JEFFREY H. WOOD
Acting Assistant Attorney General

Michelle-Ann C. Williams
Trial Attorney (MD Bar)
U.S. Department of Justice
Environmental and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0420 (phone)
(202) 305-0506 (fax)

Romney S. Philpott
U.S. Department of Justice
Environmental and Natural Resources Division
Natural Resources Section
999 18th St., #370
Denver, CO 80202
Phone: 303-844-1810
Fax: 303-844-1350

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL CENTER, *et al.* , Plaintiffs, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	No. 3:18-CV-00030-SLG **FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

I. INTRODUCTION

In 2012, the Bureau of Land Management ("BLM ") prepared a comprehensive Integrated Activity Plan and Environmental Impact Statement ("IAP/EIS") addressing leasing in the National Petroleum Reserve in Alaska ("NPR-A" or "Reserve"). This was the first ever comprehensive planning document for the entire NPR-A. The IAP/EIS stemmed from a two year planning process involving robust participation by interested stakeholders, including tribes, native villages, cooperating agencies, and the general public. BLM's intent was to ensure better protection of the environment, public use of the land, and public health—as well as to provide greater certainty and opportunity to industry.

The IAP/EIS rigorously evaluated the potential direct, indirect, and cumulative impacts of leasing the tracts made available to leasing in BLM's land use management plan for the Reserve—and was intended to provide NEPA coverage for multiple, subsequent lease sales. Every year following issuance of the IAP/EIS, and consistent with direction from the prior administration, BLM held lease sales for tracts in the NPR-A, including its most recently lease sale, held in 2017. In each case, BLM expressly examined whether new information or circumstances existed such that it needed to supplement the analysis in the IAP/EIS. Thus, prior to issuing the leases resulting from the 2017 sale, BLM again formally evaluated whether the IAP/EIS continued to provide an accurate and adequate analysis of the potential environmental impacts of leasing in the NPR-A, including in light of new information that had arisen since the IAP/EIS was issued in 2012, and concluded that it remained adequate.

Notwithstanding BLM's thorough analysis in the IAP/EIS, and its continuing scrutiny of its adequacy, Plaintiffs now allege that BLM violated the National Environmental Policy Act ("NEPA") and regulations promulgated by BLM under the Naval Petroleum Reserves

Production Act of 1976 ("NPRPA") with respect to the 2017 lease sale. Plaintiffs allege BLM: (1) failed to prepare a site-specific environmental analysis for the lease sale; and (2) failed to evaluate information about new oil discoveries before holding the sale.

Plaintiffs' claims fail. As an initial matter, Plaintiffs fail to challenge a decision that constitutes final agency action justiciable under the Administrative Procedure Act ("APA"). The decision to hold a lease sale is not final agency action—rather, a party wishing to challenge the leasing of federal minerals in the NPR-A must challenge the decision to *issue* a lease. Because most, if not all, of Plaintiffs' claims challenge BLM's preliminary decision to hold a lease sale, their claims should be dismissed. But even if Plaintiffs could avoid this jurisdictional defect, their claims are entirely without merit.

While Plaintiffs argue that BLM's analysis in the IAP/EIS was not sufficiently "site-specific," their argument is contrary to case law where courts have expressly and repeatedly rejected similar arguments. In fact, the Ninth Circuit has previously rejected a nearly identical argument challenging BLM leasing in the NPR-A under a similar IAP/EIS. Consistent with this precedent, BLM's IAP/EIS considered site-specific impacts as much as reasonably possible at the leasing stage. Moreover, while Plaintiffs argue that the IAP/EIS is no longer adequate due to subsequent oil field discoveries and other new information, BLM reasonably explained why these discoveries and other information did not present a significantly different picture of the potential impacts addressed in the IAP/EIS—in which BLM consciously erred on the side of overestimating potential impacts. Due to both the sufficiency of the explanation and the deference due BLM for such determinations, Plaintiffs' claim fails. Accordingly, the Court should grant Federal Defendants summary judgment and dismiss Plaintiffs' claims.

II. STATUTORY AND REGULATORY BACKGROUND

A. The National Petroleum Reserve in Alaska

The NPR-A is managed by defendant the Department of the Interior ("Interior") under the provisions of the Naval Petroleum Reserves Production Act of 1976, 42 U.S.C. §§ 6501-08 (hereinafter "NPRPA"). Under the NPRPA, the Secretary of the Interior is required to "conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act." 42 U.S.C. § 6506a(a).

B. The National Environmental Policy Act

NEPA, 42 U.S.C. §§ 4321-4335, serves the dual purposes of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA serves these purposes by requiring a "federal agency contemplating a major action" to prepare an environmental impact statement or "EIS." *Id*. *See also Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 666 (9th Cir. 1998) (noting that EIS requirement is "a procedural obligation designed to assure that agencies give proper consideration to the environmental consequences of their actions") (quoting *Merrell v. Thomas*, 807 F.2d 776, 777-78 (9th Cir. 1986)). NEPA is a procedural statute: it does not "mandate particular results but simply prescribes the necessary process." *Methow Valley Citizens*, 490 U.S. at 350. *See also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 758(9th Cir. 1996) ("NEPA exists to ensure a process, not to ensure any result.").

III. FACTUAL BACKGROUND

A. The NPR-A and History of Development

The nearly 23-million acres that comprise the NPR-A were originally designated a naval petroleum reserve by executive order in 1923. *N. Alaska Envtl. Ctr. v. Kempthorne* ("*NAEC*"), 457 F.3d 969, 973 (9th Cir. 2006). The Reserve was managed by the U.S. Navy until 1976, when Congress enacted the NPRPA in 1976, re-designating the reserve as the "National Petroleum Reserve in Alaska," withdrawing it from operation of the mining and mineral leasing laws, and placing it under the jurisdiction of the Secretary of the Interior. P.L. 94-258 (Apr. 5, 1976), 90 Stat. 303, 42 U.S.C. §§ 6501-08. The NPRPA was amended by the Department of the Interior Appropriations Act for Fiscal Year 1981, P.L. 96-514 (Dec. 12, 1980), 94 Stat. 2957, at 2964-65 (hereafter "1980 Amendment"), which directed the Secretary of the Interior to undertake "an expeditious program of competitive leasing of oil and gas in the [Reserve]."

Prior to 2012, BLM did not have a plan (or associated NEPA analysis) encompassing the entire NPR-A. Instead, oil and gas leasing was done subject to integrated activity plans covering only portions of the NPR-A. Various discoveries were made both within the NPR-A and in non-federal lands and waters near the NPR-A. In 1994, the discovery of the Alpine oil field on State land in the Colville River Delta near the eastern NPR-A boundary spurred increased industry interest across the North Slope. AR0189. Following Alpine, additional discoveries occurred in the northeastern NPR-A, resulting in the creation of the Greater Mooses Tooth ("GMT") and Bear Tooth exploratory units. *Id.* Overall, in the three decades following the 1980 Amendment, BLM has conducted lease sales that have resulted in 556 leases on 6,074,566 acres.[1] AR0190. From 2000 to 2012, industry had drilled 29 exploration wells on 28 federal leases in the Reserve, with fifteen of those wells in the GMT Unit. *Id.*

B. The IAP/EIS

[1] Over time, by 2012, over half of these leases expired or were relinquished. AR0542.

In 2010, BLM commenced the planning process for a new integrated activity plan/environmental impact statement, which would determine the appropriate management of the entire NPR-A based on current information about both subsurface resources (e.g., oil and gas) and surface resources (e.g., wildlife, subsistence use of the Reserve, etc.). AR0005. The process lasted over two years, and included consultation with tribes, native villages and cooperating agencies, and robust public involvement. AR1718-21. Its stated purpose was to "provide greater certainty and opportunity to industry while better protecting the environment, public use of the land, and public health." AR0006. The BLM issued the final IAP/EIS, which was over 2,600 pages long, including appendices, in December 2012. *Id.*; AR0010.

In an introductory section, the IAP/EIS unequivocally established that the decision resulting from it "may authorize multiple lease sales," and that BLM contemplated that the environmental analysis in the IAP/EIS would serve as the basis for its compliance with NEPA for the next, and subsequent lease sales. AR0023 (noting that "[p]rior to conducting each additional sale, [BLM] would conduct a determination of the existing NEPA documentation's adequacy," and if adequate, "the NEPA analysis for such sales may require only an administrative determination of NEPA adequacy"). Consistent with this objective, for purposes of impact analysis, the IAP/EIS assumed "that all lands that the record of decision determines to be available for leasing would be offered in the first and subsequent lease sales." *Id.*

1. Alternatives Evaluated in the IAP/EIS

The IAP/EIS analyzed five alternatives (Alternatives A, B-1, B-2, C, and D) that differed substantially in terms of the amount—and specific location—of the acreage that would be made available for oil and gas leasing in any given lease sale. *See* AR0008. The alternatives also varied with respect to other management decisions. *Id.* (noting that the alternatives "provide a

broad range of oil and gas leasing availability, surface protections, and Special Area designations.")

Under Alternative A, the no-action alternative, BLM would continue to manage the NPR-A under existing decisions, and would make approximately 57 percent (13 million acres) of the Reserve's subsurface acres available to oil and gas lease sales (although approximately 1.57 million acres in the Northwestern NPR-A and approximately 425,000 acres north and east of Teshekpuk Lake would remain deferred from leasing until 2014 and 2018, respectively). AR0033; AR2540. Lands with particularly high surface resource values (such as those within Special Areas)[2] would continue to receive special protection through stipulations and required operating procedures (such as development restrictions and timing and spatial constraints on activities), and certain stipulations and required operating procedures/best management practices ("BMPs") would apply to oil and gas-related activities. AR0034; AR0056-125 (Table 2-3 summarizing additional protections/stipulations/BMPs for each alternative). In a map, the IAP/EIS illustrated precisely where the "K" stipulations—i.e., stipulations providing additional protections in select biologically sensitive areas would be imposed under Alternative A. *See* AR2541 (map); *see also* AR0098-123 (table describing K stipulations and identifying where they would be imposed under the various alternatives).

[2] Under the NPRPA, the Secretary may designate special areas that contain "significant subsistence, recreational, fish and wildlife, or historical or scenic value." 42 U.S.C. § 6504(a). The statute provides that any exploration in such areas "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." *Id.* One of these areas, the Teshekpuk Lake Special area, which provides important caribou calving and insect relief areas, and bird breeding, molting, staging, and migration habitats), occurs in the northeast of the NPR-A, AR0034, and is mentioned several times in Plaintiffs' briefing.

Under Alternative B-1, BLM would allow oil and gas leasing on less than half of the Reserve (11 million acres). AR0034. The remaining portions of the Reserve would be unavailable to oil and gas leasing, including 3.1 million acres in the Northeast portion of the Reserve (including most of Teshekpuk Lake Special Area, discussed in footnote 2) and 8.2 million acres in the southwestern NPR-A. AR0035; AR2542. On lands not made available to leasing, BLM generally would not permit new non-subsistence permanent infrastructure or exploratory drilling (with the exception of subsurface pipelines under the Wainwright Inlet/Kuk River and activities necessary for activity under prior valid existing oil and gas leases). AR0035. BLM would significantly enlarge the amount of lands managed as special areas, including enlarging the Teshekpuk Lake, Kasegaluk Lagoon, and Utukok River Uplands Special Areas, and would also create a new, 1.6 million acre Peard Bay Special Area. AR0035. Finally, it would impose various stipulations and BMPs on oil and gas-related activities. *See* AR0056-125; AR2541 (map showing where K stipulations would be imposed).

Alternative B-2 (the alternative ultimately adopted by BLM) also emphasized protection of surface resources, but did so to a lesser extent than Alternative B-1. It would make slightly more subsurface resources available for leasing: 11.8 million acres (nearly 52% of the total NPR-A). AR0036. The lands designated as unavailable to leasing under Alternative B-2 included a large area (approximately 3.1 million acres) in the northeastern portion of the NPR-A which largely, but not entirely, matched lands designated as unavailable in Alternative B-1.[3] AR0037; AR2544. Similarly, Alternative B-2 would make slightly fewer acres (7.3 million) unavailable to leasing in the southwestern portion of the NPR-A. AR0037. Alternative B-2 also would

[3] For instance, the IAP/EIS explained that "Alternative B-2 makes lands currently under lease and near lands currently under lease in northeastern NPR-A near Fish Creek available and makes lands between Barrow and Dease Inlet/Admiralty Bay unavailable." AR0037

prohibit new non-subsistence infrastructure on fewer lands—doing so only on unavailable lands in the southwestern NPR-A and approximately 1 million acres in and around Teshekpuk Lake. AR0038; AR2544. Like Alternative B-1, Alternative B-2 would enlarge the Utukok River and Teshekpuk Lake Special Areas (but the latter by 140,000 acres less than would be added under B-1), and would create a new Peard Bay Special Area (but would only include 107,000 acres within it). AR0036. Alternative B-2 would impose the same stipulations and BMPs as imposed under Alternative B-1. *See* AR0056-125; AR2542 (K stipulation map).

Alternative C increased the amount of acreage available for oil and gas leasing to 17.9 million acres (76 percent of the federal subsurface estate in the NPR-A). AR0039. The areas unavailable for leasing would include selected coastal areas and 4.4 million acres in the far south of the Reserve. AR0039; AR2546. Exploratory drilling and non-subsistence permanent infrastructure would be prohibited only in those 4.4 million acres, and two special areas. It would enlarge (by a lesser amount than B-1 and B-2) the Teshekpuk Lake and Utukok River Uplands Special Areas, and create a 107,000 acre Peard Bay Special Area. AR0040. Protective measures associated with Alternative C were largely similar to those imposed under Alternatives B-1 and B-2, but with some differences. *See* AR0056-125. For instance, there would be some differences as to where certain K stipulations were imposed. *See* AR2547 (K stipulation map).

Finally, Alternative D would maximize leasing opportunities in the NPR-A, making all lands in the Reserve available for oil and gas leasing (although maintaining current deferrals). AR0040. There would be no expansions of special areas, nor prohibition of new non-subsistence permanent infrastructure. AR0041; AR2548. Although certain lands would receive special protection, several stipulations common to the other alternatives to protect biological resources

near Teshekpuk Lake would not apply or would be less restrictive. *See* AR0056-125. *See also* AR2549 (map showing location of K stipulations).

2. Description of Oil and Gas Development in the NPR-A

To inform the analysis of the potential impacts of each of the alternatives, the IAP/EIS described in detail the process of oil and gas development in the NPR-A. It cautioned that "[t]he petroleum-related activities described in this section are applicable in a general sense because the timing and location of future commercial-sized discoveries cannot be accurately predicted until exploration drilling occurs." AR0541. However, based on existing oil and gas development in the NPR-A and the North Slope of Alaska, BLM described the process and infrastructure of oil and gas development that could be expected under all five alternatives. *Id*.

First, the IAP/EIS explained the timeline for a typical oil and gas development project in the North Slope. It explained that development activities (such as obtaining drilling and operational permits; drilling disposal wells; establishing base camp; drilling developmental wells; and installing pipeline, pump stations, and production facilities) are normally completed between three and six years after the initial discovery. Production itself typically occurs for ten to fifty years following development. Finally, abandonment (plugging and abandoning wells; removing production equipment, restoration of the site) normally takes two to five years for an individual well. AR0543. As a general rule, the EIS explained that it is likely that ten or more years would pass between a lease sale and the start of actual oil production. AR0544.

Next, the IAP/EIS described the infrastructure and process for each of the phases. Starting with exploration, it explained how seismic survey work (which requires a permit from BLM before it can commence) is an integral part of exploration for oil and gas fields. AR0546-49. It described various seismic survey methods, the type of equipment and vehicles used in

surveying, and timing considerations. *Id.* Next, it discussed construction of ice roads, snow-packed trials, ice pads and ice airstrips, which provide seasonal, temporary infrastructure for use in exploration operations. AR0553. It disclosed that exploration operations require movement of heavy equipment (drilling rigs, drill pipe, and camps) and large amounts of material (such as steel casing, drilling mud, cement, and fuel) to remote locations. AR0554. It also described how some materials are moved by approved low-ground pressure vehicles. *Id.*

The IAP/EIS explained the process of drilling of exploration wells, noting that exploratory drilling occurs entirely during the winter months on non-permanent ice pads, as new gravel exploration pads would be prohibited under all of the proposed alternatives. AR0553. The IAP/EIS explained that drilling operations require large amounts of water to create drilling fluid (typically a mix of water, clay, and chemicals circulated into a wellbore during drilling). AR0555. Over a three-to-four month drilling season, drilling a single exploration or delineation well could require a total of 1,650,000 gallons of water, which would be obtained (if possible) from a source close to the well site. *Id.* Drilling a 10,000 foot well could use 630 tons of drilling mud and create 820 tons of rock cuttings. *Id.* All cuttings and solid drilling mud must be hauled to existing facilities in the Prudhoe-Kuparuk areas. *Id.*

Upon completion of exploratory drilling, the operator would remove all equipment and materials. AR0553. However, as the IAP/EIS explained, if exploratory drilling were to lead to the discovery of a new field, then delineation of the field would take place over subsequent winter drilling seasons. *Id.* On average, operators have drilled five delineation wells per discovery. AR0554.

Moving to production, the IAP/EIS first described the necessary infrastructure. For instance, a producing operation would require construction of a production pad that could

support dozens of wells and contain a large central processing facility for an oil field (or a combined central processing/gas compressor facility for a gas field). AR0556; AR0570-71. Necessary infrastructure would also generally include an airstrip, camp facilities, and a storage yard. Operators would also install pipeline infrastructure, such as feeder lines, regional pipelines, booster pump (for oil) or additional compression stations (for natural gas), a high pressure trunk line, a gas conditioning facility, and an oil-sale and/or gas-sale pipeline to transport the resource to market. *Id.* If a satellite pad were necessary, additional infrastructure (including a gathering system and a road) would be required. *Id.*

To provide a more concrete analysis of the infrastructure required for production, BLM described two oil development strategies that it expected could occur on new fields discovered in the Reserve. *Id.* The first strategy—joint field development—would likely be used in certain parts of the NPR-A, specifically "economic zones" 110 and 120, which comprise approximately the northeast quarter of the Reserve. *Id.*; AR0558. A joint field development would contain two production pads, with one pad also housing a central processing facility. AR0557. The IAP/EIS provided a hypothetical layout of a joint oil development complex, including approximate acreage required for the facilities. AR0559. It also provided a table estimating the area of surface disturbance (and amount of gravel)[4] needed for a prototypical joint oil development complex. AR 0560. The second strategy (which would likely be used on new discoveries in the remaining portions of the NPR-A) would be operation of a stand-alone facility. AR0558. A stand-alone facility would contain one production pad and one central processing facility. *Id.*

[4] With respect to gravel requirements, the EIS explained that gravel is the preferred material for pad construction, and discussed sources of gravel, as well as potential alternative materials and technologies for pad construction. AR0567-68. It explained that for its analysis, the EIS assumed that approximately one acre would be disturbed for gravel removal to meet the gravel needs for five acres of oil and gas development. *Id.*

The IAP/EIS provided a hypothetical layout for this type of facility (including approximate acreage) and a table estimating the area of surface disturbance (and amount of gravel) that would be required. AR 0561-62.[5]

The IAP/EIS described other infrastructure and demands related to production as well. For instance, it explained that during production, waterflooding would constitute the primary demand for water. AR0570. Waterflooding involves injecting water into selected areas of the oil/gas reservoir to maintain subsurface pressure, promoting fluid flow to the production wells. The IAP/EIS explained that a field with a daily production rate of 50,000 barrels of oil would require approximately two million gallons per day (or approximately 760 million gallons of water each year. AR0571. Nearby lakes and underground water could be used, subject to environmental and cost restrictions. *Id.* As an alternative, seawater could be used, which would require a seawater intake and treatment plan located on the coast, and an insulated pipeline from the plant to the wells. *Id.*

The IAP/EIS explained that oil production also can include the use of miscible fluid injection—the injection of various types of gases (including, consistent with common industry practice on the North Slope, hydrocarbon gases which are produced along with conventional oil). AR0572. In addition, fracture stimulation (or "fracking") is sometimes used on the North Slope to enhance production of fluids from reservoirs with low permeability. *Id.* The IAP/EIS explained that after drilling, a fracture medium (or mixture) containing water, foam mixtures, or gasses, plus proppants (such as ceramic spheres or sand) are injected. *Id.* It further explained that leakage of fluids or natural gas from fracturing activities has been blamed for compromising

[5] Even though no commercial natural gas fields have been developed on Alaska's North Slope, BLM also provided diagrams and tables estimating surface disturbance for hypothetical gas development projects. AR0562-66.

ground water where it has been used improperly to enhance gas production from tight sands and shales, but that no similar leakage problems have been reported on the North Slope. *Id.*

The IAP/EIS also disclosed that staging areas (i.e., areas where equipment and materials are stockpiled, moved and assembled) would be required for development of a new field. It described where and how such sites might be created and used, noting that in some circumstances, existing staging areas could be utilized. AR0566-67. It also explained how oil and gas would be transported from production facilities in the Reserve. AR0573. It noted that "if oil development occurred in the NPR-A a new pipeline would most likely be constructed from the planning area to the Alpine oil field, and would then connect to the Kuparuk River Unit." AR0574. However, the IAP/EIS noted that other pipeline routes would be possible, and the actual locations of new pipelines in the NPR-A would depend on the location and sequence of commercial-sized discoveries. *Id.* In light of this uncertainty, the IAP/EIS provided maps showing possible future pipeline corridors. AR0578. Finally, it described the general infrastructure and specifications for pipelines that could be constructed. AR0576.[6]

Finally, BLM explained the process of abandonment. AR0572-73. Abandonment operations generally would include removing all equipment, plugging all wells, restoring the site, cutting well casing at least 3 feet below the surface, and conducting final environmental studies. *Id.* The IAP/EIS explained that lessees would be obligated to remove gravel pads and associated gravel roads, though exceptions may be granted for environmental or public purposes. *Id.* Reclaimed or abandoned pad sites may be revegetated. *Id.*

[6] The IAP/EIS also addressed in this section road construction and overland vehicle travel related to oil and gas production. AR0579. Similarly, earlier in its discussion, the IAP/EIS also described and quantified likely aircraft use through all phases of oil and gas field activities, using information from past activities to quantify flights based on the stage of activity. AR0545-46.

3. Assumptions and Development Scenarios in the IAP/EIS

Before analyzing the potential impacts of the five alternatives, BLM explained its assumptions with respect to future oil and gas activity on the NPR-A (and in its vicinity). BLM made assumptions based on the 2011 USGS NPR-A economic assessment, but also its own knowledge of the largely undiscovered petroleum resources in the planning area, current industry practice, and professional judgment. AR0581. BLM emphasized that it was purposefully identifying an "optimistic set of development scenarios" such that it would "minimize the chance that the resultant impact analysis will understate potential impacts." *Id.* Consistent with this, BLM made the following assumptions:

> • Multiple lease sales would be held;
>
> • Economic conditions (particularly oil and gas prices) would be high enough to support development in northern Alaska;
>
> • Industry would aggressively lease and explore the tracts offered, which could require large numbers of exploration wells;
>
> • Several industry groups would independently explore and develop new fields in the NPR-A;
>
> • Undiscovered oil deposits located outside economic zones 110 and 120 would be found in the process of gas exploration and some would be commercially developed as stand-alone fields;
>
> • New geologic information would confirm the present assumptions, future drilling would generally confirm what today are perceived as high-potential plays, and few, if any, new high-potential plays would be discovered;
>
> • Discovered oil and gas in federal subsurface in the GMT and Bear Tooth units would be developed as satellites to the Alpine field and discovered oil near Umiat would also be produced in less than 10 years;
>
> • A major gas pipeline would be constructed from the North Slope to a commercial market.

AR0581-83.

Applying these assumptions, the IAP/EIS described possible development scenarios addressing both discovered and undiscovered oil and gas in the NPR-A under the five alternatives. With respect to discovered oil and gas, BLM discussed the potential development of discovered pools underlying the GMT and Bear Tooth Units in the northeastern edge of the NPR-A. AR0585. BLM projected potential production levels and the infrastructure that might be necessary for development in these units. AR0585-88. It provided a similar assessment for the Umiat field in the southeastern NPR-A. AR0589.

With respect to undiscovered oil and gas, the IAP/EIS emphasized that:

> Estimates of undiscovered resources are uncertain for geologic, engineering, and economic reasons. Geologic data are in a nearly constant state of revision, as new concepts are revealed by detailed studies, mapping, and new well information. Engineering evolves with new technology and experience. Economic conditions, such as oil and gas prices, are difficult to predict beyond the very near future. Nevertheless, estimates of oil and gas resources are necessary to provide the basis for identifying areas for possible future leasing and projecting reasonably foreseeable exploration and development scenarios for impact analysis.

AR0590. Conditioned with the foregoing caveat, BLM described estimates for development of undiscovered oil and gas. *Id.* As it illustrated in a map, BLM projected the potential economically recoverable undiscovered oil (at an optimistically high $180/barrel) for the eight economic zones making up the Reserve. AR0594. BLM then described the amount of economically recoverable oil available under each of the five alternatives evaluated under the IAP/EIS. AR0597. It provided quantified estimates of activities under each of the alternatives, including mileage and acreage estimates of seismic surveying; exploration/delineation and production and service wells for undiscovered oil and gas resources; estimated surface

disturbance for undiscovered oil and gas activities; and estimated total surface disturbance. AR0603-13.[7]

4. Potential Environmental Impacts

In its exhaustive Chapter 4, the IAP/EIS, for each of the alternatives, described and analyzed the potential environmental effects for a series of resources including air quality and climate, paleontological resources, soil resources, surface and groundwater resources and water quality, vegetation, wetlands and floodplains, birds, terrestrial mammals, marine mammals, special status species, cultural resources, subsistence, sociocultural systems, environmental justice, recreation resources, wild and scenic rivers, wilderness characteristics, visual resources, economy, and public health. *See* AR0126-52 (Table 2-4 summarizing and comparing impacts from each alternative). The analysis compared the foreseeable impacts to these resources under the various alternatives. *Id.* Its comparative analysis included discussions as to differing impacts arising from the different amounts and locations of lands that would be made available for oil and gas leasing—and based on the BMPs and stipulations that would be applied to different lands. *See, e.g.*, AR1283 (explaining that the "fundamental difference among the various alternatives regarding potential effects on fish is the extent of land that would be open for leasing to conduct oil and gas activities and the distribution of those lands within the NPR-A Fish Habitat Units . . ."); AR1293-9 (describing how impacts on terrestrial mammals would be greatest under Alternative D based on lands open to leasing and restrictions applied under that

[7] The IAP/EIS also, as part of the background to its environmental consequences analysis, described its assumptions and analysis for addressing potential spill or releases, and the potential impacts that might result from leasing, exploration, and production. AR0614-28. This discussion in the IAP/EIS summarizes Appendix G to the EIS, which thoroughly describes the information, models, and assumptions used to analyze the potential for oil spill in the NPR-A. *Id;* AR2318-38.

alternative); AR1302 (noting absence of specific stipulations could increase impacts to seals at specific location).

The IAP/EIS also included a nearly 300-page section discussing the potential cumulative impacts that could result from leasing in the NPR-A. AR1371 – 1665. BLM's cumulative impacts analysis encompassed a broad temporal period: from 1900 (when the first exploration on the North Slope began) through the year 2100. AR1372. With respect to the geographic scope, the cumulative impacts analysis extended "across much of the North Slope," including "contiguous State and Native lands to the east of the NPR-A." AR1372-73. It expressly included the Colville-Canning Area (the large area east of the NPR-A between the Colville and Canning rivers, from the Beaufort Sea south to the Brooks Range), the Beaufort Sea (both State waters and outer continental shelf), the Chukchik Sea Outer Continental Shelf, and, of course, the NPR-A itself. AR1389-99. The analysis addressed the potential cumulative impacts to the same resources (i.e., air quality and climate, paleontological resources, etc.) as addressed in the main portion of the IAP/EIS's effects analysis. *See* AR0126-52.

C. Record of Decision

In February 2013, Secretary Ken Salazar signed the Record of Decision ("ROD") for the IAP/EIS. AR3412. The ROD documented Secretary Salazar's decision to adopt Alternative B-2 as the plan governing future management of the Reserve. *Id.* at 3416. The ROD accordingly made 11.8 million acres of the NPR-A available for oil and gas leasing, and designated the remaining portions of the Reserve as unavailable to oil and gas leasing, including approximately 3.1 million acres within the Teshekpuk Lake Special Area. AR3423; AR3523. The ROD expanded the Teshekpuk Lake and Utukok River Uplands areas and created a new, 107,000 acre

Peard Bay Special Area. AR3417; AR3423. It further prevented new non-subsistence infrastructure on certain lands. AR3421-22.

The ROD adopted performance-based stipulations and BMPs that would govern new leases within the Reserve. AR3417. These included measures to protect lakes and streams within the Reserve, and included larger setbacks for certain rivers, such as the Colville, Kikiakrorak, and Kogosuruk rivers. AR3423; AR3524. The ROD explained that any surface disturbing activities (including exploratory drilling, road/pipeline construction, seismic data acquisition, etc.) would require additional authorization from BLM subsequent to leasing. AR3462.

D. Leasing under the IAP/EIS

Under the NPRPA, BLM is required to conduct "an expeditious program of competitive leasing of oil and gas in the Reserve." 42 U.S.C. § 6506a(a). BLM issues oil and gas leases under the process defined by its regulations located at 43 C.F.R. Part 3130. The process commences with BLM's State Director in Alaska publishing in the Federal Register a call for nominations and comments on tracts for leasing, 43 C.F.R § 3131.2(a), and concludes with the State Director executing the lease on behalf of the United States and transmitting the executed copy to the lessee. 43 C.F.R. § 3132.5(h)). Under the direction of President Obama, BLM has held annual lease sales for the NPR-A from 2013 to 2017. AR9843, 9851, 11558, 11677, 11684. In each instance after the 2013 lease sale, BLM used a determination of NEPA adequacy to analyze whether the IAP/EIS continued to provide adequate analysis to support issuance of new leases. *Id.*

With respect to the lease sale at issue here, on June 28, 2017, BLM published in the Federal Register a Call for Nominations and Comments for its annual oil and gas lease sale,

asking for public input. AR3579. BLM received a variety of comments, including from environmental organizations recommending against proceeding with the sale, and/or ensuring that protected areas not be subject of the lease sale, as well as comments from others proposing that BLM increase available leasing acreage. AR3583-84. On September 26, 2017, BLM finalized a DNA concluding for purposes of NEPA compliance that the IAP/EIS adequately analyzed the impacts of issuing leases under the lease sale. AR9513-16. Therein, BLM explained that the direct, indirect, and cumulative impacts were similar and essentially unchanged from those analyzed in that EIS. AR9513-14.

BLM held the lease sale on December 6, 2017. AR9711. Only seven of the 900 tracts offered received bids (79,998 acres out of 10.3 million acres). *Id.*; AR9703 (lease sale map). After the sale occurred, on December 22, 2017, the U.S. Geological Survey issued a new assessment of undiscovered oil and gas resources within the Nanushuk and Torok geologic formations on the Alaska North Slope. AR11691-95; AR9723. The assessment (the "USGS Assessment") indicated that estimated undiscovered, technically recoverable oil and gas resources in the NPR-A and adjacent State and Native lands, and State waters, were significantly higher than previous estimates, based on recent, larger than anticipated oil discoveries. AR11691. The USGS Assessment discussed four new discoveries: (1) the Pikka discovery of an oil pool east of the NPR-A; (2) the Horseshoe confirmation of the same oil pool; (3) the Willow pool (within the NPR-A); and (4) the Smith Bay oil pool, less than 1 mile offshore of the NPR-A. *Id.*

In light of the USGS Assessment, and prior to making a decision to issue the leases under the 2017 lease sale, BLM prepared a new DNA (the "Revised DNA") to address the lease sale. AR9723-32. The Revised DNA, dated February 21, 2018, evaluated in detail whether the USGS

Assessment, and the associated new discoveries, constituted significant new information or circumstances that warranted additional analysis under NEPA. AR9725. The Revised DNA also considered leases issued from the 2016 lease sale, and recent findings in an EIS prepared for the proposed development of GMT One unit, which is within the NPR-A.[8] Ultimately, the Revised DNA determined that the IAP/EIS still accurately reflected the potential environmental impacts from continued leasing in the NPR-A, and that none of the new information demonstrated a significant difference in the potential impacts described and analyzed in the IAP/EIS. AR9731. As a result, on February 22, 2018, BLM signed and issued the seven leases resulting from the 2017 lease sale. AR9767-68. *See also, e.g.*, AR9732-36 (signed lease for L-079).[9]

E. This Litigation

On February 2, 2018, before BLM had issued any leases resulting from the 2017 sale, Plaintiffs Northern Alaska Environmental Center, Alaska Wilderness League, Defenders of Wildlife, the Sierra Club, and the Wilderness Society (together "Plaintiffs") filed this lawsuit. ECF No. 1. In their initial complaint, Plaintiffs asserted two claims. In Count I, Plaintiffs alleged that BLM violated NEPA by holding the lease sale and making an irretrievable and irreversible commitment of resources without first preparing an EIS or environmental assessment ("EA"). *Id.* ¶ 56. In Count II, Plaintiffs alleged that BLM violated NEPA by deciding to hold the 2017 lease sale without first conducting an adequate assessment of the direct, indirect, and cumulative impacts, particularly in light of new information allegedly before BLM. *Id.* ¶¶ 61-64.

[8] BLM's decision to address these categories of new information was motivated in part by the filing of this lawsuit on February 2, 2018. As discussed below, because this lawsuit was brought before BLM decided to issue the leases from the 2017 lease sale, there is nothing improper, or post-decisional, about the Revised DNA.

[9] Although the document send to the successful bidders, announcing that the oil and gas leases had been "issued" had a date stamp of February 23, 2018, the date of issuance is February 22, 2018, the date the leases were signed by the authorized official. *See, e.g.,* AR9732

On June 4, 2018, Plaintiffs filed an amended complaint. ECF No. 32. The Amended Complaint contained Counts I and II, and added an additional claim, Count III. *Id.* at 17. In Count III, Plaintiffs allege that BLM's decision to hold the 2017 lease sale without first conducting a NEPA analysis violated the NPRPA and its implementing regulations. *Id.* ¶ 71.

IV. STANDARD OF REVIEW

Review of Plaintiffs' claims is governed by the APA, which provides that courts may only set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). Under this deferential standard, "[a]gency action is presumed to be valid and must be upheld if a reasonable basis exists for the agency decision." *Peck v. Thomas*, 697 F.3d 767, 772 (9th Cir. 2012). "A reasonable basis exists where the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Id.* (citation omitted). Further, "where, as here, a court reviews an agency action involv[ing] primarily issues of fact, and where analysis of the relevant documents requires a high level of technical expertise, [courts] must defer to the informed discretion of the responsible federal agencies.'" *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009).

V. ARGUMENT

A. Plaintiffs Fail to Challenge Final Agency Action

As an initial matter, Plaintiffs fail to invoke the subject matter jurisdiction of the Court. Because Plaintiffs challenge BLM's decision to hold a lease sale (rather than its issuance of the leases), and further, because they filed their complaint before the leases were issued, their claims should be dismissed for failure to challenge final agency action.

NEPA does not provide a private right of action, and therefore, Plaintiffs must invoke the private right of action in the APA. *Earth Island Inst. v. U.S. Forest Serv*., 351 F.3d 1291, 1300 (9th Cir. 2003). The APA requires that a plaintiff challenge final agency action. *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003). This is a jurisdictional requirement. *Gallo Cattle Co. v. U.S. Dep't. of Agric.*, 159 F.3d 1194, 1199 (9th Cir. 1998); *Or. Nat. Desert Ass'n v. U.S. Forest Serv*., 465 F.3d 977, 982 (9th Cir. 2006). Subject matter jurisdiction "must exist at the time the action is commenced." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Thus, "[i]n the context of judicial review under the APA, a challenge to agency conduct is ripe only if it is filed after the final agency action." *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016). *See also West v. U.S. Army Corps of Eng'rs*, C06-5516 RBL, 2007 WL 4365790, at *3 (W.D. Wash. Dec. 12, 2007) ("Because plaintiff filed his original complaint prior to the final agency action by the Corps this Court did not have subject matter jurisdiction at the time the original complaint was filed").

Agency action is "final" if (1) it "mark[s] the 'consummation' of the agency's decisionmaking process," and (2) "it determines rights or obligations, or legal consequences flow from it." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). For the leasing decisions at issue in this litigation, there could be no consummation of the agency's decisionmaking process—nor any related determinations of rights or obligations, or legal consequences—until BLM made its final decision and signed the leases on February 22, 2018. *See* AR9732, 9737, 9742, 9747, 9752, 9757, and 9762. *See also S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1159 (10th Cir. 2013) ("Federal courts have repeatedly considered the act of *issuing* a lease to be final agency action which may be challenged in court") (emphasis added).

Plaintiffs assert that final agency action occurred before issuance of the leases, alternatively because (1) the decision to hold a lease sale was final agency action (All Counts); or because (2) the final decision to issue the leases occurred by January 23, 2017, when BLM accepted Conoco and Andarko's bids and transmitted copies of the proposed leases to be signed (for Count I). *Compare* ECF No. 32, ¶¶ 67 & 71 (alleging BLM's decision to hold lease sale prior to preparing adequate environmental analysis violated NEPA and NPRPA) and ECF No. 36 at 27 (arguing that "BLM was obligated to conduct a site-specific NEPA analysis prior to holding the 2017 lease sale") *with* ECF No. 32 ¶ 59 alleging that "when BLM issued the leases, it made an irretrievable commitment of resources"). Neither assertion has merit.

With respect to the first, Plaintiffs fail to provide any authority indicating that the mere decision to *hold* a lease sale constitutes final agency action. In fact, they contradict their position by recognizing in both their complaint and their brief that lease issuance constitutes the relevant decision point. ECF 32 ¶ 59; ECF 36 at 18 (quoting *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988) (arguing that when "an agency decides to *issue a lease* that does not contain an express provision reserving the authority to preclude surface occupancy, it constitutes an irretrievable commitment of resources") (emphasis added). Moreover, there can be no credible argument that a decision to hold a lease sale and seek bids has the type of "legal consequences" necessary to constitute final agency action when BLM expressly "reserves the right to reject any and all bids received for any tract, regardless of the amount offered." 43 C.F.R. § 3132.5(b); *Bennett*, 520 U.S. at 177–78. Accordingly, their challenges to BLM's decision to hold a lease sale do not challenge final agency action and must be dismissed.[10]

[10] Plaintiffs' Counts II and III cannot be reasonably construed as challenging lease issuance itself. ECF No. 32 ¶¶ 67 & 71. Count I, by contrast, could arguably be construed as challenging the decision to issue the leases but, as indicated below, Plaintiffs filed their suit prematurely.

Plaintiffs' alternative theory (at least for their Count I)—that they are challenging final agency action because BLM's actual decision to issue the leases occurred prior to BLM's actually doing so—fails as well. Disregarding the plain language of the leases and sole decision document (which accompanied the fully executed leases), Plaintiffs argue that BLM made the decision to issue the leases when it determined that Conoco and Andarko's bids were adequate, and sent lease forms to the oil companies to complete and execute. ECF No. 36 at 36-37. Plaintiffs incorrectly assert that, following BLM's adequacy determination, BLM "no longer retained the discretion to deny the leases outright or condition their issuance." *Id*.

Plaintiffs' contentions result from a misunderstanding of the leasing procedures under BLM's regulations. Pursuant to 43 C.F.R. § 3132.5-1(e), BLM provided Conoco and Andarko with written notice that their bids had been found acceptable. *See* AR11695. However, that notice did not represent a decision to issue leases. Rather, BLM still retained the authority to reject any and all lease offers. The official lease form transmitted by BLM, approved by BLM's Director under 43 C.F.R. § 3132.5-1, makes this clear. The lease form is entitled "*Offer* to Lease and Lease for Oil and Gas." *See, e.g.,* AR11698. In completing, executing and returning the lease forms to BLM, the companies were expressly "offer[ing] to lease all or any of the lands" described in the lease forms. *See* AR11698. The lease form also makes clear that final acceptance by BLM is necessary before the lease can be effective—indeed, it warns offerees on multiple occasions that the "offer may be rejected," particularly if the form is not properly completed and fails to include "all the information required." AR11699, AR11700.

Corroborating this point, case law (albeit addressing leasing under the Mineral Leasing Act) establishes that BLM's decision to issue a lease does not occur until the actual issuance of the lease. *See Reese River Basin Citizens Against Fracking, LLC v. Bureau of Land Mgmt.*,

3:14-CV-00338-MMD-WG, 2014 WL 4425813, at *3 (D. Nev. Sept. 8, 2014) (noting that, under Mineral Leasing Act, "[a]lthough BLM has conducted the lease sale, BLM retains discretion to issue the leases," and therefore there was no consummation of the agency's decision-making process); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999) (finding plaintiff's claim premature when it "brought its NEPA action before any leases had actually been issued by the BLM"); *W. Energy All. v. Salazar*, 10-CV-0226, 2011 WL 3737520, at *7 (D. Wyo. June 29, 2011) (holding that "the energy companies do not automatically gain an entitlement to lease issuance based merely on payments made under 30 U.S.C. § 226(b)(1)(A)"). *Cf. S. Utah Wilderness All.*, 707 F.3d at 1159 ("Federal courts have repeatedly considered the act of *issuing* a lease to be final agency action which may be challenged in court") (emphasis added).

Moreover, courts, including the Ninth Circuit, have repeatedly recognized that the Secretary of the Interior's "plenary authority over the disposition of federal lands" provides the Interior Department with considerable discretion to refrain from transferring interests in federal lands if, at any point prior to the actual transfer, it decides doing so would be unwise or unlawful. *See Schade v. Andrus*, 638 F.2d 122, 124–25 (9th Cir. 1981) (holding that "the Secretary of the Interior has 'broad plenary power over the disposition of public lands,'" and that "so long as legal title remains in the government, there is continuing jurisdiction in the Department to consider *all issues* in land claims") (emphasis added); *Ideal Basic Indus.. v. Morton*, 542 F.2d 1364, 1368 (9th Cir. 1976) (finding that "even though the BLM had determined [plaintiff's mineral] claim to be valid and the Assistant Secretary approved as final that determination, the Department had authority to reconsider its prior decision" as long as title remains in United States, in light of Secretary's "broad plenary powers over the disposition of public lands");

Hoefler v. Babbitt, 139 F.3d 726, 728 (9th Cir. 1998) (noting "wall of authority" recognizing that the "Department of the Interior has plenary authority over the administration of public lands, including minerals on those lands").

In the most recent case addressing Interior's "plenary authority," the court rejected a similar argument to that implied by Plaintiffs here, namely that under the applicable law BLM had a "ministerial duty to deliver [a] patent" once payment was received by the agency. *See Silver State Land, LLC v. Schneider*, 145 F. Supp. 3d 113, 132 (D.D.C. 2015), *aff'd*, 843 F.3d 982 (D.C. Cir. 2016). The plaintiffs in that case argued that Interior no longer had discretion to not issue a patent under the Federal Land Management and Policy Act ("FLPMA"), which provided that "the Secretary *shall* issue all patents or other documents of conveyance after any disposal." *Id.* (emphasis added). The court disagreed, finding that Interior retained the discretion to not issue patents at any point until issued, in light of the Secretary's plenary authority over disposition of federal land and related obligation to ensure that any transfer was lawful. *See id.* (noting that "until title is transferred, DOI remains the legal steward responsible for ensuring that any conveyance of the land is in strict compliance with Congressional mandates"). Its rationale was upheld on appeal to the D.C. Circuit. *See Silver State Land, LLC v. Schneider,* 843 F.3d 982, 992 (D.C. Cir. 2016) (agreeing that agency's regulation implying payment of purchase price creates contractual rights with United States "does not eliminate the authority of the Secretary to cancel an invalid land sale after final payment has been transmitted").

The *Silver State* courts' rationale applies equally here. Interior, through BLM, retained the discretion to decide against issuing the leases until its final determination that it was lawful to

do so. Once it had satisfied itself of the legality of doing so in the Revised DNA, BLM issued the leases—but until that moment, it retained the discretion not to do so.

Accordingly, consistent with the plain language of the relevant lease documents and Interior's plenary authority over disposition of federal lands, the final decision to issue the challenged leases—and the decision which resulted in legal consequences—occurred on February 22, 2018, when BLM executed and issued the fully executed leases. AR9767. Because Plaintiffs' lawsuit predates that decision (and two of its counts expressly challenge an earlier, non-final action), Plaintiffs fail to invoke the subject matter jurisdiction of the Court and their lawsuit should be dismissed.[11]

B. Claims Challenging the Adequacy of the EIS are Time-Barred

Alternatively, even if the Court were to find that Plaintiffs have challenged final agency action, their first claim is time-barred insofar as they assert that the IAP/EIS is inadequate. In this claim, Plaintiffs assert that BLM violated NEPA by holding the lease sale and making an irretrievable and irreversible commitment of resources without adequately addressing the site-specific impacts from the lease sale. ECF No. 1 ¶ 56. But this claim addresses the adequacy of the IAP/EIS. *See id.* ¶¶ 36-37 (alleging that IAP/EIS addressed oil and gas development, and impacts thereof, only at the "programmatic level").

To allow more certainty with respect to efforts to develop resources in the NPR-A, Congress imposed a strict time-limit for parties seeking to challenge any EIS addressing oil and gas leasing in the NPR-A. Specifically, the NPRPA provides:

[11] The fact that Plaintiffs filed an amended complaint after the leases issued cannot save Plaintiff's Count I. *See Citizens for Appropriate Rural Roads*, 815 F.3d at 1079 (addressing final agency action, and holding that "[b]ecause Count 8 of the amended complaint presented the same claim as Count 8 in the original complaint, Count 8 relates back and the amended complaint does not cure the ripeness issue").

> Any action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) concerning oil and gas leasing in the National Petroleum Reserve--Alaska shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.

42 U.S.C.A. § 6506a(n). Here, the notice of availability for the IAP/EIS issued on December 28, 2012. 77 Fed. Reg. 76515-16 (Dec. 12, 2012). As a result, any challenge to the IAP/EIS had to be brought by February 27, 2013. Plaintiffs' claim, asserted in February 2018, is over five years too late.

Insofar as Plaintiffs may argue that Section 6506a(n) renders their claims unreviewable, the argument fails because Plaintiffs need not have waited until their claims were barred. The Plaintiffs here actively participated in the administrative process for the IAP/EIS. *See* AR1969-72 (plaintiff NAEC comments to draft IAP/EIS, noting that comments were in addition to those made at hearing in Fairbanks and Anchorage). Moreover, the IAP/EIS, in turn, clearly disclosed that it would serve as the basis for BLM's compliance with NEPA for the next, and subsequent lease sales. AR0023 (noting that "[p]rior to conducting each additional sale, [BLM] would conduct a determination of the existing NEPA documentation's adequacy," and if adequate, "the NEPA analysis for such sales may require only an administrative determination of NEPA adequacy"). Plaintiffs should, therefore, could and should have challenged the adequacy of the IAP/EIS within the limitations period imposed by the NPRPA. Having failed to do so, their first claim is time-barred and should be dismissed.

C. Plaintiffs' Claims Fail on the Merits

Even if Plaintiffs had properly challenged the issuance of the leases, their claims would still fail on the merits. First, as confirmed by binding, on point precedent, BLM adequately analyzed the site-specific impacts of issuing the leases to the extent required in the leasing stage.

Second, BLM took a hard look at new information (including regarding new oil discoveries in the North Slope) and reasonably determined that the IAP/EIS fully satisfied NEPA's requirements with respect to the leases at issue here, and that no supplemental NEPA analysis was required.

1. BLM Adequately Analyzed the Site-Specific Impacts of issuing the Leases

As discussed above, BLM prepared a 2,600-page IAP/EIS addressing the potential environmental impacts of issuing oil and gas leases in the NPR-A. The IAP/EIS analyzed alternatives that provided differing proposals as to the amount and location of acreage that would be made available to leasing, the size of protected special areas, the stipulations and BMPs that would apply to leased parcels, and other management actions. It described in detail the process and infrastructure necessary for oil and gas development as projected to occur in the NPR-A. It then evaluated the potential impacts of oil and gas exploration and development activity on the NPR-A's resources and other uses, including under the selected alternative. It described and analyzed the potential environmental effects on a series of resources and uses, including those emphasized by Plaintiffs, such as terrestrial mammals, migratory birds, etc. *See, e.g.,* AR1064-70 (addressing impacts under Alternative B-2 to terrestrial mammals); AR1055-58 (addressing impacts under Alternative B-2 to birds). *See also* AR0126-52 (Table 2-4 summarizing and comparing impacts from each alternative). Its analysis described how stipulations and BMPs would mitigate impacts to the affected resources. *See, e.g.,* AR1060-62; AR1069-70 (addressing effectiveness of stipulations and BMPs under Alternative B-2 with respect to impacts on birds and terrestrial mammals).[12] Finally, it also included a lengthy analysis of the potential

[12] As noted, these are all included as examples: the IAP/EIS contains similar discussions for all relevant resources under all of the evaluated alternatives.

cumulative impacts that could result from leasing in the IAP/EIS—in combination with potential oil and gas activity outside the Reserve. AR1371 – 1665.

Recognizing that this analysis had been completed in 2012, moreover, BLM examined whether NEPA required any supplemental analysis prior to issuing leases resulting from the 2017 lease sale. *See* AR9723-31. In its Revised DNA, BLM determined that the direct, indirect, and cumulative impacts of issuing the leases were "similar and essentially unchanged from those identified in the multiple sale analysis" in the IAP/EIS, and that the existing NEPA documentation fully covered the lease issuance. AR9729, AR9731. In sum, BLM thoroughly considered "all foreseeable direct and indirect impacts" of issuing the leases, thereby taking the "hard look" required by NEPA. *See NAEC*, 457 F.3d at 975; *W. Watersheds Project v. Salazar*, 993 F. Supp. 2d 1126, 1142 (C.D. Cal. 2012), *aff'd sub nom. W. Watersheds Project v. Jewell*, 601 F. App'x 586 (9th Cir. 2015) (finding BLM properly addressed new information in a Determination of NEPA Adequacy).

2. The Type of Site-Specific Analysis Promoted by Plaintiffs is Not Required under NEPA

Despite the exhaustive analysis contained in the IAP/EIS, Plaintiffs claim that BLM violated NEPA because it "failed to conduct a site-specific NEPA analysis prior to holding the 2017 lease sale." ECF No. 36 at 18. As noted above, this claim is not justiciable because the lease sale was not final agency action. In fact, Plaintiffs themselves admit that it is the *issuance* of leases that constituted the "irretrievable commitment of resources" under NEPA (and final agency action under the APA). *See id.* But even if Plaintiffs' claims were justiciable, Plaintiffs cannot demonstrate that BLM failed to comply with NEPA.

Plaintiffs first argue at length that BLM must prepare an EIS prior to issuing oil and gas leases under *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988) and *Sierra Club v. Peterson*, 717

F.2d 1409, 1415 (D.C. Cir. 1983). *See* ECF No. 36 at 27-30; *See also Connor*, 848 F.2d at 1451 ("unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases"); *Peterson*, 717 F.2d 1409 (similar). However, Federal Defendants do not dispute this point. Here, unlike in *Connor* and *Peterson*, BLM prepared and relied upon an EIS analyzing the potential environmental impacts of issuing oil and gas leases. The issue, therefore, is whether the IAP/EIS provided sufficient detail—an issue not addressed in *Connor* or *Peterson.*

Turning to this issue, Plaintiffs argue that BLM could not rely upon the IAP/EIS because it was not sufficiently "site-specific." ECF No. 36 at 31. But the Ninth Circuit has repeatedly rejected arguments that the type of site-specific environmental analysis endorsed by Plaintiffs is required at the leasing stage. *See, e.g., Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 493–94 (9th Cir. 2014) ("An agency is not required at the lease sale stage to analyze potential environmental effects on a site-specific level of detail") (citing *NAEC*, 457 F.3d at 975–76). This is because, at the leasing stage, "[p]rior to exploration, it is difficult to make so much as an educated guess as to the volume of oil likely to be produced or the probable location of oil wells," and therefore site-specific evaluation of potential environmental impacts is inherently speculative. *See Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1192 (9th Cir. 1988).

In fact, in *NAEC v. Kempthorne*, the Ninth Circuit rejected a nearly identical argument made by some of the very same Plaintiffs in a similar challenge to leasing in the NPR-A. 457 F.3d at 976. In that case, Plaintiffs insisted that a previous IAP/EIS prepared for the northwest portion of the NPR-A was insufficient because it did not evaluate impacts with respect to specific lease parcels. But the Ninth Circuit explained:

> The problem is that until the lessees do exploratory work, the government cannot know what sites will be deemed most suitable for exploratory drilling, much less

> for development. We are left with a "chicken or egg" conundrum in that if plaintiffs' interpretation of its requirements were adopted, NEPA could never be satisfied in the circumstances of this case.

Id. at 976. *See also id.* (noting that at the "earliest stage, the leasing stage we have before us, there is no way of knowing what plans for development, if any, may eventually materialize."). The court noted, however, site-specific impacts would not evade review, because to the extent such plans or other proposals for development occur in the future, additional approvals and NEPA review will be undertaken. *Id.* at 977. Thus, the Ninth Circuit agreed with an earlier D.C. Circuit opinion, holding that in addressing the leasing stage, "when an agency complies in good faith with the requirements of NEPA and issues an EIS indicating that the agency has taken a hard look at the pertinent environmental questions, its decision should be afforded great deference." *Id.* (quoting *N. Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)). The Ninth Circuit accordingly rejected the plaintiffs' argument that BLM's EIS was insufficiently site-specific for the leasing stage.

In similar fashion, the District Court for the District of Columbia rejected analogous arguments in a challenge to leasing in the NPR-A in *Wilderness Soc. v. Salazar*, 603 F. Supp. 2d 52, 62 (D.D.C. 2009). Like the Ninth Circuit, the court credited BLM's argument that "the level of specificity of the EIS analysis was appropriate for the leasing stage given the available information and the phased nature or oil and gas development." *Id.* It explained:

> Because defendants did not know the exact location of exploratory wells and development at the time of the EIS, they were limited in their site-specific analysis. Defendants make clear in the EIS and ROD that further site-specific analysis will be conducted prior to exploration in the planning area. Lessees are required to apply to BLM for approval of their exploration plans and applications for permits to drill. (See EIS at II–48, II–94.) Defendants state that they "will conduct any necessary additional NEPA analyses tiered to the IAP/EIS" at those stages. (See Defs.' Opp'n & Mem. in Supp. at 24.) Indeed, defendants have conducted additional NEPA analyses when specific proposals for exploration and development have been submitted. (See id. at 24 n. 21.).

Id. at 62. The court therefore held that the EIS "provides sufficient analysis of the environmental effects of the proposed alternatives on the various areas within the NPR–A," satisfying the "hard look" requirement of NEPA. *Id.* at 65.

The *NAEC* and *Wilderness Society* courts' analyses are directly on point and mandate denial of Plaintiffs' claim. At this leasing stage, the type of site-specific analysis would be unworkably speculative—and to the extent later proposals for on-the-ground oil and gas activities are made, BLM will undertake a more site-specific analysis at that stage.

Plaintiffs unsuccessfully attempt to distinguish *NAEC*, asserting that in that case, "the court assumed that the leases were NSO leases" akin to those for which an EIS was found unnecessary in *Conner*. ECF No. 36 at 33. First, Plaintiffs' analysis of *NAEC* does not make sense. Although the Ninth Circuit noted that the leases were somewhat more like non-NSO leases in *Conner*, the leases were not meaningfully so because, unlike in *Connor*, the *NAEC* court found that their issuance would constitute an irretrievable commitment of resources. *Id.* at 976. Corroborating this point, the *NAEC* court made clear that *Connor* was immaterial to its analysis of the relevant question before it: "the degree of site specificity required in the EIS." *Id.* (noting that *Conner* "is of no assistance to plaintiffs"). Second, the *NAEC* court's analysis did not rely on the nature of the leases—it focused on the degree of site-specific analysis necessary at the leasing stage. *Id.* at 977 (summing up the reasons—none of which had to do with the nature of the leases—that "the government was not required at this stage to do a parcel by parcel examination of potential environmental impacts").[13] Plaintiffs' attempt to distinguish the binding authority of *NAEC* therefore fails.

[13] Even if the nature of the leases were pertinent (which it is not), Plaintiffs do not provide any basis to determine that the leases at issue here are any different from those in *NAEC*, or that the

Plaintiffs also argue that the IAP/EIS itself provided that it "was sufficiently detailed only for purposes of the broad programmatic decisions allowed in the IAP." ECF No. 36 at 31. This is contradicted by the record. The IAP/EIS expressly stated that it was intended to provide the analysis for the next lease sale, and multiple, subsequent sales. AR0032. Furthermore, Plaintiffs' characterization of the IAP/EIS as wholly "programmatic"—even if accurate, which it is not—would not help them. As the Ninth Circuit has explained, "[a] comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific or project-specific impact statement, unless new and significant environmental impacts arise that were not previously considered."[14] *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). Indeed, "[w]hen a programmatic EIS has already been prepared, we have held that site-specific impacts need not be fully evaluated until a "critical decision" has been made to act on site development" at a "particular site." *Cal. v. Block*, 690 F.2d 753, 761

applicable regulations incorporated in the leases have meaningfully changed. For instance, BLM maintains the authority to (1) "provide maximum protection" to special resource areas; 43 C.F.R. § 236.1; (2) "limit, restrict, or prohibit use of and access to lands within the Reserve;" 43 C.F.R. § 2361.1; (3) suspend operations/production "in the interest of conservation of natural resources" or to "mitigate[]reasonably foreseeably and significantly adverse effects on surface resources;" 43 C.F.R. 3135.3(a)(1) & (3), and (4) even administratively cancel nonproducing leases for failure to comply with legal requirements. 43 C.F.R. § 3136.3. *See also* AR3087-91 (issued lease incorporating regulatory requirements). These regulations apply the NPRPA's express authorizations to impose conditions ensuring the protection of NPR-A surface resources. *See* 42 U.S.C.A. § 6506a(b) ("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 [NPR-A]"); 42 U.S.C. § 6506a(k)(2) (Secretary may suspend operations and production on any lease or unit, including "in the interest of conservation").

[14] The question of whether "new and significant" information has arisen is the subject of Plaintiffs' second count, addressed below.

(9th Cir. 1982) (citing *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978)). BLM's issuance of leases is not a decision to act on "site development."

Similarly, Plaintiffs object that the IAP/EIS represented that further site-specific analysis would be required when BLM approved action "on the ground." ECF No. 36 at 32. But the IAP/EIS was not referring to the issuance of leases—which are not actions "on the ground." Rather, the later approval of site-specific proposals for exploratory or other surface disturbing activity is exactly what the Ninth Circuit was referring to as being properly deferred until after the leasing stage. *See NAEC*, 457 F.3d at 977 (noting that "[s]uch analysis must be made at later permitting stages when the sites, and hence more site specific effects, are identifiable"). *See also* AR11723 ("All surface disturbing activities such as exploratory drilling, road/pipeline construction, seismic acquisition, and overland moves require additional authorization(s) issued subsequent to leasing"); AR0023 (noting future actions on leases requiring BLM approval would require "further NEPA analysis based on specific and detailed information about where and what kind of activity is proposed").

Accordingly, Plaintiffs fail to meet their burden of demonstrating a NEPA violation. *See Te-Moak Tribe v. Dep't of Interior*, 608 F.3d 592, 605 (9th Cir. 2010); *Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995). Their conclusory assertion that BLM failed to undertake some ill-defined "site specific analysis" is not supported by case law. With the IAP/EIS, BLM took the requisite "a hard look at the pertinent environmental questions" relevant to issuing the leases from the 2017 sale, and Plaintiffs' claim should be dismissed. *NAEC*, 457 F.3d at 976.

3. Plaintiffs' Claim that BLM Failed to Take a Hard Look Fails

In their Counts II and III, Plaintiffs argue that BLM violated NEPA and the NPRPA by "failing to take a hard look at the potential direct, indirect, and cumulative impacts of its decision

prior to holding the 2017 lease sale." ECF No. 36 at 34. Again, as noted above, the decision to hold a lease sale is not final agency action, and these claims should be dismissed for lack of subject matter jurisdiction. But even were that not the case, Plaintiffs' claim—which is essentially that BLM failed to supplement the EIS based on new information—fails on the merits.

a. Plaintiffs' effectively claim that BLM failed to supplement its NEPA analysis, and that should be reviewed under the relevant standard.

As demonstrated above, the IAP/EIS took an exhaustive view of the impacts of leasing in the NPR-A, and BLM took the requisite hard look at the potential impacts of issuing the leases before it did so. In addressing the relevant claims, Plaintiffs' brief, however, fails to address the quality of this analysis: rather, Plaintiffs argue that BLM violated NEPA because it failed to "assess the potential impacts of leasing in light of *new developments and decisions* that indicated the potential impacts of oil development were greater than originally anticipated." ECF 36 at 34 (emphasis added). *See also id.* at 35 (arguing that "BLM's explanation for why the new information was not significant and did not require additional NEPA analysis was . . . arbitrary and capricious"); *id.* at 39 (arguing that BLM did not "discuss any of the concerns raised by [Plaintiffs] related to the new information or need to evaluate . . . effects of the lease sale in light of recent developments in the region"). Nowhere do Plaintiffs argue that the IAP/EIS generally failed to take a hard look at any particular direct, indirect, and cumulative effects—rather, they focus on arguing that five categories of new information are "significant." ECF No. 36 at 41-52. As such, Plaintiffs' claim is indisputably a claim that BLM failed to supplement the IAP/EIS in light of new information. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000); 40 C.F.R. § 1502.9(c)(1)(ii).

Understood in its proper context, the standards applicable to Plaintiffs' challenge are as follows. As relevant here, an agency must prepare a supplement to an existing EIS only if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" 40 C.F.R. § 1502.9(c)(ii).[15] *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989) (supplementation may be required "in light of new information that shows that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered."). Thus, an agency is not required to supplement its EIS every time "new information comes to light;" rather, it must do so only "if there is significant new information relevant to environmental concerns." *Kunaknana v. U.S. Army Corps of Eng'rs* ("*Kunaknana I*"), 23 F. Supp. 3d 1063, 1089 (D. Alaska 2014) (citing 40 C.F.R. § 1502.9(c)). Moreover, the new information must show a "*seriously different picture* of the likely environmental harms stemming from the proposed project," in order for supplemental NEPA to be required. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (emphasis in original).

With respect to process, "[w]hen new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require [an SEIS]." *Dombeck*, 222 F.3d at 558 (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir.1980)). Courts evaluate whether an agency needed to prepare a supplemental EIS (or "SEIS") under the arbitrary or capricious standard. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 853 (9th Cir. 2013). Accordingly, a dispute as

[15] An agency also needs to supplement its NEPA analysis if "(1) "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(1). However, Plaintiffs make no allegation that BLM has made substantial changes to leasing in the NPR-A.

to whether an SEIS is required "must be resolved in favor of the expert agency so long as the agency's decision is based on a reasoned evaluation of the relevant factors." *Kunaknana v. U.S. Army Corps of Eng'rs* ("*Kunaknana III*"), 3:13-CV-00044-SLG, 2015 WL 3397150, at *3 (D. Alaska May 26, 2015); *see also Kunaknana I*, 23 F. Supp. 3d at 1063 ("Whether an SEIS is required "is a classic example of a factual dispute the resolution of which implicates substantial agency expertise.") Here, BLM took a hard look at the new information identified by Plaintiffs, and ultimately determined that the information was consistent with the IAP/EIS's analyses and did not paint a "seriously different picture" of likely environmental harms.

b. The Court May Rely on the Revised DNA to address this claim

As an initial matter, Plaintiffs argue that the Court should not review BLM's Revised DNA to address their supplementation claims, because BLM prepared it *after* BLM held its lease sale in December, 2017. Plaintiffs therefore argue that it is post-decisional, and issued in violation of BLM's regulations. ECF No. 36 at 35. These arguments fail.

As demonstrated above, it was BLM's issuance of the leases—not its decision to hold a lease sale—that constitutes both the irretrievable commitment of resources (for purposes of NEPA) and final agency action (for purposes of the APA). BLM retained the authority to not issue the leases until it signed and issued the leases. *See* Section V.A *supra*. Because BLM prepared the Revised DNA prior to, and to inform the actual issuance of, the leases, it was not post-decisional. Nor was the Revised DNA, as Plaintiffs imply, some meaningless "paper trail" exercise. To the contrary, had BLM determined, in preparing the Revised DNA, that the IAP/EIS was *not* adequate to fulfill BLM's obligations under NEPA, then it necessarily retained the discretion to not issue the leases in order to avoid a violation of federal law. *See, e.g., Silver State Land, LLC*, 145 F. Supp. 3d at 132.

Plaintiffs' related argument, that the Revised DNA violated 43 C.F.R. § 3131.2(b), one of BLM's regulations implementing the NPRPA, is equally unavailing. Section 3131.2(b) provides that, as part of "[t]entative tract selection," "[t]he State Director, after completion of the required environmental analysis (see 40 CFR 1500–1508), shall select tracts to be offered for sale." As discussed above, Plaintiffs' assertion of a violation of this regulation is not justiciable—because neither holding a lease sale (nor identifying tentative tracts to include in such sale) constitutes final agency action. *See* Section V.A. *supra*.

But even if that were not the case, Plaintiffs could not factually establish that BLM did not comply with Section 3131.2(b). BLM's Acting State Director did, in fact, select tracts to be offered "after completion of the required environmental analysis"—in this case the IAP/EIS. Plaintiffs focus on the post-sale Revised DNA—but the Revised DNA is an administrative document recording BLM's determination that no additional NEPA analysis was required. It is not itself, an "environmental analysis" under NEPA. *See Idaho Sporting Cong. Inc. v. Alexander,* 222 F.3d 562, 566 (9th Cir. 2000) (recognizing appropriate use of "'non-NEPA' environmental evaluation procedures" such as DNAs to address new information, but cautioning that they may not be used to undertake environmental analysis required in an environmental assessment or EIS under NEPA's regulations). There is no basis to claim a violation of Section 3131.2(b) under these circumstances.[16]

Finally, even if the Court were to agree with Plaintiffs that the Revised DNA should have

[16] Moreover, the regulation's language is not focused on mandating that BLM prepare a NEPA analysis (that is already required under NEPA): rather, its mandate is that the Secretary "shall" select tracts to be offered for sale, and in doing so, "shall" consider various items, including *available* environmental information, etc. 43 C.F.R. § 3131.2(b). Plaintiffs do not allege that BLM violated any of these "shall" mandates—nor could they demonstrate how doing so would somehow make it improper for the Court to review the Revised DNA.

been prepared earlier, the Court should still review it when addressing Plaintiffs' claim. This Court has held that it can be proper for courts to review agency post hoc rationalizations of decisions—though such rationalizations must be "viewed critically." *Kunaknana III*, 2015 WL 3397150 at *4 (noting that "the Supreme Court, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, found that such post hoc rationalizations may be appropriate"). Indeed, in *Kunaknana III*, this Court reviewed a post-decisional supplemental information report (which is akin to BLM's Revised DNA) to find that the defendant agency need not supplement its EIS. *Id*. And such approach is eminently sensible. Here, if the Court were to determine that BLM had failed to adequately explain its decision that it need not supplement, then the appropriate remedy would be to remand to BLM to prepare a document analyzing whether the new information identified by Plaintiffs warranted an SEIS—which is what the Revised DNA did. *See Kunaknana III*, 2015 WL 3397150, at *4. It would serve no purpose to reject the Revised DNA and order the agency to prepare a new document reiterating the analysis in the Revised DNA. The Court should accordingly reject Plaintiffs' argument and review the Revised DNA in addressing Plaintiffs' claims.

c. *The Revised DNA demonstrates that BLM reasonably determined that the IAP/EIS need not be supplemented*

Plaintiffs claim that BLM's analysis in the IAP/EIS was inadequate because it failed to address five categories of new information. But for each category, the Revised DNA reasonably explained why none of the new information showed that the proposed leases would "'affect the quality of the human environment' in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374. *See also Tri-Valley CAREs*, 671 F.3d at 1130 (new information must portray a "*seriously different picture* of the likely environmental harms stemming from the proposed project").

i. USGS Assessment

First, the Revised DNA addressed the information about new discoveries described in the USGS Assessment. It explained that the USGS Assessment estimated 8.7 billion barrels of mean, undiscovered, technically recoverable oil (and 25 trillion cubic feet of natural gas), which was substantially higher than a prior USGS 1.5 billion barrel oil estimate for the study area. AR9725. However, as an initial matter, BLM explained that the while the USGS Assessment provided an increased estimate of *technically* recoverable undiscovered oil, in the IAP/EIS, BLM had used estimates of *economically* recoverable undiscovered oil in the IAP/EIS. AR2796. As BLM explained, estimates of economically recoverable oil have to account for real-world economic assumptions (such as the cost of exploring and developing remote resources), and as such, economically recoverable oil can comprise only a fraction of technically recoverable oil. *Id*. Moreover, BLM explained that the USGS Assessment's projections were not directly applicable to the IAP/EIS because the Assessment encompassed a large area of land and offshore waters "that only partially overlap[] with the study area" for the USGS assessments that BLM relied upon for the IAP/EIS. *Id.* In particular, the USGS Assessment includes "a large area of State and Native-owned land outside the NPR-A." *Id.*

Even setting these two "apples and oranges" problems aside, however, BLM explained that the analysis in the IAP/EIS had accounted for, or was unaffected by, the new discoveries discussed in the USGS Assessment. For instance, the IAP/EIS presumed that further exploration would occur in these areas outside the NPR-A, and that there was a reasonable chance such exploration would lead to discoveries and development, and accounted for their potential cumulative impacts. AR9728. *See also* AR1400-12 (discussion in IAP/EIS of reasonably foreseeable development for cumulative impacts). Furthermore, the IAP/EIS made a variety of

assumptions aimed at minimizing the risk of understating potential impacts, including (1) basing its assumption on the high end of USGS's price range projections; (2) estimating the amount of infrastructure at the upper limits of what BLM believed likely; (3) assuming that multiple lease sales would be held, occurring on an annual basis; and (4) assuming that industry would aggressively lease and explore the tracts offered for sale. AR9728; *see also* AR0582-83. Under these circumstances, BLM reasonably determined that the new information in the USGS Assessment did not "appreciably affect the impacts analysis in the IAP/EIS, which already erred on the conservative side and over-analyzed likely potential impacts." AR9728.

Plaintiffs cannot dispute this latter point, but instead object to BLM's explanation that "technically recoverable oil" is not the same as "economically recoverable oil"—asserting that BLM has previously ignored the distinction. ECF No. 36 at 42-43. But BLM's previous acknowledgment that there is some relationship between the amount of technically and economically recoverable oil does not contradict BLM's recognition that the two can, and often do, substantially differ. Indeed, the USGS Assessment itself recognizes the fact that various factors may "jeopardize[] the economic viability of oil accumulations." AR11692. Moreover, Plaintiffs ignore the other components of BLM's explanation, namely that (1) the USGS Assessment covered a large area that only partially overlapped the study area in USGS's earlier study (which BLM relied upon in the IAP/EIS) and (2) the IAP/EIS's analysis, particularly in light of its conservative assumptions, did not present a "seriously different picture of the likely environmental harms stemming from the proposed project." *See Tri-Valley CAREs*, 671 F.3d at 1130.

ii. The Willow Discovery

In the revised DNA, BLM also discussed the four specific discoveries addressed in the

USGS Assessment. The first, the Willow prospect, is the only new discovery that exists within the NPR-A, and was estimated to contain 300 million barrels of technically recoverable oil. AR9727. As BLM explained, the IAP/EIS accounts for the Willow prospect, given its relation to the GMT and Bear Tooth Units, where significant development and infrastructure were expressly forecast in the IAP/EIS. *Id.* The IAP/EIS expressly addresses potential infrastructure, gravel requirements, etc., for these two units. While BLM noted in the IAP/EIS that it was assuming that those two units contained up to 120 million barrels of economically recoverable oil, AR0585, the Revised DNA explained that development of the Willow discovery would not lead to significantly different environmental impacts. In fact, as BLM explained, the Willow discovery and the likely infrastructure and activity that would be necessary to develop it was consistent with the IAP/EIS's predictions and analyzes.[17] AR9727. *See also* AR0557 (projecting joint field development (likely to occur in economic zone 110—where Willow is located) as containing two production pads, with one housing a central processing facility). Particularly given the deference due for such determinations, BLM's reasoned determination that the Willow prospect would not result in significantly different impacts than those already evaluated in the IAP/EIS should be upheld. *See Kunaknana III*, 2015 WL 3397150, at *3.

iii. Other New Discoveries

The Revised DNA also addressed three other discoveries made in the vicinity of the NPR-A. First, it discussed the Pikka and Horseshoe discoveries (estimated to contain together as much as 1.0 billion technically recoverable barrels of oil), located outside and to the east of the

[17] To be sure, because the discovery occurred after the IAP/EIS issued, the IAP/EIS did not specifically predict construction of infrastructure at the location of the Willow development. However, the IAP/EIS certainly contemplated the possible development of new discoveries, particularly in the northeast portion of the Reserve, and estimated potential surface disturbance in a manner to "make it very unlikely that this IAP/EIS will underestimate impacts." AR605-608.

NPR-A. AR9727. Because of their location, BLM explained that the discoveries will not result in development wells or unit extension proposals within the NPR-A—and furthermore, any transportation-related infrastructure (including pipelines) will likely be routed eastward, away from the NPR-A. *Id*.

BLM also described the Smith Bay discovery (a large discovery in State waters in the Beaufort Sea adjacent to the NPR-A), noting that it was somewhat unsubstantiated (given irregularities in testing and lack of delineation). *Id*. BLM explained that under the ROD for the IAP/EIS, all federal parcels near Smith Bay were unavailable for leasing—so no new wells or production impacts were anticipated within the NPR-A related to this discovery. *Id.* (explaining that the IAP/EIS "does not afford BLM an opportunity to lease or explore any adjacent lands that could be tied to this prospect."). BLM also explained that it had accounted for the existence of oil resources in these State waters in the IAP/EIS, including analyzing a potential pipeline route from this area through the NPR-A. *Id.*; *see also* AR0577-78.

With respect to both the Pikka/Horseshoe and Smith Bay discoveries, Plaintiffs argue that BLM failed to truly consider their relevance because it limited its consideration to impacts within the NPR-A. ECF No. 36 at 47. This is incorrect: BLM explained that although these "discoveries are not likely to impact leasing and development in NPR-A under the current IAP/EIS, if ultimately proved up and developed, they have some potential to cumulatively combine with effects from NPR-A leasing and development." AR9728. And as BLM further explained, the IAP/EIS had expressly anticipated the possibility of discoveries near the NPR-A—and "accounted for their potential cumulative impacts." *Id*. *See also* AR1389-95

(describing oil development through 2012 for Colville-Canning Area[18] and Beaufort Sea State waters[19]); 1404-06 (identifying potential development in Beaufort Sea waters); AR1411-13 (identifying potential conventional and unconventional development in Colville-Canning Area and area east of NPR-A); AR1414-15 (estimating future oil and gas production, and footprint acreage for oil and gas activities on North Slope); AR0126-52 (tables comparing effects of alternatives, including cumulative impacts).

With specific respect to Smith Bay, Plaintiffs argue that BLM ignored the fact that even if leasing would be prohibited on NPR-A lands south of Smith Bay, other oil and gas infrastructure *would be* permitted and the impacts of such were not evaluated in the IAP/EIS. ECF No. 36 at 49. First, this is only partially true: on a significant stretch of the lands south of Smith Bay, no new non-subsistence infrastructure is allowed under the ROD; and furthermore, all of those lands are within the Teshekpuk Lake Special Area—on which BLM is required to ensure that activities are "conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of [the NPRPA]." AR3435. Moreover, the IAP/EIS evaluated potential impacts on such lands related to development of adjoining state lands and waters—most critically (as noted above) analyzing a potential pipeline route through the NPR-A that would service development in this area. AR9727; *see also* AR0577-78. Accordingly, BLM reasonably determined that new information about these discoveries would not appreciably affect the impacts analysis in the IAP/EIS. AR9728.

iv. New Leases in the 2016 Lease Sale

The Revised DNA also addressed whether the amount of acreage of new leases issued as

[18] The Colville-Canning area is that between the Colville and Canning rivers, and includes the Pikka/Horseshoe discovery. *See* AR1389; AR9727.
[19] As noted above, Smith Bay is in the Beaufort Sea. *See* AR3523.

a result of the 2016 lease sale presented new information not evaluated in the IAP/EIS. As BLM noted, the acreage leased in the 2016 lease sale was the greatest under a NPR-A lease sale since the IAP/EIS was adopted. AR9728. However, there was actually *more* acreage in the NPR-A under lease when the IAP/EIS issued (nearly 1.5 million acres), than there was following the 2016 lease sale, due to the subsequent abandonment of leases. *Id*. Further, *over half* of the tracts leased in the 2016 lease sale had been leased in 2012 when the IAP/EIS was issued (but were subsequently abandoned, only to be re-leased in the 2016 sale). *Id.*

Plaintiffs argue that the pertinent new information is not the number of active leases—but the fact that the 2016 leases were primarily obtained by ConocoPhillips and Andarko, as part of a new effort to "mov[e] forward aggressively with development from the Reserve." ECF No. 36 at 50. But Plaintiffs ignore the fact that BLM assumed in the EIS, among other things, that economic conditions (particularly oil and gas prices) would be high enough to support development in northern Alaska; industry would aggressively lease and explore the tracts offered; and several industry groups will independently explore and *develop* new fields in the NPR-A; etc. *See* AR0581-83; AR9728. As a result, BLM's determination that the IAP/EIS need not be supplemented based on the 2016 lease sale results was eminently reasonable.

v. The GMT-1 EIS

Finally, the Revised DNA explained why a 2014 EIS prepared for the GMT-1 proposed oil and gas development plan did not constitute new information. The GMT-1 EIS determined that approval of the operator's plan could cause significant impacts to subsistence use of lands in the project's vicinity to residents of a nearby village—contradicting the IAP/EIS's prior determination that leasing would generally not have such an effect. AR9729. However, as the Revised DNA explained, the GMT-1 analysis and ROD resulted from a unique situation. BLM's

original preferred alternative for GMT-1 would have ensured all GMT-1 infrastructure observed a 3-mile setback for Fish Creek (consistent with guidelines established in the IAP/EIS), established in the record of decision for the IAP/EIS to protect the important subsistence use area. *Id.* However, in making a Clean Water Act ("CWA") § 404 permit decision required for the GMT-1, the Army Corps of Engineers found that a different alternative (and one which would allow some infrastructure within the Fish Creek Setback) was required under the CWA. AR11562. In order to solve this conflict, BLM approved the different alternative and allowed an exception to the Fish Creek Setback—but in doing so, required mitigation (including funding for compensatory mitigation projects) to reduce the adverse impacts to less than a significant level. AR9729. Given this unique circumstance giving rise to the GMT-1 subsistence impact determination—and the additional mitigation imposed to reduce such impacts—BLM determined that it did not change the general analysis of potential subsistence impacts from leasing and development in the IAP/EIS. *Id.*

Plaintiffs, however, argue that part of the mitigation for GMT-1 was the preparation of a "Regional Mitigation Strategy" (or "RMS"), which when completed, would be used primarily to "identify priority areas within the Northeastern NPR-A region for avoidance and future compensatory mitigation actions." AR11599. But the fact that BLM plans to *create* such a strategy is not new information that shows "that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374. If in the future, BLM identifies areas that should be the subject of "avoidance and future compensatory mitigation" through application of the RMS (once it is finalized), that information may need to be accounted for by BLM in its decision-making process. But at this point, the RMS is not itself even completed, and Plaintiffs' provide

no authority for their contention that BLM is required to delay taking any action in the meantime. Accordingly, this argument fails.

In summary, Plaintiffs have failed to demonstrate that any of the five categories of information they identify present a "seriously different picture of the likely environmental harms stemming from" the leasing activity contemplated and analyzed in the IAP/EIS. *See Tri-Valley CAREs*, 671 F.3d at 1130. The Court should defer to BLM's reasoned determination that no supplementation of the IAP/EIS was required, and dismiss Plaintiffs' Third Count.

D. Plaintiffs' Remedy Request Should Be Denied

With respect to remedy, Plaintiffs ask that the Court "set aside BLM's decision and vacate the leases, and enter a declaratory judgment that BLM was obligated to conduct a NEPA analysis . . . prior to holding the lease sale." ECF No. 36 at 55. Because, as indicated above, Defendants did not violate NEPA or the NPRPA, all of Plaintiffs' requests should be denied. But even if the Court should finds a violation by Federal Defendants, it should order that the parties file briefs addressing the appropriate remedy.

Plaintiffs' primary request is that the Court vacate the leases.[20] But as this Court has recognized, to determine whether vacatur is warranted, a court should balance two factors: (1) the seriousness of the agency's error and (2) the disruptive consequences of vacatur, in light of the fact that it is "an interim change that may itself be changed." *Kunaknana v. U.S. Army Corps of Eng'rs* ("*Kunaknana II*"), 3:13-CV-00044-SLG, 2014 WL 12813625, at *2 (D. Alaska July 22, 2014) (quoting *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992–93 (9th Cir.

[20] Plaintiffs also ask that the Court set aside BLM's decision—but do not specify which decision they wish the Court to set aside. As noted above, two of their claims expressly challenge BLM's decision to hold a lease sale—but it is not clear how setting aside that decision would occur, since the lease sale has already taken place.

2012)).

At this stage, the Court has not made a determination that BLM erred, and if so, how. As a result, it is impossible for the parties to meaningfully address the first factor—the seriousness of the agency's error. With respect to the second factor, given the seriousness of the consequences of vacatur of the leases—both in terms of the loss of substantial bid monies to the United States and the State of Alaska (which receives a 50% share), AR9711, and any disruption to the lessees, the Court should only address vacatur after being properly advised by briefing dedicated to that subject. *See, e.g., Kunaknana II*, 2014 WL 12813625, at *3 (finding in the specific circumstances in that case that vacatur was not warranted given the disruptive consequences it would have).[21] Accordingly, to the extent the Court finds that BLM erred, it should order the parties to confer and propose an appropriate schedule for briefing remedy.

VI. CONCLUSION

Plaintiffs argue that BLM failed to undertake necessary environmental analysis before holding a lease sale for the NPR-A. But the Court lacks subject matter jurisdiction over their claims, as neither the decision to hold a lease sale, nor the lease sale itself constitutes final agency action challengeable under the APA. Furthermore, although the issuance of leases here *was* final agency action, Plaintiffs filed their complaint before that issuance occurred and, accordingly, the relevant claims in the complaint must be dismissed for lack of subject matter jurisdiction. To the extent the Court reaches the merits, Plaintiffs' claims fail because BLM *did* undertake an appropriate NEPA analysis before issuing the leases—it relied on the lengthy

[21] Plaintiffs' request for declaratory judgement is also defective, in that they ask the Court to order BLM to undertake a NEPA analysis before it holds a lease sale. But as discussed previously, the holding of a lease sale is not the irreversible and irretrievable commitment of resources triggering a duty under NEPA—the issuance of a lease is. *See Conner*, 848 F.2d at 1448.

IAP/EIS that fully analyzed the direct, indirect, and cumulative impacts of issuing leases in the NPR-A. In its subsequent revised DNA, BLM convincingly explained why the IAP/EIS remained adequate, even in light of new information including new oil discoveries on the North Slope. The Court should grant Federal Defendants summary judgment and dismiss Plaintiffs' claims.

Respectfully submitted this 24th day of July 2018,

JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ Romney S. Philpott
Romney S. Philpott
Colorado Bar No. 35112
U.S. Department of Justice, ENRD
Natural Resources Section
999 18th St., #370
Denver, CO 80202
Phone: 303-844-1810
Fax: 303-844-1350
E-mail: Romney.Philpott@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made through the Court's electronic filing and notice system (CM/ECF).

Dated: July 24, 2018.

/s/ Romney S. Philpott
Romney S. Philpott