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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants, and CONOCOPHILLIPS ALASKA, INC., et al., Intervenor-Defendants.	Case No. 3:23-cv-00058-SLG
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

NORTH SLOPE BOROUGH'S RESPONSE IN OPPOSITION TO PLAINTIFFS' OPENING BRIEFS FOR SUMMARY JUDGMENT

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GLOSSARY

ANILCA	Alaska National Interest Lands Conservation Act
APA	Administrative Procedure Act
BA	biological assessment
BiOp	biological opinion
BLM	Defendant Bureau of Land Management
Borough	Intervenor-Defendant North Slope Borough
CBD	Plaintiffs Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, Greenpeace, Inc., and Natural Resources Defense Council
CO_2	carbon dioxide
CO_2e	carbon dioxide equivalent
ConocoPhillips	Intervenor-Defendant ConocoPhillips Alaska, Inc.
EIS	environmental impact statement
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FSEIS	BLM, Willow Master Development Plan, Final Supplemental Environmental Impact Statement (Jan. 2023)
FWS	U.S. Fish and Wildlife Service
GHG	greenhouse gas
ITS	incidental take statement

MT	metric tons
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPR-A	National Petroleum Reserve-Alaska
NPRPA	Naval Petroleum Reserves Production Act
Project	Willow Master Development Plan
ROD	BLM, Willow Master Development Plan, Record of Decision (Mar. 13, 2023)
Services	U.S. Fish and Wildlife Service and National Marine Fisheries Service
SILA	Plaintiffs Sovereign Iñupiat for a Living Arctic, Alaska Wilderness League, Environment America, Northern Alaska Environmental Center, Sierra Club, and The Wilderness Society
TLSA	Teshekpuk Lake Special Area
TMT	thousand metric tons
Willow	Willow Master Development Plan

I. INTRODUCTION

Once again, a critically important development project on Alaska's North Slope is under attack by outside groups who think they know better than the people who live here. For over 50 years, the people of the North Slope—the majority of whom are Iñupiat—have relied on responsible development of regional oil and gas reserves to sustain essential government services and support regional employment. Tax revenue from oil and gas infrastructure funds nearly all North Slope Borough ("Borough") government services in support of eight remote villages in a region with extremely limited economic opportunity. The Iñupiat people take seriously their responsibility to ensure the health of their lands and natural resources, which have sustained them and their subsistence traditions for thousands of years. The Willow Master Development Plan ("Willow" or "Project") has been subject to rigorous environmental review, local consultation, and careful planning to reduce and mitigate impacts to our natural resources.

The Bureau of Land Management ("BLM") and other federal agencies have twice extensively reviewed and analyzed Willow for conformance with all applicable laws governing resource development and environmental protection. Willow is sited in the National Petroleum Reserve-Alaska ("NPR-A")—an area explicitly established to ensure that our nation has adequate petroleum supplies—on lands leased by ConocoPhillips Alaska, Inc. ("ConocoPhillips") for oil and gas production. This Court largely upheld the previous environmental reviews of Willow, except for a few discrete deficiencies to be remedied on remand. *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739 (D. Alaska 2021) ("*SILA*"). The Federal Defendants have corrected these issues,

conducted additional analyses, and reauthorized Willow. Still not satisfied, Sovereign Iñupiat for a Living Arctic ("SILA") and Center for Biological Diversity ("CBD") (collectively, "Plaintiffs") renew their legal challenges.

Plaintiffs' claims are meritless. BLM's Final Supplemental Environmental Impact Statement ("FSEIS") identified and evaluated a new preferred alternative decreasing Willow's number of drill pads, significantly reducing infrastructure within the Teshekpuk Lake Special Area ("TLSA"), and lowering anticipated oil production and greenhouse gas ("GHG") emissions. AR820777. BLM then published its Record of Decision ("ROD") approving Willow, which even further reduced the Project's potential footprint. BLM again consulted with the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services") to obtain the proper Endangered Species Act ("ESA") authorizations. Soon after, this Court and the Ninth Circuit denied Plaintiffs' requests for preliminary injunction, allowing construction of Willow to commence. This Court should now deny Plaintiffs' arguments on the merits and allow ConocoPhillips to proceed with its lawful development activities.

II. BACKGROUND – THE NORTH SLOPE BOROUGH[1]

The Borough is the area-wide local government representing eight remote Native villages on the North Slope of Alaska. Declaration of Mayor Harry K. Brower, Jr. ¶ 3 ("Brower Decl.").[2] Its jurisdiction includes the entire NPR-A, where Willow is located.

[1] The Borough incorporates by reference the Background provided by the Federal Defendants. Fed. Defs. 2-15.

[2] Mayor Brower's Declaration is available at 3:23-cv-00061-SLG, ECF 25-1, and 3:23-cv-00058, ECF 28-1.

Id. Borough residents are predominantly Iñupiat people who have subsisted on NPR-A's resources for thousands of years. *Id.* ¶¶ 5, 14. Its residents depend on a mixed economy comprised of subsistence activities and limited employment opportunities supported, in large part, by responsible natural resource development.

Oil production on the North Slope has been the lifeblood of Borough communities since the 1970s. Today, oil production provides roughly 95% of the Borough's tax revenue, supporting services, infrastructure, and jobs across a region the size of Wyoming. *Id.* ¶ 8. These tax revenues enable the Borough to invest in public infrastructure and utilities (including reliable sewer, water, and heat) and to provide essential services to its eight communities, including education, health (including clinics in each village, hospitals, and increased sanitation), wildlife management, and emergency services (including aircraft and crew that conduct regular medevac and search and rescue operations across the North Slope). *Id.* ¶ 9.

Yet the Borough's ability to continue providing such services is threatened by a 30-year decline in North Slope oil production. Down from its peak of 1,974,000 barrels per day in 1988, in 2022, the North Slope produced just 428,000 barrels per day, about 2.11% of U.S. consumption.[3] Willow will marginally improve U.S. oil production, but the Project will have an outsized impact on the Borough's ability to provide critical

[3] *See* U.S. Energy Information Administration, Frequently Asked Questions, https://www.eia.gov/tools/faqs/faq.php?id=33&t=6#:~:text=In%202020%2C%20the%20United%20States,of%20annual%20consumption%20since%201995; *see also* U.S. Energy Information Administration, Petroleum & Other Liquids: Alaska North Slope Crude Oil Production, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=manfpak2&f=a.

government services to its communities, providing an estimated $1.25 billion in Borough property tax revenues over its 30-year lifespan. *See* Brower Decl. ¶ 10; AR821019. Willow is also projected to generate between $2.6 billion to $4.4 billion in royalty revenue sharing for the NPR-A Impact Grant Program, which offers grants to the Borough and its incorporated cities. AR821160-61. These funds are necessary for the Borough and its villages to provide essential services to their residents, including the protection of vital subsistence resources.

Because the Iñupiat people depend on the subsistence resources of NPR-A's lands and waters for their physical health, cultural well-being, and survival, the Borough has necessarily developed considerable expertise in balancing the environmental and economic interests of its residents. For example, the Borough ensures the protection of local wildlife through appropriate environmental protections. Brower Decl. ¶ 13. The Borough's Department of Wildlife Management promotes sustainable subsistence harvests and monitors the population and health of fish and wildlife species through research, management, cooperation, and collaboration with subsistence hunters, government agencies, researchers, industry partners, and others. *Id.* ¶ 15. Its Department of Planning and Community Services has also successfully permitted oil and gas exploration, development, and production for over 40 years. *Id.* ¶ 12. The Borough's expertise has long allowed it to protect its residents, environment, and subsistence resources, while responsibly facilitating, when appropriate, oil and gas development. *Id.* ¶¶ 12-16.

III. STANDARD OF REVIEW

The Borough incorporates by reference the Standard of Review provided by the Federal Defendants. Fed. Defs. 15-16. This Court must uphold BLM's decision as long as the agency has considered the relevant data, articulated a satisfactory explanation for its action, and made no clear error of judgment. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

IV. ARGUMENT

A. BLM Complied with Its NEPA Obligations.

Plaintiffs claim that BLM violated the National Environmental Policy Act ("NEPA") in two ways. First, Plaintiffs argue that BLM considered an unreasonably narrow range of alternatives that violated NEPA, the Naval Petroleum Reserves Production Act ("NPRPA"), and this Court's prior order. CBD 8-15; SILA 9-17. Second, they argue that BLM violated NEPA by failing to analyze GHG emissions from other projects that they allege may be caused by Willow, but that are not part of Willow. CBD 15-20; SILA 22-24. Plaintiffs misconstrue BLM's obligations under NEPA and the NPRPA and ignore BLM's thorough and well-explained approach to developing, considering, and evaluating alternatives in the FSEIS.

i. BLM Properly Considered a Reasonable Range of Alternatives.

NEPA regulations require that an environmental impact statement ("EIS") "[e]valuate reasonable alternatives to the proposed action" and "[l]imit their consideration to a reasonable number of alternatives." 40 C.F.R. § 1502.14(a), (f) (2022). Courts review an agency's range of alternatives "under a 'rule of reason' standard that

requires an agency to set forth only those alternatives necessary to permit a reasoned choice." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012) (citation omitted). "An agency need not, therefore, discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (internal quotation marks and citation omitted) (emphasis added). An EIS need only "briefly discuss" reasons for eliminating alternatives not selected for detailed examination. 40 C.F.R. § 1502.14(a).

The range of considered alternatives is constrained by the stated purpose of the action. *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004); 40 C.F.R. § 1508.1(z). An agency need not consider alternatives that "extend beyond those reasonably related to the purposes of the project." *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012) (citation omitted). Here,

> [t]he purpose of the Proposed Action is to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources in the Willow reservoir located in the Bear Tooth Unit (BTU), while providing maximum protection to significant surface resources within the NPR-A, consistent with BLM's statutory directives.

AR820723-24. Neither CBD nor SILA challenge this statement of purpose. Accordingly, the scope of this Court's inquiry is limited to evaluating whether the alternatives examined in the FSEIS are sufficiently broad to provide for informed decision-making and public participation within the context of the action's stated purpose.

In *SILA*, this Court faulted BLM's alternatives analysis for two narrow reasons. First, the Court found that BLM impermissibly limited the scope of alternatives "based on the view that ConocoPhillips has the right to extract all possible oil and gas on its leases." *SILA*, 555 F. Supp. 3d at 770. Second, it found that BLM "failed to consider the statutory directive that 'maximum protection' be given to surface values within the TLSA." *Id.*; *see also* Fed. Defs. 8-9.

On remand, BLM unequivocally remedied these deficiencies. It revised the Purpose and Need statement to include "providing maximum protection to significant surface resources within the NPR-A, consistent with BLM's statutory objectives." AR820724. In developing the action alternatives, and in direct response to this Court's prior order, the agency paid "specific attention . . . to the minimization of impacts on caribou, waterbird, and shorebird habitats, consistent with the purpose of the TLSA." AR820745. It also revised screening criteria to "consider alternatives that would reduce infrastructure and environmental impacts relative to" the proposal (Alternative B), "and specifically to consider alternative concepts that would reduce infrastructure and impacts within the TLSA." AR821948. These changes resulted in a new alternative—Alternative E—that significantly reduces the environmental impacts that Plaintiffs target. *See, e.g.*, AR820770, AR820776, AR824339 (all describing reduced impacts).

Notwithstanding these substantial revisions responding directly to this Court's instructions, Plaintiffs remain dissatisfied with the scope of the alternatives considered. Plaintiffs primarily assert that BLM's recognition of ConocoPhillips' right to "fully develop" or extract all "economically viable quantities of recoverable oil" is not

meaningfully different than its prior view that ConocoPhillips has the right to "extract all possible oil and gas on its leases." CBD 9; SILA 12. Plaintiffs misinterpret this Court's prior holding. The Court did not identify any error with BLM's view of the quantity of oil and gas at issue. *SILA*, 555 F. Supp. 3d at 768 (ConocoPhillips "has the right to 'extract . . . all the oil and gas'"). Instead, the Court clearly explained that BLM's error was its view that the lease rights "precluded" any consideration of modifications to "the configuration or location of the drill pads," and that the lessee had the "unfettered right to drill wherever it chooses." *Id*. Consistent with the Court's direction, BLM developed a new alternative unconstrained by the drilling configurations and locations of ConocoPhillips' proposed development plan. And, contrary to Plaintiffs' claims, BLM stranded economically viable quantities of oil when it narrowed the scope of the Project. *See*, *e.g.*, *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004-05 (9th Cir. 2013) (rejecting argument that BLM was required to consider additional "mid-range alternative[s]"). As approved in the ROD, Willow is substantially different in design, impact, and output from ConocoPhillips' initial proposal.

Plaintiffs also argue that BLM misapplied its authority under the NPRPA and failed to "assure the maximum protection" of surface values within special areas. CBD 10-11; SILA 10-11, 15-16. But Plaintiffs misinterpret both the NPRPA's requirements and BLM's re-evaluation and reformulation of alternatives. In 1980, Congress amended the NPRPA to promote the exploration and development of oil and gas resources within the NPR-A. Pub. L. No. 96-514, 94 Stat. 2964 (1980) (codified at 42 U.S.C. § 6506a). Congress directed that the "Secretary shall conduct an expeditious program of competitive

leasing of oil and gas in the Reserve in accordance with this Act." 42 U.S.C. § 6506a(a). While Congress recognized that any exploration within the TLSA and similarly designated special areas "shall be conducted in a manner which will assure the maximum protection of such surface values," Plaintiffs disregard the NPRPA's qualifier that "maximum protection" is only afforded "to the extent consistent with the requirements of this Act for the exploration of the reserve." *Id.* § 6504(a) (emphasis added). As this Court recognized, "infrastructure is allowed, and indeed anticipated, within the TLSA." *SILA*, 555 F. Supp. 3d at 769 (emphasis added).

Plaintiffs also disregard that the NPRPA's authorization to "include or provide for such conditions, restrictions, and prohibitions . . . to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [NPR-A]" is explicitly reserved to the Secretary's discretion depending on what she "deems necessary or appropriate." 42 U.S.C. § 6506a(b) (emphasis added). While an important consideration, protection of designated special areas is subservient to Congress' directive to expeditiously explore and develop oil and gas resources, and the Secretary has discretion to determine which protective measures are "necessary or appropriate" to mitigate adverse effects to NPR-A surface resources. Plaintiffs fail to establish that BLM abused its discretion with respect to protection of any surface resources.

The Court previously faulted BLM for "presupposing the preclusion of any alternative development scenarios within the TLSA based on the lease terms" and for characterizing the TLSA as "only an administrative boundary." *SILA*, 555 F. Supp. 3d at 769. In response, BLM adopted new alternative screening criteria and, as Plaintiffs

acknowledge, considered an alternative that would prohibit Willow infrastructure within the TLSA. AR821948, AR821965. After reviewing, BLM rejected this alternative and thoroughly explained why "it would not meet the Project's purpose and need":

> Approximately 67% CPAI's BTU leases by surface area are located in the TLSA. This concept would completely eliminate access to oil and gas resources in several BTU leases located in the TLSA, substantially reduce access to such resources in additional BTU leases located in the TLSA, and create significant overlap in drilling reach between drill sites BT1 and BT2, which would have the net effect of having all of the surface impacts of a road and two pads but with far less resource recovery.

AR821965. While Plaintiffs disagree with the result (CBD 12-13, SILA 14), BLM provided the requisite "brief discussion" for eliminating that alternative from further detailed examination.

The fallacy of Plaintiffs' arguments is further exposed by BLM's well-documented efforts to balance its obligations concerning exploration and mitigation of impacts to surface resources. BLM explained, in significant detail, its methodology and analysis underlying its development of alternatives that would both accommodate oil and gas development and protect the surface resources and special areas of the NPR-A. AR821948-50. BLM identified a new alternative (Alternative E) that eliminated a proposed drill site in the TLSA and evaluated nine potential new locations for the other TLSA drill site to further minimize and mitigate potential impacts to surface resources. AR821980-82. While Plaintiffs complain Alternative E did not go far enough, BLM met its obligations. Alternative E also reduces infrastructure in the TLSA by 40% compared to other alternatives, produces less oil overall, and reduces Willow's GHG emissions. AR821712, AR821859. The ROD then selected a modified version of Alternative E that

disapproved a deferred fourth drill site, resulting in three drill sites, compared to the five originally proposed.

Because the FSEIS includes a reasonable range of alternatives meeting the stated purpose and need of the proposed action and protecting surface values in special areas and the NPR-A, and because BLM provided the requisite brief discussion for eliminating Plaintiffs' desired alternatives from more detailed examination, Plaintiffs' NEPA and NPRPA claims fail.

ii. BLM Properly Evaluated GHG Emissions.

Plaintiffs previously challenged BLM's analysis of downstream GHG emissions, and this Court found that BLM's exclusion of foreign GHG emissions in its alternatives analysis was flawed. *SILA*, 555 F. Supp. 3d at 765. The FSEIS directly remedies this issue. AR822432-500. Instead of challenging BLM's compliance with the Court's remand order, Plaintiffs now allege that BLM failed to consider downstream GHG emissions from other projects that Willow may potentially induce. CBD 15-20; SILA 22-24. As explained by the Federal Defendants and ConocoPhillips, these arguments are meritless. Fed Defs. 24-28; ConocoPhillips 15-24.

B. BLM Reasonably Exercised Its Discretion and Met Its NPRPA Obligations.

CBD incorrectly asserts that BLM violated its NPRPA obligations by: (1) failing to "reasonably explain its failure to adopt an alternative that would meaningfully reduce downstream emissions"; and (2) "decid[ing] not to impose any measures to mitigate those downstream emissions . . . without reasoned explanation." CBD 21.

Plaintiffs' first assertion is patently false. BLM clearly explained its selection of Alternative E, as modified in the ROD, and the resulting reduction in indirect emissions compared to the other action alternatives. AR820776, AR820770, AR 824900-01 (noting reduction of 21,750,000 metric tons ("MT") in carbon dioxide equivalent ("CO_2e") emissions relative to Alternative B).

CBD's claim that BLM failed to reasonably explain why it "did not impose a single measure to mitigate the Project's downstream [i.e., indirect] emissions . . . ," CBD 23, is also contrary to the record. As stated in the ROD, the disapproval of BT5 responds to a cooperating agency's suggested mitigation measure. AR824962. Moreover, BLM reasonably exercised its discretion to determine what mitigation is "necessary or appropriate," 42 U.S.C. § 6506a(b), and clearly explained why it rejected proposals to periodically re-review its NEPA analysis, AR824964, limit field life to 20 years, AR824972, and impose redundant land reforestation requirements, AR824973. CBD's NPRPA allegations are meritless.

C. BLM Complied with Its ANILCA Section 810 Obligations.

Contrary to SILA's allegations, SILA 17-22, BLM complied with Alaska National Interest Lands Conservation Act ("ANILCA") Section 810 by appropriately: (1) considering (and adopting) alternatives that would reduce impacts to subsistence; (2) determining that its selected alternative will involve the minimal amount of public lands necessary to accomplish the purposes of the use; and (3) determining that reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources.

"The purpose of ANILCA § 810 is to protect Alaskan subsistence resources from unnecessary destruction. [It] does not prohibit all federal land use actions which would adversely affect subsistence resources but sets forth a procedure through which such effects must be considered and provides that actions which would significantly restrict subsistence uses can only be undertaken if they are necessary and if the adverse effects are minimized." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544 (1987). The Borough incorporates by reference the background on Section 810 provided by Federal Defendants. Fed. Defs. 5-6, 32-33.

SILA's argument that BLM violated its Tier-1 obligations lacks merit. The FSEIS clearly describes how certain alternatives would reduce the use of public lands needed for subsistence purposes. BLM added Alternative E, "which reduces infrastructure within the TLSA relative to the previously analyzed action alternatives," specifically in response to comments "that emphasized the importance of protecting caribou movement and migration and reducing the effects of industrial development on subsistence use and the traditional ways of life of the community of Nuiqsut" and "consistent with [the Court's] direction to consider alternatives that provide 'maximum protection' for surface values in the [TLSA]." AR824999.

SILA erroneously asserts that BLM "acknowledged that none of the action alternatives meaningfully reduced the use and occupancy of lands needed for subsistence purposes" and "admitted the benefits to subsistence users from [reducing infrastructure in the TLSA to lessen impacts to caribou hunting] would be 'minimal.'" SILA 18. Even before the ROD's removal of the BT5 drill site, however, Alternative E provided a

smaller footprint, shorter gravel roads, 40% less infrastructure within the TSLA, and the relocation of certain infrastructure "farther from high-density calving areas and mosquito-relief habitat." AR824339. While its ANILCA Section 810 analysis recognized that Alternative E might not result in "a substantial reduction in direct impacts to Nuiqsut subsistence harvesters," BLM clearly found and explained that Alternative E could reduce impacts on caribou habitat and help minimize the deflection of caribou away from Nuiqsut caribou hunting grounds, as well as result in other lessened impacts on subsistence resources. AR824339-40 (emphasis added).

To the extent SILA rehashes its argument that BLM improperly limited its consideration of alternatives by precluding alternatives that would strand economically viable quantities of oil, SILA 19-20, that argument is meritless for the reasons explained above. *Supra* 12-13; *see also* Fed. Defs. 20-23; ConocoPhillips 12-14. Unlike *City of Tenakee Springs v. Clough*, on which SILA relies, rather than rigidly adhere to an interpretation of contractual obligations that led the agency to refuse to consider any alternative that would result in the availability of less timber, 915 F.2d 1308, 1312-13 (9th Cir. 1990), BLM engaged in a thorough review of multiple alternative courses of action before selecting Alternative E. BLM's consideration of alternatives clearly satisfied its ANILCA Section 810 obligations.

BLM also met its Tier-2 obligations.[4] First, BLM reasonably determined that "the proposed activity will involve the minimal amount of public lands necessary to

[4] SILA does not appear to claim that BLM violated 16 U.S.C. § 3120(a)(3)(A). SILA 21. BLM's determination under this provision was clearly reasonable. AR824998-99;

accomplish the purposes of such use, occupancy, or other disposition." 16 U.S.C. § 3120(a)(3). As explained in *Hoonah*, the "measure of what is 'necessary' and what must be 'minimal' in the statutory language is 'the purposes of such . . . disposition,' not minimization of impact on subsistence." 170 F.3d at 1230. There, the court rejected the argument that Section 810 requires an agency to "select the alternative which minimizes, not necessarily the total acres of public lands, but the amount of land needed for subsistence purposes," and 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.

Here, the purpose of the disposition is to develop oil and gas resources from leases in the Willow reservoir, consistent with applicable laws. Similar to the agency's decision at issue in *Hoonah*, BLM considered the wide-ranging effects of the development plan and made the necessary findings. AR820726-27, AR820756-1146, AR824998-99. Through Alternative E, BLM reduced the Project footprint to approximately 499 acres (384 acres of gravel footprint and 115 acres of excavation), the least of any of the action alternatives. AR825000. As described in the ROD:

> Reducing the amount of overall infrastructure will also diminish potential impediments to the movement of caribou and subsistence users. . . . Alternative E . . . also requires the least length of pipelines and roads with

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Hoonah Indian Ass'n v. Morrison, 170 F.3d 1223, 1227 (9th Cir. 1999) (explaining requirement). Moreover, while SILA complains that inclusion of these determinations in the ROD rather than the FSEIS "deprived the public of the opportunity to evaluate the findings prior to a final decision," SILA 21, this was in fact noted in the FSEIS, AR824371, and in no way impacted the final decision or caused any harm to Plaintiffs or the public.

> less than 500 feet of separation, thereby reducing the occurrence of "pinch points" that may restrict caribou and subsistence user movement.

AR824898-99. Despite SILA's speculation that BT5 could be resurrected in the future and criticism of the BLM's discussion of the implications of BT5's removal, SILA 19, the ROD also clearly explains BLM's disapproval of both BT4 and BT5, and the resulting reductions in potential impacts to subsistence resources. AR824900. BLM minimized impacts on subsistence in the context of the purposes of the disposition, meeting its obligations under 16 U.S.C. § 3120(a)(3)(B). *See Kunaknana v. Clark*, 742 F.2d 1145, 1149, 1151-52 (9th Cir. 1984) (Section 810(a) "must be read in light of" the NPRPA provisions providing for "an expeditious program of competitive leasing of oil and gas in the [NPR-A]").

Second, BLM complied with 16 U.S.C. § 3120(a)(3)(C) in determining that "reasonable steps will be taken to minimize adverse impacts upon subsistence uses and resources resulting from such actions." In addition to the reduction in lands and surface infrastructure, the ROD and FSEIS impose a multitude of other lease stipulations, AR820745, and require operating procedures, design features, and mitigation measures to protect subsistence uses and resources. *E.g.*, AR824926, AR824930-56 (subsistence boat ramps, pullouts, and tundra access ramps; community consultation and engagement on subsistence activities; and other measures), AR824999-5001, AR824892, AR824901 (discussing the boat ramps and vehicle turnouts/ramps added "as mitigation to help offset Project effects on the community of Nuiqsut"), AR821021-68. Moreover, BLM determined that disapproving BT5 should further reduce "impacts to subsistence

activities and wildlife including caribou." AR824900. BLM met its Tier-1 and Tier-2 obligations under ANILCA Section 810.

D. The Federal Defendants Complied with Their ESA Obligations.

Plaintiffs assert that Federal Defendants violated the ESA's consultation requirements by failing to consider the impacts of Willow's GHG emissions on certain threatened species. CBD 25-32; SILA 24-31. Specifically, CBD asserts that BLM improperly concluded that Willow's GHG emissions will have "no effect" on polar bears or bearded and ringed seals, and that the Services erroneously agreed. CBD 27. SILA similarly asserts that FWS failed to consider whether Willow's GHG emissions "may affect" polar bears. SILA 26-27. Plaintiffs also assert that the lack of an incidental take statement ("ITS") for polar bears violated the ESA. CBD 32-37; SILA 31-36. These arguments are meritless.[5] Plaintiffs misstate the record and the roles and decisions of the respective agencies, and their arguments reflect a fundamental misunderstanding of the ESA consultation process, its requirements, and the best available science.

i. The Federal Defendants Appropriately Consulted on the Proposed Action.

Pursuant to ESA section 7, "[e]ach Federal agency shall, in consultation with [FWS or NMFS], insure that any action authorized, funded, or carried out by such agency

[5] As separate, derivative arguments, Plaintiffs argue that because the Services' consultations were allegedly flawed, BLM's reliance on them was unlawful. SILA 36; CBD 38. Plaintiffs are wrong. The Services complied with all applicable ESA requirements, and FWS's biological opinion and NMFS's written concurrence with BLM's not likely to adversely affect determination are both lawful. BLM properly relied on them.

. . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Accordingly, Section 7 only requires "the action agency to avoid acts that will more likely than not jeopardize a species." *Me. Lobstermen's Ass'n v. NMFS*, 70 F.4th 582, 595 (D.C. Cir. 2023).

To initiate the consultation process, the action agency (here, BLM) "shall conduct a biological assessment [('BA')] for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action." 16 U.S.C. § 1536(c)(1). The BA shall evaluate the "effects of the action" on listed species and critical habitat, and its contents "are at the discretion of the Federal agency and will depend on the nature of the Federal action." 50 C.F.R. § 402.12(a), (f). BLM is to use the BA "in determining whether formal consultation . . . is required." *Id.* § 402.12(k)(1).

Consultation is not required if BLM makes a "no effect" determination for the action. *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). If BLM determines that the proposed action "is not likely to adversely affect" any listed species or critical habitat and the respective Service concurs in writing, formal consultation is not required. 50 C.F.R. §§ 402.14(b)(1), 402.12(k)(1). If BLM determines that listed species or critical habitat "are likely to be adversely affected by the action," formal consultation is required and initiated by the submission of the BA to FWS or NMFS. *Id.* § 402.14(c)(3). BLM is responsible for providing the best scientific and commercial data available to the Services to allow for "an adequate review of the effects that an action may have upon listed species or critical habitat." *Id.* § 402.14(d).

During formal consultation, the respective Service develops and provides a biological opinion ("BiOp") "detailing how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(A). In doing so, the Service evaluates the "effects of the action" along with any cumulative effects. After adding these effects to the "environmental baseline," the Service formulates its opinion "as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." 50 C.F.R. §§ 402.14(g)(4), 402.14(h). "Nothing in § 7 requires 'distorting the decisionmaking process by overemphasizing highly speculative harms' whenever the available data is wanting." *Me. Lobstermen's Ass'n*, 70 F.4th at 596 (citation omitted). Finally, the Service is required to "[f]ormulate a statement concerning incidental take, if such take is reasonably certain to occur." 50 C.F.R. §§ 402.14(g)(7), 402.14(i). BLM and the Services clearly met their ESA obligations.

a. Plaintiffs' Consultation Claims Are Legally Flawed, Factually Inaccurate, and Procedurally Improper.

Plaintiffs base their consultation-related arguments on the false contention that BLM and the Services made improper "no effect" determinations. CBD 27; SILA 27-28. Plaintiffs misinterpret the ESA's requirements regarding effects determinations, misrepresent the record, and fail to properly plead these claims.

First, Plaintiffs fail to recognize that it is solely the action agency (BLM, not the Services) that can make a "no effect" determination, and that assessment is based on a review of the "action" as a whole. The ESA regulations state that "[e]ach Federal agency

shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a) (emphasis added). A "no effect" determination is "the appropriate conclusion when the action agency determines its proposed action will not affect listed species or critical habitat." FWS & NMFS, *Endangered Species Consultation Handbook* at 3-12 (1998) (emphasis added). If BLM finds that its action will have "no effect" on listed species or critical habitat, "it need not consult with the expert agencies." *Nat'l Family Farm Coal. v. U.S. Envtl. Prot. Agency*, 966 F.3d 893, 922 (9th Cir. 2020) (citation omitted). "The Federal agency makes the final decision on whether consultation is required, and it likewise bears the risk of an erroneous decision." *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005) (emphasis added) (citation omitted). Any attempt by Plaintiffs to challenge a purported "no effect" or improper "may affect" determination by FWS or NMFS fails as a matter of law.

Contrary to CBD's remaining claims, BLM did not make "no effect" determinations for polar bears or ice seals. Instead, BLM prepared BAs that properly "evaluate[d] the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine[d] whether any such species or habitat are likely to be adversely affected by the action." 50 C.F.R. § 402.12(a) (emphasis added). BLM concluded that the action "may affect and is likely to adversely affect polar bears," FWS_AR030118, which triggered formal consultation and FWS's preparation of the BiOp. For bearded and ringed seals, BLM concluded that the action "may affect and is not likely to adversely affect" those species, AR525026-27, which, with NMFS's

written concurrence, NMFS_AR000143, terminated consultation. CBD's claims that BLM made improper "no effect" determinations fail because BLM made no such determinations.

Because BLM is required to "evaluate the potential effects of the action" and the "contents of a [BA] are at the discretion of the Federal agency [i.e., BLM]," 50 C.F.R. § 402.12(a), (f), Plaintiffs' "no effect/may affect" arguments are in essence challenges to BLM's BAs. Here, any such argument is improper because neither CBD nor SILA made such a claim in their respective complaints. The only ESA-related claims directed at BLM relate to BLM's reliance on NMFS's concurrence and FWS's BiOp. CBD Am. Compl. 53-54, ECF 104; SILA Am. Compl. 65, ECF 88. These claims do not target either of BLM's BAs, and "summary judgment is not a procedural second chance to flesh out inadequate pleadings." *Wasco Products, Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (citation omitted); *Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011) (because the complaint did not raise the claim, the claim was not properly before the court). Because they were not pled, Plaintiffs' arguments regarding purportedly erroneous "no effect" or "may affect" determinations are not properly before this Court and must be rejected.

b. BLM Appropriately Determined that Impacts from GHG Emissions Do Not Qualify As "Effects of the Action" with Concurrence from the Services.

Notwithstanding their procedural flaws, Plaintiffs' arguments also fail on the merits. To be included and evaluated in a BA, and in a subsequent BiOp, the alleged impacts of GHG emissions on listed species or critical habitat must qualify as an "effect

of the action." 50 C.F.R. §§ 402.12(a) ("[BA] shall evaluate the potential effects of the action"), 402.14(h)(1)(iii) (BiOp shall include "[a] detailed discussion of the effects of the action on listed species or critical habitat").

The Services have defined the scope of "effects of the action" for purposes of Section 7 consultation as follows:

> *Effects of the action* are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.

Id. § 402.02 (emphasis added). Pursuant to the regulations, "[a] conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available." *Id.* § 402.17(b) (emphasis added). "Clear and substantial" means "there must be a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur," which must be based "on solid information and should not be based on speculation or conjecture." 84 Fed. Reg. 44,976, 44,977 (Aug. 27, 2019) (emphasis added); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (the "obvious purpose of the requirement that each agency 'use the best available scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise"). While a consequence does not have to be guaranteed to occur, "it must have a degree of certitude." 84 Fed. Reg. at 44,977 (emphasis added). For example, a consequence is not caused by a proposed action if it "is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur." 50 C.F.R. § 402.17(b)(3).

Many federal agencies have considered and issued guidance on how to address GHGs for ESA Section 7 consultation purposes. When listing polar bears as threatened due to the projected decline of sea ice habitat throughout its range, FWS provided specific guidance regarding the implications of the listing for Section 7 consultations relating to oil and gas development activities on the North Slope:

> [T]he future effects of any emissions that may result from the consumption of petroleum products refined from crude oil pumped from a particular North Slope drilling site would not constitute "indirect effects" and, therefore, would not be considered during the section 7 consultation process. The best scientific data available to the Service today does not provide the degree of precision needed to draw a causal connection between the oil produced at a particular drilling site, the GHG emissions that may eventually result from the consumption of the refined petroleum product, and a particular impact to a polar bear or its habitat. At present there is a lack of scientific or technical knowledge to determine a relationship between an oil and gas leasing, development, or production activity and the effects of the ultimate consumption of petroleum products (GHG emissions).

73 Fed. Reg. 28,212, 28,300 (May 15, 2008) (emphasis added); *see also* AR727213-15. FWS found that "there is no traceable nexus between the ultimate consumption of the petroleum product and any particular effect to a polar bear or its habitat." 73 Fed. Reg. at 28,300. Accordingly, with no ability to establish a causal connection between GHG emissions from North Slope oil and gas development and any effects to polar bears, such emissions "would not be considered during the section 7 consultation process." *Id*.

FWS was not the only federal agency to reach this conclusion.[6] The Environmental Protection Agency ("EPA") also examined whether it could establish a

[6] The U.S. Geological Survey also determined that "[i]t is currently beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts at an exact location." Memorandum from Mark D.

causal connection between GHG emissions and detectable impacts to ESA-listed species through a modeling exercise that analyzed hypothetical emissions from a power plant of over 14 million MT of carbon dioxide ("CO_2") per year over a 50-year period (a total of 700,000 thousand metric tons ("TMT") CO_2 over 50-year project life).[7] Willow, by comparison, is anticipated to result in an average of 4.32 million MT of CO_2 emissions per year for 30 years. AR820777 (total of 129,699 TMT CO_2e over 30-year project life). Based on emissions substantially greater and for a longer duration than those from Willow, EPA calculated the corresponding change in global atmospheric CO_2 concentration and the resulting change in global mean temperature increase. Meyers Letter at 6-7. EPA found that:

> The best available climate change modeling tools predict that a source with GHG emissions in amounts equal to or less than those of the model facility analyzed above will have at most an extremely small impact on average global temperature and global atmospheric CO_2 concentrations over and beyond the anticipated functional lifetime of the proposed source. Regional modeling and any associated downscaling calculations to predict effects at a specific species location introduce untested approaches and additional uncertainties. It is clear that any such temperature and ocean acidification outputs, or any specific impact on the corals or polar bears, would be too small to physically measure or detect in the habitat of these species.

Id. at 8 (emphasis added). Based on its analysis, and "in light of the uncertainties in attempting to use the models' outputs to predict impacts at a local level," EPA

Myers, Director, U.S. Geological Survey, *The Challenges of Linking Carbon Emissions, Atmospheric Greenhouse Gas Concentrations, Global Warming, and Consequential Impacts* at 2 (May 14, 2008) (Declaration of Tyson C. Kade ("Kade Decl."), Ex. A).

[7] Letter from Robert J. Meyers, Principal Deputy Assistant Administrator, Office of Air and Radiation re: "Endangered Species Act and GHG Emitting Activities" at 5 (Oct. 3, 2008) (Kade Decl., Ex. B) ("Meyers Letter").

determined that "the risk of harm to any listed species . . . or the habitat of such species . . . is too uncertain and remote to trigger ESA section 7(a)(2) obligations." *Id.*

Following a review of EPA's analysis, NMFS "agree[d] that current models do not allow us to trace a link between individual actions that contribute to atmospheric carbon levels and localized climate impacts relevant to a consultation."[8] Likewise, the Solicitor of the Department of the Interior found that:

> [S]cience cannot say that a tiny incremental global temperature rise that might be produced by an action under consideration would manifest itself in the location of a listed species or its habitat. Similarly, any observed climate change effect on a member of a particular listed species or its critical habitat cannot be attributed to the emissions from any particular source. Rather it would be the consequence of the collective [GHG] accumulation from natural sources and the world-wide anthropogenically produced GHG emissions since at least the beginning of the industrial revolution.

FWS_AR032376 (emphasis added). The Solicitor concluded, with the concurrence of the Secretary of the Interior, that "a proposed action that will involve the emission of GHG cannot pass the 'may affect' test and is not subject to consultation under the ESA and its implementing regulations." FWS_AR032377. During its preparation of the BAs for Willow, BLM confirmed that FWS's interpretation regarding the scope of consultation on GHG emitting activities remained in effect. AR512743-44.

Notwithstanding these scientific conclusions and their preclusion of Plaintiffs' claims, Plaintiffs erroneously assert that BLM and the Services ignored the best available science, which they allege is more substantially developed than in 2008. CBD 30-32;

[8] Letter from James H. Lecky, Director, Office of Protected Resources, NMFS, at 2 (Oct. 10, 2008) (Kade Decl., Ex. C).

SILA 28-29. It is well established, however, that "[t]he determination of what constitutes the 'best scientific data available' belongs to the agency's 'special expertise' and warrants substantial deference." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 924 (9th Cir. 2018) (citation omitted). "The best available data requirement 'merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on.'" *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (i.e., agency "cannot ignore available biological information") (emphasis added) (citation omitted). Furthermore, an agency is not required "to conduct new tests or make decisions on data that does not yet exist." *Nat'l Family Farm Coal.*, 966 F.3d at 925 (emphasis added) (citation omitted). And, courts "may not substitute [their] scientific judgment for that of the agency." *Friends of Santa Clara River*, 887 F.3d at 924. Applying these principles, Plaintiffs' best available science argument readily fails.

CBD submitted comments to BLM with the same arguments and scientific studies that Plaintiffs now cite. AR704774-96. BLM did not "ignore" or "fail to consider" the best available science, as Plaintiffs allege. *See*, *e.g.*, AR820758. To the contrary, BLM "further evaluated" whether there exists "the possibility of establishing causal links between Willow-specific GHG emissions and climate change-related effects to listed species and/or designated critical habitat." AR811703. BLM recognized that polar bears have a "nuanced relationship with sea ice," that each polar bear stock utilizes its sea ice habitat "in a unique manner," and that researchers have not detected "a linear relationship between the amount of sea ice lost and impacts to polar bears." AR811704. Like the

2008 analyses, BLM concluded that the "new" scientific information "does not connect the impacts from GHG emissions for a specific, individual activity, such as Willow, to a specific area for analysis which could affect the health of a discrete listed species, such as polar bears or ice seals." AR811704.

Rather than engaging with BLM's reasoned explanation, Plaintiffs quibble with the use of the words "precision," "precise," and "granularity" to allege that BLM and the Services "applied the wrong standard." CBD 28-29; SILA 30. But the record makes clear that BLM applied the correct standard by evaluating potential "effects of the action" and concluding that a "marginal seasonal decrease in sea ice extent somewhere in the Arctic" does not correspond to consequences that are "reasonably certain to occur" to any listed species or critical habitat. AR811704. BLM used the words Plaintiffs cite to highlight the lack of "clear and substantial information" necessary to support a conclusion that a consequence of an action is "reasonably certain to occur." 50 C.F.R. § 402.17(b); AR811705 (explaining that BLM lacked basic, necessary information, such as "[w]here in the Arctic the reduction in sea ice extent would occur" and "[w]hether that sea ice is utilized by polar bears"). Similarly, for bearded and ringed seals, BLM explained that it lacked the requisite information "to understand the species-specific consequences of a marginal sea ice loss caused by a specific project." AR811705. Absent this "solid information," BLM would have had to impermissibly rely on "speculation or conjecture." *See Me. Lobstermen's Ass'n*, 70 F.4th at 600 (if the agency "lacks a clear and substantial basis for predicting an effect is reasonably certain to occur, . . . the effect must be disregarded in evaluating the agency action").

Following their independent reviews of BLM's assessment, both FWS and NMFS agreed with BLM's conclusions. FWS_AR032341; NMFS_AR000495. After acknowledging advances in climate change science since 2008, FWS concurred that "the current state of climate science does not allow us to draw causal links between contributions from project-specific GHG emissions to global climate change, and subsequent project-specific effects on listed species and designated critical habitat." FWS_AR032341. Specifically, FWS stated that:

> [W]e agree that an estimate of a project-caused decrease in sea ice occurring somewhere in the Arctic, without more specific information (e.g., location and type of affected sea ice, use [if any] of that sea ice by listed species and their prey/forage, etc.), does not enable us to predict any "effects of the action" to listed species or designated critical habitat per section 7 and its implementing regulations.

Id. (emphasis added). NMFS also agreed "that the scope of the ESA Section 7 consultation with respect to GHG emissions is appropriate." NMFS_AR000495. Instead of "disregarding available scientific evidence" or "applying the wrong standard," BLM and the Services considered the "best scientific and commercial data available," and appropriately concluded that Plaintiffs' information did not provide a basis for evaluating impacts of GHG emissions as "effects of the action" under the ESA regulatory requirements.[9]

Plaintiffs would have BLM and the Services speculate about geographically unknown and biologically uncertain impacts to threatened species that Willow's minor

[9] As the Federal Defendants and ConocoPhillips explain, the cases cited by Plaintiffs are inapposite and readily distinguishable. Fed. Defs. 44; ConocoPhillips 44-45.

additive GHG contributions to the larger global climate processes may or may not cause in any particular area. Such an approach is contrary to the requirements of the ESA. This Court should reject Plaintiffs' invitation to disregard the ESA's standards in favor of speculation and guesswork.

ii. An ITS Is Not Required Because Willow Will Not Incidentally Take Any Polar Bears.

Plaintiffs' allegations regarding the lack of an ITS for polar bears are equally meritless. CBD 32-37; SILA 31-36. The ESA defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). In 1975, FWS defined "harass" to mean:

> an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

50 C.F.R. § 17.3 (emphasis added). This definition has remained unchanged for almost 50 years.

a. FWS Properly Interpreted "Harass" and Its Interpretation Is Entitled to Deference.

Plaintiffs assert that FWS's statement in the BiOp—that "incidental disturbances resulting from this proposed action" do not constitute harassment because they "would not occur intentionally or negligently"—is a "novel" or "ad hoc" interpretation that conflicts with FWS's regulations and the ESA. CBD 32; SILA 32.

The Borough incorporates by reference the Federal Defendants' and ConocoPhillips' responses to Plaintiffs' arguments. Fed. Defs. 47-51; ConocoPhillips

47-52. FWS's interpretation of its own regulatory definitions is entitled to deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019) (deference to agency's interpretation of its own regulations). Plaintiffs' arguments challenging FWS's interpretation of "harass" fail.

b. Plaintiffs Fail to Demonstrate that Any Incidental Take Is Reasonably Certain to Occur.

Regardless of how it interprets "harass" in its own regulatory definition, FWS is only required to issue an ITS when a take is "reasonably certain" to occur. *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1243 (9th Cir. 2001) ("it would be unreasonable for [FWS] to impose conditions on otherwise lawful land use if a take were not reasonably certain to occur as a result of that activity"); SILA 36 (ITS must account for "reasonably certain" take). In its BiOp, FWS thoroughly disclosed and evaluated all Willow-related activities that "could potentially disturb" polar bears and explained that no ESA harassment would occur. FWS_AR032512-20, FWS_AR032536-38, FWS_AR032540-42. Other than reference to general statements about potential or temporary disturbances, Plaintiffs' arguments fail because they cite no evidence demonstrating that any such disturbance, even if it occurs, would be biologically significant or that there would be any "likelihood of injury."

1. FWS Correctly Concluded that Willow Will Not Result in Incidental Take of Non-Denning Polar Bears.

With respect to non-denning (or "transient") polar bears, Plaintiffs offer only speculative and generic statements concerning potential stressors that might disturb or disrupt polar bears. FWS candidly assessed and disclosed "whether activities associated

with the Project could potentially disturb polar bears." FWS_AR032512 (emphasis added). Plaintiffs latch on to this assessment to assert, without any additional evidence, that it is somehow inconceivable "that Willow will not incidentally take even one non-denning polar bear." CBD 35; SILA 36 ("[s]uch impacts would logically create a likelihood of injury"). Apart from these hypothetical claims, neither CBD nor SILA point to any evidence indicating that Willow will "significantly disrupt" normal polar bear behavior or that any such harassment is "reasonably certain to occur" such that an ITS is required.

First, while CBD identifies several Willow activities that will occur in polar bear habitat, CBD 35, it cites no evidence that these activities will "significantly disrupt" normal polar bear behavior patterns or make an incidental take reasonably certain to occur. Instead, CBD merely speculates that these activities "risk[] significant disruptions and take," stating that polar bears "can be sensitive" to noise and that Willow "could" disrupt normal activities, displace bears from foraging and resting areas, and interrupt movement patterns. *Id*. (citing FWS_AR032513 and AR515923); SILA 36. On the contrary, FWS evaluated all of these potential disturbances and explained, based on the best available science, that any such impacts would only result in "minor and short-term behavioral changes" that "would not be biologically significant." FWS_AR032537, FWS_AR032529 (listing reasons why project specific disturbance would not result in injury).

Next, CBD incorrectly posits that all polar bears "already suffer from nutritional stress, declining reproductive and survival rates, and poor body condition." CBD 35-36.

The references they cite, however, show the opposite—polar bear survival rates have generally improved since 2006. AR517713, AR517731 (from 2001 to 2016, southern Beaufort Sea polar bear "[s]urvival improved modestly from 2006 to 2008 and afterward rebounded to comparatively high levels for the remainder of the study, except in 2012"). Notwithstanding, CBD asserts that these preexisting "harms" could somehow be exacerbated by "more energetic stress" to polar bears from increased travel which then "can lead to injury." CBD 36. Again, CBD fails to point to any evidence that activities at Willow would cause anything other than "minor" or "temporary" changes in behavior that are not "biologically significant."

Finally, CBD disagrees with FWS's rationale for finding that Willow will not create a "likelihood of injury" for harassment. CBD asserts that "a lower density [of polar bears in the Project area] does not preclude Willow from harassing individual bears." *Id.* It is axiomatic, however, that a low likelihood of polar bear occurrence in inland areas correlates to a low possibility that incidental take could occur. FWS_AR032513 ("Information on the distribution of transient (non-denning) polar bears indicates they generally remain north of the Project area."). Then, despite recognizing that "non-denning bears 'can move away from disturbance if necessary," CBD asserts that such movements could constitute harassment if energetically stressed female polar bears forego reproduction or females with small cubs expend additional energy. CBD 36-37. Other than speculation, CBD provides no evidence demonstrating that female bears with these energetic traits or small cubs will be in the Project area, let alone exposed to disturbances that would significantly disrupt behavior patterns or result in a

reasonably certain "likelihood of injury." CBD also speculates, again without evidence, that "on-going existing levels of human activities and disturbance" could harm bears because of "increased movement." CBD 37. CBD ignores the BiOp's finding that "[h]abituation may also influence individual bear behavior"—i.e., habituation makes it less likely that such polar bears' normal behavior patterns would be significantly disrupted.[10] FWS_AR032513. Last, CBD focuses on one design feature regarding vehicle traffic to broadly fault FWS's recognition that "various Project design features" would "minimize the impacts of disturbance" to non-denning bears. CBD 37. CBD mischaracterizes the BiOp and ignores that FWS considered a broad suite of minimization and mitigation measures that will collectively "reduce project impacts to polar bears and polar bear critical habitat." FWS_AR032511, FWS_AR032522.

None of Plaintiffs' generic and speculative assertions have any evidentiary support or otherwise demonstrate that Willow could cause a "biologically significant" disturbance of non-denning polar bears such that an incidental take is "reasonably certain to occur." Based on the best available scientific and commercial data available, FWS correctly concluded the opposite. FWS_AR032516, FWS_AR032529.

2. FWS Correctly Concluded that Willow Will Not Result in Incidental Take of Denning Polar Bears.

SILA's argument that FWS "did not consider" whether disturbances to denning polar bears could qualify as incidental harassment is unequivocally contradicted by the

[10] "Habituation" is commonly understood as a "reduction of psychological or behavioral response to a stimulus as a result of repeated or prolonged exposure." Webster's College Dictionary (2nd ed. 1997).

record.[11] SILA 35. The BiOp explains that the likelihood of a polar bear denning near Willow is very low. FWS_AR032509. In the relevant area, 95% of all historical confirmed and probable polar bear dens occurred within 4.5 km of the Beaufort Sea coast, and most of the Project's infrastructure is more than 10 km from the coast. FWS_AR032518, FWS_AR032517 (activities at Oliktok Dock lack temporal overlap with polar bear denning).

FWS also evaluated the scientific literature regarding the effects of anthropogenic disturbance on maternal denning polar bears and concluded that the majority of denning polar bears "tolerated exposure to a variety of disturbance stimuli near dens with no apparent change in productivity." FWS_AR032517. SILA also disregards that FWS requires den detection surveys prior to any winter operations and the establishment of 1-mile exclusion zones around any detected den to further reduce the possibility of any impacts. FWS_AR032518.

Finally, FWS conducted a polar bear den simulation model to "assess impacts to denning polar bears from disturbance associated with all phases of the Proposed Action." FWS_AR032575. FWS determined that any disturbance affecting adult female polar bears was an "MMPA [Marine Mammal Protection Act] Level B harassment." FWS_AR032580. FWS explained that MMPA Level B harassment, predicated on a "potential to disturb," is not a take under the ESA (i.e., "harass" under the ESA requires a "likelihood of injury"). FWS_AR032540. Contrary to SILA's contention, FWS

[11] No Plaintiff challenges the BiOp's conclusions regarding polar bear cubs.

"considered" all potential disturbances to female polar bears and concluded that none are likely to rise to the level of an incidental take. FWS_AR032516, FWS_AR032529.

V. VACATUR IS NOT WARRANTED

Plaintiffs ask this Court to vacate the ROD, FSEIS, BiOp, and all decisions that rely on those documents. CBD 41; SILA 39. The Federal Defendants' review of Willow was lawful and should be upheld. However, should this Court find that Plaintiffs' claims merit some remedy, vacatur is not warranted.

Agency action that violates the Administrative Procedure Act ("APA") can be remanded without vacatur "when equity demands." *Cal. Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citations omitted). When considering vacatur, this Court "must balance [any] errors against the consequences of such a remedy." *Id.* at 993. "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." *Id.* at 992 (citation and internal quotation marks omitted); *Wood v. Burwell*, 837 F.3d 969, 976 (9th Cir. 2016) ("[R]emand of the Secretary's decision without vacating the project is the clearly preferable alternative and comports with Ninth Circuit precedent holding that agency action in violation of the APA can be left in place during remand when equity demands.") (internal citations and quotations omitted).

Plaintiffs disparagingly assert that any harms that might result from vacatur are merely a delay of economic benefit. They are wrong. Vacating any of the agency actions authorizing Willow would be highly disruptive, and likely result in Willow's termination. ConocoPhillips 56-60; Declaration of Connor A. Dunn ¶¶ 14-21 ("Dunn Decl."). This

outcome would severely and negatively impact the entire Alaskan economy, and such harms would be acutely felt by the Borough, its communities, and its residents—the majority of whom are Iñupiat. The Borough relies almost exclusively on revenue from taxes levied on oil and gas infrastructure to provide critical government services—such as education, health, social, infrastructure, utilities, and emergency services—to its eight communities. Brower Decl. ¶ 9. Vacatur and termination of Willow would eliminate this critically important revenue source (estimated to be $1.25 billion) and the related economic and social public benefits, as well as deprive the Borough and its communities of Willow's associated NPR-A Impact Grant funding, which provides further significant benefit to local communities. *See supra* Section II.

Even delay of Willow will result in significant consequences to the Borough and its communities. Declines in oil revenue have already impacted the Borough's ability to provide government services and maintain its critical municipal infrastructure, much of which has reached the end of its useful life and will soon become health and safety issues. For example, Utqiaġvik—the Borough's most populated city and seat of the municipality—is in desperate need of a sea wall to protect its residents and critical municipal infrastructure from coastal erosion that increasingly threatens to breach the village's protective dirt barrier with each storm.[12] Such projects are made possible by

[12] *See* U.S. Army Corps of Engineers Feasibility Report, Barrow Alaska Coastal Erosion (Oct. 2019), *available at* https://www.poa.usace.army.mil/Portals/34/docs/civilworks/publicreview/Barrow/BarrowAlaskaCoastFinalFeasibilityReportsigned.pdf?ver=2020-02-14-191257-430.

taxes on development projects like Willow, and Utqiaġvik's coastline may not be able to withstand coastal erosion for another remand period if Willow is vacated.

Furthermore, any delay or termination of Willow would negatively impact Borough residents' employment opportunities in a region that struggles with unemployment. Borough residents have already benefitted from local employment opportunities made possible by ConocoPhillips' Spring 2023 construction activities, Dunn Decl. ¶ 3, and vacatur would deny Borough residents the benefit of such jobs for the upcoming winter construction season and beyond, depending on the length of the remand or Conoco's decision to terminate Willow.

Similarly, vacatur would impede or deny local residents the opportunity to benefit from increased access to subsistence resources by utilizing Willow's gravel roads or other Willow-related subsistence infrastructure. For example, ConocoPhillips has already started construction of a subsistence boat ramp for local community use, which provides subsistence access to the Tiŋmiaqsiuġvik (Ublutuoch) River from the GMT2 road. *Id.* Additional Willow infrastructure will further benefit Borough residents' subsistence activities, such as the installation of a boat launch at Judy Creek for use by Nuiqsut residents during the 2024-2025 construction season. *Id.* ¶ 10. Delay or denial of such access harms food security for the Alaska Natives who continue to rely on subsistence resources for their physical and cultural well-being.

Accordingly, should this Court find any error in agency action, the Borough respectfully requests that this Court evaluate, through supplemental briefing and

argument, a remedy tailored to any identified error that limits potential consequences of vacatur.

VI. CONCLUSION

For the reasons set forth above, in addition to those presented by the Federal Defendants and Intervenor-Defendants, the Borough respectfully requests that the Court deny Plaintiffs' requested relief and allow Willow to proceed without further delay.

DATED August 30, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document contains 9,923 words, excluding the items exempted by Local Civil Rule 7.4(a)(4). Counsel relies on the word count of the computer program used to prepare this brief.

DATED this 30th day of August, 2023.

/s/ Tyson C. Kade
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 2023, I filed a true and correct copy of the foregoing and accompanying document with the Clerk of the Court for the United District Court – District of Alaska by using the CM/ECF system. Participants in Case Nos. 3:23-cv-00058-SLG and 3:23-cv-00061-SLG who are registered CM/ECF users will be served electronically by the CM/ECF system.

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