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*)
Ann Alexander (*pro hac vice*)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter St., 21st floor
San Francisco, CA 94104
T: 415.875.6100 / 415.875.6190
E: csegal@nrdc.org
E: aalexander@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.; ARCTIC SLOPE REGIONAL CORPORATION; NORTH SLOPE BOROUGH; KUUKPIK CORPORATION; and STATE OF ALASKA, *Intervenor-Defendants.*	)	Case No. 3:23-cv-00061-SLG

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

I. BLM failed to consider an adequate range of alternatives.

Although they attempt in various ways to obscure it, Defendants do not dispute the core of Plaintiffs' argument—that BLM limited the alternatives it considered in evaluating Willow to those that would avoid stranding an economically viable quantity of oil. As Plaintiffs explained, Doc. 24 at 12-15, because this constraint is not justified and is contrary to BLM's obligations to protect surface resources in the Reserve, BLM acted arbitrarily when it excluded otherwise reasonable alternatives on this basis and violated NEPA by assessing an inadequate range of alternatives. Unable to address this central flaw in BLM's alternatives analysis, Defendants focus almost entirely on an argument that Alternative E reduced surface impacts, and that this met BLM's obligation—without addressing the fact that *no* alternative substantially reduces the volume of oil to be produced, and attendant major greenhouse gas impacts, or eliminates development in the highly sensitive Teshekpuk Lake Special Area.

The Department of the Interior (Interior) acknowledges the constraint that it must allow ConocoPhillips to develop all economically viable fossil fuel under its leases, though it is begrudging and evasive. The agency defends, and thereby acknowledges, its assumption that it could not limit "access to economically viable quantities of oil." Doc. 48 at 25 n.8. More evasively, it places emphasis on changes in the wording of its limitation on alternatives since the EIS for the first Willow project—noting that the current version no longer specifically references a need to allow access to "all" the oil.

Id. at 22. But it fails to explain how the elimination of this word actually changed the substance of the alternatives analysis or how the substitute constraint in the final SEIS—all economically recoverable oil—is functionally different. Similarly, it purports to disavow that BLM thought it had to allow ConocoPhillips "to fully develop" its oil field. *Id.* at 25 n.8. Plaintiffs agree that the cited regulations do not mandate full oil development, but BLM's own statements make clear it imposed such a constraint. It asserts that "for the Willow development plan to be *approved* . . . it 'must describe the activities to fully develop the oil and gas field.'" *Id*. (emphasis added). In the draft SEIS itself, when BLM screened alternatives, it indicated "fully develop" was intended to be synonymous with not "strand[ing] an economically viable quantity of oil." *See* Doc. 24 at 12 (citing Doc. 24-9 at 7). And, as Plaintiffs described, *id.* at 12 (citing Doc. 24-13 at 13), in addition to relying on the economically viable oil limit to explain its alternative choices, the final SEIS itself states that BLM applied the synonymous constraint that it may only consider alternatives that accomplish "full field development."

ConocoPhillips likewise dances around BLM's self-imposed restraint. It suggests that ensuring full viable oil recovery was only one factor considered, but ultimately concedes that this limitation was in place and defends as "entirely reasonable" BLM's rejection of alternatives on the basis that they "'would strand an economically viable quantity of recoverable oil.'" Doc. 54 at 24 (quoting final SEIS); *see also id.* at 20

(noting "statutory mandates to allow access to the oil resource").[1] ConocoPhillips also suggests that Plaintiffs are "cherry picking" when citing the stranding limitation as the basis for Interior's analysis, *id.* at 24, but the record makes clear this limitation was important. Interior disallowed *any* alternative that would strand economically recoverable oil. *See* Doc. 24-13 at 25-29.

Indeed, even the final choices BLM made when it selected the version of Alternative E adopted in the ROD demonstrate that BLM treated not stranding any economically viable oil as a fundamental prerequisite. The SEIS had rejected an alternative that would eliminate the BT5 well pad in addition to BT4 due to the purported stranding problem. *Id.* at 29. The final decision adopted in the ROD did delete BT5, but BLM did not disavow the stranding limit. Instead, it invited ConocoPhillips "to conform the Bear Tooth Unit to [its] Decision" by relinquishing leases that would have been accessible only from the excluded drill sites. Doc. 24-15 at 113 n.4. ConocoPhillips then did just that. Doc. 54 at 16. In other words, BLM's final decision was consistent with its

[1] Additionally, ConocoPhillips' suggestion is irrelevant. This Court's 2021 decision made clear that even partial, non-primary reliance upon an illegal constraint on alternatives is unlawful. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 769 (D. Alaska 2021) (*SILA*). It also does not comport with the record. It is clear from the text of BLM's rejection of alternatives that in many cases the need to allow access to all economically viable oil was functionally the primary consideration. *See, e.g.,* Doc. 24-13 at 26 ("This alternative concept does not meet the Project's purpose and need and would strand economically viable quantities of recoverable oil accessed by BT4 and BT5. BLM determined that there are economically viable quantities of recoverable oil in these areas based on its review of the available geologic data and because there is enough resource accessible from BT4 and BT5 that [ConocoPhillips] has proposed constructing gravel roads and drill site pads to access it.").

limiting principle that no economically viable oil under lease would be stranded.

Defendants are unable to disavow the stranding limitation, and neither can they justify it. Interior cites the fact that ConocoPhillips' leases are so-called non-NSO leases, but does not and cannot demonstrate that this fact prohibits stranding of any economically viable quantities of oil. It cites *Conner v. Burford*, 836 F.2d 1521, 1524 (9th Cir. 1988), Doc. 48 at 25 n.8, but that case does not justify BLM's position. Indeed, it recognizes that BLM may limit activities on non-NSO leases to avoid impacts. Similarly, Interior notes ambiguously that ConocoPhillips has an undefined level of "development rights" in its leases, subject to an also undefined "level of reasonable regulation." *Id*. In fact, the "reasonable regulation" to which non-NSO leases are subject is broad. As Plaintiffs explained, Doc. 24 at 13, the Ninth Circuit has considered non-NSO leases in the Reserve and excused BLM from conducting parcel-by-parcel NEPA analysis prior to selling the leases on the ground that "[t]he government can condition permits for drilling on implementation of environmentally protective measures, and w*e assume it can deny a specific application altogether* if a particularly sensitive area is sought to be developed and mitigation measures are not available." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006) (emphasis added).

ConocoPhillips points to the Reserves Act's instruction to conduct an expeditious program of competitive leasing, Doc. 54 at 25, and Congressional intent to advance private oil and gas development in the Reserve, *id.* n.79. However, neither—nor any other authority, as Plaintiffs have explained, Doc. 24 at 12-15—mandates development of

all economically viable fossil fuels underlying leases. And BLM did more than "consider[]" allowing access to economically recoverable oil, as ConocoPhillips suggests, Doc. 54 at 25, it required it.

Nor does ConocoPhillips' additional invocation of the purpose and need statement help its cause. *Id*. As the company seems to acknowledge, the purpose would be satisfied with a project that "allow[s] for *some* development of oil." *Id.*; *see also* Doc. 24 at 15-16.

Finally, Defendants attempt to distract from BLM's unlawful constraint on alternatives by discussing extensively the ways in which the alternatives considered involved varying well-pad configurations and locations. Doc. 48 at 22-25; Doc. 54 at 19-21. However, this does not remedy the flaw, which was the insistence that whatever c*onfiguration* is used cannot actually limit the oil recovered. *SILA*, 555 F. Supp. 3d at 769 (describing that "to the extent BLM relied on this reason to not examine other alternatives, its alternatives analysis was inadequate"). In assessing Willow the second time, Interior decided it could move well-pad locations, but only if the company could *still* access all economically viable fossil fuels beneath its leases. Though this approach resulted in well-pad changes, the substance of the unlawful limitation remained. Accordingly, the mere fact that BLM considered an alternative (Alternative E) with fewer and different well-pad configurations is not responsive to the Court's order, because BLM limited the alternative well-pad configurations it would consider based on a flawed understanding of its authority (access to all "economically viable" oil) that is functionally

indistinguishable from its first assessment (access to "all possible" oil).

Due to the stranding limitation, Doc. 48 at 29, BLM never fully analyzed the possibility of keeping infrastructure entirely out of the Teshekpuk Lake Special Area. Tellingly, Interior's brief highlights "alternative component" 44 that would keep infrastructure completely out of the Special Area, Doc. 48 at 25, but glosses over the fact that BLM *summarily rejected* "component 44" (and Plaintiffs' other suggested alternatives) on the basis that it would strand economically viable oil.[2] Doc. 24-13 at 26. Thus, ConocoPhillips' characterization of Alternative E as a "middle ground" alternative that comes reasonably close to giving Plaintiffs what they asked for is entirely inaccurate. Doc. 54 at 21-23; *see also* Doc. 48 at 27-29 (Interior's similar argument). This alternative does not exclude infrastructure in the Teshekpuk Lake Special Area altogether. Doc. 24-1 at 41-44. Indeed, Alternative E places miles of road and pipeline and dozens of oil wells there. Doc. 48-15 at 48, 50; Doc. 24-15 at 13, 15.

Moreover, and equally importantly, Alternative E fails to address in any significant way—much less provide any "middle ground"—Plaintiffs' request, Doc. 24-1 at 33, 42, 46-47, that BLM consider an alternative substantially limiting greenhouse gas

[2] Interior appears to suggest, Doc. 48 at 25, that this explanation of its reason for excluding an alternative suffices to meet its obligation under NEPA to consider a full range of reasonable alternatives. Not true. Dismissal of alternatives is not the same as the detailed study of viable alternatives that NEPA requires. *Compare* 40 C.F.R. § 1502.14(a) (addressing alternatives which are eliminated from detailed study) *with id.* § 1502.14(b) (addressing alternatives considered in detail); *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 constitute the detailed analysis required of all reasonable alternatives).

emissions. Alternative E does not substantially reduce production volumes (notwithstanding Interior's characterization of it as a "substantially scaled back plan," Doc. 48 at 9).[3] As considered in the SEIS, Alternative E would produce 97 percent as much oil as ConocoPhillips' preferred project (and all other alternatives analyzed), Doc. 24-13 at 34 (613.5 million barrels under Alternative E compared to 628.9 million barrels of oil under Alternatives B (Proponent's Project), C, and D), and, as approved, 92 percent as much, Doc. 24-15 at 22 (576 million barrels for Willow as approved).

Thus, unlike the alternative at issue in *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006), cited by ConocoPhillips, Doc. 54 at 21-23, Alternative E cannot be said to have incorporated Plaintiffs' concepts. Rather, BLM rejected these concepts outright. Doc. 24-13 at 26-29. And, unlike in *Kempthorne*, where the Court credited BLM's "explanation that the Audubon Alternative as a whole was inconsistent with the [management plan] and statutory mandates," 457 F.3d at 978, BLM has here rejected Plaintiffs' alternative proposals in reliance on its flawed understanding of its authority.

[3] ConocoPhillips' assertion that Plaintiffs failed to explain why the alternatives it proposed are viable, Doc. 54 at 25, ignores Plaintiffs' explanation in comments to the draft SEIS that BLM was wrong to exclude, based on the stranding limitation, alternatives that reduce greenhouse gas emissions and avoid Special Areas. *See* Doc. 24-19.

II. BLM's failure to analyze downstream greenhouse gas emissions from development caused by Willow violates NEPA.

BLM violated NEPA by failing to analyze the downstream greenhouse gas emissions of oil and gas development Willow will cause. Doc. 24 at 16-20. This argument is not "novel," *cf.* Doc. 48 at 32, but is based on extensive caselaw confirming that a project's "reasonably foreseeable . . . [g]rowth inducing effects" are "indirect impacts that must be considered" in a NEPA analysis. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737 (9th Cir. 2020) (citation omitted). Downstream greenhouse gas emissions from both West Willow and development of other adjacent identified pools of oil are reasonably foreseeable, indirect impacts of BLM's approval of Willow. NEPA therefore required BLM to disclose and analyze these impacts in the Willow final SEIS. Yet BLM failed to do so, rendering its approval of Willow unlawful.

Notably, no party contests the fact that Willow will facilitate additional oil and gas development in the Reserve. *See* Doc. 48 at 32-35; Doc. 54 at 26-32. Nor could they, as both BLM and ConocoPhillips have repeatedly indicated as much. *See, e.g.*, Doc. 24-20 at 2-3 (ConocoPhillips' 2021 statement to investors that it believes Willow "could be the next great Alaska hub" and that it "identified up to 3 billion [barrels of oil equivalent]" near Willow "that could leverage the Willow infrastructure" and "offers significant long-

term upside to this project");[4] Doc. 24-13 at 1 (final SEIS acknowledging that Willow will make development of adjacent lands "easier and more economically viable"). Instead, Defendants make a series of arguments to excuse BLM's failure to analyze the greenhouse gas consequences of these activities, but none successfully rebut Plaintiffs' argument.

Interior claims that BLM did not have to consider the growth-inducing impacts of West Willow because it "is not a proposed action" and therefore does not constitute "a reasonably foreseeable action." Doc. 48 at 33. But this argument misconstrues the facts and the law. On the facts, BLM has already determined West Willow *is* a "Reasonably Foreseeable Future Action," Doc. 24-13 at 1, thus "highly probable" to occur, Doc. 24 at 17, and it cannot now change its position in litigation. *See Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1120 (9th Cir. 2010) (rejecting counsel's post-hoc argument where "BLM never advanced such a position in the EIS itself."). As such, this case is a far cry from those relied on by Interior, Doc. 48 at 33, where there was no "specific, quantifiable information about the parameters of future . . . development," such as "the scope or location" of that development that could inform an analysis. *Chilkat Indian Vill. of Klukwan v. BLM*, 399 F. Supp. 3d 888, 920, 922 (D. Alaska 2019) (citation omitted).

[4] ConocoPhillips faults Plaintiffs for citing this three-billion-barrels-of-oil figure that the company made to its own investors without the context of the full administrative record. Doc. 54 at 32 n.110. The supposed context its explanation of that statement to BLM provides—that these prospects "have a higher degree of uncertainty relative to our major projects and development drilling programs"—does nothing to undermine the fact that Willow will facilitate reasonably foreseeable additional oil development in the Reserve. *See* Doc. 54-22 at 4 (RFI 248).

Here, BLM has detailed information about West Willow—including not only its location, but also the quantity of oil West Willow would produce and when it would begin production. *See, e.g.*, Doc. 24-13 at 3, 41 (estimating West Willow could produce 75 million barrels of oil, starting in 2035). The problem is that BLM did not disclose or analyze the reasonably foreseeable downstream greenhouse gas emissions from such development.

Moreover, the two cases Interior cites address agencies' obligation to analyze cumulative impacts, not indirect impacts from the decision itself. *See Chilkat Indian Vill. of Klukwan*, 399 F. Supp. 3d at 921-22; *Lands Council v. Powell*, 395 F.3d 1019, 1023 (9th Cir. 2005). They focus on proposed actions because the cumulative impacts requirement focuses on actions. 40 C.F.R. § 1508.7 (requiring analysis of the "impact of the action . . . when added to other . . . reasonably foreseeable future actions"). The obligation to assess indirect effects, on the other hand, focuses on effects. *Id.* § 1508.8 (requiring analysis of effects, which are . . . later in time or farther removed in distance . . . but still reasonably foreseeable"). The cases' limit on an agency's cumulative actions analysis thus does not cabin an agency's obligation to assess reasonably foreseeable indirect effects. The obligation to consider specific growth inducing, indirect effects of a project is a different and more particularized obligation. It provides the public and the decision-maker with information about the full effects that will flow from approving Willow, specifically, as opposed to effects from other past, present, and future activities that may be unrelated to Willow, which is what the

obligation to assess cumulative impacts requires. *See City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (noting the importance of considering growth-inducing impacts because "[i]f impact statements are to be useful, they must address the major environmental problems likely to be created by a project") (citation omitted).

Interior additionally attempts to dismiss the import of the Ninth Circuit decisions cited by Plaintiffs regarding the need to consider growth-inducing effects by claiming those cases involved environmental assessments rather than EISs. Doc. 48 at 34-35. This is a distinction without a difference. "Taking a 'hard look' includes 'considering all foreseeable . . . indirect impacts,'" *League of Wilderness Defs.-Blue Mts. Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012) (citation omitted), whether in an EIS or not.

ConocoPhillips, for its part, acknowledges that West Willow is identified in the final SEIS as reasonably foreseeable, Doc. 54 at 29, but argues that Interior did not have the information necessary to project downstream greenhouse gas emissions from it. It asserts, citing the final SEIS, that Interior has concluded analyzing these impacts would be speculative because such emissions "are highly dependent on if and when these leases are developed and how much oil can be technologically and economically feasible to recover." *Id.* at 30. To the contrary, BLM has all the information needed to assess these impacts now. As noted above, BLM has, itself, projected the amount of production from West Willow and the date when production will begin. Doc. 24-13 at 3, 41 (estimating 75 million barrels of oil, starting in 2035); *see also* Doc. 24-18 at 5 (the Environmental

Protection Agency's statements in 2022 about the "reasonably foreseeable, large scale [greenhouse gas] emissions associated with the developments of West Willow[.]").

For projects beyond West Willow, BLM has examined data for oil potential in other adjacent lands, Doc. 24-13 at 17, 19 (describing how ConocoPhillips has published estimates for the oil potential in its leases west of Willow), 21 (describing how BLM has examined proprietary data "related to exploration wells and seismic exploration in this area"). While the precise details of oil production at other foreseeable wells are not known, that lack of certainty does not excuse BLM from failing to consider the wells' downstream impacts *at all.* Again, the cases cited by Interior, Doc. 48 at 33, are inapposite. Their approval of agency choices to ignore effects of projects not yet proposed is limited to the cumulative effects obligation they address, and they are factually distinguishable because the agencies in those cases lacked information to conduct a meaningful analysis. Here, BLM does not need the kind of detailed information about specific location and configuration accompanying a proposal to analyze the indirect effects of greenhouse gas emissions resulting from future projects it will catalyze. The agency can conduct a useful assessment of the indirect effects from projects facilitated by Willow with the information it already has. *See WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67-71 (D.D.C. 2019) (upholding an agency's choice not to analyze the direct "impacts of specific drilling projects," but requiring the agency to analyze greenhouse-gas consequences of development its leasing decision

would catalyze, where, like BLM does here, it had the information to do so meaningfully).

As the Ninth Circuit has repeatedly affirmed, "[d]rafting an EIS 'necessarily involves some degree of forecasting,' and the agency 'must use its best efforts to find out all that it reasonably can' when predicting the environmental effects of the proposed action." *Ctr. for Biological Diversity*, 982 F.3d at 735 (citation omitted); *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) ("[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, . . . the agency may not simply ignore the effect."). Here, BLM conducted an analysis of the direct impacts of downstream greenhouse gas emissions from the oil Willow will produce even though much of that oil will not be produced and consumed for decades. The agency bears an equivalent obligation for the indirect impacts of projects Willow will foster, like West Willow and other foreseeable projects. Neither Interior nor ConocoPhillips provide a compelling reason why BLM cannot.

Both Interior and ConocoPhillips seek to translate Plaintiffs' argument about a major gap in the indirect impacts analysis for Willow into one about the adequacy of the cumulative impacts analysis and defend the final SEIS on that ground. They argue this Court's prior decision regarding the agency's cumulative impacts analysis in the previous EIS resolves the issue. Doc. 48 at 33-34; Doc. 54 at 29. There, the SILA plaintiffs[5]

[5] The "SILA Plaintiffs assert[ed]" the claim, *SILA*, 555 F. Supp. 3d at 781, not the CBD plaintiffs. *Cf.* Doc. 48 at 33.

argued that the EIS's cumulative impact discussion failed to "provide detailed information on Greater Willow, including 'the proposed drill site locations, estimates for production amount and timing, and that Willow's pipelines were designed to support Greater Willow development.'" *SILA*, 555 F. Supp. 3d at 781. As detailed above, the evaluation of a project's indirect impacts—and particularly its growth inducing impacts—is different and serves a different purpose than a cumulative impacts analysis. And in any event, the Court rejected the SILA plaintiffs' previous argument because "this information [was] contained in the EIS." *Id.* Here, the information regarding West Willow's downstream greenhouse gas emissions is *not* in the final SEIS. Thus, the final SEIS cannot be "sufficient for the decision maker and the public to understand the potential scope and impacts of Greater Willow." *Id.*

ConocoPhillips' assertion that "BLM disclosed the direct and indirect emissions of all the potential future projects in the [] Reserve" in the final SEIS, Doc. 54 at 32, cannot save BLM's faulty analysis. The referenced analysis is from BLM's EIS on the Integrated Activity Plan—a programmatic document that does not mention West Willow at all. *See* Doc. 24-4 at 30-33. It is axiomatic that while "'tiering' to a previous EIS is sometimes permissible, the previous document must actually discuss the impacts of the project at issue." *S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009). Here, the EIS on the Integrated Activity Plan assesses potential emissions from all oil and gas activity across the entire Reserve, *see* Doc. 24-4 at 4, but does not disclose the emissions from West Willow specifically or how Willow

will induce this future development and emissions. *See WildEarth Guardians*, 368 F. Supp. 3d at 71 (noting that greenhouse gas "analyses conducted in EISs issued at the land use planning stage are necessarily more general than analyses conducted at" later stages and BLM's acknowledgment of that notion). Presumably this is why, in issuing the final SEIS for Willow, BLM analyzed the direct greenhouse gas emissions from construction and development drilling (*i.e.*, operation) of West Willow. Doc. 24-13 at 41-42. It should have also done so for the downstream greenhouse gas emissions from consumption of the developed oil.

ConocoPhillips' reliance on *Kempthorne*, 457 F.3d at 974, is inapposite. Doc. 54 at 30-31. *Kempthorne* dealt with a programmatic EIS on an earlier iteration of a management plan for the Reserve. 457 F.3d at 973-74. But "[t]he required level of analysis in an EIS is different for programmatic and site-specific plans." *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 497 (9th Cir. 2014). It is at the site-specific EIS stage—*i.e.*, the final SEIS for development of Willow—where BLM should include "data-gathering and analysis of system-wide impacts." *See Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 801 (9th Cir. 2003). BLM's failure to consider downstream emissions from West Willow and other reasonably foreseeable future activities violates NEPA.

PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION

Plaintiffs have demonstrated a number of ways in which they will be irreparably harmed, immediately and over time, by permanent road construction and mining activities planned this winter and spring, any one of which is sufficient to support a preliminary injunction.

First, Interior is mistaken that the disturbance impacts to caribou Plaintiffs cite from the SEIS are only from "impacts of the entire project" and therefore not relevant to the injunction request. Doc. 48 at 42. To the contrary, Plaintiffs pointed to evidence that included disturbance and displacement from upcoming winter and spring construction activities. Doc. 24 at 21-23; Doc. 24-12 at 51 (discussing impact occurring "during all periods of human activity"), 58 (discussing impacts from "[a]ll project roads"), 50-51 (discussing traffic impacts from winter and spring construction), 57 ("Impacts to resource availability would occur year-round. Impacts would be higher during winter construction, when ice roads are present and activities are at their peak. Use of the direct effects analysis area by Nuiqsut . . . harvesters is highest during winter . . . although a substantial amount of summer and fall activity occurs in the eastern portion of the analysis area where the mine site is located"); Doc. 24-13 at 10 (showing mine site in the heart of highest subsistence use area for Nuiqsut).

In addition to this evidence of impacts to caribou, Plaintiffs submitted the declaration of Dr. Rosemary Ahtuangaruak detailing the immediate effect that winter ground-disturbing activities and the permanent harm from the mine and road would have

on her and her family, in the context of her larger concerns regarding the Project. Specifically, she observed that the site of the planned gravel mine, along the Tiŋmiaqsiuġvik River, is a "beautiful" area that "has been a place of wellness for me," whose qualities will be permanently destroyed by industrial development. Doc. 24-23, ¶¶51, 53, 54. And she has highlighted the use of the affected areas for central parts of her way of life, such as berry picking and hunting by her and her family, that would be affected by either the construction in the coming weeks or the existence of the new mine and road, in addition to impacts to caribou themselves. *See* Doc. 24 at 22-24. ConocoPhillips attacks but does not undermine these harms.

ConocoPhillips devotes particular attention to Dr. Ahtuangaruak's statements about the potential impact of gravel mines and roads on caribou. Doc. 54 at 38-41. ConocoPhillips does not directly dispute BLM's own findings in the SEIS that gravel mines and roads adversely affect caribou, Doc. 24 at 21-23, rather it points to declarations from community members whose experiences lead them to feel such an effect is unlikely. Doc. 54 at 39-40. Dr. Ahtuangaruak's different experience and her statements about the effects on caribou are supported by BLM's own analysis, Doc. 24-23, ¶54; Doc. 24 at 21-23, and remain persuasive. Kuukpik correctly acknowledges that community members that experience disturbance from blasting, whether to community members themselves or to animals in the area, "plausibly identif[y] an injury." Doc. 58 at 17.

ConocoPhillips also takes on, unsuccessfully, Dr. Ahtuangaruak's statement that

her family's hunting will be disturbed by the construction and the development itself. It cites declarations of community members who assert that, in their own experience, the area where the mine will be located is not important for hunting. Doc. 54 at 39. But in the very declarations it offers, there is also direct evidence that the mine site *is* used for hunting, consistent with Dr. Ahtuangaruak's own firsthand description. One of ConocoPhillips' declarants, a respected elder in the community, Doc. 58-1, ¶10, acknowledged that there is a "current trail out that direction," used for hunting. Doc. 54-6, ¶¶12-13. And Kuukpik provides a declaration from a community member that corroborates use of the area for hunting. Doc. 58-3, ¶9 ("There is a trail out that way towards the new mine that people use for hunting.").

ConocoPhillips similarly fails to undercut other harms Dr. Ahtuangaruak cites. It argues she cannot pick berries in the month of April, Doc. 54 at 42, but ignores that the mine will irreparably scar the area affecting future berry seasons, including this summer's season, and that irreparable harm refers to harm occurring "before a decision on the merits can be rendered." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (quoting Charles Alan Wright et al., Federal Practice and Procedure § 2948.1 (2d ed. 1995)). ConocoPhillips also argues that another local resident does not think the site that Dr. Ahtuangaruak finds beautiful is particularly interesting, Doc. 54 at 42-44, but another resident's opinion does not negate the personal harm Dr. Ahtuangaruak will suffer.

More broadly, ConocoPhillips disputes that aesthetic or recreational harm related to a small area can justify injunctive relief. *Id.* Not so. ConocoPhillips' cited cases are

easily distinguished. Mining and roadbuilding impacts will be neither "minimal" nor "fleeting," *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 40 (D.D.C. 2013), but rather will ruin Dr. Ahtuangaruak's enjoyment of a traditional use area. Such harm is hardly "objectively minimal under the circumstances," *Earth Island Inst. v. Elliott*, 290 F. Supp. 3d 1102, 1124 (E.D. Cal. 2017). Nor is that harm minimized by the number of acres affected. Rather, as the Ninth Circuit has held, the inability to "view, experience, and utilize" an area in its "undisturbed state" constitutes irreparable harm, even when other similar areas remain available for use. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

In short, Dr. Ahtuangaruak's declaration presents evidence of the immediate harm that would occur from wintertime road and mine construction and associated blasting, and also harmful effects from the road and associated mine site over time. This evidence is grounded in Dr. Ahtuangaruak's firsthand experience with existing oil and gas developments and supported by BLM's own final SEIS. *See supra* p. 16. Thus, the cases cited by Interior and ConocoPhillips—arguing that mere "concerns and fears," unsupported by evidence, are insufficient to establish irreparable harm, Doc. 54 at 38; *see also* Doc. 48 at 41—are irrelevant.

ConocoPhillips questions how likely Plaintiffs' other members are to be in the area affected by the mine and road, focusing on the evidence from Dan Ritzman, Doc. 54 at 38 n.142. But he has provided evidence showing the activities scheduled for completion this year could harm his use and enjoyment of the affected area, including

where the mine will be, in the Ublutuoch (Tiŋmiaqsiuġvik) River corridor. Doc. 24 at 23-24; Doc. 24-24, ¶¶27 (discussing summer 2023 plans "to explore[] the . . . Ublutuoch River" and stating that "[d]evelopment in this area would greatly decrease my experience of the landscape and influence future travel plans"); Doc. 24-15 at 50 (showing the mine will be placed within the river setback). ConocoPhillips' belief that these harms are not likely to occur or that the areas are not important to Plaintiffs' members is unavailing.

Defendants have not successfully rebutted the very real, and in most cases permanent, harm in the near- and long-term to Plaintiffs' members from the activity about to proceed in the absence of an injunction.

THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A PRELIMINARY INJUNCTION HERE

The vast majority of harms raised by Defendants and Intervenors are temporary, and ConocoPhillips' alleged economic harms are severely overstated. None outweigh the irreparable harm that will occur to Plaintiffs' members if mining and its associated major disruption begins.

ConocoPhillips misleadingly asserts a preliminary injunction risks the viability of the entire Project. Doc. 54 at 9, 48-49 (citing Doc. 54-10). It argues it has held some of the leases underlying Willow for a long time, and they are at risk of termination because the Reserves Act contains a provision specifying lease expiration after 30 years of non-production. Doc. 54-10, ¶¶19 (citing 42 U.S.C. § 6506a(i)(5)), 22. However, this provision is followed immediately by another (remarkably, not referenced by

ConocoPhillips) specifying that no lease over lands "capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same due to circumstances beyond the control of the lessee." 42 U.S.C. § 6506a(i)(6). In such circumstances, BLM suspends operations and production on the relevant leases, which stops the running of the lease term, prevents it from expiring, and relieves the lessee of any obligation to pay rent or royalties. 43 C.F.R. § 3135.2.

Thus, even crediting ConocoPhillips' surprising assertion that it fears a few lost weeks of road construction could kill the Project, the argument is without merit. If this Court were to enjoin the Project temporarily because BLM failed to meet its obligations under NEPA, the delay would not be of ConocoPhillips' making, and it would not face termination of its leases as a result of any delay in conducting operations. This fatal flaw not only affects ConocoPhillips' core harm argument, but it also infects the public interest arguments made by ConocoPhillips and other parties because they overwhelmingly address the purported benefits of the completed Project and not from this winter's planned construction (the only subject of this preliminary injunction motion). *See infra* p. 24.

Moreover, ConocoPhillips's assertion that an injunction threatens the Project's viability is inconsistent with BLM's view of possible project timelines. If a preliminary injunction is issued and operations are delayed, but later the Court upholds the BLM decision, operations could resume within the timeframe BLM assumed was a reasonable start time for production. *See* Doc. 24-11 at 6 ("If the [Master Development Plan] is

approved, construction is currently assumed to start in either winter 2022/2023 or winter 2023/2024."). And at this point, ConocoPhillips admits it has not made a "final investment decision," Doc. 54-10, ¶¶19, 20; 25 (noting cited construction expenditures are "subject to the company's final investment decision"), making the argument that the Project hinges on a preliminary injunction decision even more untenable. For these reasons, none of ConocoPhillips' assertions about the threat a preliminary injunction poses to the Project as a whole outweighs the near term and permanent harm that will occur to Plaintiffs' members if these activities proceed. *See* Doc. 54-10, ¶¶19, 20, 23; *N. Alaska Env't Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986).

Accordingly, what remains is a balance between the *temporary* harm of a delay versus the temporary and *permanent* harm to Plaintiffs and the environment that would be wrought by mining and roadbuilding, which tips in Plaintiffs' favor. As is typical of environmental injury, the current situation pits permanent damage to the land, irreparable by money, against the temporary economic setback of an injunction. In the face of that tradeoff, concerns with the irreparable destruction should prevail. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable"); *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1101 (9th Cir. 2006) ("Although the public has an economic interest in the mine, there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that

may result from the mine's operation."); *Hodel*, 803 F.2d at 471 (irreparable environmental harm outweighed competing harm to miners despite potential for "real financial hardship"); *S. Fork Band*, 588 F.3d at 728 (holding that suspending a project until proper consideration of project impacts under NEPA has occurred was appropriate).

Intervenors point to Nuiqsut community members who describe potential personal benefits of construction jobs. *See* Doc. 58 at 8-9, 21, 23-25; Doc. 48 at 44; Doc. 54 at 47. Though real, these potential benefits would only be delayed by a preliminary injunction, not denied. Should Plaintiffs not prevail on the merits, the Project will proceed next winter, and the infrastructure and jobs will be made available then. *See League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) ("If the . . . project is approved after trial, then it and the consequent jobs will proceed."); *S. Fork Band*, 588 F.3d at 728 ("The resulting harm asserted . . . is cast principally in economic terms of employment loss, but that may for the most part be temporary.").

By the same token, Intervenors point to residents who believe road construction could benefit subsistence opportunities, Doc. 58 at 21; Doc. 54-6, ¶14; Doc. 58-2, ¶¶9-11; Doc. 54 at 45-47; Doc. 48 at 36, but any potential harm from delaying such opportunities by one year is inherently limited. In any case, while expansion of the road this year may provide better access to subsistence hunting, Intervenors have not shown that not having the road will result in harm to community members' current subsistence uses.

As to any potential economic harm to ConocoPhillips, the company was well aware of the litigation risks when it decided to proceed with immediately building ice

roads, stage for road and mine construction, and execute contracts that were contingent upon the lawful approval of the Project. Doc. 54 at 47; Doc. 54-9; Doc. 54-11, ¶6. The risk of financial hardship was created and should be borne by the corporation. *Hodel*, 803 F.2d at 471; *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) ("Self-inflicted wounds are not irreparable injury.") (alteration and citations omitted); *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1093 (9th Cir. 2014) (explaining companies that presume permitting outcomes assume the risk of doing so).

As for the Defendants' public interest arguments, the vast majority of revenues, royalty payments, state taxes, and interests cited by Defendants and Amici Curiae are from activities that would occur if the Project, as a whole, is built and begins producing oil. Doc. 48 at 36-37; Doc. 53 at 24-25; Doc. 54 at 8-9, 49-50; Doc. 55-1 at 5-6, 14; Doc. 59 at 8-9. However, the overall potential benefits of a completed Project are not at issue in this motion, which addresses only the short-term relief of maintaining the status quo by preventing immediate construction that will permanently alter the landscape before the Court can adjudicate whether BLM lawfully approved Willow. Purported benefits tied to the completed Project are not relevant to the question of whether this temporary injunction is in the public interest.

Further, ConocoPhillips' statement that "Local and Tribal governments agree" moving forward with Willow immediately is in the public interest, Doc. 54 at 9, does not account for the Tribal and City governments of Nuiqsut, the community most directly affected by Willow, who have expressed deep concerns about immediate and permanent

harm that could occur from the impacts of roads, road construction, and mining. *See* Doc. 24-23 at 111, 116-17; Doc. 24-15 at 50.

Finally, "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest." *S. Fork Band*, 588 F.3d at 728; 42 U.S.C. §§ 4321 *et seq.* Similarly, the Reserves Act, as amended, requires careful consideration and mitigation of impacts to surface resources before approving surface disturbing activity in the Reserve. 42 U.S.C. § 6506a(b); *SILA*, 555 F. Supp. 3d at 768-69. Thus, delay of construction until this Court determines whether its impacts have been adequately assessed comports with the public interest. Both the balance of equities and the public interest weigh in Plaintiffs' favor.

Respectfully submitted this 28th day of March, 2023.

s/ Erik Grafe

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)
Eric P. Jorgensen (Alaska Bar No. 8904010)
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*)
Ann Alexander (California Bar No. 321751) (*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 6,653 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. 68).

Respectfully submitted this 28th day of March, 2023.

s/ Erik Grafe
Erik Grafe