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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INTRODUCTION

BLM's EA and decision approving ConocoPhillips' Exploration Program failed to examine in any meaningful way the site-specific impacts of the program or consider reasonable alternatives to the program. BLM and ConocoPhillips seek to avoid defending BLM's unlawful decision entirely by asserting that because ConocoPhillips' Exploration Program has ended, this matter is moot. If that were correct, it would mean that BLM's authorization of winter exploration in the Reserve, which happens nearly every year and always concludes too quickly to be litigated, can never be challenged. But it is not correct because this case falls squarely within the capable of repletion, yet evading review exception to the mootness doctrine.

On the merits, BLM and ConocoPhillips effectively do not defend BLM's analysis in the EA itself, asserting instead that BLM's tiering to the Plan EIS satisfied its obligations under NEPA. These arguments cannot succeed because the Plan EIS does not contain the site-specific analysis of the impacts or project-specific consideration of alternatives that NEPA requires. This Court has made clear that general analysis in the Plan EIS or a leasing EIS does not eliminate BLM's obligations to consider the site-specific impacts of exploration it approves in the Reserve, *see N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006). The response briefs are unable to justify BLM's ongoing shell game of

asserting at the planning stage that it will consider site-specific impacts later and then asserting at later stages that it has already considered the impacts in the Plan EIS.

STATEMENT OF STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities, except those contained in the addenda to Appellants' opening brief and/or Appellees' and Intervenor-Appellees' answering briefs, appear in the addendum to this brief.

ARGUMENT

I. Appellants' claims are not moot because BLM's authorization of winter exploration is capable of repetition, yet evading review.

In arguing that this case is moot, BLM and ConocoPhillips incorrectly focus on the undisputed fact that ConocoPhillips' 2018-19 winter exploration program has ended. Gov't Br. at 19-20; ConocoPhillips Br. at 16-20. That fact does not bar judicial review here. Regardless of one company's specific plans, this case is not moot because it falls within the exception to the mootness doctrine for disputes "capable of repetition, yet evading review." *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1002 (9th Cir. 2017); *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287 (9th Cir. 2013). A case is capable of repetition, yet evading review, "when (1) the duration of the challenged action is too short to allow full litigation before it ceases or expires, and (2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again." *Wildwest Inst.* 855 F.3d at 1003-04

(quoting *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1018 (9th Cir. 2012)). BLM's authorization of winter exploration meets these two criteria—the annual timeframe for winter exploration in the Reserve is too short to permit full judicial review, and there is a reasonable likelihood BLM will again authorize winter oil exploration in the Reserve. Relief in this case will prevent BLM from repeating its unlawful conduct or relying on this inadequate EA in future decisions.

Neither BLM nor ConocoPhillips disputes that BLM's authorization of winter exploration expires too quickly to permit full judicial review. Gov't Br. at 20-25; ConocoPhillips Br. at 20-26. An action is "fully litigated if it is reviewed by this Court and the Supreme Court." *Shell Offshore*, 709 F.3d at 1287 (internal quotations omitted). The period between authorization of exploration and its expiration each year is only months due to the seasonal requirements for ice roads and tundra travel. III-ER-280; FER-11. This short timeframe is well within the periods this Court has held insufficient to assure full review. *See, e.g.*, *Karuk Tribe*, 681 F.3d at 1018 ("We have repeatedly held that similar actions lasting only one or two years evade review."). Seeking an injunction could not have preserved the challenge for review because BLM's authorization would have expired at the end of the exploration season regardless. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1330 (9th Cir. 1992) ("Although the harvest of pollock could have been

enjoined, the expiration of the 1991 TAC could not. No injunction could have preserved this challenge to a short-term rule.").

On the second factor, contrary to the opposing arguments, Gov't Br. at 20-25; ConocoPhillips Br. at 20-26, Appellants have a reasonable expectation of being subjected again to BLM's unlawful authorization of winter exploration in the Reserve. BLM has a history of relying on short EAs, tiering to general, programmatic decisions in the Reserve, for its analysis of impacts of specific drilling projects, including impacts to caribou and subsistence. CR 31 at 1-2 ("This is the same practice BLM has followed for *every* winter exploration program in the Petroleum Reserve for two decades."); FER-22-83; FER-84-154. There is no reason to expect this pattern will change. Much of the northeastern portion of the Reserve is open to oil and gas exploration and development, and industry interest in exploration in the area continues. Since the Exploration Program at issue here, ConocoPhillips has completed another exploration program in the 2019-20 winter season, I-ER-25; FER-3-21, and another company is currently seeking approval for a planned exploration program, BLM, National NEPA Register, AEA O&G Exploration, DOI-BLM-AK-R000-2021-0003-EA

(last visited Dec. 9, 2020), https://eplanning.blm.gov/eplanning-ui/project/2003448/510.[1]

BLM and ConocoPhillips erroneously assert that this case does not fall into the capable of repetition exception to mootness because BLM will not be asked to approve future exploration identical to ConocoPhillips' 2018-19 Exploration Program. Gov't Br. at 21; ConocoPhillips Br. at 21-23. But this Court has made clear that plaintiffs "need only show that it is reasonable to expect that the [agency] will engage in conduct that will once again give rise to the allegedly moot dispute." *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 856 (9th Cir. 1999). In other words, the question here is not whether BLM might approve an identical exploration program (obviously it will not), it is whether BLM might approve another exploration program under circumstances that give rise to a similar dispute over BLM's NEPA analysis. *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 910 (9th Cir. 2003) (finding a challenged agency action capable of repetition where there is a pattern of agency reliance on the same rationales and analyses); *Alaska Ctr. for Env't*, 189 F.3d at 856-57 ("the issue raised by ACE is not whether Powder Guides will be issued another permit, but whether the Forest Service will issue other commercial helicopter permits in the Chugach National Forest without

[1] Appellants filed a motion, concurrent with this brief, asking the Court to take judicial notice of this fact.

NEPA analysis like the Powder Guides permit"); *Greenpeace Action*, 14 F.3d at 1330 ("[T]he major issue—whether the Secretary has adequately examined the effects of pollock fishing on the Steller sea lions—is likely to recur in future years."). As discussed, the record here supports a reasonable expectation that BLM will again approve exploration in the Reserve in a manner that gives rise to a dispute over the same general issues raised in this case. *Supra* pp. 4-5.

BLM attempts to distinguish this case from several cases where this Court has held that an action was capable of repetition. Gov't Br. at 23-24. While certain details of these cases, of course, differ from this one, none "confirm that the present case is moot." Gov't Br. at 23. In *Wildwest Institute*, the fact that the Fish and Wildlife Service was required to make the determination that was the subject of dispute in that case annually does not demonstrate that such a requirement is necessary to come within the exception. 855 F.3d at 1003. To the contrary, as the *Wildlwest Institute* Court clearly states, the question is simply whether "there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again," *id.*, and as discussed, *supra* pp. 5-6, this Court's precedent makes clear that such an expectation may be established in a variety of ways. The supposed distinguishing facts from *Greenpeace Action*, that the Secretary had already relied on the same biological opinion to issue a new total allowable catch rule, Gov't Br. at 24 (citing 14 F.3d at 1330), are actually analogous to this case—BLM has

already issued another EA approving winter exploration in the northeastern Reserve, tiering to the same plan EIS. FER-3-21; I-ER-25. And *Shell Offshore, Inc.*, far from demonstrating a requirement for certainty that a dispute will recur, actually sets a bar for recurrence that is easily met here. The Court concluded that there was "every reason to believe that the underlying wrong will recur," explaining that "Shell has drilling rights under a multi-year lease, and there is no reason to believe that Greenpeace USA's 'stop Shell' campaign was limited to the 2012 drilling season." 709 F.3d at 1288. In this case, ConocoPhillips and others have drilling rights under leases in the Reserve, and easily satisfy a "no reason to believe" test; *see id.*, here there is affirmative evidence that recurrence is likely. *Supra* pp. 4-5.

ConocoPhillips asserts that this case is like *Ramsey v. Kantor*, 96 F.3d 434, 446 (9th Cir. 1996). In *Ramsey*, though, the Court concluded a dispute was not likely to recur because an intervening court decision required the defendants to use a specific method for calculating fisheries limits, different than the one in dispute. *Id.* Accordingly, that particular dispute had no chance of recurring. Here, by contrast, Appellants have a reasonable expectation that the issues raised in this case will recur.

BLM and ConocoPhillips also argue that this case is not capable of repetition because ConocoPhillips does not plan to conduct further exploration in

the Reserve. Gov't Br. at 21; ConocoPhillips Br. at 25; Mot. to Suppl., Dkt. 20-1 at 4. As an initial matter, ConocoPhillips' self-serving statement of intent deserves little weight. This intention could change at any time. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . [I]f it did, the courts would be compelled to leave the defendant free to return to his old ways." (quoting *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289, 289 n. 10 (1982))). Even taken at face value, ConocoPhillips' assertion that it has no plans to conduct exploration in the next two years, in the context of its history of regular exploration in the northeastern Reserve and ownership of leases that it could explore and develop, hardly establishes that it will not again seek approval of exploration in the reasonably near future. More importantly, this argument avoids the point: the question turns on whether BLM is likely to follow the same process in the future, not whether a single company has plans to engage in the process. The record supports a reasonable expectation that BLM will again be asked to approve oil and gas exploration in the northeastern Reserve, whether by ConocoPhillips or another company. *Supra* pp. 4-5. Indeed, as mentioned above, another company has requested that BLM approve upcoming winter exploration. *Supra* pp. 4-5.

BLM and ConocoPhillips point to two other circumstances that they assert have changed, rendering this case moot. First, BLM and ConocoPhillips both assert that any new winter exploration approval will not tier to the Plan EIS because that Plan has been superseded by a new plan issued in 2020. Gov't Br. at 22-23; ConocoPhillips Br. at 24. This is incorrect. At the time of this filing, BLM has published a final EIS for proposed revisions to the Plan, but it has not issued a record of decision approving it. 85 Fed. Reg. 38,388 (June 26, 2020); BLM, National NEPA Register, National Petroleum Reserve in Alaska Integrated Activity Plan, DOI-BLM-AK-R000-2019-0001-EIS, https://eplanning.blm.gov/eplanning-ui/project/117408/510 (last visited Dec. 9, 2020).[2] The 2013 Plan remains the operative management plan for the Reserve. Even if the new plan were in place, it would be the same type of programmatic document to which BLM has tiered previous EAs. The process would not fundamentally change, and the types of issues raised by Appellants in this case would remain likely to recur. Second, BLM points to recently effective updates to NEPA regulations, and asserts that any future exploration would be considered under a different regulatory regime. Gov't Br. at 23. But the statute requires BLM to consider reasonably foreseeable impacts and no alteration to the regulations

[2] Appellants filed a motion, concurrent with this brief, asking the Court to take judicial notice of this fact.

allows the agency to simply ignore how those impacts affect the environment, whether directly, indirectly, alone, or in combination with other impacts. *See* 42 U.S.C. § 4332(2)(C); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). Moreover, the new regulations continue to require that EAs discuss "the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1501.5(c)(2) (Sep. 14, 2020).

ConocoPhillips also asks the Court to consider evidence that it claims shows its Exploration Program did not have significant environmental impacts and asserts this evidence demonstrates the Court cannot grant relief in this case. Mot. to Suppl.; ConocoPhillips Br. at 19-20. Such a post-decisional evidentiary inquiry is unnecessary and inappropriate here. The issues before the Court in this case concern BLM's failure to adequately evaluate the *potential* environmental impacts from and consider alternatives to ConocoPhillips' Exploration Program. Opening Br. at 17-57. Whether this case is moot, as discussed above, *supra* pp. 5-6, depends on whether the types of issues presented in this case are likely to recur. ConocoPhillips' opinion about whether this particular Exploration Program ultimately had significant environmental impacts—and Appellants certainly do not concede that the program had no impacts, were that question properly before the Court—cannot demonstrate that BLM properly considered the program's potential impacts or alternatives to the program. Nor could it demonstrate that BLM will not

again engage in the same conduct or that all future exploration activities would cause no harm to Appellants. Appellants do not dispute that the Court cannot change the outcome of ConocoPhillips' Exploration Program or remedy any environmental harm that it may have caused. Instead, this case remains justiciable because it is capable of repetition, yet evading review.

Fundamentally, BLM and ConocoPhillips argue that winter exploration in the Reserve—which the record shows occurs nearly every year, and which can have significant environmental consequences—can never be challenged because each year the circumstances of the particular exploration program will be slightly different. If this case can be mooted by the short season, so too would challenges to those future exploration activities, and the harms Plaintiffs experience would be perpetually irremediable. This is precisely the circumstance the exception for matters capable of repetition, yet evading review is intended to address, and this case fits squarely within the exception.

II. BLM failed to examine in any meaningful way the impacts of ConocoPhillips' Exploration Program to caribou.

BLM's and ConocoPhillips' argument that BLM adequately considered the site-specific impacts of ConocoPhillips' Exploration Program and was not required to prepare an EIS because it tiered its skeletal EA to the Plan EIS, Gov't Br. at 33-37; ConocoPhillips Br. at 26-31, ignores both the agency's failure to supply in the EA "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) (internal quotations omitted), and the lack of any analysis of the site-specific effects of this proposed action in the Plan EIS, *see W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1049-50 (9th Cir. 2013). As Appellants explained in their opening brief, this is part of BLM's pattern of refusing to analyze in detail the impacts of oil and gas activities at each phase in the planning, leasing, and permitting process, in violation of NEPA. Opening Br. at 18-21. This is not a new, separate claim, as ConocoPhillips' suggests, ConocoPhillips Br. at 31, rather, it is necessary context within which BLM's action must be considered. At the planning and leasing phases, BLM has promised site-specific analysis later, at the exploration and development stage. Now, at the exploration stage, BLM attempts to point back to the Plan EIS as satisfying its obligations for site-specific analysis under NEPA. This is obfuscation. BLM cannot hide the truth that at no point—either in the EA or Plan EIS—did BLM examine the site-specific impacts of this Exploration Program.

A. BLM's EA is inadequate because it failed to supply a convincing statement of reasons why ConocoPhillips' Exploration Program would not have significant impacts.

BLM failed to provide any statement of reasons, much less a convincing statement of reasons, why the impacts from ConocoPhillips' Exploration Program would be insignificant. "In reviewing an agency's finding that a project has no

significant effects, courts must determine whether the agency has . . . provided a convincing statement of reasons to explain why a project's impacts are insignificant.'" *Bark v. U.S. Forest Serv.*, 958 F.3d 865, 870 (9th Cir. 2020) (quoting *In Def. of Animals v. U.S. Dep't of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014)); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (holding that an agency's defense of its finding of no significant impact must be found in the EA, not elsewhere in the record). Here, BLM's EA concludes without explanation that "[o]nly minor impacts would be expected" to caribou and that the proposed action "would not reduce population levels or distribution during the winter season." III-ER-276. It includes no explanation why the effects of the Exploration Program on caribou will be insignificant. *See* III-ER-292-98.

BLM and ConocoPhillips do not argue that BLM included a statement of reasons in the EA. Instead, they assert that BLM satisfied its obligation to provide a convincing statement of reasons simply by citing, without any explanation, to the Plan EIS. Gov't Br. at 14-15; ConocoPhillips Br. at 46. No authority supports this assertion. To the contrary, absent an explanation of how the generic analysis of caribou impacts in the Plan EIS satisfies BLM's obligation to conduct a project-specific assessment of impacts in the time and place of the project, BLM has

avoided entirely its obligation to provide a convincing statement about the lack of potentially significant impacts of *this* project. *Supra* pp. 12-13.

B. Tiering to the Plan EIS does not satisfy BLM's obligation to examine the site-specific impacts of a particular project to caribou.

The Plan EIS's analysis also does not independently support BLM's finding that this project would have no significant impacts to caribou because it does not consider the site-specific effects of this action. Appellants do not, as BLM suggests, object generally to BLM tiering project-level environmental analysis like this one to programmatic EISs. Gov't Br. at 27. Tiering can be appropriate, but it does not obviate the need for the agency to take a hard look at the site-specific impacts of its action. *See W. Watersheds Project*, 719 F.3d at 1049 (holding that an EIS that "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" of the proposed action) (internal quotations omitted). BLM's argument that an agency is obligated only to consider new or different impacts that were not already considered in a programmatic EIS is similarly inapt. Gov't Br. at 30. This is only the case when the earlier statement adequately addresses the site-specific impacts of subsequent projects. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 783 (9th Cir. 2006). An agency must still take a hard look at the site-specific impacts of any action it takes when, as will

usually be the case, the programmatic EIS does not. *W. Watersheds Project*, 719 F.3d at 1049-50; *Pit River Tribe*, 469 F.3d at 783. BLM has not done so here, either in its EA or in the Plan EIS.

The Plan EIS—a zoning and land management plan for the entire 23-million-acre Reserve—is necessarily broad and vague. It discusses generally how caribou may be affected by winter exploration activities, but it does not include any site-specific analysis of the effects of winter exploration on caribou in ConocoPhillips' Exploration Program area. *See* II-ER-132; II-ER-185-87; Opening Br. at 29-30. BLM's recitation of this general discussion in its brief, Gov't Br. at 33-34, demonstrates nothing more. Indeed, the Plan EIS itself contradicts BLM's assertion that this analysis adequately covers future, specific exploration or development actions by stating explicitly that "[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. Additionally, this Court has concluded that the type of site-specific analysis necessary to support an exploration decision is not required, and may not be possible, in an EIS evaluating a broader planning decision. *See N. Alaska Envtl. Ctr.*, 457 F.3d at 977 (holding that site-specific analysis of oil and gas exploration and development was not required at the lease sale phase because "[s]uch analysis must be made at later

permitting stages when the sites, and hence more site specific effects, are identifiable."). The Court's recent decision in *Northern Alaska Environmental Center. v. U.S. Department of Interior*, 965 F.3d 705 (9th Cir. 2020), is not to the contrary. There, the Court deferred to BLM's position that the Plan EIS was the EIS for a 2017 leasing decision, but it did not address whether the Plan EIS was adequate for that purpose because it concluded that question was barred by the NPRPA's statute of limitations, nor did the Court address the type of analysis necessary at the exploration stage. *Id.* at 724.

Beyond failing to address the site-specific impacts of exploration, the general caribou discussions in the Plan EIS actually highlight the potential for ConocoPhillips' winter exploration program to significantly affect caribou in ways not yet analyzed. Opening Br. at 31-32. This is not a mischaracterization of the record, as BLM suggests. Gov't Br. at 35. The Plan EIS states that the assumption of temporary effects from exploration "has not been scientifically tested" and that effects could vary based on different conditions and in some years "have an additive effect on natural winter mortality." I-ER-141. The Plan EIS also acknowledged that "[a]ny caribou in the immediate vicinity of the [winter] 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, and 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," II-ER-132, which is now occurring with annual winter exploration. The EA addresses none of these effects.

ConocoPhillips' arguments on this score also ignore BLM's obligation to analyze the site-specific impacts of the action. It argues that BLM has satisfied its NEPA obligations by discussing generally the uncertainty about potential effects of winter exploration on caribou in the Plan EIS. ConocoPhillips Br. at 38-39. But the Plan EIS's discussion of uncertainty about the effects of winter exploration over millions of acres and over decades is no more sufficient for this Exploration Program than the Plan EIS's discussion of general impacts that are well understood. BLM must analyze the site-specific impacts of this Exploration Program, including addressing any uncertainty about those impacts, based on current information about this particular area and project. *Supra* pp. 14-15; *see also Am. Wild Horse Campaign v. Bernhardt*, 963 F.3d 1001, 1009 (9th Cir. 2020) (noting that agency appropriately considered site-specific uncertainty where it used "existing evidence to assess the level of uncertainty and made 'reasonable predictions on the basis of prior data' to conclude that there would be no significant environmental impact"). BLM has failed to do so here.

III. BLM violated NEPA by failing to analyze the cumulative impacts of the Exploration Program, the GMT2 construction project, and the 2019 geophysical exploration program.

BLM failed to analyze how the impacts to caribou from winter exploration would cumulate with the impacts to caribou from GMT2 construction and geophysical exploration. *See Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010). Neither BLM nor ConocoPhillips deny the clear potential for such impacts. *See* Gov't Br. at 40-45; ConocoPhillips Br. at 44-49; Opening. Br. at 40; *see also Te-Moak*, 608 F.3d at 605 (finding that plaintiffs need to show "only the potential for cumulative impact"). Despite such potential, the EA presents no meaningful information about impacts to caribou let alone "quantified or detailed information" about such impacts.[3] *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993-94 (9th Cir. 2004). BLM and ConocoPhillips again attempt to rely on the tiering regulation designed only to "eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review," 40 C.F.R. § 1502.20, instead to dissolve any further analytic responsibility on BLM's part.

[3] ConocoPhillips asserts that Appellants somehow waived the cumulative impacts arguments regarding subsistence. *See* ConocoPhillips Br. at 44 n.10. But Appellants' opening brief makes clear that, given the centrality of caribou to subsistence practices, impacts to the former are necessarily intertwined with impacts to the latter. Opening Br. at 38.

The EA does not meaningfully analyze how impacts to caribou from the Exploration Program will cumulate with impacts from the GMT2 construction and the geophysical exploration. Opening Br. at 40-42. BLM attempts to gloss over this absence by pointing toward other parts of the EA's cumulative impacts analysis. Gov't Br. at 41-42. But these are irrelevant to whether the EA contains sufficient analysis of the cumulative impacts to caribou. ConocoPhillips does not even attempt to defend the EA on its own merits. Instead, both BLM and ConocoPhillips ultimately turn to the EA's tiering statements in an attempt to save BLM's analysis. *See* Gov't Br. at 41-42; ConocoPhillips Br. at 45-47.

But the tiered-to documents cannot make up for these shortcomings. Where prior NEPA analyses contain sufficiently quantified or detailed information on environmental impacts, tiering, of course, can be appropriate. *See Klamath-Siskiyou*, 387 F.3d at 997; *Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt.*, 470 F.3d 818, 823 (9th Cir. 2006). But neither BLM nor ConocoPhillips point to a discussion in any of the tiered-to documents articulating the cumulative effects of the three projects at issue. Nor can they. None of the tiered-to documents discuss geophysical exploration, *see* I-ER-56 (noting that neither tiered-to document "identifies geotechnical exploration specifically"), let alone how the 2019 geophysical exploration will cumulate with the two other projects at issue here. This alone demonstrates the ineffectiveness of BLM's tiering.

BLM and ConocoPhillips impermissibly attempt to paper over this gap by pointing to a patchwork of passages from the Plan EIS and GMT2 SEIS discussing exploratory drilling generically. *See* Gov't Br. at 43; ConocoPhillips Br. at 47-48. But avoiding site-specific analysis by relying on generic analysis at the project stage contravenes established law. *Klamath-Siskiyou*, 387 F.3d at 997. Asserted similarities between the impacts of geophysical exploration and other types of exploratory drilling projects, do not replace a site-specific analysis of this geophysical exploration project and the other two projects. Indeed, such similarities suggest even more potential for cumulative impacts. *See Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 989 (N.D. Cal. 2002).

And the extant caribou analysis in the tiered-to documents also cannot cure the EA's cumulative impacts deficiencies. The analysis in both the Plan EIS and GMT2 SEIS flagged potential effects to caribou from oil and gas exploration that BLM did not address in those documents. *See* Opening Br. at 44-45. Rather than picking up these clearly identified problem areas at the site-specific stage, the EA passes over them in silence.

BLM and ConocoPhillips incorrectly suggest that by tiering to the earlier analyses, BLM is incorporating earlier-identified uncertainties about cumulative impacts to caribou sufficient to satisfy its NEPA obligations. *See* Gov't Br. at 44-45; ConocoPhillips Br. at 45-47. But, as explained above, if an agency cannot, for

one reason or another, develop the relevant specific information in a more general EIS, it must do so at the site-specific stage or provide an explanation at that time why "definitive information could not be provided." *Klamath-Siskiyou*, 387 F.3d at 993-94; *supra* p. 17. The EA does not even acknowledge the issues raised in the tiered-to document, leaving the public—particularly residents of North Slope communities such as Nuiqsut—and decisionmakers in the dark about the potential cumulative impacts to caribou from oil and gas activity.[4]

Nor does the relative recency of the GMT2 SEIS change this analysis. *See* ConocoPhillips Br. at 46-47 (suggesting that the closeness in time between the GMT2 SEIS and EA obviates the need to do additional analysis in the EA). While NEPA does not require an agency to duplicate work previously done, *see* 40 C.F.R. § 1502.20; 40 C.F.R. § 1502.21, those rules matter only where the agency has actually done the work. And that is not the case here. *See supra* p. 19.

[4] As it did before the district court, ConocoPhillips again incorrectly asserts that Appellants rely on "inapt" case law. *See* ConocoPhillips Br. at 48-49. But the rules of *Klamath-Siskiyou* and *Te-Moak* continue to be directly applicable. The cumulative impacts analyses in the tiered-to EISs are deficient for a project-level assessment because they lack the requisite site-specific analysis and therefore cannot support the agency's conclusions here. *See Klamath-Siskiyou*, 387 F.3d at 997. Further, the EA's cumulative impacts analysis is deficient because it lacks the "sufficiently detailed" discussion of the cumulative impacts of the three projects. *See Te-Moak*, 608 F.3d at 603.

IV. BLM failed to consider appropriate alternatives to ConocoPhillips' Exploration Program.

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

In comments on the draft EA, Appellants requested BLM to consider an alternative that would have permitted ConocoPhillips to drill fewer wells during the 2018-19 exploration season. II-ER-236. This alternative was reasonable, consistent with the project's purpose and need, and would reduce environmental impacts. BLM violated NEPA by not considering it. Opening Br. at 48-51. Appellants do not, as BLM suggests, argue that the EA is deficient simply because it considered only ConocoPhillips' proposed alternative and a no-action alternative, Gov't Br. at 47; rather, it was BLM's arbitrary refusal to consider any reasonable alternatives to ConocoPhillips' proposal, including a fewer-wells alternative, that is the source of BLM's NEPA violation. Opening Br. at 46-51.

BLM asserts that it adequately considered a fewer-wells alternative by briefly acknowledging the alternative and eliminating it from further consideration. III-ER-291; Gov't Br. at 49-50. But discussing a feasible alternative in a single paragraph and eliminating it from further detailed discussion does not satisfy NEPA's requirement to give full and meaningful consideration to feasible alternatives. *W. Watersheds Project*, 719 F.3d at 1052 (rejecting an EA that briefly discussed reasonable alternatives but excluded them from detailed analysis); *see*

Laguna Greenbelt, Inc. v. U.S. Dep't of Transp., 42 F.3d 517, 524 (9th Cir. 1994) (explaining that an EIS must discuss "in detail all the alternatives that were feasible and briefly discuss the reasons others were eliminated").

BLM argues that it determined a fewer-wells alternative was inconsistent with the project's purpose and need because it concluded that reducing the number of wells approved would be an unreasonable restriction on ConocoPhillips' rights under its leases. Gov't Br. at 51-52. As an initial matter, this is inconsistent with the text of the purpose and need statement itself—"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—which plainly does not preclude a fewer-wells alternative. Second, it is inconsistent with the record and the law. BLM's descriptions of ConocoPhillips' general obligations and rights to explore and develop its leases subject to reasonable restriction—even assuming them to be accurate characterizations of the leases, which BLM failed to include in the administrative record—do not demonstrate that limiting the number of wells ConocoPhillips was permitted to drill in a particular exploration would be unreasonable. Opening Br. at 49-50. Nor is there any support for this position to be found in the statutes or regulations governing oil and gas exploration and development in the Reserve. To the contrary, BLM has clear authority, indeed an

obligation, to condition or restrict activity on leases 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).

ConocoPhillips argues that BLM satisfied its obligation to consider alternatives by tiering to the Plan EIS. ConocoPhillips Br. at 52-53. As with BLM's consideration of impacts, tiering to the Plan EIS does not cure BLM's failure to consider reasonable alternatives to this winter Exploration Program. The Plan EIS considered five different alternatives for areas that would be open to leasing, ranging from 11 million acres, under Alternative B-1, to the entire 22.8 million acres within the Reserve. I-SER-45. BLM ultimately selected an alternative that opened 11.8 million acres, approximately 52 percent of the total land in the Reserve, to leasing. II-ER-155. Based on the difference in total area open to leasing under each alternative, BLM projected different total numbers of exploration wells it expected might be drilled. II-SER-299, 317. But this general discussion of impacts from projected exploration drilling over millions of acres and over several decades aimed at informing a decision about which areas to open to leasing hardly constitutes the requisite site-specific consideration of alternatives to a specific proposed exploratory drilling program in a particular location in a single year.

If the purpose and need statement precludes BLM from restricting the number of exploration wells ConocoPhillips may drill on its lease in a season, it is unlawful. Appellants do not assert that the NPRPA *requires* BLM to limit the number of wells a company may drill on leases, as BLM suggests. Gov't Br. at 52-53. Instead, as Appellants explained in their opening brief, Opening Br. at 52-53, BLM has a clear obligation and authority to impose the conditions, restrictions, and prohibitions it determines are necessary to mitigate adverse environmental effects. 42 U.S.C. § 6506a(b). BLM cannot eliminate its obligation to make that determination with respect to a particular project through a narrowly drafted purpose and need statement. Additionally, NEPA prohibits an agency from drafting a purpose and need statement so narrowly that only one alternative could accomplish its goals. *Nat'l Parks & Conservation Ass'n v. U.S. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010).

ConocoPhillips asserts that Appellants failed to exhaust or have waived these arguments. ConocoPhillips Br. at 53. But Appellants plainly asked BLM to consider a fewer-wells alternative and asserted that BLM had not offered a valid reason for declining to consider the alternative in comments on BLM's EA. II-ER-236. Appellants "alert[ed] the agency to [their] position and contentions." *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 710 (9th Cir. 2009) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553,

(1978)). Appellants directly argued in the district court that BLM improperly rejected a fewer wells alternative for the same reasons raised on appeal, CR 27 at 28-35, and therefore Appellants met their obligations. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

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

BLM violated ANILCA for the same reasons it violated NEPA: by refusing to consider a feasible alternative proposed by Appellants. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 731 (9th Cir. 1995); Opening Br. at 55-57.

BLM incorrectly asserts that ANILCA section 810 requires only that an agency consider alternatives that would reduce or eliminate the amount of public lands needed for a proposed action. Gov't Br. at 54. This interpretation is contradicted by the text of the statute, which mandates consideration of alternatives that "would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." 16 U.S.C. § 3120(a). Alternatives that may restrict the duration or intensity of use or otherwise reduce the impact to subsistence resources plainly "reduce" the use or occupancy of public land and therefore fall within the provision's meaning. *See Alaska Wilderness Recreation & Tourism Ass'n*, 67 F.3d at 730-31 (addressing alternatives that would produce lower volume of timber); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310-

13111 (9th Cir. 1990) (same). It is also in conflict with this Court's interpretation of the intent of the provision "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*, 67 F.3d at 731 (quoting *City of Tenakee Springs*, 915 F.2d at 1310). BLM failed to consider any alternatives, including the fewer-wells alternative proposed by Appellants, that would minimize the impact of the project on subsistence uses.

Moreover, even if BLM's strained interpretation were correct, it would not establish that BLM satisfied its obligation to consider alternatives here. A fewer-wells alternative undeniably would use less land needed for subsistence purposes, by requiring fewer ice roads and fewer drill sites within Nuiqsut's subsistence use area. Opening Br. at 56.

BLM's and ConocoPhillips' arguments concerning BLM's ANILCA Section 810 evaluation and findings are misplaced. *See* Gov't Br. at 54; ConocoPhillips Br. at 56-57. Appellants do not challenge BLM's findings pursuant to section 810(a)(3). Appellants instead challenge BLM's failure to consider alternatives as required by ANILCA section 810(a), which it must do regardless of its findings. 16 U.S.C. § 3120(a); *Kunaknana v. Clark*, 742 F.2d 1145, 1150-51 (9th Cir. 1984). The Section 810 Subsistence Evaluation and Findings form, which is incorporated by reference in the EA and FONSI, III-ER-

304, 381-82, does not contain any independent consideration of alternatives and confirms that BLM only considered ConocoPhillips' proposal and the no-action alternative.

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court declare unlawful and vacate BLM's record of decision and EA.

Respectfully submitted this 9th day of December, 2020.

s/ Jeremy Lieb

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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.

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Signature: *s/ Jeremy Lieb* **Date:** December 9, 2020

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ADDENDUM

40 C.F.R. § 1501.5

§ 1501.5 Environmental assessments.

Effective: September 14, 2020

. . .

(c) An environmental assessment shall:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; and

(2) Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, and the environmental impacts of the proposed action and alternatives, and include a listing of agencies and persons consulted.

. . . .