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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL CENTER, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

CONOCOPHILLIPS ALASKA, INC.,

Intervenor-Defendant.

Case No. 3:18-cv-00030-SLG

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS AND ACRONYMS

Abbreviation/Acronym	Explanation
APA	Administrative Procedure Act
BLM	Bureau of Land Management
CPAI	ConocoPhillips Alaska, Inc.
DNA	Determination of NEPA Adequacy
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
GMT	Greater Mooses Tooth
GMT-1	Greater Mooses Tooth 1
IAP	Integrated Activity Plan
NEPA	National Environmental Policy Act
Northern Center	Northern Alaska Environmental Center
NPRPA	Naval Petroleum Reserves Production Act
NSO	No Surface Occupancy
OCSLA	Outer Continental Shelf Lands Act
Reserve/NPR-A	National Petroleum Reserve–Alaska
RMS	Regional Mitigation Strategy
SEIS	Supplemental Environmental Impact Statement
USGS	U.S. Geological Survey

ARGUMENT

Plaintiffs (collectively, Northern Center) submit this reply in support of their Motion for Summary Judgment. This Court has jurisdiction to review Northern Center's claims because the Bureau of Land Management's (BLM) decision to hold a leases sale is an independent final agency action. BLM held the 2017 lease sale in the National Petroleum Reserve–Alaska (Reserve) without first preparing an analysis under the National Environmental Policy Act (NEPA) examining the potential site-specific or direct, indirect, and cumulative impacts. In doing so, the agency violated NEPA and the Naval Petroleum Reserves Production Act (NPRPA). This Court should grant Northern Center's motion for summary judgment and vacate the leases and any underlying decision documents.

I. THE COURT HAS JURISDICTION TO REVIEW NORTHERN CENTER'S CLAIMS.

This Court has jurisdiction over Northern Center's claims in its amended complaint.[1] Both the Supreme Court and the Ninth Circuit have held that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."[2] In *Northstar*, the Ninth Circuit expressly limited *Morongo Band of Mission Indians v. California State Board of Equalization* (*Morongo*), the case relied on by BLM.[3] BLM's reliance on the Seventh Circuit case *Citizens for Appropriate Rural Roads v. Foxx* is also misplaced because it is contrary to *Northstar*.[4] Northern Center filed its amended complaint after BLM issued the leases.[5] The amended complaint cured any potential defect in jurisdiction.

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[1] First Am. Compl. for Declaratory & Injunctive Relief, ECF No. 32 [hereinafter Am. Compl.].

[2] *Northstar Fin. Advisors Inc. v. Schwab Invs.* (*Northstar*), 779 F.3d 1036, 1044 (9th Cir. 2015) (quoting *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007)).

[3] *Northstar*, 779 F.3d at 1046 ("While *Morongo* does contain the broad statement that 'subject matter jurisdiction must exist as of the time the action is commenced' and that a lack of subject-matter jurisdiction at the outset cannot be cured subsequently, it is now clear, if it was not then, that this rule is more nuanced than the inflexibility suggested by its language."); *Morongo*, 858 F.2d 1376 (9th Cir. 1988).

[4] 815 F.3d 1068 (7th Cir. 2016).

[5] BLM signed the leases on February 23, 2018. Administrative Record (AR) 9767–68. Northern Center filed the amended complaint on May 21, 2018. Am. Compl. Applying the relation back rule as argued by BLM is contrary to the purpose and spirit of the rule and should be rejected. *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1005 (9th Cir. 2014) ("Rule

In addition, BLM's failure to conduct an environmental analysis under NEPA is a final agency action. BLM's argument that lease issuance is a final agency action, while true, ignores the fact that BLM's failure to conduct a NEPA analysis prior to the lease sale was itself a final agency action.[6] The Ninth Circuit has specifically held that BLM's decision not to perform a NEPA analysis is a final agency action subject to challenge under the Administrative Procedure Act (APA).[7] An agency action is final if it "mark[s] the 'consummation' of the agency's decisionmaking process," and it determines rights or obligations, or legal consequences flow from it.[8] At the point of the lease sale, the agency had decided not to perform any additional environmental analysis, in violation of NEPA and the NPRPA.[9] That decision was no longer tentative or interlocutory, meeting the first prong. Under the second prong, the failure to do a NEPA analysis prior to the lease sale had legal consequences because that analysis informed the selection of tracts and the lease terms that BLM would offer.[10] BLM's failure to conduct a NEPA analysis prior to the lease sale was therefore a final agency action.

BLM asserts that the lease sale is not a final agency action because BLM also takes steps after the sale to issue the leases.[11] This is a non sequitur to the question of whether its decision

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15's purpose is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." (internal quotation marks omitted)).

[6] BLM's attempts to distinguish certain claims for purposes of jurisdiction are misplaced because all three counts challenge BLM's failure to perform a NEPA analysis prior to the lease sale. *See* Fed. Defs.' Resp. to Pls.' Mot. for Summ. J. & Cross-Mot. for Summ. J. 30 n.10, 34 n.11, ECF No. 47 [hereinafter BLM Br.].

[7] *See Hall v. Norton*, 266 F.3d 969, 973–74, 975 n.5 (9th Cir. 2001) (holding BLM's decision not to prepare a NEPA analysis was a final agency action under the APA); *see also Recent Past Pres. Network v. Latschar*, No. CIV.A.06-2077 TFH AK, 2009 WL 6325768, at *5 (D.D.C. Mar. 23, 2009) ("On a NEPA claim under § 706(2), an agency's expressed decision not to prepare an EIS is a final agency action."), *adopted in part, rejected in part*, 701 F. Supp. 2d 49, 60 (D.D.C. 2010); *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1248 (D. Mont. 2005).

[8] *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

[9] *See* 43 C.F.R. § 3131.2(b); *see also infra* Part III.B.

[10] *See* 43 C.F.R. § 3132.5-1; *see also* BLM Br. at 24 (explaining the process and required forms used to execute leases).

[11] BLM relies on *S. Utah Wilderness All. v. Palma*, 707 F.3d 1146 (10th Cir. 2013), for the proposition that the act of issuing a lease is the final agency action subject to challenge. BLM Br. at 22. That case is factually distinct, as it dealt with leases that BLM had retroactively suspended, not a challenge following a lease sale, a point recognized by the court. 707 F.3d at 1159. Additional cases cited by BLM are also factually distinguishable. *See Reese River Basin Citizens*

not to do a NEPA analysis is a final agency action. That BLM takes multiple, discrete actions when issuing leases does not mean lease issuance is the only final agency action. BLM's failure to conduct a NEPA analysis prior to the lease sale violates NEPA and the NPRPA regulations and is itself a final agency action. BLM's argument to the contrary should be rejected.

II. BLM VIOLATED NEPA BY FAILING TO CONDUCT A SITE-SPECIFIC ANALYSIS.

A. Northern Center's Site-Specific Claim Is Not Time Barred Because It Is Not a Challenge to the Integrated Activity Plan.

BLM and ConocoPhillips Alaska, Inc. (CPAI) misunderstand Northern Center's site-specific claim as a challenge to the Environmental Impact Statement (EIS) for the 2012 Integrated Activity Plan (IAP).[12] Northern Center is not challenging the IAP's analysis. It is challenging BLM's failure to conduct a site-specific NEPA analysis before the lease sale. This is a discrete agency action, separate from BLM's adoption of the IAP.[13] The IAP is a broad management plan that governs the management of the entire Reserve, not just oil and gas leasing. It did not commit BLM to issue specific leases or authorize specific lease sale actions.[14]

BLM's and CPAI's arguments would effectively force plaintiffs to raise any site-specific challenges at a point when there is not yet a legal obligation for BLM to conduct a site-specific analysis. This is contrary to Ninth Circuit case law. An agency is not required to fully evaluate

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Against Fracking, LLC v. BLM, No. 3:14-CV-00338-MMD-WG, 2014 WL 4425813, at *3 (D. Nev. Sept. 8, 2014) (no final agency action where four lease sale protests were under consideration by BLM, thus agency had not issued leases); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 46, 50 (D.C. Cir. 1999) (holding leases issued under Forest Service regulations were not an irretrievable commitment of resources because Forest Service regulations specifically require a third procedural step where NEPA may be completed between the sale and final lease issuance); *W. Energy All. v. Salazar*, No. 10-CV-0226, 2011 WL 3737520 (D. Wyo. June 29, 2011) (plaintiffs solely challenged BLM's failure to timely issue leases under a provision that leases "shall" issue within sixty days of qualifying bid payment).

[12] BLM Br. at 41–42; ConocoPhillips Alaska's Resp. in Opp'n to Pls.' Mot. for Summ. J. & Cross-Mot. for Summ. J. 24–28, ECF No. 46 [hereinafter CPAI Br.].

[13] *Cf. High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (recognizing that plaintiffs were challenging "specific discrete agency actions," separate from the agency's adoption of a programmatic-level management plan that was not subject to review).

[14] Mem. in Supp. of Pls.' Mot. for Summ. J. 14–16, 23, ECF No. 36 [hereinafter NAEC Br.]; *see also Friends of Yosemite Valley v. Norton* (*Yosemite*), 348 F.3d 789, 800 (9th Cir. 2003) (stating that, at the programmatic stage, an agency "adopts an amendable [management] plan to guide management of multiple use resources").

site-specific impacts "until a critical decision has been made to act on site development" — i.e., it "proposes to make an irreversible and irretrievable commitment."[15] In the oil and gas context, this occurs when an agency decides to issue a lease that does not contain an express provision retaining the agency's authority to prohibit later activities on those leases (i.e., leases without a no surface occupancy (NSO) provision, or "non-NSO leases").[16] Under this framework, BLM could — and did — postpone conducting a site-specific analysis from the management plan phase. But once BLM decided to issue non-NSO leases — like it did in the 2017 lease sale — it was obligated to conduct a site-specific analysis.[17] That NEPA violation did not occur at the time of the IAP.

The IAP's statement that BLM might not conduct additional NEPA analysis prior to future lease sales does not foreclose Northern Center from challenging BLM's actions now, at the point when the NEPA violation actually occurred.[18] If BLM had decided to issue leases with an NSO provision, for example, NEPA's requirement for a site-specific analysis would not have been triggered.[19] The Court is in the best position to evaluate whether the agency is complying with the NEPA obligation to conduct a site-specific analysis at this stage, when the agency made an irretrievable commitment of resources.

In sum, Northern Center is not arguing that BLM was obligated to conduct a site-specific analysis at the programmatic stage in the IAP. Northern Center is arguing that the agency's subsequent failure to conduct a site-specific analysis prior to making an irretrievable commitment of resources violates NEPA. That NEPA violation occurred at the lease sale stage, not in the IAP. The 60-day statute of limitations in the NPRPA is not applicable.

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[15] *Yosemite*, 348 F.3d at 801 (quoting *California v. Block* (*Block I*), 690 F.2d 753, 761 (9th Cir. 1982)).

[16] *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988).

[17] *See infra* Part II.B; *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006).

[18] *Cf. Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998) ("[A] person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper."); *see also Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 50 (D.C. Cir. 1999) (stating that judicial prudence "restrains courts from hastily intervening into matters that may best be reviewed at another time or in another setting, especially when the uncertain nature of an issue might affect a court's ability to decide intelligently" (internal quotation marks omitted) (quoting *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1382 (D.C. Cir. 1996))).

[19] *Block I*, 690 F.2d at 761; *Conner*, 848 F.2d at 1448.

B. BLM Was Obligated to Prepare a Site-Specific NEPA Analysis.

As Northern Center explained, BLM was obligated to conduct a site-specific analysis prior to the lease sale, but failed to do so.[20] BLM is incorrect that the IAP analyzed the site-specific impacts of issuing leases.[21] The IAP was a broad, programmatic-level management plan that governed how BLM would manage the entire, 22.8-million-acre Reserve — an area the size of Indiana.[22] The Record of Decision for the IAP states the IAP "is suitably specific for broad-scale management decisions," but never purported to be a site-specific analysis.[23] Outside of areas with known petroleum resources (Umiat, Greater Mooses Tooth and Bear Tooth Units), the IAP only looked at what infrastructure is typical of oil and gas developments generally and did not propose or consider specific areas where development of resources might take place or what the impacts of oil and gas development might be in specific areas.[24]

BLM now argues that the IAP's broad analysis of which areas to designate as available for potential future leasing and general consideration of wildlife and other resources was sufficiently site-specific.[25] But BLM's original and revised Determination of NEPA Adequacy (DNA) failed to even consider whether the IAP was suitably site-specific for purposes of this specific lease sale.[26]

BLM is also not due the level of deference claimed in BLM's brief.[27] Here, BLM did not take the initial step of preparing an Environmental Assessment (EA) to examine the potential environmental significance of this lease sale or consider whether the existing NEPA analysis in the IAP analyzed those impacts at an appropriately site-specific level. BLM's conclusory statements that it already fully considered all potential impacts and was not obligated to do *any* additional NEPA analysis for the lease sale is unreasonable and contrary to law.[28]

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[20] NAEC Br. at 18–25.
[21] BLM Br. at 29–30.
[22] NAEC Br. at 31.
[23] AR 3434; NAEC Br. at 14–16, 31.
[24] NAEC Br. at 14–16, 31.
[25] BLM Br. at 29–30; *see also infra* notes 90–94 (discussing post hoc rationales).
[26] AR 9723–9731.
[27] BLM Br. at 39.
[28] *See High Sierra Hikers Ass'n*, 390 F.3d at 640 (indicating the court will apply a lower reasonableness standard instead of arbitrary and capricious review when reviewing an agency decision not to prepare an EIS without first preparing an EA).

The IAP's general evaluation of impacts and decision that BLM could make 11.8 million acres available for leasing also does not relieve BLM of its obligation to comply with NEPA at the lease sale stage.[29] The IAP is a management plan intended to guide BLM's overall management of multiple resources.[30] It did not make the specific decision of which tracts to offer in this lease sale, and it did not commit BLM to issue specific leases; it specifically deferred that decision until the lease sale stage.[31]

Relying on *Native Village of Point Hope v. Jewell*, BLM and CPAI misinterpret current Ninth Circuit case law and claim that an agency is not required to do a site-specific analysis at the lease sale stage.[32] *Jewell* involved an offshore lease sale held pursuant to the Outer Continental Shelf Lands Act (OCSLA). Under OCSLA, there is no irretrievable commitment of resources at the lease sale stage,[33] so the agency is not required to fully consider the site-specific impacts at that time. That differs from this case, where there was an irretrievable commitment of resources at the lease phase.[34] *Jewell* does not stand for the proposition that no site-specific analysis is required at the lease sale stage outside of the OCSLA context. Instead, in *Conner v. Burford*, the Ninth Circuit indicated that an agency is required to conduct an in-depth environmental analysis under NEPA prior to issuing non-NSO leases.[35]

BLM and CPAI erroneously distinguish *Conner* on the ground that *Conner* involved a situation where the agency issued leases without preparing an EIS at any point prior to leasing.[36]

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[29] *See Blue Mountains Biodiversity Project v. Blackwood* (*Blue Mountains*), 161 F.3d 1208, 1211, 1214 (9th Cir. 1998) (stating the adoption of a management plan that contemplates certain actions might occur does not exempt the future actions from further NEPA review).

[30] NAEC Br. at 14–16, 23; AR 3416; *Yosemite*, 348 F.3d at 800.

[31] *See, e.g.*, AR 23 (noting BLM may or may not offer areas open to leasing as part of the lease sales); AR 9532–36; AR 9537; AR 9538 (Detailed Statement of Sale). CPAI takes the extreme position that there was an irretrievable commitment of resources at the IAP stage to offer leases, but that is contrary to Ninth Circuit case law and BLM's position. CPAI Br. at 31; BLM Br. at 22.

[32] 740 F.3d 489 (9th Cir. 2014); BLM Br. at 38; CPAI Br. at 30. The specific language BLM and CPAI rely on is also dicta and misstates the holding in *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006).

[33] *Vill. of False Pass v. Clark*, 733 F.2d 605, 610 (9th Cir. 1984).

[34] NAEC Br. at 27–30.

[35] 848 F.2d 1441; *see, e.g.*, *Ctr. for Biological Diversity v. BLM*, 937 F. Supp. 2d 1140, 1152–53 (N.D. Cal. 2013).

[36] BLM Br. at 38; CPAI Br. at 30–31.

In *Conner*, the Forest Service prepared EAs.[37] One of the Forest Service's erroneous reasons for concluding in the EAs that the leases would not have a significant impact on the environment and it did not need to prepare an EIS was because the decision conformed with the guidance and management requirements in the area's management plan.[38] The question in *Conner* was when the agency was required to move from a programmatic-level NEPA review to a site-specific NEPA analysis — not whether the agency was required to prepare a NEPA analysis in the first instance. In the present case, BLM failed to prepare even an EA to assess the potential significance of its lease sale decision, and *Conner* instructs that a NEPA analysis was required.

Contrary to BLM's and CPAI's assertions, *Kempthorne* did not exempt the agency from having to conduct a site-specific analysis at the lease sale stage.[39] The question in *Kempthorne* was whether BLM was obligated to conduct a site-specific analysis going parcel by parcel in the IAP EIS that covered just the northwest portion of the Reserve.[40] The court ultimately concluded the analysis in that particular EIS was sufficiently site-specific and that the agency did not need to do a parcel-by-parcel level of review. The court did not hold that the agency was wholly exempt from having to do a site-specific analysis at the lease sale stage.[41] BLM and CPAI claim Northern Center is incorrect in stating the court assumed BLM could prohibit future activities on the leases at issue.[42] Although the court in *Kempthorne* stated the leasing program as a whole was an irretrievable commitment of resources in the sense that BLM could not forbid all oil and gas activities in the northwest area because of the statutory requirement to conduct oil and gas, the court also "assume[d] [BLM could] deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available."[43] Here, BLM does not assert that it has retained the authority to prohibit or deny later applications for activities

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[37] 848 F.2d at 1443–44.

[38] *Id.* at 1444, 1446.

[39] BLM Br. at 42; CPAI Br. at 29–31.

[40] 457 F.3d at 976. Similar to *Kempthorne*, the court in *The Wilderness Society v. Salazar* (*TWS*), 603 F. Supp. 2d 52 (2009), looked at whether the IAP for a much smaller area of the Reserve was sufficiently site-specific. Both *Kempthorne* and *TWS* involved challenges to the site-specific analysis in the IAPs for specific regions in the Reserve. They were not challenges to subsequent lease sales held years later pursuant to a broader, Reserve-wide IAP.

[41] *Kempthorne*, 457 F.3d at 977.

[42] BLM Br. at 40; CPAI Br. at 31.

[43] *Kempthorne*, 457 F.3d at 976.

outright.[44] Because BLM gave up its "absolute ability to prohibit potentially significant impact[s]" by issuing non-NSO leases, "BLM was required to conduct a thorough NEPA analysis to determine whether the sale would have a substantial environmental impact."[45]

BLM's reliance on *Salmon River Concerned Citizens v. Robertson* (*Salmon River*) for the proposition that a programmatic impact statement will negate the need for a site-specific impact statement is also misplaced.[46] The statement quoted by BLM refers to the fact that an agency may not need to prepare an EIS-level NEPA analysis if a programmatic-level EIS has already fully analyzed the action — not that the agency is wholly exempt from future NEPA reviews or from examining site-specific impacts when it makes an irretrievable commitment of resources.[47] *Salmon River* in fact reaffirmed that the agency needed to prepare site-specific EAs or EISs once it reached the point of making an irretrievable commitment of resources.[48]

BLM and CPAI also argue that the agency cannot do a more in-depth NEPA analysis at the lease sale stage because it would be speculative and hard to know prior to exploration where activities will occur.[49] The Ninth Circuit has expressly rejected this as a justification for failing to fully analyze the effects of issuing non-NSO leases.[50] BLM has a choice: if it does not have sufficient information at the lease sale stage to conduct a site-specific NEPA analysis, it can delay that analysis "provided that it reserves both the authority to *preclude* all activities pending submission of site-specific proposals and the authority to *prevent* proposed activities if the environmental consequences are unacceptable."[51] Here, BLM did not reserve the authority to preclude all activities. The agency was, therefore, required to conduct a site-specific analysis.[52]

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[44] The terms of the leases at issue in *Kempthorne* are irrelevant given the court's assumption that BLM retained the authority to later prohibit activities on those leases. BLM Br. at 40–41 n.13. BLM does not assert it has that authority here.

[45] *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153; *Block I*, 690 F.2d at 761.

[46] 32 F.3d 1346 (9th Cir. 1994); BLM Br. at 41.

[47] *Salmon River Concerned Citizens*, 32 F.3d at 1356.

[48] *Id.* at 1357–58; *see also Pit River Tribe*, 469 F.3d at 783–84 (examining *Salmon River* and stating "vague prior programmatic statements are no longer enough" when there is an irretrievable commitment of resources").

[49] BLM Br. at 38–39; CPAI Br. at 29–30.

[50] *Conner*, 848 F.2d at 1450–51.

[51] *Id.* (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)).

[52] *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153.

CPAI also mischaracterizes Northern Center's argument by claiming that it would lead to BLM doing duplicative EISs year after year for the lease sale.[53] Under Department of the Interior's NEPA regulations, an agency may tier an EA to a programmatic-level EIS like the IAP if that EIS has "*fully* analyzed those significant effects" and "so long as any previously unanalyzed effects are not significant."[54] Here, BLM did not take the initial step to prepare an EA to take a hard look at the potential consequences of this specific lease sale and to determine whether the IAP fully analyzed the site-specific effects. Regardless, the IAP did not include a site-specific analysis.[55] Because the IAP did not contain a site-specific analysis and BLM planned to make an irretrievable commitment of resources by issuing non-NSO leases, BLM was obligated to conduct a site-specific analysis.

BLM and CPAI also argue the IAP sanctions the use of DNAs for the lease sales and only doing site-specific analysis for on-the-ground activities like exploration and development, not the lease sale.[56] This approach is contrary to Ninth Circuit case law. BLM was obligated to conduct a site-specific analysis at the point when it proposed to make an irreversible and irretrievable commitment.[57] BLM crossed that threshold by issuing non-NSO leases.[58] The agency's promises of site-specific analysis at a future time are unavailing if the agency no longer has the ability to adopt the no-action alternative, even if a project has significant environmental impacts.[59] Because BLM issued non-NSO leases and failed to retain the authority to prevent activities, BLM was required to conduct a site-specific NEPA analysis prior to the lease sale. The agency's failure to do so violates NEPA.

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[53] CPAI Br. at 29.
[54] 43 C.F.R. § 46.140 (emphasis added).
[55] NAEC Br. at 14–16, 31–34; *see supra* notes 20–27 and accompanying text.
[56] BLM Br. at 41–42; CPAI Br. at 32.
[57] *Block I*, 690 F.2d at 761.
[58] *Conner*, 848 F.2d at 1451.
[59] *Id.*

III. BLM VIOLATED NEPA AND THE NPRPA BY FAILING TO TAKE A HARD LOOK AT THE DIRECT, INDIRECT, AND CUMULATIVE IMPACTS AND NEW INFORMATION.

A. BLM and CPAI Err in Applying the Standards Applicable to Supplemental NEPA Claims.

BLM and CPAI are mistaken in arguing the Court should apply the standards applicable to supplemental EISs (SEIS). This case is not challenging the content of the IAP,[60] and Northern Center is not arguing that BLM needs to prepare a supplemental NEPA analysis for the IAP.[61] BLM's obligation to supplement the IAP EIS is not at issue.[62]

Decisions to conduct a lease sale and issue the leases are on their own major federal actions subject to NEPA[63] — distinct from the major federal action of adopting the IAP. BLM is required to comply with NEPA at every stage of the oil and gas development process, including the leasing stage.[64] NEPA requires that federal agencies prepare an EIS for any major federal action that may significantly affect the quality of the human environment or an EA to determine if an EIS is required.[65] BLM is not exempt from these NEPA requirements merely because the IAP contemplates that leasing might occur.[66]

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[60] *See supra* Part II.A.

[61] Even if the Court applies the standard applicable to SEIS claims, Northern Center has shown this information was significant, required additional NEPA analysis, and that BLM's conclusions to the contrary were arbitrary. *See supra* Part III.C; NAEC Br. at 34–52.

[62] *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004) (noting that a land management plan is not the type of ongoing federal action typically requiring supplementation, absent a need to amend or revise that management plan). *But see Blue Mountains*, 161 F.3d at 1211, 1214 (stating the adoption of a management plan that contemplates certain actions might occur does not exempt those future actions from further NEPA review).

[63] *See* 43 C.F.R. § 3131.2(b); 40 C.F.R. § 1508.18; *see also supra* Part II.B.

[64] *See Blue Mountains*, 161 F.3d at 1211, 1216; *Block I*, 690 F.2d at 761 ("The critical inquiry in considering the adequacy of an EIS prepared for a large scale, multi-step project is not whether the project's site-specific impact should be evaluated in detail, but when such detailed evaluation should occur."); *see also* 40 C.F.R. §§ 1502.16, 1508.8, 1508.25(c).

[65] 42 U.S.C. § 4332; 40 C.F.R. §§ 1501.4, 1508.9, 1508.18(b)(4); *Kern v. BLM*, 284 F.3d 1062, 1067 (9th Cir. 2002); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

[66] *See, e.g.*, *Blue Mountains*, 161 F.3d at 1214 (stating that, just because the management plan contemplated that logging might occur, did not mean logging projects were exempt from further NEPA analysis, and holding that the tiering regulations did not exempt the Forest Service from having to comply with NEPA at stages after adoption of the forest management plan).

Here, BLM failed to prepare either an EA or an EIS. BLM instead relied on a DNA. DNAs are "an administrative convenience created by the BLM."[67] They are not a NEPA document and cannot contain NEPA analysis.[68] BLM can rely on a DNA to authorize an activity only if 1) the proposed action is already fully covered by an existing NEPA analysis, including the assessment of any site-specific impacts, and 2) there are no new circumstances, new information, or unanticipated or unanalyzed environmental impacts that warrant NEPA analysis.[69]

Here, BLM improperly used a DNA. At a minimum, BLM was required to prepare an EA prior to the lease sale to assess the site-specific impacts and consider the significance of new information that was neither known nor considered at the time of the IAP.[70] If that assessment indicated there were likely to be significant impacts or there were significant questions about the significance of that information relevant to the lease sale, the agency would have been obligated to prepare an EIS. If not, BLM could issue a finding of no significant impact and hold the lease sale. Under the correct legal standard, BLM violated NEPA by failing to take a hard look at the direct, indirect, and cumulative impacts of the lease sale in either an EA or EIS.

B. The Original DNA Is the Relevant Decision Document for Evaluating BLM's Compliance with NEPA and the NPRPA.

BLM failed to take a hard look at relevant information related to the potential direct, indirect, and cumulative impacts of the lease sale and other developments in the region prior to the lease sale.[71] BLM provided only conclusory statements in the original DNA that there was no new information or circumstances and that the direct, indirect, and cumulative impacts were unchanged.[72] These statements are insufficient to show BLM took a hard look prior to the lease

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[67] *S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1255 (D. Utah 2006).

[68] *Id.*; BUREAU OF LAND MGMT., NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK H-1790-1, at § 5.1.3 (2008) [hereinafter BLM NEPA HANDBOOK], *available at* https://www.ntc.blm.gov/krc/uploads/366/NEPAHandbook H-1790 508.pdf.

[69] BLM NEPA HANDBOOK, *supra* note 68, § 5.1.2–.3; *see also S. Utah Wilderness All.*, 166 IBLA 270 (Aug. 16, 2005).

[70] *See, e.g.*, *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153 (involving a situation where BLM had at least prepared an EA prior to conducting an oil and gas lease sale and where the court ultimately held BLM was obligated to prepare an EIS).

[71] NAEC Br. at 38–40.

[72] NAEC Br. at 39; *see also Blue Mountains*, 161 F.3d at 1213 (stating the agency's failure to

sale at any of the information Northern Center identified.[73] At no point in their briefs do BLM or CPAI assert that the original DNA demonstrates that BLM took a hard look at this information prior to conducting the lease sale.[74]

BLM's and CPAI's arguments that BLM was only required to conduct this analysis prior to signing the leases ignore the fact that BLM's regulations require NEPA compliance prior to conducting the lease sale. While agencies generally have to fully comply with NEPA prior to taking a major federal action and making an irretrievable commitment of resources,[75] BLM's Reserve regulations more specifically mandate when BLM is required to conduct this analysis for lease sales: BLM must conduct its NEPA review prior to selecting tracts to offer in the lease sale.[76] When adopting these regulations, BLM confirmed that all NEPA review should occur prior to the selection of any tracts for a lease sale.[77] When BLM signed the leases is irrelevant because, under the regulation, the point at which BLM was obligated — but failed — to ensure it fully complied with NEPA was prior to the lease sale.

BLM's and CPAI's arguments asserting the DNA is not an environmental analysis or a NEPA decision, such that the agency did not violate its regulation, are misplaced.[78] Northern Center agrees that a DNA is not a NEPA document.[79] But — as CPAI acknowledges — BLM was required to "make a reasoned decision documented in the record."[80] The DNA is where

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discuss the new information lends weight to the claim that the agency never took a hard look).

[73] NAEC Br. at 39.

[74] *See* BLM Br. at 47–55; CPAI Br. at 36–38. CPAI's only argument related to the original DNA is that any challenge to the original DNA is moot because the revised DNA superseded the original. CPAI Br. at 36 n.159. As Northern Center explains, the original DNA is the relevant document to assess whether BLM complied with NEPA prior to the lease sale.

[75] *See, e.g.*, *Metcalf*, 214 F.3d at 1143.

[76] 43 C.F.R. § 3131.2(b) ("The State Director, after completion of the required environmental analysis (see [the NEPA regulations at] 40 CFR 1500–1508), shall select tracts to be offered for sale.").

[77] Procedures for Leasing of Oil & Gas in the Nat'l Petroleum Reserve; Alaska, 46 Fed. Reg. 55494, 55495 (Nov. 9, 1981) ("The leasing process in the National Petroleum Reserve–Alaska, except for the first two lease sales of not more than two million acres, is subject to the National Environmental Policy Act of 1969.").

[78] CPAI Br. at 37–38; *see* BLM Br. at 46.

[79] CPAI Br. at 46; BLM NEPA HANDBOOK, *supra* note 68, § 5.1.2–.3.

[80] CPAI Br. at 37; *see also Blue Mountains*, 161 F.3d at 1211 (indicating an agency must "supply a convincing statement of reasons why potential effects are insignificant" (quoting *Save the Yaak Comm. v. Block* (*Yaak*), 840 F.2d 714, 717 (9th Cir. 1988))).

BLM documented that decision. BLM was obligated to make this reasoned decision and ensure it complied with NEPA prior to selecting tracts and holding the lease sale.[81] Under the interpretation urged by BLM, if the revised DNA had indicated BLM's NEPA analysis was insufficient, the resulting NEPA analysis would have occurred after the lease sale it was intended to inform took place. This reading of the regulation is unreasonable and should be rejected.

CPAI argues it is irrelevant when BLM signed the DNA and that the relevant question is whether the record contains a reasoned explanation for the agency's decision.[82] NEPA documents are required to serve "as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made."[83] Here, BLM concedes that it prepared the revised DNA in response to this litigation.[84] BLM does not argue — and the record does not show — that the agency actually took a hard look prior to the lease sale at any of the impacts or information Northern Center identified, even though that information was available to the agency prior to the lease sale.[85]

BLM and CPAI also argue BLM complied with NEPA and the NPRPA regulation by preparing the EIS for the IAP. This argument conflates two distinct stages of the oil and gas process and should be rejected. BLM first adopts a broad management plan (i.e., the IAP) that sets out where BLM might offer leases, but does not set out the specific tracts it will offer in any lease sales or involve the actual issuance of leases.[86] BLM separately conducts a lease-sale-specific process where it decides which tracts it will offer and holds a lease sale.[87] BLM is not exempt from having to comply with NEPA at the lease sale stage.[88] The IAP did not and could not take into consideration the developments and other information that arose subsequent to its adoption that indicated the impacts of the lease sale would be far greater than originally anticipated.[89] BLM was obligated to comply with NEPA at the lease sale stage by preparing a NEPA analysis prior to the lease sale, but failed to do so.

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[81] 43 C.F.R. § 3131.2(b).
[82] CPAI Br. at 38.
[83] 40 C.F.R. § 1502.2(g).
[84] BLM Br. at 27 n.8.
[85] AR 4489 (identifying the information in comments).
[86] *See* AR 1–2622; AR 3412–3525.
[87] *See* 43 C.F.R. §§ 3131.1 to 3132.5-2 (BLM's leasing regulations)
[88] *Blue Mountains*, 161 F.3d at 1214.
[89] *See infra* Part III.C; NAEC Br. at 40–53.

BLM argues in the alternative that it is proper for this Court to review the agency's post hoc rationalizations in the revised DNA.[90] BLM's revised DNA is an after-the-fact explanation for its decision and should be rejected by this Court. The U.S. Supreme Court has made it clear that an agency's decision must stand or fall on the record before the agency at the time of its decision, and "the *post hoc* rationalizations of the agency or the parties to . . . litigation cannot serve as a sufficient predicate for agency action."[91] BLM's reliance on *Kunaknana v. U.S. Army Corps of Engineers* is misplaced.[92] *Kunaknana* does not stand for the proposition that the court will normally review post hoc rationalizations of agency decisions. The court's review in *Kunaknana* was limited to reviewing the Corps' explanation of the basis for its original decision following remand, "rather than a more recent rationalization of that decision."[93] Unlike the agency's explanation in *Kunaknana*, here BLM concedes that it prepared the revised DNA in response to this litigation and makes no assertion that it took a hard look or met its obligations under NEPA prior to conducting the lease sale,[94] in violation of the law.

C. BLM Was Required to Consider the Potential for Increased Direct, Indirect, and Cumulative Impacts and New Information in a NEPA Analysis.

BLM violated NEPA by not completing either an EA or an EIS prior to conducting the lease sale that took a hard look at the consequences of its action. There were substantial questions about the potential for significant impacts from leasing that were not considered or known at the time of the IAP, particularly in light of new information.[95] At a minimum, BLM should have analyzed the significance of the impacts in an EA. BLM failed to provide a "convincing statement of reasons" for its decision not to conduct a NEPA analysis in the original DNA.[96] Even if the Court looks to the post-lease sale, post-litigation, revised DNA, BLM still

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[90] BLM Br. at 46–47.

[91] *Am. Textile Mfrs. Inst. Inc. v. Donovan*, 452 U.S. 490, 539 (1981); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Vista Hill Found., Inc. v. Heckler*, 767 F.2d 556, 559 (9th Cir. 1985) ("[A]n agency's decision can be upheld only on a ground upon which it relied in reaching that decision.").

[92] No. 3:13-cv-00044-SLG, 2015 WL 3397150 (D. Alaska May 26, 2015).

[93] *Id.* at *4.

[94] *See* BLM Br. at 27 n.8.

[95] NAEC Br. at 40–53.

[96] *Blue Mountains*, 161 F.3d at 1212 (quoting *Yaak*, 840 F.2d at 717) (indicating the court will only defer to an agency's decision if it is "fully informed and well considered").

failed to supply a reasoned explanation for why the information was not significant and did not require further NEPA analysis.[97]

1. New Information Related to the USGS Report and New Discoveries Around the Reserve Was Significant.

New information related to the U.S. Geological Survey (USGS) report and other discoveries around the Reserve was significant and required preparation of a NEPA analysis.[98] Both BLM and CPAI rely on the wrong standard — that applicable to supplemental NEPA claims — in arguing that Northern Center is required to show a "seriously different picture" of the potential environmental harms.[99] That standard is not applicable.[100] Regardless, the updated USGS report and information about new discoveries in and around the Reserve demonstrated a dramatic increase in the potential development and impacts likely to occur in the region.[101]

CPAI implies that this information is somehow less significant because it is the amount of development and not the amount of oil that matters.[102] But the USGS report and other developments in the region indicated there was a substantial increase in the estimates of both oil and the amount of development likely to occur in and immediately adjacent to the Reserve. For example, two of the significant discoveries that triggered the revision of the USGS report (Willow and Nanushuk) are already moving toward development and permitting.[103] The IAP's analysis of the potential impacts was based on the assumption that there was far less oil than USGS now believes to be the case.[104] The Record of Decision for the IAP recognized that changes to those estimates in the Reserve would potentially require the agency to reconsider the balance between development and the protection of other values in the Reserve.[105]

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[97] *See High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (2004) (reviewing an agency decision not to prepare an EIS for reasonableness where the agency did not first prepare an EA).

[98] NAEC Br. at 41–43.

[99] BLM Br. at 49; CPAI Br. at 39.

[100] *See supra* Part III.A.

[101] NAEC Br. at 41–43.

[102] CPAI Br. at 39.

[103] NAEC Br. at 45–47 (discussing Willow and Nanushuk).

[104] NAEC Br. at 41–42 (discussing the nearly six-fold increase in oil estimates).

[105] AR 3437; NAEC Br. 42–43.

BLM's point that the USGS report was somehow less significant because it only partially overlapped the study area in USGS's earlier study is misplaced.[106] USGS revised its estimates based on several major oil discoveries that occurred both in and immediately adjacent to the Reserve.[107] The Willow discovery alone, at approximately 300 million barrels, amounted to roughly two-thirds of the total amount of economically recoverable oil BLM originally estimated would be developed in the entire Reserve. All of this information was significant and raises substantial questions about the potential for additional leasing to cause significant impacts.

2. New Information Related to Willow Was Significant.

Northern Center also raised substantial questions about the potential for increased, significant impacts from additional leasing in light of the Willow discovery.[108] BLM argues on the one hand that BLM fully accounted for the Willow prospect in the IAP, but at the same time concedes — contrary to the revised DNA — that the Willow discovery occurred after the IAP and that the IAP did not specifically predict that CPAI would build infrastructure at the location of the Willow development.[109] BLM did not account for or assess a discovery of this size in the northeast corner of the Reserve in the IAP. BLM assumed that it would be economical to produce up to 120 million barrels of oil from the discoveries in the Greater Mooses Tooth (GMT) and Bear Tooth units.[110] BLM estimated a total of 128 million barrels of undiscovered economically recoverable oil might be found in the northeast corner of the Reserve (where the GMT and Bear Tooth units are located) and assumed the total amount of economically recoverable oil for the entire Reserve was 491 million barrels.[111] The Willow prospect alone is approximately 300 million barrels of oil — almost two-thirds the total amount of oil BLM assumed would be economically recoverable from the entire Reserve and well above what it estimated for the northeast corner.[112] BLM did not account for the Willow discovery in the estimates of either discovered or undiscovered resources for the northeast corner or the Reserve.

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[106] BLM Br. at 49.
[107] AR 11691.
[108] NAEC Br. at 43–46.
[109] BLM Br. at 50 & n.17; AR 9727 (stating the IAP accounted for and analyzed Willow).
[110] AR 585.
[111] AR 594 & fig.4-12. Contrary to CPAI's assertions, Northern Center did not err in representing the size of these estimates. CPAI Br. at 41.
[112] NAEC Br. at 45.

CPAI's arguments that Willow was fully analyzed because the IAP estimated there might be eight new central processing facilities at unspecified locations in the Reserve does not change the fact that the IAP did not account for this scale of development in this particular area in the Reserve. The IAP did not account for an additional production facility in the GMT or Bear Tooth units and did not account for additional oil production on the scale now contemplated with the Willow discovery.[113] CPAI's argument underscores that the IAP did not look at site-specific impacts. A major new development that will further extend the existing developments and add to the serious impacts already occurring to subsistence and other resources in the region will have different impacts from one located far away from any communities or existing developments.

CPAI's reliance on the D.C. Circuit Court's decision in *Theodore Roosevelt* is unavailing.[114] That case involved a different legal and factual issue — whether the agency improperly precommitted to an action by issuing a decision approving a gas project prior to finalizing an amendment to the management plan for the region.[115] Northern Center is not arguing that the lease sale is inconsistent with the IAP or that the IAP must be amended. Here, BLM asserted in the revised DNA that the IAP fully considered the Willow project and that it did not need to do any NEPA analysis for this lease sale. That conclusion is contrary to the IAP. The Willow project has the potential to significantly magnify the impacts to subsistence and other resources and should have been considered in a NEPA analysis prior to the lease sale.

3. New Information Related to Other Discoveries Was Significant.

BLM also should have considered new information about other significant developments and discoveries in the region.[116] BLM acknowledges that there was the potential for these projects to cumulatively combine with other impacts from leasing and development in the Reserve,[117] yet failed to take the threshold step of analyzing its significance in an EA. Pikka, Horseshoe, and Smith Bay are immediately adjacent to the Reserve and are massive discoveries that were unknown at the time of the IAP.[118] BLM and CPAI argue the IAP expressly anticipated

[113] NAEC Br. at 45–46.
[114] *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497 (D.C. Cir. 2010).
[115] *Id.* at 508–09.
[116] NAEC Br. at 46–49.
[117] AR 9728.
[118] NAEC Br. at 46–48.

these discoveries and accounted for their potential impacts. But they rely only on generalized discussions in the IAP about the history of oil development and the likelihood that oil activities would continue to expand across the North Slope and Beaufort Sea.[119] The IAP did not account for the impacts from these discoveries.

Regarding Smith Bay, BLM's revised DNA dismisses new information related to Smith Bay because the adjacent areas in the Reserve are closed to leasing. This argument ignores the fact that there may be associated onshore activities and infrastructure with the potential for serious impacts.[120] BLM's arguments that some of the areas south of Smith Bay are closed to development and that development in the open areas would be done with maximum protections were not rationales BLM provided in its revised DNA and are post hoc explanations by counsel.[121] While BLM's analysis of a potential pipeline from offshore activities in the IAP may have looked at one type of infrastructure and activities,[122] that analysis did not take into consideration the potential for a significant amount of other onshore activity and infrastructure in support of such a massive discovery immediately adjacent to the Reserve. CPAI relies on *Theodore Roosevelt* to argue BLM did not need to consider Smith Bay since it was a project in its infancy with an uncertain future.[123] That case is not on point. The court in that case held that the agency's decision not to rewrite an EIS to discuss a development that arose around the time the agency finalized that EIS was not arbitrary and capricious because the new developments were not reasonably foreseeable under NEPA.[124] Here, BLM did not prepare either an EA or an EIS to examine the potential significance of the information or determine if the Smith Bay development was reasonably foreseeable.[125] At a minimum, BLM should have considered the

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[119] BLM Br. at 51–52; CPAI Br. at 43, 47; *see* AR 1389–95, 1404–06 (discussing the history of oil and gas across the entire North Slope and Beaufort Sea); AR 1411–13 (assuming generally that development on the North Slope would continue expanding and that there might be additional discoveries in areas east of the Reserve); AR 1414–15 (estimating the total amount of oil that might be produced in the Arctic over the next hundred years); AR 126–52.

[120] NAEC Br. at 48–49.

[121] *See supra* notes 90–94 & accompanying text.

[122] BLM Br. at 52.

[123] CPAI Br. at 44; *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 513.

[124] *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 513.

[125] *Cf. High Sierra Hikers Ass'n*, 390 F.3d at 640.

potential significance of all this information in an EA. BLM's dismissal of the information in the revised DNA was both unreasonable and contrary to the information before the agency.[126]

CPAI also misapprehends the applicable legal standard in arguing that Northern Center failed to show there was a seriously different picture of the potential environmental harms in light of the Pikka and Horseshoe projects that required an SEIS.[127] This is not an SEIS claim. BLM did not even prepare an EA for the lease sale to analyze the potential significance of these developments. CPAI's reliance on *Habitat Education Center, Inc. v. U.S. Forest Service*, an SEIS case, is similarly misplaced.[128] Northern Center was not required to show new scientific evidence. Northern Center just needed to — and did — raise substantial questions about the potential for significant environmental impacts from these developments, which were not considered in the IAP.[129] CPAI's assertion that the projects will be analyzed in another NEPA analysis is also off point because BLM was obligated at this stage to consider the direct, indirect, and cumulative impacts of the lease sale in light of reasonably foreseeable future actions.[130]

Pikka, Horseshoe, and Smith Bay have the potential to significantly magnify the direct, indirect, and cumulative impacts to subsistence and other resources in the region. They should have been fully considered in a NEPA analysis prior to BLM conducting the lease sale.

4. New Information Related to the 2016 Lease Sale Was Significant.

BLM points to the IAP's generalized assumptions that there would be development and leasing in the Reserve as justification for why it did not need to prepare an SEIS.[131] CPAI similarly asserts that the IAP contemplated leasing 11-million acres and estimated there would be a certain amount of infrastructure that has yet to be exceeded at unspecified locations in the Reserve.[132] Although the IAP contemplated oil and gas activities would occur generally throughout the 22.8-million acre Reserve, outside of the units known at the time (Mooses Tooth,

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[126] NAEC Br. at 48–49.

[127] CPAI Br. at 45–46.

[128] 673 F.3d 518 (7th Cir. 2012); CPAI Br. at 46.

[129] *See Blue Mountains*, 161 F.3d at 1216 (indicating the test for when an EIS is required is whether there are substantial questions about the potential for significant impact).

[130] *See Kern*, 284 F.3d at 1072 (indicating NEPA is not designed to postpone analysis, but "to require such analysis as soon as it can reasonably be done"); 40 C.F.R. § 1508.7.

[131] BLM Br. at 53. This argument again misapplies the SEIS standard.

[132] CPAI Br. at 46–47.

Bear Tooth, Umiat), BLM never looked at the potential impacts at a site-specific level.[133] Combined with Willow and other discoveries in the region that substantially increased the oil estimates, the 2016 lease sale indicated there was likely to be a significant increase in potential development and other activities in the region.[134] The block of leases CPAI acquired extended out from its existing acreage and developments, into an area thought to contain primarily gas resources and no large oil deposits.[135] The lease sale and related discoveries indicated there was far greater interest and an increased likelihood of significant development in an area that was experiencing significant impacts to subsistence and other resources beyond what BLM considered in the IAP.[136] In determining whether an action will have a significant impact on the environment, the agency is required to consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts" and, if actions in combination have a cumulative environmental effect, that must be considered in an EIS.[137] BLM's conclusions to the contrary are also not entitled to deference, since the agency failed to prepare either an EA or an EIS analyzing the significance of this information.[138] BLM's failure to consider the impacts from the 2016 lease sale violates NEPA.

5. New Information Related to the Greater Mooses Tooth 1 (GMT-1) Development and the Regional Mitigation Strategy Was Significant.

In authorizing the 2017 lease sale, BLM also failed to consider its own recent findings in the GMT-1 SEIS that oil and gas activities in the northeastern Reserve could have significant impacts on subsistence uses.[139] BLM and CPAI argue that the findings of major impacts to subsistence resources from the GMT-1 project were the result of "unique" circumstances — namely, the decision in the GMT-1 Record of Decision permitting the placement of

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[133] *See supra* Part II.B; NAEC Br. at 14–16, 31–32.
[134] NAEC Br. at 49–50.
[135] NAEC Br. at 50.
[136] *See infra* Part III.C.5; NAEC Br. at 50–53 (discussing the GMT-1 decision).
[137] 40 C.F.R. § 1508.27(b)(7); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 605 (9th Cir. 2010) (indicating there is only a low burden to show the potential for cumulative impacts).
[138] *High Sierra Hikers Ass'n*, 390 F.3d at 640.
[139] NAEC Br. at 50–53.

infrastructure near Fish Creek.[140] This is another post hoc rationalization that is not supported by the record before the agency when it made its decision to hold the 2017 lease sale. It is also contrary to the record. BLM determined in 2014 that there would be major impacts to subsistence and environmental justice under *any* alternative authorizing BLM's permits for GMT-1.[141] This finding was not exclusively tied to Fish Creek setback, as BLM and CPAI suggest. The finding was a result of a "critically important shift in residents' and BLM's understanding of impacts on subsistence" from aircraft, and finding that "[a]dditional survey data, testimony from residents, and new information gathered since [the 2012 IAP] . . . indicates that the intensity of these impacts and the overall degree of impacts may be higher than previously anticipated."[142] BLM expressly recognized in 2014 that new information gathered since the IAP indicated impacts to subsistence from oil and gas activities and infrastructure was greater than previously anticipated. BLM failed to take a "hard look" at these findings before holding the 2017 lease sale in the same subsistence use area impacted by the GMT-1 project.

BLM's revised DNA also claims that the "beneficial offsetting effects" of compensatory mitigation projects would "reduce the adverse impacts to subsistence to a less than significant level," but does not reference the Regional Mitigation Strategy (RMS) that was intended to help identify and carry out mitigation projects.[143] The fact that BLM did not discuss the RMS in its revised DNA highlights that the agency failed to take a hard look.[144] BLM and CPAI both fail to respond to Northern Center's argument that the RMS resulted from the need to address foreseeable impacts from future projects, identify if additional areas needed to be off limits to leasing or development, and consider additional mitigation measures for future development decisions.[145] As BLM acknowledges in its brief, "the RMS is not itself even completed."[146] BLM could not analyze the alleged "benefiting offsetting effects" of compensatory mitigation projects that have yet to be identified in a completed RMS or implemented prior to the lease sale.

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[140] BLM Br. at 53–54; CPAI Br. at 48–49.

[141] AR 10107.

[142] AR 10307–10308. This argument again misapplies the SEIS standard. CPAI Br. at 42.

[143] AR 9729.

[144] *See Blue Mountains*, 161 F.3d at 1213 (stating the agency's failure to discuss a report lent weight to the claim that the agency did not take a "hard look").

[145] *See* NAEC Br. at 51–52 (explaining BLM intended the RMS to address and compensate for impacts from development from the GMT-1 project and future oil and gas activities).

[146] BLM Br. at 47.

IV. THE COURT SHOULD VACATE THE DNAS AND LEASES BECAUSE BLM AND CPAI FAILED TO DEMONSTRATE THAT VACATUR IS NOT WARRANTED.[147]

BLM and CPAI misapply the limited exception to vacatur to assert that vacatur of BLM's decision and the leases is not warranted.[148] As Northern Center explained, vacatur is the presumptive remedy under the APA.[149] BLM and CPAI have not met their burden of demonstrating that this case is one of the "rare circumstances" where departure from the presumptive remedy is warranted.[150] Courts have recognized a very narrow exception to the standard remedy of vacatur, remanding agency decisions without vacating only in circumstances when there could be serious environmental harm from vacating.[151] The Ninth Circuit considers two factors to determine if remand without vacatur is warranted: (1) the seriousness of the agency's error, and (2) "the disruptive consequences" of vacatur.[152]

Regarding the first prong — the seriousness of the violation — BLM's argument that it is not clear how serious the violation is until the Court rules should be rejected.[153] Northern Center raises one regulatory and two NEPA violations: the failure to do site-specific analysis prior to

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[147] BLM and CPAI ask this Court to order additional briefing on remedy. BLM Br. at 55; CPAI Br. at 49, 53. Neither BLM nor CPAI indicated they would seek separate remedy briefing when negotiating the case management schedule. *See* Joint Mtn. for Case Mgmt. & Scheduling, ECF No. 25; *see also* Order Granting Joint Mot. for Case Mgmt. & Scheduling, ECF No. 27 (entering order consistent with the joint motion). BLM and CPAI should have included their remedy arguments as part of the summary judgment briefing. The Court should reject this request.

[148] BLM Br. at 55–56; CPAI Br. at 49–53. BLM also asserts that the request for declaratory relief should be rejected because Northern Center seeks an order for BLM to conduct NEPA prior to the lease sale before there was an irretrievable commitment of resources. BLM Br. at 56 n.21. The NPRPA regulation requires NEPA before lease sales and its failure to do NEPA was a final agency action. *See supra* Parts I, III.B.

[149] NAEC Br. at 53 & n.271; 5 U.S.C. § 706(2)(A).

[150] *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); NAEC Br. at 54 n.274 (explaining that the party seeking remand without vacatur carries the burden to show that departure from the presumptive remedy is warranted); *see also AquAlliance v. U.S. Bureau of Reclamation*, No. 1:15-cv-754-LJO-BAM, 2018 WL 2734923, *5 (E.D. Cal. 2018) (noting that the agency "failed to justify remand without vacatur"); BLM Br. at 55–56; CPAI Br. at 49–53 (arguing for remand without vacatur).

[151] NAEC Br. at 54 & n.275; *cf. Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532–33 (9th Cir. 2015) (vacating an insecticide rule where leaving it in place "risks more potential environmental harm than vacating it").

[152] *Cal. Cmtys. Against Toxics v. U.S. EPA* (*Cal. Cmtys.*), 688 F.3d 989, 992 (9th Cir. 2012).

[153] BLM Br. at 56.

issuing non-NSO leases, and the failure to take a hard look at potential impacts and new information prior to a lease sale. These are fundamental NEPA requirements that go to the heart of NEPA's dual purposes: informing agencies before decisions are made and informing the public.[154] They are serious violations.[155] CPAI asserts that the NEPA violations are "relatively minor and curable," such that BLM can make the same decision on remand.[156] This argument presumes the outcome will be the same if a NEPA analysis is conducted, relegating NEPA to a paper exercise to justify already-made decisions. It should not be treated as such.[157] To cure the defects of the 2017 lease sale requires BLM to undertake a NEPA analysis, not to explain, again, why it did not undertake that analysis in the first instance.[158] CPAI also asserts that additional NEPA at the leasing phase would likely not result in a different outcome because BLM already adopted the IAP.[159] But the IAP does not purport to be a site-specific analysis and it was not the point when BLM made specific lease sale decisions.[160] Whether the outcome would be different can only be known after NEPA compliance.

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[154] *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005); *Yosemite*, 348 F.3d at 800.

[155] 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made . . . ."); *see also Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.* (*KS Wild*), 109 F. Supp. 3d 1238, 1245 (N.D. Cal. 2015) (finding a failure to conduct cumulative impacts analysis, "an integral part of fulfilling NEPA's purpose," was a serious error).

[156] CPAI Br. at 50–51. CPAI also asserts that it is hard to imagine how additional NEPA at the leasing phase would result in a different outcome because BLM already adopted the IAP. CPAI Br. at 51. This misunderstands the IAP. The IAP does not purport to be a site-specific analysis and it was not the point when BLM made specific lease sale decisions. *See supra* Part II.B. Whether the outcome would be different can only be known after NEPA compliance.

[157] *See* 40 C.F.R. § 1502.5 ("The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made . . . ."); *Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1124 (9th Cir. 2010) ("NEPA is not a paper exercise, and new analyses may point in new directions."); *see also Metcalf*, 214 F.3d at 1146 (questioning whether, absent vacatur, a new NEPA document would "be a classic Wonderland case of first-the-verdict, then-the-trial").

[158] *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (explaining that, when considering the seriousness of the error, a court considers if "an agency may be able readily to cure a defect in its explanation of a decision"); *cf. Kunaknana v. U.S. Army Corps of Eng'rs*, No. 3:13-cv-44-SLG, 2014 WL 12813625, at *2 (D. Alaska July 22, 2014) (remanding without vacatur for a limited explanation of why the agency originally decided not to prepare an SEIS).

[159] CPAI Br. at 51.

[160] *See supra* Part II.B.

CPAI's argument that the seriousness of the error can be minimized because site-specific analysis will take place in the future misunderstands and exacerbates the problem Northern Center seeks to remedy.[161] BLM currently issues leases without doing site-specific NEPA analysis and without retaining the authority to prohibit future activities on leases.[162] While BLM may conduct a NEPA analysis in the future in response to individual applications or proposals, BLM's position is that it cannot prohibit oil and gas activities because it has not retained the authority to do so at the lease stage. BLM is committing itself at the lease phase to allow activities without that decision being informed by a site-specific NEPA evaluation.[163]

Regarding the second factor — the disruptive consequences of vacatur — BLM's and CPAI's assertions that the consequences of vacatur are disruptive because bid monies will be lost, delay will result, and lessees interests will be impacted should be rejected.[164] None of the consequences identified by BLM or CPAI rise to the level warranting this Court's deviation from the standard remedy of vacatur. CPAI's reliance on *California Communities* to argue vacatur would have disruptive consequences is misplaced.[165] In that case, the court was faced with whether to vacate a rule where doing so would stop construction of a power plant, lead to the loss of 350 jobs, and require action by the California legislature.[166] More importantly, without the power plant coming online, blackouts would ensue and additional generators would be needed, leading to increased air pollution.[167] The court declined to vacate the rule because doing so would lead to additional air pollution, the specific problem the rule sought to address.[168] In comparison, the problems Northern Center seeks to address — the failure to do site-specific

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[161] CPAI Br. at 51.

[162] *See supra* Part II.B.

[163] For this reason, CPAI's reliance on *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014 (E.D. Cal. 2013), is misplaced. CPAI Br. at 51. While the agency decision at issue in that case (adoption of a management framework) did not authorize any on-the-ground activities, which would be proceeded by site-specific NEPA, here, the BLM's issuance of non-NSO leases is foreclosing options in the future without first completing a site-specific NEPA analysis.

[164] BLM Br. at 56 (BLM simply asserts that the consequences would be disruptive without providing any specific basis); CPAI Br. at 50, 52.

[165] CPAI Br. at 52–53.

[166] *Cal. Cmtys.*, 688 F.3d at 993–94.

[167] *Id.*

[168] *Id.*; *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995) (declining to vacate a rule when doing so could lead to the extinction of a species).

analysis and take a hard look prior to leasing — are not remedied by leaving the decision and leases in place on remand.[169] CPAI also asserts that BLM's management of the Reserve will be disrupted because the agency will have to undertake duplicative tasks at public expense.[170] A site-specific analysis is not a duplicative task, as one has not yet been completed.[171] This argument also presumes that the action after NEPA review will be the same; it should be rejected for the same reasons that BLM's NEPA violations are not "minor."[172] Instead, BLM will be able to exercise its discretion to either issue NSO leases or conduct a site-specific analysis for the lease sale.

In sum, BLM and CPAI have not met their burden to show that this Court should deviate from the default APA remedy of vacatur. BLM's NEPA violations are serious and there are not sufficiently disruptive consequences to support leaving the decision and leases in place. The decision and leases should be vacated.[173]

CONCLUSION

Based on the foregoing, the Court should grant Northern Center's Motion for Summary judgment, void any leases or other approvals related to the lease sale, and enter a declaratory judgment that BLM was obligated to analyze the potential site-specific and direct, indirect, and cumulative impacts in a NEPA analysis prior to the lease sale.

Respectfully submitted this 7th day of August, 2018.

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[169] *See KS Wild*, 109 F. Supp. 3d at 1246 (rejecting economic arguments and ordering vacatur because the economic impacts were not similar to those in *California Communities*).

[170] CPAI Br. at 53.

[171] *See supra* Part II.B.

[172] *See supra* notes 150–55 & accompanying text.

[173] *See, e.g.*, *Pit River Tribe*, 469 F.3d at 788 (holding that lease extensions must be undone due to NEPA violations); *San Juan Citizens All. v. Bureau of Land Mgmt.*, 2018 WL 2994406, at *20 (D.N.M. June 14, 2018) (vacating NEPA decision and oil and gas leases).

CERTIFICATE OF SERVICE

I certify that on August 7, 2018, I caused a copy of PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

s/ Suzanne Bostrom
Suzanne Bostrom