Jeremy C. Lieb
Erik Grafe
Ian S. Dooley
Carole A. Holley
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
T: 907.277.2500
E: jlieb@earthjustice.org
E: egrafe@earthjustice.org
E: idooley@earthjustice.org
E: cholley@earthjustice.org

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751
E: ejorgensen@earthjustice.org

Attorneys for Plaintiffs Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, and Greenpeace, Inc.

Kristen Monsell (*pro hac vice*)
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, St. #800
Oakland, CA 94612
T: 510.844.7100
E: kmonsell@biologicaldiversity.org

Attorneys for Plaintiff Center for Biological Diversity

Cecilia Segal (*pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter St., 21st floor
San Francisco, CA 94104
T: 415.875.6100
E: csegal@nrdc.org

Michelle Wu (*pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
40 West 20th St., 11th Floor
New York, NY 10011
T: 646.889.1489
E: michellewu@nrdc.org

Attorneys for Plaintiff Natural Resources Defense Council

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

CENTER FOR BIOLOGICAL DIVERSITY *et al.*, *Plaintiffs*, v. BUREAU OF LAND MANAGEMENT *et al.*, *Defendants*, CONOCOPHILLIPS ALASKA, INC. *et al.*, *Intervenor-Defendants.*	)	Case No. 3:23-cv-00061-SLG

PLAINTIFFS' REPLY BRIEF UNDER LOCAL RULE 16.3(c)(3)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

INTRODUCTION

The Willow Project carries an enormous carbon footprint and threatens an ecologically rich and sensitive area already disproportionately harmed by climate change. Plaintiffs' opening brief detailed how BLM and the Services failed to adequately consider or grapple with Willow's significant impacts in violation of NEPA, the Reserves Act, and the ESA. Defendants and Intervenors attempt to distract from those failures, but do not persuasively defend them. Nor do they demonstrate, in the face of the agencies' serious errors, that this Court should deviate from the normal remedy of vacatur.

ARGUMENT

I. BLM violated NEPA.

A. BLM did not evaluate an adequate range of alternatives.

Defendants and Intervenors maintain that BLM satisfied NEPA's alternative analysis requirements, portraying Plaintiffs' arguments to the contrary as a mere policy disagreement. But Plaintiffs thoroughly described how BLM's analysis fell short, once again limiting the alternatives considered based on a misapplication of the agency's authority under the Reserves Act and thus failing to adequately address this Court's earlier decision. Defendants' and Intervenors' attempts to distinguish or distract from that basic fact miss the mark. Defendants and Intervenors also fail to rebut Plaintiffs' argument that BLM's additional justification for constraining its analysis—the purpose and need statement—is flawed because the statement is in fact fully consistent with the

alternatives BLM refused to consider.

Defendants neither dispute that BLM excluded alternatives from consideration if they risked stranding an economically viable quantity of oil, nor even attempt an argument that the constraint differs from the rationale this Court rejected in *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F.Supp.3d 739, 768-70 (D. Alaska 2021) (*SILA*). Indeed, the closest Defendants come to addressing Plaintiffs' core argument is a single footnote. Doc. 149 at 33 n.7. There, Defendants assert that ConocoPhillips "possess[es] development rights." *Id.* (citing *Conner v. Burford*, 848 F.2d 1441, 1444 (9th Cir. 1988)). But that does not automatically entitle ConocoPhillips to *all* economically viable oil on its leases; to the contrary, *Conner* recognizes that BLM can limit lease activity to avoid environmental impacts. 848 F.2d at 1448-49; *see also* Doc. 115 at 19-20 & n.4 (detailing BLM's authority to limit, reject, or suspend development projects to protect surface resources).

Defendants' footnote next asserts that 43 C.F.R. § 3137.71(b)(1) did not impose any obligation on BLM to consider only those alternatives that fully developed the field. Plaintiffs agree. Doc. 115 at 20 n.4. But Defendants' post-hoc position cannot change how BLM conducted its analysis. As Plaintiffs explained, the draft SEIS equated fully developing the field with not stranding economically viable quantities of oil and limited the range of alternatives evaluated accordingly. *Id.* at 18-21. And while BLM hid the ball by later deleting some (but not all) references to fully developing the field from the final SEIS, the appendices and record make clear that it continued to exclude from

detailed review any alternatives that did not satisfy that principle. *See* BLM_3512_AR821958-59 (citing economic viability constraint as justification for eliminating three alternative components from further study); BLM_3512_AR821710 (continuing to link 43 C.F.R. § 3137.71(b)(1)'s "fully develop" language to the economic viability constraint and reiterating that BLM would not consider alternatives that "do not disclose and analyze the impacts of full field development"). BLM's position is unlawful for much the same reasons as in *SILA*, 555 F.Supp.3d at 768-70, and Defendants fail to show differently.

ConocoPhillips and Kuukpik cite NEPA segmentation principles to argue that BLM could *only* evaluate alternatives that fully developed the Willow reservoir. Doc. 153 at 23-24; Doc. 156 at 23-26. But BLM's obligation to evaluate the maximum possible impacts of ConocoPhillips' Master Development Plan in no way excused it from also evaluating alternatives that would have produced lesser impacts—particularly when, as Kuukpik recognizes, BLM had the authority to approve such alternatives. Doc. 156 at 25. In fact, Kuukpik's view that BLM could approve a lesser development option, yet somehow be barred from first *studying* that option under NEPA, runs counter to the statute's mandate that agencies look before they leap. *See 350 Mont. v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022).[1] ConocoPhillips also contends that BLM's

[1] Though ConocoPhillips and Kuukpik quote it selectively, Doc. 153 at 23; Doc. 156 at 25, Plaintiffs' comment letter urged BLM to consider the full effects of ConocoPhillips' proposal *as well as* an alternative that authorized less development. BLM_3330_AR509715-16.

economic viability constraint is factually distinct from its earlier "all possible oil" constraint because none of the action alternatives would allow ConocoPhillips to recover 100 percent of the oil. Doc. 153 at 22-23. But that was true of the 2020 EIS, too, so the distinction fails. *See* BLM_3142_AR505788 (BLM observing that under the 2020 EIS, "the optimized project," Alternative B, "only anticipated recovering approximately 91% of the resource").

Defendants and Intervenors next point to the length of BLM's revised analysis and various other components and criteria described therein as evidence of its sufficiency. *See* Doc. 149 at 29-34; Doc. 153 at 20-21; Doc. 155 at 15. But BLM's short, appendix-only discussions of alternative components that were "considered and then dismissed," without any assessment of their environmental impacts, cannot "cure" the agency's failure to analyze a reasonable range of alternatives. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1052 (9th Cir. 2013); *see also Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 877 (9th Cir. 2022) (summary discussion of alternatives in an appendix does not suffice); 40 C.F.R. § 1502.14 (alternatives analysis "should present the environmental impacts of the proposal and the alternatives in comparative form"). And, crucially, "[n]o amount of alternatives or depth of discussion" can fulfill NEPA's mandates when the agency "bases its choice of alternatives on an erroneous view of the law," as BLM did here. *CBD v. FWS*, 409 F.Supp.3d 738, 766 (D. Ariz. 2019), *aff'd*,

33 F.4th 1202 (9th Cir. 2022).[2]

The record confirms that BLM's economic viability constraint played a significant role in constraining the range of alternatives evaluated. For example, BLM cited the constraint as a basis for rejecting an alternative that would have eliminated infrastructure in the Teshekpuk Lake Special Area, BLM_3512_AR821958—even though that alternative offered "maximum protection" to the Special Area's surface resources (as opposed to Alternative E), while still allowing ConocoPhillips to recover 71 percent of the reservoir's oil. *See* BLM_3142_AR505789 (describing Alternative E ("BT2 North" scenario) as providing only "greater," not "maximum," protection).

Similarly, the economic viability constraint led BLM to ensure that the (only) new alternative considered, Alternative E, maximized oil recovery. BLM_3512_AR821980-82 (new BT2 drill site selected because it would "provide[] the best reservoir access" of all nine options); BLM_3512_AR820732 (BT1 and BT2 drill pads made longer to "accommodate additional wells"). Defendants and Intervenors stress that BLM considered various drill-pad configurations before finalizing that new alternative. Doc. 149 at 29-30; Doc. 153 at 20-21; Doc. 155 at 16, 18. But that is not significant where

[2] Defendants make no attempt to distinguish the cases cited in Plaintiffs' opening brief. ConocoPhillips, meanwhile, claims that *CBD v. FWS* is inapposite because, there, the agency used the "wrong regulations." Doc. 153 at 21-22. That is precisely the point. The agency "misapplied" its legal authority and, as a result, evaluated an overly narrow set of alternatives under NEPA. 409 F.Supp.3d at 766; *see id.* at 764-65 & nn.14-15. So too here. And, for that reason, ConocoPhillips' reliance on *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006), is misplaced; there, BLM did not constrain alternatives based on a misapprehension of its authority.

Alternative E's oil production differs from the other action alternatives by only three percent, *see* BLM_3512_AR822034-35. *See California v. Block*, 690 F.2d 753, 769 (9th Cir. 1982) (agency's emphasis on "decisional inputs and criteria" was "meaningless" when they generated "only a limited range of outcomes").[3] The ROD's approval of three well pads instead of five is little better; it reduced Alternative E's oil production by only five percent, *see* Doc. 115 at 21-22.[4]

In short, BLM's erroneous view of its authority under the Reserves Act precluded it from evaluating any alternatives that struck a middle ground between recovering all economically viable oil from the field and recovering no oil at all. Alternative E would produce 92 percent as much oil as ConocoPhillips' proposal. *See* Doc. 115 at 22; *Wild Fish Conservancy v. NPS*, 8 F.Supp.3d 1289, 1300 (W.D. Wash. 2014) ("[T]here is a meaningful difference, or viable alternative, between 0% and 82%."), *aff'd*, 687 F.App'x 554 (9th Cir. 2017). And it would place 96 percent as much infrastructure in the Colville River Special Area and 60 percent as much infrastructure in the Teshekpuk Lake Special

[3] The alternatives at issue in *CBD v. NHTSA* differed in magnitude by an equivalent or greater amount. 538 F.3d 1172, 1218 (9th Cir. 2008) (alternatives ranged, depending on year, from 22.2 to 22.7; 22.2 to 23.3; and 22.2 to 23.6 miles per gallon—*i.e.*, increases of 2.3, 5.0, and 6.3 percent, respectively). As such, ConocoPhillips' efforts to distinguish that case, Doc. 153 at 21 & n.41, are unpersuasive. Indeed, ConocoPhillips previously represented that oil production and greenhouse gas emissions were "approximately the same" across Willow's action alternatives and that comparing them on that basis thus held "limited value." BLM_3162_AR505892.

[4] Defendants assert that ConocoPhillips requested approval for five pads, Doc. 149 at 30, but fail to address Plaintiffs' record citation indicating that the company ultimately sought approval for three, Doc. 115 at 22.

Area. *See* BLM_3512_AR820745 (Alternative E would place 2.3 miles of gravel road and pipeline in Colville River Special Area as compared to 2.4 miles under Alternative B); BLM_3512_AR821859; *NRDC v. USFS*, 421 F.3d 797, 814 (9th Cir. 2005) (faulting agency for not considering an alternative that would allocate less than 50 percent of development acreage to "unspoiled" roadless areas). Defendants' and Intervenors' cited cases are therefore inapposite. *See Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004-05 (9th Cir. 2013) (upholding analysis where BLM "did consider a mid-range alternative"); *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 871-72 (9th Cir. 2004) (similar).[5]

Finally, Defendants and Intervenors fail to meaningfully engage with Plaintiffs' argument that BLM arbitrarily invoked the purpose and need statement to reject alternatives from further evaluation. Doc. 115 at 23-24. For example, as described above, an alternative eliminating infrastructure from the Teshekpuk Lake Special Area would have afforded that area maximum protection while also providing access to 71 percent of the reservoir's oil—thus plainly satisfying the Project's purpose and need. *See*

[5] Defendants suggest that protections from the 2022 IAP and forthcoming mitigation measures are adequate substitutes for BLM's faulty analysis. Doc. 149 at 30, 33-34. But the record does not establish that these measures would accomplish the same level of protection for special areas or as meaningful a reduction of Willow's oil production as other possible alternatives, had BLM not imposed its economic viability constraint. The No Action Alternative likewise cannot cure BLM's failure to study an alternative that differed in oil recovery by more than three percent. *See Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 813 (9th Cir. 1999) (alternatives analysis deficient where agency "considered only a no action alternative along with two virtually identical alternatives"); *contra* Doc. 149 at 31.

Doc. 115 at 23-24. BLM disagreed, but nowhere explained *why*. *See* BLM_3512_AR821965. To be sure, the agency offered various *other* reasons for rejecting the alternative, such as the economic viability constraint—a significant criterion—and concerns about overlap in drilling reach and the amount of oil that would be recovered from particular leases. *Id.* Picking up on this, Defendants argue that alternatives imposing drilling limits on multiple leases would not meet the Project's purpose and need. Doc. 149 at 32-33. But concluding that the alternative would have "far less resource recovery" overall is not the same as concluding that it would have *none*. BLM_3512_AR821965. The purpose and need statement calls simply for "the production and transportation to market of federal oil … in the Willow reservoir." BLM_3512_AR820696. BLM cannot be permitted to inject a threshold amount of oil recovery into that statement and then reject alternatives on that basis.[6]

Intervenors' attempts to read a certain level of oil recovery into the statement of purpose and need and into the Reserves Act itself, *see* Doc. 153 at 24-25; Doc. 155 at 16-17; Doc. 156 at 25 & n.83, should likewise be rejected. Contrary to their representations,

[6] Defendants stop shy of arguing that BLM cannot preclude development on some individual leases as part of approving a master development plan for a unitized field. Indeed, BLM's ROD seems to have done so for at least leases H-015, H-016, and H-108. *Compare* BLM_3512_AR822032 (overlay of oil pool and drilling reach of Alternative E), *with* BLM_3000_AR501846 (map suggesting leases H-015, H-016, and H-108, at a minimum, would not recover any oil under modified Alternative E (which disapproved drill pad BT5)). That exercise of authority is fully consistent with the agency's obligation to protect the Reserve and, if necessary, "to set or modify the quantity, rate, and location of development and production" on unitized leases. 43 C.F.R. § 3137.21(a)(4).

the Reserves Act has two purposes: facilitating oil and gas development in the Reserve while also safeguarding its ecological and subsistence values. *See* 42 U.S.C. §§ 6504(a), 6506a(b); Doc. 115 at 13 (citing legislative history). Evaluating action alternatives that would offer more significant protections for special areas and more meaningful reductions of Willow's massive carbon emissions is fully consistent with both.

B. BLM failed to assess downstream emissions from reasonably foreseeable future oil development caused by Willow.

1. Downstream emissions from future oil development caused by Willow are reasonably foreseeable.

No party contests that Willow will facilitate additional oil development. Nor do they dispute that NEPA requires BLM to evaluate the Project's reasonably foreseeable growth-inducing effects. Instead, Defendants argue, based on a clear misstatement of the law, that BLM had no obligation to consider the downstream greenhouse gas emissions of West Willow because it "is not a proposed action." Doc. 149 at 36. They barely address, much less refute, Plaintiffs' argument that BLM must disclose foreseeable downstream emissions from additional development beyond West Willow.[7]

As an initial matter, Defendants' argument that only "proposed actions" are reasonably foreseeable is contrary to Ninth Circuit precedent and premised on an erroneous citation. Whether a future action is reasonably foreseeable is a fact- and

[7] ConocoPhillips does not join these arguments. It argues that BLM adequately analyzed downstream emissions from West Willow and other future development in the SEIS. Doc. 153 at 25-28, 30-34. These arguments are factually incorrect, as addressed below. *Infra* pp. 14-15.

context-specific determination, and certain actions must be considered "even if they are not specific proposals." *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078-79 (9th Cir. 2011) (quoting EPA, *Consideration of Cumulative Impact Analysis in EPA Review of NEPA Documents* at 12-13 (May 1999)); *see also, e.g.*, *Kern v. BLM*, 284 F.3d 1062, 1075 (9th Cir. 2002) ("It is not appropriate to defer consideration of cumulative impacts … when meaningful consideration can be given now."); *Thomas v. Peterson*, 753 F.2d 754, 758-59 (9th Cir. 1985) (requiring consideration of timber sale although only road had been "proposed"), *abrogated in part on other grounds as stated in Cottonwood Env't Law Ctr. v. USFS*, 789 F.3d 1075, 1088-92 (9th Cir. 2015). Defendants' argument relies on deleted language from *Lands Council v. Powell* that is not precedent. 395 F.3d 1019, 1023 (9th Cir. 2005) (order amending opinion); Doc. 149 at 36 n.9 (quoting deleted language).[8]

Defendants' argument also wrongly focuses on only the standard for evaluating whether a future action is reasonably foreseeable for purposes of a *cumulative impacts* analysis. Doc. 149 at 36-37. BLM was separately required to analyze West Willow's downstream emissions and the downstream emissions from additional foreseeable oil development induced by Willow as *indirect effects*. *See* 40 C.F.R. § 1508.8(b); *CBD v.*

[8] *Chilkat Indian Village of Klukwan v. BLM*, 399 F.Supp.3d 888, 920 (D. Alaska 2019), adopted BLM's citation to the same deleted language in *Lands Council*. BLM dropped that improper citation on appeal, and the Ninth Circuit decision affirming on the different facts of that case does not rely on it. 825 Fed.App'x 425, 428-29 (9th Cir. 2020) (mem.). This case is also distinguishable on its facts. *Infra* p. 13.

Bernhardt, 982 F.3d 723, 737-38 (9th Cir. 2020) (*Liberty*). This distinction is important. A cumulative impacts analysis evaluates the impacts of an action together with "other past, present, and reasonably foreseeable future *actions*" regardless of the cause of or authority responsible for those actions. 40 C.F.R. § 1508.7 (emphasis added). Indirect effects are "*effects* … caused by the action" itself, including "growth inducing effects," over which the permitting agency has control. 40 C.F.R. § 1508.8(b) (emphasis added). Understanding them is especially critical to informed decision making. *See City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (analysis of indirect effects "indispensable" to "address[ing] the major environmental problems likely to be created by a project"). Thus, BLM must consider downstream emissions from future oil development Willow will induce if those emissions are reasonably foreseeable, even if the details of specific future development plans are uncertain.[9] This inquiry is cabined because it is tied to Willow's consequences; it is not an open-ended requirement to quantify emissions from all potential future oil development in the Reserve, as Defendants suggest, Doc. 149 at 38. 40 C.F.R. § 1508.8(b) (indirect effects limited to those "caused by the action").

The record shows that Willow will lead to downstream greenhouse gas emissions from West Willow and additional future oil development. West Willow is the easy case.

[9] The reasonably foreseeable indirect effects of an action, including its growth-inducing effects, are the same whether an agency prepares an environmental assessment or an EIS. 40 C.F.R. § 1508.8(b) (defining indirect effects); *contra* Doc. 153 at 31; Doc. 149 at 38.

Contrary to Defendants' argument, BLM has already determined in the SEIS, and ConocoPhillips concedes, that West Willow is a reasonably foreseeable future action. Defendants cannot now change their position in litigation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983) ("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself."); BLM_3512_AR821123; Doc. 153 at 26-27. Downstream emissions from West Willow's estimated 75 million barrels of oil production, BLM_3512_AR821124, are necessarily also reasonably foreseeable and should have been included in the SEIS's analysis. *See Liberty*, 982 F.3d at 737-38. Beyond West Willow, BLM recognized that Willow would facilitate development of additional, identified oil reserves, which ConocoPhillips estimates include "up to 3 billion barrels."[10] BLM_3484_AR773486. In fact, ConocoPhillips have repeatedly made clear that Willow is intended to function as a "hub" for future development that extends the transportation and processing network connecting oil reserves on Alaska's North Slope to the Trans-Alaska Pipeline. BLM_3484_AR773442; *see* BLM_3512_AR821122; BLM_3484_AR773440. Thus, even if there is more uncertainty about the details of particular development projects beyond West Willow, the downstream emissions from producing that oil are still reasonably foreseeable.

[10] Though ConocoPhillips denigrates Plaintiffs' citation of this estimate, Doc. 153 at 31 n.91, the company in fact confirmed to BLM that it accurately represents the resource potential on its nearby leases. BLM_3301_AR509541.

Willow's function as a hub makes it more like the highway interchange in *City of Davis*, which existed to facilitate development, 521 F.2d at 674-77, than the mine exploration plan in *Chilkat Indian Village of Klukwan*, which was intended to determine if subsequent mine development was feasible, 399 F.Supp.3d at 917-18. In fact, Willow's transportation and processing purpose is akin to that of a stand-alone pipeline, rail line, or other transportation infrastructure project. NEPA requires agencies considering such projects to evaluate the impacts of the development they will facilitate. *E.g.*, *Eagle Cnty. v. Surface Transp. Bd.*, __ F.4th__, No. 22-1019, 2023 WL 5313815, at *13-14 (D.C. Cir. 2023) (requiring consideration of greenhouse gas emissions from new oil production in basin served by rail line despite uncertainty about drill site locations); *N. Plains Res. Council*, 668 F.3d at 1078-79 (impacts from coal and coal bed methane development in region served by rail line); *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 869 (9th Cir. 2005) (increased tanker traffic resulting from refinery dock expansion). That oil will also be produced by Willow itself cannot excuse BLM from considering the impacts of the additional oil production it is intended to facilitate.

Finally, Defendants contend that this Court already rejected Plaintiffs' argument in their challenge to BLM's 2020 decision approving Willow. Doc. 149 at 36-37. That is false. The Court found unpersuasive a different argument made by SILA Plaintiffs about the 2020 EIS's *cumulative* impacts analysis because the information at issue in that claim was contained in the EIS, even if not in the cumulative impacts analysis itself. *SILA*, 555 F.Supp.3d at 781. Here, the claim is about *indirect effects*, and the information regarding

reasonably foreseeable downstream emissions from West Willow and other induced development is not contained anywhere in the SEIS.

2. The SEIS does not disclose downstream emissions from West Willow or any development Willow will facilitate.

Defendants and ConocoPhillips argue that BLM already considered the downstream greenhouse gas emissions from at least the West Willow project. Doc. 149 at 36-37; Doc. 153 at 26-28, 30-34. Not so. BLM analyzed the direct emissions from West Willow's drilling activity, not the downstream emissions from producing the oil at West Willow or any other induced project. Finding that truth requires a close read of a confusing presentation in the SEIS and the IAP/EIS.

The SEIS states that its cumulative greenhouse gas analysis includes "emissions from the West Willow discovery," but the disclosed emissions include only 48,500 annual metric tons (MT) from "drilling activity." BLM_3512_AR821126; *see* BLM_3512_AR822689-90. This is a far cry from the *millions* of metric tons that would result from developing and burning 75 million barrels of oil. Those much larger emissions are not disclosed anywhere in the SEIS.

Specifically, neither West Willow's downstream emissions nor those from any other induced development is included in either of the two calculations described in the SEIS's cumulative emissions discussion. First, BLM totaled certain individual sources of cumulative emissions and included only Willow's direct, indirect, and foreign emissions, West Willow's drilling activity emissions, and emissions from existing North Slope

facilities listed in table 3.20.2. BLM_3512_AR821126-27. Second, BLM calculated the broader emissions from hypothetical development in the Reserve and Arctic Refuge. In doing so, BLM added the high range of the IAP's projected development emissions and potential Refuge development emissions to the individual sources of emissions listed above—still excluding downstream emissions from West Willow and other induced development. *Id*. That BLM listed West Willow's drilling activity as a separate item in this tally reflects BLM's view that West Willow was not already encompassed within the IAP's analysis. Examination of the IAP itself confirms that unlike the Willow SEIS, the IAP considered West Willow as a component of Willow and excluded it from emissions analysis as a planned development. FWS_78_AR364553 (excluding Willow and other existing and planned development from IAP oil production estimates); BLM_3512_AR822689 (explaining emissions from West Willow "would occur as part of any Willow alternative"); FWS_78_AR364805[11] (describing West Willow drill sites as "not subject to this IAP").

[11] This citation to IAP Appendix H, here and in Plaintiffs' opening brief, is intended to show that the IAP, generally, excluded West Willow from its analysis. Contrary to ConocoPhillips' argument, Doc. 153 at 33, it does not conflict with any representation Plaintiffs have made about the distinction between downstream greenhouse gas emissions and local emissions, *see* Doc. 78 at 3.

II. BLM violated the Reserves Act.

BLM's failure to reasonably explain its decision not to adopt an alternative or mitigation measures to limit Willow's downstream emissions was arbitrary, capricious, and not in accordance with its obligations under the Reserves Act. *See* 5 U.S.C. § 706(2)(A). Defendants' and Intervenors' contrary arguments ignore the record and attempt to obscure Plaintiffs' claim.[12]

No one disputes that Willow's downstream emissions will contribute to climate change and that climate harms are amplified in the Arctic and the North Slope. *See* Doc. 115 at 30. Defendants and ConocoPhillips fault Plaintiffs for citing broader climate trends as evidence of climate harms to the Reserve's "surface resources," Doc. 149 at 40-41; Doc. 153 at 35, but they fail to acknowledge that BLM itself relied upon this connection. As Plaintiffs explained, BLM concluded in the ROD that it is "especially important" to limit greenhouse gas emissions and reduce climate impacts in the Reserve specifically because of climate effects "on the Arctic and the North Slope" generally. Doc. 115 at 31 (quoting BLM_3513_AR824900). Similarly, in the SEIS, BLM relied on broader climate trends as evidence of climate harms to the Reserve's "surface

[12] CBD Plaintiffs bring separate claims under NEPA and the Reserves Act. *Compare* Doc. 104, ¶¶171-80, *with id.*, ¶¶191-98; *contra* Doc. 149 at 38-39. Both are reviewed under the Administrative Procedure Act. *See Nat'l Audubon Soc'y v. Kempthorne*, No. 1:05-CV-00008-JKS, 2006 WL 8438583, at *3, *13-16 (D. Alaska Sept. 25, 2006); *contra* Doc. 156 at 27.

resources"—such as its wetlands and vegetation, water resources, and wildlife. *See* BLM_3512_AR822441 (section titled "Projected Climate Trends and Impacts in the Project Area" describing climate change-induced harms in Alaska generally, such as wetland drying, permafrost thawing, and increased risk of wildfires and insect outbreaks); BLM_3512_AR820757 (in examining Willow's effects on climate change, "the analysis area for this Project is the Arctic, with a focus on the North Slope of Alaska"); BLM_3512_AR821122 (climate change "affects all resources assessed in the EIS").

Though ConocoPhillips insists that only harms to surface resources from "on-the-ground development activities" require mitigation, *see* Doc. 153 at 35, the statutory text itself contains no such limitation: the effects on surface resources need only be "reasonably foreseeable and significantly adverse," 42 U.S.C. § 6506a(b). Because the record shows that climate harms from Willow's downstream emissions fit that standard, BLM must impose measures it "deems necessary or appropriate" to limit such harms. *Id.*; *see also id.* § 6504(a) (requiring "maximum protection" of "surface values" in special areas). That obligation furthers one of the Reserves Act's two core purposes—protecting the Reserve's ecological resources. *See supra* pp. 8-9; *contra* Doc. 153 at 35 (arguing that oil production is the Act's "whole purpose").

Having failed to rebut this evidence, Defendants and Intervenors resort to invoking BLM's broad discretion under the Reserves Act. *See* Doc. 149 at 40; Doc. 153 at 34-35; Doc. 154 at 16-20; Doc. 155 at 20. Defendants purport to distinguish Plaintiffs' cited cases, *see* Doc. 149 at 41, but here—much as in *NRDC v. Pritzker*, 828 F.3d 1125, 1139

(9th Cir. 2016)—two of the three mitigation measures that BLM rejected were recommended by subject matter experts at EPA. *See* Doc. 115 at 33; *see also W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011) (faulting BLM for failing to address concerns raised by other federal and state agencies). That the cases do not interpret the Reserves Act, Doc. 153 at 36 n.114, or involve a "quantified standard," Doc. 149 at 41, does not detract from the basic principle for which they were cited. *See* Doc. 115 at 33-34. That is, even when the Reserves Act affords the agency discretion, the agency's "exercise of discretion within that statutory framework must be reasonable and reasonably explained." *Biden v. Texas*, 142 S.Ct. 2528, 2543 (2022). BLM fell short of that standard here.

As to alternatives, North Slope Borough essentially argues that by disapproving BT5 in modified Alternative E, BLM selected an alternative (and imposed a mitigation measure) that sufficiently limits downstream emissions. *See* Doc. 155 at 20. But as Plaintiffs explained, BLM failed to rationally justify why that five percent drop in downstream emissions satisfied the agency's Reserves Act obligations, particularly where BLM improperly rejected alternatives that would have allowed for a more meaningful reduction. *See* Doc. 115 at 31; *supra* p. 5. Indeed, contrary to Defendants' argument, BLM's own assessment of eliminating infrastructure from the Teshekpuk Lake Special Area demonstrates that an alternative that would provide maximum protection yet generate fewer emissions is not at all speculative, and that Alternative E does in fact fall

short of the maximum protection standard. Doc. 149 at 40; *supra* p. 5.[13]

As to mitigation measures, Defendants and Intervenors cite "numerous" measures in the SEIS, ROD, and 2022 IAP that they argue are sufficient to protect surface resources, Doc. 149 at 39-40; Doc. 153 at 34-35; Doc. 154 at 19-20, but these are irrelevant to Plaintiffs' specific claim. While these measures might address Willow's other environmental impacts, beyond disapproving BT5 in modified Alternative E, discussed above, Defendants and Intervenors do not identify a single measure that is intended to mitigate climate harm to surface resources from Willow's downstream emissions. As Plaintiffs explained, BLM exercised its statutory authority to impose some measures (including those it deemed applicable from the IAPs, *see* BLM_3512_AR820762-64) to modestly limit the Project's direct emissions, but then stopped short: it did not impose any measures to mitigate the Project's indirect or downstream emissions, which are ten times greater, and it offered no reasoned explanation for that decision. *See* Doc. 115 at 32-34. Defendants and Intervenors entirely fail to grapple with that disconnect.

[13] ConocoPhillips misconstrues Plaintiffs' claim: Plaintiffs do not argue that BLM was "*required* to reduce production" to mitigate climate harms to surface resources, Doc. 153 at 35, but rather that BLM's failure to adopt an alternative and mitigation to limit those harms was not reasonably justified or explained in light of available options. *See* Doc. 115 at 30.

III. BLM and the Services violated the ESA.

A. The agencies unlawfully failed to consult on Willow's greenhouse gas emissions.

Despite admitting that sea ice loss threatens the continued existence of polar bears, ringed seals, and bearded seals, and that Willow's greenhouse gas emissions contribute to climate change, which in turn contributes to sea ice loss that harms these species, Doc. 149 at 47-48; FWS_75_AR032344, the agencies did not consult on Willow's climate impacts on these species. Instead, the Services deferred to BLM's conclusion that Willow's emissions will have no effect. This case is not one where Plaintiffs "simply disagree with Defendants' expert scientific determinations," Doc. 149 at 56, because the record shows the Services never actually applied their expertise to the question. As a result of this failure, the Services' consultations unlawfully failed to assess the impacts of Willow's carbon emissions and BLM unlawfully relied on those faulty consultations in approving Willow.[14]

Defendants seek to excuse the failure by arguing Willow's substantial emissions do not constitute an "effect of the action" that the agencies needed to consider, but in so doing, Defendants confuse the likelihood of an effect occurring with the scale of its impact on imperiled species. While measuring the scale of such impacts may be difficult,

[14] Plaintiffs notified BLM of their intent to sue over its failure to consider Willow's carbon emissions and reliance on unlawful consultations, Decl. of Monsell; Doc. 108, ¶11, and Plaintiffs' complaint raised those same allegations, Doc. 104, ¶¶152, 156, 220-22, 224-26.

the agency cannot just refuse the task. *Nw. Env't Advocs. v. EPA*, 537 F.3d 1006, 1026 (9th Cir. 2008) (similar holding for Clean Water Act). If Defendants can continue to ignore incremental contributions to climate change, polar bears and ice seals will "be gradually destroyed, so long as each step on the path to destruction is sufficiently modest"—one of the "very ills the ESA seeks to prevent." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008); *see also* BLM_3462_AR726810 (Services describing consultation benefits "where numerous actions impact a species").

1. The Services did not apply their expertise or use the best available science.

Defendants and Intervenors accuse Plaintiffs of misconstruing the ESA and its regulations, claiming that the "may affect" standard applies only to BLM (the action agency), not the Services (the consulting or expert agencies). Doc. 149 at 53-54; Doc. 153 at 51-52; Doc. 155 at 28. While ESA regulations require the action agency to initially consider whether its action might affect a listed species or critical habitat, 50 C.F.R. § 402.14(a), the "may affect" standard also applies in evaluating whether an impact is one the consulting agency must consider where, as here, a consultation has crossed the threshold for another reason. *CBD v. BLM*, 698 F.3d 1101, 1120, 1122 (9th Cir. 2012).

Thus, the *Services* must themselves examine "all relevant information," *id.* at 1120 (citation omitted), and apply *their* expertise to determine all the possible ways the action "may affect" a species, and then, of those potential effects, determine which effects are

"reasonably certain to occur" and must therefore be evaluated in a consultation to determine their significance. *See id*. at 1122, 1124; 50 C.F.R. § 402.02. Any other rule would allow action agencies to hide potential impacts from consultation simply by failing to mention them in their initial "may affect" determination.

What makes this situation unique is that the Services did none of these things for Willow's greenhouse gas emissions. Instead, they acquiesced to BLM's conclusion that these emissions are not an effect of Willow because the science is not precise enough to measure their impacts. FWS_75_AR032341; NMFS_AR000495.[15] Defendants obfuscate the roles of each agency to paper over the Services' failures to consider Willow's carbon emissions and make the determinations required of them as expert agencies. For example, Defendants rely on BLM's memo to the Services on this issue to assert that they "explained that quantifying a marginal decrease in seasonal sea ice in unknown spots somewhere in the … Arctic does not enable the Agencies' expert biologists to identify any 'reasonably certain to occur' consequences." Doc. 149 at 50. While one could perhaps infer from this that BLM's *own staff* could not identify impacts caused by sea ice loss, the record refutes the notion the Services' "expert biologists" even attempted to do so.

[15] ConocoPhillips' claim that Plaintiffs cannot challenge the Services' responses to BLM's memo, Doc. 153 at 52-53, is a red herring. Plaintiffs are not challenging these responses alone, but the agencies' final consultations, which are indisputably final agency actions. *Bennett v. Spear*, 520 U.S. 154, 156 (1997). Plaintiffs focused their argument on BLM's memo and the Services' responses because they are the only record documents mentioning the issue.

Indeed, there is not a single record document that shows NMFS ever analyzed any possible impacts of Willow's emissions on ice seals. *See* NMFS_AR000143-94 (NMFS concurrence); NMFS_AR000495 (single-sentence response to BLM's memo); *contra* Doc. 149 at 51 (claiming NMFS considered these impacts). Similarly, while FWS's biological opinion acknowledges that climate change threatens polar bears, it does not consider whether or how Willow's emissions will add to those threats. FWS_76_AR032378-582. In responding to BLM, FWS simply reiterated its position held since 2008 that the science is not reliable or granular enough to consider the issue. FWS_75_AR032341; *see also* FWS_75_AR032371-77. Although Defendants claim the agencies examined the new science and "consider[ed] the outputs of these models," Doc. 149 at 55-56, nowhere does the record show where the Services actually did.[16]

Instead, Defendants want the Court to "trust them that they looked at the relevant data" and that their conclusions are reasonable based on that data. *CBD v. USFS*, 444 F.Supp.3d 832, 870 (S.D. Ohio 2020). But "[w]ithout some articulated criteria … grounded in the record and available scientific evidence," such trust is unjustified. *CBD v. NHTSA*, 538 F.3d at 1224-25 (citation omitted); *see also Nat'l Wildlife Fed'n*, 524 F.3d at 932 n.10 (courts cannot "infer 'an analysis that is not shown in the record'"

[16] FWS did not, for example, consider the Notz study that enables linking a certain amount of emissions to a certain amount of sustained Arctic sea ice loss, BLM_3462_AR736154-58, or other recent research linking the number of ice-free days polar bears face each year with reduced reproductive and survival potential, BLM_3462_AR725322-28.

(citation omitted)). Defendants' repeated pleas for deference thus ring hollow.

2. Defendants' other arguments lack merit.

Defendants admit that the consultations must consider all "effects" of Willow on polar bears, ice seals, and their critical habitat. Doc. 149 at 49; 50 C.F.R. § 402.02. However, they erroneously claim that Willow's greenhouse gas emissions do not constitute such an effect because "consequences to polar bears or ice seals" are not "reasonably certain to occur" from such emissions. Doc. 149 at 51.

As described above, the first problem is that the expert agencies failed to make these determinations themselves based on their own evaluation of the available science. Defendants' brief thus relies on BLM's conclusion that the science is not precise enough to link a specific amount of emissions to specific impacts on the species. *Id*. In so asserting, Defendants essentially concede that Willow's emissions will likely have *some* impact on polar bear and ice seals, and it is the *extent* of the impact that is too hard to measure. This confuses the question of whether an impact is reasonably certain to occur with what the scale of that impact will be—a question the consultation process is supposed to answer. *See, e.g.*, *Cal. ex rel. Lockyer v. USDA*, 459 F.Supp.2d 874, 912 (N.D. Cal. 2006) ("Uncertainty about the precise impacts does not mean that potential effects should not be addressed."), *aff'd*, 575 F.3d 999 (9th Cir. 2009). It thus does not justify the failure to examine the impacts in the consultations.

ConocoPhillips' reliance on some relevant science to calculate how much sea ice

loss Willow's carbon emissions will cause, Doc. 153 at 55-56, only proves this point. ConocoPhillips argues Willow's emissions are too small to have any impact, but that again goes to the scale of the impact, not the likelihood of it occurring. It is up to the Services—not the oil industry—to do the analysis of significance through consultation and reach their own conclusions regarding, for example, whether Willow's climate impacts are "insignificant" and thus "not likely to adversely affect" polar bears or ice seals, BLM_3462_AR726745-46, or are likely to result in take that must be minimized. 16 U.S.C. § 1536(b)(4)(C)(ii). But they did not, violating their obligation to use the available science "to develop projections" about how Willow's emissions might affect these species and their critical habitat. *Conner*, 848 F.2d at 1454; *see also* BLM_3462_AR726759.

To justify the Services' failure, Defendants heavily rely on FWS's 2008 policy under which FWS never consults on the impacts of carbon emissions ("M-Opinion"). FWS_75_AR032371-77. But "'longstanding agency practice can[not] trump' clear statutory commands." *Anacostia Riverkeeper v. Jackson*, 798 F.Supp.2d 210, 234 (D.D.C. 2011) (citation omitted). Like the BLM memo, the M-Opinion erroneously confuses the likelihood of impacts with their scale, and both demand a level of scientific precision inconsistent with the ESA's requirement that agencies base consultations on the best available science, including in evaluating what effects are reasonably certain to occur, and thus deprives of all meaning the duty to consult on effects of an "undetermined character." Doc. 115 at 37-38; *see also Sw. Ctr. for Biological Diversity*

v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000) ("Even if the available scientific … data were quite inconclusive, [the agency] may—indeed must—still rely on it ...." (citation omitted)). Neither Defendants nor Intervenors address this obligation.

Courts have routinely required consultations on actions that are scientifically complex, involve countless third parties, and where impacts to species can occur virtually anywhere in the United States and often many years after the underlying action. These include, for example, pesticide registrations used potentially anywhere in the country by innumerable third parties, *CBD v. EPA*, 861 F.3d 174, 180, 188 (D.C. Cir. 2017); *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 652 (9th Cir. 2022); the potential use of fire retardants nationwide even though the location of fires cannot be predicted with any specificity, *Forest Serv. Emps. for Env't Ethics v. USFS.*, 397 F.Supp.2d 1241, 1256-57 (D. Mont. 2005); and rules establishing targets for renewable fuel volumes that would lead to unidentified land use changes, *see Growth Energy v. EPA*, 5 F.4th 1, 30-32 (D.C. Cir. 2021). No court has excused such analyses by holding that impacts to listed species are too difficult to measure precisely. Defendants provide no persuasive reason—nor could they—why climate change impacts should be treated any differently.

Moreover, the M-Opinion and statements in FWS's polar bear listing were expressly based on the state of the science in 2008. *See, e.g.*, FWS_75_AR032371 (basing conclusions on "the scope of existing science"); 73 Fed. Reg. 28,212, 28,300 (May 15, 2008) (referencing "[t]he best scientific data available to [FWS] today"). They cannot be used as a permanent excuse to exempt a category of impacts from ESA

consultation. Defendants' and Intervenors' reliance on a single sentence in the 2015 Clean Power Plan (which never took effect, and which simply cites back to a 2008 finding) and a 2022 rule on penguins in Antarctica, Doc. 149 at 52, also fails as they say nothing about the current state of the science on polar bears and ice seals in the Arctic. Doc. 115 at 39 n.9.

3. Plaintiffs have standing for this claim.

ConocoPhillips wrongly claims that Plaintiffs fail to satisfy the causation and redressability elements of standing for this claim. Plaintiffs have (1) suffered "an injury-in-fact" (2) "fairly traceable" to the agencies' failures that is (3) "likely to be redressed by a favorable court decision." *CBD v. FWS*, 807 F.3d 1031, 1043 (9th Cir. 2015). "[T]he presence of one [Plaintiff] with standing is sufficient to satisfy Article III's case-or-controversy requirement" for other Plaintiffs. *Rumsfeld v. Forum for Acad. & Inst. Rights*, 547 U.S. 47, 52 n.2 (2006).

ConocoPhillips does not contest that Plaintiffs have satisfied injury-in-fact based on the harm to their members' interests in and plans to use and enjoy polar bears and ringed and bearded seals. *See, e.g.*, Doc. 115-1, ¶¶7, 33-34, 83, 88, 90; Doc. 115-2, ¶¶27-34; Doc. 115-3, ¶¶16-17; Doc. 115-4, ¶¶13, 16-18, 55-60; Ex. 5, ¶¶17, 23-27;[17] *CBD v. Kempthorne*, 588 F.3d 701, 707-08 (9th Cir. 2009) (holding these types of injuries cognizable for standing).

[17] Plaintiffs are filing a corrected version of the declaration of Richard Steiner (Doc. 115-5) to fix a typographical error.

It instead challenges causation and redressability based on injuries from greenhouse gas emissions. But Plaintiffs' members' injuries stem not only from Willow's emissions impacts on polar bears and ice seals, but also from Willow's non-climate impacts, such as noise pollution. *See, e.g.*, Doc. 115-1, ¶¶83, 90; Doc. 115-2, ¶29; Doc. 115-3, ¶16; Ex. 5, ¶¶24-25. Because Plaintiffs have such injuries, they "may seek to invalidate the action that caused it 'by identifying all grounds on which the agency may have failed to comply with its statutory mandate,'" including climate-related harms. *Mont. Env't Info. Ctr. v. BLM*, 615 Fed.App'x 431, 432 (9th Cir. 2015) (mem.) (citation omitted); *see also WildEarth Guardians v. BLM*, 870 F.3d 1222, 1231-32 (10th Cir. 2017) (similar).[18] The Court need go no further.[19]

Regardless, Plaintiffs also satisfy causation and redressability based on the agencies' failure to consult on Willow's carbon emissions. As to causation, ConocoPhillips ineffectively relies on *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013), to argue Plaintiffs' showing is deficient. There, the court recognized that "[a] causal chain does not fail simply because it has several links,

[18] In *WildEarth Guardians v. Salazar*, 880 F.Supp.2d 77, 95 (D.D.C. 2012), the court provided no specific analysis for why it believed the plaintiffs lacked standing for their ESA claims, instead simply cross-referencing its decision regarding their NEPA claims. On appeal, the D.C. Circuit rejected the portion of the opinion prohibiting the plaintiffs from raising any of their climate claims under NEPA, without separately examining whether they could sue under the ESA. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 317-18 (D.C. Cir. 2013); *contra* Doc. 153 at 44 n.155.

[19] The State's challenge to Plaintiffs' injury-in-fact for purposes of the incidental take claim is meritless. *Infra* pp. 37-38.

provided those links are not hypothetical or tenuous and remain plausible." *Id.* at 1141-42 (citation omitted). Here the chain consists of a small number of unattenuated links: (1) the agencies failed to consult on the impacts of Willow's greenhouse gas emissions on polar bears or ice seals; and (2) these failures mean the agencies identified no alternative action or mitigation measure that would lessen the risks of Willow's emissions on these species. *See CBD v. FWS*, 807 F.3d at 1044.[20]

Additionally, unlike in *Bellon*, here scientific evidence demonstrates it is certainly "plausible" that Willow's emissions may negatively affect polar bears and ice seals. For example, the record shows Arctic sea ice loss from human-caused greenhouse gas emissions threatens the species' continued existence, Doc. 115 at 35; that Willow will increase such emissions, BLM_3512_AR820777; and that such emissions will lead to a certain amount of Arctic sea ice loss, BLM_3462_AR736154-58; *see also* BLM_3462_AR725322-28. This is the precise evidence *Bellon* found was lacking there. *See* 732 F.3d at 1143-44; *see also Growth Energy*, 5 F.4th at 28 (environmental groups had standing to challenge EPA's failure to consult on renewable fuel standards).

ConocoPhillips raises the bar in suggesting Plaintiffs cannot demonstrate causation unless they prove where Arctic sea ice loss will occur. Doc. 153 at 41, 48-49. *Bellon*'s references to the need to connect "localized climate impacts" to emissions, 723

[20] The ESA recognizes species can be harmed through a long causation chain. *See* 50 C.F.R. § 402.02 ("action area" for consultations is all areas "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action").

F.3d at 1143, were based on the nature of the plaintiffs' injuries, such as flooding of their property and their diminished ability to snowshoe in particular areas. *Id.* at 1140-42. Here, in contrast, Plaintiffs' members' interests are in migratory species threatened by sea ice loss; additional loss of their sea ice habitat anywhere can affect the species, and Plaintiffs' members ability to use and enjoy them in any area they plan to do so. *See, e.g.*, Doc. 115-2, ¶34; Doc. 115-3, ¶¶16, 31; Doc. 115-4, ¶59, Ex. 5, ¶¶26-27. As a result, Plaintiffs need not show where ice will melt to demonstrate causation. *See Melone v. Coit*, No. 1:21-cv-11171-IT, 2023 WL 5002764, at *4 (D. Mass. Aug. 4, 2023) ("Whether Melone observes right whales off the coast of … Massachusetts, or … Florida, is irrelevant where it is the same population … that migrate[s] from one location to the other, and it is the same population" that will be impacted by the action at issue).

Plus, unlike the substantive claims at issue in *Bellon*, the failure to comply with the ESA's consultation requirements is a "procedural injury [that] lessens a plaintiff's burden [to demonstrate] causation and redressability." *CBD v. FWS*, 807 F.3d at 1044 (citation omitted); *see also WildEarth Guardians v. USDA*, 795 F.3d 1148, 1158 (9th Cir. 2015) (discussing *Bellon*). As such, Plaintiffs "need only demonstrate that compliance with Section 7(a)(2) *could* protect [their] concrete interests," *NRDC v. Jewell*, 749 F.3d 776, 783 (9th Cir. 2014) (citation omitted).

This requirement is met. Upon further consultation, the agencies could adopt measures to reduce Willow's carbon emissions, such as denying another well pad, thus better protecting Plaintiffs' interests in polar bears and ice seals. *See* 16 U.S.C.

§ 1536(b)(3)(A), (b)(4)(C)(i)–(ii); 50 C.F.R. § 402.13(b).[21]

Plaintiffs are not required to show how the agencies' "procedural breach of the ESA" harms ESA-listed species. Doc. 153 at 49. It "is the objective and purpose of the consultation process" to answer the question of whether and how Willow's emissions affect polar bears and ice seals. *Cottonwood Env't Law Ctr*, 789 F.3d at 1082; *see also Friends of the Earth v. Laidlaw Env't Servs*., 528 U.S. 167, 181 (2000) (courts cannot "raise the standing hurdle higher than the necessary showing for success on the merits in an action").

Indeed, ConocoPhillips' reliance on an extra-record declaration to opine on what the Notz study shows about Willow's impacts to polar bears or seals, Doc. 153 at 46-48, "is nothing more than an effort to bootstrap standing analysis to issues that are controverted on the merits" that should be rejected. *Pub. Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989). Courts "cannot assume at the threshold that [Defendants] will prevail on the merits to close the courthouse door to [Plaintiffs]." *Id.*

ConocoPhillips also attempts to circumvent the relaxed standing requirements by claiming, as to redressability, that Plaintiffs' claim depends on the actions of third parties. Doc. 153 at 43-44, 46. Not so. ConocoPhillips cannot develop Willow without Defendants' approval, and it is the agencies' behavior that Plaintiffs seek to alter. *See*

[21] "[S]tanding declarations are not required to 'connect the dots' regarding causation and redressability … only … provide the factual basis necessary to demonstrate injury-in-fact." *CBD v. NOAA Fisheries*, No. 4:21-cv-00345-KAW, 2022 WL 17488678, at *10 (N.D. Cal. Dec. 7, 2022) (citation omitted); *contra* Doc. 153 at 44.

CBD v. FWS, 807 F.3d at 1044 (finding injury redressable where FWS could impose more stringent mitigation measures to guide third-party behavior following lawful consultation). *WildEarth Guardians v. USFS*, 70 F.4th 1212, 1216-18 (9th Cir. 2023)—where a state could still engage in the underlying action without the federal government's approval—is therefore inapposite. *Whitewater Draw Natural Resource Conservation District v. Mayorkas*, 5 F.4th 997, 1014-15 (9th Cir. 2021), and *Florida Audubon Society v. Bentsen*, 94 F.3d 658, 669-72 (D.C. Cir. 1996)—where the plaintiffs challenged various government policies that would not directly impact them, and their alleged injuries turned on whether and how other people would respond to those policies—are similarly inapt.

ConocoPhillips also incorrectly claims that Plaintiffs cannot show redressability because climate change has many causes. Doc. 153 at 49-50. "[T]he mere existence of multiple causes of an injury does not defeat redressability." *WildEarth Guardians v. USDA*, 795 F.3d at 1157. "So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant." *Id.*; *see also Mass. v. EPA*, 549 U.S. 497, 524 (2007) (an injury is fairly traceable to and redressable by the defendants if they can take a "small incremental step" to reduce it). Here, BLM admits Willow will "contribute to climate change impacts." BLM_3512_AR820777.

B. FWS unlawfully failed to include an incidental take statement for polar bears.

FWS based its conclusion that Willow will not harass even a single polar bear over its 30-year lifespan on an arbitrary interpretation of harassment and factual conclusions contrary to the evidence. Doc. 115 at 41-46. Defendants and Intervenors offer no compelling justification for FWS' position.

1. FWS's interpretation flouts the ESA.

In its biological opinion, FWS concluded that ConocoPhillips will not harass polar bears because (with the exception of hazing) none of its activities would be done with the intent to take polar bears. FWS_76_AR032541-42. Plaintiffs explained how that interpretation is inconsistent with the ESA's plain language and the very notion of incidental take, Doc. 115 at 42-43. Moreover, it is inconsistent with FWS's regulation: "intentional" modifies "act," not, as FWS's interpretation would require, the act's effect on the species. 50 C.F.R. § 17.3.

Defendants do not seriously defend this core component of the biological opinion and instead focus on the negligence element of the regulation, wrongly claiming that Plaintiffs read "negligent" out of the definition. *E.g.*, Doc. 149 at 58-59. The regulation uses the disjunctive "or." 50 C.F.R. § 17.3. Acts need not be intentional *and* negligent. Because ConocoPhillips intends to develop Willow, its actions constitute harassment if they create a likelihood of injury to polar bears. The Court can stop there.

Regardless, their arguments based on negligence fare no better. Defendants and Intervenors argue that because ConocoPhillips will abide by various mitigation measures required under the Marine Mammal Protection Act (MMPA), any harassment of polar bears will not be "negligent" because it will not involve any "degree of fault," and therefore cannot be incidental take. *E.g.*, Doc. 149 at 58-59; Doc. 153 at 57, 58. This argument is inconsistent with one of the purposes of the incidental take provisions—to authorize take that results from otherwise lawful activities provided they are conducted in conformance with measures spelled out in the incidental take statement.

To support the argument, they cite a decades-old Federal Register notice in which FWS was describing what actions would subject private landowners to "criminal liability" for taking endangered species on their land. Doc. 149 at 60 (citing 46 Fed. Reg 29,490, 29,491 (June 2, 1981)); Doc. 153 at 60 (same). But whether an individual is liable for take under ESA section 9 "is irrelevant to" FWS's obligation to issue an incidental take statement under section 7 since the ESA requires such a statement "for '*the taking* of an [ESA-listed] species incidental to the agency action' … not the *prohibited* taking." *CBD v. Salazar*, 695 F.3d 893, 910 (9th Cir. 2012) (citation omitted). This is because an incidental take statement does not just serve as an exemption from take liability, but also as a trigger to reinitiate consultation, *i.e.*, "a check on [FWS's] original decision" that the action under review will not jeopardize the species. *Id.* at 911 (citation omitted). This check is especially important here as this biological opinion is the only place where FWS must examine and account for all take from all of Willow's

activities over the next three decades. Thus, while for criminal prosecutions for engaging in a prohibited take FWS's focus on a degree of fault may be a reasonable interpretation, for incidental take it is not, where the ESA requires the agency to impose limits on take when it is incidental, not prohibited.

Moreover, FWS's new interpretation is inconsistent with settled law about the relationship between MMPA authorization and the ESA incidental take obligation. Defendants argue once an entity receives an MMPA authorization, any take by harassment does not have to be included in an ESA incidental take statement because mitigation measures apply. This is inconsistent with the ESA's requirement that for ESA-listed marine mammals, an incidental take statement must specify the measures "necessary to comply with section 1371(a)(5) of [the MMPA] with regard to such taking." 16 U.S.C. § 1536(b)(4)(iii)-(iv); *CBD v. Raimondo*, 610 F.Supp.3d 252, 262 (D.D.C. 2022). There is no exception to the requirement to specify the extent of and mitigation measures for take by harassment, and FWS cannot create one.

2. FWS's findings that Willow will not harass any polar bears contradict the record.

Defendants claim that while "small numbers of transient bears could be exposed to project-related disturbance," FWS noted "five reasons" why those disturbances would not constitute harassment. Doc. 149 at 64-65. But Plaintiffs explained why each of these reasons are unsupported by the record—including the biological opinion itself. Doc. 115 at 45-46. Finding any one of these reasons unsupported is grounds to hold the biological

opinion unlawful. *See NRDC v. USFS*, 421 F.3d at 807 (discussing harmless error). Neither Defendants nor Intervenors directly respond to these arguments, instead pointing to the same conclusory statements and unsupported reasons Plaintiffs challenge. *See* Doc. 149 at 64-65; Doc. 153 at 63; Doc. 155 at 39.

North Slope Borough claims polar bears are habituated to noise pollution, but no record evidence supports this assertion. Doc. 155 at 41. Defendants also wrongly claim that *Cook Inletkeeper v. Raimondo*, 533 F.Supp.3d 739 (D. Alaska 2021), is inapposite because the case involved take under the MMPA, not the ESA. Doc. 149 at 65-66. The case stands for the proposition that an agency cannot rely on mitigation measures to conclude no take will occur when those measures do not actually mitigate the take at issue. *Cook Inletkeeper*, 533 F.Supp.3d at 754-55. That is what FWS did here. *See* FWS_76_AR032420 (prohibiting "[c]hasing wildlife with ground vehicles"), 512 (relying on this measure). ConocoPhillips' reliance on FWS's statement that "vehicle traffic is 'tightly regulated in industry developments, including speed limits on in-field thoroughfares,'" Doc. 153 at 63 (citing FWS_76_AR032520), fails for similar reasons. FWS relied on this measure to conclude that "vehicle-polar bear collisions would be extremely unlikely," FWS_76_AR032520, not to mitigate noise disturbance from vehicle traffic.

3. Plaintiffs have standing for this claim.

The State baselessly asserts that Plaintiffs lack standing for their incidental take statement claim because Plaintiffs have not demonstrated injury-in-fact. Doc. 157 at 9-22. Injury-in-fact requires a showing of "an aesthetic or recreational interest in a particular place, or animal, or plant species" and "an increased risk of harm" to those interests. *Ocean Advocs.*, 402 F.3d at 860 (citation omitted). Plaintiffs have made this showing.

For example, one of Plaintiffs' members describes cultural and subsistence interests in polar bears, and how Willow's noise pollution and other impacts harms those interests. Doc. 115-1, ¶90. Another describes how he "go[es] to the Arctic to view polar bears," "enjoy[s] seeing the bears in the area," is "dedicated both professionally and personally" to their protection, and how Willow threatens those interests. Doc. 115-2, ¶¶19, 26; *see also* Doc. 115-3, ¶¶16-17; Ex. 5, ¶¶17, 24-25.

The State erroneously suggests that Plaintiffs must visit or observe bears in the exact area where Willow will take bears. Doc. 157 at 16-17. They cite no case holding any plaintiff to such a high standard. Indeed, courts have consistently rejected these types of arguments, holding instead "that an alleged injury to a population segment of animals the plaintiffs have directly visited, observed, or studied is sufficient to support standing." *Mayo v. Jarvis*, 177 F.Supp.3d 91, 131 (D.D.C. 2016); *see also Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d 803, 822 (9th Cir. 2018) (finding irreparable harm to a plaintiff's aesthetic interests in ESA-listed salmon where plaintiff stated "[f]ewer salmon

mean fewer opportunities to see them" when the plaintiff is recreating in Idaho's rivers).

This Court's decision in *Kunaknana v. U.S. Army Corps of Engineers*, 23 F.Supp.3d 1063 (D. Alaska 2014), is not to the contrary. There, the plaintiff group the Court found lacked standing did not have members with "concrete plan[s] to visit the project area in the future" and instead based their standing on the fact the project could potentially result in a catastrophic oil spill that could reach the Arctic Ocean where its members hoped to go. *Id.* at 1082-83.

Here, Plaintiffs' declarations show their members use polar bears or have concrete plans to visit the North Slope to look for them, including areas Willow will impact, Doc. 115-1, ¶90; Doc. 115-2, ¶¶27-28; Doc. 115-3, ¶¶16-17; Ex. 5, ¶17, and the record shows Willow will disturb polar bears. *See, e.g.*, FWS_76_AR032516-17, 29-30, 36-37. These members' injuries are not based on "connection[s] to the broader ecosystem," Doc. 157 at 17 (citation omitted), but on their interests in the very same population of imperiled bears Willow will impact. *See, e.g.*, Doc. 115-2, ¶¶25-29; Doc. 115-3, ¶27. *Wilderness Society v. Rey*, 622 F.3d 1251, 1255-57 (9th Cir. 2010), is inapposite for similar reasons.

IV. Vacatur is warranted.

A. No unusual circumstances merit remand without vacatur.

Defendants and Intervenors fail to show why the ordinary remedy of vacatur should not apply here. To evaluate whether rare circumstances exist warranting remand without vacatur, courts consider, *inter alia*, whether vacatur risks environmental harm and whether it would lead to results that are inconsistent with the governing statute. Doc.

115 at 47. Those circumstances do not exist here.

The State speculates that vacatur would cause environmental harm but provides no details about the nature of the harm or how it might occur. Doc. 157 at 25-26. Further, the record belies the State's assertion, *id.* at 27, that roads reduce environmental damage, and instead demonstrates extensive harm from roads and includes mitigation for those impacts. BLM_3512_AR820706; BLM_3513_AR824928, 47, 52. Much of that environmental damage has yet to occur, since only a small portion of the total project has been completed, distinguishing this case from *Kunaknana v. U.S. Army Corps of Engineers*, No. 3:13-CV-00044-SLG, 2014 WL 12813625, at *3 (D. Alaska July 22, 2014).

The State also argues the delay of energy production is inconsistent with the purposes of the Reserves Act, Doc. 157 at 34-35, but the Act does not call for development regardless of its consequences; BLM is obligated to protect the Reserve's surface resources and the purpose of remand is to ensure compliance with these obligations. Doc. 115 at 13; *contra* Doc. 125-1 at 26-27 (explaining how vacatur is consistent with the statutory purposes of NEPA and the ESA).

Thus, this is not a case where vacatur would cause environmental harm, as in *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995), and *Audubon Society of Portland v. U.S. Army Corps of Engineers*, No. 3:15-cv-665-SI, 2016 WL 4577009, at *16 (D. Or. Aug. 31, 2016), where leaving the agency's decision in place better protected ESA-listed species. Nor is this a case where vacatur conflicts with

a statutory purpose, as in *California Communities Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012), where vacatur of a Clean Air Act rule would cause the very environmental harm—worsened air quality—that the statute aimed to prevent. Absent such factors, courts in the Ninth Circuit generally do not remand without vacatur.

The seriousness of the agencies' errors also does not make remand without vacatur appropriate. As Plaintiffs' opening brief explained, BLM's and the Services' errors are serious and go to core analytical decisions that, upon remand, could lead to substantially different outcomes. Doc. 115 at 48-49. Defendants and Intervenors barely address that point, wrongly claiming instead that it is premature to discuss the seriousness of the agencies' errors. Doc. 149 at 66; Doc. 153 at 66.[22] But the parties have fully briefed the merits, and thus are well aware of the types of errors at issue and have had a full opportunity to address their seriousness should the Court rule in Plaintiffs' favor. Therefore, additional remedy briefing is unnecessary.

Nor do Intervenors' arguments about disruptive consequences change the calculus on vacatur. Those consequences are largely financial; even if significant, they do not by themselves present the rare or limited circumstances in which remand without vacatur might be justified, as discussed further below.[23]

---

[22] That BLM's and the Services' supplemental analyses for Willow are "comprehensive," Doc. 157 at 24, or reflect a "compromise" among stakeholders, Doc. 156 at 35, is irrelevant when the portions of those analyses challenged by Plaintiffs contain serious legal errors. *SILA*, 555 F.Supp. 3d at 804.

[23] Defendants have chosen not to submit their views about potential disruption.

B. Financial harm does not warrant remand without vacatur.

The potential financial harms Intervenors identify are either baseless or a normal consequence of vacatur.

First, an entire category of asserted harms rests on ConocoPhillips' unsupported argument that Willow is unlikely to be built if vacatur is granted. ConocoPhillips suggests that some of its leases may expire due to a provision in the Reserves Act providing for lease expiration after 30 years of non-production. Doc. 153 at 69; Doc 153-2, ¶¶16-17. Yet the company acknowledges that the Act also prohibits the cancellation of leases capable of producing oil in paying quantities if the lack of production is due to circumstances beyond the lessee's control, Doc. 153-2, ¶17, such as vacatur resulting from an unlawful decision. The company also acknowledges that this Court already made this point, *id*., and Defendants themselves have not even raised the prospect of lease expiration. ConocoPhillips' insistence that a "serious risk" of expiration exists absent a binding declaratory judgment is unpersuasive. ConocoPhillips is also conspicuously silent about other considerations that might affect whether it moves forward with the Project, for which it has yet to make a final investment decision.

The bulk of other Intervenors' claims of disruption, such as loss of income and taxes from the Project over its lifetime, hinge entirely on the same flawed argument. *See* Doc. 154 at 22-23; Doc. 155 at 43-44; Doc. 156 at 34-35; Doc. 157 at 32. Taking the threat of lease expiration out of the equation, the Project's financial benefits will only be deferred if BLM concludes, on remand, that it should approve the Project in some form.

Such delay is a normal consequence of vacatur.

Second, to the extent that ConocoPhillips and other companies suffer financial harm due to the delay itself, this, too, is a normal consequence of vacatur—particularly where the companies proceeded "with full knowledge that Plaintiffs were contesting [the permit] allowing them to do so" and thus "assumed some risk of economic disruption." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F.Supp.3d 91, 104 (D.D.C. 2017); *see also* Doc. 115 at 49-50. For example, the State cites permitting inefficiencies, Doc. 157 at 28-30, and Arctic Slope Regional Corporation points to the costs of hiring a new management team, Doc. 154 at 23-24, but these are part of business "in an area fraught with bureaucracy and litigation." *Standing Rock*, 282 F.Supp.3d at 104. The State's reliance on *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146, 152-53 (D.C. Cir. 1993), is inapposite. There, vacatur would not just cost the Commission $3.8 million but would give a "peculiar windfall" to licensees. *Id.* at 152. No such odd result would occur here.[24]

Intervenors also point to the delayed benefit of mitigation measures, such as the subsistence ramp and protections for Teshekpuk Lake caribou habitat, Doc. 155 at 45; Doc. 156 at 31, but these are simply mitigation for the inevitable harmful impacts that would flow from Willow itself and cannot be considered a net benefit that would be lost

[24] ConocoPhillips relies on *Idaho Farm Bureau*, 58 F.3d at 1405-06, to argue that its private investment in Willow to date should weigh against vacatur, but that case involved only public expenditures (and, as detailed above, the potential extinction of a species).

during remand. Indeed, the City and Tribal governments of the community that will be most affected by the Project, Nuiqsut, have been unequivocal about the harm it will cause to subsistence and community health, notwithstanding mitigation. In their comments as cooperating agencies, the City and Tribe noted that Willow will put subsistence resources that are valued at nearly $30,000 per person per year at risk and exacerbate the community's food insecurity. BLM_3481_AR772925. Community leaders also detailed how the mitigation measures are deeply flawed and unsupported by any analysis showing to what extent, if any, they will be effective. BLM_3494_AR776982-83; *see also* Doc. 115-1, ¶¶13-18, 23, 46, 49, 51, 54, 99-100 (identifying extensive harm to subsistence from construction activities).

Because ConocoPhillips has not yet made a final investment decision, it is premature for Defendants and Intervenors to assume that any of their claimed benefits from the Project are assured. Indeed, upon remand, BLM could make a different decision about Willow. Any resulting reductions in its expected financial value would be necessary to comport with the law, as determined by the remand.

C. The harm from delayed jobs during remand is unavoidable if remand is to serve its purpose.

Intervenors are correct that vacatur will make some jobs unavailable while construction is on hold. Doc. 153 at 68; Doc. 155 at 45; Doc. 153 at 33-34. Although real and meaningful, especially in small communities where even seasonal jobs are hard to come by, this harm is a necessary consequence of remand, if it is to have any value at

all. Allowing construction to proceed for another two years even though the agencies may make different choices on remand undercuts the entire purpose of the remand and the governing statutes and risks substantially biasing the agencies' options. *See Colo. Wild Inc. v. USFS*, 523 F.Supp.2d 1213, 1220-21 (D. Colo. 2007) (noting risk on remand that "bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the Forest Service towards its original, non-NEPA compliant access decision"); *Indigenous Env't Network v. U.S. Dep't of State*, 369 F.Supp.3d 1045, 1051 (D. Mont. 2018) (finding construction despite NEPA and ESA violations could "skew the Department's future analysis and decision-making regarding the project").

CONCLUSION

For the foregoing reasons, the Court should declare BLM's and the Services' actions unlawful, vacate their review and approval of the Project, and remand for further analyses.

Respectfully submitted this 15th day of September, 2023.

s/ Eric P. Jorgensen

Eric P. Jorgensen (Alaska Bar No. 8904010)
Erik Grafe (Alaska Bar No. 0804010)
Jeremy C. Lieb (Alaska Bar No. 1810088)
Ian S. Dooley (Alaska Bar No. 2006059)
Carole A. Holley (Alaska Bar No. 0611076)
EARTHJUSTICE

Attorneys for Plaintiffs Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, and Greenpeace, Inc.

s/ Kristen Monsell

Kristen Monsell (California Bar No. 304793) (*pro hac vice*)
CENTER FOR BIOLOGICAL DIVERSITY

Attorneys for Plaintiff Center for Biological Diversity

s/ Cecilia Segal

Cecilia Segal (California Bar No. 310935) (*pro hac vice*)
Michelle Wu (New York Bar No. 5633664) (*pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL

Attorneys for Plaintiff Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I certify that this document contains 11,360 words, excluding items exempted by Local Civil Rule 7.4(a)(4), and complies with the word limits requested in Plaintiffs' Unopposed Motion to File Overlength Reply (Doc. 169).

Respectfully submitted this 15th day of September, 2023.

s/ Eric P. Jorgensen
Eric P. Jorgensen

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2023, a copy of foregoing PLAINTIFFS' REPLY BRIEF UNDER LOCAL RULE 16.3(c)(3), with attachments, was served was served electronically on all counsel of record through the Court's CM/ECF system.

I further certify that Tarek Farag, tarekfaragusa@hotmail.com, was served by electronic mail.

s/ Eric P. Jorgensen
Eric P. Jorgensen