TREG TAYLOR
ATTORNEY GENERAL
Mary Hunter Gramling
Alaska Bar No. 1011078
State of Alaska, Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600, Facsimile: (907) 465-2520
Email: mary.gramling@alaska.gov

Attorney for the State of Alaska

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

STATE OF ALASKA'S COMBINED OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs in these cases challenge the United States Bureau of Land Management's ("BLM") approval of the 2023 Willow Master Development Plan (MDP) supported by the Record of Decision ("ROD"), Supplemental Environmental Impact Statement ("SEIS"), the United States Fish and Wildlife Services' ("FWS") Biological Opinion ("BiOp"). The Willow MDP authorizes ConocoPhillips Alaska, Inc. ("ConocoPhillips") to construct and operate infrastructure necessary to allow production and transportation to market of oil and gas from ConocoPhillips' leases in the Bear Tooth Unit, commonly known as the "Willow Project", in the National Petroleum Reserve–Alaska ("Petroleum Reserve" or "NPRA").

The Willow Project ROD and associated authorizations followed from years of robust environmental studies and public comment opportunities. The Defendant-Intervenor State of Alaska ("State") was a cooperating agency in those reviews. The State has significant interests in these cases due to its status as a sovereign state, neighboring land manager, regulatory authority, and taxing authority. The activities from the Willow Project will provide much needed jobs, subsistence access, billions in revenues, and bolster the nation's energy security.

The *Sovereign Iñupiat for a Living Arctic* plaintiffs ("SILA") allege that the ROD is deficient under the National Environmental Policy Act ("NEPA"), the Alaska National Interest Lands Conservation Act ("ANILCA"), and the Naval Petroleum Reserves Production Act ("NPRPA" or "Reserves Act"). SILA also challenges the BiOp under the Endangered Species Act ("ESA"), and BLM's reliance on the BiOp. (*Sovereign Iñupiat for a Living Artic v. Bureau of Land Mgmt.*, No. 3:23-cv-00058-SLG, Dkt. 105, hereafter "SILA Br."). The *Center for Biological Diversity* plaintiffs ("CBD") bring similar claims under NEPA, Reserves Act, and ESA but do not include any challenge under ANILCA. (*Center for Biological Diversity*, No. 3:23-cv-00061-SLG, Dkt. 115, hereafter "CBD Br."). Both Plaintiffs seek the vacatur of the ROD, BiOp, and related authorizations under the Administrative Procedure Act ("APA").

The Court should deny the Plaintiffs' claims and enter summary judgment in favor of the Federal Defendants and Defendant-Intervenors.

FACTUAL BACKGROUND

The Court is well familiar with the factual background of the Willow Project since this is the second time the Willow Project has been challenged in recent years and the Court considered many of the issues in the earlier preliminary injunction motions in these cases. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land*

Mgmt. (SILA IV), 555 F.Supp. 3d 739 (D. Alaska 2021); *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt. (SILA V),* No. 3:23-cv-00058-SLG, Dkt. 74 Order re Motions (D. Alaska Apr. 3, 2023) (2023 WL 2759864). Accordingly, the State generally incorporates its factual background from prior filings and the factual backgrounds of the other Defendant-Intervenors if applicable.

STANDARD OF REVIEW

For convenience of the parties and the Court, the State generally adopts the standard of review arguments by the other Defendant-Intervenors. The State challenges the Plaintiffs' standing to bring ESA claims though so this opposition functions similar to a cross-motion. *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1068-69 (D. Alaska 2014).

ARGUMENT

Due to the Court's preference that intervenor parties avoid duplicative arguments, the shortened briefing schedule, the convenience of the Court and parties, and the substantial responses filed by the Federal Defendants and other Defendant-Intervenors in these cases, the State's briefing will focus on standing and remedy. The State generally joins the briefings of the other Defendant-Intervenors opposing as without merit the Plaintiffs' claims under NEPA, ESA, APA, ANILCA, and the Reserves Act.

I. PLAINTIFFS LACK STANDING FOR ESA CLAIMS

Plaintiffs' ESA claims follow the same two general tracks. In the first track, Plaintiffs argue that the Federal Defendants' consultations failed to assess the Willow Project related emissions' purported impacts to global climate change and then - many leaps later - the alleged impact to polar bears. SILA Br. at 24; CBD Br. at 26. As for the second track of Plaintiffs' ESA claims, Plaintiffs allege that the FWS's BiOp erroneously evaluated potential "take" of polar bears associated with the Willow Project construction and operation. ConocoPhillips' arguments will explain why Plaintiffs lack standing as to this first track of the ESA claims and the State joins in those arguments. The State will address the second track.

A. Injury in fact to the Plaintiffs is required for Article III standing.

The jurisdiction of federal courts is limited under Article III of the United States Constitution to "cases" and "controversies." U.S. Const. art. III, § 2; *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013). Federal courts enforce this jurisdictional limitation through the doctrine of "Article III standing." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–42 (2006). Part of the rationale behind the standing doctrine is to not transform federal courts into forums for "generalized grievances" and to maintain separation of powers principles. *DaimlerChrysler*, 547 U.S. at 348; *Clapper*, 568 U.S. at 408. In *Friends of the*

Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (1992), the Supreme Court enumerated the requirements for Article III standing as follows:

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. At 180–81 (2000) (*quoting Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

The Court explained that in environmental cases, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Friends*, 528 U.S. at 181. Thus, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (*quoting Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). A mere interest, even if longstanding and the organization has qualifications to review a problem, is not sufficient alone for the organization to be aggrieved. *Sierra*, 405 U.S. at 739.

Plaintiffs bear the burden of establishing their standing and they "must demonstrate standing for each claim [they] seek[ ] to press." *See, Lujan*, 504 U.S. at 556; *DaimlerChrysler*, 547 U.S. at 352. Plaintiffs, at the summary judgment

stage, must provide "by affidavit or other evidence 'specific facts,'" demonstrating that Plaintiffs satisfy the three requisites for standing. *Lujan*, 504 U.S. at 561. "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *see also, Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888–89 (1990). Plaintiffs cannot rest on "'general averments' and 'conclusory allegations'" or "'some day intentions' to visit endangered species halfway around the world." *Friends*, 528 U.S. at 168-69 (quoting *Lujan*, 497 U.S. at 888, and *Lujan*, 504 U.S. at 564.).

An organization, like each of the Plaintiff groups, can demonstrate standing by showing that its members have standing to sue in their own right. *Friends*, 528 U.S. at 181 (*citing Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). An organization cannot rely on injuries to "unidentified" members to satisfy the requirements for injury under the standing doctrine. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). In sum, Plaintiffs must demonstrate by affidavit or other evidence that at least one member of each Plaintiff group meets the three requirements for standing for each claim and relief.

B. Plaintiffs failed to identify a member with a cognizable interest in polar bears that will be injured by the Willow Project to sustain an ESA claim.

Both Plaintiffs' briefs are devoid of the requisite details that the Court requires to access its jurisdiction over the Plaintiffs' ESA claims. Both briefs contain only a short summary statement describing the respective plaintiffs' groups interests. SILA Br. at 8; CBD Br. at 7. These bald assertions of standing do not even mention polar bears, let alone describe Plaintiffs' interest in polar bears, or explain how the construction and operation of Willow Project is likely to cause a concrete and immediate injury to those interests that is sufficient to survive summary judgment. Instead, Plaintiffs include in footnotes or textual citations references to lengthy affidavits filed in each case. SILA Br. at 8-9; CBD Br. at 7. Apparently, Plaintiffs expect the parties and the Court to pan and sift through these declarations for any nugget of injury for each claim asserted. After a review of the declarations, no "eureka" statement will follow for the Plaintiffs on their respective ESA claims.

1. The declarations contain general assertions about polar bears and are not tied to the Willow Project.

SILA's brief included nine declarations as attachments. SILA Dkt. 105-1-9. Five of which were declarations from persons that do not live in Alaska. SILA Dkt. 105-1, 105-2, 105-3, 105-5, 105-6. None of the declarations included any

testimony that the declarant had purposefully gone to anywhere near the Willow Project in the past for the purpose of viewing polar bears or that any declarant had seen a polar bear near the Willow Project. CBD's brief included eleven declarations. CBD Dkt. 115-1 – 11. Six of which were declarations from persons that do not live in Alaska. CBD Dkt. 115-2, 115-4, 115-8, 115-9, 115-10, 115-11.

Some of the Plaintiffs' declarants establish a *generalized* interest in polar bears. Mr. Ritzman, who lives in New Mexico and provided a declaration in both cases, was one of the few declarants to have actually tried to see a polar bear anywhere. SILA Dkt. 105-3; CBD Dkt. 115-2. Mr. Ritzman explained he has "been involved in polar bear viewing in the eastern Alaskan Arctic outside of the village of Kaktovik." SILA Dkt. 105-3 ¶ 40; CBD Dkt. 115-2 ¶ 19. Another declarant, Mr. Fair lives in Palmer, Alaska and stated that he had "seen polar bears in the Arctic National Wildlife Refuge and in Kaktovik." CBD Dkt. 115-3 ¶ 16. Mr. Steiner of Anchorage, Alaska stated that he saw a polar bear on "Barter Island" twelve years ago, and saw polar bears "while flying over drift ice in the Chukchi Sea" in the 1980s. CBD Dkt. 115-5 ¶ 16. Barter Island is where Kaktovik is located. These trips to Kaktovik make sense, as people who have a legitimate interest in viewing polar bears go to places, like Kaktovik, where polar bears are

commonly found.[1] Indeed, one declarant, Mr. Thompson lives in Kaktovik and runs a business "to guide polar bear viewing trips" around Kaktovik. SILA Dkt. 105-7 ¶ 3.

None of the declarations claim to ever have seen a polar bear in the Petroleum Reserve, and certainly not anywhere near the Willow Project area. Notably, declarant and local Nuiqsut resident, Mr. Kunaknana says nothing about polar bears. SILA Dkt. 105-8. Another Nuiqsut resident and declarant, Dr. Ahtuangaruak mentions only that she saw signs of a polar bear in 1983 when visiting extended family *in Kaktovik*, and that her extended family hunts polar bears there. CBD Dkt 115-1 ¶¶ 24, 90.

2. It is unsurprising that none of the declarants have seen polar bears or credibly plan to see polar bears in the Petroleum Reserve.

As evident from the record in this case, the occurrence of polar bears in the Petroleum Reserve, and more particularly in the majority of the Willow Project area, is rare. FWS_76_AR032510, Fig. 7.2 (showing as rare the distribution of onshore polar bear encounters in the "inland" zone, greater than 2 kilometers from

---

[1] *Marine Mammal Viewing: Polar Bears*, Alaska Dept. of Fish and Game, https://www.adfg.alaska.gov/index.cfm?adfg=viewing.marinemammals&species=polarbear#anchor (last accessed Aug. 29, 2023)("Two Alaska communities, Kaktovik and Utquiagvik (formerly called Barrow), offer limited opportunities for polar bear viewing.).

shore.); FWS_76_AR032518. The BiOp explained:

> The majority of the Action Area is farther inland than where most polar bear dens occur, with the exception of the coastal area near Oliktok Dock (Figure 6.1). Durner et al. (2009b) reported that in northern Alaska, west of the Kavik River, 95% of all historical confirmed and probable dens occurred within 4.5 km (2.8 mi) of the Beaufort Sea coast. The majority of the proposed Project infrastructure would be greater than 10 km from the coast. For example, BT2, the closest permanent Project infrastructure to the coast would be roughly 21 km inland. *Id*.[2]

The BiOp noted that apart from the area around the (pre-existing) Oliktok Dock that the Willow Project activities would be substantially inland. FWS_76_AR032509. Moreover, the activities around this dock would not be during denning season. FWS_76_AR032511. No declarant expressed any interest in viewing polar bears around the dock or any recreational interest around the dock, if anything the opposite was expressed. Therefore, no standing can be found there. This is unsurprising because people with recreational interests in polar bears do not plan trips to go and look for polar bears in locations and at times where they

[2] *See also*, FWS_76_AR032509 ("The majority of the Action Area is farther inland than polar bears typically occur, including transient (non-denning) individuals and females prospecting for den sites and/or establishing dens. Apart from activities at and around Oliktok Dock, activities associated with the Proposed Action would occur primarily between approximately 7.8 to 26.0 miles (12.6 to 42.0 km) inland from the Beaufort Sea coast.").

are unlikely to be found.

To assert standing based on an injury to interests in viewing or experiencing polar bears related specifically to the Willow Project, Plaintiffs must demonstrate that they have concrete plans to see polar bears in the Petroleum Reserve, and specifically the area of the Petroleum Reserve where the Willow Project will be. Plaintiffs were required to set forth specific facts showing how the construction of Willow Project is going to injure their interests in polar bear viewing or experiencing polar bears in the Petroleum Reserve. *Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010) (plaintiff must show that a member "had repeatedly visited an area affected by a project, that he had concrete plans to do so again, and that his recreational or aesthetic interests would be harmed if the project went forward.").

Mr. Amstrup declares "significant professional and personal benefits from viewing, studying and protecting the polar bears in the wild." CBD Dkt 115-4 ¶ 62. He identifies no connection to the Willow Project site so he has no standing that can attached to CBD. *See, Kunaknana*, 23 F.Supp.3d at 1082.

Similarly, interests in viewing polar bears in Kaktovik, or running a polar bear tour business in Kaktovik, are not sufficient to establish standing for the Plaintiffs' ESA claims related to the Willow Project activities. Kaktovik is nearly

200 miles away from the Willow Project. "[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it." *Lujan*, 504 U.S. at 565–66 (*quoting Nat'l Wildlife Fed'n*, 497 U.S. at 887–89); *Kunaknana,* 23 F. Supp.3d at 1081–82. Plaintiffs cannot credibly allege that construction and operation of the Willow Project will impact their future polar bear viewing opportunities in Kaktovik for the purposes of standing here because "both *Lujan* and *Wilderness Society* make clear that an environmental plaintiff cannot base standing on a connection to the broader ecosystem within which a project takes place." *Kunaknana*, 23 F.Supp.3d at 1084.

3. Vague and implausible aspirational statements about viewing polar bears in the Petroleum Reserve cannot establish standing.

It might be that Plaintiffs recognized the lack of concrete injury for standing in the declarations because a few declarations attempt to manufacture injury with similar statements of aspiration and general concerns about polar bears. Mr. Ritzman states that "I hope to observe these animals in the Reserve." SILA Dkt. 105-3 ¶ 40; CBD Dkt. 115-2 ¶ 19. But, "[s]tanding is not 'an ingenious academic exercise in the conceivable,'" and instead requires "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566 (citation omitted).

Mr. Ritzman's "hope" is not supported by any factual showing to sufficient to sustain standing on an ESA claim regarding polar bears. Polar bear viewing is not even the purpose of his planned trip to the Petroleum Reserve. Mr. Ritzman outlines his river rafting plans in August 2023 on the Ipnavik River (about 100 miles from the Willow Project) and Colville River from Umiat to Nuiqsut (at closest, seven miles from the Willow Project). SILA Dkt. 105-3 ¶ 33. CBD Dkt 115-2 ¶ 27. He does not identify "polar bears" as animals that he "hope[s] to experience" on that trip. Id. This makes sense, given he has never previously seen a polar bear on other trips in that area, and he would be far too inland to expect to see a polar bear. He effectively concedes that his polar bear viewing interests are really elsewhere by expressing a concern that the Willow Project might "harm my opportunities to experience the bears across the Arctic," and that "I plan to continue returning to the Arctic to view polar bears." SILA Dkt. 105-3 ¶ 40.

The "Arctic" in Alaska is "approximately 216,000 square miles in size," and attributing impacts from the Willow Project to the entire Arctic is nothing but conjecture. *Kunaknana*, 23 F. Supp.3d at 1084 n.165. The Court in *Kunaknana* declined to find standing for the plaintiffs based on precedent, cited above, and very similar arguments to Plaintiffs now by noting the single project of miniscule size relative to the larger area and massive Arctic landscape. 23 F.Supp.3d at 1084

("[C]onnections to Arctic Alaska and to Arctic species are insufficient 'to make credible the contention that [their] future life will be less enjoyable—that [they] really ha[ve] or will suffer in [their] degree of aesthetic or recreational satisfaction" if CD–5 is developed.)(alterations in original; citation omitted). In sum, Plaintiffs attempt a the "contiguous ecosystem" argument that was rejected by *Lujan. Lujan*, 504 U.S. at 556 (*citing Nat'l Wildlife Fed'n*, 497 U.S. 871).

Another declarant, Mr. Fair, also generically states regarding polar bears that "he hopes to see one in the Reserve." SILA Dkt. 105-3 ¶ 40. The area of the Petroleum Reserve is 23.6 million acres. *SILA V,* Dkt. 74 at 3. Mr. Fair supports this hope with no specific facts as to the locality of the project within that massive area. He plans to return to the "Chipp River" to study loons, and not to try to find polar bears, "sometime in the next couple of years." CBD Dkt. 115-3 ¶ 17. This declaration is another "some day" hope found insufficient under *Lujan*. In addition, Mr. Fair provides no facts showing that he is likely to see polar bears at that location and the Chipp River is many miles from the Willow Project at its closest point. This declaration is likewise insufficient to support standing because the evidence must show "that the injury is certainly impending," and accepting allegations of an "injury at some indefinite future time" where "the acts necessary to make the injury happen are at least partly within the plaintiff's own control"

would stretch the injury in fact requirements "beyond the breaking point." *Lujan*, 504 U.S. at 564 n.2 (internal quotation marks and citations omitted).

Turning to the next declarant, Mr. Steiner indicates that he "hopes to visit the coastal plain and offshore areas in the Chukchi and Beaufort Seas again later this summer," and observe "polar bears." CBD Dkt. 115-5 ¶ 17. The Willow Project is inland and not at any of those locations. Similar to Mr. Ritzman, Mr. Steiner acknowledges that his concern is not really about viewing polar bears in the Petroleum Reserve or at the Willow Project. Instead, his declaration is based on his supposition that polar bears might be hurt by the Willow Project and then might not "migrate" to the locations where he would like to view them at some unspecified location and time in the future. Id. at ¶ 24. This concern is another conjectural statement and not evidence "that the injury is *certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (internal quotations marks and citation omitted). Mr. Fair's concerns are a "contiguous ecosystem" argument in another guise. *Id.* at 556 (*citing Nat'l Wildlife Fed'n*, 497 U.S. 871).

4. Even declarations from local Nuiqsut residents are insufficient to establish concrete injuries for standing as to polar bears.

The few declarations from the local Nuiqsut residents are also insufficient to support standing with respect to polar bears and the Willow Project construction

and operation. As explained above, Mr. Kunaknana makes no mention of polar bears in his declaration and thus cannot demonstrate an injury-in-fact related to polar bears and the Willow Project. SILA Dkt. 105-8. Dr. Ahtuangaruak's voluminous declaration scarcely mentions polar bears. CBD Dkt. 115-1. Like other declarants, Dr. Ahtuangaruak expresses concerns about polar bears. Id. at ⁋⁋ 24, 90. Her declaration does not indicate that she has ever actually seen a polar bear at the Willow Project site or made an effort to do so. Instead, the declaration contains statements of concern about things "we", not "I", observed across the wider range of "the North Slope." Id at ⁋ 90.

At summary judgment, a declarant must come forward with admissible evidence, and not hearsay statements about what an unidentified "we" saw or observed, and specific facts showing how the declarant themselves has an interest in polar bears that will be injured by the construction or operation of the Willow Project. Dr. Ahtuangaruak concerns appear to be related to the hunting interests of unnamed others, likely her extended family in Kaktovik. Id. For the CBD Plaintiffs to rely on Dr. Ahtuangaruak's declaration to support standing on their ESA claims then Dr. Ahtuangaruak, herself, must be "among the injured." *Lujan*, 504 U.S. at 563.

In summary, Plaintiffs' declarations fail to meet their burden of showing that

they will suffer an injury-in-fact that is actual, concrete, and immediate to survive summary judgment on their standing for their ESA claims. Plaintiffs' hopes to see a polar bear in the Petroleum Reserve (at times and locations where the presence of polar bears would be an anomaly) are conjectural. Plaintiffs' members have never reported seeing a polar bear anywhere near the Willow Project, and provided no evidence that seeing one in the future is even remotely likely or planned.

Concerns that the Willow Project will impact polar bear viewing or hunting activities in Kaktovik are entirely speculative and insufficient to support any injury for standing. Plaintiffs' declarations and briefings also fail to articulate how a favorable decision would address these speculative injuries. *Friends*, 528 U.S. at 181 (plaintiff must show "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."). Accordingly, Plaintiffs lack standing, and their ESA claims should be dismissed. *DaimlerChrysler*, 547 U.S. at 352-53 (Court explaining that "standing is not dispensed in gross" and must be demonstrated for each claim and relief sought. (citation omitted)).

II. EQUITY IS AGAINST VACATUR.

A. Even if there is some error, vacatur should not be ordered.

Plaintiffs' request that the Willow Project's ROD, final SEIS, BiOp, Letter of Concurrence, right of way, and permits be vacated. SILA Br. at 44-47; CBD Br.

at 47-50. The opposition response by the Federal Defendants, other Defendant-Intervenors, and the State in the arguments above, demonstrate that the Plaintiffs' arguments are without merit and that Willow ROD, final SEIS, BiOp, Letter of Concurrence, and other authorizations were lawfully issued. Out of caution and due to the current schedule, the State addresses the Plaintiffs' requested relief of vacatur. The State submits, however, that should this Court find any legal defect that a schedule for expedited briefing on remedy be allowed to ensure that any relief is narrowly tailored to the defect and whatever injury from that defect may be demonstrated by Plaintiffs.

Vacatur, like an injunction, is an equitable remedy that does not automatically issue. *Cal. Cmtys. Against Toxics v. U.S. E.P.A*, 688 F.3d 989, 992 (9th Cir. 2012). Whether agency actions should be vacated depends on several factors including 1) the seriousness of the agency's error and 2) "the disruptive consequences of an interim change that may itself be changed." *Id*. (*quoting Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C.Cir 1993)). Here, the disruptive consequences of any vacatur would far outweigh the seriousness of any error.

Turning to the first factor briefly - the consideration of the seriousness of the agency's error- this factor places the Federal Defendants and Defendant-

Intervenors in a difficult posture to argue at the merits stage because the Federal Defendants and Defendant-Intervenors maintain there was no error. Consideration of this factor now would require adverse speculation as to the Court's order and any claims of harm by Plaintiffs.

The Court's earlier analysis of vacatur as a remedy and the seriousness of errors recognized the "comprehensive nature" of the initial EIS and BiOp. *SILA IV,* 555 F.Supp.3d at 805. The ROD, final SEIS, and BiOp are even more comprehensive now. BLM and FWS in the BiOp considered public comments, including those of these Plaintiffs, even though not required. FWS_75 AR032342. The SEIS took nearly a year of review and developed a new alternative and analyzed multiple different components. AR824902-903. The ROD adopted the new alternative E and modified it to leave even less of a footprint on the Petroleum Reserve with the disapproval of drill site BT5. AR824890. From the initial scoping following remand to the final ROD, BLM considered and addressed the legal defects identified by this Court. AR824890. The ROD and supporting agency records in this case are the product of years of comprehensive review and public input and participation. The comprehensiveness of BLM's process and FWS's review should be considered by the Court in its analysis of the seriousness of any errors. While failure of an agency to explain a decision can be a serious defect, it

does not always support vacatur on remand particularly if there is a possibility the agency will be able to substantiate the decision or cure the defect and vacatur would be disruptive. *See, Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d at 150-151.

B. Significant public and private interests would be disrupted by vacatur.

1. Vacatur would result in environmental harm and disruptive consequences.

Plaintiffs assert without any factual citations or declarations that "vacatur would not cause any environmental harm." CBD Br. at 48; SILA Br. at 46. This is unsupported speculation and assumption. First, this assertion ignores the fact that construction has commenced, and activities are underway. Based on the timeline from the earlier remand and ConocoPhillips' arguments, another vacatur and remand would delay the Willow Project at least another two years with a real possibility that the Willow Project would not continue. It is quite plausible that unnecessary delay due to vacatur would require unplanned, additional ground disturbances or operations to those same areas constructed this past winter season. Stops and re-starts years later to a large-scale and complicated project of this nature could result in additional environmental disruptions due to the delay from vacatur.

Second, relatedly, the operations and construction that already has taken place did so under authorizations with attached conditions that the Plaintiffs' request for vacatur would unauthorize. This could create a confusing framework that might lead to environmental harms. *See*, *Kunaknana v. U.S. Army Corps of Eng*., 3:13-cv-00044-SLG, Dkt. 199 at 6-7, Order re Further Proceedings (July 22, 2014)(2014 WL 128132625)(finding vacatur unwarranted and noting that the environmental harms that could follow from vacatur given the partial construction and halting construction of the Colville Delta-5 drill site also located in the Petroleum Reserve).

In this Court's decision vacating and remanding the initial ROD and EIS, the Court's discussion of the disruptive consequences of vacatur explained that

> *[N]o significant environmental disruption will occur in light of the parties' stipulation to extend the temporary injunction until December 1, 2021.* The Court recognizes that vacatur would have considerable economic consequences to ConocoPhillips, which has already made a significant investment in the Willow Project. And it would have a negative impact to the many other stakeholders in the Project. *But the Court is also cognizant that construction at Willow has not yet commenced.* (emphasis added, internal citations omitted) *SILA IV,* 555 F.Supp. 3d at 804-05.

Thus, the Court has recognized repeatedly that vacatur when construction has commenced may create environmental disruptions that weigh against vacatur.

Third, vacatur may result in environmental harms because the construction

that would occur during any remand would include additional access by gravel roads and turnouts to the tundra for subsistence hunting. AR824938. Given the frequency of use of 4-wheelers in subsistence hunting and the sensitive vegetative mat in the tundra, the safer and more orderly access that the gravel roads with turnouts would provide to subsistence hunters may also protect the tundra from damage. SILA Dkt. 53-2 at 2, ¶ 4, Dec. Kaigelak, (explaining that before the road connecting Alpine CD2 and CD5 that "[i]t 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.").

2. Vacatur would result in significant public and private harms.

This Court in review of Plaintiffs' motions for preliminary injunctions to halt the winter construction season earlier this year considered many of the public and private interests that would be harmed from the construction halt and delays due to a preliminary injunction. *SILA V,* Dkt. 74 at 31 -44, Order re Motions (D. Alaska Apr. 3, 2023) (2023 WL 2759864). Many of those same interests and considerations would come into the fore from delay due to another vacatur and remand, except now the harms would be compounded due to the multiyear length of the delay and possible project risk.

It would be in keeping with the Court's prior decision on vacatur to consider

how the public interest considerations weighed in an earlier request for injunctive relief in the case. *SILA IV*, 555 F.Supp. 3d at 805 (in a discussion on vacatur "the Court recognizes that the Ninth Circuit motions panel determined when entering the injunction pending appeal that "the balance of hardships tips sharply in [Plaintiffs'] favor and that an injunction ….is in the public interest."). Just as this Court earlier found that public interest did not support an injunction, so too now does the public interest not support vacatur. Public benefits from the Willow Project include benefits that would occur during any remand period. These public benefits are not solely related to oil production revenues but include construction and development activities as well. These early year benefits would be delayed, at best, if not entirely foregone due to any vacatur on remand. Plaintiffs' arguments for vacatur attempt to downplay the economic harms from vacatur and entirely ignore the other public harms from additional delays.

a. Vacatur would harm public planning and permitting processes.

The uncertainty and delays due to vacatur at this stage in the Willow Project would create public harms to orderly public planning and permitting. The Willow Project will require many other federal, state, and local permits, approvals, reviews, and consultations. AR821894. These State and local approvals range from fire code enforcement, food permits, air quality control, water use, overweight

vehicles, drilling permits to borough level zoning. AR821900-03. Some state permitting is underway. For examples, the Willow Transportation Company submitted a pipeline right of way lease application on May 5, 2023 to construct and operate a new Willow Sales Oil Pipeline.[3] This is just one of the many highly technical reviews and analysis that will be required for the Willow Project. SILA Dkt. 52-3, at ¶ 6, Dec. Strupulis. These reviews will require expertise and staffing of State employees.

These sorts of reviews take time and require staffing and budgetary decisions to be made in advance. The multiyear delay and lost construction seasons from any vacatur of the Willow Project would likely result in ConocoPhillips delaying applications or reviews and halting others leading to inefficiencies and additional costs for all involved. The Willow Project is one of the few projects assigned to the State's Department of Natural Resources, Office of Project Management and Permitting due to the complexity of the project and impacts to multiple state agencies, without any delays.[4] A multiyear delay in the Willow

---

[3] https://dog.dnr.alaska.gov/Services/Pipeline/Willow%20Sales%20Oil%20Pipeline (last accessed Aug. 27, 2023).

[4] Dept. of Nat. Resources Off. of Project. Mgmt. & Permitting, https://dnr.alaska.gov/commis/opmp/ (last accessed Aug. 28, 2023).

Project could harm the State's public planning and administration because staff with necessary expertise might leave, institutional knowledge currently employed may be lost, other resource needs may arise, and various hurdles of budgetary and logistical planning may occur.

Any of those possibilities could result in increased timelines and costs to the State, ConocoPhillips, and other stakeholders in the Willow Project. What is true for the State's processes is likely true for other governmental interests and private interests involved in the Willow Project. SILA Dkt. 52-1 at ¶4, Dec. Nottingham (explaining that delay in projects creates uncertainty and "an inability for these organizations to plan effectively in hiring qualified people, adequately managing their existing and future accounts, and generating quality products."). Simply put, a project of this scale, length of construction, and complexity does not come together an instant and likewise cannot stop and then start again like the drop of a puck without harm.

b. Vacatur would harm public health and safety.

Vacatur would harm public health and safety due to the delays in construction of roads and boat ramps that are part of the environmental and mitigation measures for the Willow Project. Specifically, ConocoPhillips agreed to construct up to three boat ramps for subsistence users. AR820746; AR 8244892.

ConocoPhillips also agreed to "include subsistence tundra access ramps and pullouts on gravel roads with locations based on community input. The pullouts would allow local residents to access areas adjacent to roadways." AR824938.

The Court previously considered declarations from subsistence hunters that explained that "the planned construction of a gravel road and boat ramp this winter would provide a benefit because they would have faster and safer access to subsistence resources." *SILA V*, Dkt. 74 at 38. This would be true for the remaining boat ramps and gravel road access ramps and turnouts to be constructed during any period of remand. The State agrees that these roads may improve safety and health for State of Alaska residents by improving access to subsistence resources, enabling subsistence resources to be obtained more safely, and helping rural communities maintain their populations and subsistence lifestyles. In ANILCA, Congress acknowledged that the national interests in environmental and other values of these lands existed while admonishing that those protections and values should not deprive the "State of Alaska and its people" of economic and social needs. 16 U.S.C. § 3101(d). Given the subsistence and safety purposes of the roads and boat ramps to be constructed and maintained by ConocoPhillips for the Willow Project, a delay due to vacatur would delay access and safety constituting a public harm from vacatur.

c. Vacatur would harm public economic interests.

The delay due to vacatur would delay and risk on a project level scale the State's, and other governmental, receipt of revenues from the Willow Project and its associated economic activities. Specifically, the ramp up of property tax revenues, corporate income tax revenues, and bed tax and other excise tax revenues that the federal, state, and local government might receive from the increased economic activity during the construction to development phrases of the Willow Project would be delayed for years, and potentially never received, if vacatur is granted during any remand. In the event that the Willow Project did not move forward due to the vacatur on remand, the State (and local communities) would stand to lose between $2 to $4 billion in federal royalty payments from the Willow leases. AR821161. The delay due to vacatur and the risk to the Willow Project it would entail puts in jeopardy billions of tax revenues that the federal, state, and local governments would receive during the lifecycle of the project. AR917058 -59. Additionally, the delay and uncertainty due to vacatur during any remand may have unknown consequences to fiscal reputation of state and local governments in Alaska. Following the approval of the Willow Project, at least one credit rating has included the Willow Project in its consideration of the State's

credit rating.[5]

The ROD estimated that the cost of developing and producing the initial EIS was $6,971,120 and the SEIS was $3,685,000 for a total so far of $10,656,120. AR824880. These cost estimates do not include the litigation costs of the governmental and tribal entities as well as the costs incurred by the State, North Slope Borough, and other cooperating agencies. Given the costs to date, the significant governmental involvement, and the likelihood of similar additional costs on any remand, vacatur would be an unduly burdensome and disruptive pill to shallow for governments since the revenues due to construction would also be delayed or if not entirely foregone.

In *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, the Court found the potential refund liability of approximately $3.8 million that vacatur of the rule at issue would bring to be sufficiently disruptive to the Commission even with its budget of $465 million, to caution against vacatur. 988 F.2d at 152-53. Here, the inefficiencies and increased costs that would result due to delay in restarting the Willow Project following remand, the delayed or forgone tax revenues, and the

---

[5] James Brooks, *In Alaska's newest credit rating, analysts see some economic upside*, ALASKA BEACON, Aug. 04, 2023, https://alaskabeacon.com/2023/08/04/in-alaskas-newest-credit-rating-analysts-see-some-economic-upside/ (last accessed Aug. 29, 2023).

costs incurred during another costly remand process would easily exceed the $3.8 million found to be disruptive to the government in *Allied-Signal, Inc*.

d. Vacatur would harm national public energy interests.

The purpose of the Reserve Act was to protect the Navy's and then the nation's overall energy security needs, a purpose that still rings true today. 42 U.S.C. § 6506a. The Willow Project's target reservoir is the Nanushuk formation that is productive on State lands as well. SILA Dkt 52-1, at ¶ 6, Dec. Nottingham. A delay in the Willow Project due to vacatur "generates the potentiality for ineffective or limited development of the Nanushuk formation." *Id.* Oil produced from the Willow Project, and any other projects that produce from the Nanushuk formation, would be shipped down the Trans-Alaska Pipeline System (TAPS). TAPS is critical national energy infrastructure to meet the energy demands in Alaska, Washington, California, and other portions of the U.S. West Coast. SILA Dkt. 52-3. at ¶ 8, Dec. Strupulis.

National energy concerns and the purpose of the Reserves Act were among the reasons offered by the jointly filed amicus brief of the Alaska Congressional Delegation and the Alaska State Legislature describing why a preliminary injunction of the Willow Project would harm the public interest. SILA Dkt. 49-1 at 12-14. This Court in denying the preliminary injunction gave "considerable

weight" to these Alaska legislative leaders' assertions that the winter construction was in the public interest. *SILA V*, Dkt. 74 at 42. The same concerns and public purposes hold true for the lengthier delays that would follow from vacatur.

In *California Communities Against Toxics v. U.S. E.P.A*, the Ninth Circuit denied a request for vacatur during remand due to the important energy needs of the community and the "disastrous" economic consequences that "the delay and trouble [of] vacatur would cause." 688 F.3d. at 993-994. The Court explained that stopping construction of the "much needed" power plant could delay the plant and lead to blackouts; "necessitating the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent." *Id.*

Here, the nation's energy concerns and the need for oil production from the Willow Project are parallel to the energy concerns at issue in *California Communities.* Moreover, just as in *California Communities*, where vacatur would risk an energy substitution measure that would be more pollutive, contrary to the purposes of the act, so too here would vacatur risk the increased reliance of foreign oil contrary to the purposes of the Reserves Act and approval of the Willow Project. SILA Dkt. 49-1 at 12-14.

e. Vacatur would harm socio-economic interests of the State and others.

The Court has previously recognized the "substantial economic interests at

issue in this case." *SILA V*, Dkt. 74 at 34. The Court's order denying the preliminary injunctions considered the numerous declarations regarding the importance of jobs from the Willow Project to residents of Nuiqsut and throughout the State. *Id.* at 34 -36. The State's Acting Commissioner of Labor and Workforce Development explained that delay to the Willow Project would "have real impacts to employment outcomes for Alaskans, especially for Alaskans living near the Willow Project" and that the significant training opportunities from the work would "broaden[]…skills capacity for future employment opportunities" after the construction season ended. SILA Dkt. 52-2 at ¶ 2, Dec. Muñoz. Vacatur would result in missing multiple construction seasons thus compounding the socio-economic harms to the State and residents of the State that would follow. The State anticipates that the other Defendant-Intervenors may offer more specific details as to the jobs at stake and private economic impacts.

Regarding the economic consequences of vacatur, the Ninth Circuit in *California Communities* noted prior to denial of vacatur that "[t]his is a billion-dollar venture employing 350 workers." *Id*. at 994. The Willow Project is also a billion-dollar venture employing hundreds, potentially thousands, of workers. Vacatur would be extremely disruptive to the employment outlook and economic outcomes of businesses and families throughout the State.

Finally, the focus of the Plaintiffs' claims and allegations of harms relate to allegations of future harms from the Willow Project over its lifecycle or beyond. Vacatur would be excessive in light of those claims because oil would not be produced from the Willow Project during the remand period. Instead, the many public and private benefits of the Willow Project during the construction and development phrase would be unnecessarily delayed and potentially foregone. The environmental, governmental, and economic disruptions that would follow from vacatur during remand substantially outweigh any harms of the Plaintiffs' and any errors in the Willow Project approval.

C. Any remand should be limited in scope.

The State's position is that any vacatur would be disruptive and of course that no such error exists. Relatedly, any order for remand should also be limited to those portions of the decision, study, or authorization found defective. Again, depending on the defect, severance of the defective portion of the decision and limited vacatur or injunction to issue should be the utmost of relief during any period of remand.

CONCLUSION

For the foregoing reasons, and those more fully presented by the Federal Defendants, Defendant-Intervenor ConocoPhillips, Defendant-Intervenor North Slope Borough, Defendant-Intervenor Kuukpik Corporation, and Defendant-

Intervenor Arctic Slope Regional Corporation, Plaintiffs respective motions for summary judgment should be denied and summary judgment granted for the Federal Defendants and Defendant-Intervenors due to the Plaintiffs' lack of standing and failures on the merits of their claims.

DATED: August 30, 2023.

TREG TAYLOR
ATTORNEY GENERAL

By: */s/ Mary Hunter Gramling*
Mary Hunter Gramling
Alaska Bar No. 1011078
State of Alaska
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-2520
Email: mary.gramling@alaska.gov

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I certify that this brief complies with the type-volume limitation of Local Civil Rule 7.4(a)(1) because it contains 7207 words, excluding the parts of the brief exempted by Local Civil Rule. 7.4(a)(4). This memorandum has been prepared with proportionately spaced typeface, Times New Roman size 14 font.

/s/ Mary Hunter Gramling
Mary Hunter Gramling
Alaska Bar No. 1011078
State of Alaska
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-2520
Email: mary.gramling@alaska.gov

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2023, the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/ Mary Hunter Gramling
Mary Hunter Gramling
Alaska Bar No. 1011078
State of Alaska
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
Telephone: (907) 465-3600
Facsimile: (907) 465-2520
Email: mary.gramling@alaska.gov