

Patrick W. Munson (AK Bar No. 1205019)  
Charles A. Cacciola (AK Bar. No. 1306045)  
Chandler, Falconer, Munson & Cacciola, LLP  
911 W. 8<sup>th</sup> Avenue, Suite 302  
Anchorage, Alaska 99501  
(907) 272-8401

Attorneys for Intervenor-Defendant Kuukpik Corporation

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

SOVEREIGN INUPIAT 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

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

**KUUKPIK'S COMBINED BRIEF IN OPPOSITION TO PLAINTIFFS' MOTIONS  
FOR SUMMARY JUDGMENT**

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## **INTRODUCTION**

The Department of the Interior issued the Willow Record of Decision on March 13, 2023 (ROD). After years of analysis and improvements to reduce Willow's environmental and subsistence impacts, nearly every major stakeholder on the North Slope and in Alaska supports the project. Two sets of plaintiffs—the Sovereign Iñupiat for a Living Arctic (SILA) plaintiffs in case no. 23-civ-058 (SILA) and the Center for Biological Diversity (CBD) plaintiffs in case No. 23-civ-061 (CBD) (collectively, Plaintiffs)—filed near identical suits seeking to vacate the ROD and halt the project.

Plaintiffs allege the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA), the National Petroleum Reserve Production Act (NPRPA), the Alaska National Interest Lands Conservation Act (ANILCA), and the Endangered Species Act (ESA). Plaintiffs would have the court halt a project that has been exhaustively studied and modified after extensive efforts by Kuukpik and other Alaska Native stakeholders to reduce Willow's impacts while still delivering its benefits. Stopping or delaying the project is unsupported by law and contrary to the goals of the most affected stakeholders. As the only private landowner near Willow and the cultural guardian for the Kuukpikmiut—the indigenous people of the Colville River Delta—Kuukpik believes the approved version of the Willow project appropriately balances benefits and impacts. Neither the project nor the people most affected by it will benefit from further study or delay. Plaintiffs' claims should be denied and the project allowed to proceed as approved.

## BACKGROUND FACTS

Kuukpik Corporation (“Kuukpik”) has intervened to protect its interests and those of its Alaska Native shareholders. Kuukpik was formed pursuant to the Alaska Native Claims Settlement Act (ANCSA) as the Alaska Native village corporation for the community of Nuiqsut, the village closest to the future Willow site.<sup>1</sup>

As the local ANCSA village corporation, Kuukpik’s twin goals are protecting the subsistence culture of the Native residents of Nuiqsut while also providing for the long-term economic needs of its shareholders.<sup>2</sup> To achieve these goals, and as required by ANCSA, Kuukpik carefully selected and has received title to thousands of acres of surface estate around Nuiqsut.<sup>3</sup> Kuukpik’s surface estate includes tens of thousands of acres in the National Petroleum Reserve - Alaska (NPR-A) between Nuiqsut and the Willow site.<sup>4</sup> That land, conveyed by the United States in partial settlement of Alaska Natives’ aboriginal claims throughout Alaska, is the birthright of the Kuukpikmiut and critical to Nuiqsut’s subsistence culture.<sup>5</sup> These lands are the cornerstone of Kuukpik’s mission of providing economic benefits to its shareholders while also preserving the subsistence way of life that

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<sup>1</sup> AR821012.

<sup>2</sup> Decl. Joe Nukapigak ¶¶ 12-15, ECF No. 58-1 in No. 3:23-cv-00061-SLG; *see also* 43 U.S.C. § 1601(b) (“[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property...”).

<sup>3</sup> Decl. Joe Nukapigak ¶¶ 4-8, ECF No. 58-1 in No. 3:23-cv-00061-SLG (also noting, “We should have gotten all the land, but that is not the way it worked.”).

<sup>4</sup> AR821001.

<sup>5</sup> Decl. Joe Nukapigak ¶¶ 8-9, ECF No. 58-1 in No. 3:23-cv-00061-SLG.

has sustained the Kuukpikmiut for generations—a mission Kuukpik has embraced since oil was discovered in and around its lands decades ago.<sup>6</sup>

As a landowner and caretaker of Nuiqsut's subsistence lifestyle, Kuukpik understands perhaps better than anyone the balance that must be struck between development on one hand and Nuiqsut's subsistence culture on the other. For this reason, Kuukpik has participated in every major oil and gas-related planning process over the past several decades, attempting to find solutions that work for *Nuiqsut*.

Kuukpik has historically supported only balanced and responsible oil and gas development.<sup>7</sup> Kuukpik has opposed development that did not meet that high standard, including Conoco's original proposal to develop Willow and all the alternatives analyzed prior to 2022.<sup>8</sup> Since Kuukpik was first presented with the proposed project in about 2016, Kuukpik has worked with BLM, ConocoPhillips, and other *local* stakeholders to reduce impacts, increase long-term benefits, and develop a version of the project that Kuukpik and much of Nuiqsut can support.<sup>9</sup> Until recently, Kuukpik did not believe the proposed alternatives achieved that balance.<sup>10</sup> Alternative E and the 2023 ROD changed that evaluation.

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<sup>6</sup> *Id.* at ¶¶ 10-13.

<sup>7</sup> *Id.* at ¶ 11.

<sup>8</sup> *Id.* at ¶ 17.

<sup>9</sup> *Id.* at ¶ 20; AR776207.

<sup>10</sup> *See, e.g.*, AR776207:

Kuukpik's goal was to find ways to reduce impacts, increase long term benefits, and develop a project alternative that we and most of the affected



The development of Alternative E began shortly after this court vacated the 2020 ROD based on (as primarily relevant to Kuukpik) findings that BLM erred to the extent it erroneously assumed that CPAI had the right to extract “all possible” oil and gas from its leases and to the extent BLM failed to consider the statutory requirement to give “maximum protection” to surface values in the Teshekpuk Lake Special Area (TLSA).<sup>11</sup> With these findings in hand, BLM commenced a scoping and public outreach process that included opportunities for written and verbal comments and one-on-one consultations with stakeholders, including numerous meetings with Kuukpik leadership.<sup>12</sup> Throughout late 2021 and early 2022, BLM and Kuukpik consulted and exchanged ideas regarding potential pad locations, road layouts, and other measures to reduce impacts.<sup>13</sup>

BLM included many of these ideas and concepts in Alternative E of the Second Draft SEIS (June 2022). Consistent with BLM’s understanding and attention to this court’s order, Alternative E increased protective measures in the TLSA—even at the expense of oil recovery—eliminating an entire drill site inside the TLSA and proposing to defer approval

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community of Nuiqsut could support. Alternative E achieves that. After years of discussion and changes to the Project, Kuukpik supports the Willow Project as described in Alternative E because it strikes an appropriate balance between the need to develop oil and gas resources and ensuring that Nuiqsut residents can continue to practice subsistence for generations to come.

<sup>11</sup> *Sovereign Inupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739 (D. Alaska 2021) (“*SILA IV*”).

<sup>12</sup> AR821404; AR821420; AR821578; AR821670; AR821683.

<sup>13</sup> AR815446; AR501511-12; AR533126-29; AR536235-38.

of another.<sup>14</sup> It reduced the overall length of new gravel road (much of it within the TLSA)<sup>15</sup> and relocated two drill sites (including one in the TLSA) to less sensitive habitat. It also eliminated a bridge and significantly reduced traffic, gravel, water use, and dust impacts.<sup>16</sup> Alternative E added new mitigation measures to limit impacts and provide benefits to local subsistence users that had not previously been considered or required in the 2020 ROD.<sup>17</sup>

The Second Draft SEIS (June 2022) also explained why some additional alternatives were eliminated from further consideration. For example, BLM decided not to examine in detail an alternative that would eliminate drill sites BT4 and BT5, explaining in part:

This alternative would not meet BLM's requirements to fully develop the oil and gas field and it would strand an economically viable amount of oil based on BLM's review of available geologic data and the fact that CPAI has proposed constructing a gravel road and pad to extract it in its proposed action (Alternative B).

This alternative concept does not meet BLM's purpose and need for the Willow EIS, which is to evaluate the full development of the Willow reservoir. Any alternative that does not consider the impacts of full development does not provide an accurate comparison of alternatives for the reader or decision maker.<sup>18</sup>

In choosing to advance Alternative E, BLM presented an alternative that was responsive to the court's 2020 order and reduced impacts to subsistence, while also showing the infrastructure that would be necessary if the Willow reservoir was fully developed.

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<sup>14</sup> AR814552.

<sup>15</sup> AR814557.

<sup>16</sup> *See generally* AR814555-59 (Table ES.1).

<sup>17</sup> AR824953-56.

<sup>18</sup> AR815457.

Despite having not previously supported Willow, Kuukpiik determined that Alternative E was likely to reduce impacts to subsistence while maintaining most of the project's benefits.<sup>19</sup> After more than five years of proposing alternatives and mitigation measures for BLM to consider, Kuukpiik's Board of Directors—a diverse group of young shareholders, elders, subsistence hunters, whaling captains, and community leaders—finally agreed that there was an alternative that struck an appropriate balance between benefits and impacts for Nuiqsut.<sup>20</sup>

The Second Final SEIS (January 2023) evaluated Alternative E alongside Alternatives A-D, comparing each alternative against the others.<sup>21</sup> In nearly every way, BLM concluded that Alternative E would have fewer impacts than the other alternatives.<sup>22</sup> Kuukpiik agreed with that analysis, despite nevertheless acknowledging that Alternative E

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<sup>19</sup> Decl. Joe Nukapigak ¶ 19, ECF No. 58-1 in No. 3:23-cv-00061-SLG.

<sup>20</sup> See AR704757:

Kuukpiik is pleased that Alternative E includes many of the concepts that we and other stakeholders have proposed during this process. As explained in more detail below, we believe Alternative E strikes a more appropriate balance between the need to develop oil and gas resources on the North Slope and the need to ensure that Nuiqsut residents can continue to practice a subsistence lifestyle for generations to come.

<sup>21</sup> AR820747-54. BLM also again explained why it had not developed additional alternatives that would not have fulfilled the agency's purpose and need or depicted an accurate comparison of alternatives. AR820729-30; AR821927; *see generally* AR821906-71 (Appendix D.1 Alternatives Development).

<sup>22</sup> AR820703-13.

would also impact Nuiqsut.<sup>23</sup> Kuukpik therefore supported Alternative E and urged BLM to adopt it.<sup>24</sup>

The March 2023 Record of Decision adopted a modified version of Alternative E. In addition to eliminating drill site BT4, the Department of Interior also “disapproved” an additional drill site, BT5.<sup>25</sup> In doing so, it denied two of the five drill sites Conoco originally applied to build. In addition, the final approved version of Willow differed from the original proposal in the following ways (at least):

- Reduced gravel footprint, especially in the TLSA
- Relocated the northern-most drill site farther south to less sensitive caribou habitat
- Relocated the southernmost drill site to reduce impacts [especially to loons] and road and pipeline length
- Seven fewer miles of gravel road and pipelines (from 37 miles to 30 miles)
- Eliminated proposed gravel island in Harrison Bay, [reducing impacts to bowhead whales and the subsistence whalers and other users who travel by boat in the area]
- Eliminated one bridge (over Willow Creek)

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<sup>23</sup> AR776209 (“Supporting the Project doesn’t mean Kuukpik is blind to the impacts it will have; rather, it means we—perhaps more than anyone else—understand those impacts and can accept them as long as they are managed and offset by countervailing benefits.”).

<sup>24</sup> AR704757; *see also* AR776207:

Kuukpik’s goal was to find ways to reduce impacts, increase long term benefits, and develop a project alternative that we and most of the affected community of Nuiqsut could support. Alternative E achieves that. After years of discussion and changes to the Project, Kuukpik supports the Willow Project as described in Alternative E because it strikes an appropriate balance between the need to develop oil and gas resources and ensuring that Nuiqsut residents can continue to practice subsistence for generations to come.

<sup>25</sup> AR824890.

- Reduced runway length (from 6,200 feet to 5,700 feet) and commitments not to use largest and most disruptive cargo planes
- Reduced road footprint and ground traffic
- Reduced freshwater use
- Provided up to 3 boat launches for subsistence use
- Subsistence ramps for hunters to get on and off gravel roads
- Reduced speed limits for health and safety of residents and any animals on the roadways
- Improvements to a Nuiqsut subsistence trail using a geogrid material in areas of rutted tundra
- Required use of insulation to reduce road height and gravel use while protecting permafrost
- Development of a Good Neighbor Policy on caribou to assist hunters if caribou harvests are impacted by the project
- Development of vehicle and air traffic plans to reduce impacts during sensitive periods (*e.g.*, caribou calving, bird nesting, and peak caribou subsistence activity).<sup>26</sup>

In addition, the ROD includes mitigation measures that will benefit Nuiqsut and the whole North Slope.<sup>27</sup> The ROD also instructs BLM to implement Kuukpik's request for long term protection of about one million acres around Teshekpuk Lake and key caribou habitat surrounding it.<sup>28</sup>

The approved three-drill site alternative manages to achieve these reductions in subsistence impacts while *still* enabling Conoco to access 94% of the reserves they sought to access.<sup>29</sup> Thus, the vast majority of anticipated economic benefits still accrue to the State

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<sup>26</sup> AR776207 (first thirteen bullet points); AR704764-65 (last three bullet points).

<sup>27</sup> AR821016; AR821042-43.

<sup>28</sup> AR824055.

<sup>29</sup> AR824901.

of Alaska, federal government, North Slope Borough and municipalities (*via* the NPR-A Impact Mitigation Fund), and all the individuals who will be employed by or otherwise provide services or material into the Project.<sup>30</sup> Obtaining 94% of the expected resource recovery while also achieving the extensive reduction and mitigation of subsistence and environmental impacts is an extraordinary accomplishment. The approved project may come as close to balancing impacts and benefits as is practically achievable.

Plaintiffs nevertheless filed this lawsuit immediately after the ROD was released, asserting NEPA, NPRPA, ANILCA, and ESA claims. Plaintiffs moved for a preliminary injunction and temporary restraining order to halt construction during this litigation, which this court denied.<sup>31</sup> Plaintiffs then unsuccessfully sought an injunction pending appeal of that decision and emergency relief in the Ninth Circuit Court.<sup>32</sup> They have since voluntarily dismissed their preliminary injunction appeals. Plaintiffs now seek summary judgment on the merits of their claims.

### **STANDARD OF REVIEW**

Review on the merits is generally governed by the Administrative Procedure Act (APA).<sup>33</sup> Under the APA, final agency actions are reviewed under 5 U.S.C. § 706(2), and

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<sup>30</sup>*Id.*; see also AR824930 (FSEIS Table 2.1 Design Features).

<sup>31</sup> *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 3:23-CV-00058-SLG, 2023 WL 2759864, \*3 (D. Alaska Apr. 3, 2023) (“*SILA I*”), appeal dismissed, No. 23-35226, 2023 WL 4339382 (9th Cir. May 19, 2023) (“*SILA VI*”).

<sup>32</sup> *SILA VI*, 2023 WL 4339382.

<sup>33</sup> 5 U.S.C. §§ 701-706; *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1205-06 (9th Cir. 2004).

such review is “searching and careful...[but] narrow,”<sup>34</sup> “highly deferential,” and presumes the agency action is valid.<sup>35</sup> Agency decisions may be overturned only if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>36</sup> Even if a court has concerns with the agency’s approach, it must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>37</sup>

### **ARGUMENT**

BLM’s actions were reasonable and should be upheld. BLM complied with ANILCA by actively seeking input from local affected subsistence communities and taking reasonable steps to minimize and reduce impacts. BLM also complied with NEPA (and, in turn, the NPRPA) by analyzing a reasonable range of appropriate alternatives.<sup>38</sup> Contrary

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<sup>34</sup> *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

<sup>35</sup> *Pac. Coast Fed’n of Fishermen’s Ass’n v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012); *Nw. Ecosystem All. V. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Lands Council v. McNair*, 537 F.3d 981, 992-94 (9th Cir. 2008) (en banc), overruled in part on other grounds, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

<sup>36</sup> *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002) (internal citation omitted).

<sup>37</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974)).

<sup>38</sup> To avoid duplication, Kuukpik is not addressing the ESA or greenhouse gas emissions issues because other parties are better situated to respond to those arguments.

to Plaintiffs’ arguments, BLM was not required to more fully analyze additional alternative components that Plaintiffs would have preferred.<sup>39</sup> All Plaintiffs’ claims should be denied.

**I. BLM’s ANILCA § 810 analysis is not arbitrary and capricious.**

“The purpose of the ANILCA was to protect those North Slope natives who...lead a subsistence lifestyle.”<sup>40</sup> Kuukpik has taken that purpose to heart by emphasizing BLM’s obligations under ANILCA § 810 throughout the Willow planning process.<sup>41</sup> In doing so, Kuukpik has always been mindful that ANILCA does not *prohibit* activities that will impact subsistence, but is intended to “protect Alaskan subsistence resources from *unnecessary* destruction.”<sup>42</sup>

For several years, Kuukpik did not support Willow because Kuukpik believed it would inflict unnecessary harm by failing to incorporate reasonable mitigation measures that would not have significantly affected the project’s overall viability.<sup>43</sup> But Kuukpik was

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<sup>39</sup> Consistent with the Federal Defendant’s citation format, citations refer to the ECF-stamped page numbers from the docket rather than the page numbers of the Plaintiffs’ briefs. *See* Pls.’ Opening Br. for Summ. J. 9, ECF No. 105 in No. 3:23-cv-58-SLG (hereafter, “SILA Br.”); Pls.’ Principal Br. under Local Rule 16.3(c)(1) 10, ECF No. 115 in No. 3:23-cv-61-SLG (hereafter, “CBD Br.”).

<sup>40</sup> *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984) (citing 16 U.S.C. §§ 3111–3112).

<sup>41</sup> *See, e.g.*, AR533122-23 and AR704765-66.

<sup>42</sup> *City of Tenakee Springs v. Clough*, 750 F. Supp. 1406, 1427 (D. Alaska 1990) (*Tenakee I*), rev’d on other grounds by *City of Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990) (“*Tenakee II*”) (emphasis added).

<sup>43</sup> AR536235:

Kuukpik’s position throughout this process has been that we could support Willow if it was balanced and environmentally responsible. But we continue to believe that the version of the Project that was approved in 2020 will cause



forced to acknowledge that this balance shifted when BLM proposed and ultimately adopted Alternative E. Kuukpik determined that Alternative E satisfied ANILCA before this litigation even began<sup>44</sup>—a determination that should carry great weight given the role Kuukpik has played in defending subsistence over the past three decades.

ANILCA § 810(a) requires federal agencies contemplating “the use, occupancy, or disposition of public lands” in Alaska to “evaluate the effect of such use, occupancy, or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.”<sup>45</sup> If the agency determines that the contemplated action “would significantly restrict subsistence uses,” the agency is required to give notice to the communities affected, hold public hearings, and make specific findings about the propriety of the proposed action and the measures that will be taken to mitigate adverse impacts on subsistence uses and resources.<sup>46</sup> When an agency’s ANILCA § 810(a) determinations are prepared in conjunction with an EIS, the plaintiff

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unreasonable and avoidable impacts on subsistence resources that are vital to Nuiqsut and other communities on the North Slope. Kuukpik therefore does not support the approved version of the Willow Project at this time. That said, Kuukpik wants to see BLM and Conoco find a version of the Project that we can support: one that doesn’t inflict unnecessary and unreasonable impacts and risks on Nuiqsut, its subsistence resources, and Kuukpik’s land. We look forward to continuing to participate in that effort over the coming months.

<sup>44</sup> AR704766 (“But as a result of the changes, big and small, that have been introduced in Alternative E, this iteration of the Project is the first alternative that Kuukpik believes can support the findings that BLM is required to make under ANILCA 810.”).

<sup>45</sup> 16 U.S.C. § 3120(a).

<sup>46</sup> *Hanlon v. Barton*, 740 F. Supp. 1446, 1454 (D. Alaska 1988).

bears the burden to show that the determinations are inadequate under the APA's arbitrary and capricious standard.<sup>47</sup>

SILA has not carried its burden. First, SILA argues that BLM "did not adequately consider any alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes."<sup>48</sup> Their primary support for this absolutist position is to point out that "BLM concluded that all action alternatives would cause significant restrictions to subsistence" and to cherry-pick a few qualitative phrases in the SEIS that suggest the impacts associated with Alternative E may not be so different from other alternatives.<sup>49</sup> But any fair comparison of Alternative E (as proposed and as modified and approved) with the version ConocoPhillips originally proposed belies that contention. The scope of the project and the impacts associated with it have been significantly reduced, as discussed at length above.<sup>50</sup> Plaintiffs are fundamentally and factually mistaken if they believe these changes do not "meaningfully reduce" impacts to subsistence.<sup>51</sup> More to the point, BLM's determination that "reasonable steps" have been taken "to minimize adverse impacts to subsistence uses"<sup>52</sup> is reasonable and supported by the record.<sup>53</sup>

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<sup>47</sup> *Id.* at 1450-51; *Kunaknana*, 742 F.2d at 1152.

<sup>48</sup> SILA Br. 27 (emphasis added).

<sup>49</sup> SILA Br. 26, 27 ("only 'slightly' reduced impacts").

<sup>50</sup> *See supra*, Background Facts, pp.7-8.

<sup>51</sup> SILA Br. 27.

<sup>52</sup> AR825000; AR704766.

<sup>53</sup> When examining agency scientific findings made in an area of an agency's technical expertise, the court must be at its most deferential. *Balt. Gas & Elec. Co. v.*

That BLM made affirmative Tier-1 findings for all proposed action alternatives does not mean BLM violated ANILCA.<sup>54</sup> Rather, it means BLM was required under all alternatives to hold hearings, take reasonable steps to reduce impacts, and make certain findings. BLM did so.<sup>55</sup>

Plaintiffs also argue that BLM wrongfully rejected less impactful alternatives “by relying on the erroneous assumption that it could not strand economically viable quantities of recoverable oil.”<sup>56</sup> But as explained below (*infra*, pp. 17-20), BLM did not rely on any such “assumption.” Rather, BLM declined to analyze action alternatives that would not have accurately shown the impacts associated with fully developing the Willow field.<sup>57</sup> In light of that legitimate constraint, SILA’s ANILCA argument fails.

Plaintiffs’ reliance on *City of Tenakee Springs v. Clough* is misplaced.<sup>58</sup> In that case, the agency believed it was contractually obligated to make available to the Alaska Pulp

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*NRDC*, 462 U.S. 87, 103 (1983); *Lands Council*, 537 F.3d at 992-94; *Winter*, 555 U.S. at 22.

<sup>54</sup> Kuukpik has acknowledged, “[T]here may be no version of the Willow Project that could avoid ‘significantly restricting’ subsistence uses for Nuiqsut while still accessing enough oil to generate the benefits the project will provide, including Alternative E.” AR704766.

<sup>55</sup> See AR824300-74 (FSEIS Appendix G: Alaska National Lands Conservation Act Section 810 Analysis). In *Hoonah*, the Ninth Circuit explained that the entire exercise under ANILCA 810 is qualitative and requires balancing, not absolute reductions to the bare minimum impact possible. *Hoonah Indian Ass’n v. Morrison*, 170 F.3d 1223, 1226 (9th Cir. 1999). The Court upheld the selection of an alternative that balanced “job and economic opportunities, timber volume, and increased timber productivity with consideration for resource concerns.” *Id.* at 1229.

<sup>56</sup> SILA Br. 28.

<sup>57</sup> See *infra*, notes 76-87 and accompanying text.

<sup>58</sup> *Tenakee II*, 915 F.2d at 1308.

Company hundreds of millions more board feet of timber than could possibly be cut during a five-year period and, as a result, did not “seriously consider *any* alternatives which would alter this proposed result.”<sup>59</sup> The Ninth Circuit disapproved of the agency’s “failure seriously to consider any alternative to the rigid application of its own interpretation of the contract requirements.”<sup>60</sup> By contrast, BLM here engaged in a thorough review of multiple alternative courses of action before selecting Alternative E. Unlike in *City of Tenakee Springs*, BLM does not contend that ConocoPhillips’ leases (or any other agreement) preempt ANILCA or any other law.<sup>61</sup> Rather, BLM expressly noted that “BLM does not require 100% resource extraction and may condition Project approval to protect surface resources even if doing so reduces the amount of oil and gas that can be profitably produced.”<sup>62</sup> BLM did precisely that in developing Alternative E and in its final decision.

Finally, SILA criticizes BLM for reporting its Tier-II findings in the ROD rather than the SEIS, but they fail to explain why this has any substantive effect. Nor do they explain why that process was arbitrary or unreasonable since the mitigation measures ANILCA requires can only be imposed, and final ANILCA determinations made, in a ROD, not the SEIS.<sup>63</sup> The Court should deny SILA’s ANILCA claims.

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<sup>59</sup> *Id.* at 1311 (emphasis added).

<sup>60</sup> *Id.* at 1312.

<sup>61</sup> *Cf. id.* at 1311 (The government contended that the contract “require[d]” it to perform and “allow[ed] for no significant variation” so it “refus[ed] to consider alternatives.”).

<sup>62</sup> AR821709.

<sup>63</sup> *See* 40 C.F.R. §§ 1505.2 and 1506.11.

## **II. BLM Evaluated a Reasonable Range of Alternatives.**

Plaintiffs argue that BLM failed to consider reasonable alternatives, alleging violations of both NEPA and the NPRPA.<sup>64</sup> However, they mistakenly import NEPA’s “reasonable range of alternatives” requirement into the NPRPA, suggesting that BLM could violate the NPRPA by failing to generate and analyze certain alternatives.<sup>65</sup> But the NPRPA does not contain an independent requirement to generate alternatives or separately require BLM to “justify” its decisions in the way Plaintiffs contend.<sup>66</sup> Therefore Plaintiffs’ arguments under NEPA and the NPRPA must be separated and analyzed independently.

### **A. BLM complied with NEPA.**

Kuukpik consulted with BLM extensively regarding the proposed action alternatives.<sup>67</sup> The federal defendants have explained the process of developing alternatives in detail and cited extensive record evidence showing why the range of alternatives BLM considered was reasonable.<sup>68</sup> Kuukpik agrees and will not repeat those arguments.

Kuukpik wants to emphasize BLM’s careful attention to this court’s prior conclusion regarding the assumption that ConocoPhillips had the right to extract all possible oil and

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<sup>64</sup> SILA Br. 25-33; CBD Br. 17-34.

<sup>65</sup> SILA Br. 25; CBD Br. 30.

<sup>66</sup> SILA Br. 23.

<sup>67</sup> AR704756 (“[Kuukpik] spent four years exploring ways to improve the proposed Project and urging BLM to incorporate these suggestions into its alternatives analyses.”).

<sup>68</sup> Defs.’ Mem. In Opp’n to Pls.’ Mots. For Summ. J., ECF No. 137 in No. 3:23-cv-00058-SLG, p. 27-37.

gas from its leases.<sup>69</sup> ConocoPhillips<sup>70</sup> has thoroughly rebutted Plaintiffs’ contention that BLM applied “functionally the same standard”<sup>71</sup> during this supplemental analysis. BLM stated multiple times in the Second SEIS that it was not assuming ConocoPhillips had the right to extract all oil and gas from its leases,<sup>72</sup> and indeed Alternative E reduced the amount of oil ConocoPhillips can access.<sup>73</sup>

Nevertheless, Plaintiffs insist that BLM incorrectly eliminated from further analysis alternative components that would “strand economically viable quantities of recoverable oil.”<sup>74</sup> As a factual matter, this factor did not “severely curtail[] the agency’s consideration of reasonable alternatives” or play a “significant role in narrowing the range of alternatives considered,” as Plaintiffs’ contend.<sup>75</sup> BLM eliminated just three “alternative components” on the (partial) basis that an alternative incorporating them would have been inconsistent

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<sup>69</sup> *SILA IV*, 555 F. Supp. 3d at 770.

<sup>70</sup> Intervenor-Def. ConocoPhillips Alaska, Inc.’s Br. In Opp’n To Pls.’ Summ. J. Mot., 22-25, ECF No. 141 in No. 3:23-cv-00058-SLG.

<sup>71</sup> *SILA* Br. 20; *CBD* Br. 18 (arguing there is no “daylight” between these two standards).

<sup>72</sup> *See, e.g.*, AR281740 (“BLM does not require 100% resource extraction and may condition Project approval to protect surface resources even if doing so reduces the amount of oil and gas that can be profitably produced.”); AR820729; AR821948; AR821709.

<sup>73</sup> AR820777 (showing that Alternative E eliminates access to approximately 15.4 million barrels of recoverable oil).

<sup>74</sup> *SILA* Br. 21, *CBD* Br. 19.

<sup>75</sup> *SILA* Br. 18, 20-21, 23; *CBD* Br. 18-20.

with the other action alternatives and the scope of BLM's analysis.<sup>76</sup> The rejected alternatives were (i) developing Willow without BT4 and BT5, (ii) not building any infrastructure in the TLSA, and (iii) a proposal similar to Alternative E but with the northernmost drill site located farther south. Therefore, despite Plaintiffs' heavy focus on this rationale, their arguments only apply to these three rejected alternative concepts.<sup>77</sup>

More importantly, BLM's rationale for not developing an action alternative incorporating these components was reasonable. If BLM had prepared a proposed action alternative based on concept 43, 44, or 46, that proposed action alternative would have depicted only a piecemeal version of the Willow project, not the full field development that BLM was considering in this NEPA process. Simply omitting economically viable drill sites from a proposed action alternative would be a mistake because Conoco would later seek

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<sup>76</sup> AR821958-59 (eliminating from further consideration Alternative Components 43 ("Pads – Eliminate drill sites BT4 and BT5"), 44 ("Pads – No infrastructure within the TLSA"), and Component 46 ("Pads – BT2 south of Fish Creek (four-pad alternative)").

<sup>77</sup> CBD acknowledges that this argument only applies to limited alternatives that were rejected from further consideration, noting that BLM "declined to carry forward two such alternative components [components 43 and 44] because they 'would strand economically viable quantities of recoverable oil.'" CBD Br. 11 (citing AR821958). It is unclear, but immaterial, why CBD omitted component 46, to which the same rationale applied.

permission to build the drillsite(s).<sup>78</sup> Thus, such an alternative would have understated the likely environmental impacts associated with fully developing the Willow resource.<sup>79</sup>

BLM better explained this reasoning in other portions of the EIS than in the short quote repeatedly cited by Plaintiffs. In response to counsel for SILA's written comments advocating for consideration of a three-drill site alternative, for example, BLM explained:

The purpose of a master development plan is to evaluate the impacts of full field development to ensure that the National Environmental Policy Act analyses are not segmented. **[T]o the extent that an alternative concept strands an economically viable quantity of oil, the BLM would expect to receive a future permit application to develop it.** Such an alternative concept therefore does not disclose and analyze the impacts of full field development and is a false comparison to other action alternatives.<sup>80</sup>

Plaintiffs do not contend with this reasoning, instead simply repeating the “economically viable” language to insist that BLM improperly screened alternatives based on economics. But the full context of BLM's explanations makes it clear BLM did not do

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<sup>78</sup> BLM explained this when it decided not to carry forward Alternatives 43, 44, and 46—an explanation that is admittedly unclear upon first reading:

This alternative concept does not meet the Project's purpose and need and would strand economically viable quantities of recoverable oil accessed by BT4 and BT5. BLM determined that there are economically viable quantities of recoverable oil in these areas based on its review of the available geologic data *and because there is enough resource accessible from BT4 and BT5 that CPAI has proposed constructing gravel roads and drill site pads to access it.*

AR 821958-59 (emphasis added).

<sup>79</sup> AR821710 (“Such an alternative concept therefore does not disclose and analyze the impacts of full field development and is a false comparison to other action alternatives.”).

<sup>80</sup> AR821710 (emphasis added).



so.<sup>81</sup> BLM’s references to economic viability, perhaps paradoxically, did not have anything to do with profits or lease rights.<sup>82</sup> Rather, BLM was simply explaining why the proposed project alternatives were not consistent with the full field development scenario and Master Development Plan underlying this NEPA process.<sup>83</sup> Not only is this rational, this approach avoided the segmentation problem that SILA was worried about when it urged BLM to “be clear about the true scope of Willow and...not allow Conoco to piecemeal its proposal.”<sup>84</sup> And after it analyzed these alternatives (ranging from no action to maximum development under Conoco’s original proposal), BLM was free to authorize *less* development than was depicted in the Master Development Plan if it determined that competing interests—such as surface values in the TLSA—supported that decision.<sup>85</sup> That is exactly what BLM did.

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<sup>81</sup> See AR281740 (“BLM does not require 100% resource extraction and may condition Project approval to protect surface resources even if doing so reduces the amount of oil and gas that can be profitably produced.”). That said, BLM has discretion to consider oil accessibility when developing action alternatives within the NPRA. *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006).

<sup>82</sup> SILA Br. 20; *see also* CBD Br. 19 (arguing that the two factors are “functionally indistinguishable”); *SILA IV* 555 F. Supp. 3d at 769.

<sup>83</sup> AR820724 (“BLM is required to respond to the Proponent’s requests for [a Master Development Plan] and related authorizations to develop and produce petroleum in the NPR-A.”). *See Natl. Parks & Conservation Ass’n v. Bureau of Land Mgt.*, 606 F.3d 1058, 1071 (9th Cir. 2010) (noting that when “the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.”); *Tenakee I* at 1412 (“NEPA does not circumscribe the agency’s discretion to formulate project goals.”). Plaintiffs have not challenged BLM’s purpose and need statement for the Willow Master Development Plan EIS (at AR820723-24).

<sup>84</sup> AR509715.

<sup>85</sup> AR820724 (FSEIS Sec. 1.4.1, Decision to be Made) (“BLM and other authorizing federal cooperating agencies will, in their respective ROD(s), decide whether to approve the Willow MDP and the associated issuance of permits and rights-of-way for the

NEPA does not require perfect clarity as long as the agency's reasoning can be ascertained and the decision is within the agency's lawful discretion.<sup>86</sup> Here, BLM explained its reasoning for not analyzing in detail alternatives that would have portrayed only a partial picture of likely development, and its reasoning is sound.

Ironically, if BLM *had* analyzed component 43, 44, or 46, Plaintiffs would likely have sued BLM for improperly segmenting the project and failing to consider the impacts associated with drill sites that were likely to be constructed and were sufficiently connected to the Willow project to require consideration in a single EIS.<sup>87</sup> In short, rejection of Plaintiff's alternatives did not *violate* NEPA; if anything, it was *required* by NEPA.

NEPA does not require further analysis here. Rather, NEPA has worked as intended: a wide range of alternatives was analyzed and a mid-range development scenario that balances impacts and development was selected. BLM fully complied with NEPA.

**B. BLM did not violate the National Petroleum Reserve Production Act.**

To the extent Plaintiffs argue that BLM violated the NPRPA for failing to consider a "reasonable range of alternatives," the argument fails.<sup>88</sup> The NPRPA does not include an

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construction of the development plan, in whole or in part, based on the analysis contained in this [SEIS].")

<sup>86</sup> *Motor Vehicle*, 463 U.S. at 43 ("We will, however, uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.") (quoting *Bowman*, 419 U.S. at 286, internal citations omitted).

<sup>87</sup> See generally 40 C.F.R. § 1508.25(a)(1)(ii); *Chilkat Indian Vill. of Klukwan v. Bureau of Land Mgmt.*, 399 F. Supp. 3d 888 (D. Alaska 2019), *aff'd*, 825 F. App'x 425 (9th Cir. 2020).

<sup>88</sup> SILA Br. 23-25.

alternatives analysis requirement that is independent from NEPA.<sup>89</sup> BLM was under no separate obligation to generate alternatives to comply with the NPRPA beyond what was required to satisfy NEPA. As explained above, BLM fully complied with NEPA. Plaintiffs therefore cannot prevail under the NPRPA.

Plaintiffs also argue that BLM violated the NPRPA by “fail[ing] to explain” or “justify” various decisions.<sup>90</sup> The NPRPA does not create or include an independent cause of action requiring BLM to “explain” or “justify” its decisions.<sup>91</sup> Nevertheless, assuming this claim could be reviewed under the general arbitrary and capricious standard,<sup>92</sup> BLM’s decisions were not arbitrary. As noted above, BLM explained its rationale for not carrying forward each alternative Plaintiffs would have preferred. BLM’s decisions were reasonable in light of BLM’s purpose and need statement and the context of the Master Development Plan. Plaintiffs have not carried the burden of proving that this was arbitrary and capricious. Their claims under the NPRPA should be denied.

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<sup>89</sup> See 42 U.S.C. § 4332(2)(C); *N. Alaska Env’t Ctr. v. U.S. Dep’t of the Interior*, 983 F.3d 1077, 1081 (9th Cir. 2020) (“BLM’s actions taken pursuant to the authority of NPRPA are also subject to NEPA procedural requirements for the analysis of potential environmental impacts and reasonable alternatives. . . . Because NEPA does not contain its own provision for judicial review, we review BLM’s compliance with NEPA pursuant to the APA.”).

<sup>90</sup> SILA Br. 23; CBD Br. 30.

<sup>91</sup> SILA Br. 23-24, CBD Br. 30. NPRPA does not create a private right of action for citizens to enforce it. Agency action may be challenged under APA. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004).

<sup>92</sup> See, *supra*, n. 89.

### **III. Vacating the ROD for minor errors would be unreasonably disruptive.**

As this court observed in 2021, “‘courts are not mechanically obligated to vacate agency decisions that they find invalid.’ ‘Whether agency action should be vacated depends on how serious the agency's errors are ‘and the disruptive consequences of an interim change that may itself be changed.’”<sup>93</sup>

In the event the court identifies some error in BLM’s analysis, Kuukpik respectfully requests the court order supplemental briefing to allow the parties to analyze the appropriate remedy based on the court’s decision on the merits. Remanding to BLM to correct any technical or minor errors is likely the appropriate remedy.

#### **A. Vacatur would harm subsistence and the Nuiqsut community.**

Kuukpik wants Nuiqsut to receive the local benefits of the Willow project. Vacating the ROD will delay those benefits or foreclose them entirely.

Whether or not Willow proceeds, existing industry activity has and will continue to impact subsistence near Nuiqsut.<sup>94</sup> The Alpine Central Facility is just eight miles north of Nuiqsut and visible from the community day and night.<sup>95</sup> Its satellites dot the landscape

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<sup>93</sup> *SILA IV*, 555 F. Supp. 3d at 804 (quoting *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1017 (E.D. Cal. 2013)); *Cal. Cmty. Against Toxics v. U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

<sup>94</sup> AR821046 (under “No Action Alternative”, “Nuiqsut would continue to experience impacts to subsistence and sociocultural systems resulting from existing oil and gas development, ongoing exploration, and other activities in the region. Impacts from development infrastructure, traffic, human activity and noise, [and] socioeconomic changes... would continue to occur...”).

<sup>95</sup> AR821089; AR821131.

north of the community, several of them even closer than the Alpine Central Facility. Santos is currently constructing a three-drill site on Kuukpik-owned land northeast of the village.<sup>96</sup> This activity north, east, and even south of the community is expected to continue or increase in intensity regardless of whether Willow proceeds.<sup>97</sup>

Kuukpik's decision to support this ROD was heavily influenced by Kuukpik's determination that components of Willow will alleviate cumulative subsistence impacts of ongoing industry activity in and around Nuiqsut. The Willow project provides benefits that mitigate those cumulative impacts—not merely the impacts of Willow—by reducing physical and economic barriers to subsistence activities for Nuiqsut residents.

**1. The actions approved in the ROD will facilitate new access to subsistence resources.**

Accessing subsistence areas by gravel road is much safer than open tundra travel, especially farther from Nuiqsut.<sup>98</sup> The existing gravel road system is heavily used for

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<sup>96</sup> AR821141.

<sup>97</sup> AR821122-23 (“In recent years, exploration activity in the NPR-A and areas south and east of Nuiqsut (outside of the NPR-A) has increased as additional recoverable resources have been discovered in these less developed areas. This trend is likely to continue over the coming years.”).

<sup>98</sup> Decl. Nellie Kaigalak, ¶ 4, ECF No. 58-2 in No. 3:23-cv-00061-SLG:

I remember hunting before there was a road connecting Nuiqsut to the industry roads between Alpine CD2 and CD5. It was much harder to hunt before the road because you had to drive 4 wheelers out on to the tundra, which is very wet and marshy. It was easy to get stuck and there was more damage to the tundra because of the 4 wheelers that everyone used to go hunting. It also took more time, and you couldn't go as far to find caribou. It was not as safe or comfortable as hunting can be now.

subsistence all the way to its terminus at GMT2.<sup>99</sup> Extending the existing gravel road even farther would benefit subsistence users who need more places to practice subsistence safely whether Willow proceeds or not.<sup>100</sup>

The road to and throughout the Willow development offers Nuiqsut residents a safe option to drive private vehicles farther outside the village to practice subsistence.<sup>101</sup> This access benefits subsistence users who are already affected by development north and east of the village, and likely to the south in the coming years.<sup>102</sup> Halting Willow would deprive subsistence users of these new options but does nothing to prevent or slow ongoing impacts closer to Nuiqsut.

The approved project also includes three boat ramps that will enable Nuiqsut residents to access areas with “good hunting and fishing” that are currently challenging and sometimes dangerous to reach.<sup>103</sup> Nellie Kaigelak, who has hunted and fished around Nuiqsut her entire life, describes the expanded subsistence opportunities these ramps would facilitate:

I would use those boat launches for subsistence, and I think other people from Nuiqsut would too. You can’t really get to those areas right now, or at least I don’t know anyone who goes that far up those rivers. Some people get to the lower sections of those rivers right now, but you have to drive your boat down

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*See also id.* at ¶ 5, where Ms. Kaigelak recounts an instance where her husband’s 4-wheeler got stuck in the tundra “6 or 7 miles” from Nuiqsut, which forced him to walk through cold and dangerous conditions to get home.

<sup>99</sup> *Id.* at ¶¶ 6, 7.

<sup>100</sup> *Id.* at ¶¶ 4, 5, 9.

<sup>101</sup> AR821056.

<sup>102</sup> *Id.*; AR821122-23.

<sup>103</sup> Decl. Nellie Kaigelak, ¶ 11, ECF No. 58-2 in No. 3:23-cv-00061-SLG; AR821057.

the Colville to the delta or the ocean, go west along the shore, and then back upstream into the rivers. That takes probably a few hours on a boat, which isn't terrible but it's not that easy or safe either, especially if you try to cut through the Colville bog, which is very shallow. You can definitely wreck a boat trying to do that. So it would be better to be able to trailer a boat to those rivers on the gravel road.<sup>104</sup>

Ms. Kaigelak is not talking about benefits that Nuiqsut residents need only if Willow is built; she is describing benefits that Nuiqsut residents need and want *now* in order to practice subsistence as safely and efficiently as possible despite the development that is going on around them. Nuiqsut residents will not get these benefits if Willow is terminated.

**2. The ROD requires BLM to establish long-term protection for the caribou herd that is most important to Nuiqsut subsistence users.**

BLM is currently required to implement a groundbreaking mitigation measure that would be lost if the court vacates the ROD. Mitigation Measure No. 27 of the ROD states in part “BLM will develop compensatory mitigation that provides durable, long-term protection for the Teshekpuk Caribou Herd to fully offset impacts of the project on that Herd, to include protecting the surface area of Teshekpuk Lake, a buffer along all shores of the lake, and the K-10 Caribou Movement Corridors/K-16 Deferral Areas...”<sup>105</sup>

Kuukpiik strongly supports this effort to “[p]ermanently protect the most important habitat areas for the maternal and migrating caribou of the Teshekpuk Caribou Herd...”<sup>106</sup>

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<sup>104</sup> *Id.* at ¶ 11.

<sup>105</sup> AR824055.

<sup>106</sup> *Id.*; see AR824056 (citing Kuukpiik’s support for Mitigation Measure 27).

Whether Willow proceeds or not, the Teshekpuk Caribou Herd will remain a critical subsistence resource for Nuiqsut families.<sup>107</sup> If implemented in the way Kuukpiik has previously proposed, Mitigation Measure No. 27 will set aside approximately one million acres of the Herd's highest value habitat for the highest level of administrative protection, which will contribute greatly to the Herd's long-term health.<sup>108</sup> These protections would be lost if the ROD is vacated. There is no guarantee that any future decision approving Willow would include such a beneficial provision.

### **3. Willow will provide much needed local economic benefits.**

An estimated 39% of Nuiqsut Iñupiat households are below the poverty level.<sup>109</sup> The extraordinarily high cost of living exacerbates the negative impacts that this economic situation can have on local people.<sup>110</sup> Subsistence and the cash economy of Nuiqsut are interdependent.<sup>111</sup> According to 2016 data, subsistence contributes the equivalent of approximately \$20,664 to \$27,552 per household.<sup>112</sup> The subsistence economy requires cash.<sup>113</sup> It “is common for people in Nuiqsut to do seasonal work[,]” which provides cash income while enabling residents to “still subsistence hunt during the caribou season of fall

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<sup>107</sup> AR821135; AR821143; AR821046.

<sup>108</sup> AR776223 (showing outline of the approximately 1 million acres being considered for conservation status).

<sup>109</sup> AR821013.

<sup>110</sup> *Id.*

<sup>111</sup> AR821012-14.

<sup>112</sup> *Id.* With extraordinarily high inflation rates for food over the past several years, the present economic value of subsistence resources is likely to be substantially higher.

<sup>113</sup> *Id.*



and summer.”<sup>114</sup> These wage earners often help fund their extended family’s subsistence efforts because the unemployment rate remains high, between 13% and 26%.<sup>115</sup>

Nuiqsut’s modest cash economy would be negatively impacted and disrupted if Willow is delayed or cancelled. The loss of local household income caused by vacatur would be detrimental to families and community members that rely upon wage earners.

Fewer local subsistence representatives, working in conjunction with Kuukpik and the Kuukpik Subsistence Oversight Panel,<sup>116</sup> would be employed during construction and going forward.<sup>117</sup> These positions “pay a very good wage” and “are some of the best jobs in Nuiqsut for local residents” in part because they “keep locals connected to the land even while industry is operating there.”<sup>118</sup>

Nanuq, Inc., Kuukpik’s wholly owned subsidiary, expects to employ around forty additional Nuiqsut residents for the next several years for Willow work.<sup>119</sup> Each of those residents could earn approximately \$50,000 per year.<sup>120</sup> While these positions are mostly seasonal and the absolute numbers appear modest, the working-age population of Nuiqsut is less than 400. Every good job for local residents matters. Seasonal work facilitates

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<sup>114</sup> Decl. Joe Sovalik, ¶ 4, ECF No. 54-7 in No. 3:23-cv-00061-SLG.

<sup>115</sup> AR821013.

<sup>116</sup> AR821042; AR821083.

<sup>117</sup> Decl. Nellie Kaigelak, ¶ 15, ECF No. 58-2 in No. 3:23-cv-00061-SLG.

<sup>118</sup> *Id.*

<sup>119</sup> Decl. Christopher Ledgerwood, ¶ 5, Exhibit A.

<sup>120</sup> *Id.*

subsistence by allowing residents to participate in the cash economy enough to support their subsistence activities.<sup>121</sup>

Kuukpik-affiliate I.C.E. Services has been contracted to provide extensive lodging, utility operations, and catering for workers on the Willow project.<sup>122</sup> This includes about 160 new hires this coming winter alone, all of which would be lost if the Willow project is delayed or terminated.<sup>123</sup> I.C.E. expects to employ close to 300 people per year between 2025 and 2029 support the Willow project. These jobs would all be lost if Willow does not go forward.<sup>124</sup>

The loss of Nanuq and I.C.E. Services jobs caused by vacatur would be compounded by the negative effect on dividends received by Kuukpik's North Slope resident shareholders. Kuukpik dividends provide Nuiqsut resident shareholders vital cash income, with Nuiqsut's Iñupiat households receiving over half of their income from ANCSA dividend payments.<sup>125</sup> Kuukpik revenue from Nanuq's civil construction work and from Kuukpik/I.C.E. Services' hospitality services for Willow will partially fund Kuukpik dividend payments.

Finally, Willow is expected to provide significant funding to all North Slope villages for decades through the revenue sharing provisions of the NPR-A Impact Mitigation

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<sup>121</sup> AR821012-14.

<sup>122</sup> Decl. T.J. Bourdon, ¶ 3, Exhibit B.

<sup>123</sup> *Id.* at ¶ 6.

<sup>124</sup> *Id.* at ¶ 7.

<sup>125</sup> AR821013 (“Nuiqsut Iñupiat households receive 57% of their income from dividend payments (e.g., Kuukpik, ASRC)...”).

Fund.<sup>126</sup> These shared royalties are distributed among North Slope villages as grants to fund basic operations and things like school development, library staffing, wildlife studies, emergency response plans, sewage treatment facility upgrades, search and rescue equipment, and police training.<sup>127</sup> Willow is expected to contribute at least \$2.6 billion dollars to this fund over the next 30 years.<sup>128</sup> Nuiqsut and the other North Slope villages need these funds to operate and are only likely to need them more if Alaska's budgetary woes continue or decline further.

**B. Errors, if any, are unlikely to justify the harmful consequences of vacatur.**

Administrative procedure errors, if any, are likely outweighed by the disruptive consequences of vacating the ROD. The approved version of the Willow project represents a compromise path forward that works for most local stakeholders, including Kuukpiik, ASRC, and the NSB (all of whom intervened in this litigation to defend the Project).<sup>129</sup> Sending Willow back to the planning stage risks upsetting that balance by killing the project (temporarily or permanently) or generating a different decision that does *not* include the limitations and mitigation that local stakeholders fought for.

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<sup>126</sup> Decl. Joe Nukapigak, ¶ 20, ECF No. 58-1 in No. 3:23-cv-00061-SLG; AR821013.

<sup>127</sup> Julie Sande, *NPR-A Impact Mitigation Fund Report to the First Session of the Thirty-third Alaskan Legislature*, Department of Commerce, Community, and Economic Development (Jan. 2023), available at: <https://www.commerce.alaska.gov/web/Portals/4/pub/NPR-A%20Grant/2023%20NPR-A%20Report%20to%20the%20Legislature.pdf>; see also AS 37.05.530; AR821160.

<sup>128</sup> AR821161.

<sup>129</sup> Decl. Stephen V. Bross ¶¶ 10, 17, ECF No. 48-10 in No. 3:23-cv-00058-SLG.

If the court agrees that BLM failed to adequately explain or justify certain determinations, remanding for further explanation without vacating the Department of the Interior's decision to approve the entire Willow Project would seem appropriate.<sup>130</sup>

### **CONCLUSION**

For these reasons, Kuukpik respectfully requests the court deny the Plaintiffs' motions, enter judgment for Defendants, and dismiss these cases with prejudice.

Dated: August 30, 2023.

CHANDLER, FALCONER, MUNSON &  
CACCIOLA, LLP  
Attorneys for Intervenor/Defendant  
Kuukpik Corporation

By: /s/ Patrick W. Munson  
Patrick W. Munson  
AK Bar No. 1205019

By: /s/ Charles A. Cacciola  
Charles A. Cacciola  
AK Bar No. 1306045

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<sup>130</sup> See, e.g., *Natl. Fam. Farm Coalition v. U.S. Env'tl. Protec. Agency*, 966 F.3d 893, 929–30 (9th Cir. 2020), concluding:

[R]emand without vacatur is warranted. EPA's error—failing to consider harm to monarch butterflies caused by killing target milkweed—is not “serious,” especially in light of EPA's full compliance with the ESA and substantial compliance with FIFRA. Moreover, given the technical nature of EPA's error, EPA will “likely be able to offer better reasoning” and “adopt the same rule on remand.” Thus, regardless of how “disruptive” the consequences of vacatur would be—and there is evidence of potentially serious disruption if a pesticide that has been registered for over five years can no longer be used—vacatur would not be warranted.

(internal citations omitted); see also *Cal. Cmty. Against Toxics*, 688 F.3d at 994 (“While we have only ordered remand without vacatur in limited circumstances, if saving a snail warrants judicial restraint, so does saving the power supply.”) (internal citations omitted); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995).

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Civil Rule 7.4(a)(3), I hereby certify that this memorandum complies with the type-volume limitation of Local Civil Rule 7.4(a)(1) as modified by applicable orders issued by or requested from the Court because this memorandum contains 8,221 words, excluding the parts exempted by Local Civil Rule 7.4(a)(4). This memorandum has been prepared in a proportionately spaced typeface, Times New Roman 13-point font.

/s/ Charles A. Cacciola  
Charles A. Cacciola

### **CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2023, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ Charles A. Cacciola  
Charles A. Cacciola