No. 20-35224

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF NUIQSUT, et al.,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants-Appellees

and

CONOCOPHILLIPS ALASKA, INC.,

Intervenor-Defendant-Appellee

On Appeal from the District of Alaska
Case No. 3:19-cv-00056-SLG

ANSWERING BRIEF FOR CONOCOPHILLIPS ALASKA, INC.

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant-Appellee ConocoPhillips Alaska, Inc. is a wholly owned subsidiary of ConocoPhillips Company. ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips, which is a publicly traded corporation. ConocoPhillips has no parent corporation and, based on Schedule 13G filings with the Securities and Exchange Commission, no publicly held corporation owns 10 percent or more of its stock.

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I. INTRODUCTION

This appeal raises only moot questions. Plaintiffs-Appellants ("Plaintiffs") claim the Bureau of Land Management ("BLM") violated the National Environmental Policy Act ("NEPA") by producing an inadequate environmental assessment ("EA") for ConocoPhillips Alaska, Inc.'s ("ConocoPhillips") short-term winter exploration program (the "2018-19 Winter Program" or "Winter Program") in the National Petroleum Reserve-Alaska ("NPR-A" or the "Petroleum Reserve"). BLM approved the Winter Program on December 7, 2018, and ConocoPhillips *fully completed* all activities on April 28, 2019. All infrastructure associated with the Winter Program was *temporary*, involving ice roads, pads, and airstrips that have melted long ago, personnel camps that have been removed, and wells that have been drilled and plugged. What remains is undisturbed tundra, appearing as it did before the Winter Program with the exception of a few small surface well caps.

A Court "cannot take jurisdiction over a claim to which no effective relief can be granted.", *Inc. v. BLM, Medford Dist*., 893 F.2d 1012, 1015 (9th Cir. 1989). That is precisely the case here. The 2018-19 Winter Program is long-since over. The plugged wells cannot be undrilled, and the temporary infrastructure has either melted or been removed. Any future winter exploration program will necessarily be different in scope, intensity, and location, and will be evaluated through a

separate NEPA process. As Plaintiffs concede, vacating BLM's approval of the Winter Program or the associated EA (the "2018 EA") would change nothing.

Without a live controversy, Plaintiffs refashion their case as a challenge to BLM's alleged "longstanding pattern of refusing to analyze in detail the impacts of oil and gas activities." Opening Brief at 18. But Plaintiffs have not pled this argument. The claims stated in the Amended Complaint narrowly address the effects of the 2018-19 Winter Program. Those claims are moot because no relief is available. Moreover, Plaintiffs' "pattern" argument is divorced from the facts, which show that BLM has consistently and comprehensively evaluated all of the potentially significant impacts from leasing, development, and production in the Petroleum Reserve.

Aside from being moot, Plaintiffs' arguments lack merit. Plaintiffs claim that BLM violated NEPA because it failed to take a hard look at the Winter Program's potential impacts to caribou and subsistence, and failed to convincingly explain why the effects of that program were not significant. But as the district court explained, the 2018 EA was "tiered" to and incorporated the 2012 NPR-A Integrated Activity Plan Environmental Impact Statement (the "IAP EIS"), which comprehensively evaluated the impacts of leasing, exploration, and development in the Petroleum Reserve, including anticipated winter exploration activities like the 2018-19 Winter Program. Tiering is expressly authorized and encouraged by

regulation, and "promotes efficiency" by allowing the agency to "'take the requisite hard look at the potential consequences of [a] proposed action' without treading the same ground twice." ER 32. BLM reasonably relied on the comprehensive IAP EIS, addressed issues for which new information was available in its EA, and rationally concluded that the 2018-19 Winter Program would have no new significant adverse impacts that were not already addressed. Nothing more was required by NEPA.

Plaintiffs' other claims also have no legal or record support. The district court's order meticulously explains that BLM's cumulative impacts analysis satisfied NEPA and that BLM considered an adequate range of alternatives under NEPA and Section 810 of the Alaska Natural Interest Land Claims Act ("ANILCA"), 16 U.S.C. § 3120. Plaintiffs mischaracterize the district court's careful assessment and conveniently ignore large portions of the administrative record that directly undermine their claims.

Pragmatically, BLM evaluated a short-term exploration program that by design was intended to leave no trace, and in fact did so. The program was successfully carried out, without incident or environmental injury. There is no longer a live controversy regarding the 2018-19 Winter Program, and even if there were, the district court's careful review of the administrative record shows that BLM's authorization was reasonable and supported by the record. Accordingly,

ConocoPhillips respectfully requests this Court to dismiss this case as moot, or, alternatively, affirm the district court's decision on the merits.

II. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. However, this controversy is now moot, and the appeal should be dismissed for lack of jurisdiction.

III. ISSUES PRESENTED FOR REVIEW

ConocoPhillips adopts and incorporates BLM's statement of issues.[1]

IV. STATEMENT OF THE CASE

A. NEPA.

"NEPA does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (internal citations and quotation marks omitted). NEPA requires federal agencies to issue an environmental impact statement ("EIS") before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11.

[1] Relevant statutes and regulations are reproduced in the Addendum.

An agency may prepare an EA to determine whether an action significantly affects the environment, such that an EIS is necessary. 40 C.F.R. § 1501.4(b) (2019). If, based on the EA, the agency concludes that the action will have no significant impact, the agency need not complete an EIS, and instead may issue a finding of no significant impact ("FONSI"). *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 575 (9th Cir. 1998). The decision not to prepare an EIS must be supported by a "convincing statement of reasons" that the action will not have significant effects. *Barnes v. FAA*, 865 F.3d 1266, 1274 (9th Cir. 2017) (internal citations and quotation marks omitted).

Sometimes the action under review in an EA is part of a larger agency program that has already been evaluated in a comprehensive EIS. 40 C.F.R. § 1502.20 (2019).[2] Under these circumstances, the NEPA implementing regulations "encourage[]" agencies to "tier" the site-specific EA to the "broad environmental impact statement." *Id*. The subsequent EA "need only summarize the issues discussed in the broader statement, and incorporate discussions from the broader statement by reference." *Id*. The development of a comprehensive, program-level

[2] Recently, after the district court issued its summary judgment order, the Council on Environmental Quality revised the NEPA implementing regulations. *See* 85 Fed. Reg. 43,304 (July 16, 2020). References to pre-July 16, 2020 versions of the regulations that were changed, moved, reorganized, or deleted are therefore marked with "(2019)" and provided in the Addendum to this brief.

EIS "generally obviates the need for a subsequent site-specific or project-specific impact statement, unless new and significant environmental impacts arise that were not previously considered." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). BLM issues a "finding of no *new* significant impact" ("FONNSI") when it finds that a project-specific action will result in no new significant impacts that were not previously considered. 43 C.F.R. § 46.140(c) (emphasis added).

B. The Petroleum Reserve.

In 1923, President Harding established the Naval Petroleum Reserve No. 4 on Alaska's North Slope. *See N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 973–74 (9th Cir. 2006) ("*NAEC I*"). In 1976, Congress enacted the National Petroleum Reserves Production Act ("NPRPA") and transferred authority over the Petroleum Reserve from the Navy to the Secretary of Interior. *Id*. at 973. The Petroleum Reserve, which is administered by BLM, was subsequently renamed the National Petroleum Reserve-Alaska (often abbreviated to "NPR-A"). *Id.* The Petroleum Reserve remains the largest single unit of public land in the United States, encompassing approximately 23.6 million acres (22.8 million acres of which are under federal management), an area roughly the size of the state of Indiana. *Id.*

In 1980, Congress amended the NPRPA to direct the Secretary of the Interior to carry out an "expeditious program of competitive leasing of oil and gas" within the Petroleum Reserve, while recognizing the need to protect the environment. *See* Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. No. 96-514) (codified at 42 U.S.C. § 6506a(a)). The NPRPA ensures that environmental concerns and values are served in a variety of ways, including the protection of areas "designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value." 42 U.S.C. § 6504(b). Pursuant to this provision, five "Special Areas" have been established, including the *Teshekpuk Lake Special Area* to protect migratory waterfowl and shorebirds, important caribou habitat, and subsistence uses. ER 181, 182.

For portions of the Petroleum Reserve where leasing is allowed, BLM's administration occurs through a three-stage process: (1) leasing; (2) exploration; and (3) development. *NAEC I*, 457 F.3d at 977; *see* 43 C.F.R. pts. 3000, 3130, 3150, 3160. Each stage is subject to independent decision-making and approval by BLM (as well as by other local, state, and federal agencies), and each stage requires NEPA review. *NAEC I*, 457 F.3d at 977.

The *leasing stage* is the first step towards exploration and development, and the issued leases do not themselves authorize any on-the-ground activity. ER 154.

At the leasing stage, BLM determines which lands to make available for leasing, which lands to defer or make unavailable, and which protective stipulations and other mitigation measures to apply to protect surface resources. *Id.* In the Petroleum Reserve, the leasing stage involves both the lease plan and the issuance of leases through lease sales held under that plan. *NAEC I*, 457 F.3d at 976-77.

At the *exploration stage*, the leaseholder may conduct surface-disturbing activities, such as the drilling of exploratory wells after obtaining additional permits from BLM. *See* 43 C.F.R. pts. 3150, 3160. BLM may approve or reject the exploration plan as submitted or impose "[a]dditional stipulations needed to protect surface resources and special areas . . . at the time the surface use plan and permit to drill are approved." 43 C.F.R. §§ 3131.3, 3162.3-1(h)(1), (2). Exploration activities are subject to NEPA review. *See* ER 179.

The *development stage* depends on the results of exploration because "until the lessees do exploratory work, the government cannot know what sites will be deemed most suitable for exploratory drilling, much less for development." *NAEC I*, 457 F.3d at 976. The development stage may involve surface-disturbing activities, such as drilling multiple wells and installing gravel pads, and requires BLM's approval of a drilling and surface use operations plan. 43 C.F.R. § 3162.3-1. The development plan and other approvals such as Army Corps permitting are

subject to additional NEPA review. *See, e.g.*, *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1072-73 (D. Alaska 2014); *see also* ER 179.

C. The Development of the Petroleum Reserve.

Despite the statutory changes in 1980, very little development occurred in the Petroleum Reserve over the next few decades. The Petroleum Reserve is remote and not on any road system, and was many miles from the existing North Slope infrastructure or any connection to the Trans-Alaska Pipeline. *See* BLM's Supplemental Excerpts of Record ("SER") 161.

In 1994, ConocoPhillips discovered a large oil field on state lands near the eastern border outside of the Petroleum Reserve. SER 86-87. This led to the eventual development of the Alpine in the Colville River Unit, which was ultimately connected to the Trans-Alaska Pipeline. *Id.* This, in turn, led to increased interest in the Petroleum Reserve, and the development of oil and gas units in areas of the Petroleum Reserve called Greater Mooses Tooth and Bear Tooth. *Id*. Between 2000 and 2012, operators drilled 29 exploration wells in the Petroleum Reserve. *Id*.

In 2012, at the direction of President Obama, BLM finalized an Integrated Activity Plan (the "IAP") covering all future leasing, exploration, and development in the entire Petroleum Reserve. SER 6, 9. The IAP makes approximately 11.8 million acres available for oil and gas leasing. SER 464. The IAP also establishes

performance-based stipulations and best management practices ("BMPs") applicable to oil and gas activities (including winter exploration activities) in the Petroleum Reserve, and restricts surface infrastructure in certain areas. *Id*.

The IAP is supported by the comprehensive IAP EIS. SER 5. The IAP EIS is both a programmatic-level EIS and contains "site-specific" analysis of the impact of leasing decisions. *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 965 F.3d 705, 718 (9th Cir. 2020) ("*NAEC II*"). The IAP EIS "contains five alternatives that provide a broad range of oil and gas leasing availability, surface protections, and Special Area designations." SER 11. To evaluate the environmental impacts of each of these alternatives, BLM recognized that there are "many uncertainties associated with projecting future petroleum exploration and development" and, accordingly, developed hypothetical exploration and development scenarios for each of the alternatives. SER 201. To account for uncertainty, BLM made a series of "reasonable assumptions" conservatively designed "to minimize the chance that the resultant impact analysis will understate potential impacts." *Id*.

The IAP EIS considered all aspects of winter exploration activities in the Petroleum Reserve and evaluated ranges of those activities across alternatives. *See* ER 36; SER 239-49; SER 277-81; SER 299-302; SER 316-20; SER 321-25. For example, under Alternative A, BLM evaluated the impact of "196 oil or gas exploratory or delineation wells" and associated ice pads and ice roads, including

wells drilling and ice roads within the "Teshekpuk Herd caribou wintering area." SER 239, 242. The IAP EIS concluded that habitat impacts would be "negligible" due to the nature of the activity occurring on ice roads, ice pads, and ice airstrips. SER 241. The IAP EIS recognized that "[a]ny caribou in the immediate vicinity of the activity would be disturbed, possibly having a negative effect on their energy balance, hormonal status, and calving success, due to prolonged stress." SER 242. However, "[b]ecause these animals are mobile and the operation would be temporary, it is not expected that there would be any long-lasting effects on caribou." *Id*.

Consistent with the IAP, BLM has approved two ConocoPhillips developments in the Greater Mooses Tooth Unit. In 2015, BLM approved the Plan of Development for the Greater Mooses Tooth 1 ("GMT 1") project. GMT 1 was developed as a satellite to the Alpine Development, and was supported by a 2014 supplemental EIS that "tiers to" and "incorporates . . . by reference" the IAP EIS and the separate EIS produced for Alpine Development. ER 167–68. In 2018, BLM approved a similar Plan of Development for the Greater Mooses Tooth 2 ("GMT 2") project, which also tiered to and incorporated by reference the IAP EIS, the GMT 1 supplemental EIS, and the EIS for the Alpine Development. ER 196.

Most recently, ConocoPhillips proposed the development of the Willow project, which is within the Bear Tooth Unit. BLM published notice of the availability of the Final EIS for the Willow Master Development Plan on August 4, 2020. 85 Fed. Reg. 49,677 (Aug. 4, 2020).

D. Prior Exploration Activities under the IAP EIS.

Under the IAP EIS, BLM approved exploration programs in each of the years 2013, 2015, 2017, and 2018. *See* ER 346-48. Under these programs, a total of 18 exploration wells and 10 appraisal wells have been drilled. *Id*. In approving each of those programs, BLM prepared an EA to comply with NEPA, and tiered to and incorporated the IAP EIS. *Id*. Prior to this lawsuit, *none* of the previous exploration programs had been challenged in court.

E. The 2018-19 Winter Program.

ConocoPhillips submitted its Surface Use Plan of Operations for the Exploration Program in August 2018 (SER 980-1000) and, in October 2018, submitted a Request for Right of Way Permit (ER 223); requests to deviate from IAP EIS BMPs A-5, B-2, and B-2g (SER 1001-03, 1024)); and applications for permits to drill (SER 1005, 1025, 1044, 1063, 1082, 1099, 1118, 1137, 1156, 1175). BLM released a draft EA on November 9, 2018 (ER 423), after issuing its ANILCA Section 810 evaluation on November 7, 2018. SER 1194.

On December 7, 2018, BLM issued the final EA, FONNSI, and Decision Record approving the 2018-19 Winter Program with minor modifications. ER 263, 377, 384. The final EA includes responses to all public comments. ER 351-376. The EA tiers to and incorporates the IAP EIS and the supplemental EISs for GMT 1 and GMT 2. ER 273.

Under the Decision Record and associated permits approving the 2018-19 Winter Program, ConocoPhillips was authorized to build up to 57 miles of ice roads, up to 42.7 miles of snow trails, up to 23 ice pads of various dimensions, one ice airstrip, and temporary camps capable of housing 545 people; in addition to conducting exploration drilling at up to six potential sites, testing/recompleting two existing well sites, gauge monitoring at two existing well sites, and retrieving a data logger at one location. ER 278-79, 385.

In carrying out the program, ConocoPhillips built 15 ice pads, one ice airstrip, and 57 miles of ice roads plus two additional miles for lake access; drilled six new wells; and tested six wells, some of which were drilled as part of the 2018-19 Winter Program, and some of which had been previously drilled. SER 2-3. The 2018-19 Winter Program was fully completed on April 28, 2019. SER 3.

F. Procedural History.

Plaintiffs filed their Complaint on March 1, 2019, when the 2018-19 Winter Program was already well underway, and filed their Amended Complaint on

March 26, 2019, when the Winter Program was near completion. ER 643. ConocoPhillips was granted intervention on April 10, 2020. ER 644. On May 23, 2019, Plaintiffs moved for summary judgment nearly a month after the 2018-2019 Winter Program was already complete. ER 644.

On September 20, 2019, the district court held a hearing on cross-motions for summary judgment. ER 646. On January 9, 2020, the district court issued a comprehensive summary judgment order rejecting all of Plaintiffs' claims. ER 2. On March 9, 2020, Plaintiffs filed a notice of appeal. ER 75.

V. SUMMARY OF THE ARGUMENT

This appeal is moot. The 2018-19 Winter Program is long-since complete, and all associated infrastructure has either melted or been removed, leaving behind only a few capped wells. Plaintiffs do not ask for injunctive relief (and none is available) and concede that vacatur will have no impact on the completed 2018-19 Winter Program. There is no effective relief that can be granted and the appeal should be dismissed.

Even if not moot, this appeal fails on the merits. BLM approved a temporary, routine exploration program that was expected to (and did) have no discernable impacts on caribou. This was not a new or novel activity, and past experience confirms that caribou are not meaningfully impacted by winter exploration activities, as predicted in the IAP EIS and confirmed in 2018 by the

GMT 2 supplemental EIS. Under these circumstances, the 2018 EA appropriately relied on these NEPA documents to conclude that the 2018-19 Winter Program would not have significant impacts on caribou. BLM fully complied with its obligations under NEPA, and the district court's comprehensive decision should be affirmed.

VI. STANDARD OF REVIEW

The district court's decision on summary judgment is reviewed *de novo*. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000). Plaintiffs assert that BLM's approval of the 2018-19 Winter Program violates NEPA and ANILCA and seeks judicial review of BLM's decision under the Administrative Procedure Act ("APA"). The appropriate inquiry under the APA is whether the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Bennett v. Spear*, 520 U.S. 154, 174 (1997).

An agency action is arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). "The

scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

VII. ARGUMENT

A. This Appeal Is Moot.

1. The Completion of the 2018-19 Winter Program Moots this Case.

"The case or controversy requirement of Article III . . . deprives federal courts of jurisdiction to hear moot cases." *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984). Courts have an independent duty to determine mootness. *Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 628 (9th Cir. 2016). An appeal is moot when there is no longer a "'present controversy as to which effective relief can be granted.'" *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (*quoting Nw. Env't Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988)).

This appeal is moot because no effective relief is available with respect to the 2018-19 Winter Program. All equipment has been demobilized. SER 2-3. The authorized ice roads and ice pads have melted. *Id*. The exploration and appraisal wells have been capped. *Id*. No structures remain in the Winter Program area. *Id*. There is no activity to enjoin, and vacatur of the expired and completed 2018-19 Winter Program approval would be a meaningless exercise.

In *Sierra Club v. Penfold*, this Court dismissed a case for mootness on similar facts. 857 F.2d 1307, 1317 (9th Cir. 1988). There, the Court found a NEPA challenge to a completed mining operation to be moot, in part because the completed mining operation could not be moved and the impacts of the operation could not be reversed. *Id*. at 1318. The Court reasoned that "even if we assume BLM's decision making process is unlawful, no adequate remedy exists." *Id*. The Court then distinguished completed construction projects like "a power transmission line," where the Court could provide effective relief to a NEPA violation by ordering "removal" of such a project. *Id*. By contrast, "a completed mining operation cannot be moved" and the impacts "are not remediable since we cannot order that the Plans be 'unmined.'" *Id.*

The same is true here. Plaintiffs do not ask for removal or any kind of injunctive relief because there is nothing to remove and no damage to remediate. The ice roads and pads have already melted and the capped wells cannot be undrilled. "Where the activities sought to be enjoined have already occurred, and the appellate courts cannot undo what has already been done, the action is moot." *Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978). Indeed, Plaintiffs concede that "[v]acating the EA would not affect the Exploration Program because it is over." Opening Brief at 59.

Plaintiffs' attempt to reframe their case as a broader challenge to BLM's "pattern of refusing to analyze in detail the impacts of oil and gas activities" (Opening Brief at 18, 59), does not change the mootness analysis. Plaintiffs' Amended Complaint does not challenge any BLM "pattern" and is instead narrowly focused on the alleged deficiencies in the EA for the 2018-2019 Winter Program. Plaintiffs cannot base jurisdiction for this appeal on a claim that is not in their Amended Complaint. *See Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1281–82 (9th Cir. 1994) (finding case moot and rejecting arguments that declaratory relief was needed to address pattern of continual harassment where the "actual claims pleaded" in the complaint were "narrowly focused on a single past event" and the arguments of a pattern in appellate briefs appeared "[n]owhere in their complaint").

Headwaters is also instructive here. 893 F.2d 1012. In *Headwaters*, the plaintiff challenged BLM's decision to authorize three timber sales (of a group of 16 sales), alleging the sales violated BLM's obligations under the Federal Land Policy and Management Act ("FLPMA"). *Id*. at 1013. After the plaintiff failed to secure a preliminary injunction, "all the timber on the three" parcels that were the subject of the lawsuit was cut, and half of the logs were removed. *Id*. Much like Plaintiffs here, the plaintiff in *Headwaters* tried to frame its case as a broad challenge to BLM's policies on appeal and sought declaratory relief as to that

policy. *Id*. at 1014. But the Court found the case was moot because "Headwaters framed its case narrowly" as an attack related to the three parcels, and "the policies against which it seeks a declaration can have no effect" on the three parcels that had been cut. *Id*. at 1015.

Plaintiffs' pattern and practice challenge fails for the same reasons. As in *Headwaters*, Plaintiffs' Amended Complaint narrowly challenges *only* the 2018-19 Winter Program. Declaratory relief on BLM's pattern and practice "can have no effect" on the Winter Program. *Id*. In fact, Plaintiffs here are in a worse position than the plaintiff in *Headwaters* because the complaint in that case actually included a request for declaratory relief regarding BLM's policies. *Id*. Here, by contrast, Plaintiffs' pattern and practice claim is absent from the Amended Complaint. The declaratory relief requested in the Amended Complaint simply addresses BLM's approval of the now-completed "winter exploration program." ER 636.

Lastly, Plaintiffs summarily claim that vacatur is meaningful because it "would prevent BLM from relying on the inadequate EA in future authorizations." Opening Brief at 59. But the record is clear that BLM has always conducted a *new* EA for each exploration program. ER 338-348. That is so because each program is different in terms of location, number of wells, locations of ice roads, and many other factors, and thus each program requires its own site-specific EA. *Id*. In any

event, if BLM decides to rely on the 2018 EA as part of some future decision, Plaintiffs are free at that time to argue that such reliance is improper if there is a live case or controversy for a court to resolve. *See Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 838 (9th Cir. 2014) (finding "forward-looking relief" regarding future actions "is not ripe for judicial review"). But, now, no "future authorizations" are at issue, no challenges to such authorizations are ripe, and Plaintiffs' request for "preventative" relief has no jurisdictional basis. In short, vacatur of the EA has no effect on the 2018-19 Winter Program.

2. No Exception to the Mootness Doctrine Applies.

Plaintiffs concede that there is no longer a live controversy and instead argue that "BLM's authorization of the winter exploration is capable of repetition yet evades review." Opening Brief at 2-3. This narrow exception to mootness does not apply here.

Where a case is technically moot, the court may exercise jurisdiction if the controversy "is one of those extraordinary cases in which the complained of activity may be repeated and yet evade review." *Alaska Fish & Wildlife Fed'n v. Dunkle,* 829 F.2d 933, 939 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988). "[T]he capable-of-repetition doctrine applies only in exceptional situations" and only "where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation

or expiration, *and* (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (brackets in original; emphasis added; internal citations and quotation marks omitted). The plaintiff bears the burden of establishing these two requirements. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1021 (9th Cir. 2010).

Plaintiffs cannot meet that burden because there is no "reasonable expectation" that Plaintiffs will be subject to the "same action again." *Spencer*, 523 U.S. at 17. Two cases from this Court illustrate the scope of this requirement. In *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992), this Court held that a challenge to an expired 1991 annual fishing regulation based on an (allegedly faulty) environmental analysis, was "likely to recur in future years" because the 1992 fishing regulation issued the following year was based on the *same* environmental analysis. By contrast, in *Ramsey v. Kantor*, this Court distinguished *Franklin* in a situation where the agency would *not* be relying on the same underlying environmental analysis in future years. 96 F.3d 434, 446 (9th Cir. 1996). The Court explained that a challenge to an expired fishing regulation was moot when the agency would either "no longer . . . rely[] on the particular biological opinion that was being challenged, but rather upon a new opinion" or rely on the same biological opinion but base "its ruling on different criteria or

factors in the future." *Id.* (*citing Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071 (9th Cir. 1995)).

The facts of this appeal are similar to *Kantor* and unlike *Franklin*. Plaintiffs' Amended Complaint alleges that BLM's 2018 EA for the Winter Program violated NEPA (and ANILCA) because it failed to provide a "convincing statement of reasons," consider cumulative impacts, and discuss sufficient alternatives. ER 630-36. But the EA for the 2018-19 Winter Program is tailored to the site-specific nature of the program's geographic scope, ice road and air strip configurations and locations, temporary camps, and number and location of wells. ER 338-348 (showing new EA for each winter program). Any future winter program will have its own site-specific EA (or site-specific EIS if appropriate) that will be tailored to that program's unique features. Indeed, each prior Petroleum Reserve exploration program had a different site-specific EA (ER 338-348) and, most recently, BLM prepared a *different* site-specific EA for the winter exploration that occurred in 2019-20 (which Plaintiffs did not challenge). *See* Declaration of Dominic Miocevic, ¶¶ 3, 5-7.[3]

[3] ConocoPhillips has submitted the Miocevic Declaration to address new factual developments that bear on this Court's analysis of mootness. ConocoPhillips has separately filed a motion for leave to include this declaration as part of the appeal.

This is in sharp contrast to *Franklin*, in which the agency relied on the *same* environmental document the following year. Here, as in *Kantor*, BLM in future years "would no longer be relying on the particular [EA] that was being challenged, but rather upon a new [assessment]" and will necessarily be making that assessment on "different criteria or factors in the future." 96 F.3d at 446.

The district court reached a contrary result because, at the time, ConocoPhillips planned to conduct an exploration program in the winter of 2019-2020, and the court found that "it appear[ed] likely that additional NEPA analyses for future exploration in the NPR-A will tier to and rely on the 2012 IAP/EIS, the GMT1 [supplemental EIS], and the GMT2 SEIS in the same manner as the 2018 EA." ER 27. Thus, the district court found *Franklin* persuasive. But the Amended Complaint does not mention tiering at all nor does it challenge the adequacy of the 2012 IAP EIS or any of the other environmental documents that BLM relied upon. The Amended Complaint solely challenges the adequacy of the site-specific EA for the 2018-19 Winter Program. Thus, the fact that BLM might use tiering in the future (as authorized by regulation) is not relevant to whether the specific injury complained of here is likely to recur.

Notwithstanding the district court's tiering rationale, circumstances have significantly changed. The IAP EIS has been superseded by BLM's 2020 Integrated Activity Plan and Environmental Impact Statement (the "2020 IAP

EIS"). 85 Fed. Reg. 38,388 (June 26, 2020); Miocevic Decl. ¶ 8. Accordingly, it is no longer true that "additional NEPA analyses for future exploration on the NPR-A will tier to and rely on the 2012 IAP/EIS." ER 27. Instead, any such future analysis will necessarily tier to and rely on the 2020 IAP EIS. Similarly, in August 2020, BLM issued the Final EIS for the Willow Master Development Plan. Miocevic Decl. ¶ 8. This Plan covers much of the geographic scope of the 2018-19 Winter Program, and any future exploration in that area will likely tier to and rely on the Willow EIS as well as the 2020 IAP EIS. ER 391–92; ER 223 (2018-19 Winter Program request identifying exploration needed in the Willow area). Thus, even if future exploration programs continue to tier to and rely upon existing EISs, and even if the practice of tiering were challenged in the Amended Complaint, any future exploration program would necessarily rely on "different criteria or factors in the future." *Kantor*, 96 F.3d 434, 446.

Other circumstances relied upon by the district court have also changed. Specifically, although ConocoPhillips did, in fact, continue exploration in 2019-20 (as referenced by the district court), it terminated that program in April 2020 due to COVID-19-related safety concerns. Miocevic Decl. ¶¶ 3-7. And, in any event, the 2019-20 program is now in the past. ConocoPhillips has enough exploration data to proceed with the development of the Willow project and has no plans to conduct any winter exploration activities in the Petroleum Reserve for at least the next

couple of years. *Id*. ¶¶ 9-10. Whether ConocoPhillips engages in exploration in this, or any other, portion of the Petroleum Reserve in the future depends on many factors, including future global and local economic conditions and future oil prices that are difficult to predict. *Id*. ¶ 10. Future exploration activity in the Petroleum Reserve by ConocoPhillips is therefore unlikely at this time, and the nature, scope, and location of such a future program is purely speculative. *See Shell Offshore Inc.*, 815 F.3d at 628 n.3 (case moot and not reasonably likely to recur where "Shell called a halt to all Arctic exploration 'for the foreseeable future'").

Under these circumstances, there is no "reasonable likelihood that the same party will be subject to the action again." *City of Richmond*, 743 F.2d at 1353. ConocoPhillips has no present plans for winter exploration activities in this area of the Petroleum Reserve, any future exploration will be governed by a *different* IAP and evaluated in a *different* EA (or EIS), and that different EA (or EIS) will tier to and rely upon (if at all) *different* EISs. Even the regulations that will govern BLM's future NEPA review of exploration plans have since changed. *See* 85 Fed. Reg. 43,304 (July 16, 2020) (comprehensive revisions to NEPA regulations). It is thus improbable that Plaintiffs will be subject to the same action again.[4]

[4] Plaintiffs here could have potentially avoided mootness by seeking a preliminary injunction or administrative stay. "'Where prompt application for a stay pending appeal can preserve an issue for appeal, the issue is not one that will evade review.'" *Headwaters, Inc.*, 893 F.2d at 1016 (*quoting Am. Horse Prot.*

(continued . . .)

In sum, this Court should dismiss this appeal as moot. The sole activity that is the subject of the Amended Complaint was completed long ago and, as Plaintiffs concede, no effective relief can be granted. The "evading review" exception to mootness does not apply because the second criterion for that exception—a "reasonable likelihood that the same party will be subject to the same action again"—is not satisfied. *City of Richmond*, 743 F.2d at 1353.

B. BLM's NEPA Analysis Is Fully Consistent with Applicable Law.

Plaintiffs' arguments also fail on the merits. BLM took the required "hard look" at the consequences of the 2018-19 Winter Program by producing a thorough EA that was tiered to three relevant EISs. Nothing more was required under NEPA.

1. BLM Rationally Concluded that the 2018-19 Winter Program Would Have No New Significant Impacts.

As the district court concluded, BLM's EA for the 2018-19 Winter Program satisfies NEPA "by tiering to NEPA documents that fully analyze the impacts on caribou of exploration activity to the southeast of Teshekpuk Lake." ER 43. The IAP EIS comprehensively evaluates the effects of winter exploration activities in

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(. . . continued)
Ass'n, Inc. v. Watt, 679 F.2d 150, 151 (9th Cir.1982)). A stay would have precluded ConocoPhillips from conducting the work under the 2018-19 Winter Program, thus preserving the underlying controversy pending judicial review. *See Protectmarriage.com-Yes on 8*, 752 F.3d at 836 ("[A] court can ensure that a live controversy persists until the action is fully litigated by enjoining the challenged conduct until the litigation concludes.").

the NPR-A. ER 36-38. BLM properly tiered to the IAP EIS, performed an evaluation in the EA of the proposed 2018-19 Winter Program that considered new information, and rationally concluded that the preferred alternative would not result in significant impacts beyond those already addressed in the IAP EIS. ER 273, 382.

This conclusion is rational and fully supported by the administrative record, and should be confirmed. In the IAP EIS, BLM evaluated the environmental impacts of five different alternatives that included a range of scenarios contemplating different levels of winter exploration activity. *See generally* SER 161-234. The IAP EIS described in detail all of the activities involved in carrying out a winter exploration program, including construction of ice roads, snow trails, ice airstrips, and ice pads; transportation of personnel and equipment; and drilling and plugging of exploration wells. SER 172-77. BLM then produced hypothetical development scenarios, for the purpose of evaluating impacts, and those scenarios included detailed estimates of winter exploration activity levels, along with other oil and gas activities. SER 200-234, 236-37. These scenarios covered all areas in the Petroleum Reserve open to leasing for which exploration and development activities could occur, including the area covered by the 2018-19 Winter Program. SER 35-52; *see also* SER 435, 437, 439, 441, 443.

Specifically for exploration activities, the IAP EIS's preferred alternative estimated that up to 152 oil and gas exploration and delineation wells would be drilled, with associated ice roads and ice strips. SER 226-28. Other development scenarios predicted as many as 276 oil and gas exploration and delineation wells. *Id*. These "figures provide realistic estimates for impact analysis purposes that make it very unlikely that this IAP/EIS will underestimate impacts." SER 228. In fact, the more recent 2018 GMT 2 Supplemental EIS confirms that the level of activity from winter exploration has proven to be *less* than anticipated in the IAP EIS. ER 586. The total number of exploration wells drilled under the IAP EIS has been far below that evaluated in the EIS. ER 338-348.

Chapter 4 of the IAP EIS uses those conservative estimates of exploration activity to assess environmental impacts associated with each of the hypothetical scenarios. BLM addressed the effects of exploration activities in Chapter 4, including specifically in the wildlife (caribou) section and in the subsistence section. SER 238-259, 260-275; *see also* SER; 65-66. 71-74, 236-37. As for the selected alternative, the IAP EIS concluded that habitat impacts would be "negligible" due to the nature of the activity occurring on ice roads, ice pads, and ice airstrips. SER 241. The IAP EIS recognized that "[a]ny caribou in the immediate vicinity of the activity would be disturbed, possibly having a negative effect on their energy balance, hormonal status, and calving success, due to

prolonged stress." SER 242. However, "[b]ecause these animals are mobile and the operation would be temporary, it is not expected that there would be any long-lasting effects on caribou." *Id*. The IAP EIS candidly disclosed that "this assumption has not been tested and conditions for winter survival vary from year to year." *Id*. Accordingly, the IAP EIS recognized that "[i]t is possible that this disturbance could have an additive effect on natural winter mortality." *Id*.

For the 2018-19 Winter Program, BLM prepared an EA that tiered to, and incorporated by reference, the IAP EIS, as well as the supplemental EISs for GMT 1 and GMT 2. ER 272-73. BLM explained in the EA that if it "determines that the preferred alternative would not result in significant impacts *beyond those already addressed in the IAP/EIS* . . . and ROD . . . , the BLM would prepare a Finding of No New Significant Impacts and Decision Record approving the selected alternative." ER 273 (emphasis added).

The EA did not identify any new significant impacts that were not already addressed in the IAP EIS, and there are none. The proposed level of winter exploration activity (drilling up to *eight* wells) is squarely within the scope of winter activity contemplated in the IAP EIS (up to 152 wells under the selected alternative). ER 280. With respect to impacts to caribou, the EA thus appropriately concludes that "only minor impacts would be expected and impacts were covered in the 2012 NPRA IAP/EIS." ER 276. Consistent with the IAP EIS, the EA states

that the proposed action "may disturb wildlife from the immediate area of activities but would not reduce population levels or distribution during the season." ER 276. In response to public comments, BLM's EA further explained that "[i]t would not be expected that caribou would vacate an extensive area adjacent to exploration activities during winter" and that the impacts "would be local in extent, would not affect herd distribution or reduce populations." ER 371.[5] On-the-ground observations during the 2018-19 Winter Program verified this prediction, showing caribou in close proximity to winter operations. Miocevic Decl. Ex A at 1, 3-6.

Typical of a tiered NEPA review, BLM's 2018 EA addresses additional, relevant topics with specificity (including topics raised in Plaintiffs' comments), while relying upon the analyses in the IAP EIS for effects of activities that were comprehensively addressed in that document. ER 274-78, 292-95, 371. The EA included a detailed, three-page assessment of all new information regarding potential subsistence impacts. ER 292-9. It also included detailed assessments of three discrete areas for which BLM granted exceptions to certain BMPs contained

[5] In their briefing below, Plaintiffs made a separate NEPA argument alleging that BLM failed to consider subsistence impacts. *See* ER 43. The district court rejected that argument, finding it was "reasonable for the EA to determine that subsistence impacts associated with one season's winter exploration would be moderate and short term." ER 43–53. Plaintiffs do not challenge that finding or address NEPA-related subsistence issues on appeal, and therefore have waived this issue. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) ("Issues raised in a brief which are not supported by argument are deemed abandoned.").

in the IAP EIS. ER 283-88, 295-298. BLM rationally concluded that there were no new significant impacts beyond those already evaluated in the IAP EIS. ER 292-94. BLM also determined that the 2018-19 Winter Program was "in conformance" with the IAP EIS, including all of the mitigation measures contained in the IAP EIS. ER 387. All of these determinations are well-supported by the agency's record, and Plaintiffs point to no contrary record evidence that was ignored by BLM.

In short, BLM's tiered NEPA review met (and exceeded) all applicable legal requirements. Plaintiffs merely disagree with BLM's impact findings based on the scientific information in the record. But BLM is the expert, not Plaintiffs, and BLM's findings are entitled to deference. *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012).

2. Plaintiffs' Other NEPA Arguments Have No Merit

a. Plaintiffs' "shell game" arguments mischaracterize the record.

Plaintiffs hope to spark the Court's interest in this moot controversy by accusing BLM of a "shell game . . . through its long-standing pattern of refusing to analyze in detail the impacts of oil and activities at any phase in the planning, leasing, and permitting process." Opening Brief at 18-19. But the Court only has jurisdiction (if at all) on the claims alleged in the Amended Complaint, which only address the 2018-19 Winter Program. The APA provides jurisdiction over specific

agency actions, not agency "patterns." In any event, as demonstrated below, Plaintiffs' newfound "shell game" argument ignores contrary precedent and undisputed facts. BLM has consistently performed appropriate NEPA analyses at the leasing, exploration, and development phases in the Petroleum Reserve.

As to the leasing stage, in *NAEC II*, this Court recently rejected the claim that BLM failed to provide a site-specific analysis of leasing decisions in the Petroleum Reserve. *NAEC II*, 965 F.3d at 724. The Court found that the IAP EIS *was* the site-specific EIS for the leasing stage. *Id*. (The IAP EIS "*was* the EIS for the 2017 lease sale."). Plaintiffs do not even cite this case despite the fact that some of the Plaintiffs are parties to that case. They also fail to mention that the Court in *NAEC I* also rejected the claim that BLM failed to prepare an EIS for Petroleum Reserve lease sales. 457 F.3d at 976 ("An EIS is undeniably required, and, indeed one has been prepared."). Plaintiffs' alleged pattern of failing to address in detail the impacts at the leasing phase lacks any factual basis and is foreclosed by this Court's precedent.

Plaintiffs also misrepresent the facts regarding the development phase for Petroleum Reserve projects—the phase with the most potential for environmental impacts. To date, only two projects have reached the development phase in the Petroleum Reserve (GMT 1 and GMT 2) and the Willow project is currently in permitting for development. Each plan of development was supported by *its own*

comprehensive EIS. ER 166, 194; 85 Fed. Reg. at 49,677. This is the opposite of "refusing to analyze in detail the impacts of oil and gas activities at any phase." Opening Brief at 18. Again, Plaintiffs' claim of a so-called pattern of BLM's alleged failure to address in detail the impacts of projects at any phase is factually baseless.

And as for the exploration phase, there is no dispute that BLM conducted a site-specific EA for each and every winter exploration program it authorized. ER 338-48. The choice to do an EA, rather than an EIS, at the exploration phase is a function of the limited and temporary nature of the activity that has minimal impacts (i.e., infrastructure used for a few months and then melts), and the fact that the IAP EIS already evaluated in detail the impacts of a much higher level of exploration throughout the Petroleum Reserve (and specifically on the Teshekpuk Lake caribou herd and subsistence activities) and found that the impacts were likely to be minimal and temporary. The 2018 EA appropriately tiered to and relied on that analysis.

This is not a "shell game." It is precisely the tiering process contemplated by NEPA. NEPA and its implementing regulations *encourage* agencies, like BLM here, to rely upon and tier to comprehensive EISs that address the activity in question. *See* 40 C.F.R. § 1502.20 (2019). As the D.C. Circuit explained:

> In general, an agency preparing an environmental assessment for a drilling permit is not required to

> reevaluate the analyses included in the relevant project's EIS. Instead, NEPA regulations allow "tiering," which permits site-specific environmental analyses to incorporate by reference the general discussions of prior, broader environmental impact statements. . . . While courts have required environmental assessments to analyze certain impacts for the first time when the broader analysis did not address the impact in question *at all, see, e.g., Kern,* 284 F.3d at 1078, this is not such a case.

Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 511–12 (D.C. Cir. 2010) (citation omitted). The Department of Interior's NEPA regulations similarly explain that "[t]iering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant." 43 C.F.R. § 46.140(c). Plaintiffs do not cite these regulations, much less attempt to apply them.

Plaintiffs instead appear to believe that the 2018 EA is not a site-specific analysis (sometimes they say "parcel by parcel" analysis) of the impacts of the Winter Program—an analysis they claim was *promised* by BLM. Opening Brief 20-21. But this argument just ignores the record. The 2018 EA is a site-specific analysis. The 2018 EA identified the specific site at issue (ER 271), the exact location of wells (ER 278-79), the size, number, and location of ice roads, ice pads, camps, and ice air strips (ER 280-82; 308-09), the location of each stream crossing

(ER 322-27), and all equipment that would be used in that program (328-332). The EA also identified the unique features of the project, such as needed deviations from standard practices, and evaluated those effects. ER 283-88.

Based on that review, BLM determined that features specific to this project would have "minor" impacts to caribou, and that those impacts "were covered in the NPRA IAP/EIS," and that no further analysis was required. ER 276. BLM found that subsistence was "potentially impacted" and the 2018 EA proceeded to further analyze subsistence impacts specific to the 2018-19 Program, and incorporated the relevant discussion from both the IAP EIS and the 2018 GMT 2 supplemental EIS. ER 293-94. All told, BLM found the site-specific impacts of the 2018-19 Winter Program would be "short term and minimal" and that no EIS was therefore required, and issued a FONNSI. ER 382. Nothing more was required by NEPA.

Plaintiffs nevertheless contend that the EA "includes no specific discussion of the Exploration Program on caribou." Opening Brief at 23. But this argument ignores the fact that the 2018 EA *incorporates* and includes the detailed discussion in the IAP EIS and the 2018 supplemental GMT 2 EIS. As the district court explained, the IAP EIS "describes the Teshekpuk Caribou Herd in detail," discusses "the potential impacts of exploration activities on caribou" including "significant exploration within the area to the southeast of Teshekpuk Lake,

including the Fish Creek Area," and "recognized that the Teshekpuk Caribou Herd would be present in this area during exploration activities and discussed potential impacts to the herd." ER 35-37, 42-43. Moreover, as the district court explained, the 2018 EA tiers to the 2014 GMT 1 and 2018 GMT 2 supplemental EISs, which support the conclusion that "winter exploration activities would have a minimal impact on the Teshekpuk Caribou Herd." ER 40. Based on this record, the district court correctly concluded that "the 2018 EA adequately explains the basis for its conclusion that ConocoPhillips' winter exploration program would have minimal impacts on Teshekpuk Caribou Herd caribou." ER 41-42.

In short, by "tiering to NEPA documents that fully analyze the impacts on caribou of exploration activity in the southeast of Teshekpuk Lake, the EA supplied a convincing reason why additional analysis was not necessary." ER 43. BLM fully performed the site-specific analysis required by NEPA. NEPA simply requires an agency to consider and evaluate the relevant impacts of an agency action. Plaintiffs identify no impacts that were not considered by BLM.

b. Plaintiffs' tiering arguments lack merit.

Plaintiffs double down, claiming that tiering cannot fulfill BLM's site-specific obligations because none of the tiered-to documents "take[] a hard look at the specific effects of the program." Opening Brief at 25. This argument misses the point. BLM satisfied its obligations to take a hard look at the 2018-19 Winter

Program by producing an EA specific to that program that incorporated by reference the prior discussion of impacts in the IAP EIS and supplemental GMT 1 and GMT 2 EISs. The IAP EIS contemplated that this exact type of winter exploration program would occur, and the GMT 2 EIS identified the 2018-19 Winter Program as a likely future action. ER 579; SER 172-175. The IAP EIS discussed the expected impact of similar past and future exploration activities on the Teshekpuk Lake Caribou herd, and the 2018 GMT 2 supplemental EIS confirmed that actual impacts in the intervening years in adjacent and overlapping areas was in line with those earlier predictions (that is, minimal or no impacts). ER 585-587. That was more than enough basis for BLM to conclude that the 2018-19 Winter Program also would have no new significant impacts.

Next, Plaintiffs claim that BLM cannot tier to the IAP EIS because that document supposedly "highlights the potentially significant effects of winter exploration and the information gaps BLM had to address." Opening Brief at 31. This mischaracterizes the record. Plaintiffs selectively quote a paragraph from the IAP EIS that addresses potential effects of "development" (not exploration) and the associated year-round exposure. *Id*. (*quoting* ER 132 in the section titled "Oil and Gas Development"). The IAP EIS addresses the effects of "Exploratory Drilling" in the preceding section and concludes (as discussed above) that the effects would be "less than" Alternative A (ER 131-32), which concluded that the effects of

winter exploration activities on the Teshekpuk Lake Caribou Herd would be minimal. ER 119-120.

Nor did the IAP EIS identify "information gaps BLM had to address." Instead, the IAP EIS (as discussed above) candidly acknowledged that portions of its analysis had not been scientifically tested. ER 120. These are not gaps to fill. It is well-established that NEPA cannot be "read as a requirement that complete information concerning the environmental impact of a project must be obtained before action may be taken." *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1280 (9th Cir. 1973). "It is not required that every conceivable impact be analyzed, or that action be deferred until all studies have been done that might be done." *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994), *aff'd sub nom. Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996).

In *Theodore Roosevelt*, the D.C. Circuit rejected this same argument, holding that BLM was not required to "fill in any holes" because, as here, the programmatic EIS generally addressed the topics at issue and the agency was not obligated to reevaluate those analyses. 616 F.3d at 511–12. In fact, when preparing the IAP EIS, BLM was required by regulation to, and did, identify areas of uncertainty and missing information. *See* 40 C.F.R. § 1502.22 (2019) ("When an agency is evaluating reasonably foreseeable significant adverse effects on the

human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.").

BLM was *not* required to "fill the information gaps" in subsequent analyses tiered to the IAP EIS in order to reduce or eliminate the supposed "substantial uncertainty." *See Theodore Roosevelt Conservation P'ship*, 616 F.3d at 511–12. Rather, at the exploration stage, BLM was required to determine, based on the best *available* information, whether there were any "new and significant environmental impacts . . . that were not previously considered." *Salmon River Concerned Citizens*, 32 F.3d at 1356. Plaintiffs fail to address this essential question. BLM, however, squarely addressed this question in the record, issuing a FONNSI concluding that the winter program would have "no new significant impacts on the environment" and that "[t]he impacts from the proposed action are short term and minimal." ER 382.

Plaintiffs next contend that new information "glaringly" precludes tiering, because the Teshekpuk Caribou Herd "declined 40 percent between 2008 and 2018" and that BLM "did not address this" in the 2018 EA. Opening Brief at 34-35 (citing ER 565). This argument again misses the mark. The source of this new information is the GMT 2 supplemental EIS, which *was tiered to and incorporated*

into the 2018 EA. This information was not overlooked in the 2018 EA—it is part of the 2018 EA.

And again, Plaintiffs take information out of context to try to foment controversy where none exists. Plaintiffs fail to mention that the recent pullback in population followed *two decades of unprecedented population growth*, seeing the Teshekpuk Lake Caribou Herd grow from 11,882 animals in 1984 to 68,000 animals in 2008. ER 565. The GMT 2 EIS explains that, as of 2018, the population was 41,542 animals (about 3.5 times greater than 1984). *Id*. Plaintiffs also conveniently fail to mention that the causes of the pullback "are likely related to poor nutrition, difficult winter weather conditions, high calf predation, and nutritionally mediated risk of predation" (ER 565[6]) and are "are not thought to be related to oil field development." ER 576.

Furthermore, this Court's precedent is clear that "NEPA 'regulations do not anticipate the need for an EIS anytime there is some uncertainty, but only if the effects of the project are 'highly' uncertain.'" *Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1008 (9th Cir. 2020) (*quoting Ctr. for Biological*

[6] Plaintiffs also point to a study published after the IAP EIS that they claim shows the potential for significant effect to caribou from winter activities. Opening Brief at 35–36. But as the district court correctly explained, that study (which dealt with Norwegian reindeer) does not undermine the conclusions in the IAP EIS that concluded that caribou could be disturbed, but the effects would be minimal. ER 42 (n.184).

Diversity v. Kempthorne, 588 F.3d 701, 712 (9th Cir. 2009)). That "highly uncertain" threshold is not met when, as here, winter exploration activities have been occurring for many years with no demonstrated or remotely identifiable impact to caribou. *Id*. (threshold not met because "[g]elding horses is not a new practice"). Indeed, "[a]n environmental impact statement is not required merely because an analysis reveals a potential for a minor impact." *Barnes*, 865 F.3d at 1274–75.

After relying on the GMT 2 supplemental EIS to supply new information related to caribou, Plaintiffs flip-flop and argue that BLM cannot tier to the GMT 1 or GMT 2 supplemental EISs because (a) they do not address winter exploration and (b) the NEPA regulations do not permit tiering to these EISs. Opening Brief at 36.

The first argument is factually wrong. The GMT 2 supplemental EIS addresses the impacts of past and future winter exploration (including ConocoPhillips' then-planned 2018-19 Winter Program) (SER 905) and specifically evaluates the cumulative impact of all past and future projects on caribou (SER 908-911). The GMT 2 supplemental EIS concludes that "[o]verall, industry and agency actions on the North Slope are expected to have minor impacts

to caribou herd productivity" and that combined impacts on caribou are expected to be "minor." SER 910-11.[7]

Plaintiffs also incorrectly argue that BLM is legally *prohibited* from tiering to the GMT 1 and GMT 2 supplemental EISs. Principally, this argument is waived because Plaintiffs failed to raise this argument with the district court. *Friedman v. AARP*, Inc., 855 F.3d 1047, 1057 (9th Cir. 2017) ("Our general rule is that we do not consider an issue not passed upon below.").[8] The 2018 EA and FONNSI both expressly state that they tiered to the GMT 1 and GMT 2 supplemental EISs, and Plaintiffs did not challenge that decision in their Amended Complaint or in the district court proceeding.

Even if not waived, the argument has no merit. NEPA regulations allow tiering "[f]rom a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis." 40 C.F.R. § 1508.28(a). The IAP EIS is a program EIS. The GMT 1 and GMT 2 EISs both expressly tier to the IAP EIS and are clearly part of

[7] The supplemental GMT 1 EIS also considered future winter exploration activity (including the Bears Tooth area) (SER 687-90, 693) and discussed the cumulative impacts of oil and gas exploration and development on caribou. SER 694-97.

[8] It is also waived because it is not in the Plaintiffs' Amended Complaint or their public comments to the agency.

that larger program. ER 168, 196. The 2018-19 Winter Program is also clearly part of that larger program and tiers to all three EISs. ER 273. Plaintiffs cite to no case finding that it is inappropriate to tier to a program EIS and that program's related tiered EISs.[9] BLM's actions here are plainly consistent with the intent of tiering to "eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for discussion." 40 C.F.R. § 1502.20 (2019).

In any event, it is hard to see how tiering to the 2018 GMT 1 and 2 supplemental EISs creates a reversible error. The 2018 EA is properly tiered to the IAP EIS, which provides all the foundation necessary to issue a FONNSI in this case. Even if BLM could not tier to the 2018 GMT 1 and 2 supplemental EISs, it could still incorporate that material by reference and in fact expressly did so. *See* ER 273 (identifying GMT 1 and GMT 2 EISs "which are incorporated in their entirety by reference in accordance with CEQ Regulation 40 CFR 1502.21."); *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,034 (Mar. 23, 1981) (material that can be

[9] The decision in *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) is distinguishable, as the BLM in that case attempted to post-hoc rely on unrelated EISs that did not discuss the impact of the project under review. Here, by contrast, all the EISs considered anticipated winter exploration activities. The decision in *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 688 F.3d 1067, 1088–89 (9th Cir. 2011), does not help Plaintiffs either, because in that case the agency did not tier at all, but relied on unrelated EISs for "background information."

incorporated by reference includes "other EISs"). BLM met the requirements for incorporation by reference at 40 C.F.R. § 1502.21 (2019) by citing to the EISs and briefly describing their contents. ER 273, 290, 299. As this Court explained, there is no reversible error when an agency identifies a document as "'tiered to and incorporated' rather than just 'incorporated.'" *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 794 (9th Cir. 2014).

In sum, BLM reasonably looked to and relied upon prior NEPA analyses for the Petroleum Reserve, confirming and concluding that winter exploration activities have, at most, a minimal and temporary impact on the Teshekpuk Lake Caribou Herd. The district court affirmed that approach in a comprehensive decision, which should be affirmed by this Court.

3. BLM Appropriately Considered Cumulative Impacts.

Plaintiffs argue that the EA does not meaningfully address cumulative impacts to caribou[10] and repeat arguments that BLM cannot tier to the GMT 1 and GMT 2 supplemental EISs for that analysis. Opening Brief at 38. These arguments fail for similar reasons as their arguments above.

[10] Below, Plaintiffs argued that the cumulative impact analysis also failed to address impacts to subsistence—a claim the district court rejected. ER 60-61. Plaintiffs' Opening Brief limits their cumulative impact argument on appeal to impacts to caribou, and any claim related to subsistence is therefore waived.

A "[c]umulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (2019). "An EA's analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010) (internal citation and quotation marks omitted).

As the district court explained, "the 2018 EA took the requisite hard look at cumulative impacts to caribou and subsistence activities . . . by tiering to previous EISs that fully analyze these issues." ER 62; *see also* ER 298 (cumulative impact analysis relying on IAP EIS, GMT 1 EIS, and GMT 2 EIS). In the GMT 2 supplemental EIS, BLM recently conducted a full analysis of the expected cumulative impacts on caribou associated with oil and gas development in the Petroleum Reserve. ER 585-588. This analysis catalogued past, present, and future activity, including the anticipated 2018-19 Winter Program, future seismic exploration, and the future development of the Willow project, including the future discovery and development of gravel mines to support that project, among many other projects. ER 576-581. The GMT 2 supplemental EIS concluded that the cumulative impacts to caribou "are within the range of cumulative impacts from oil

and gas activities considered" in the IAP EIS, and the GMT 2 project would have "minor" impact with no "synergistic" effects at the herd level. ER 588.

The 2018 EA, in turn, incorporated and relied on this analysis, which showed that "[r]ecent winter activities authorized by the BLM in the NPR-A have not caused significant direct or indirect adverse impacts to the environment." ER 299. Furthermore, "[t]he small number and minimal severity of the impacts occurring from 1999 to 2017 demonstrates the overall effectiveness of the environmental protections that are applied to winter exploration activities in the NPR-A." ER 299. After specifically addressing the potential cumulative impacts of those and additional projects occurring in or around the Petroleum Reserve during winter 2018 in the EA (including responses to specific comments (ER 298-303, 375), BLM concluded that the 2018-19 Winter Program would not "add substantially to the incremental past, present, and future impacts" of oil and gas exploration and development activities in and around the NPR-A. ER 299. Having incorporated the prior analysis by reference, BLM was not required to repeat that analysis in the 2018 EA. 40 C.F.R. § 1502.21 (2019).

Put another way, in August of 2018, BLM completed a comprehensive review of the cumulative impacts on the Teshekpuk Lake Caribou Herd for all past, present, and foreseeable future Petroleum Reserve activities in the GMT 2 EIS, including the 2018-19 Winter Program. The 2018 EA for the 2018-19 Winter

Program was completed *only four months later*, in December of 2018, and incorporated and relied on the *just completed* cumulative impact analysis on caribou in the GMT 2 EIS. Under these circumstances, "[r]equring the [BLM] to duplicate these efforts" in the 2018 EA "would be nonsensical." *Cal. Trout v. Schaefer*, 58 F.3d 469, 474 (9th Cir. 1995).

Plaintiffs turn their focus to a contemporaneous geotechnical exploration (gravel boreholes to locate a future gravel mine for Willow) that was also completed in the winter of 2018-19, and claim that the tiered documents do not address this project. Opening Brief at 43. Again, they ignore the record. The 2018 EA specifically identifies this project in its cumulative impacts analysis as a project occurring "this winter" (ER 298 (list of projects including ConocoPhillips' "Borehole Project looking for a gravel source" in the winter of 2018-19)) and then addresses the cumulative impacts of the "borehole project to look for gravel" as they pertained to subsistence impacts. ER 300. Likewise, the GMT 2 supplemental EIS addressed cumulative impacts to caribou that included both the 2018-19 Winter Program and the development of "a potential new gravel mine" for Willow. ER 579; *see also* ER 581 (identifying a "Gravel mine to support Willow project"); ER 586 (evaluating cumulative impacts of future gravel mining for Willow on caribou).

Moreover, the impact of the development of gravel resources in the Petroleum Reserve was already evaluated it the IAP EIS. The IAP EIS's preferred alternative considered and evaluated the impacts of locating and developing 29 gravel mines in the Petroleum Reserve (ER 608), including 104 acres of gravel pits in the Greater Mooses Tooth and Bears Tooth areas. ER 588. In any event, as the district court explained (and Plaintiffs do not dispute), the gravel exploration program would result in only short-term displacement, and was not expected to "reduce population levels or distribution during the winter season." ER 56 n.244 (*citing* AR 8700). BLM reasonably concluded in the 2018 EA that there would be no meaningful cumulative effects from this project either. ER 299.

In addition to the lack of record support, Plaintiffs' arguments rely upon inapt case law. In *Klamath-Siskiyou Wildlands Center v. BLM*, the Ninth Circuit found fault with two BLM timber sale EAs that failed to address cumulative impacts because the programmatic EIS to which they tiered *also* failed to address cumulative impacts. 387 F.3d 989, 997 (9th Cir. 2004). Here, by contrast, the tiered to and incorporated EISs plainly address cumulative impacts including specifically the 2018-19 Winter Program. Indeed, this Court has already found the holding in *Klamath-Siskiyou Wildlands Center* to be distinguished when, as here, the agency incorporates supporting information into the EA. *Jones v. Nat'l Marine*

Fisheries Serv., 741 F.3d 989, 998 (9th Cir. 2013).[11] Likewise, this Court's decision in *Te-Moak Tribe*, 608 F.3d at 605 n.13, is off-point for the same reason—the incorporated and tiered to documents in that case "did not discuss cumulative effects."

In sum, Plaintiffs have presented no credible evidence or argument showing that BLM's NEPA approach to cumulative effects is unlawful. Ultimately, Plaintiffs simply disagree with BLM's conclusions about the significance of certain potential effects. But Plaintiffs are not the experts and BLM's decisions are entitled to substantial deference. *See Native Ecosystems Council*, 697 F.3d at 1051 ("A court generally must be at its most deferential when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA.") (internal quotation marks and citations omitted).

4. BLM Properly Considered Alternatives Under NEPA.

Plaintiffs' last NEPA argument is that BLM unlawfully failed to consider the alternative of drilling "fewer wells." Opening Brief at 48.[12] This argument is contrary to the record and Ninth Circuit case law.

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[11] Plaintiffs also cite *Center for Environmental Law & Policy v. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011), but that case provides no help to Plaintiffs as it affirmed the cumulative effects analysis and declined to reach arguments related to incorporation by reference of other EISs. *Id*. at 1009 n.4.

[12] The district court also rejected the arguments that BLM failed to consider alternatives to deviations from BMPs, finding that the 2018 EA fully explained the

(continued . . .)

NEPA requires agencies to consider alternatives to the proposed action. 42 U.S.C. § 4332(2)(E). In *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1246 (9th Cir. 2005), the Ninth Circuit determined to "join our sister circuits in holding that an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *Id*. (upholding the Forest Service's consideration of a "no action" alternative and its "preferred" alternative, even though no other alternatives were considered in detail). "[W]ith an EA, an agency is only required to include a brief discussion of reasonable alternatives." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). There is no "minimum number of alternatives that an agency must consider," *Native Ecosytems*, 428 F.3d at 1246, and consideration of a "no action" alternative and its "preferred" alternative in an EA satisfies that "lesser" obligation. *See, e.g.*, *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1022 (9th Cir. 2012); *N. Idaho Cmty.*, 545 F.3d at 1154 (holding agencies "fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the . . . EA").

(. . . continued)
need for deviations. ER 67–68. Plaintiffs do not address this argument in their Opening Brief and it should be deemed waived.

Equally important, NEPA does not require an agency to "consider every possible alternative to a proposed action," or "alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." *Muckleshoot Indian Tribe*, 177 F.3d at 813 (*quoting Seattle Audubon Soc'y*, 80 F.3d at 1404). Likewise, "NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences." *Headwaters, Inc. v. BLM, Medford Dist.*, 914 F.2d 1174, 1181 (9th Cir. 1990).

Plaintiffs claim that they raised a viable alternative of "fewer wells" during the public comment process and that BLM "refused to consider a fewer wells alternative." Opening Brief at 48. This argument is factually incorrect. BLM did consider this alternative, but concluded that it did not warrant detailed discussion. The 2018 EA contains a section titled "Alternatives Considered but Eliminated from Detailed Consideration." ER 291. That section specifically addresses "[t]he alternatives to reduce the number of wells approved for drilling." *Id.* (emphasis in original). BLM then explained why this alternative would be contrary to the lease terms, and would not meet the purpose and need of the exploration program. *Id*.

This is all that NEPA requires for an EA. In *Center for Biological Diversity v. Salazar*, this Court rejected similar arguments where the agency "explains in the EA why it concluded that [alternatives] were not feasible" and where the agency

"explains . . . why the EA did not examine in greater detail some of the alternatives suggested by Plaintiffs." 695 F.3d 893, 916 (9th Cir. 2012).

Plaintiffs rely heavily on this Court's decision in *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013). However, the Court in *Abbey* was "troubled by BLM's decision not to consider a reduced- or no-grazing alternative at the site-specific level, having chosen not to perform that review at the programmatic level." *Id*. at 1050.

Here, by contrast, BLM extensively reviewed and considered reduced- or no levels of leasing, exploration, and development in the five alternatives of the IAP EIS, including reduced- or no levels of "exploratory drilling operations and ice roads" that would "traverse Teshekpuk Caribou Herd caribou wintering areas." ER 36. The level of exploration drilling varied from 128 wells to 236 wells, with BLM ultimately selecting alternative B-2 with 152 anticipated wells. SER 299. BLM, in fact, selected a reduced level of leasing, exploration, and development (alternative B-2) that "add[ed] approximately 1.9 million acres to the Teshekpuk Lake Special Area" to protect caribou and made "approximately 11 million acres of the NPR-A unavailable for oil and gas leasing." ER 37 (*quoting* SER 39-40). The concerns stated in *Abbey* have no application here. *See, e.g.*, *Ctr. for Env't Law & Policy*, 655 F.3d at 1012 (BLM adequately discussed alternatives in EA, where EA discussed two alternatives—the preferred alternative and a no-action alternative—

and the SEIS to which it was tiered considered and rejected the alternatives plaintiff-appellant preferred); *N. Idaho Cmty.*, 545 F.3d at 1153–54 (approving an EA that discussed only two alternatives because a prior EIS had evaluated the project's environmental effects in depth).

Plaintiffs now dispute the adequacy of BLM's explanation in the EA, arguing that fewer number of wells might be sufficient, or that the purpose and need statement is too narrow. Opening Brief at 48-55. These arguments are too little, too late. "A participant in an administrative process must alert the agency to their position and contentions" and the "[f]ailure to raise such particular objections may result in forfeiture of any objection." *Ctr. for Biological Diversity*, 588 F.3d at 710 (brackets, quotation marks, and citations omitted). BLM's explanation for eliminating the "fewer wells" alternative from detailed consideration was provided in the draft EA. SER 1201 (November 18, 2018 draft EA providing identical explanation as final EA). Plaintiffs were afforded an opportunity to comment on that rationale. Plaintiffs' comments do not make any of the arguments in their Opening Brief, instead generically stating that BLM "does not offer a legally supportable reason" for eliminating this alternative from detailed consideration. ER 236. These newly conceived arguments are waived.[13]

[13] Plaintiffs also did not raise this issue with the district court, and have waived the argument for this reason too.

Even if not waived, the arguments have no merit. The 2018 EA explains that "[t]he project is needed to provide detailed information regarding potential reserves of oil and gas within the NPR-A." ER 269. It further explains that "[t]he purpose for the proposed action is for BLM to provide reasonable access to and use of public lands within the NPR-A in a manner that would allow the applicant to explore and appraise oil and gas potential on NPR-A leases operated by CPAI," and that "[t]he objective of the proposed action would be to allow the applicant to conduct the requested activity subject to reasonable and appropriate Stipulations and Best Management Practices." *Id*.

ConocoPhillips' proposal for the 2018-19 Winter Program reflected its assessment of necessary exploration projects consistent with its lease rights, and BLM agreed. ER 269. Plaintiffs introduced no evidence into the record to the contrary, and there is none. Plaintiffs try to flip the scales and argue that there is no evidence that the proposed wells are needed. Opening Brief at 51. But ConocoPhillips' application and request clearly supplies that evidence. ER 223. And to the extent that there is any lack of development in the record on this issue, that is because Plaintiffs failed to raise these concerns in public comment. ER 228. In short, Plaintiffs' proposal to drill fewer wells was appropriately rejected because it "would not meet the purpose and need" of the proposed action. ER 291. *See Native Ecosystems Council*, 428 F.3d at 1248 ("[I]t makes no sense" for agencies

"to consider alternatives that do not promote the goal" or the "purpose" the agency is trying to accomplish.) (internal citation and quotation marks omitted)).

Finally, Plaintiffs' argument also fails because the selected alternative will "have no new significant impacts on the environment and will cause no undue or unnecessary degradation to the public lands." ER 382. In *Earth Island Institute v. U.S. Forest Service*, the Court observed that "'it makes little sense to fault an agency for failing to consider more environmentally sound alternatives to a project which it has properly determined, through its decision not to file an impact statement, will have no significant environmental effects anyway.'" 697 F.3d at 1023 (*quoting Sierra Club v. Espy*, 38 F.3d 792, 803 (5th Cir. 1994)); *see also Headwaters, Inc.*, 914 F.2d at 1181 ("NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences."). This, however, is exactly what Plaintiffs are asking this Court to do. Plaintiffs' fewer-wells argument provides no basis for invalidating BLM's decision.

C. BLM's Alternatives Comply with ANILCA.

Lastly, Plaintiffs summarily argue that BLM also violated ANILCA Section 810, repeating their NEPA argument that BLM was required to consider a "fewer wells" alternative. This argument fails for the same reasons discussed above. *See*

Sierra Club v. Penfold, 664 F. Supp. 1299, 1307 (D. Alaska 1987) ("NEPA case law is helpful in interpreting § 810.").

ANILCA Section 810(a) requires federal agencies contemplating "the use, occupancy, or disposition of public lands" in Alaska to "evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." 16 U.S.C. § 3120(a). BLM's analysis under ANILCA Section 810 is detailed in a document titled "Compliance with ANILCA Section 810 – Evaluation and Findings." SER 1194-1199. That document explains how the BLM conducted "government to government" discussion with the Native Village of Nuiqsut regarding the 2018-19 Winter Program. SER 1198. BLM then made findings that the Winter Program was "not expected to significantly restrict subsistence uses." *Id*.

Tellingly, Plaintiffs do not cite or discuss BLM's ANILCA Section 810 "Evaluation and Findings" and do not even include those findings in their excerpts of record. Accordingly, Plaintiffs have not shown, and cannot show, that BLM's Section 810 ANICLA findings are arbitrary and capricious.

Instead of addressing BLM's findings, Plaintiffs claim (without authority) that an agency fails to satisfy ANILCA if the agency's Section 810 evaluation

"decline[s] to consider alternatives or consider[s] only a no action alternative where feasible alternatives exist." Opening Brief at 56. No court has ever so held,[14] and BLM's ANILCA guidance is directly to the contrary. BLM's guidance addresses the consideration of Section 810 alternatives in a project involving an EA, explaining: "Commonly, EAs consist of at least two alternatives: the proposed action, and a no-action alternative. As a result, an analysis of this topic may be very brief."[15]

BLM's Section 810 analysis more than meets that standard. ER 381. BLM made separate detailed findings related to Section 810 and discussed Section 810 in the 2018 EA, and again in the FONNSI. SER 1194; ER 304 ("This proposed action would not, in and of itself, significantly restrict subsistence uses for the community of Nuiqsut" and "would be anticipated to result in temporary and less than significant restrictions"); ER 381 ("no new significant impacts are

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[14] The cases on which Plaintiffs rely are inapposite. *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990), *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723 (9th Cir. 1995), and *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984), all deal with the more stringent analysis requirements for an EIS or an SEIS. *See Earth Island Institute*, 697 F.3d at 1023.

[15] BLM, Compliance with ANILCA Section 810, at 12, www.blm.gov/download/file/fid/10986 (last visited October 15, 2020); *see also Kunaknana*, 742 F.2d at 1150 ("Agency interpretations of a statute are entitled to great deference and should be upheld so long as they are reasonable."); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1191 (9th Cir. 2000) (Ninth Circuit has "deferred to the Secretary of the Interior's interpretation of ANILCA.").

anticipated" to subsistence). Comparing the no-action alternative to the proposed action, BLM concludes that the 2018-19 Winter Program "would not alter the distribution, migration or location of harvestable fisheries resources," "would not create any legal barriers that would limit subsistence harvest and access," and "would not appreciably impact any other harvestable resources such as wood, water, berries or vegetation," and, consequently, that the "direct and indirect effects of the proposed action are not anticipated to significantly restrict subsistence uses." SER 1198-99. BLM further concluded that its subsistence analysis had identified "[n]o new significant impacts" to subsistence uses from the 2018-19 Winter Program. SER 1199. Having found as much, BLM had no obligation to do more in order to comply with Section 810. *See* BLM, Compliance with ANILCA Section 810, at 12; *see also City of Tenakee Springs v. Clough*, 750 F. Supp. 1406, 1421 (D. Alaska 1990) (acknowledging the agency's argument that "ANILCA, like NEPA, does not require affected agencies to consider project alternatives which do not achieve the purpose contemplated for the proposed action" as "correct"), *overruled on other grounds*, 915 F.2d 1308 (9th Cir. 1990).

Moreover, the NEPA analyses to which the EA tiers include thorough analyses of subsistence impacts from oil and gas exploration in and near the Petroleum Reserve. The IAP EIS's Section 810 analysis, for example, is nearly 30 pages in length and examines the potential effects on subsistence for all five of the

IAP EIS alternatives (SER 383-411) and concludes that the proposed levels of exploratory drilling for all alternatives "would not significantly restrict subsistence use by communities in or near the NPR-A (Anaktuvuk Pass, Atqasuk, Barrow, *Nuiqsut*, Point Lay, and Wainwright." SER 385-403 (emphasis added). BLM's Section 810 analysis for the GMT 2 supplemental EIS is similarly robust and documents the potential subsistence impacts for the three alternatives. SER 926-951.

In *Amoco Prod. Co. v. Village of Gambell, Alaska*, the Supreme Court instructed courts that Congress did not subordinate all other uses of public lands to subsistence uses. 480 U.S. 531, 545–46 (1987) ("Congress clearly did not state in ANILCA that subsistence uses are always more important than development of energy resources, or other uses of federal lands … ."); *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1230 (9th Cir. 1999) ("Subsistence uses by rural Alaskans are an important public interest to which the [agency] had to give careful attention. But they are not the only such interest."). BLM met the requirements of Section 810 by expressly considering the potential impacts on the abundance and availability of, and access to, subsistence resources.

In light of the analyses undertaken by BLM in the EA and the documents to which it is tiered, and the standard for evaluating ANILCA alternatives for an EA,

Plaintiffs' claim that BLM failed to comply with its obligations under Section 810 fails.

VIII. CONCLUSION

For the foregoing reasons, the appeal should be dismissed as moot. Alternatively, the decision of the district court should be affirmed on the merits.

DATED: October 16, 2020.

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CERTIFICATE of COMPLIANCE

This brief contains 13,985 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Signature *s/Jason T. Morgan*_____ **Date** __**October 16, 2020**____

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2.6(a), ConocoPhillips states that it is aware of no related cases.

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ADDENDUM

ADDENDUM

Native Village of Nuiqsut, et al.,
v.
Bureau of Land Management, et al.

No. 20-35224

Addendum
Page No.

16 U.S.C. § 3120. Subsistence and land use decisions [ANILCA § 810]

(a) Factors considered; requirements

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

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

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

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

* * * *

42 U.S.C. § 4332 - Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible:

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and

(2) all agencies of the Federal Government shall—

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes; the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

* * *

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

* * * *

42 U.S.C. § 6504. Administration of reserve

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

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

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

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

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

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

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

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

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

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

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

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

42 U.S.C. § 6506a. Competitive leasing of oil and gas

(a) In general

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

(b) Mitigation of adverse effects

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

(c) Land use planning; BLM wilderness study

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

(d) First lease sale

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

(e) Withdrawals

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

* * * *

40 C.F.R. § 1501.4 (2019)

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

40 C.F.R. § 1502.20 (2019)

§ 1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

40 C.F.R. § 1502.21 (2019)

§ 1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

40 C.F.R. § 1502.22 (2019)

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, “reasonably foreseeable” includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the Federal Register on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

40 C.F.R. § 1508.7 (2019)

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.11

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

40 C.F.R. § 1508.28

§ 1508.28 Tiering.

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

43 C.F.R. § 46.140 Using tiered documents.

A NEPA document that tiers to another broader NEPA document in accordance with 40 CFR 1508.28 must include a finding that the conditions and environmental effects described in the broader NEPA document are still valid or address any exceptions.

(a) Where the impacts of the narrower action are identified and analyzed in the broader NEPA document, no further analysis is necessary, and the previously prepared document can be used for purposes of the pending action.

(b) To the extent that any relevant analysis in the broader NEPA document is not sufficiently comprehensive or adequate to support further decisions, the tiered NEPA document must explain this and provide any necessary analysis.

(c) An environmental assessment prepared in support of an individual proposed action can be tiered to a programmatic or other broader-scope environmental impact statement. An environmental assessment may be prepared, and a finding of no significant impact reached, for a proposed action with significant effects, whether direct, indirect, or cumulative, if the environmental assessment is tiered to a broader environmental impact statement which fully analyzed those significant effects. Tiering to the programmatic or broader-scope environmental impact statement would allow the preparation of an environmental assessment and a finding of no significant impact for the individual proposed action, so long as any previously unanalyzed effects are not significant. A finding of no significant impact other than those already disclosed and analyzed in the environmental impact statement to which the environmental assessment is tiered may also be called a “finding of no *new* significant impact.”