No. 20-35224

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF NUIQSUT; ALASKA WILDERNESS LEAGUE; FRIENDS OF THE EARTH; NATURAL RESOURCES DEFENSE COUNCIL; and SIERRA CLUB,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT; DAVID BERNHARDT, in his official capacity as Secretary of the Interior; CHAD PADGETT, in his official capacity as Alaska State Director of the Bureau of Land Management; and NICHELLE JONES, District Manager, Bureau of Land Management Arctic District Office,

Defendants-Appellees,

and

CONOCOPHILLIPS ALASKA, INC.,

Intervenor-Defendant-Appellee.

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

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August 17, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Native Village of Nuiqsut, Alaska Wilderness League, Friends of the Earth, Natural Resources Defense Council, and Sierra Club hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

Alaska's Western Arctic, managed by the Bureau of Land Management (BLM) as the National Petroleum Reserve-Alaska ("the Reserve"), is a globally important ecological resource and a vital source of subsistence resources for the communities in northern and western Alaska. On December 7, 2018, BLM approved ConocoPhillips Alaska Incorporated's ("ConocoPhillips") expansive plan for winter oil and gas exploration activities ("Exploration Program") in a portion of the Reserve with especially important ecological and cultural values, a region that is home to the Teshekpuk Caribou Herd and a primary subsistence use area for the Native Village of Nuiqsut. BLM approved the Exploration Program—which included up to six new exploratory wells, 57 miles of ice roads, an airstrip, 23 ice pads, 43 miles of snow trails, and camps for 545 oil workers, and which expanded oil and gas activity into previously undeveloped areas of the Reserve—without taking a hard, site-specific look at the effects of the activities or considering alternatives to ConocoPhillips' proposed program.

BLM's failures here are part of an ongoing pattern of avoiding the full environmental impact assessment in the Reserve that the National Environmental Policy Act (NEPA) requires. At the land management planning stage, where BLM designates which areas in the 23-million-acre Reserve are open to oil and gas leasing, BLM provides a broad, general analysis in a plan environmental impact

statement (EIS) and commits to site-specific impact assessment later. Then, at the later project stage, BLM points back to the plan EIS. Here, BLM failed to take a hard look at the direct and cumulative impacts of the Exploration Program and failed to consider alternatives. BLM's approval of the Exploration Program, and BLM's ongoing practice of refusing to take a hard look at the impacts of authorizing oil and gas activities in the Reserve, violate NEPA and the Alaska National Interest Lands Conservation Act (ANILCA). Appellants respectfully request that this Court correct this long-standing problem by vacating and declaring unlawful BLM's Exploration Program decision and environmental analysis (EA).

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 because Appellants bring claims based on federal law. This Court has appellate jurisdiction over the district court's final judgment pursuant to 28 U.S.C. § 1291. The district court signed a final judgment on January 9, 2020, and entered it on January 10, 2020. I-ER-1. Appellants filed the notice of appeal on March 9, 2020, II-ER-75-79, within the sixty days allowed for appeals when an agency of the United States is a party. Fed. R. App. P. 4(a)(1)(B)(ii).

Though the Exploration Program has ended, Appellants' challenge is not moot. BLM's authorization of winter exploration is capable of repetition yet

evades review because the annual timeframe for winter exploration in the Reserve—six months at most—is too short to permit full review, and there is a reasonable likelihood BLM will again authorize winter exploration in the area and assess the environmental impacts through an environmental assessment (EA). *See, e.g.*, *Wildwest Institute v. Kurth*, 855 F.3d 995, 1002-03 (9th Cir. 2017); *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287-88 (9th Cir. 2013); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir. 1992).

ISSUES PRESENTED FOR REVIEW

1. Did BLM violate NEPA when it concluded, without taking a detailed and site-specific hard look, that the Exploration Program would have no significant impact on caribou?
2. Did BLM violate NEPA when it concluded that the Exploration Program would have no significant cumulative impacts without analyzing the combined impacts of the Exploration Program with two concurrent projects in the same area?
3. Did BLM violate NEPA and ANILCA when it failed to consider any reasonable and feasible alternatives beyond ConocoPhillips' proposed action and the no-action alternative?
4. Did the district court err in dismissing Appellant Friends of the Earth for lack of standing, when the court overlooked that the declaration of Nuiqsut resident

Rosemary Ahtuangaruak was submitted by Friends of the Earth in support of its standing?

STATEMENT OF STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the addendum to this brief.

STATEMENT OF THE CASE

I. Legal Framework

A. The National Environmental Policy Act

"NEPA expresses a Congressional determination that procrastination on environmental concerns is no longer acceptable." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982)). To that end, the statute requires federal agencies to prepare "a detailed statement" on "the environmental impact" of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C)(i); *see also* 40 C.F.R. § 1500.2 (requiring that federal agencies "[u]se all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment"). NEPA review thus has two principal purposes: (1) to "ensure that the agency will have available, and will carefully consider, detailed information concerning significant environmental impacts"; and (2) to "guarantee

that the relevant information will be made available to the larger public audience." *Ctr. for Biological Diversity*, 538 F.3d at 1185 (internal quotation marks and alterations omitted).

For proposals that do not fall into an established categorical exclusion from NEPA review and for which an agency has yet to require an EIS, the agency prepares an EA to determine whether an EIS is necessary. 40 C.F.R. § 1501.4(a), (b). An agency "must prepare an EIS 'if substantial questions are raised as to whether a project *may* cause significant degradation of some human environmental factor.'" *Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1274 (9th Cir. 2017) (quoting *Ctr. for Biological Diversity*, 538 F.3d at 1219) (emphasis in original); *see Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); *see also* 40 C.F.R. § 1508.13 (only if an agency affirmatively determines, based on the EA, that the proposed action "will not have a significant effect" on the environment, can it issue a finding of no significant impact and proceed without preparation of a full EIS). "If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project's impacts are insignificant." *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015) (quoting *Blue Mountains*, 161 F.3d at 1212).

In an EA, an agency must disclose and analyze the "environmental impacts of the proposed action and alternatives," including direct, indirect, and cumulative

impacts. 40 C.F.R. §§ 1508.7, 1508.8, 1508.9(b). This analysis must be site-specific even if a broader, programmatic EIS covering the area exists. *See W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1049 (9th Cir. 2013) ("Our conclusion that the . . . EIS contains sufficient analysis for informed decision-making at the programmatic level does not reduce or minimize BLM's critical duty to fully evaluate site-specific impacts.") (internal quotations omitted). The agency must thus evaluate the effects of the particular project on the particular location at issue. *See id.* And the agency must provide a detailed analysis. *See Blue Mountains*, 161 F.3d at 1213 ("[G]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided." (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998))); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992-94 (9th Cir. 2004); *Ore. Nat. Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 822-23 (9th Cir. 2006) (finding inadequate an EA that "did not contain objective quantified assessments of the combined environmental impacts of the proposed actions"). While the agency is authorized to rely on information contained in some types of prior EISs "to eliminate repetitive discussion of the same issues and to focus on the actual issues ripe for decision," *see* 40 C.F.R. § 1502.20, it remains obligated to provide detailed analysis about the specific effects of the particular

project at issue. *See Klamath-Siskiyou*, 387 F.3d at 997 (finding inadequate an agency's general statements about cumulative effects and explaining that "[w]hat is missing in the documentation . . . is any *specific* information about the cumulative effects").

NEPA requires an agency to "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E). "This 'alternatives provision' applies whether an agency is preparing an [EIS] or an [EA], and requires the agency to give full and meaningful consideration to all reasonable alternatives." *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (citing *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005)); *see also* 40 C.F.R. § 1507.2(d) ("This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to [EISs]."); *id.* § 1508.9(b) (noting EAs "[s]hall include brief discussions of . . . alternatives as required by section 102(2)(E)"). An agency must consider in an EA or EIS a reasonable alternative that could reduce adverse impacts. *See W. Watersheds Project*, 719 F.3d at 1051-53 (holding that grazing allotment EA was deficient because it failed to consider reduced-grazing alternative).

B. Alaska National Interest Lands Conservation Act Section 810

Congress enacted ANILCA section 810 "to protect Alaskan subsistence resources from unnecessary destruction." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 (1987). To accomplish this purpose, section 810(a) requires, among other things, that an agency considering permitting any use, occupancy, or disposition of public lands first undertake an initial evaluation of the proposed action's effects on subsistence and whether the effects can be avoided. 16 U.S.C. § 3120(a). Specifically, the agency must evaluate: (1) the proposed action's effect on subsistence uses and needs; (2) the availability of other lands for the purposes sought to be achieved; and (3) other alternatives that would reduce or eliminate the use of public lands needed for subsistence purposes. *Id.* This initial evaluation, including the obligation to consider alternatives, must occur for all actions subject to ANILCA, regardless of whether the action would significantly restrict subsistence uses. *See id.*; *Kunaknana v. Clark*, 742 F.2d 1145, 1150-51 (9th Cir. 1984). An agency must consider all feasible alternatives that would "minimize the impact of a proposed project on resources which rural village residents of Alaska use for subsistence." *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310, 1311-12 (9th Cir. 1990).

II. Factual Background

A. The Teshekpuk Lake Special Area, Caribou, and Nuiqsut's Traditional Practices.

The United States has long recognized that the Reserve is a uniquely valuable ecosystem that deserves protection. In 1976, Congress expressly called for protection of the significant natural, fish and wildlife, scenic, and historical values of the 23-million-acre Reserve. Naval Petroleum Reserves Production Act of 1976, Pub. L. 94-258, Title I § 104(b), 90 Stat. 304 (codified at 42 U.S.C. § 6504(a)) (NPRPA). Congress granted the Secretary of the Interior discretion to condition, restrict, or prohibit activities there as necessary to protect against significant adverse effects to these surface resources. 42 U.S.C. § 6506a(b). Additionally, Congress designated certain areas, and authorized the Secretary to designate others, for "maximum protection" of "subsistence, recreational, fish and wildlife, or historic or scenic value[s]." *Id.* § 6504(a). In these areas, exploration must "be conducted in a manner which will 'assure the maximum protection of such surface values.'" *Id.*; II-ER-103.

Congress specifically designated the Teshekpuk Lake area for protection of surface values, 42 U.S.C. § 6504(a), and the Department of the Interior formally designated the Teshekpuk Lake area as a "special area[] within the [Reserve]" the following year. 42 Fed. Reg. 28,723, 28,723 (June 3, 1977); II-ER-103. The Teshekpuk Lake Special Area protects important subsistence resources and uses

and world-class waterfowl and shorebird nesting, staging, and molting habitat. II-ER-89, 94-95, 103, 117. It also provides calving, insect relief, migration, and wintering areas for the more than 40,000 caribou of the Teshekpuk Caribou Herd. II-ER-89, 98-103; IV-ER-565.

The location where much of the Exploration Program took place—the Fish Creek area southeast of Teshekpuk Lake and directly west of Nuiqsut—is one of just two primary overwintering areas for the Teshekpuk Caribou Herd, and one of the only places on the Arctic coastal plain where caribou overwinter. II-ER-98, 101-02, 152, 151; III-ER-271, 293. The Teshekpuk Caribou Herd is "unique in that the majority of the herd typically remains on the coastal plain through the winter." IV-ER-563. In fact, "[d]uring most years since 1990, the majority of Teshekpuk Caribou Herd caribou have wintered on the coastal plain of the [Reserve], especially around Atqasuk and southeast of Teshekpuk Lake." II-ER-102. As oil and gas development encroaches on the Teshekpuk Caribou Herd's winter habitat, the herd faces year-round exposure to industrial activity. II-ER-132. No North Slope caribou herd has previously been exposed to oil gas activities year-round. *Id.*

The Teshekpuk Caribou Herd has been in decline in recent years as a result of low calf production and survival and high adult mortality. II-ER-174. The population has declined 40 percent over the past decade, down from more than

68,000 in 2008. IV-ER-565. The underlying causes of the decline are uncertain. II-ER-174.

Subsistence activities in the Reserve, especially in areas within and near the Teshekpuk Lake Special Area, are vital to those living in Nuiqsut, a community on the eastern border of the Reserve, about 35 miles south of the Beaufort Sea. II-ER-108-16; II-ER-204, 208-09. "Subsistence refers to a way of life in which wild renewable resources are obtained, processed, and distributed for household and communal consumption according to prescribed social and cultural systems and values." II-ER-176. In other words, subsistence refers to traditional harvesting practices and the deep-rooted cultural systems they sustain. Most households in Nuiqsut obtain a substantial portion of their food from subsistence, and particularly caribou. II-ER-111, 113.

B. Management of the Reserve and the 2013 Integrated Activity Plan and Environmental Impact Statement.

BLM manages oil and gas activities in the Reserve pursuant to a multi-step process. II-ER-85. It first promulgates activity plans. The Reserve activity plans are programmatic management plans that zone areas of the Reserve as open or closed to oil and gas activities. At the second stage, BLM determines whether, when, and where to hold lease sales in any portions of areas that the activity plans have designated as open for leasing. II-ER-85. Once leases are sold, BLM reviews exploration plans submitted by lessees, and, if oil or gas are discovered on

the leases, it reviews development plans for developing and producing these fossil fuels. *Id.*

In 2013, BLM issued its first-ever comprehensive management plan covering the entire Reserve. II-ER-81. The record of decision for the Integrated Activity Plan (Plan) designates 11.8 million acres (approximately 52 percent) of the Reserve as available for oil and gas leasing. II-ER-158; II-ER-90. Consistent with its programmatic nature, the Plan EIS generally describes the suite of potential impacts from all stages of oil and gas exploration and development across the 11.8 million acres open to leasing under the Plan. II-ER-129. It defers the more specific and detailed analysis necessary for on-the-ground actions until such actions are proposed: "[f]uture actions requiring BLM approval, including a proposed exploratory drilling plan . . . would *require* further NEPA analysis based on *specific and detailed information* about where and what kind of activity is proposed." II-ER-85 (emphasis added).

C. ConocoPhillips' Winter Exploration Program.

On November 9, 2018, BLM released a draft EA evaluating ConocoPhillips' proposal to expand significantly its winter exploration activities into previously undeveloped areas of the Reserve, including large portions of the ecologically and culturally important Fish Creek watershed within the Teshekpuk Lake Special Area. *See* III-ER-422, 424-25; II-ER-225 (map showing the project would stretch

west of the western-most existing wells, Tinmiaq 8 and Tinmiaq 9). During an abbreviated public-comment period, II-ER-226, Appellants raised concerns about the potentially significant effects of the program and about BLM's decision to consider only the proposed action and a no-action alternative. II-ER-228-37. As part of their comments, Appellants submitted multiple studies, one of which was published several years after the Plan EIS, demonstrating the potential for significant effects to caribou from winter activities. *See* II-ER-233-34 (discussing caribou studies in the record at II-ER-240-45, II-ER-246-54, II-ER-255-62). Appellants explained that these studies show that when caribou are forced to move more in response to disturbance, they may lose body mass. II-ER-233-34 (discussing study in the record at II-ER-240-45). Appellants explained that a recent study they submitted may be especially relevant to potential population-level impacts from winter exploration activities because it shows that the winter body mass of female caribou is strongly correlated with the likelihood of calving success and survival. II-ER-233-34 (discussing studies in the record at II-ER-255-62, 246-54. BLM did not incorporate these studies into its final EA. On December 7, 2018, BLM released a final EA and finding of no significant impact and signed a record of decision approving the Exploration Program. III-ER-263-376; II-ER-377-83; III-ER-384-88.

BLM's decision authorized ConocoPhillips to drill up to six exploratory wells and to construct up to 57 miles of ice roads, an airstrip, 23 ice pads, 43 miles of snow trail, and camps capable of housing 545 people. III-ER-278-80, 282; III-ER-385. The Exploration Program is one piece of ConocoPhillips' long-range plan to push progressively westward in the Reserve. *See* II-ER-226 n.4 ("The idea is that, by gradually extending the oil infrastructure west, each new project becomes economically viable." (quoting A. Bailey, *Early GMT-1 start: First oil begins to flow from ConocoPhillips' NPR-A Alpine satellite pad*, PETROLEUM NEWS (Oct. 14, 2018))).

Alongside the Exploration Program, BLM approved two additional oil and gas projects in the same area. First, ConocoPhillips obtained approval to pursue a geotechnical exploration program, which authorized drilling up to 125 onshore boreholes to identify potential gravel sources for future oil development projects and up to 40 offshore boreholes to delineate routes for transporting supplies from ships to onshore oil development projects. III-ER-391-92. Second, BLM authorized ConocoPhillips' plans to construct a gravel road and drill pad for the Greater Mooses Tooth 2 Development Project (GMT2). II-ER-198. These projects, which included substantial vehicle traffic over large areas, overlapped spatially and temporally with the Exploration Program within the Teshekpuk

Caribou Herd's winter range and Nuiqsut's heavy use subsistence area. II-ER-101-02, 115, 152; II-ER-192-93; II-ER-211; III-ER-271; III-ER-393-94.

APPELLANTS' INTERESTS

Appellants have standing to bring this case. Members of Appellant groups use and enjoy—and intend to continue to use and enjoy—the Reserve, including areas affected by the Exploration Program, for various purposes, including subsistence, recreation, wildlife viewing, education, research, photography, and/or aesthetic and spiritual enjoyment. *See* IV-ER-427-28, ¶7; IV-ER-436-39, 477, ¶¶5, 8-9, 69; IV-ER-482-83, ¶¶11-12; IV-ER-490-91, ¶8; IV-ER-496-501, ¶¶10-15, 17-22, 24; IV-ER-509-10, 514-19, ¶¶8, 23-34. The Exploration Program will directly and irreparably injure these interests. *See* IV-ER-428-29, 431-33, ¶¶8, 15-17; IV-ER-438-40, 449-50, 457-59, ¶¶9-11, 29, 40-41; IV-ER-483-84, ¶¶13-14; IV-ER-491-2, ¶¶8, 10-11; IV-ER-500-03, ¶¶23, 25-29; IV-ER-520-23, ¶¶37-38, 40-42.

SUMMARY OF THE ARGUMENT

BLM's approval of the Exploration Program follows a long-standing BLM pattern of refusing to look in detail at the site-specific impacts of the actions it authorizes in the Reserve. Here, in keeping with this pattern, BLM violated NEPA and ANILCA in at least three ways. First, BLM failed to take a hard, site-specific look at the Exploration Program and did not supply a convincing statement of

reasons explaining why it would not have the kind of significant effects on the Teshekpuk Caribou Herd that would require an EIS. Second, BLM violated NEPA by failing to disclose and analyze the cumulative impacts of the Exploration Program and other exploration and construction projects occurring during the same time and in the same area. Third, BLM failed to consider any alternatives to ConocoPhillips' proposal, including reasonable and feasible alternatives proposed by Appellants, as required by NEPA and ANILCA. Appellants respectfully request that this Court end BLM's practice of failing to take a detailed, site-specific look when analyzing the impacts and considering alternatives for the projects it authorizes in the Reserve. Appellants also request that this Court vacate the district court's ruling dismissing Appellant Friends of the Earth for lack of standing.

ARGUMENT

I. Standard of Review

This Court reviews a district court's denial of summary judgment and questions of statutory interpretation de novo. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719-20 (9th Cir. 2003).

Judicial review in this case is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 706. *See Klamath-Siskiyou,* 387 F.3d at 992. The APA directs the reviewing court to "hold unlawful and set aside agency action, findings, and

conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). To meet the APA standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). In reviewing the adequacy of a NEPA document, courts apply a "rule of reason" to ensure that the agency has taken the requisite "hard look" at the potential environmental consequences of the proposed action. *Klamath-Siskiyou*, 387 F.3d at 992-93 (citing *Churchill County v. Norton*, 276 F.3d 1060, 1071-71 (9th Cir. 2001). An agency's "'hard look' 'must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made.'" *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)).

II. BLM failed to take a hard look at the impacts of the Exploration Program on caribou.

BLM neither prepared an EIS nor supplied a convincing statement of reasons to explain why the effects of the Exploration Program on caribou would be insignificant, in contravention of its NEPA obligations to take a hard look at the site-specific impacts of activities it authorizes. *See Cascadia Wildlands*, 801 F.3d

at 1111. Substantial questions exist concerning the effects of such exploration on caribou. The record shows that the Exploration Program had the potential to significantly affect caribou. *See* II-ER-132; II-ER-185-87. And, as BLM has acknowledged, the Exploration Program occurred within an important overwintering area for the Teshekpuk Caribou Herd, encompassing a large area around Fish Creek. III-ER-293. Disregarding this record evidence without any specific analysis, BLM concluded in its EA that the Exploration Program would have only "minor impacts" on caribou. III-ER-276.

BLM's attempt to tier to prior NEPA analyses does not cure this failure. The prior NEPA analyses were prepared for other decisions and are not specific to the Exploration Program. Moreover, they highlight the potential for impacts from projects like ConocoPhillips', do not address new information, and, in some cases, do not even address winter exploration impacts. BLM's EA is therefore arbitrary and violates NEPA.

A. BLM is playing a NEPA shell game to avoid analyzing the full impacts of oil and gas activities in the Reserve.

BLM is engaging in a shell game in the Reserve through its long-standing pattern of refusing to analyze in detail the impacts of oil and gas activities at any phase in the planning, leasing, and permitting process, in violation of NEPA. *See Pac. Rivers Council v. U.S. Forest Serv.*, 689 F.3d 1012, 1029-30 (9th Cir. 2012), vacated as moot, 570 U.S. 901 (2013) (noting public "concern that

programmatic NEPA documents often play a 'shell game' of when and where deferred issues will be addressed, undermining agency credibility and trust."). At the programmatic Plan EIS phase, BLM provides broad, general analysis, with the promise of site-specific analysis later when projects are approved. Then at the project phase such as exploration, BLM points back to the programmatic Plan EIS for the site-specific analysis. This case presents the opportunity to put an end to BLM's repeated and ongoing failure to take the hard, site-specific look that NEPA requires in the Reserve.

Here, BLM's analysis of caribou impacts is, on its face, deficient: a single paragraph (included in the response to comments, not the body of the EA, III-ER-371) that provides no specific details and no factual support for its conclusions. *See Blue Mountains*, 161 F.3d at 1213 ("The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the [agency's] defense of its position must be found."). Tellingly, BLM did not assert below, nor did the district court find, that the EA, standing alone, satisfied NEPA's requirement that the agency take a hard look at impacts to caribou, including the necessary site-specific detail. BLM and the court instead pointed back to the programmatic Plan EIS. I-ER-42-43.

But the Plan EIS to which the EA tiers for the Exploration Program is a broad-scale zoning and land management plan for the entire Reserve that explicitly

states that site-specific analysis will be required when exploration activities are permitted: "[f]uture actions requiring BLM approval, including a proposed exploratory drilling plan . . . would *require* further NEPA analysis based on *specific and detailed information* about where and what kind of activity is proposed." II-ER-85 (emphasis added). The Plan EIS also raises questions about the potential for significant effects from subsequent on-the-ground actions. *See infra* pp. 31-34. Yet in this case BLM argued, and the district court held, that BLM did not, in fact, have to undertake "further NEPA analysis based on specific and detailed information," II-ER-85, about the impacts of this Exploration Program on caribou. I-ER-41-43. Instead, the district court held that it was proper for BLM to rely on general statements in the Plan EIS and other unrelated EISs without further site-specific analysis. *Id.* Thus, the promises in the Plan EIS have not been fulfilled, BLM has avoided ever having to take a hard look at the impacts of this Exploration Program on caribou, and NEPA's commands remain unmet.

In cases challenging prior Plan EISs in the Reserve, both the Alaska District Court and this Court have relied on assurances of future site-specific analysis in declining to require more detailed and specific analysis in the Plan EIS or for lease sales. For example, in a case involving the prior Reserve Plan EIS, this Court affirmed BLM's decision not to do a site-specific analysis at the lease sale phase, stating:

> [T]he government was not required at this stage to do a parcel by parcel examination of potential environmental effects. Such effects are currently unidentifiable, because the parcels likely to be affected are not yet known. Such analysis must be made at later permitting stages when the sites, and hence more site specific effects, are identifiable.

N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 977 (9th Cir. 2006). More recently, the Alaska District Court relied on this decision to affirm BLM's decision not to do a site-specific analysis at the lease sale phase under the current Plan EIS: "[t]he *Kempthorne* Court recognized that a parcel-specific EIS analysis would be required before any actual exploration or development activity could occur on a leased parcel." *N. Alaska Envtl. Ctr. v. U.S. Dep't of the Interior*, No. 3:18-CV-00030-SLG, 2018 WL 6424680, at *4 (D. Alaska Dec. 6, 2018). BLM's approval of the Exploration Program was the final step before on-the-ground activities, and it was BLM's last opportunity to take the hard, site-specific look NEPA requires. BLM has not done so here. Appellants ask that this Court ensure that BLM's prior promises of site-specific analysis, relied on by this Court in prior cases, are kept by determining that BLM's failure to take a hard, site-specific look at the impacts of this Exploration Program on caribou violated NEPA.

B. Caribou that depend on the Exploration Program area are an essential subsistence resource and are vulnerable to exploratory activities.

A site-specific analysis of impacts to caribou was critical here because the project area provides important caribou habitat, and the Exploration Program had

the potential to cause significant effects. The Exploration Program occurred within an important overwintering area for the Teshekpuk Caribou Herd, encompassing a large area around Fish Creek. III-ER-293. As a consequence, the proposed activities fell directly within the "heavy use" segment of Nuiqsut's contemporary subsistence use areas, including the caribou subsistence use area. II-ER-115; II-ER-192-93; III-ER-271. Nuiqsut residents place extreme value on this area because it provides food security; it is one of very few areas where caribou remain on the coastal plain throughout the year and has historically been one of the only areas close to Nuiqsut where people could hunt without interference from infrastructure and industrial activity. III-ER-293. Members of the Native Village of Nuiqsut use the area year-round for subsistence activities; however, the peak of activity, including for caribou, occurs in the winter months. II-ER-181-83; III-ER-293.

The record shows that winter exploration activities have potentially significant impacts on caribou. *See* II-ER-132; II-ER-185-87. The expansion of industrial oil and gas activity into the Teshekpuk Caribou Herd's winter range southeast of Teshekpuk Lake will expose the herd to unprecedented, year-round oil and gas activities. II-ER-132. Because no other Alaska caribou herd winters on the coastal plain, where oil and gas development has historically occurred in Alaska's Arctic, no herd has previously been exposed to intensive winter

exploration activities in its winter range. *Id.* There is therefore substantial uncertainty about how the herd will respond to this increasing, intensive winter exploration and other development activity. II-ER-132.

The record demonstrates that effects to caribou from exposure to winter exploration activities may be significant. Among other harmful impacts, surface vehicular traffic, aircraft traffic, and drilling activities disturb caribou, which may force them to abandon the local area for the remainder of the winter. II-ER-129-31. Increased movement due to disturbance forces caribou to expend energy resources that are already depleted in the winter, which can result in a loss of body mass. II-ER-233-34 (discussing caribou studies in the record at II-ER-243-44). Caribou displaced from habitats with more nutritious forage and that expend energy responding to disturbances may not be able to compensate for losses of energy reserves in the winter, which would potentially reduce individual survival and reproduction. II-ER-188. This is of particular concern because winter body mass of female caribou strongly correlates with the likelihood of their calving success and survival. II-ER-233-34 (discussing caribou studies in the record at II-ER-255-61 and II-ER-246-52).

C. The EA does not analyze impacts of the Exploration Program on caribou.

BLM's EA includes no specific discussion of the effects of the Exploration Program on caribou. *See* III-ER-292-98. The EA merely notes in its discussion of

subsistence impacts that "the proposed action is anticipated to deflect caribou and furbearers from the area." III-ER-293. And it concludes without explanation that "[o]nly minor impacts would be expected" and that the proposed action "would not reduce population levels or distribution during the winter season." III-ER-276.

In comments on the draft EA that BLM largely ignored, Appellants raised concerns about the project's potential effects to the Teshekpuk Caribou Herd and BLM's failure to address those effects. *See supra* p. 13. BLM did not make any changes to its analysis in the final EA, nor did it address the studies Appellants had submitted. Instead, BLM responded with the conclusory statement that "[a]lthough the proposed action may be disruptive to individual caribou and displace some individuals from the immediate vicinity of activities, these impacts would be local in extent, would not affect herd distribution or reduce populations." III-ER-371. Like BLM's conclusion that impacts will be minor, this response is not supported by any documentation in the record or any analysis in the EA.

BLM's limited, general statements about caribou and its cursory conclusion that there will be no significant effects fall well short of establishing that it has taken the "hard look" required by NEPA, especially in the face of contrary record evidence. *See Blue Mountains*, 161 F.3d at 1213 ("[G]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."

(quoting *Neighbors of Cuddy Mountain*, 137 F.3d at 1380)). To support its decision not to prepare an EIS, BLM was required to "supply a convincing statement of reasons" explaining why impacts to caribou will be insignificant. *Cascadia Wildlands*, 801 F.3d at 1111. This convincing statement of reasons must be supported by "documentation" and "data." *Blue Mountains*, 161 F.3d at 1213. BLM has not only failed to provide convincing reasons, it has provided no reasons and no documentation or data in the EA explaining why the impacts of the Exploration Program will not be significant.

D. BLM's attempt to tier to prior EISs does not fulfill its site-specific assessment obligations.

BLM cannot satisfy its obligation to analyze how this particular project will affect caribou by tiering to prior EISs, none of which takes a hard look at the specific effects of this Exploration Program. First, the Plan EIS does not provide any analysis of the potential impacts of this particular Exploration Program on caribou. Instead, it promises more detailed analysis later, at the phase at issue here—the permitting of exploration activities. Second, the programmatic discussion of potential caribou impacts points to the possibility of significant impacts to caribou at the site-specific level, highlighting the need for careful examination of impacts here. Third, new information that has become available since the Plan EIS points to the potential for significant impacts to caribou that

NEPA required BLM to consider. Finally, neither the law nor the facts permit BLM to tier to the GMT1 or GMT2 EIS for this project.

1. The Plan EIS contains a general discussion of potential impacts and promises a more detailed analysis of impacts when BLM approves an exploration program.

The Plan EIS is a programmatic statement that generally describes the suite of potential impacts to caribou from all stages of oil and gas exploration and development across the 11.8 million acres open to leasing under the Plan. Because it is a programmatic document, the Plan EIS promises site-specific analysis later, when specific exploration projects are proposed. The Plan EIS does not take a hard look at the site-specific impacts to caribou of this Exploration Program.

Tiering to a programmatic EIS does not obviate the obligation to provide the site-specific hard look that NEPA requires when authorizing a specific activity under the program. 43 C.F.R. § 46.140 ("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."). *See also W. Watersheds Project*, 719 F.3d at 1049-50 (finding that even when a tiered-to "EIS contains sufficient analysis for informed decision-making at the programmatic level [that] does not reduce or minimize BLM's critical duty to fully evaluate site-specific impacts" of the proposed action); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006) (Once a

"'critical decision' has been made to act on site development . . . any vague prior programmatic statements are no longer enough."); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 54 (D.D.C. 2019) ("Put simply, an EA for a specific BLM action may incorporate program-wide EISs, but must supplement those EISs with more specific environmental analyses of the action at issue."). In some cases, it may be appropriate for BLM to tier to the Plan EIS to avoid repeating information about the general environment or basic species information or other matters addressed in the programmatic EIS. But even when it tiers to a prior EIS, BLM must assess the specific impacts of a later project and supply a convincing statement of reasons in an EA to justify a conclusion that the action will have no significant effects. *See Cascadia Wildlands*, 801 F.3d at 1111. If BLM cannot supply a convincing statement of reasons why the action will have no significant effects, it must prepare an EIS. "Nothing in the tiering regulations suggests that the existence of a programmatic EIS . . . obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project." *Blue Mountains*, 161 F.3d at 1214 (holding that an EA did not contain enough "documentation" or "data" to address the concerns raised by the plaintiffs about potentially significant effects).

In the Reserve, this Court has held that a specific action such as an exploration program requires a site-specific, "parcel by parcel" analysis. *N. Alaska*

Envtl. Ctr., 457 F.3d at 977. In contrast, the Plan EIS analyzes potential impacts on a massive scale, across "approximately 11.8 million acres of federally owned subsurface (nearly 52 percent of the total in the NPR-A)." II-ER-90. While this area includes the area of the "northeastern NPR-A near Fish Creek," II-ER-91, where the Exploration Program will occur, the environmental impacts analysis is at the scale of the entire open 11.8 million acres of the NPR-A, not a subset of that area. II-ER-129.

Given the massive scope of the analysis, the Plan EIS's impacts discussion is necessarily both broad and vague. It is not the "hard and careful look" at site-specific impacts that NEPA requires at the exploration phase. *W. Watersheds Project*, 719 F.3d at 1051. Nor does it claim to be. According to the Plan EIS itself, "[f]uture actions requiring BLM approval, including a proposed exploratory drilling plan . . . would require further NEPA analysis based on specific and detailed information about where and what kind of activity is proposed." II-ER-85.

This lack of location- and project-specific analysis is borne out in the Plan EIS's discussion of impacts to caribou. Written years before ConocoPhillips conceived the Exploration Program, the EIS does not seek to address the particular location, conditions, scope or intensity of activities, or current information related to impacts of a particular project. Indeed, to the extent it discusses exploration

impacts, it tends to highlight issues of potential significance that may vary by year, project type, or location, and need to be resolved in later analysis. For example, in discussing the types of impacts that might occur across the Reserve, the Plan EIS states that "[e]xploratory drilling would be conducted during the winter, when some mammal species are less active or less often present, although wintering Teshekpuk Caribou Herd caribou could be present in large numbers." II-ER-129-30. The Plan EIS does not identify whether caribou are likely to be present in large numbers in the Exploration Program area in the 2018-2019 season, as a project and location specific analysis must.

The Plan EIS explains that exploration "activities may cause short-term (a few minutes to 1 hour) displacements of and disturbance to terrestrial mammals, or they may cause abandonment of the local area for the remainder of the winter." II-ER-120. The Plan EIS does not, as a site-specific analysis would, look at the location and significance of the proposed activity to determine which of these drastically different scenarios is likely to occur for caribou in the Exploration Program area in the 2018-2019 season.

The Plan EIS notes that BLM *assumes* that winter exploration activities do not have population-level impacts, but it qualifies this assumption: "However, as with effects of disturbance by seismic operations, this assumption has not been tested and conditions for winter survival vary from year to year. It is possible that

this disturbance could have an additive effect on natural winter mortality." *Id*. The Plan EIS does not probe whether the Exploration Program may have such an additive effect on caribou winter mortality. For example, it does not consider how the dramatic decline in caribou numbers since the Plan EIS might play into potential population-level impacts from the Exploration Program. *See supra* pp. 10-11. Nor does it consider the studies Appellants submitted with new information about these types of additive effects. *See supra* p. 13. Nor does the Plan EIS apply the best available science to current information about the particular conditions present for the Exploration Program—such as current patterns of caribou use, likely weather conditions for this exploration season, or other activities happening at the same time—to determine whether "conditions for winter survival" in this season might lead to "an additive effect on natural winter mortality." II-ER-120.

In sum, the Plan EIS does not attempt, or purport to attempt, a "specific and detailed" analysis of this or any exploration plan but instead promises this analysis when the specific activity is proposed. II-ER-85. Nor could it provide such an analysis, because the specific information about this Exploration Program was not available when BLM completed the Plan EIS. According to this Court, at the Plan EIS phase, such site-specific "effects are currently unidentifiable, because the parcels likely to be affected are not yet known. Such analysis must be made at later permitting stages when the sites, and hence more site specific effects, are

identifiable." *N. Alaska Envtl. Ctr.*, 457 F.3d at 977. "It is at this stage, when the agency makes a critical decision to act, that the agency is obligated fully to evaluate the impacts of the proposed action." *W. Watersheds Project*, 719 F.3d at 1050. The "hard and careful look" at site-specific effects that NEPA requires, *id.* at 1051, was not possible when BLM completed the Plan EIS, and the Plan EIS both acknowledges and reflects that. II-ER-85.

2. The Plan EIS's programmatic discussion of potential caribou impacts raises questions about potentially significant impacts to caribou at the site-specific level.

Worse, the Plan EIS actually highlights the potentially significant effects of winter exploration and the information gaps that BLM had to address before it could conclude that this particular Exploration Program will have only minor impacts. According to the Plan EIS:

> Oil and gas development within the [Reserve] could introduce for the first time such infrastructure and activities into the winter range of a North Slope caribou herd (Teshekpuk Caribou Herd). . . . [T]here is no evidence as yet of adverse effects other than increased hunting mortality for those animals close to villages. It is not known what population effects might occur if the majority of the herd were to have year-round contact with oil and gas facilities and activities. Despite the current lack of evidence regarding adverse effects from seismic exploration and village contact, negative effects on caribou energy budgets during winter could result from this new situation. Such an effect could be manifested through increased winter mortality itself, or a reduction in calf productivity.

II-ER-132. Moreover, the Plan EIS notes that exploratory drilling operations and ice roads would traverse Teshekpuk Caribou Herd wintering areas and 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." II-ER-120. These statements point to the potential for significant effects at which BLM must take a hard look before permitting any actual exploration project.

Importantly, in the Plan EIS, BLM was unable to conclude that winter exploration would have no long-lasting effects on the Teshekpuk Caribou Herd. *See id.* Instead, it explained that the assumption that effects from winter exploration would be temporary "has not been scientifically tested" and "[i]t is possible that this disturbance could have an additive effect on natural winter mortality and could disproportionately impact young of the year and pregnant cows. Such an impact over several years could accumulate and reduce the productivity of the caribou herds involved." II-ER-141.

These conclusions in the Plan EIS run contrary to BLM's assertion in the EA that caribou impacts from winter drilling will be minor. Given the substantial questions raised regarding potentially significant impacts to caribou in the Plan EIS, BLM could not reach a no significant impacts finding without attempting to address the information gaps that precluded such a finding in the Plan EIS. But as

explained above, *supra* pp. 23-25, the EA provides no analysis whatsoever of these important questions surrounding caribou impacts and identifies no intervening research that would relieve the concerns about potentially significant impacts.

In dismissing BLM's failures, the district court misapplied the undisputed rule that "[u]ncertainty in the face of incomplete information is acceptable in an EIS, provided that the agency 'candidly disclose[s] the risks and any scientific uncertainty' of the action under review." I-ER-40 (quoting *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)). Appellants do not challenge BLM's statement of uncertainty in the Plan EIS for purposes of the decision years ago to adopt the overall Plan. Appellants instead challenge BLM's failure to attempt to answer the Plan EIS's questions in a later, site-specific EA that tiers to the Plan EIS.

This Court has explained that information that "may not be essential to a reasoned choice among alternatives" at an early phase of a staged process "may, in fact, be essential at a later stage." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 497 (9th Cir. 2014). *Native Village of Point Hope v. Jewell* involved oil and gas leasing, exploration, and development on the outer continental shelf, which involves a phased approach to permitting and NEPA. There the Court explained:

> [W]hen a project proponent actually submits a plan, [the Bureau of Ocean Energy Management] will be required

> under NEPA to perform a plan- or site-specific environmental analysis of that proposed plan. At that stage, missing or incomplete information that has not been essential to a reasoned choice among alternatives at the lease sale stage may later become essential.

Id. at 499 (internal quotations omitted). It further noted that "certain items of presently missing or incomplete information [at the leasing stage] will be known (and utilized to avoid or minimize adverse impacts) at a later stage of . . . review." *Id*. at 498-99.

The questions the Plan EIS raises here regarding potentially significant impacts to caribou are precisely the type of information that may be both more readily available and essential at this site-specific exploration phase. BLM therefore had a duty to look at the questions in the Plan EIS regarding impacts to caribou and determine whether it could answer those questions at this later, site-specific analysis.

3. The EA did not address new information since the Plan EIS bearing on the question of whether there may be significant impacts to caribou.

Even if the Plan EIS had taken a hard, site-specific look at impacts to caribou from this Exploration Program, BLM still had a duty to determine whether there was new information since 2012 bearing on caribou impacts when it

approved this program. Here, there is new information that BLM did not analyze.[1] Most glaringly, the Teshekpuk Caribou Herd, which appeared to be increasing at the time of the Plan EIS, declined 40 percent between 2008 and 2018. IV-ER-565. The EA did not disclose this fact, let alone analyze its implications for the Exploration Program's impacts on caribou. The district court in fact relied on the Plan EIS's outdated discussion of increasing herd numbers to show that it was reasonable for BLM to conclude that impacts to caribou from the Exploration Program will be insignificant: "populations of Teshekpuk Herd and Central Arctic Herd caribou have increased between the mid-1970s and 2008. Thus, disturbance of caribou due to oilfield development may adversely affect caribou populations, but these effects are not readily apparent based on population trends." I-ER-39-40 (quoting Plan EIS at II-ER-143). What did not appear to be a problem in 2012 now appears to be a problem, but BLM did not address it in the EA.

Moreover, in comments on the draft EA, Appellants submitted multiple studies, one of which was published several years after the Plan EIS, demonstrating the potential for significant effects to caribou from winter activities. *See* II-ER-233-34 (discussing caribou studies in the record at II-ER-240-44, 246-

[1] The district court's attempt to rely on the GMT1 and GMT2 EISs to cover new information fails both as a matter of law and fact, as explained below. *Infra* pp. 36-38. It is not lawful to tier to those EISs, nor do the EISs provide updated information (or any information) about the impacts of exploration on caribou.

52, 255-61). BLM did not address these studies or their implications for the Exploration Program.[2]

4. The GMT1 and GMT2 EISs do not discuss the impacts of this, or any, winter exploration program.

Finally, to the extent the district court relied on the GMT1 and GMT2 EISs to affirm BLM's failure to take a hard, site-specific look at the effects of the Exploration Program on caribou, the court's holding does not comport with legal requirements for tiering, or the facts of this case. The GMT EISs do not cover this specific Exploration Program as a legal or a factual matter, nor do they even analyze impacts from exploration projects generally.

The GMT EISs do not fall into either of the two categories of EIS to which NEPA regulations permit tiering. 40 C.F.R. § 1508.28 (permitting tiering to a programmatic plan such as the Plan EIS, or a previous EIS for the *same action*). These two EISs cover entirely separate development-stage projects and do not address exploration activities, let alone activities conducted in the Exploration Program area. This Court has rejected agency attempts to tier to documents that fall outside those permitted by the regulations. *See, e.g., S. Fork Band Council of*

[2] The district court's opinion includes a footnote discussing the most recent study and analyzing its relevance to the Exploration Program. I-ER-42 n.184. The court's conclusory consideration of the study cannot cure BLM's failure to consider the study and other new information before authorizing the Exploration Program.

W. Shoshone of Nevada v. U.S. Dep't of Interior, 588 F.3d 718, 726 (9th Cir. 2009) ("[t]he mere existence of an entirely separate draft EIS, discussing a similar issue with regard to a different project, but without any indication that it discussed the specific environmental impacts at issue, cannot satisfy NEPA"); *see also N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1088-89 (9th Cir. 2011) (The project "EISs are site-specific EISs that do not fall into either situation where tiering is permitted.").

Further, as a factual matter, the GMT EISs do not support BLM's finding of no significant impact. Both the GMT1 and GMT2 EISs cover the construction and development of oil development units. Because unit construction occurs after successful exploration, neither EIS analyzes impacts from exploration. The discussion in the GMT1 EIS that the district court quoted as supporting BLM's analysis was in a section describing construction and development impacts during calving. I-ER-41 ("[R]ecent studies of calf growth and survival for caribou displaced by or exposed to oil and gas infrastructure disturbance during calving . . . , did not conclude significant survival or growth impacts."). Calving occurs in *late spring and early summer*, II-ER-99, making this analysis in the GMT1 EIS inapplicable on its face to *winter* exploration activities. Moreover, this paragraph in the GMT1 EIS is copied directly from a 2012 U.S. Army Corps of Engineers EIS for the Point Thomson development (again, not exploration) unit

located on the Beaufort Sea coast, nowhere near this Exploration Program. II-ER-188. In sum, the GMT EISs provide no support for a conclusion that BLM took a hard look at the site-specific impacts of this Exploration Program, or for a conclusion that this program will have no significant impacts.

III. BLM failed to adequately analyze the cumulative impacts of the Exploration Program.

BLM has also impermissibly failed to analyze the potential cumulative impacts to caribou from ConocoPhillips' Exploration Program and the company's geophysical exploration and GMT2 construction projects. This failure necessarily undermines the EA's limited analysis of cumulative impacts to subsistence, since the two are intertwined, as the EA acknowledges. *See* III-ER-292-93, 299; *see also* CR 27 at 3-6, 19-22, 23-27; CR 33 at 15 n.2. As explained below, the EA itself does not satisfy NEPA because it completely fails to consider how impacts from geophysical exploration could cumulate with impacts from the Exploration Program and provides no meaningful analysis of the potential cumulative impacts of the GMT2 project. Nor do any other documents to which the EA purports to tier satisfy NEPA's requirement to consider cumulative impacts of the Exploration Program.

NEPA directs agencies to analyze impacts that arise "from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" in an EA. 40 C.F.R. § 1508.7; *see also* 40 C.F.R. § 1508.27 (The

significance of impacts under NEPA depends, in part, on "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts."). To fulfill this obligation, agencies must in an EA provide analysis about how the potential impacts of the specific projects at issue cumulate, and how "these projects, and the differences between the projects, are thought to have impacted the environment." *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010); *see also Klamath-Siskiyou*, 387 F.3d at 997 ("Neither in the [management plan EIS] nor in the EAs does the agency reveal the incremental impact that can be expected on the . . . watershed as a result of each of *these* four successive timber sales.") (emphasis in original). Further, agency EAs providing "general statements about possible effects and some risk" do not satisfy NEPA—the analysis must include "quantified or detailed information that results in a useful analysis." *Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011) (internal quotations and citations omitted). To prevail, plaintiffs need to show "only the potential for cumulative impacts." *Te-Moak*, 608 F.3d at 605. And if an agency fails to analyze cumulative effects, it must revise its environmental analysis. *See Or. Nat. Res. Council*, 470 F.3d at 822-23.

A. BLM's EA fails to meaningfully analyze cumulative impacts.

The EA does not meaningfully analyze the cumulative impacts of the Exploration Program, geotechnical exploration, and GMT2 construction on caribou or, by necessity, subsistence, even though such impacts would cumulate. *See Ctr. for Envtl. Law & Policy*, 655 F.3d at 1007. These were three separate projects. Each affected wildlife and subsistence. *See* CR 27 at 3-6; IV-ER-559-68, 570-71 (GMT2); II-ER-212-13; III-ER-292-93 (Winter Exploration); III-ER-413-15 (Geotechnical Exploration). Each activity took place in the Fish Creek drainage basin. *See* CR 27 at 6-7; *see also* II-ER-211 & IV-ER-552-55 (demonstrating relationship of GMT2 to Fish Creek); III-ER-271, 293 (demonstrating relationship of Exploration Program to Fish Creek); III-ER-393-94, 430 (demonstrating relationship of geotechnical exploration to Fish Creek). Each took place in winter. *See* IV-ER-550; III-ER-280; III-ER-399. Each involved similar activities, such as drilling and increased vehicle traffic. *See* II-ER-198-203; III-ER-280-89; III-ER-399-412. And each infringed on an important overwintering and migration area for the Teshekpuk Caribou Herd. *See* CR 27 at 3-4; II-ER-101-02, 152; II-ER-211; III-ER-271; III-ER-393-94. These qualities are compelling evidence of the "potential for cumulative impacts." *Te-Moak*, 608 F.3d at 605; *see also Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 989 (N.D. Cal. 2002) (noting that

"similarities with respect to timing, geography and purpose" are evidence of cumulative impacts from different projects).

Notwithstanding the inherent potential for cumulative impacts, the EA lacks "quantified or detailed information" about how impacts from the three specific projects at issue will cumulate on caribou, nor does it explain why "definitive information could not be provided." *See Klamath-Siskiyou*, 387 F.3d at 993-94; *Or. Nat. Res. Council*, 470 F.3d at 822-23. First, and most glaringly, the EA's cumulative impacts analysis completely fails to address the 2019 geotechnical exploration program. It makes only passing references in a list and a parenthetical. III-ER-298, 300. Such references are insufficient for the analysis NEPA demands. *See Ctr. for Envtl. Law & Policy*, 655 F.3d at 1007.

Second, and almost as starkly, the EA fails to provide any meaningful analysis of cumulative impacts from the GMT2 construction project. The EA generically states that the project will "present the most prominent immediate impacts," that those cumulative impacts will "likely [be] more intense and extensive than previous winter seasons," and that "likely impacts for subsistence from the cumulative scenario include hunter disturbance and avoidance and reduced local availability of resources." III-ER-299. Fatally, however, the analysis evinces no attempt to provide "quantified or detailed information" about these potential impacts or explain why BLM cannot provide such information.

Among other things, the EA contains no information on where or how the GMT2 construction and the two winter exploration programs overlap with each other; it provides no information on how the projects overlap with caribou or important hunting areas; and it makes no attempt to explain what "more intense and extensive" means. *See Klamath-Siskiyou*, 387 F.3d at 993-94 ("[a] proper consideration of the cumulative impacts of a project requires 'some quantified or detailed information'"); *Or. Nat. Res. Council*, 470 F.3d at 822-23 (finding inadequate an EA that "did not contain objective quantified assessments of the combined environmental impacts of the proposed actions."). By failing to provide any quantified or detailed information, BLM has impermissibly obscured the seriousness of the combined impacts of the projects on the area in question. *See Te-Moak*, 608 F.3d at 602 (finding that NEPA requires that "an EA fully address cumulative environmental effects").

B. BLM cannot rely on the tiered-to documents to bridge the EA's failures.

In an attempt to alleviate the undisputed deficiencies in the EA's analysis, BLM purported to tier to prior EISs. But these prior NEPA documents do not correct the EA's critical omissions. They do not provide the necessary "quantified or detailed" information about subsequent projects and, indeed, they provide no basis for concluding that such impacts would not be significant. *See Klamath-Siskiyou*, 387 F.3d at 993-94. First, none of the prior EISs meaningfully analyze

geotechnical exploration. And second, the caribou discussions therein highlight critical analytic gaps that the EA fails to address.

As the district court acknowledged, neither the Plan EIS nor the GMT2 EIS "identifies geotechnical exploration specifically," let alone the particular 2019 geotechnical project.[3] *See* I-ER-56. Tiering provides acceptable analysis under NEPA when the tiered-to documents include "*specific* information about the cumulative effects" at issue. *Klamath-Siskiyou*, 387 F.3d at 997 (emphasis in original); *Or. Nat. Res. Council*, 470 F.3d at 823. The tiered-to documents, like the EA, thus fail to provide the analysis NEPA requires.

The district court found that, because the direct impacts of the geotechnical project were generally similar to those from exploratory drilling, the agency could ignore a detailed analysis of cumulative impacts of the 2019 geotechnical exploration program. *See* I-ER-56-57 (finding that because the impacts of the geotechnical exploration, as described in the geotechnical program EA, were "similar in kind to those of exploratory drilling," the cumulative impacts discussion of exploratory drilling "adequately capture the impacts of geotechnical exploration as well"). But this finding condones precisely the sort of generalized analysis that this Court has rejected in NEPA analyses at the site-specific stage.

[3] Nor does, or could, the GMT1 EIS supply the missing analysis. It preceded the GMT2 EIS by four years. And it completely fails to identify any specific potential impacts from ConocoPhillips' 2019 geotechnical exploration project.

See Klamath-Siskiyou, 387 F.3d at 997. Moreover, "similarities with respect to timing, geography and purpose" of projects are in fact evidence of a heightened potential for cumulative impacts. *See Bosworth*, 199 F. Supp. 2d at 989. Therefore, that the direct impacts of the geotechnical exploration and exploratory drilling projects were similar does not cure BLM's failure here; the essential fact remains that nowhere did BLM attempt to quantify or otherwise detail how such impacts would cumulate within the context of the projects at issue.[4] *See Or. Nat. Res. Council*, 470 F.3d at 822-23; *Te-Moak*, 608 F.3d at 603-07.

Beyond this analytical gap, the caribou discussions in the tiered-to analyses show the potential for significant effects and the need for detailed discussion at the site-specific stage. Those documents repeatedly flag elements of the caribou response to oil and gas exploration and development that BLM was unwilling or unable to address at the programmatic phase. *See*, *e.g.*, *supra* pp. 31-34; II-ER-141 (the Plan EIS "assum[ing]" that impacts to the Teshekpuk Caribou Herd from exploration "did not persist after exploration was completed" but that "this assumption has not been scientifically tested."); II-ER-149 (the Plan EIS noting that "[i]t is not known what population effects might occur if the majority of the herd were to have year-round contact with oil and gas facilities and activities.");

[4] Nor does the discussion of the Willow project in the GMT2 EIS that the district court points to specifically discuss the geotechnical exploration ConocoPhillips is pursuing. *See* IV-ER-579, 581, 583, 586-587.

IV-ER-587 (GMT2 EIS noting that "[d]etermining the overall cumulative impacts on herd abundance is difficult to predict"); IV-ER-574-575 (GMT2 EIS noting that "predicting a herd's response to a newly-constructed road is largely speculative" but "may" alter movement patterns). The EA, however, does not address—or even acknowledge—any of these gaps.

Despite this, the district court found that BLM had adequately justified its failure to obtain the missing information in the prior EISs, and that those justifications remained good for purposes of the EA. *See* I-ER-59-60. While such deferring may have been sufficient in the EISs—which are not being challenged here—they do not carry forward throughout the life of oil and gas development within the Reserve. As discussed above, if an agency fails to develop relevant specific information about potential impacts in a programmatic EIS, then it must do so at the site-specific stage or explain why it cannot. *See supra* pp. 26-27. When discussing the cumulative impacts of particular projects in an EA, agencies must provide "some quantified or detailed information" about possible effects or an explanation for why "definitive information could not be provided." *Klamath-Siskiyou*, 387 F.3d at 993-94. Moreover, the analysis BLM is neglecting is not insignificant—the gaps that the tiered-to documents highlight go directly to how oil and gas projects will affect the ongoing viability of the Teshekpuk Caribou Herd in an area critical for hunters from Nuiqsut, *see* II-ER-115; II-ER-192-93.

Yet nowhere in the EA did BLM even attempt to address the prior demographic uncertainties the agency itself flagged by quantifying or otherwise detailing the impacts of these three projects on caribou. Nor did BLM otherwise explain whether and to what degree such uncertainties persist in the context of these site-specific projects.

IV. BLM failed to consider appropriate alternatives to the Exploration Program.

BLM violated NEPA and ANILCA by failing to consider a range of alternatives to ConocoPhillips' proposal. NEPA requires that BLM consider a reasonable range of alternatives, and ANILCA requires that BLM consider alternatives that would reduce or eliminate effects on subsistence. Notwithstanding these directives, BLM considered only ConocoPhillips' proposal and a no-action alternative. BLM did not develop its own alternatives, and it refused to consider reasonable alternatives proposed by Appellants.

A. BLM violated NEPA by failing to consider reasonable alternatives.

By considering only ConocoPhillips' proposed action along with a no-action alternative and arbitrarily rejecting a reasonable alternative presented by Appellants, BLM violated NEPA's requirement to "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E).

NEPA's requirement to consider alternatives "applies whether an agency is preparing an [EIS] or an [EA]," and requires the agency to "give full and meaningful consideration to all reasonable alternatives." *W. Watersheds Project*, 719 F.3d at 1050 (quoting *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)); *see also* 40 C.F.R. § 1507.2(d) ("This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to [EISs]."); *id.* § 1508.9(b) (noting EAs "[s]hall include brief discussions of . . . alternatives as required by section 102(2)(E)"). An agency's obligation to consider a reasonable range of alternatives in an EA is not satisfied by merely presenting a preferred alternative and a no-action alternative that are sufficiently different; instead, the relevant question is whether the agency failed to examine reasonable alternatives. *W. Watersheds Project*, 719 F.3d at 1050-54 (holding that BLM improperly declined to consider limited grazing and no grazing alternatives to a proposed grazing allotment). "The existence of a viable but unexamined alternative renders an [EA] inadequate." *Id.* at 1050 (alteration in original).

In comments on the draft EA, Appellants requested BLM consider additional reasonable alternatives that would reduce environmental impacts while meeting the purpose and need for the project. *See Native Ecosystems Council*, 428 F.3d at 1246-47 (looking first to the stated purpose of the action to determine whether

agency considered reasonable alternatives). One of these alternatives would have reduced the number of wells permitted. II-ER-236. Authorizing fewer wells would reduce impacts from the Exploration Program by reducing the footprint of the project, leading to, among other things, fewer miles of ice roads and reduced vehicle traffic. *See supra* pp. 12-15; I-ER-66. This would create fewer opportunities for conflict with subsistence users and caribou. *See supra* pp. 10-11. Drilling fewer wells would also reduce the cumulative effects of the Exploration Program in the context of the other ongoing activities in the area. *See supra* pp. 14-15.

BLM refused to consider a fewer-wells alternative on the basis that it would not meet the project's purpose and need. III-ER-291. This refusal was unlawful for two reasons. First, a fewer-wells alternative is consistent with the project's stated purpose and need, and BLM's attempts to justify a contrary conclusion are arbitrary and unsupported. Second, if the purpose and need statement were indeed so narrow as to preclude consideration of a fewer-wells alternative, it would violate NEPA and the NPRPA.

1. A fewer-wells alternative is consistent with the project's purpose and need.

The EA's purpose and need statement plainly does not preclude a fewer-wells alternative. The EA explains that this project is "needed to provide detailed information regarding potential reserves of oil and gas within the [Reserve]" in

order to facilitate future oil production in the Reserve and that the "purpose for the proposed action is for BLM to provide reasonable access to and use of public lands within the [Reserve] in a manner that would allow the applicant to explore and appraise oil and gas potential on [Reserve] leases operated by [ConocoPhillips]." III-ER-269. The statement does not mandate any particular number of wells or intensity of exploration, and the term "reasonable" qualifying "access" incorporates BLM's responsibility under the NPRPA to protect other resources and values in the Reserve. *See* 43 C.F.R. § 3152.2(b).

Notwithstanding this plain language, BLM asserted that a limitation on the number of wells would be inconsistent with the purpose and need statement because it "would be contrary to the terms of [ConocoPhillips'] leases." III-ER-291. BLM explained that the leases "allow[] the company to have a drilling program on its leases after going through the review process for particular wells" and "instruct leaseholders to exercise reasonable diligence in developing and producing, while preventing unnecessary damage to, loss of, or waste of leased resources." *Id.* BLM also cited what it referred to as a company's regulatory "obligat[ion] to continue drilling to delineate the resource and an associated future participating area." *Id.*

None of these assertions about the leases or regulatory requirements supports BLM's position that it must accept ConocoPhillips' project as proposed.

BLM did not cite to any specific provisions of the leases that would establish the obligations it describes in the EA, and it did not include the leases in the administrative record. But even assuming BLM accurately characterized the two lease obligations it referenced, neither precludes a fewer-wells alternative. Allowing a company to have a drilling program on its leases does not mean that BLM must permit whatever number of wells the company requests to drill. BLM has not articulated or pointed to any such requirement in ConocoPhillips' leases. Similarly, an obligation to exercise reasonable diligence to develop the leases is fully compatible with BLM action to limit the number of exploration wells; the limitation would not result from a lack of diligence but an obligation BLM must meet to protect the surface resources and values of the Reserve. Nor could BLM apply such general lease obligations in a way that would be inconsistent with its statutory obligation to condition or restrict activity on lands within the Reserve as it determines necessary to protect other resources. *See* 42 U.S.C. § 6506a(b); 43 C.F.R. § 3152.2(b).

Similarly, any obligation to delineate resources that ConocoPhillips may have—under regulations BLM broadly cited in the EA—also does not preclude BLM from conditioning or restricting exploratory drilling, including by limiting the number of wells drilled in a particular season. No provision of the regulatory subpart the EA cited in support of this obligation requires that BLM approve an

applicant's specific drilling plans. *See* 43 C.F.R. §§ 3137.5-3137.15. BLM's brief reference to the regulation in the EA certainly does not attempt to explain how it would. III-ER-291. And, as with the leases, BLM cannot apply the delineation regulation in a way that would be inconsistent with its statutory obligation to protect surface resources. *See supra* p. 50.

Finally, BLM provided no factual analysis showing that all of the wells proposed by ConocoPhillips are necessary to provide "reasonable access" to "explore" for oil resources, as spelled out in the purpose statement. Instead, BLM relied on the unsupported argument that fewer wells would be inconsistent with the leases and delineation regulations. There is no evidence in the record demonstrating that ConocoPhillips needed to drill six wells to explore for resources on its leases, and neither ConocoPhillips nor BLM made such a factual argument below. The district court appears only to have assumed there was such a rationale. *See* I-ER-67 (noting "ConocoPhillips . . . *apparently* concluded that up to six additional exploration wells were necessary . . ." (emphasis added)). Thus, BLM's assertion that it could reject a fewer wells alternative as inconsistent with the purpose and need statement is contrary to the plain language of the purpose and depends, ultimately, on unsupported and arbitrary assertions about lease and regulatory obligations.

2. If the purpose and need statement precludes a fewer-wells alternative, it is unlawful.

If this Court were to adopt BLM's strained reading of the purpose and need statement, then the statement itself would be unlawful under both NEPA and the NPRPA because it would be unreasonably narrow. *See League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 689 F.3d 1060, 1069 (9th Cir. 2012) ("Because they determine the range of reasonable alternatives, an agency cannot define the purpose and need of a project in unreasonably narrow terms."). First, it would be contrary to the NPRPA's statutory objectives to protect the Reserve. Second, it would be so narrow that only ConocoPhillips' proposed action could accomplish its goals. And, third, it would be an improper adoption of private interests.

The Exploration Program's purpose and need cannot reasonably exclude a fewer-wells alternative because doing so would be contrary to the NPRPA's statutory objectives and BLM's management obligations under that statute. "Courts evaluate an agency's statement of purpose under a reasonableness standard, and in assessing reasonableness, must consider the statutory context of the federal action at issue." *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014) (internal citation omitted); *see also Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004) ("Where an action is taken pursuant to a specific statute, the statutory objectives of the project serve

as a guide by which to determine the reasonableness of objectives outlined in an EIS."). In the NPRPA, Congress expressly recognized the need to protect the Reserve's unique "environmental, fish and wildlife, and historical or scenic values." 42 U.S.C. § 6503(b). It therefore required the Secretary of the Interior to "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." 42 U.S.C. § 6506a(b). BLM's regulations further define this obligation by providing that exploration permits "shall contain such reasonable conditions, restrictions and prohibitions as the authorized officer deems appropriate to mitigate adverse effects upon the surface resources of the Reserve." 43 C.F.R. § 3152.2(b). BLM's position that it must authorize the number of wells ConocoPhillips requests to drill is directly inconsistent with its obligation to impose conditions and restrictions on exploration that it determines are necessary to protect the Reserve's other resources or values.

BLM's purpose and need statement would also be unreasonably narrow if only one alternative could accomplish its goals. "An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Nat'l Parks & Conservation Ass'n v. U.S. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) (quoting *Friends*

of Southeast's Future v. Morrison, 153 F.3d 1059, 1066 (9th Cir. 1998)). If the purpose and need statement here required BLM to permit ConocoPhillips to drill the six wells it requested, it would unreasonably preclude the agency from considering any alternative meaningfully different than ConocoPhillips' proposal. Approval of ConocoPhillips' proposal would be "merely a foreordained formality." *HonoluluTraffic.com*, 742 F.3d at 1230.

Similarly, BLM cannot adopt ConocoPhillips' objectives as the basis of its purpose and need statement in a way that excludes reasonable alternatives that meet the public purpose of the action. An agency may not circumvent its obligation to consider reasonable alternatives "by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives." *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1072. The district court's reasoning, which goes beyond any argument made by BLM or ConocoPhillips, suggests the opposite. The court explained that "with ConocoPhillips having apparently concluded that up to six additional exploration wells were necessary to obtain sufficient information about the area's development potential, it was reasonable for the 2018 EA to eliminate an alternative authorizing fewer wells as inconsistent with the proposed action's purpose and need." I-ER-67. But relying uncritically on the number of wells a permit applicant says are required in a given season as the basis for the project's purpose and need is

precisely the type of adoption of private interests this Court has held violates NEPA.[5] *See Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1072 (holding that BLM violated NEPA by adopting proponent's specific plans to develop a large landfill, thereby excluding other alternatives that would have met the public purpose of meeting long-term landfill demand).

In this case, "[p]rovid[ing] reasonable access to and use of public lands within the [Reserve] in a manner that would allow the applicant to explore and appraise oil and gas potential on [Reserve] leases" is the public purpose for this project. III-ER-269. Requiring that alternatives meet ConocoPhillips' specific objectives, including allowing up to six wells, would exclude other alternatives that would still provide ConocoPhillips with reasonable access and ability to explore its leases.

B. BLM violated ANILCA by failing to consider feasible alternatives that would reduce harm to subsistence resources and uses.

ANILCA section 810 required BLM to consider all feasible alternatives that would reduce impacts to subsistence resources and uses. By considering only ConocoPhillips' proposal and a no-action alternative, BLM failed to comply with this obligation.

[5] As noted, *supra* pp. 51-52, there is also no evidence in the record that ConocoPhillips concluded that up to six exploration wells was necessary during the 2018-19 season to obtain information about its leases.

As relevant here, section 810 requires that BLM evaluate "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). This provision is not merely procedural; it is "intended to minimize the impact of a proposed project on resources which rural village residents of Alaska use for subsistence." *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995) (quoting *City of Tenakee Springs*, 915 F.2d at 1310). An agency cannot decline to consider alternatives or consider only a no-action alternative where feasible alternatives exist. *See Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 731 (finding agency failed to consider viable alternatives); *City of Tenakee Springs*, 915 F.2d at 1311-12.

There is little question that a fewer-wells alternative would reduce subsistence impacts and the use of lands needed for subsistence purposes. In particular, fewer wells would mean fewer ice roads, reduced vehicle traffic, and fewer opportunities for conflict with subsistence resources and users. *Supra* p. 48. A fewer-wells alternative was also feasible because BLM has authority to place limitations on the scale of exploratory drilling it permits in a given year, and ConocoPhillips did not have any right or obligation to drill up to six wells in the 2018-19 winter season. *See supra* pp. 48-51. BLM's failure to consider a fewer-

wells alternative, or any other feasible alternatives that would reduce subsistence impacts, violated ANILCA section 810.

V. Appellant Friends of the Earth demonstrated that it has standing to bring this case.

While the district court held that all other Appellants have standing, it improperly dismissed Appellant Friends of the Earth for lack of standing. The district court's decision overlooked the fact that declarant Rosemary Ahtuangaruak is a member of Appellant Friends of the Earth and that Appellant Friends of the Earth submitted her declaration to support its standing to bring the action.

Rosemary Ahtuangaruak is a member of Friends of the Earth who lives in Nuiqsut. IV-ER-435, ¶3. Her declaration was submitted to the district court to show that members of Friends of the Earth are injured by the challenged action. CR 27 at 7-9. However, in explaining its dismissal of Friends of the Earth for lack of standing, the district court did not acknowledge that Rosemary Ahtuangaruak's declaration was relevant to its determination. I-ER-19 n.92. Instead, the court apparently treated the organizational declaration of Marcelin Keever as the sole declaration submitted by Friends of the Earth and, on that basis, concluded Friends of the Earth did not identify particularized harm. *Id.*

Further indicating an oversight, the district court referred to Rosemary Ahtuangaruak's declaration in upholding the Native Village of Nuiqsut's standing. While the district court's affirmation of the Native Village of Nuiqsut's standing

relied primarily and correctly on the declaration of Martha Itta, it also twice cited to Rosemary Ahtuangaruak's declaration as showing particularized harm relevant to standing for the Native Village of Nuiqsut. I-ER-17 n.83 & 16 n.79.

It is thus apparent that in addressing the standing of Friends of the Earth, the district court did not identify Rosemary Ahtuangaruak as a member of Friends of the Earth. Friends of the Earth has demonstrated that it has standing to bring this action and the district court's judgment to the contrary should be reversed.

VI. The Court should vacate and declare the EA unlawful.

The normal remedy under the APA for an unlawful agency action is vacatur. 5 U.S.C. § 706(2)(A). *See also Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095-96, 1106 (9th Cir. 2011). Additionally, the court may grant declaratory relief where there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (quoting *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996)). Because BLM approved the Exploration Program based on an arbitrary and unlawful EA, this Court should set aside the program and EA.

Although the Court retains discretion to remand without vacatur where vacatur would cause harm to the environment, *see, e.g.*, *Pollinator Stewardship*

Council, 806 F.3d at 532 (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995)), or thwart the objective of the statute at issue, *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980), there is no reason to depart from the normal remedy of vacatur in this case. *Cf. Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (denying vacatur that would result in "the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent"). Vacating the EA would not affect the Exploration Program because it is over. Vacatur would, however, prevent BLM from relying on the inadequate EA in future authorizations, giving effect to NEPA's purpose of helping "public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). Moreover, the deficiencies in the EA are significant and are part of BLM's ongoing pattern of failing to take the hard look required by NEPA when authorizing exploration programs in the Reserve.

CONCLUSION

BLM violated NEPA and ANILCA by (1) failing to take a detailed and site-specific look at the impacts of the Exploration Program on the Teshekpuk Caribou Herd and provide a convincing statement of reasons why those impacts will not be significant; (2) failing to analyze the cumulative impacts of the Exploration Program and other exploration and construction projects occurring during the same

time and in the same area; and (3) failing to consider any alternatives to ConocoPhillips' proposal. Appellants therefore request that this Court vacate and declare unlawful BLM's record of decision and EA.

Respectfully submitted this 17th day of August, 2020.

s/ Rebecca Noblin

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STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6 AND FORM 17

9th Cir. Case Number: 20-35224

The undersigned attorney states the following:

[x] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature: *s/ Rebecca Noblin* **Date:** August 17, 2020

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

9th Cir. Case Number: 20-35224

I am the attorney or self-represented party.

This brief contains 13,651 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 *(select only one)*:

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

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

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

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Rebecca Noblin* **Date:** August 17, 2020

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ADDENDUM

FEDERAL REGISTER NOTICES **Page(s)**

5 U.S.C.A. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C.A. § 3120

§ 3120. Subsistence and land use decisions

(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.A. § 4332

§ 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;

. . .

(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.A. § 6503

§ 6503. Transfer of jurisdiction, duties, property, etc., to Secretary of the Interior from Secretary of Navy

. . .

(b) Protection of environmental, fish and wildlife, and historical or scenic values; promulgation of rules and regulations

With respect to any activities related to the protection of environmental, fish and wildlife, and historical or scenic values, the Secretary of the Interior shall assume all responsibilities as of April 5, 1976. As soon as possible, but not later than the effective date of transfer, the Secretary of the Interior may promulgate such rules and regulations as he deems necessary and appropriate for the protection of such values within the reserve.

. . . .

42 U.S.C.A. § 6504

§ 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.

. . . .

42 U.S.C.A. § 6506a

§ 6506a. Competitive leasing of oil and gas

. . .

(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.

. . . .

40 C.F.R. § 1500.1

§ 1500.1 Purpose.

. . .

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. § 1500.2

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 C.F.R. § 1501.4

§ 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).

. . . .

40 C.F.R. § 1502.20

§ 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. § 1507.2

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below.

Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

. . .

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) where the discussion of alternatives is confined to impact statements.

. . . .

40 C.F.R. § 1508.7

§ 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. § 1508.8

§ 1508.8 Effects.

Effects include:

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

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

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

40 C.F.R. § 1508.9

§ 1508.9 Environmental assessment.

Environmental assessment:

. . .

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.13

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

40 C.F.R. § 1508.27

§ 1508.27 Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.

Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

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

§ 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.”

43 C.F.R. § 3152.2

§ 3152.2 Action on application.

(a) The authorized officer shall review each application and approve or disapprove it within 90 calendar days, unless compliance with statutory requirements such as the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) delays this action. The applicant shall be notified promptly in writing of any such delay.

(b) The authorized officer shall include in each geophysical exploration permit terms and conditions deemed necessary to protect values, mineral resources, and nonmineral resources. Geophysical permits within National Petroleum Reserve—Alaska shall contain such reasonable conditions, restrictions and prohibitions as the authorized officer deems appropriate to mitigate adverse effects upon the surface resources of the Reserve and to satisfy the requirement of section 104(b) of the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. 6504) (See part 3130 for stipulations relating to the National Petroleum Reserve—Alaska).

(c) An exploration permit shall become effective on the date specified by the authorized officer and shall expire 1 year thereafter.

(d) For lands subject to section 1008 of the Alaska National Interest Lands Conservation Act, exploration shall be authorized only upon a determination that such activities can be conducted in a manner which is consistent with the purposes for which the affected area is managed under applicable law.

42 Fed. Reg. 28,723

Notices
DEPARTMENT OF THE INTERIOR
Office of the Secretary
ALASKA
National Petroleum Reserve in Alaska Designation of Special Areas
June 3, 1977

AGENCY: Office of the Secretary

The purpose of this publication is to give notice of the designation of the Utukok River Uplands, Teshekpuk Lake, and Colville River as special areas within the Naval Petroleum Reserve No. 4, Alaska (the reserve). The name "Naval Petroleum Reserve No. 4" will statutorily change to "National Petroleum Reserve in Alaska" on June 1, 1977.