NOS. 23- 3627 & 23-3624

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al.,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT, et, al.,

Defendant Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY, et al.,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT, et, al.,

Defendant Appellees

Appeals from the United States District Court for the District of Alaska
Case Nos. 3:23-cv-58 & 3:23-cv-61 (Hon. Sharon L. Gleason)

THE STATE OF ALASKA'S ANSWERING BRIEF

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INTRODUCTION

Contrary to the State's economic interests, vital socioeconomic needs of State residents, and state and national energy security concerns, the Plaintiff-Appellants[1] (collectively "Plaintiffs", "CBD", or "SILA") in these consolidated cases seek to halt a long-awaited oil and gas development project, the Willow Project, in the National Petroleum Reserve-Alaska ("the Reserve"). Plaintiffs challenge the Bureau of Land Management's approval of the Willow Master Development Plan supported by the Record of Decision ("ROD"), Supplemental Environmental Impact Statement ("SEIS"), the United States Fish and Wildlife Services' ("FWS") Biological Opinion ("BiOp"), and other related federal approvals. Plaintiffs challenge the approvals of the Willow Project under the National Environmental Policy Act ("NEPA"), the Administrative Procedures Act ("APA"), the Alaska National Interest Lands Conservation Act ("ANILCA"), the Naval Petroleum Reserves Production Act ("NPRPA" or "Reserves Act") and the Endangered Species Act ("ESA"),

The ROD approving the Willow Project followed from years of review and public involvement. Construction is underway on the project and providing vital

[1] *Center for Biological Diversity, et al. v. BLM*, Dkt. 46.1 ("CBD Br.")(No. 23-3624); *Sovereign Iñupiat for a Living Arctic, et al. v. BLM*, Dkt. 43.1(SILA Br.) (No 23-3627).

jobs and job training opportunities in a remote area of the State. The Willow Project approved in the ROD has support from local governments, both the executive and legislative branches of the State government, and the three members of Alaska's federal congressional delegation. The cases are without merit. The relief is sought is against weighty public interests. The cases should be dismissed.

JURISDICTIONAL STATEMENT

The State adopts the jurisdictional statement of the other Defendant-Intervenors.

ISSUES PRESENTED

The State adopts the statement of issues presented by the other Defendant-Intervenors. To avoid duplicative briefing, this brief focuses on standing and remedy:

1. *Standing.* The CBD declarations lack particularity to show geographic connections to the Willow Project area for ESA claims related to polar bears and contain conjectural statements about polar bears potentially hundreds of miles away from the Willow Project area. Does CBD have standing to bring its ESA claims?
2. *Remedy*. The Willow Project approvals followed from years of consultation with communities and cooperating agencies. The construction currently employs hundreds of people in a remote area of

the State and is providing vital job training opportunities. If this Court reverses the district court's decision and concludes the Federal Defendants did violate a law, what is the remedy?

STATEMENT OF THE CASE

Following years of studies and consultations, the Willow MDP authorizes ConocoPhillips Alaska, Inc. ("ConocoPhillips") to construct and operate infrastructure necessary to allow for production and transportation to market of oil and gas from its leases in the Bear Tooth Unit, commonly known as the "Willow Project." 3-SER-603. The Willow Project is located within the Reserve. *Id.*

The State was a cooperating agency in the reviews leading to the ROD, offering expertise on sociocultural issues, human health, wildlife, subsistence, economic resources, off-road travel, and ice roads. 3-SER-603. The State also contributed as a cooperating agency due to the State responsibilities on air permits, water quality, spill prevention and responses, and wastewater permits. 3-SER-603.

The State intervened in these cases due to its unique role as a sovereign state, permitting and taxing authority, neighboring land owner, and cooperating agency. 2-SER-532-33. The Willow Project leases were issued under the Reserves Act, 42. U.S.C. §6501-6508. The State as a sovereign and neighboring landowner has a unique role as a participant in the federal system under the Reserves Act. The Reserves Act provides that the federal government is to pay the State fifty percent

of revenues received from leases issued in the Reserve. 42 U.S.C. §6501. The State appropriates those funds to its NPR-A Impact Grant Program to help communities mitigate the impacts of development and provide vital infrastructure to rural communities. AS 37.05.530. The Willow Project will benefit existing infrastructure of national importance, the Trans-Alaska Pipeline System ("TAPS"). 3-SER-590. The construction currently underway for the Willow Project includes subsistence boat ramps and gravel roads that will improve safe access to subsistence resources in the State. 1-SER-12-13. It is against this background that the State participates in these cases.

SUMMARY OF ARGUMENT

The State joins the briefings of the other Defendant-Intervenors opposing as without merit the Plaintiffs' claims under NEPA, ESA, APA, ANILCA, and the Reserves Act. Due to the expedited briefing schedule and number of Defendants, it was not practicable to file a singular joint combined responsive brief in these consolidated cases. For the convenience of the Court and the parties, in efforts to avoid duplicative arguments, and considering the substantial briefs filed by the Federal Defendants and other Defendant-Intervenors, the State's briefing focuses on standing and remedy.

STANDARD OF REVIEW

The standard of review for whether CBD has standing to bring their ESA claims is de novo. *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1098 (9th Cir. 2022). Remedy is generally considered in the first instance in the trial court. *350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022).

ARGUMENT

I. CBD lacks standing to bring ESA claims.

CBD challenges the Willow Project approvals as violating the ESA. CBD Br. at 48-65. As a threshold matter, this Court assesses whether it has jurisdiction over CBD's claims under Article III of the United States Constitution. U.S. Const. art. III, § 2; *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 408 (2013). 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 v. Cuno*, 547 U.S. 332, 348 (2006); *Clapper*, 568 U.S. at 408. This Court looks to whether CBD met its burden at the summary judgment stage to establish standing for each claim. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 556 (1992); *DaimlerChrysler*, 547 U.S. at 352.

At the district court, the State and ConocoPhillips challenged the Plaintiffs' standing to bring ESA claims. ER-66. SILA did not raise its ESA claims on appeal. CBD has waived, for failure to brief, its allegations that the FWS's BiOp

erroneously evaluated potential "take" of polar bears from the Willow Project. Thus, only the ESA claims before the Court are CBD's nebulous allegations that the Federal Defendants failed to assess Willow Project emissions purported impacts to global climate change and then somehow impacts polar bears. CBD Br. at 49-65.

The district court held that "the Plaintiffs demonstrated injury-in-fact to their interest in viewing polar bears in the region encompassing the Willow Project." ER-73. However, this Court reviews standing de novo and the arguments and Plaintiffs involved have narrowed since the district court decision. *Tailford,* 26 F.4th at 1098. CBD cannot rest on "'general averments' and 'conclusory allegations'" or "'some day intentions' to visit endangered species halfway around the world." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 168-69 (2000) (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990) and *Lujan*, 504 U.S. at 564.). CBD must show that one of its members can demonstrate standing. *Friends*, 528 U.S. at 181 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). "[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).

CBD's brief contains conclusory assertions of standing with a string of citations to declarations. CBD Br. at 27-28. Of the seven declarations cited, Dr. Ahtuangaruak is the only resident of Nuiqsut, the city closest to the Willow Project. 2-ER-113b. She declared that she observed a polar bear in Kaktovik in the 1980s. 2-ER-132. Her declaration expresses concerns about polar bears "in the Reserve", "on the North Slope", "in the Refuge", and in "dens in the Reserve." 2-ER-165-66. Mr. Fair, a resident near Palmer, Alaska, declared that he had seen polar bears in the Arctic National Wildlife Refuge and in Kaktovik. 3-ER-362. Mr. Steiner, an Anchorage, Alaska resident, took flights in 2008 and 2009 to observe polar bears "on sea ice." 2-ER-287. Mr. Steiner indicated an intent to visit "*offshore* areas in the Chukchi and Beaufort Seas" to observe polar bears. 2-ER-292.

Some descriptions of the areas mentioned in the declarations may help put these declarations into geographic perspective. The "Arctic" in Alaska is "approximately 216,000 square miles in size." *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F.Supp.3d 1063, 1084 n.165 (D. Alaska 2014). The "North Slope" is also a vast expanse generally considered to cover the entire northern coastline of Alaska. AS 43.90.900(16)("North Slope" means that part of the state that lies north of 68 degrees North latitude.). The "Beaufort Sea" borders hundreds of miles of Alaska's northern coastline from Point Barrow eastward into the Northwest

Territories of Canada. The Arctic National Wildlife Refuge contains about 19 million acres, approximately the size of South Carolina. https://www.fws.gov/refuge/arctic (last accessed Jan. 12, 2024). The City of Kaktovik, bordering the Arctic National Wildlife Refuge, is nearly 200 miles away from the Willow Project. Kaktovik is closer to Canada than Willow Project. https://www.cityofkaktovik.org/ (last accessed Jan. 12, 2024).

The Reserve is 23.6 million acres, approximately the size of Indiana. *N. Alaska Env't Ctr. v. U.S. Dep't of the Interior*, 983 F.3d 1077, 1081 (9th Cir. 2020). The Willow Project is within the Reserve, approximately 20 miles inland from the coast. 7-SER-1845. The Willow Project surface footprint will be about 499 acres. 3-SER-713. The occurrence of polar bears in the Reserve and more particularly in the majority of the Willow Project area, is rare. 7-SER-1846, Fig. 7.2 (showing as rare the distribution of onshore polar bear encounters in the "inland" zone, greater than 2 kilometers from shore.).

In sum, no declarant for CBD reported to have seen a polar bear near the Willow Project area or intended to visit the Willow Project area with the intention to see polar bears. This is unsurprising given the rarity of polar bears that far inland. This rarity does not alleviate the injury-in-fact standing requirements for CBD to sustain its ESA claims. The declarants for CBD fail to show a geographic

connection to the Willow Project area for CBD to have standing on ESA claims tied to polar bears.

The CBD declarants generalized concerns and interests in viewing polar bears in Kaktovik, the Arctic National Wildlife Refuge, the Reserve overall, or the expanse Beaufort Sea are speculative and insufficient to support standing to show use related to the Willow Project area. Given the geographic scale of the areas mentioned in the declarations, it would eviscerate the requirement in *Lujan* that environmental plaintiffs "use the area affected by the challenged activity" and not be just "in the vicinity" if standing could be claimed by a resident miles away from an inland project, where polar bears are not found, for concerns about polar bears hundreds of miles away from the project. 504 U.S. at 565–66. Accordingly, CBD fails to establish that any member will suffer an injury in fact related to the Willow Project that is actual, concrete, and immediate for standing on ESA claims. The State also joins in the standing arguments asserted by ConocoPhillips.

II. If the Court remands, the equities demand remand without vacatur.

A. Any remand should be to the district court for briefing on remedy.

For the reasons set forth above and those set forth in the briefs of the Federal Defendants and other Defendant-Intervenors, the State maintains that the Plaintiffs arguments are without merit and no legal error exists. The Plaintiffs request this

Court vacate and remand back to the agencies the Willow ROD, final SEIS, BiOp, Letter of Concurrence and other authorizations for the Willow Project. CBD Br. at 65; SILA Br. at 53. Assuming for argument that this Court finds a legal error, this Court should remand to the district court for additional proceedings.

Given this matter has an expedited briefing schedule, the district court is most familiar with the record and could allow for any additional briefing or fact finding necessary to appropriately narrowly tailor the relief to address any legal error and any injury. ER-7 (District court order explaining familiarity with the background due to the prior order, 2-SER-429-72, in the case.); 1-SER-3-29 (Order denying motions for injunction pending appeal).

B. Vacatur is not an automatic remedy.

Contrary to the Plaintiffs' arguments, this Court does not automatically and presumptively vacate agency decisions for any legal error. Vacatur is a remedy in equity that does not automatically issue. *Cal. Cmtys. Against Toxics v. U.S. E.P.A*, 688 F.3d 989, 992 (9th Cir. 2012); *350 Montana,* 50 F.4th at 1273 (refusing to automatically vacate decision because there was "a dearth of evidence concerning the impact of vacatur."); *see*, *United States v. Texas*, 143 S. Ct. 1964, 1981–85 (2023) (Gorsuch, J., concurring) (opining that the APA's phrase "set aside" is not tantamount to "vacate" and that ordinary remedies apply under the APA instead). The Plaintiffs' arguments that vacatur should be presumptive are an ill fit where

vacatur would operate as an injunction to halt the current and upcoming construction for the Willow Project. *See, Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156–58 (2010) (no presumption of injunctive relief for NEPA violation). Because the Plaintiffs seek to vacate numerous approvals necessary for the continued construction, vacatur would have the practical effect of an injunction, requiring a court to first weigh the equities without a thumb on the scale.

In its consideration of whether to order vacatur and remand as a remedy, the Court weighs 1) the seriousness of the agency's error and 2) "the disruptive consequences of an interim change that may itself be changed." 688 F.3d at 992 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C.Cir 1993)). The devastatingly disruptive consequences of vacatur and the magnitude of the public and private equities obstructed would outweigh the "seriousness" of any error alleged in this case.

Turning briefly to the "seriousness" of any error factor, the Court considers whether the agency could adopt the same decision on remand. *Center for Food Safety v. Regan*, 56 F.4th 648, 663-64 (9th Cir. 2022). A failure of an agency to explain a decision can be a serious defect, but 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., 988 F.2d at 150-151. Courts consider whether the agency has substantially complied with the law in assessing the seriousness of the error. *Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 929 (9th Cir. 2020) (remanding without vacatur finding error of "failing to consider harm to monarch butterflies caused by killing target milkweed—is not "serious," *Cal. Cmtys.*, 688 F.3d at 992, especially in light of EPA's full compliance with the ESA and substantial compliance with FIFRA.").

This case does not come before this Court from a blank slate. The reviews underpinning the Willow Project approvals challenged here are the product of years of comprehensive review and public input and participation from cooperating agencies with expertise. 3-SER-603 (background since 2020 and cooperating agencies); 3-SER-615-617 (overview of public involvement). Even when the prior ROD was vacated, the district court noted the "comprehensive nature" of the initial EIS and BiOp. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt. (SILA IV),* 555 F.Supp. 3d 739, 805 (D. Alaska 2021). The ROD, final SEIS, and BiOp are even more comprehensive now. 3-SER-593 (combined costs of initial EIS and SEIS totaling over $10 million). The SEIS, after nearly a year of additional review, developed a new alternative with analysis on multiple different components. 3-SER-611. ConocoPhillips agreed to construct boat ramps and tundra access ramps as an important subsistence mitigation measure. 3-SER-788;

3-SER-614.The ROD modified the new alternative in order to leave even less of a surface footprint in the Reserve and disapproved a drill pad. 3-SER-612. This is not a case where there was no EIS or no BiOp; the record and review was expansive. *Migrant Clinicians Network v. U.S. E.P.A.*, 88 F.4th 830, 848 (9th Cir. 2023) (remanding with vacatur after "a wholesale failure to comply with the ESA" distinguishing from *Center for Food Safety*, 56 F.4th at 657.). The Court should consider the comprehensive nature of the ROD and SEIS supports that substantial compliance was made even if some error is found.

C. Vacatur would disrupt significant public economic interests.

The Plaintiffs attempt to downplay the economic harms that the disruption of vacatur would cause to public interests. CBD Br. at 69; SILA Br. at 56. The delay due to vacatur would risk important governmental revenues that would accrue during remand as well as place at risk on a project-level basis billions in anticipated government revenues.

The construction activity during any remand period would result in increased property tax revenues, corporate income tax revenues, bed tax, and other excise tax revenues. AS 43.56; AS 43.20; AS 29.45. The State and other cooperating agencies, like the North Slope Borough, have spent significant resources coordinating with the Federal Defendants on reviews for the Willow Project. Dkt. 27.1 at 7 (No. 23-3627); 1-SER-23-24; 5-SER-1204. Given the scope

of work and consultation to date and the likelihood of similar costs on any remand, vacatur during any remand period would be particularly disruptive for the State and local governments because the revenue ramp up during the early construction years to offset remand costs would not be available and potentially foregone.

Vacatur would also be disruptive and costly for governmental and private entities because the delay from vacatur would generate uncertainty and inefficiencies that likely lessen the overall benefits. Dkt. 27.2 at 3¶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.") (No. 23-3627).

In the event that the delay due to vacatur caused the Willow Project not to go forward, the State and communities surrounding the Reserve would stand to lose out on between $2 to $4 billion in federal royalty payments from Willow Project leases. 5-SER-1186-87. The Reserve Act requires the federal government to pay the State fifty percent of revenues received from the "sales, rentals, bonuses, and royalties on leases issued…" in the Reserve. 42 U.S.C. § 6506a. The State through its NPR-A Impact Grant Program awards grants from those revenues to communities to mitigate the impact of development and provide vital infrastructure to these rural communities. 5-SER-1186-87; 3-SER-614. Similarly, any delay due

to vacatur puts the Willow Project at risk and jeopardizes the billions in tax revenues that the federal, state, and local governments would receive over the lifetime of the Willow Project. 3-SER-614; 10-SER-2739-40.

D. Vacatur would devastate socioeconomic interests.

The State as a sovereign has interests in promoting the health, safety, and welfare of its citizens as well as the utilization, development, and conservation of natural resources. Alaska Const. Arts. VII, VIII, and X. 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). The maintenance of healthy communities and subsistence lifestyles is part and parcel of the economic and social needs for remote communities.

The construction during any remand period would include the continuation of the gravel road and subsistence boat ramp work started last season. 1-SER-12-13; 3-SER-788. These gravel turnouts and subsistence ramps may also allow for increased safety for subsistence users and search and rescue operations. 2-SER-467 (quoting a local resident that roads would be "very beneficial for search and rescue); 1-SER-28. The improved safety and access to subsistence resources may help rural communities maintain their populations and subsistence lifestyles

consistent with the purposes of ANILCA to meet the socioeconomic needs to the State of Alaska and its people. 1-SER-28 ("Considering that last year's gravel road has already aided in the successful harvesting of caribou by many subsistence hunters, the construction of subsistence ramps and additional miles of gravel road, in addition to the employment opportunities Willow will afford, would help ensure an "adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people," which is a stated purpose of ANILCA."). Accordingly, vacatur halting this construction during remand would disrupt vital public safety and socioeconomic interests.

In downplaying the importance of economic harm, the Plaintiffs fail to appreciate the realities for the socioeconomic structure in remote Alaska. CBD Br. at 69; SILA Br. at 55. None the cases relied on by the Plaintiffs addressed remote Arctic communities recovering from post-pandemic economics with limited job training opportunities. The State's Acting Commissioner of Labor and Workforce Development explained "[o]il and gas jobs continue to play a vital role in Alaska's economy as they provide substantial revenue to the state and high-paying jobs in a region where the cost of living is amongst the highest in the state." Dkt. 27.3, at 4 ¶4 Dec. Muñoz (No. 23-3627). Vacatur would disrupt vital job training opportunities during any remand period. "Willow's employment will also include significant training opportunities for North Slope Borough residents, and other

Alaskans, further broadening their skills capacity for future employment opportunities." *Id.* at 2 ¶2.

This situation is similar to *California Communities*, in which this Court decided to remand without because vacatur would obstruct "a billion-dollar venture employing 350 workers." 688 F.3d at 994. The Willow Project is a billion dollar venture for ConocoPhillips and also State and local governments. 1-SER-23; 5-SER-1186-87; 10-SER-2739-40. The Willow Project is currently employing hundreds of workers and the construction during any remand period would employ over 1,000 people. 1-SER-23-24; 10-SER-2740. Just as in *California Communities*, vacatur would be devastatingly disruptive to economic and employment outcomes and opportunities. 688 F.3d at 994.

E. Vacatur could result in environmental harms and provides no meaningful benefit to Plaintiffs' purported environmental interests.

Plaintiffs' assertions that vacatur would not cause environmental harms fail to account for the current construction status and the benefits of the Willow Project that would be delayed and potentially foregone during any remand. CBD Br. at 67; SILA Br. at 54.

First, as noted above, construction is ongoing so vacatur that would halt the current work could lead to disruptions that might negatively impact the environment since the work plan and the mitigations scheduled might be in

disarray from an abrupt halt. Also, the delay and then years later restart following from any remand period could require additional surface disturbances than currently planned or other unanticipated environmental impacts and costs. Stops and starts to projects may lead to environmental harms.

Second, the record and declarations from subsistence hunters show that roads can make subsistence resources more accessible and associated harvests of those resources more successful. 1-SER-28; 6-SER-1560 (noting the increase in caribou harvested within 2.5 miles of new infrastructure following construction of the nearby the Kuukpik Spur Road near Nuiqsut). Importantly from an environmental standpoint, gravel roads with turnouts provide more orderly access to subsistence resources and may help protect the sensitive vegetative mat of the surrounding tundra from the impacts of 4-wheelers on the Reserve. 2-SER-467 (quoting a local Nuiqsut resident explaining getting four-wheelers struck can lead to tundra damage.).

Third, the construction and activities that would occur during any remand period would not include oil production. 1-SER-13 (noting there would not be oil and gas production at Willow during the 2023-2024 or 2024-2025 seasons.). The gravamen of the environmental harms that the Plaintiffs allege stem from claims related to oil production over the lifespan of the Willow Project and even further afield emissions from consumption of that production. CBD Br. at 12 (focusing on

alleged climate harms); SILA Br. at 33 (focusing the developmental scale and impacts). Vacatur of the approvals allowing for the current construction to proceed during remand when no oil will be produced would not meaningfully benefit the Plaintiffs' environmental concerns.

F. Vacatur would harm state and national energy interests.

The Willow Project's target reservoir is the Nanushuk formation that is productive on State lands as well as in the Reserve. Dkt 27.2 at 4 ¶6, Dec. Nottingham (No. 23-3627). Vacatur would disrupt important state energy interests because delay in the Willow Project "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. Dkt. 27.4 at 4 ¶8, Dec. Strupulis (No. 23-3627).

The delay due to vacatur would harm energy security interests because more production is needed in TAPS to alleviate operational challenges. The State's Pipeline Coordinator explains that due to "the long lead time associated with [oil and gas] projects, initiation of new developments now is critical to avoiding what

could become an increasing operational issue with wax and ice over the next decade." *Id.* at 4 ¶ 10.

The delay due to vacatur would also be contrary to the energy security purposes of the Reserve Act. In order to meet first the Navy's and then the nation's overall energy security needs, the Reserves Act mandates "an expeditious program of competitive leasing of oil and gas." 42 U.S.C. § 6503; 42 U.S.C. § 6506a; 3-SER-588. The CBD Plaintiffs incorrectly assume that "weakened energy security" is only a harm if the Willow Project is terminated as opposed to the harm of delays flowing from vacatur and remand. CBD Br. at 69.

This Court has recognized that vacatur is inappropriate when delay would harm important energy needs. In *California Communities*, the Court denied a request to impose vacatur during remand due to the important energy needs of the community and "the delay and trouble vacatur would cause." 688 F.3d at 993-994. The Court reasoned that stopping construction on a power plant could lead to delays and then blackouts. *Id.* These blackouts would in turn risk "necessitat[ing] the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent." *Id.* Similar to *California Communities*, vacatur would risk energy substitutions measures that might be more pollutive and increase reliance on foreign oil contrary to the purpose of the Reserve Act and important state energy priorities. *Id.*; 3-SER-590 (Joint Resolution of the Alaska Legislature explaining

the widespread support in the Willow Project by local governments and trade groups, benefits of resource development to rural communities, energy security interests and resolving that "further delay" is not in the public interest.).

CONCLUSION

The Plaintiffs' appeals are without merit and should be dismissed. CBD lacks standing for ESA claims. Due to the devastating economic, socioeconomic, and energy security threats that would follow from any vacatur, if the Court finds any error the Court should remand to the district court for briefing on remedy.

STATEMENT OF RELATED CASES

9th Circuit Case Number: No 23-3624, *Center for Biological Diversity, et al. v. BLM*, and No 23-3627, *Sovereign Iñupiat for a Living Arctic, et al. v. BLM,* are consolidated.

/s/Mary Hunter Gramling
Mary Hunter Gramling
Chief Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 12, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Mary Hunter Gramling
Mary Hunter Gramling
Chief Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I certify that:

(i) This document uses proportionally spaced, 14-point, roman style font and therefore complies with the typeface style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6); and

(ii) This document contains 4494 words.

/s/Mary Hunter Gramling
Mary Hunter Gramling
Chief Assistant Attorney General