility *on the Secretary*, *see* 16 U.S.C. §§ 668dd(d), 668ee(12), the Secretary cannot escape that obligation by claiming *the Service* lacks authority to act.

### B. The Secretary failed to meet his obligation under the Refuge Act and ANILCA to ensure all Refuge purposes were "fulfilled."

Defendants' and Intervenors' responses fail to acknowledge—much less show compliance with—the Secretary's obligation in developing the Programs to ensure other Refuge purposes were "fulfilled." To begin with, they misrepresent Plaintiffs' argument. Plaintiffs do not assert that original Refuge purposes take priority over the oil and gas purposes for the Coastal Plain or that every acre must be managed for every purpose.

Doc. 180 at 32-33. Plaintiffs instead ground their argument on the specific requirements in the Refuge Act and ANILCA that the Refuge and the Coastal Plain be managed to "fulfill" their multiple purposes. Doc. 172 at 20-21.

Defendants never acknowledge this obligation, instead asserting that they have met the laws' requirements because they acknowledged and addressed in some way all statutory purposes, Doc. 180 at 31, relying on the 2025 ROD's conclusion that the Program "does not defeat" the other non-oil and gas purposes, *id.* at 32. But Congress did not merely require that the agency acknowledge the purposes. And the duty to "fulfill" purposes requires more than not defeating them. *See* Webster's Third New International Dictionary 918 (1971) (defining "fulfill" as to "carry out" or "accomplish").

Nor do the Refuge Act or ANILCA grant the agency "broad discretion" over the degree to which it could meet the statutory purposes. *Contra* Doc. 180 at 33. The cases Defendants cite construe multiple-use statutes governing the U.S. Forest Service and BLM, where courts have recognized broad discretion in balancing uses across managed lands. But the Refuge Act and ANILCA are different. In these statutes, Congress directed the agency to do its best to "fulfill" each of the Refuge purposes when designing a program. Doc. 172 at 22. True, adopting a program to fulfill the oil and gas purpose for the Coastal Plain will result in harm to conservation and other Refuge purposes. But here, where the agency acknowledged that its selected Programs would cause more harm[4] to the original Refuge purposes than other alternatives that also complied with the Tax Act and OBBBA, *see* Doc. 172 at 19-20, the agency lacks discretion to adopt the selected Programs without justification.

Intervenors go further, arguing that Congress has "rebalanced" the statutory purposes for the Coastal Plain, Doc. 183 at 16, or dictated the framework for the Program, Doc. 185 at 20; or even that the other statutory purposes do not apply in the Coastal Plain, *id.* at 21. The Tax Act and OBBBA refute these assertions. While the Tax Act added an oil and gas purpose, neither statute removed the pre-existing purposes for the Coastal Plain.[5] And the minimum requirements for leasing in the statutes, including the OBBBA requirement to use lease stipulations from the 2020 Program, did not preclude the Secretary from designing the Programs in ways that maximize the protection of those other purposes—the agency retains substantial discretion, including over how much and where to offer lands for lease and where to allow seismic exploration. Doc. 172 at 21-22.

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[4] AIDEA's assertion that Plaintiffs make contradictory arguments by citing the agency's recognition of harm to the original purposes, Doc. 185 at 21, is premised on a mischaracterization: Plaintiffs argue that the agency's obligation is to "fulfill" the purposes, not merely to acknowledge impacts to them.

[5] Defendants' alternative argument that the addition of an oil and gas purpose was intended to make it the dominant purpose, Doc. 180 at 33 n.5, fails for the same reason. Congress added an additional purpose; it gave no indication that the previously established purposes for the area were repealed. *Cf.* 163 Cong. Rec. S7538-40 (daily ed. Nov. 30, 2017) (statement of Sen. Murkowski).

Alaska Industrial Development and Export Authority's (AIDEA) assertion that Congress must have intended leasing in derogation of other purposes because the required lease sales exceed the size of the Coastal Plain, Doc. 185 at 22-23, is also inconsistent with the statutory language. Congress could not have intended the impossible—leasing more land than exists on the Coastal Plain. Instead, the language illustrates the opposite: Congress expected successive sales might offer the same acres until those areas received a winning bid, especially considering the requirement to offer leases in the highest oil potential areas. Regardless, the requirement to offer certain amounts of land cannot be read to generally relegate the Refuge's other designated purposes to second-tier status. Similarly, AIDEA's attempt to demote other purposes based on Congress' use of the word "area-wide," Doc. 185 at 23, also runs aground on the statutory language—the statute's direction to lease 400,000 acres rather than the whole area obviously cannot be understood as an obligation to offer for lease the whole area.

**C. The Secretary violated the Wilderness Act.**

Again, Defendants mischaracterize Plaintiffs' argument, suggesting it is premised on an assertion that the existence of the adjacent designated Mollie Beattie Wilderness Area precludes oil and gas activity on the Coastal Plain. Doc. 180 at 34. To the contrary, Plaintiffs recognize that the obligation to manage lands with an eye toward protecting adjacent designated wilderness areas has limits, Doc. 172 at 23, but argue the Secretary failed even to consider this obligation when adopting the Programs.

Defendants apparently recognize the obligation to protect adjacent designated wilderness areas when making decisions about oil and gas development, but argue that the obligation only applies when specific projects are proposed. Doc. 180 at 34-35. Although specific exploration or development proposals for the Coastal Plain would trigger that obligation, that does not mean there is no obligation at the program stage, where the agency is making fundamental decisions that can affect adjacent designated wilderness. Indeed, whether to lease lands closest to the designated wilderness is likely the most significant decision the Secretary will make in respect to impacts on adjacent wilderness areas. And yet the Secretary appears not to have recognized or acted on this obligation at the program level, even though he considered alternatives that would have met the oil and gas purpose but reduced wilderness impacts. Doc. 172 at 23. The Secretary thus violated his obligations under the Wilderness Act.

Once again, Intervenors go further than Defendants, arguing that Wilderness Act obligations end at the boundary of the designated wilderness areas or that Congress repealed those obligations here. Doc. 183 at 20; Doc. 185 at 25. Neither is correct. While Congress clarified in other statutes that designation of a particular wilderness did not impose obligations outside the designated area, *see, e.g.*, Michigan Wilderness Act of 1987, Pub. L. No. 100-184, § 7, 101 Stat. 1274, 1277, Congress did no such thing here, either when it designated the Mollie Beattie Wilderness Area, *see* ANILCA § 702(3), or in the Tax Act or OBBBA. Nor does the fact that the Tax Act and OBBBA were later enacted undercut the Wilderness Act obligation to protect with reasonable measures the adjacent designated wilderness, *contra* Doc. 185 at 25-26, because there is no conflict—much less an irreconcilable conflict—between the statutes. *See Me. Cmty. Health Options*, 590 U.S. at 315. Indeed, the Secretary could have reduced impacts to the wilderness by reducing the nearby land subject to leasing. Doc. 172 at 23.

Finally, AIDEA's argument that the Wilderness Act obligation does not apply because the BLM does not manage the wilderness area fails because the Secretary is charged with both the management (through the Service) of the National Wildlife Refuge System, 16 U.S.C. § 668dd(a), which includes the Refuge and wilderness area, *see* ANILCA § 702(3), and the development (through BLM) of the Programs, *see* Tax Act § 20001(a)(2). He thus must reconcile those equally applicable obligations. *Supra* p. 6-9.

## III. Violations of NEPA's alternatives requirement

Plaintiffs advance two claims that BLM failed to comply with NEPA's central mandate to assess "a reasonable range of alternatives." 42 U.S.C. § 4332(2)(C)(iii). The first claim is aimed at the 2020 Program and its lease sale, against which AIDEA's leases issued in that sale must be judged. *Supra* p. 1-3. For that decision, adopted under the discretion afforded by the Tax Act, BLM failed to assess a reasonable range of alternatives because it declined to analyze an alternative that would better fulfill the Refuge's conservation purposes. Doc. 172 at 24-28. The second claim is aimed at the 2025 Program and its lease sale, which was adopted under OBBBA's more stringent constraints on BLM's discretion. For that decision, BLM failed to assess a reasonable range of alternatives because it assessed only one alternative that was feasible and lawful under OBBBA's new regime. *Id.* at 28-30.

Defendants and Intervenors focus much of their defense on the fact that BLM has prepared two lengthy NEPA documents over the years, suggesting that these many pages must be enough. But, as discussed below, they cannot point to where in these documents BLM undertook the critical analysis Plaintiffs argue is missing. Intervenors also lean heavily into *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168 (2025). Doc. 184 at 15-16, 18; Doc. 183 at 26-27; Doc. 185 at 60-62. As the American Petroleum Institute (API) recognizes, however, *Seven County* affirms that an agency's choice about alternatives must "fall within a broad zone of reasonableness." Doc. 184 at 18 (quoting *Seven Cnty.*, 605 U.S. at 183). BLM's choices not to analyze a viable conservation-focused alternative in the 2019 FEIS and to evaluate only a single lawful alternative in adopting the 2025 Program do not pass this test.

### A. BLM violated NEPA by adopting the 2020 Program without considering a conservation-focused alternative.

Defendants do not defend the adequacy of BLM's 2019 FEIS alternatives analysis at all, arguing incorrectly that Plaintiffs' claim is moot. Doc. 180 at 29-30, 45. As described *supra* p. 1-3, the claim is not moot: BLM relied on the 2019 FEIS and 2020 ROD to issue seven of AIDEA's current leases in the 2021 lease sale, and the Court can grant relief by declaring the 2019 FEIS inadequate and vacating those leases.

Only the North Slope Borough (NSB) Intervenors defend the 2019 FEIS's alternatives analysis on the merits, arguing that BLM's responses to comments justify its decision not to assess the missing alternative. Doc. 183 at 29. The record refutes their argument. In the pages they cite, BLM justifies its decision not to assess more protective alternatives on the grounds that a program 1) that opens fewer than 800,000 acres to leasing, AR91742-43, AR91853, AR91856, AR91874, AR91878, or 2) that would approve fewer than 2,000 acres of surface development, AR91755, AR91783, AR91952-53, AR90238, would violate the Tax Act. Both arguments incorrectly interpret the law, Doc. 172 at 26, 43-45, *infra* at p. 35-37, and thus cannot justify BLM's failure to examine a conservation alternative. *See Ctr. for Biological Diversity v. BLM*, 141 F.4th 976, 996-97 (9th Cir. 2025) (finding agency's mistaken interpretation of a regulation could not justify decision to limit the range of alternatives). In any case, no party cites any responses to the other elements of a conservation alternative commenters urged, including protecting sensitive habitat from leasing and seismic surveying and prohibiting surface occupancy of leased lands. *See* Doc. 172 at 25.

The NSB Intervenors also try to brush aside Plaintiffs' citation to BLM's incorporation of elements of the missing alternative in the 2024 SEIS. Doc. 183 at 30. But the fact that BLM analyzed more protective alternatives in 2024 illustrates that they were viable in 2019, too. NEPA thus obligated BLM to assess them. *See* Doc. 172 at 27.

**B. BLM violated NEPA by adopting the 2025 Program after considering only one permissible alternative.**

Under OBBBA, BLM was required to apply the "terms and conditions" adopted in the 2020 ROD, but it otherwise retained the same discretion it had under the Tax Act, including about where to lease and allow seismic surveying on the Coastal Plain. NEPA required BLM to inform its exercise of this discretion by preparing "a detailed statement" containing "a reasonable range of alternatives to the proposed agency action . . . ." 42 U.S.C. § 4332(2)(C)(iii). BLM violated this clear command to assess a "reasonable *range* of alternatives" by assessing only *one* alternative that would satisfy the OBBBA's terms and conditions mandate.

No party disputes that BLM assessed only one alternative (Alternative B in the 2019 FEIS, adopted in the 2020 Program) that examines the impacts of adopting a program with the "terms and conditions" now mandated by OBBBA. All the other alternatives BLM analyzed in the 2019 FEIS and 2024 SEIS included terms and conditions that differ from Alternative B and thus, if adopted, would violate OBBBA. *Compare, e.g.*, AR507036 (requiring no AIR surveys under ROP 10 in 2020 ROD), *with* AR389324 (requiring two AIR surveys under ROP 10 for all 2024 alternatives); *see also, e.g.*, AR5397 (outlining different Lease Stipulation 1 requirements under all alternatives assessed in 2019).

Because OBBBA prohibits BLM from adopting ROPs and stipulations that are more (or less) protective than those in Alternative B, these other alternatives, with their different terms and conditions, cannot form a "reasonable range" of alternatives for BLM's post-OBBBA program decisions.

BLM's error undercuts the core purpose and function of NEPA: to inform the public and decisionmakers about the environmental consequences and alternatives to proposed actions. *WildEarth Guardians v. U.S. Dep't of Agric. Animal & Plant Health*

*Inspection Serv. Wildlife Servs.*, 135 F.4th 717, 727-28 (9th Cir. 2025). By considering only a single alternative that would comply with the governing law, BLM deprived itself (and the public) of information needed to weigh that alternative against others that could meet Congress's requirements with less impact on the Refuge. Missing are alternatives that analyze and compare the impacts of opening different areas to leasing and seismic surveying under the OBBBA-mandated terms and conditions. BLM's failure to assess such alternatives in this context violates NEPA's core alternatives mandate. *See* Doc. 172 at 27-28.

Defendants and Intervenors' arguments to the contrary fail. Defendants' argument that agencies are not required to assess alternatives that are infeasible, Doc. 180 at 45-47, misses the point. Aside from 2019's Alternative B, BLM has analyzed *only* infeasible alternatives here. The missing alternatives, by contrast, are feasible because they reflect both what OBBBA requires (set terms and conditions) and what it left BLM to decide (where to allow leasing and seismic). For this reason, *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management*, which affirmed BLM's decision not to assess alternatives that the Court found inconsistent with the Reserves Act, is not on point. 701 F. Supp. 3d 862, 879-82 (D. Alaska 2023); *contra* Doc. 180 at 46.

Similarly, Defendants' reliance on the rule that agencies can adopt minor variations on alternatives that are in the spectrum of those analyzed in an environmental impact statement, Doc. 180 at 48-49, is misplaced. Because only 2019's Alternative B contains the mandated terms and conditions, and the no-action alternative is not feasible considering OBBBA's lease sale mandate, BLM analyzed no spectrum of feasible alternatives from which it could adapt its final action.

*Earth Island Institute v. U.S. Forest Service* does not support Defendants either. 87 F.4th 1054 (9th Cir. 2023). In that case, the Ninth Circuit concluded that the agency reasonably assessed only an action alternative and a no-action alternative because the proposed additional alternatives were not significantly distinct from the action alternative the agency assessed. *Id.* at 1065-66. Here, alternatives that examine the impacts of opening fewer acres to leasing and seismic surveying than Alternative B under OBBBA-mandated terms and conditions would have significantly distinguishable impacts.[6] *See, e.g.,* FWS2025_00519-20 (explaining that under the chosen alternative, "all of" the terrestrial denning habitat in the Coastal Plain could be affected by seismic, and that "any polar bear dens in the area . . . could result in a disturbance response"); FWS2025_00478 (showing that denning habitat occurs throughout the entire Coastal Plain); AR389541 (explaining how Alternative D2 protected "the most acreage" of denning habitat including by closing areas to leasing and limiting seismic). BLM's failure to analyze them thus fails *Earth Island*'s test.

AIDEA's assertion that the 2025 Program did not require additional NEPA analysis because OBBBA "selected" Alternative B and "required BLM to adopt that option" in its entirety, Doc. 185 at 64-65, finds no support in OBBBA. Congress could

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[6] In addition, the no-action alternative here was not feasible, unlike in *Earth Island Institute*, where the agency could have chosen not to undertake the forest management actions under consideration. *See* 87 F.4th at 1059-60.

have directed BLM to adopt the 2020 ROD in its entirety, but it chose not to. OBBBA's command is narrower: that BLM must (1) hold four additional lease sales, OBBBA § 50104(b)(1), (2) "offer the same terms and conditions" in those sales as contained in the 2020 ROD adopting Alternative B, *id.* § 50104(b)(1), and (3) offer at least 400,000 acres in each sale, *id.* § 50104(b)(3). While these constraints are material, they still unambiguously leave BLM with discretion to choose which areas within the Coastal Plain to open for leasing and seismic surveying. NEPA requires BLM to study the impacts of the alternative ways in which it could exercise its remaining discretion.[7]

API's insistence that OBBBA "simply []reaffirmed" the Tax Act, Doc. 184 at 17, so the prior alternatives remain feasible and sufficient, fails in the opposite direction: it elides the way in which the OBBBA restricts BLM's discretion. Because OBBBA requires BLM to adopt specific terms and conditions, the only feasible alternatives, after the OBBBA, are ones that apply the 2020 ROD's terms and conditions. The prior alternatives that all analyzed *different* terms and conditions are infeasible and cannot constitute the reasonable range required by NEPA.

[7] AIDEA's characterization of Plaintiffs' argument in footnote 236, Doc. 185 at 65, and its argument that no alternative analysis is required absent congressional instruction, *id.*, proceed from the same flawed premise. Congress did not direct BLM to adopt a particular program. It set parameters within which BLM was required to act. These parameters left BLM with choices to make, and NEPA requires it to inform those choices.

## IV. Violations of the ESA

Plaintiffs' opening brief showed that the 2020 and 2025 BiOps violate the ESA by 1) relying on future compliance with the MMPA; 2) relying on ineffective and uncertain mitigation measures; 3) misusing relevant information on population decline; and 4) ignoring information about female recruitment. *See* Doc. 172 at 30-42. Defendants fail to rebut any of these claims. Their central argument is that the deficiencies in the BiOps either do not exist or are unimportant because the BiOps are programmatic, and they ask the Court to trust that future processes and independent third-party decisions will fix any problems. But in so arguing, they misrepresent both the record and the law. The BiOps contain insufficient and arbitrary analysis, including relying on uncertain and unspecific mitigation measures. And future consultations cannot cure insufficient analyses in a programmatic biological opinion: the ESA requires a comprehensive biological opinion at the beginning of a federal action, not some later date. *Conner v. Burford*, 848 F.2d 1441, 1457-58 (9th Cir. 1988). A robust analysis at the programmatic stage is important because that is the only time all effects from the whole action are considered cumulatively. *See Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th Cir. 2015). Here, the BiOps' deficiencies compound to minimize the Program's expected effect on polar bears and allow a "no jeopardy" conclusion in the face of dire warnings about the bears' future.

### A. The Service violated the ESA by relying on future compliance with the MMPA in the 2020 BiOp.

Only Intervenors attempt to defend the 2020 BiOp.[8] Citing a regulation that allows deferral of incidental take statements (ITS) for certain programmatic actions, they argue the BiOp permissibly relies on future MMPA authorizations because it was a programmatic BiOp. Doc. 183 at 42-43 (citing 50 C.F.R. § 402.14(i)(7)); Doc. 185 at 29-30 (same). However, Plaintiffs' argument, Doc. 172 at 31-32, is not aimed at the Service's failure to prepare an ITS, so the regulation is not relevant.[9]

Plaintiffs' argument is aimed at the Service's refusal to perform a comprehensive analysis of how the Program will harm polar bears, relying instead on later compliance with the MMPA. *See, e.g.*, AR265609-11 ("Quantifying these effects is very difficult. . . . If the incidental take associated with an action meets the MMPA . . . there should be little potential for the incidental take from that action to jeopardize the continued existence of polar bears."). On that issue the law is clear. The Service's failure mirrors the situation in *Center for Biological Diversity v. Bernhardt (Liberty)*,

[8] Defendants argue that any challenge to the 2020 BiOp is moot. Doc. 180 at 29-30. It is not. *Supra* p. 1-3.

[9] Intervenors' reliance on 50 C.F.R. § 402.14(g)(8) (2019) is also misplaced. Doc. 183 at 40, 42; Doc. 184 at 22-23. Even setting aside that the regulation has been vacated, *Center for Biological Diversity v. U.S. Department of the Interior*, No. 24-CV-04651-JST, 2026 WL 898264, at *16 (N.D. Cal. Mar. 30, 2026), it also did not alter the longstanding requirement that mitigation measures must be specific enough that the Service can evaluate the project's impacts on imperiled species, s*ee National Wildlife Federation v. National Marine Fisheries Service*, 831 F.Supp.3d 1012, 1035-36 (D. Or. 2026) (explaining that under the 2019 regulation, mitigation measures must still be "described with specificity.").

where the Ninth Circuit determined the agency could not rely on a finding that "authorizations under the MMPA would minimize the level of persistent disturbance" as a factor in its BiOp analysis. 982 F.3d 723, 748 (9th Cir. 2020). Here, the Service expressly based a no-jeopardy finding in part on future MMPA compliance, just what *Liberty* held is improper. *See* AR265609-11. The Service's decision to so limit its analysis also violates its obligation to employ the best available science. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 807 F.3d 1031, 1047-48 (9th Cir. 2015).

That this was a programmatic BiOp is no matter. As this Court has recently affirmed, programmatic and project-level biological opinions must both predict future effects relying on the best available science. *Native Village of Hooper Bay*, 2026 WL 2409781 at *25-26 (rejecting argument that programmatic BiOps are subject to more lenient standards); *see also Ctr. for Biological Diversity v. Zeldin*, 171 F.4th 356, 378 (D.C. Cir. 2026) (holding that the ESA's requirement to perform an adequate effects analysis is not diminished for programmatic BiOps). Contrary to AIDEA's suggestion, Doc. 185 at 29-30, future step-down ESA consultations cannot cure a faulty programmatic no-jeopardy decision because they lack the necessary "unit-wide analysis" required at the "programmatic level." *See Cottonwood Env't Law Ctr.*, 789 F.3d at 1082. And an agency cannot avoid its obligation to perform ESA analysis "merely because it is bound to comply with another statute that has consistent, complementary objectives". *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008).

In the 2020 BiOp, the Service abdicated its responsibility to conduct a robust analysis, instead deferring to future decisions including MMPA authorizations.

### B. Plaintiffs have standing to challenge the 2025 BiOp.

AIDEA's two arguments that Plaintiffs lack standing to challenge the 2025 BiOp are incorrect. First, OBBBA did not deprive BLM of all discretion at the programmatic and leasing stage. *Contra* Doc. 185 at 34. As described *supra* p. 13-17, OBBBA left BLM discretion about what areas to lease and open for seismic surveying. Further, the "terms and conditions" that OBBBA directs BLM to adopt include the obligation to consult under the ESA, *see* AR522140, AR507026, preserving the Secretary's discretion to impose additional mitigation where warranted. Indeed, in the 2025 Program, the Secretary exercised this authority, adopting additional mitigation measures developed under the ESA in consultation with the National Marine Fisheries Service (NMFS) and contained in that agency's BiOp for the Program. *See* AR520896-917 (NMFS requiring numerous mitigation measures in its BiOp); AR522125 (noting NMFS "also identified additional mitigation measures to protect listed species" and that "BLM will ensure" adherence to all "additional mitigation measures"); AR522123. OBBBA was thus no barrier to additional protections to prevent impacts to polar bears, including those related to identifying and avoiding dens. *Contra* Doc. 185 at 34-35.

Second, the results of an AIR survey that AIDEA flew last winter do not undercut Plaintiffs' showing of injury and causation as to their ESA challenge to ROP 10. Doc. 185 at 35-37. AIDEA complains that "Plaintiffs submit no evidence" that "operators will cease flying AIR surveys" or that BLM will approve other detection methods. Doc. 185 at 36-37 (citation omitted). But AIDEA misunderstands the law. Courts "accept as valid the merits" of Plaintiffs' legal claims for standing purposes. *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022); *see also Idaho Conservation League v. Bonneville Power Admin.*, 83 F.4th 1182, 1189 (9th Cir. 2023). Thus, for purposes of standing, the Court must assume as correct Plaintiffs' claim that Defendants relied on non-binding and ineffective mitigation measures to avoid disturbing polar bear dens. Doc. 150 at 47. The only question is whether BLM's failure to adequately mitigate impacts to polar bears is reasonably likely to negatively affect bears, thus injuring Plaintiffs. The undisputed evidence demonstrates that it is. *See, e.g.*, FWS2025_00536-37 ("Exploration, development, production, and abandonment activities are expected to disturb denning polar bears").

### C. The Service violated the ESA by relying on faulty mitigation measures and arbitrary analysis in the 2025 BiOp.

Defendants and Intervenors point to the 2025 BiOp's programmatic nature to try to explain away numerous deficiencies. Doc. 180 at 57-67, 71-72; Doc. 183 at 39-41, 45-46; Doc. 184 at 21-22; Doc. 185 at 30, 32. But Defendants and Intervenors identify no caselaw allowing agencies to rely on uncertain and ineffective mitigation measures, make arbitrary assumptions, or ignore the best available science when they are engaged in a programmatic consultation. The ESA requires more. *See supra* p. 20.

The cases that Defendants cite reinforce that, even at the programmatic stage, agencies must perform comprehensive evaluations informed by the best available science.  In *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, the programmatic BiOp responded to a "lack of data" on a relevant topic by projecting likely effects through "an extensive review of known characteristics," "explaining the location and characteristics of [the species'] habitat," "extrapolating from known [information] . . . to project the impacts," and modelling a "worst-case scenario."  807 F.3d 1031, 1050-51 (9th Cir. 2015) (cleaned up).  Similarly, in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, the BiOp relied on a previous programmatic plan that was "unique and extensive"—"not an ordinary government land-management strategy" but rather a "massive effort" of "unprecedented thoroughness" that had "already been approved by this court."  378 F.3d 1059, 1068 (9th Cir.), *amended*, 387 F.3d 968 (9th Cir. 2004). Finally, in *Defenders of Wildlife v. U.S. Department of Navy*, despite rejecting Ninth Circuit precedent that BiOps "must be coextensive in scope" with the entire action, the Eleventh Circuit found the requirement was met because the agency had already "analyzed the entire action" and therefore its "decision to analyze impacts from operations again in a future consultation" was not arbitrary and capricious. 733 F.3d 1106, 1121-22 (11th Cir. 2013).

Defendants and Intervenors' requests for lax standards at the programmatic stage are not supported by the law.  Applying the appropriate standards, the 2025 BiOp cannot stand.

### 1. Mitigation measures

Defendants relied on faulty mitigation measures to decrease the number of polar bear deaths in their jeopardy analysis, erroneously assuming the measures will fully protect over 500 cubs. *See* Doc. 172 at 32-38. Defendants and Intervenors respond by insisting that future processes will ensure the mitigation measures are effective, and by misrepresenting what the mitigation measures actually require. By basing its no-jeopardy determination on nonbinding and unspecific mitigation measures, the Service violated the ESA's mandate that agencies ensure their actions are not likely to jeopardize the future existence of a species. *Liberty*, 982 F.3d at 747-48.

Defendants primarily rely on future processes to argue that the mitigation measures will be effective, asserting that "*all* site-specific actions will need to be permitted through step-down ESA consultations and any necessary MMPA authorizations." Doc. 180 at 65 (citing FWS2025_00411). Yet while they acknowledge that the NSO areas under Stipulation 1 are subject to numerous exceptions, Doc. 180 at 65, they fail to explain how the Service could reasonably assume, in spite of these exceptions, that NSO protections will protect all bears in NSO maternal denning habitat. *See* Doc. 172 at 34-35. Indeed, AIDEA confirms that pipelines and roads will need to cross NSO areas, because avoiding them would make parcels "non-viable." Doc. 185 at

40.[10] And while it claims that such crossings will be small, AIDEA ignores that gravel mines and other "necessary" uses will also be permitted in NSO areas. *See* Doc. 185 at 41-42; Doc. 172 at 34; *see also* AR522138 (stating that "[f]acilities such as a dock and a seawater treatment/desalinization plant may be allowed"). Because of the numerous exceptions, it was unreasonable for the Service to assume that Stipulation 1 will protect all dens in NSO areas.

As to ROP 10, Defendants falsely claim that "surveys are required" under the ROP. Doc. 180 at 67. NSB Intervenors also misrepresent ROP 10, stating it "applies to all 'onshore activities' in polar bear denning habitat during denning season." Doc. 183 at 47 (citing AR521422). But Plaintiffs' brief—and the plain text of the ROP—show those statements are untrue. ROP 10 does not require AIR surveys at all. Doc. 172 at 35-36. Nor does it require any efforts—let alone AIR surveys—to locate dens around existing facilities or for activities on ice roads after construction. Doc. 172 at 36. Wishful thinking is no substitute for the specific and binding conditions the ESA requires. Doc. 172 at 32-33.

Nor can the AIR survey AIDEA flew last winter, Doc. 185 at 35-36; Doc. 185-1, cure the Service's reliance on ROP 10. First, the survey, which post-dates the 2025

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[10] AIDEA also claims "FWS recognized those NSO corridors were crossable and reasonably accorded them conservation value for reducing, but not eliminating, den disturbances." Doc 185 at 39 (citations omitted). This is untrue. The BiOp assumes that all dens in NSO areas will be protected from development and production. *See* FWS2025_00532-33 (reducing den disturbances based on the percentage of NSO maternal denning habitat in each area).

BiOp, is not part of the record. *See Seattle Cmty. Council Fed'n v. FAA*, 961 F.2d 829, 834 n.3 (9th Cir. 1992) (declining to consider extra-record evidence in a record review case).[11] But, in any event, the survey supports Plaintiffs' claims in three ways.

First, AIDEA did not follow the Service's conservation recommendations. For example, it failed to fly a first survey between Nov. 25 and Dec. 15, and conducted survey flights during periods of snow, mist, and cloud cover. *See* FWS2025_00617-18; Doc. 185-1 at 11-13. Second, the survey's unsurprising failure to locate any dens highlights the arbitrariness in assuming a high detection rate for single surveys. *See* Doc. 172 at 35 n.4; Doc. 185-1 at 7; *see also* FWS2025_00519-20 (noting heightened complexity of finding dens on the Coastal Plain). Third, nothing prevents AIDEA from submitting last year's survey results to fulfill ROP 10 when applying for a seismic permit in upcoming seasons. While AIDEA may plan to conduct further AIR surveys, such surveys are not required under ROP 10, which has no timing requirement. *See* Doc. 172 at 36-37. In short, AIDEA's voluntary choice to conduct an AIR survey last year cannot cure the Service's reliance on ROP 10, which requires no such survey. *See* Doc. 172 at 37-38.

AIDEA's alternative assertion that even a total failure of survey methods would only marginally increase bear deaths compared to deaths from other activities, Doc. 185 at 38-39, fares no better. The assumptions about AIR surveys were critical to the

[11] Although the Court may in certain circumstances consider extra-record evidence in assessing its jurisdiction, as described *supra* p. 21-22, the report is not relevant to Plaintiffs' standing.

Service's analysis. *See* FWS2025_00522-23 (assuming AIR surveys before seismic activity); FWS2025_00528-29 (assuming AIR surveys before exploratory drilling); FWS2025_00533 (assuming AIR surveys before all development and production activities). AIDEA's argument, in contrast, is an impermissible post-hoc rationalization. *See Nat'l Wildlife Fed'n*, 524 F.3d at 932 n. 10. Further, AIDEA's suggestion that the population can sustain additional deaths merely because other activities are already killing bears ignores the Service's obligation not to "tip a species from a state of precarious survival into a state of likely extinction" or deepen existing jeopardy "by causing additional harm." *Id.* at 930. "Under [AIDEA's] approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest." *Id.*

**2. The Service ignores the best available science on polar bear decline.**

The BiOp violates the ESA by misusing population data to arbitrarily diminish the likelihood of jeopardy. Doc. 172 at 38-41. The Service ignored the bears' decline when assessing the effect of Program-related cub deaths, yet relied on the decline to dismiss the possibility that the Program will disturb more dens than projected. In addition, the Service ignored the deaths it has projected from other federally authorized activities. Such a "manipulati[on of] variables to achieve a 'no jeopardy' finding" violates the ESA. *Nat'l Wildlife Fed'n*, 524 F.3d at 933 (rejecting BiOp analysis where "the dead fish were really alive.").

In response, Defendants and Intervenors insist that the Service "did not ignore polar bears' declining status" because it acknowledged the decline elsewhere in the BiOp. Doc. 180 at 68-71; Doc. 183 at 49-51; Doc. 184 at 27-28; Doc. 185 at 43-44. But the fact that one part of the jeopardy analysis recognizes that bears will continue to decline due to climate change highlights its fundamental flaw: the jeopardy analysis fails to analyze the impact of takes from the Program relative to that expected significant decline. FWS2025_00608-10. The BiOp does not provide a reasoned rationale for why the jeopardy analysis ignores peer-reviewed studies and existing population models. Defendants now claim that the Service used outdated population data because it did not have enough information to predict how many bears or dens "will be exposed to particular future activities in specific future years." Doc. 180 at 69-70. But the record shows the Service can make such numerical projections and in fact did so earlier in the BiOp when it stated that the ecoregion "is expected have a 75 percent reduction in the numbers of bears by the end of the century." FWS2025_00534-35 (citation omitted). In any event, the Service cannot ignore the decline because of insufficient information on the one hand, while relying on that same decline elsewhere within the same jeopardy analysis. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*,, 184 F. Supp. 3d at 901.

Intervenors' attempts to minimize the threat to polar bears by claiming that the science shows their situation is "not as dire as previously assumed," Doc. 183 at 50; Doc. 184 at 28, also fall short. The Service's species status report describes the unequivocal scientific consensus on the predicted future of polar bear populations: "a significant decline in the global abundance of bears, and the possible extirpation of some subpopulations." FWS2025_31369. Although one study found that the Southern Beaufort Sea population was stable from 2010 to 2020, the record describes a population with years of steep decline interspersed with periods of relative stability, *see, e.g.*, AR7110 ("Low survival from 2004 through 2006 led to a 25–50% decline in abundance. . . . abundance was comparatively stable from 2008 to 2010."), and the BiOp found the population "likely decreased" in 2024, FWS2025_00425; *see also* AR510831 ("A pattern of relative stability interspersed with periods of low survival and population decline is a plausible trajectory for a specialized apex predator whose niche habitat is vanishing."). In any case, the Service did not, as Intervenors imply, dismiss decline based on a finding that it was not "dire," the Service relied on the fact of decline to avoid accounting for a greater number of dens on land. The Court should disregard Intervenors' attempt to rewrite the scientific consensus and provide post-hoc justifications regarding future harm facing polar bears.

Nor can Defendants avoid that the percentage of the population that will be taken by the 2025 Program is a central part of the agency's no-jeopardy conclusion. Doc. 180 at 70-71. The BiOp's jeopardy analysis points to other factors (which contain other faults) but repeatedly returns to its claim that the program will cause the deaths of only an "extremely small" percentage of the population. FWS2025_00610-11 (mentioning the percentage of the population affected multiple times as the basis for the no-jeopardy conclusion). Clearly, the claimed "extremely small" percentage played a role in the Service's decision-making.

Finally, neither Defendants nor Intervenors defend the Service's choice to ignore other deaths in the same subpopulation that will be caused by federally authorized actions. *See* Doc. 172 at 40-41. Nor could they. Such a deliberate attempt to further minimize the likelihood of jeopardy is the opposite of the "common sense" approach required by the ESA. *Nat'l Wildlife Fed'n*, 524 F.3d at 933.

By not analyzing take relative to the predicted future population level, the Service arbitrarily failed to assess effects on polar bears within the context of baseline environmental conditions. *Id.* at 930.

**3. The BiOp arbitrarily minimizes the loss of female cubs.**

Defendants and Intervenors fail to identify a reasoned basis for the jeopardy analysis ignoring the Program's potential to cause future demographic impacts from female cub deaths. They primarily summarize the BiOp without addressing the specific error Plaintiffs describe. *See* Doc. 180 at 72; Doc. 183 at 51-52; Doc. 184 at 29-30; Doc. 185 at 42-43. Intervenor API points to a lack of documented cub mortalities from past industry activities, Doc. 184 at 29-30, but ignores that these activities were all outside the Refuge and that there are many reasons it is difficult to affirmatively observe and confirm cub mortalities. 91 Fed. Reg. 11240, 11252 (Mar. 9, 2026) (recognizing complications of confirming cub mortality "given environmental conditions, the existence of scavengers, and difficulty of observation"); *see also* FWS2025_00520 (describing documented instance of female bear abandoning her den prematurely in possible response to previous seismic exploration in the Refuge).

AIDEA misreads the study cited by Plaintiffs, claiming it fails to show that females that lose their cubs are unlikely to breed again in the next year. Doc. 185 at 42. But the study does show that a mother who has lost her entire litter is unlikely to produce another in the next denning season, unlike the Service assumed in its BiOp. Doc. 172 at 41-42. It shows she has only around a 20 percent chance of doing so.[12] As with future population declines, excluding this evidence that undermines an important assumption underlying the jeopardy analysis renders the analysis incomplete because the Service "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

**D. BLM's reliance on the BiOps was arbitrary.**

Defendants' argument that BLM reasonably relied on the BiOps, Doc. 180 at 80-81, assumes that the BiOps are valid. Because the BiOps are invalid, BLM's reliance on them was arbitrary.

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[12] Table 3 in the study, AR514662, estimates that between 2001-2006, approximately ten percent of mothers with cubs produced cubs the next season (row 8), while half of mother with cubs lost their entire litter (row 6, showing survival rate of at least one cub at 49.6 percent). This means that only about 20 percent of bears that lost their litters rebred (10/50 =0.2). The Service also failed to account for the likelihood of partial litter loss in its analysis. Partial litter loss is common, *see* AR3946 ("We recorded 20 deaths of single young from litters of two"), and mothers who lose part of their litter will not rebreed. FWS2025_00609 (noting a mother is available to rebreed "if she lost her entire litter").

## V. Violations of the Tax Act and OBBBA

The 2025 Program is also invalid "because it rests on misreadings of the very Acts of Congress that give the Secretary his limited authority to allow oil and gas surface development on the Coastal Plain." Doc. 172 at 43. Defendants and Intervenors' reviewability and merits arguments in response are unavailing.

### A. The Secretary's statutory interpretation, which he embedded into the 2025 Program, is reviewable.

Plaintiffs' challenge to the Secretary's misinterpretation of the Tax Act and OBBBA, which defines the impact of the 2025 Program, is ripe for the Court's review. The question presented is "purely one of statutory interpretation that would not benefit from further factual development." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (cleaned up).

Moreover, the scope of allowable surface development on the Coastal Plain is part and parcel of the Program that injures Plaintiffs' members. *See* Doc. 172 at 15-16 (explaining Plaintiffs' standing, citing declarations from their members, Docs. 172-4 to 172-6). Significantly—apart from a single, baseless exception, *supra* p. 21-22—no party disputes that Plaintiffs face injury from the Program *now* and have demonstrated that fact. Indeed, recent events underscore the impending nature of Plaintiffs' harm. Just three months ago, BLM completed a lease sale under the Program, which it touted as "another important step" toward "developing" the Coastal Plain. Press Release, BLM, *BLM Holds First Successful Coastal Plain Oil and Gas Lease Sale Under Working Families Tax Cuts*

*Act* (June 5, 2026), https://perma.cc/6KWK-EL37. Under these circumstances, Plaintiffs' claim is ripe. As this Court has explained:

> When addressing the sufficiency of a showing of injury-in-fact grounded in potential future harms, Article III standing and ripeness issues often boil down to the same question. In that context, ripeness can be characterized as standing on a timeline, and the analysis for both standing and ripeness is essentially the same.

*Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt*, 381 F. Supp. 3d 1127, 1135 (D. Alaska 2019) (cleaned up). Likewise, here, because Plaintiffs' standing is clear, so too is the ripeness of their claim, and the Court should proceed to discharge its "virtually unflagging obligation to hear and decide cases." *Id.* at 1136 (citation omitted).

*Southern Utah Wilderness Alliance v. Palma* is inapposite. 707 F.3d 1143 (10th Cir. 2013). There, the parties contested whether the plaintiff faced actual or imminent harm. *See id.* at 1156-57. Moreover, the agency actions challenged in *Palma*—the issuance of mineral leases—were in a state of suspension. *See id.* at 1158-60. Here, by contrast, Plaintiffs standing is unrefuted, the 2025 Program remains operative, and leases have been sold.

Similarly unavailing is the contention—raised only by AIDEA—that finality is lacking. *See* Doc. 185 at 67-70. To be final, agency action must first "mark the consummation of the agency's decisionmaking process," as opposed to being "merely tentative or interlocutory" in nature. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up). Second, the action must be "one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (cleaned up). These conditions are met here. Within the 2025 ROD, and as an integral part of the Program it established, the Secretary completed his statutory interpretation as it concerns surface development on the Coastal Plain. *See* AR522118-19. It is likewise uncontestable that the Program, including its terms regarding surface development, carries legal consequences. For example, it formed the predicate for the recent lease sale.

That BLM has yet to make lease-specific or similarly individualized *applications* of the Secretary's interpretation (along with other aspects of the Program) is of no moment. The interpretation is final, just as the Program is final. Indeed, Defendants do not contest finality; they invoke only the ripeness doctrine when asserting that this claim must await "the context of a concrete proposal for a future project." Doc. 180 at 43-44. But Defendants are wrong about ripeness. The Program *is* concrete. It establishes the scope of allowable surface development on the Coastal Plain. And it threatens Plaintiffs with impending harm.

In short, there is no cause to delay reviewing Plaintiffs' challenge.[13]

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[13] If the Court disagrees, it should stay this claim and retain jurisdiction to allow Plaintiffs to be heard before any person may physically alter the surface of the Coastal Plain. *See Brotherson v. Professional Basketball Club*, No. C07-1787RAJ, 2008 WL 11343106, *3 (W.D. Wash. Apr. 14, 2008).

### B. The Secretary incorrectly interpreted his statutory authority.

Defendants and Intervenors are also wrong on the merits.

As an initial matter, Defendants and the NSB Intervenors are mistaken about the standard of review. The question is not whether the Secretary's interpretation is "reasoned," Doc. 180 at 44; Doc. 183 at 64, but instead whether it is correct. "In the business of statutory interpretation, if it is not the best, it is not permissible." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024). The Court owes the Secretary no deference; even "when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Id.* at 395.

On that score, the Secretary's interpretation defies principles of statutory construction and, in at least two respects, paves the way for more surface development on the Coastal Plain than Congress intended and enacted. If 2,000 surface acres truly represented a non-discretionary floor, as the 2025 Program provides and as Defendants and Intervenors contend, *see* Doc. 180 at 44; Doc. 185 at 70; Doc. 187 at 32-33, then Congress would have written Tax Act § 20001(c)(3) differently. For example, the statute might state that the Secretary "shall authorize no fewer than 2,000 surface acres upon the submission of applications cumulatively requesting such an amount" (or even "shall authorize 2,000 surface acres" without any qualifier). But instead, Congress wrote that the Secretary "shall authorize *up to* 2,000 surface acres," Tax Act § 20001(c)(3) (emphasis added), providing BLM discretion to determine the appropriate locations and cumulative acreage for qualifying facilities—while at the same time discharging the agency's other (sometimes competing) obligations under other statutes that neither the Tax Act nor OBBBA waived. Because the 2025 Program incorrectly presumes the opposite, i.e., that the Tax Act compels BLM to allow 2,000 surface acres of development so long as someone requests such acreage for qualifying facilities, the Program is invalid.

The Secretary doubles down on his error, attempting to bend the Tax Act to allow *even more than* 2,000 surface acres of development on the Coastal Plain. *See* AR522119. Defendants and Intervenors agree. As Alaska bluntly contends: "When 2,000 acres of surface authorizations are in place, the normal discretion returns to the Secretary." Doc. 187 at 33. But no statutory text supports this bold reading. To the contrary, the only part of the Tax Act that mentions surface development on the Coastal Plain is section 20001(c)(3), which plainly caps it. Congress meant what it wrote. As Senator Murkowski explained: "[W]e are talking about a very limited surface development to just 2,000 Federal acres within the [Coastal Plain] area." 163 Cong. Rec. S7539 (daily ed. Nov. 30, 2017).

Congress simply did not grant the Secretary authority to exceed 2,000 acres of surface development. Contrary to Defendants and Intervenors' argument, Doc. 180 at 44; Doc. 185 at 71-72; Doc. 187 at 34-36, the Secretary's obligation to issue rights of way or easements under Tax Act § 20001(c)(2) does not mean that he may greenlight more than

2,000 surface acres of development on the Coastal Plain under Tax Act § 20001(c)(3). Again, only the latter provision of the statute, subsection (c)(3), addresses surface development. No other statutory provision applicable to the Coastal Plain, including subsection (c)(2), employs similar text. Thus, only subsection (c)(3) applies to—and limits—surface development on the Coastal Plain.

Because the 2025 Program exceeds the limits of the Secretary's statutory authority, it should be set aside.

## VI. Remedy of Vacatur

The remedy arguments of Defendants and Intervenors aside, the law is clear: "Vacatur of the agency action is the presumptive remedy under the APA," *WildEarth Guardians v. U.S. Dep't of Agriculture*, 135 F.4th at 739 (cleaned up), and courts "have only ordered remand without vacatur in limited circumstances." *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012); *see also, e.g.*, *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("We leave an invalid rule in place only when equity demands that we do so." (cleaned up)). And "when determining whether to leave an agency action in place on remand, [courts] weigh the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Pollinator*, 806 F.3d at 532 (cleaned up).

In this case, vacatur is the appropriate remedy, and the APA's presumption in its favor stands unrebutted. Although Defendants and Intervenors contest the merits, they do not dispute in their remedy response that each of Plaintiffs' substantive and procedural claims is "serious," Doc. 172 at 9, or that if the Court finds Defendants erred, the "fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Pollinator*, 806 F.3d at 532.

Likewise, Defendants and Intervenors have failed to show that vacatur would cause unduly disruptive consequences. *See* Doc. 180 at 81-82; Doc. 185 at 74-75; Doc. 187 at 38. While Defendants contend that vacatur would "imped[e] lease sales and exploration activities during a national energy emergency," Doc. 180 at 82, they have not provided any corroborating detail tailored to the agency actions challenged here. *See id.*; *see also, e.g.*, Doc. 185 at 75-76 (similarly general allegations of disruptive consequences from AIDEA, the primary leaseholder). Indeed, it would surprising if they had provided specific allegations of disruptive consequences, given their position that the 2025 Program "does not authorize *any* on-the-ground activities," Doc. 180 at 13, and that surface development on the Coastal Plain—not to mention actual production of oil and gas—remains "roughly seven years" away. *See id.* at 43 (citing AR390596-97).[14]

## CONCLUSION

The Court should grant summary judgment for Plaintiffs and vacate the challenged decisions.

[14] Alaska's request for a separate briefing schedule on remedy, Doc. 187 at 38, contravenes the Court's May 15, 2026, Order, Doc. 169, which limits such briefing to Plaintiffs' request for vacatur of leases.

Respectfully submitted this 4th day of September, 2026.

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## CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 9,999 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limit requested in Plaintiffs' unopposed motion to file overlength reply brief.

Respectfully submitted this 4th day of September, 2026.

*s/ Erik Grafe*
Erik Grafe (Alaska Bar No. 0804010)
EARTHJUSTICE

**CERTIFICATE OF SERVICE**

I certify that on September 4, 2026, a copy of the foregoing PLAINTIFFS' REPLY BRIEF was served electronically through the CM/ECF system on counsel of record.

*s/ Erik Grafe*
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