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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC,
et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants,

and

CONOCOPHILLIPS ALASKA, INC., et al.,

Intervenor-Defendants.

Case No. 3:23-cv-00058-SLG

**NAQSRAGMIUT TRIBAL COUNCIL'S MOTION FOR LEAVE TO FILE BRIEF
OF AMICUS CURIAE**

The Naqsrarmiut Tribal Council respectfully moves this Court to enter an order allowing the Naqsrarmiut Tribal Council to file the brief of amicus curiae lodged with this motion. Amicus Curiae, Naqsrarmiut Tribal Council (hereafter Tribal Council), is the Tribal government for the Nunamiut people of the Village of Anaktuvuk Pass. The Community is a federally recognized Indian Tribe (88 Fed. Reg. 2112, Jan. 12, 2023). The Tribal Council’s amicus brief supports the plaintiffs’ challenge to the authorization of the Willow Master Development Plan (“Willow Project”) by addressing the importance of caribou to people of the Community, their livelihoods, and their culture, and the devastating impact the Willow Project will have on the region’s caribou populations.

“The district court has broad discretion to appoint amici curiae,” and amicus briefs should normally be allowed “when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”

Alaska R.R. Corp. v. Flying Crown Subdivision Addition No. 1 & Addition No. 2 Prop. Owners Ass’n, No. 3:20-CV-00232-JMK, 2021 WL 1112382, at *3 (D. Alaska Mar. 23, 2021) (citations omitted). It is impossible to overstate the importance of Alaska Native subsistence uses of wild game and fish resources and the Alaska Native knowledge and indigenous customs and traditions inexorably tied to these practices. Alaska Natives have been stewards of these resources since time immemorial; this stewardship is a core element of Alaska Native self-determination. The Community, in particular, identifies as “Caribou People”—a people for whom caribou (tuttu) are not only their livelihood and physical survival, but also closely and deeply tied to their spiritual existence, traditions, and culture. Having traveled and lived with caribou since time immemorial, the

historically nomadic (or semi-nomadic) members of the Community have expert knowledge of caribou behaviors and ecology as well as of the landscape. Located far from any coast, the well-being of the Community is even more closely interwoven with the well-being of caribou than other Villages in Alaska. The Community is uniquely situated to understand and explain the impacts on caribou from activities and changing circumstances, such as oil and gas exploration and development and climactic changes.

At issue in this litigation are the Defendants' decisions to allow the Willow Project, with its decades-long plan for development, in the National Petroleum Reserve-Alaska ("Reserve"). The Reserve, with 23 million acres, is the largest single swath of public lands in the United States, and one of the wildest. The Reserve is home to numerous species of cultural importance to the region's tribes, and most importantly for the Community, it is essential habitat for Barren Ground Caribou (especially the Teshekpuk, Western Arctic, and Central Arctic herds). As a result, the development of the Willow Project will exacerbate the existing ecological physiological, and cultural impacts on the Community from previous oil and gas development in the region. Specifically, the Willow Project's three drill sites, miles of gravel roads, central processing facility, operations center, airstrip, and hundreds of miles of ice roads all have the potential to cause further direct and indirect impacts on caribou movements, and by extension to the Anaktuvuk Pass Community. Moreover, the Willow Project's potential to produce 576 million barrels of oil, resulting in an estimated 260 million metric tons of combined direct and indirect greenhouse gas emissions over 30 years, will add to the impacts on caribou

migration and dispersion patterns as a result of anthropogenic-caused climate change that the Community has already witnessed.

The historic and current perspective that the Tribal Council brings to the Court's attention, and the focus of its amicus brief on the history and importance of caribou to the people of Anaktuvuk Pass, will provide the court with additional relevant information on the possible direct and indirect implications of the case. Because caribou are woven into the culture, the modern-day decrease in herd size, the disruption in migration paths, and other impacts of a changing climate, imperil this Tribe's ability to practice its subsistence practices and to pass down their culture, traditions and skills to the next generations. Despite the significant adverse effects on the caribou that are integral to the Community's subsistence way of life and traditions that have survived thousands of years, the federal government failed to consult with the Community about the Willow Project. As a result, the Community's concerns about the effects of the Willow Project have not been heard and it is clear that BLM does not understand the impacts of the Willow Project on their subsistence way of life, on their culture and traditions, and on caribou.

The Tribal Council, through its briefing, seeks to add value to the Court's evaluation of the issues presented by the parties to this case. Its brief offers a different perspective on the impact of the legal issues before the Court, and will assist the Court by providing insights and facts on the impact of the federal decisions at issue. BLM failed to meet its commitments and obligations when it excluded the Village of Anaktuvuk Pass from its consultation and engagement efforts during the assessment and permitting of the Willow Project. These failures have led BLM to overlook or ignore, the direct, indirect,

and cumulative impacts of the Willow Project on the Community, and fail to take the steps necessary to protect the Community's subsistence practices.

For these reasons, the Tribal Council is qualified to be an amicus in this case, and the Court should grant this motion, allow Tribal Council to file an amicus brief, and accept the brief filed herewith.

Respectfully submitted the 28th day of July, 2023.

/s/ Melissa A. Hornbein

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2023, a copy of the foregoing was served by electronic means and all counsel of record by the Court's CM/ECF system.

s/ Melissa A. Hornbein
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BRIEF OF AMICUS CURIAE NAQSRAGSMIUT TRIBAL COUNCIL

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INTRODUCTION

The Village of Anaktuvuk Pass (the Community) is a federally recognized Indian Tribe. 88 Fed. Reg. 2112 (Jan. 12, 2023). Amicus Curiae, Naqragmiut Tribal Council, is the Tribal government for the people of the Village of Anaktuvuk Pass.

The Community has approximately 425 residents, the vast majority of whom are Nunamiut.¹ The Nunamiut identify as “Caribou People”—a people for whom caribou (tuttu) are not only their livelihood and physical survival, but also closely and deeply tied to their spiritual existence, traditions, and culture. Having traveled and lived with caribou since time immemorial, the history and survival of the people of Anaktuvuk Pass are profoundly interconnected with caribou and the well-being of caribou. Unlike their relatives closer to the coast, members of the Anaktuvuk Pass Community do not also hunt whales, seals, and fish, but rely almost exclusively on caribou for their subsistence. The Community has expert knowledge of caribou behaviors and ecology. Indeed, these nomads (or semi-nomads) were so familiar with caribou that they could see the world through the eyes of caribou and predict where the caribou would go and how they would respond to different circumstances. Due to its long history with and deep knowledge of caribou, the Community is uniquely situated to understand and explain the impacts on caribou from oil and gas exploration and development and climate change.

The Willow Master Development Plan (Willow Project or Project), is in the National Petroleum Reserve-Alaska (Reserve), an expansive and wildlife-rich landscape.

¹ U.S. Census Bureau (2020) Total population Anaktuvuk Pass city, Alaska, available at <https://data.census.gov/table?q=anaktuvuk+pass> (last visited July 28, 2023).

The 23-million-acre Reserve is the largest and arguably wildest contiguous swath of public land in the United States. The Reserve provides habitat for polar bears, brown bears and hundreds of thousands of birds, and, most significantly for the Community, essential habitat for the Barren Ground Caribou herds of Teshekpuk, the Central Arctic, and the Western Arctic. The Willow Project will have significant adverse effects on the herds that are integral to the Community's subsistence and traditions that have survived thousands of years; yet the federal government failed to consult with the Community.

Executive Order 13175 provides that the Department of Interior and Bureau of Land Management (BLM) must consult with federally recognized Tribes when federal actions or decisions may impact them.² Further, BLM must “proactively provide opportunities for meaningful involvement of minority populations, low-income populations, and Tribes in BLM decision making processes that affect their lives, livelihoods, and health. This commitment is in addition to the BLM's responsibilities to consult with federally recognized Tribes.”³ BLM failed to meet these commitments and obligations when it excluded the Village of Anaktuvuk Pass, deeply affected by this decision, from its consultation and engagement efforts.⁴

² 65 Fed. Reg. 67,249 (Nov. 9, 2000).

³ *Environmental Justice Implementation*, BLM Instruction Memorandum 2022-059, #4, available at <https://www.blm.gov/policy/im2022-059> (last visited July 28, 2023).

⁴ BLM claims to have “initiated the government-to-government with the Naqsrarmiut Tribal Council. See BLM, Willow Master Development Plan Supplemental Environmental Impact Statement FINAL Volume 1: Executive Summary, Chapters 1 through 5, Glossary, and References (Jan. 2023) (FSEIS), ES-19. However, the Naqsrarmiut Tribal Council is notably absent from Table 3.17.2 of FSEIS (“Summary of BLM's Alaska Native consultation meetings for the Willow Supplemental Environmental

Because BLM failed to consult with the Community (notwithstanding an explicit request from the Tribal Council⁵), the Community's concerns about the effects of the Willow Project have not been heard. While the previous Administration did meet with the Tribe regarding the earlier iteration of the Willow Project, the BLM failed to engage with the Tribal Council in its decision-making process on remand despite acknowledging that the current Willow Project "may significantly restrict subsistence use" of caribou and that "cumulative effects of current and future activities may significantly restrict subsistence uses for Nuiqsut due to a reduction in availability of caribou and furbearers and due to limitations on subsistence user access to the area."⁶

BLM's failure to meaningfully consider impacts on the Community is particularly puzzling given its knowledge of how profoundly reliant the Community is on sharing with communities like Nuiqsut.⁷

Impact Statement"). *Id.*, at 350; *see also* BLM, Willow Master Development Plan Supplemental Environmental Impact Statement Record of Decision (Mar. 2023), 16 ("Record of Decision") (describing BLM's consultation action, without reference to the Naqragmiut Tribal Council).

⁵ Exhibit 1, Letter from Tribal Council requesting consultation.

⁶ *See* FSEIS, App. G (Alaska National Interest Lands Conservation Act Section 810 Analysis); Record of Decision, 16-17.

⁷ "Sharing is one of the core values of Iñupiaq society and culture, which serves to maintain and strengthen familial and social ties both within and between communities on the North Slope." FSEIS at 303; *See also id.* at 338 ("Extensive sharing networks for Kaktovik and Wainwright documented during the study included other North Slope households such as Utqiagvik, Atkasuk, and Anaktuvuk Pass.").

To ensure the resolution of this litigation includes information regarding the concerns about and the impacts of the Willow Project on the Community, the Naqsrarmiut Tribal Council of the Village of Anaktuvuk Pass now files this amicus curiae brief.

ARGUMENT

A. Interests of the Anaktuvuk Pass Community.

The Village of Anaktuvuk Pass came into existence in 1949, when the first five families of this Community settled there. The elders decided this pass in the Brooks Range was a good location for a number of reasons, including not only its beauty, but, most importantly, because the pass was a regular migration path for the Teshekpuk, Western Arctic, Central Arctic, and at times the Porcupine caribou herds. This location allowed the community to settle in one place, build homes, and wait for the herds to move through their home valley. Many of the elders in the community today took that long walk to settle in Anaktuvuk Pass. The last nomadic families to settle in Anaktuvuk Pass, moving away from the nomadic way of life, did so in 1964.

Community elders seek to continue to pass down their knowledge and skills regarding their deep and intricate relationship with caribou to the next generations. This includes knowing how to hunt caribou, sew kamiks (traditional boots made from caribou hides) and parkas that allow the people to survive a dauntingly extreme winter climate, speak the language (a dialect of Iñupiaq), how to use every single part of the caribou, and more. Because caribou is woven into the culture, the modern-day decrease in herd sizes, the disruption in migration paths, and the changing climate all imperil this Community's ability to pass down these traditions and skills to future generations.

For example, the celebratory treat of akutaq (or akutuq) has not been made in the Community since 2005. Akutaq requires an abundance of fat from bull caribou in the fall, which is then whipped into a frozen treat flavored with dried and ground meat. The Community has been unable to harvest bulls with adequate fat for this traditional celebratory delicacy for 18 years. As a result, the youth in the Community have never experienced—or learned how to make—akutaq.

Hunting caribou makes the people kind, humble, generous, and spirited. The practice of delivering meat to elders upon the first successful hunt of the season is an example of the strongly-held Nunamiut value of sharing to ensure collective well-being. While sharing with elders continues to be practiced in the Community, young hunters must now travel increasingly far distances to harvest caribou. With the resulting heightened risk, additional time, and fuel expense (gas is currently around \$8.00/gallon), hunting caribou is becoming harder and harder. In the last few years, when the Community struggled to find adequate caribou, Nuiqsut (a village with which the Community has close ties, a long sharing history, and many relatives) invited the Community to hunt caribou in their area. The Community chartered planes to fly hunters north to Nuiqsut, so they could hunt where the caribou were.⁸

The Community is deeply concerned about the increasing disturbances impacting caribou. Having lived and moved with caribou, its members have always understood how sensitive caribou are. Indeed, traditional communal hunting practices—which many

⁸ FSEIS at 338. *See also id.* at 373, noting a rate of food insecurity of 54% for Anaktuvuk Pass.

believe were learned from wolves—involved building fences of iñuksiat (scarecrow-like structures, made of stone and willow branches) to scare caribou into lakes, rivers, or corrals to facilitate the harvest. Children were taught to stay quiet to avoid disrupting the migration of caribou herds. The Nunamiut traveled using sleds with dogs, and they understood that even the dogs' barks could disturb caribou, so they taught their dogs to be quiet when caribou were nearby. From millennia of hunting and moving with caribou, the Community knows to avoid hunting the leaders of herds because doing so would cause the entire herd to change its migration path. People in the Community have observed that disruption can cause caribou to either stop their migration or choose a different path—a change can last for 20 or more years.⁹

Indeed, the extensive oil and gas development already occurring in the region is significantly impacting the Barren Ground Caribou. The addition of the massive, decades-long industrial activity associated with the Willow Project will only exacerbate existing impacts through the building of roads, gravel mines, vehicle traffic, drill pads, pipelines, air traffic and associated activities.

⁹ Along with many others, a recent study led by scientists from the U.S. Geological Survey corroborated the Community's traditional ecological knowledge that caribou are sensitive to disturbance. Johnson, H. E., et al. (2020). Caribou Use of Habitat Near Energy Development in Arctic Alaska. *The Journal of Wildlife Management*, 84(3), 401-412, available at <https://doi.org/10.1002/jwmg.21809> (last visited July 28, 2023). That study found that even after several decades around oil and gas industrial facilities, caribou continue to show an aversion to and will avoid such facilities. *See also Even after decades, caribou still aren't fully used to oil development, scientists say*, Arctic Today, Jan. 23, 2020, available at <https://www.arctictoday.com/even-after-decades-caribou-still-arent-fully-used-to-oil-development-scientists-say/> (last visited July 28, 2023).

The cumulative impacts of oil and gas development on the Community are substantial and affect their way of life. Since the Trans-Alaska Pipeline System was built in the 1970's, the Porcupine Herd no longer passes through Anaktuvuk Pass. Similarly, after the Dalton Highway was built, and especially since it was opened to the public, the Community has continued to witness a decrease in caribou. While elders in the Community once saw hundreds of thousands of caribou migrate through the Pass, after major oil and gas development started in the north, they more regularly see only hundreds, which is painful for them to witness. Many members of the Community believe that if the caribou go away everything else will likewise suffer and disappear.

Additionally, with a warming climate, the Community has seen changes in caribou behaviors. While they once saw the major fall migration between August and October, it now more often occurs between November and January. This change in migration timing causes more hardship to the Community during hunting season and increases food insecurity. Every year now, the people worry and wonder if the caribou will come through, or if they will need to charter a plane to travel elsewhere to hunt. Development of the Willow Project only exacerbates these concerns.

B. BLM Ignored the Anaktuvuk Pass Community's Subsistence Interests.

Despite the Community's consistent efforts to explain why the Willow Project, and other similar developments in the region, could endanger their livelihood and culture, BLM has failed to meet its obligations to consult with the Tribe or attempt to address their concerns. This failure has led to BLM's breach of its obligations under the National Environmental Policy Act (NEPA), the Alaska National Interest Lands Conservation Act

(ANILCA), and the Naval Petroleum Reserves Production Act of 1976 (NPRPA), and to BLM ignoring the direct, indirect, and cumulative impacts of the Willow Project on a community that is uniquely reliant on the Barren Ground Caribou.

1. The Anaktuvuk Pass Community is already suffering impacts to its subsistence practices and culture as a result of existing development.

As explained above, the Community's existence is intertwined with that of the Barren Ground Caribou herds of the North Slope, and has been for millennia.¹⁰ Thus, impacts to caribou and their habitat, even distant from Anaktuvuk Pass, can have disproportionate impacts on the Community. As such, the discovery of oil and the subsequent establishment of the Reserve represented the beginning of fundamental changes in the Community's way of life.

In particular, since the discovery of oil in Prudhoe Bay in 1968 and 1969, the accretion of oil and gas infrastructure on the North Slope has had a profound impact on all Inupiat communities—not least that of Anaktuvuk Pass. The proliferation of pipelines,

¹⁰ The BLM has acknowledged this reliance and the potential for disproportionate impacts on the Nanamiut in its 2020 Integrated Activity Plan and Final Environmental Impact Statement for the National Petroleum Reserve, available at https://eplanning.blm.gov/public_projects/117408/200284263/20020342/250026546/Volume%201_ExecSummary_Ch1-3_References_Glossary.pdf (last visited July 28, 2023). There, BLM noted that “[t]he community of Anaktuvuk Pass has one of the highest reliances on caribou of all the study communities and relies on the migration of caribou from areas of high hydrocarbon potential into traditional harvesting areas; *therefore, this community could be particularly vulnerable to changes in the availability of caribou and the resulting detrimental changes to diet and nutrition.* The peripheral communities listed in the Affected Environment would more likely experience indirect impacts on subsistence uses if there are changes to the availability or abundance of terrestrial subsistence resources resulting from NPR-A development.” *Id.* at 3-372 (emphasis added).

roads, and other production infrastructure has had direct physical and psychological impacts on the Community by instigating changes in members' traditional diets and interrupting cultural and religious customs surrounding their subsistence hunts, as well as the transmission of those customs to younger generations. The development of the Willow Project represents yet another inflection point for this community because of its enormous scope and growth-inducing effects; such a turning point could well mean the Community's subsistence culture will no longer be sustainable.

Compounding the changes wrought by oil and gas infrastructure are those caused by sport-hunters who can access new areas on the gravel and ice roads built by industry. As previously discussed, the Nunamiut people of Anaktuvuk Pass possess unique traditional ecological knowledge that allows them to employ hunting practices that minimize disturbance to the caribou migration. Sport hunters lack this knowledge of—or interest in—the traditional migration pathways of caribou and regularly shoot the lead animal or animals, taking the rack and leaving the meat. These practices deflect the herds away from their traditional migration pathways and reduce the individuals available for subsistence hunting, making subsistence even more challenging for the Community.

2. The Willow Project Will Exacerbate Existing Negative Impacts to Barren Ground Caribou Herds on which the Community Relies.

Construction of the Willow Project will exacerbate these existing ecological physiological, and cultural impacts on the Community. The Project's three drill sites, miles of gravel and ice roads, central processing facility, operations center, and airstrip all have the potential to cause further direct impacts to caribou movements, and by

extension, to the Anaktuvuk Pass Community. In addition, given the Willow Project's potential to produce 576 million barrels of oil, resulting in an estimated 260 million metric tons of combined direct and indirect greenhouse gas emissions over 30 years, it is difficult to imagine that the Project will not also contribute substantively to climate-related impacts on both the Community and the caribou herds on which it depends. BLM, for all practical purposes, ignored the project's potential to contribute to the worsening of such impacts and the compounding effect of the Willow Project on the Community.

NEPA requires BLM to take a "hard look" at the consequences of its proposed actions. *Se. Alaska Conservation Council v. United States Forest Serv.*, 468 F. Supp. 3d 1148, 1152 (D. Alaska 2020); 42 U.S.C. § 4332(2)(C). That analysis must include consideration of the environmental impacts and potential adverse effects of such actions, including their cumulative effects and the consideration of potential measures for their mitigation. 40 C.F.R. §§ 1502.1, 1502.14, 1502.16. The analysis of cumulative impacts must include the impacts of the proposed action together with the impacts of past, present, and reasonably foreseeable activities. *Id.* § 1508.1(g)(3). As demonstrated by the FSEIS, and the Community's disregarded plea for consultation, BLM omitted this critical step.

Of equal importance, BLM also disregarded the Project's growth-inducing effects and those effects' impacts on the Community. The Project proponent, Conoco Phillips, has described Willow as "the Next Great Alaska Hub," and has identified a potential for as many as 3 billion barrels of oil equivalent from nearby projects that would rely on

Willow's infrastructure. The climate and landscape effects of such development would further compound those of the Willow Project.

BLM must evaluate such growth-inducing effects independent of its overall cumulative effects analysis, even where such effects are uncertain. *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975); *see Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1139 (9th Cir. 2011) (even where the stated purpose of a runway expansion project was not to increase air traffic, the agency was required to analyze the potential that such effects could occur as a result of the runway's increased capacity). Here, in contrast to *Barnes*, BLM has been clear that the project *will* facilitate future development. As an initial matter, the West Willow Project is explicitly identified by BLM as a Reasonably Foreseeable Future Action that was included in the near-field modeling analysis.¹¹ BLM has also acknowledged that there are 189 active leases to the south and west of Willow, and that:

[T]he existence of the Willow Project makes exploration of these areas more attractive, since the Willow Project infrastructure would enable access to the area and lower the costs of a development should a discovery be made. To the extent that exploration of non-unitized leases south and west of Willow results in a discovery, development of that oil and gas would be made more likely by the existence of the Willow Project.¹²

Yet BLM neglected to meaningfully analyze the impacts of such future development on the culture and subsistence of the Anaktuvuk Pass Community, despite its conclusion in the vacated 2020 analysis for the Project, that “the cumulative effects of past, present and

¹¹ FSEIS at 401, 408.

¹² *Id.* at 401.

reasonably foreseeable future activities, including those outside of NPRA, may significantly restrict uses for Nuiqsut, Utqiagvik, Anaktuvuk Pass, Atkasuk, and Wainwright due to a reduction in the abundance of caribou caused by alteration of their distribution and degradation of habitat....”¹³ This finding is not included in the FSEIS.

BLM is required, as part of its analysis of indirect effects, to examine “growth inducing effects and other effects related to induced changes in the pattern of land use.” 40 C.F.R. § 1508.1(g)(2). The future oil and gas development that could be facilitated—and is admittedly rendered more likely—by the implementation of the Willow Project is likely to have just such growth-inducing effects, which will parlay into further effects “related to induced changes in the pattern of land use.” For the Community at Anaktuvuk Pass, further changes to the Tribe’s traditional patterns of land use would compound the negative impacts the community is already experiencing due to existing oil and gas infrastructure. BLM should be compelled to analyze these impacts before irretrievably committing federal (and Tribal) resources to the Project.

The Community already has significant concerns that if caribou go, everything else supporting their way of life will follow. In light of the massive scale of development the Willow Project represents, and its potential for future growth-inducing impacts, BLM’s analysis of its consequences was woefully inadequate. *See, e.g., Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071-74 (9th Cir. 2002) (cumulative impact analysis must be more than perfunctory; it must provide a useful analysis of past, present,

¹³ BLM, Willow Master Development Plan Final Environmental Impact Statement (August 2020), ES-14.

and reasonably foreseeable future impacts); *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) (“The purpose of an EIS is to insure that the agency considers all possible courses of action and assesses the environmental consequences of each proposed action.”).

BLM’s failure to consider how the Willow Project would contribute to ongoing and new adverse effects on subsistence communities, including that of Anaktuvuk Pass, violates NEPA.

3. BLM Failed to Comply with Statutory Provisions that Protect the Anaktuvuk Pass Community’s Subsistence Interests.

BLM’s decision to authorize the Project also violates substantive protections for the Community’s subsistence interests embodied in ANILCA and the NPRPA

a. Section 810 of ANILCA Requires BLM to Consider Subsistence Interests, including those of the Anaktuvuk Pass Community.

A critical purpose of ANILCA is to preserve and maintain wildlife habitat and populations, and protect subsistence resources and uses. 16 U.S.C. § 3101(b)–(c). In enacting ANILCA, congress recognized the potential for adverse impacts to subsistence uses and the need to prevent such impacts, declaring that the use of Alaska’s public lands “is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands.” *Id.* § 3112(1). ANILCA proactively accords “non wasteful” subsistence uses priority over other uses, and provides that subsistence practices “may not be restricted unless necessary to protect the continued

viability of fish and wildlife populations.” *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (citing 16 U.S.C. § 3114).

Consistent with these principles, the Act’s Congressional Declaration of Findings recognizes that “the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.” 16 U.S.C. § 3111(1). With respect to Alaska Native Tribes, courts have recognized that if Tribes’ access to subsistence resources and uses is “destroyed, so too is their traditional way of life.” *Alexander*, 938 F.2d at 945. This finding mirrors the Community’s belief that if the caribou are destroyed or rendered too few and scattered to hunt, their tribal culture will likewise be eradicated. ANILCA is designed to respond to the fact that subsistence uses are “threatened” by population growth and expanded access to remote areas, and “by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management.” *Id.* at §3111(3).

The threats ring particularly true for the Community, which has witnessed declines in and changes to patterns of caribou availability from oil and gas infrastructure and has been impacted by sport-hunting practices that further imperil its traditional subsistence practices and the availability of the caribou necessary to sustain its members. These are precisely the types of impacts ANILCA is intended to require consideration of and which it is designed, to the greatest extent possible, to ameliorate. BLM failed to fulfill these

purposes as they relate to the Anaktuvuk Pass Community.¹⁴ BLM's disregard for the Community is inconsistent with other recent analyses where it consulted the Community with respect to potential impacts. In particular, BLM's analysis of the Alpine Satellite Development Plan for the Proposed Greater Mooses Tooth One Development Project (GMT-1) resulted in a finding that significant restrictions on subsistence uses for communities, *including* Anaktuvuk Pass, could result from the project, and warranted a positive determination under ANILCA Section 810, 16 U.S.C. § 3120. BLM also held a § 810 hearing in Anaktuvuk Pass for that project.¹⁵ In contrast to Willow's sprawling infrastructure, the GMT-1 project proposed a single drilling pad and gravel road.

When evaluating a prospective use of public lands, Section 810 of ANILCA requires an agency such as BLM to consider potential impacts to subsistence uses, the availability of alternate lands for the proposed use, "alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes." *Id.* § 3120(a). If the results of this evaluation demonstrate that the prospective use of public lands will significantly restrict subsistence uses, the proposed use cannot be permitted until or unless the agency makes a finding that the restriction is necessary and consistent with "sound management principles for utilization of the public lands," that the activity will use the minimum amount of public lands necessary to accomplish the

¹⁴ Again, the absence of Anaktuvuk pass in Table 3.17.2 of the FSEIS is telling.

¹⁵ Final Supplemental Environmental Impact Statement for the Alpine Satellite Development Plan Proposed for the Greater Mooses Tooth One Development Project (October 2014), available at https://eplanning.blm.gov/public_projects/nepa/37035/50835/55578/GMT1_Final_SEIS_Volume_4_Oct_2014.pdf (last visited July 28, 2023).

purposes of the proposed use, and that “reasonable steps” will be taken to minimize adverse impacts” on subsistence uses and resources. *Id.*

BLM determined that *all* action alternatives would cause significant restrictions to subsistence uses. BLM admitted as much when it acknowledged that Alternative E—which purports to reduce infrastructure in the Teshekpuk Lake Special Area—would have “minimal” benefits for subsistence uses, particularly as to the Teshekpuk caribou herd (TCH):

[T]he reduction in impacts to all resources will be minimal. Overall, a slightly smaller percentage of Nuiqsut harvesters (88%) would potentially be affected under Alternative E compared to Alternative B (91%), and the difference occurs specifically among goose hunters. The Project is likely to deflect TCH caribou from areas where Nuiqsut hunters harvest them.”¹⁶

If the only alternatives considered will have undeniably significant and negative impacts on subsistence uses, and more specifically on caribou and the Community, then BLM failed to abide by its commitments and obligations. Not only does this determination indicate an inadequate range of alternatives were considered, but BLM left Anaktuvuk Pass—and the Community’s subsistence uses—out of its analysis altogether.

As previously noted, existing reductions in caribou populations and changes to migration routes caused by a combination of established oil and gas infrastructure, sport-hunting, and climate change impacts have put the Community at risk. In addition, impacts to *any* of the region’s caribou populations have a disproportionate potential to impact the Community’s subsistence uses due to their almost exclusive reliance on caribou—a

¹⁶ FSEIS, App G, p. 35.

reliance that distinguishes the Community from many other North Slope Alaska Native communities. BLM has previously recognized this unique vulnerability of the Community.¹⁷

Because BLM determined that significant restrictions to subsistence activity will result from development under all alternatives for the Willow Project and because it failed to consider any alternatives that would have meaningfully reduced subsistence impacts, thereby satisfying ANILCA's required Tier-2 analysis, its decision to approve the project through adoption of Alternative E was arbitrary. *Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (finding unlawful an agency's failure to consider any alternative that would constrain developer's contractual rights in order to prevent subsistence impacts).

b. BLM Failed to Ensure “Maximum Protection” of the Community’s Subsistence Resources under the NPRPA.

The NPRPA governs BLM's management of the surface values and subsurface resources in the Reserve. 42 U.S.C. §§6501-6508. Because of the Reserve's vital wildlife and subsistence values, the NPRPA requires BLM to consider and protect the “environmental, fish and wildlife, and historical or scenic values” of the Reserve when it authorizes oil and gas activity. 42 U.S.C. § 6503(b); *see also id.* §§ 6504(a) & 6505(b). In fact, the Secretary must impose “conditions, restrictions, and prohibitions” on such activities that “the Secretary deems necessary or appropriate to mitigate reasonably

¹⁷ BLM, National Petroleum Reserve in Alaska Integrated Activity Plan and Environmental Impact Statement FINAL Volume I: Executive Summary, Chapters 1-3, References, and Glossary (June 2020), 3-372.

foreseeable and significantly adverse effects” to those resources. *Id.* § 6506a(b).¹⁸ This broad mandate includes the power to limit or reject a development proposal if impacts are too significant and cannot be mitigated. *Id.*; 43 C.F.R. § 2361.1(e)(1) (“after consultation with... Native organizations,” BLM “may limit, restrict, or prohibit use of and access to lands within the Reserve”); *id.* § 3162.3-1(h)(2) (BLM may “[r]eturn the application” for a permit to drill and indicate the “reasons for disapproval”); *id.* § 3135.2(a)(1), (3) (BLM may suspend production “in the interest of conservation of natural resources” or to mitigate “reasonably foreseeable and significantly adverse effects on surface resources”); *N. Alaska Env’t Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006) (“The government can condition permits for drilling on implementation of environmentally protective measures, and we assume it can deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available.”).

Further, the NPRPA requires the Secretary of the Interior to designate certain “Special Areas,” (and authorizes the Secretary to designate additional areas) of “subsistence, recreational, fish and wildlife, or historical or scenic value.” 42 U.S.C. §6504(a). Under this authority, the areas around Teshekpuk Lake and the Colville River,

¹⁸ Consistent with this broad statutory authority, the rights granted in a lease are explicitly subject to limitation under the provisions of the NPRPA. The lease terms specifically allow BLM to condition and restrict development by “specify[ing] rates of development and production” and requiring measures to “minimize adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users.” BLM’s executed leases for the Willow Project, as provided by BLM in *Center for Biological Diversity et al. v. BLM et al.*, 555 F. Supp. 3d 739, 805 (D. Alaska 2021) (No. 3:20-cv-00308-SLG), Dkt Nos. 118, 118-2, 118-3, and 118-4 (July 16, 2021), at 6, 7, ¶¶4, 6.

among others, have been designated as Special Areas that merit “maximum protection.” *Id.*¹⁹ The Colville River provides summer habitat (for food and insect relief) for the Western Arctic caribou herd, while the Teshekpuk Lake caribou herd and Central Arctic caribou herd use the Colville River as winter habitat in some years. The Teshekpuk Lake Special Area, with the largest lake in Arctic Alaska, provides essential habitat areas and calving grounds for the Teshekpuk Lake caribou herd.²⁰ Both of these Special Areas are important habitat for the Teshekpuk, Western Arctic, and Central Arctic caribou herds that the Anaktuvuk Pass Community relies on for its subsistence. BLM’s approval of the Willow Project would expand development into both—currently undeveloped—Special Areas. BLM has not explained how allowing for such development, including constructing a well pad in the Teshekpuk Lake Special Area, meets its obligation to afford the area “maximum protection” as required under the NPRPA. Rather, it justified the decision to allow development within these special areas based on an unreasonably restricted and unsupported reading of 43 C.F.R. § 3137.71(b)(1), which BLM asserts limits its authority to consider an alternative that would strand an “economically viable” quantity of oil.²¹ There is simply no support in 43 C.F.R. § 3137.71(b)(1)—which applies

¹⁹ 42 Fed. Reg. 28,723 (June 2, 1977).

²⁰ *Id.* and expanded in 1999, 64 Fed. Reg. 16,747 (Apr. 6, 1999).

²¹ BLM’s alternative screening criteria included a “fully develop” criterion that notes: “BLM may not permit a development proposal that would strand an economically viable quantity of oil.” BLM eliminated 16 alternatives from further consideration and analysis based on this screening requirement. *See* BLM, Willow Master Development Plan Supplemental Environmental Impact Statement DRAFT Volume 1: Executive Summary, Chapters 1 through 5, Glossary, and References (June 2022), 6-7. In the FSEIS, this concept was buried deep in an appendix, and was phrased merely as an impermissibility

to lessees, not BLM—for this proposition. Thus, BLM’s rejection of any alternative that would remove development from the Special Areas is arbitrary, capricious, and unsupported by the record. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983).

Until now, industrial activity in the reserve has been concentrated in its northeastern region. The Willow Project, however, would expand industrial activity into the Western Arctic. Moreover, approval and construction of the Project would ensure that oil and gas extraction will continue for decades (not even considering the growth-inducing effects of the Willow Project, which render more likely the expansion of oil and gas infrastructure even further westward in the Reserve, additional greenhouse gas pollution, and increased direct and indirect impacts). The hundreds of millions of barrels of oil and the hundreds of millions of metric tons of direct and indirect greenhouse gas emissions that will result from the Project will guarantee exacerbation of climate change impacts that are already harming caribou and the people of Anaktuvuk Pass.

BLM has therefore failed to implement its authority to “minimize adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses.” This failure, along with BLM’s inappropriate deference to ConocoPhillips’ lease rights at the expense of compliance with the NPRPA’s requirement to maximize protection of the Teshekpuk and Colville River Special Areas, will have significant negative impacts on the lands, cultural and wildlife resources that the residents of

to “strand economically viable quantities of recoverable oil, dispensing with the “fully develop” language but retaining the concept. FSEIS, App D1 at 37.

Anaktuvuk Pass rely on for their physical, spiritual, cultural well-being. BLM's approval of the Willow Project fails to comply with its obligation to accord "maximum protection" to these areas.

CONCLUSION

The challenges facing the Community of Anaktuvuk Pass are already extensive. Existing oil and gas development in the North Slope, along with climate change, have already significantly impacted the Community's ability to rely on the caribou that have sustained its people and their ancestors for thousands of years. ANILCA and the NPRPA prioritize and maximize protections for subsistence uses. The Department of Interior's and BLM's policies, along with Executive Order 13175, espouse a commitment to consult with Tribes and engage with communities impacted by federal agency decisions on public lands. Here, with these commitments unfulfilled and promises broken, the Community of Anaktuvuk Pass is suffering the consequences. BLM's approval of the Willow Project should be vacated.

Respectfully submitted this 28th day of July, 2023.

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CERTIFICATE OF SERVICE

I certify that on July 28, 2023, I caused a copy of the Amicus Brief, 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.

/s/ Melissa A. Hornbein
Melissa A. Hornbein

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 5,666 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits of Local Civil Rule 7.4(a)(2). Respectfully submitted this 28th day of July, 2023.

/s/ Melissa A. Hornbein
Melissa A. Hornbein

Exhibit 1

March 3, 2023

Deb Haaland
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Steve Cohn
Alaska State Director
U.S. Bureau of Land Management
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Dear Officials:

On behalf of the community and people of Anaktuvuk Pass, the Nunamiut people, we write to request government-to-government consultation. We have learned of the potential imminent approval of ConocoPhillips' Willow Master Development Plan in the National Petroleum Reserve-Alaska (Reserve) and are writing to implore you to uphold your obligations to consult with our federally recognized Tribal Government,¹ before a decision is made on whether to approve the Willow project.

The Department of the Interior has committed to "consult with tribes on a government-to-government basis whenever [the Department] plans or actions have tribal implications."² The Bureau of Land Management (BLM) is similarly "charged with engaging in regular and meaningful consultation and collaboration with federally recognized tribes in the development of Federal policies and decisions that have tribal implications."³

When the Willow project was proposed last time, under the prior administration, your offices recognized the tribal implications of the project and met with our community twice before the project was approved.⁴ That effort at consultation, through two meetings, was not sufficient, but at least some effort was made last time around to recognize our Tribal Government and the concerns of our people. There has been no similar effort this time. **We ask you to not finalize your decision about whether to approve the Willow project until we have had an opportunity**

¹ 88 Fed. Reg. 2112 (Jan. 12, 2023).

² Dept. of the Interior, Department Manual, Policy on Consultation with Indian Tribes and Alaska Native Corporations at 2, ¶4.4 (Nov. 9, 2015).

³ BLM, BLM Manual 1780 Tribal Relations (P) at 1-1 (Dec. 15, 2016).

⁴ See BLM, Willow Master Development Plan, Final Supplemental Environmental Impact Statement, Vol. 8, App. B.1 at 1, Tbl. B.1.1. (Jan. 2023) (FSEIS); *id.*, App. B.2 at 1, Tbl. B.2.1.

for meaningful government-to-government consultation, and to express the concerns of our people about the potential impacts of BLM's decision.

We are deeply concerned about the potential implications the Willow project could have for our people, our community, and our Tribal Government. Residents of Anaktuvuk Pass provided written comments to BLM last time the project was proposed, imploring BLM to come back to the community for further discussion and to provide bigger maps and Caribou migration data, and responding thoughtfully to BLM's request for ideas of how impacts from Willow could be reduced or mitigated. Residents of our community described concerns about potential impacts to our primary diet, Caribou, to global warming, and to our way of life. BLM has not come back to our community this time and we feel our people and their concerns have been overlooked.

The Barren Ground Caribou are of immense importance to our people, to our survival, and to the preservation of our culture and tradition. These Caribou include those in the Teshekpuk, Western Arctic, and Central Arctic herds. Caribou have been the primary diet of our people since time immemorial. We have been hunting and using Caribou for thousands of years to feed and clothe our people and to make tools and sinew to build and maintain our equipment and our clothing. Caribou are vital to our culture, to our livelihood, and to our physical and spiritual wellbeing.

We are deeply concerned that impacts to Caribou from the Willow project could reduce the Caribou that are available for our hunters near our community, and in our traditional hunting and trading grounds, which includes the areas affected by the Willow project. For the past several years, the Caribou have not been coming to the hunting grounds near our community like they used to. We feel oil and gas projects in the Reserve could be deflecting Caribou from their traditional migration paths and causing increased mortality. For decades we have watched the oil and gas activities march further west from Prudhoe Bay, and we have grown increasingly worried about how these activities affect Caribou. We think the Willow project and the projects that could be built from Willow could continue to harm Caribou, to deflect them, and to contribute to the decreasing number of Caribou available for our people.

Our hunters have had to travel further and further and have been forced to hunt at times of the year that are not as good for our people, like in the winter when our hunters must take cows instead of bulls. In recent years, we have had to pay for our hunters to go to Nuiqsut to hunt with their residents and our relatives, and to try and bring Caribou home to our people. This practice, sending our hunters away from their families and our community to Nuiqsut, seems like the new normal.

Your Final Supplemental Environmental Impact Statement found, under your obligations pursuant to the Alaska National Interest Lands Conversation Act, that the Willow project's action alternatives, and the cumulative case, "may significantly restrict subsistence use" for the

community of Nuiqsut.⁵ We hunt and use the same Caribou as our friends and relatives in Nuiqsut. We hunt with them to try and preserve the health of our community and our way of life. Our communities have traded with, and supported, one another since time immemorial. Our people, the Nunamiut people, have depended on the Caribou and the places they roam, from here to Nuiqsut and beyond, for thousands of years and to this day. We are worried that Willow and other oil and gas projects will significantly restrict our subsistence uses too, and cause harm to our community and to our people.

We request government-to-government consultation with you to discuss the potential harms to our community from the Willow project. We ask you to consult with us before you make a decision on whether to approve Willow.

Sincerely,



Charlie Sollie Hugo
President
Naqragmiut Tribal Council

CC:

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⁵ FSEIS, Vol. 15, App. G.