

ERIC B. FJELSTAD
PERKINS COIE LLP
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
Telephone: 907.279.8561
EFjelstad@perkinscoie.com

STACEY BOSSHARDT (*Pro Hac Vice*)
DC Bar No. 458645
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
SBosshardt@perkinscoie.com

***Attorneys for Intervenor-Defendant
Arctic Slope Regional Corporation***

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

Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.
No. 3:23-cv-00058-SLG, 3:23-cv-00061-SLG

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT, et al.,

Defendants,

and

CONOCOPHILLIPS ALASKA, INC., et al.,

Intervenor-Defendants.

Case No. 3:23-cv-00061-SLG

**INTERVENOR-DEFENDANT ARCTIC SLOPE REGIONAL CORPORATION'S
SUMMARY JUDGMENT BRIEF**

Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.

No. 3:23-cv-00058-SLG, 3:23-cv-00061-SLG

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. ASRC’s Interest in the Willow Project	2
A. Arctic Slope Regional Corporation.	2
B. Benefits to ASRC’s Iñupiat Shareholders from the Project.	6
1. Contracting Opportunities for ASRC’s Subsidiaries.	7
2. Employment of ASRC Shareholders.	9
3. Benefits to ASRC Shareholders from Tax and Royalty Payments that Fund Government Services in the North Slope Region.	10
4. Benefits from Infrastructure Associated with the Project.	11
5. Affirmation of Environmental Protections Included in the Project Approvals.	12
II. The Court Should Reject Plaintiffs’ Challenges to the Federal Agency Decisions Authorizing the Project.	13
III. If the Court Identifies Any Need for Further Action by the Federal Defendants to Meet Statutory Requirements, the Court Should Not Vacate the Existing Approvals While the Federal Defendants Comply with the Court’s Instructions.	18
CONCLUSION	22

INTRODUCTION

Arctic Slope Regional Corporation (“ASRC”) intervened in these cases to protect the interests of its approximately 13,900 Iñupiat shareholders, many of whom live in the North Slope region where the Willow project will be located. ASRC’s mission is to actively manage its business, lands, resources, and investments to enhance Iñupiat cultural and economic freedom, with continuity, responsibility, and integrity. To fulfill this mission, ASRC is committed to responsible development of natural resources in a manner that respects Iñupiat subsistence values while ensuring proper care of the environment, habitat, and wildlife.

ASRC’s extensive involvement in the administrative process for the Project exemplifies how it pursues the two aspects of its mission in parallel: developing a sustainable North Slope economy and protecting the Iñupiat way of life. Plaintiffs’ lawsuits threaten that mission by seeking to cancel a project that would bring substantial and needed benefits to ASRC’s shareholders. As stated by ASRC’s President, Rex A. Rock:

The Project represents a durable addition to the North Slope economy. It provides for responsible development, increased employment opportunities, and an important source of regional tax revenue while addressing the needs of regional subsistence users. It also includes strong mitigation measures to protect the environment.¹

Informed and shaped over the course of five years of public meetings, comment periods,

¹ Declaration of Rex A. Rock, Sr. (“Rock Decl.”) ¶ 59.

and consultation with ASRC and its shareholders, the Willow Project is environmentally responsible and economically critical to the North Slope. It will bring tax revenues, job opportunities, increased dividend income, and needed infrastructure to a region where economic opportunity is scarce, and economic conditions remain incredibly challenging after the Covid-19 pandemic.

ARGUMENT

I. ASRC's Interest in the Willow Project

Other parties and amici will present a wide range of arguments and views on the outcome of this lawsuit, including the perspectives of federal, state and local governments, environmental advocacy groups, occasional visitors to the Arctic, and even a clothing retailer. ASRC presents the unique perspective of an Alaska Native corporation that is owned by Iñupiaq people who make their homes on the North Slope. ASRC's unquestioned judgment is that the Willow project is vital to their interests, and it complies with all relevant statutes. ASRC's assessment is joined by others elected to represent the interests of the indigenous people of Alaska, as reflected in the expressions of support for the Project submitted with Mr. Rock's Declaration.² Supporting organizations include the Alaska Federation of Natives, the ANCSA Regional Association, and the Voice of the Arctic Iñupiat.

A. Arctic Slope Regional Corporation.

ASRC is one of twelve land-owning Alaska Native regional corporations

² See Rock Decl. Exs. K, L, and M, and ¶¶ 61, 62, 70, 71, 72.

established under the Alaska Native Claims Settlement Act of 1971 (“ANCSA”).³ ASRC’s region, the North Slope of Alaska, encompasses 55 million acres. The region includes the villages of Point Hope, Point Lay, Wainwright, Atkasuk, Utqiagvik (formerly Barrow), Nuiqsut, Kaktovik, and Anaktuvuk Pass. The residents of these villages are also residents of the North Slope Borough. The Borough’s residents are predominantly Iñupiat people, many of whom are also among ASRC’s approximately 13,900 Iñupiat shareholders.⁴

ASRC is one of the largest Alaskan-owned and operated companies.⁵ ASRC holds title to approximately five million acres of land conveyed to it under ANCSA, including land with energy, mineral, and other resource potential.⁶

Under ANCSA, Native corporations, including ASRC, “provide benefits to [their] shareholders who are Natives or descendants of Natives or to [their] shareholders’ immediate family members who are Natives or descendants of Natives to promote the health, education or welfare of such shareholders or family members.”⁷ Consistent with this unique Congressional mandate, ASRC provides financial returns to its Iñupiaq shareholders in the form of jobs and dividends. Since its inception, ASRC has paid

³ 43 U.S.C. §§ 1601–1629h.

⁴ Rock Decl. ¶ 1.

⁵ *Id.* ¶ 19.

⁶ *Id.* ¶ 10-11.

⁷ 43 U.S.C. § 1606(r) (authorizing ANCs “to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed” and stating that “[e]ligibility for such benefits need not be based on share ownership in the Native Corporation”).

approximately \$1.56 billion in dividends to its shareholders.⁸ In addition, under ANCSA's revenue sharing provision, ASRC distributes a portion of its net revenues to other Alaska Native corporations, for the ultimate benefit of their Alaska Native shareholders. Since ASRC's inception, ASRC's distributions to other Alaska Native corporations exceed \$1.6 billion.⁹

ASRC's mission is not purely financial. ASRC is deeply committed to preserving the Iñupiat way of life, culture and traditions, including the ability for its shareholders to participate in their traditional subsistence and recreational activities.¹⁰ This commitment drives ASRC's management of its nearly 5 million acres of land in the North Slope region, and ASRC's position on proposed development of non-ASRC lands in the region. In keeping with ASRC's cultural values, ASRC has utilized less than 2% of its land for natural resource development. The vast majority of ASRC's land is protected, preserved, or treated as de facto wilderness for cultural and subsistence use by its Iñupiat shareholders.¹¹

The Project represents the type of carefully studied and responsibly mitigated oil and gas development that balances the interests of ASRC's shareholders. Through vigilant consultation and public participation in the administrative process, ASRC has worked tirelessly to shape the Project's design and mitigation.¹² ASRC's shareholders would best

⁸ Rock Decl. ¶ 16.

⁹ *Id.* ¶ 17.

¹⁰ *Id.* ¶ 13.

¹¹ *Id.* ¶ 10.

¹² *See id.* ¶¶ 40-53.

be served if the Project is built and operated with all due speed. An order from this Court stopping the Project or imposing additional delay would severely harm ASRC's pursuit of socially and environmentally responsible economic development opportunities for its shareholders on the North Slope.

The benefits of the project to the Iñupiat people of the North Slope were recognized in a resolution adopted by an Alaska non-profit corporation, The Voice of the Arctic Iñupiat ("Voice").¹³ Voice is a broad-based organization whose members include local governments, ANCSA regional and village corporations (including ASRC), and tribes on the North Slope. Voice's purposes include promoting the social welfare of the Iñupiat of the Arctic Slope, promoting an understanding of the North Slope economy, and encouraging culturally safe and responsible development for economic sustainability. In November 2022, Voice's Board passed a resolution recognizing that the region and communities will benefit from responsible development that will strengthen the North Slope Borough's tax base, provide contracting opportunities for tribes and ANCs, and provide access to grants for community projects through the NPR-A Impact Mitigation Grant Program. This resolution supported advancement of the Willow Project "to further support the economic foundation of the North Slope region and ensure the sustainability and viability of its eight communities and the Inupiaq culture."¹⁴

¹³ *Id.* ¶ 71 and Ex. M.

¹⁴ *Id.*

B. Benefits to ASRC's Iñupiat Shareholders from the Project.

Oil and gas development is the primary economic generator for the North Slope.¹⁵ North Slope oil production has declined steadily since its peak in 1988 at 1.97 million barrels per day, to less than 500,000 barrels per day today.¹⁶ The industry, and the Project, remain critical to the region. According to a 2019 North Slope Borough Census Report, more than a quarter of Iñupiat households in the North Slope Borough fell below the poverty level in 2019, even before the Covid-19 pandemic.¹⁷ The Census Report also estimated the unemployment rate to be as high as 32% in 2019, and the employment level in 2022 is even lower because the economy is still recovering from the economic impacts of the pandemic.¹⁸ Corporate dividends from ASRC and other Alaska Native Corporations were the second major contributor to income for Iñupiat households in the North Slope Borough (38%), after wages (49%).¹⁹

The Project would have a peak production of up to 180,000 barrels of oil per day over its 30-year life, which would help offset declines in production from the North Slope

¹⁵ Supplemental Environmental Impact Statement (“SEIS”) at 292 (released Feb. 1, 2023) (noting that “the oil industry is the major private industry employer” in Nuiqsut), available at <https://eplanning.blm.gov/eplanning-ui/project/109410/570>.

¹⁶ *Id.* at 293.

¹⁷ North Slope Borough 2019 Economic Profile & Census Report at 109–10, https://www.north-slope.org/wp-content/uploads/2022/03/2019_NSB-EconomicProfileAndCensusReport_Final.pdf; Rock Decl. ¶¶ 65-66.

¹⁸ SEIS at 293, 295; Rock Decl. ¶¶ 65-66. The U.S. Census Report, based on a five-year average for the 2016-2020 years, found the unemployment rate in Nuiqsut to be 13%, reflecting “the lack of employment opportunities for community residents.” SEIS at 291-92 (citing Tab. 3.15.1).

¹⁹ SEIS at 293, 295.

oil fields and contribute to the local, state, and national economies.²⁰ Direct benefits to ASRC's shareholders include contracting opportunities for ASRC subsidiaries; job opportunities for its shareholders in a region where unemployment is high and volatile; increased dividend income to supplement shareholders' household incomes (many of which fall below the poverty level); increased tax revenue to the Borough and royalty payments to the State that translate into improvements in the quality of life for ASRC's shareholders in the North Slope region; and the preservation of a ROD that includes protections for subsistence uses that ASRC has secured through sustained participation throughout the agencies' NEPA processes.

1. Contracting Opportunities for ASRC's Subsidiaries.

The Project provides opportunities for ASRC's subsidiaries to enter into contracts with ConocoPhillips to support the Project.²¹ Through a competitive bidding process, ASRC's subsidiary ASRC Energy Services, LLC (AES) has entered into service contracts with ConocoPhillips in support of the Project, including a construction contract and a logistics support contract.²² Other contracting opportunities may arise as the Project progresses.

These contracts will generate revenue for ASRC that may be distributed to ASRC's

²⁰ *Id.* at ES-1.

²¹ Rock Decl. ¶ 26.

²² *Id.* ¶¶ 28, 30. AES has been working with ConocoPhillips for more than two decades to develop oil and gas resources on the North Slope of Alaska. *Id.* ¶ 23. AES employs 130 ASRC shareholders across the North Slope, almost all of whom have jobs supporting oil and gas development. Rock Decl. ¶¶ 19-21.

Iñupiat shareholders as dividends, and to other Alaska Native corporations under ANCSA’s revenue sharing provisions.²³ In addition, ASRC invests a portion of its revenues in initiatives that promote and support shareholder training and occupational development, healthy communities, and sustainable local economies.²⁴ One such training program that Willow revenue will support is expansion of AES’s “Nutaaq” (which means “new learner” in Iñupiat) training program.²⁵ This is a paid, entry level training program for ASRC shareholders who typically do not have sufficient training, skills, qualifications, or experience to obtain full time, regular employment in a trade position. Through the paid training program, AES invests in internal and external training and apprenticeships to enable employees to obtain skilled trade positions, at AES or elsewhere, in craft fields like electrical, welding, scaffolding, pipefitting, heavy equipment operating, and additional trades. ConocoPhillips is a key supporter of the Nutaaq program, contributing both funding for Nutaaq training and positions supporting ConocoPhillips’ work. The majority of Nutaaq graduates go on to work for AES supporting ConocoPhillips’ operations at the Kuparuk and Alpine oil fields. Any delay or cancellation of the Willow project is expected to reduce the opportunities for ASRC shareholders to obtain valuable training to work in

²³ SEIS at 296 (“If local oil industry support companies, such as those owned by Kuukpik or ASRC, earn revenues on the Project, this would indirectly affect local incomes through increased dividends.”); SEIS at 292 (“Nuiqsut Iñupiat households receive 57% of their income from dividend payments (e.g., Kuukpik, ASRC).”).

²⁴ Rock Decl. ¶ 15.

²⁵ *Id.* ¶ 31.

Alaska trades.²⁶ As another example, for the past few years, ASRC has partnered with the Arctic Slope Native Association and the North Slope Borough to provide medical travel funds to shareholders. The grant funding provided by ASRC is made possible through revenues from projects like Willow.²⁷

2. Employment of ASRC Shareholders.

Contracts between ConocoPhillips and ASRC's subsidiaries will result in jobs for ASRC's Iñupiat shareholders and North Slope residents.²⁸ AES and its subsidiaries expect to employ approximately 825 people to support the project.²⁹ As examples, AES submitted a successful competitive bid for a large Willow construction project. In order to perform this construction contract, AES expects to employ approximately 340 craft and trade personnel during each winter construction season for the next four years.³⁰ AES also submitted a successful competitive bid for a logistics support contract for the Project. For this contract, AES anticipates employing approximately 40 people per year over a six-year period.³¹ AES also invested significant time, effort and expense to build a talented senior project management and staff team of approximately 45 people to oversee and support the

²⁶ *Id.*

²⁷ *Id.* ¶ 34.

²⁸ *Id.* ¶¶ 27-30; SEIS at 296 ("Local residents may also be employed by local industry support companies contracted to provide goods and services during construction."); SEIS § 3.15.2.3.1. and 294 (Support service jobs also make up 58% of all oil industry jobs statewide).

²⁹ Rock Decl. ¶ 27.

³⁰ *Id.* ¶ 28.

³¹ *Id.* ¶ 30.

construction work.³² Given the small employment base and high unemployment rate on the North Slope, these jobs “can substantially affect the local and regional economy.”³³

3. Benefits to ASRC Shareholders from Tax and Royalty Payments that Fund Government Services in the North Slope Region.

BLM projects revenues for the State of Alaska and North Slope Borough from federal royalties and state and local taxes of approximately \$10 billion.³⁴ Taxes and royalties paid by the Project will support important social services and programs that directly benefit ASRC’s Iñupiat shareholders.

The North Slope Borough receives approximately 96% of its revenues from taxes levied on oil and gas infrastructure.³⁵ It is projected that the Project will provide over one billion dollars to the North Slope Borough through property taxes.³⁶ ASRC’s shareholders receive vital services from the Borough, including educational services such as support for Alaska’s only tribal college; health care services; fire, police, and search and rescue services; water and sewer infrastructure; and heating and electrical subsidies to partly offset extremely high energy costs. The Borough also spends millions of dollars each year to address the impacts of global climate change, including building and

³² *Id.* ¶ 29.

³³ SEIS at 296–97.

³⁴ SEIS Table 3.15.5; BLM, Willow Master Development Plan Record of Decision (issued Mar. 12, 2023), available at <https://eplanning.blm.gov/eplanning-ui/project/109410/570> at 12.

³⁵ Rock Decl. ¶ 35.

³⁶ *Id.*

rebuilding protective coastal berms, rebuilding roads, and addressing the consequences of melting permafrost. The Project's revenues will enable the Borough to continue and even enhance these services.³⁷

In addition, Nuiqsut and other North Slope communities are eligible for grant funding under the NPR-A Impact Grant Program.³⁸ Under this program, the federal government pays a portion of its oil and gas royalties to the State of Alaska. From these funds, the State provides grants to North Slope communities to fund programs or projects that offset development impacts or improve communities most directly or severely impacted by oil and gas development.³⁹ Past grants to Nuiqsut have supported general government operations, youth center operations and maintenance, a boat ramp, community center maintenance, a natural gas pipeline, building conversions, graveyard fencing, City Hall renovation, a playground, and the Colville River Access Road.⁴⁰ The Project is expected to add over \$2.5 billion to the NPR-A Grant program, to the direct benefit of Nuiqsut and other communities.⁴¹

4. Benefits from Infrastructure Associated with the Project.

As part of the Project, ConocoPhillips will build roads and other local infrastructure. These infrastructure projects are expected to lower the cost of living and provide greater

³⁷ See Rock Decl. ¶¶ 36-37, Ex. H at 3.

³⁸ SEIS at 292.

³⁹ See *id.* at 439.

⁴⁰ *Id.* at 293.

⁴¹ Rock Decl. ¶ 39.

access for subsistence activities to local Iñupiat residents.⁴² Nuiqsut residents currently have access to the Dalton Highway (and the state’s gravel road system) four months of the year (by ice road); during the rest of the year, Nuiqsut is only accessible by air with scheduled and chartered flights from Utqiagvik.⁴³ Nuiqsut’s residents have identified road connectivity as a high priority. New roads will lower the cost of living—including the cost of goods and services—and provide greater access for subsistence activities.⁴⁴ Gravel cells opened to build roads for the Project will be available for community development uses. Without industry involvement, such access would be “cost prohibitive.”⁴⁵ Project support facilities for Willow will include several road pullouts with subsistence access ramps, as well as boat ramps for subsistence use, providing Nuiqsut residents with enhanced year-round access for subsistence activities.⁴⁶

5. Affirmation of Environmental Protections Included in the Project Approvals.

Finally, ASRC has an interest in ensuring that the Project’s impacts on the natural and subsistence resources and activities vital to its members are no greater than necessary. ASRC actively advocated for its shareholders’ interests, including in subsistence uses and resources, throughout the NEPA process.⁴⁷ ASRC commented on

⁴² See, e.g., SEIS §§ 2.5.3.2 and 2.5.13.

⁴³ *Id.* at 291; see also *id.* §§ 2.5.3.2 and 2.5.13.

⁴⁴ See Rock Decl. Ex. H at 4.

⁴⁵ *Id.*

⁴⁶ See, e.g., SEIS §§ 2.5.3.2 and 2.5.13.

⁴⁷ Rock Decl. ¶¶ 41-43. See also SEIS § 1.10.4 (noting “regular consultation” with ASRC and Kuukpik).

the draft EIS in 2019 and 2020, SEIS scoping in March 2022, and the draft SEIS in August 2022.⁴⁸ ASRC commented on alternatives, economic impacts to the community, and mitigation. Several of its comments on the draft EIS were incorporated,⁴⁹ yielding changes by BLM and ConocoPhillips that protect subsistence resources.⁵⁰ For instance, ASRC's comments on the draft EIS caused the company to modify the Project to include a new module transfer option that eliminated the need to build an offshore gravel island.⁵¹ ASRC's comments also spurred ConocoPhillips to update the design of its proposed subsistence ramps and commit to incorporate input from Nuiqsut residents when siting boat ramps to further protect and promote subsistence activities.⁵²

II. The Court Should Reject Plaintiffs' Challenges to the Federal Agency Decisions Authorizing the Project.

ASRC joins the arguments on the merits made by the Federal Defendants and ConocoPhillips and will not repeat them here. ASRC will highlight an important issue concerning interpretation of the Naval Petroleum Reserves Production Act (NPRPA).⁵³

This Court is familiar with the history of the National Petroleum Reserve in

⁴⁸ See, e.g., Rock Decl. Exs. A (Oct. 29, 2019 comments on Draft EIS); B and C (May 4, 2020 comments on Draft EIS); E (Mar. 9, 2022 comment letter); and H and I (Aug. 29, 2022 comment letters).

⁴⁹ See *id.* Ex. H at 3.

⁵⁰ See SEIS App. B.2, at 118; see generally Rock Decl. ¶¶ 41-43.

⁵¹ *Id.*; Rock Decl. ¶ 55.

⁵² See SEIS at 33, 129; see also Rock Decl. ¶ 54 (listing mitigation projects ASRC obtained).

⁵³ 42 U.S.C. § 6501, et. seq.

Alaska (NPR-A) and the NPRPA.⁵⁴ In their briefs, plaintiffs invoke two provisions of the NPRPA. The first provision is 42 U.S.C. § 6504(a), directing that exploration within specified areas “shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.”⁵⁵ The second provision is 42 U.S.C. § 6506a(b), which states that “[a]ctivities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR-A].”⁵⁶ The record demonstrates BLM’s careful adherence to these statutory directives. Neither provision supports reversal of the agency’s decision.

Prior litigation in this Court addressed the interpretation of section 6504(a). In *National Audubon Society v. Kempthorne*,⁵⁷ Judge Singleton addressed an argument that 2006 authorizations for oil leasing activity in the Teshekpuk Lake Special Area violated this provision. The Court rejected the argument, recognizing that “maximum protection” of the areas specified in the statute must be reconciled with Congress’s explicit directives

⁵⁴ See *ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm’n*, 2023 WL 2403720 *1 (D. Alaska 2023).

⁵⁵ This provision was originally enacted in 1976, as section 104(b) of the NPRPA (PL 94-258, 90 Stat. 303), codified as 42 USC § 6504(b). It was renumbered in 2005.

⁵⁶ This provision was originally enacted in 1980, as part of the appropriations rider that directed the Secretary of the Interior to open the NPR-A to private exploration and establish an expeditious program of competitive leasing. PL 96-514, 94 Stat. 2964, (1980).

⁵⁷ 2006 WL 8438583 (D. Alaska 2006).

to explore and produce oil in the NPR-A.

[T]he Secretary must necessarily balance the leasing of the lands in TLSA with the protection of the environment. In other words, the Secretary must balance the impact on the environment with the countervailing, and inevitably conflicting, mandate to develop a program of competitive leasing.⁵⁸

Reviewing the agency's decision to authorize leasing, the Court recognized two governing principles. First, the Court recognized that the agency addressed the statutory directive by imposing numerous lease stipulations restricting activities in sensitive areas.⁵⁹ Second, the Court recognized that Congress gave the agency discretion to achieve a balance between the goal of achieving competitive leasing and the mandate to provide maximum protection of surface values, and that the Court could not substitute its judgment for the agency.⁶⁰ Accordingly, the Court rejected the challenge based on section 6504(a).

The same analysis applies to section § 6506a(b). This statutory directive coexists with Congress's explicit directions to conduct an expeditious program of competitive leasing of oil and gas within the NPRA, 42 U.S.C. § 6506a(a). Indeed, both provisions were adopted by the same Congress, in the same appropriations rider.⁶¹ The directive in section 6506a(b) does not prevent exploration or production, but only directs the agency

⁵⁸ *Id.* at *15.

⁵⁹ *Id.*

⁶⁰ *Id.* at *16.

⁶¹ PL 96-514, 94 Stat. 2964 (1980).

to exercise its discretion to impose conditions, restrictions, and prohibitions that the Secretary deems necessary.

The record demonstrates actions taken by BLM to implement protections that fulfill the statutory directives. From the start, BLM took steps to ensure that surface areas of the NPR-A, including Teshekpuk Lake and other designated special areas, received the level of protection intended by Congress. In 2013, early in the NPR-A development process, BLM issued an Integrated Activity Plan (IAP) that closed nearly half of the NPR-A, 11 million acres, to leasing.⁶² Within the area open to leasing, 2.5 million acres were restricted to allow no surface construction.⁶³ The IAP restrictions “include areas critical to sensitive bird populations and the Teshekpuk Lake and Western Arctic Caribou Herds.”⁶⁴ For the areas open to leasing and surface occupancy (the remaining 9.3 million acres), the IAP imposed multiple terms and conditions intended to protect NPR-A surface values.⁶⁵

In 2022, BLM initiated a comprehensive review of the 2013 IAP pursuant to Executive Order 13990 and Secretarial Order 3398, and issued a new IAP affirming the 2013 land allocations, finding that they “strike[] a balance” among development, the “importance of surface resources,” and the need to mitigate impacts on subsistence

⁶² Willow Master Development Plan History, AR505211; *see also* AR516638-639 (BLM 2022 NPRA IAP ROD.pdf, folder 3377).

⁶³ *Id.*

⁶⁴ 2022 IAP ROD, AR516640.

⁶⁵ Willow Master Development Plan History, AR505211; *see also* AR516638-39.

uses.⁶⁶ This 2022 IAP includes dozens of lease stipulations and other measures to reduce and minimize the impact to surface resources.⁶⁷

Beyond the IAPs, BLM took affirmative steps to protect sensitive areas and achieve the mandates in sections 6504(a) and 6506a(b). As discussed in the Federal Defendants' brief, the FSEIS and ROD contain required operating procedures, design features, and other mitigation measures specifically designed to provide maximum protection to TLSA surface resources.⁶⁸ Along with the more than two dozen project mitigation measures adopted in the 2023 ROD,⁶⁹ BLM applied the protections from the 2013 and 2022 IAP RODs.⁷⁰

As Judge Singleton's 2006 decision reflects, sections 6504(a) and, by extension, 6506a(b) give the Secretary discretion to strike an appropriate balance between development and mitigation/protection. The Court must defer to BLM's judgment in determining how to balance Congress's directive to conduct oil exploration and development in the NPR-A with the Congress's directives to achieve "maximum protection" of sensitive areas, and to take measures deemed necessary or appropriate to mitigate significantly adverse effects.

⁶⁶ BLM 2022 NPRA IAP ROD.pdf, folder 3377, AR516637, 516652.

⁶⁷ 2023 Willow MDP ROD App. A, AR824926.

⁶⁸ Federal Defs.' Br. at 23-24, 29-30.

⁶⁹ 2023 Willow MDP ROD App. A, AR824946-56.

⁷⁰ *Id.* at AR824926.

III. If the Court Identifies Any Need for Further Action by the Federal Defendants to Meet Statutory Requirements, the Court Should Not Vacate the Existing Approvals While the Federal Defendants Comply with the Court's Instructions.

As remedies for the alleged statutory violations, Plaintiffs request that the Court vacate the Record of Decision, final SEIS, BiOp, and permits. ASRC strongly believes that plaintiffs' claims are meritless. But if the Court finds the need to remand for BLM to address any issues, the Court should not vacate the decisions and permits for the Project while BLM complies with the Court's instructions.

As the Court previously recognized, courts are not mechanically obligated to vacate agency decisions that they find invalid.⁷¹ Whether agency decisions should be vacated depends on how serious the agency's errors are, and the disruptive consequences from vacating the agency's decision.⁷² As the Ninth Circuit's decision in *California Communities Against Toxics* illustrates, these "disruptive consequences" may include the economic harm caused by vacatur. There, the court declined to vacate the challenged decision when doing so would delay a much-needed power plant, and vacatur would be "economically disastrous" because it would stop a billion-dollar project employing 350 workers.⁷³

⁷¹ *Sovereign Inupiat for a Living Arctic v. BLM* ("SILA"), 555 F. Supp. 3d 739, 804 (quoting *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1017 (E.D. Cal. 2013)).

⁷² *SILA*, 555 F. Supp. 3d at 804 (quoting *Cal. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012)).

⁷³ *Cal. Cmty.*, 688 F.3d at 993-94.

This Court recognized two years ago that vacatur would have a negative impact to many stakeholders in the Project.⁷⁴ Two years later, as the Project has advanced, the harmful consequences to ASRC and its shareholders from vacatur are concrete and specific. The impact of vacatur on ASRC, its shareholders, and the North Slope's residents weighs strongly against this drastic remedy.

First, vacatur could end the Project. If so, the benefits to ASRC, its Iñupiat shareholders, and the North Slope communities outlined on pages 6 to 13 and in Mr. Rock's Declaration will be lost in their entirety. To be specific, this means:

- Loss of AES's existing construction and logistics contracts to support the Project, and loss of future contracts in support of the Project.
- Loss of contract revenue that would otherwise pay dividends to ASRC shareholders and contribute to revenue-sharing with other ANCs.
- Loss of contract revenue that would support important initiatives for ASRC shareholders, such as the Nutaaq training program at AES, and community and economic development projects for North Slope residents and communities.
- Loss of jobs for ASRC's shareholders, including the opportunity to work on 825 jobs anticipated by AES and its subsidiaries.
- Loss of millions of dollars that AES has invested in project-specific

⁷⁴ *SILA*, 555 F. Supp. 3d at 804.

equipment to fulfill construction contracts for the Project.⁷⁵

- Loss of billions of dollars that the NSB would receive in taxes over the life of the project, and loss of the services that the NSB could provide with these tax revenues, including critical education services; fire, police, and search and rescue services; water and sewer infrastructure; heating and electric subsidies; and global-warming impact mitigation.
- Loss of community grants funded through the NPR-A Impact Grant Program.
- Loss of anticipated infrastructure improvements related to the Project.

Plaintiffs may speculate that the same economic benefits could still be achieved at some time in the future, if vacated authorizations are later reissued. The hypothesis that the Project can start again with new authorizations in a year, or two years, or five years, is untested and speculative at best, but even if the Project is reauthorized at some later date, there will be real losses from delaying the Project. It stands to reason that when a big project like this is stalled, there are high costs. As concrete examples, AES spent significant amounts to assemble a highly-qualified senior project management team that is currently managing its contracts with ConocoPhillips. If the Project is delayed beyond the approaching winter season, AES will lose this senior project management team.⁷⁶ If the Project returns at some indefinite time in the future, AES would need to duplicate its costs to assemble a new team. AES could also be required to bring new team members

⁷⁵ Rock Decl. ¶ 32.

⁷⁶ Rock Decl. ¶ 29.

up to speed on the Project, and to update its data on the Project, thus repeating millions of dollars worth of employee time already spent to prepare for work on the Project.⁷⁷ In short, AES and ultimately ASRC would bear significant costs from any significant delay.

Moreover, the costs of delay do not fall only on corporations and institutions. These costs fall directly on individuals—in this case, ASRC’s Iñupiat shareholders. Delay is not an abstract concept for people who need jobs or job training. Every individual’s time in the workforce is finite. Men and women who lose the opportunity for a good job now, or who lose a chance to get essential job training now, may never make up the lost income, even if the project is revived at some future date.

ASRC therefore urges the Court to first conclude that the plaintiffs’ challenges to the Project are without merit and dismiss the lawsuits. But if the Court concludes that some further refinement of Project authorizations is appropriate, ASRC asks that before ordering vacatur, the Court carefully consider the magnitude of any agency error, weighed against the serious and disruptive consequences of vacatur. Achieving legal perfection in complex authorizations is an elusive goal, and it should not drive a remedy that inflicts unnecessary and avoidable harm.

⁷⁷ Rock Decl. ¶ 33.

CONCLUSION

ASRC joins the Federal Defendants and Intervenor in requesting that the Court grant summary judgment affirming the decisions by the Federal Defendants.

DATED: August 30, 2023.

PERKINS COIE LLP

By: s/ Stacey Bosshardt
Stacey Bosshardt (*Pro Hac Vice*)
DC Bar No. 458645
SBosshardt@perkinscoie.com
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Eric B. Fjelstad (Bar No. 9505020)
EFjelstad@perkinscoie.com
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
Telephone: 907.279.8561

***Attorneys for Intervenor-Defendant
Arctic Slope Regional Corporation***

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2023, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system, thereby serving counsel of record who are registered CM/ECF users via the CM/ECF system.

Dated: August 30, 2023.

/s/ Tae Kim
Tae Kim