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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL CENTER, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants,

and

CONOCOPHILLIPS ALASKA, INC.,

Intervenor-Defendant.

Case No. 3:18-cv-00030-SLG

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF ABBREVIATIONS AND ACRONYMS

Abbreviation/Acronym	Explanation
APA	Administrative Procedure Act
BLM	Bureau of Land Management
CD-5	Colville Delta-5
DNA	Determination of NEPA Adequacy
EIS	Environmental Impact Statement
EA	Environmental Assessment
FONSI	Finding of No Significant Impact
GMT	Greater Mooses Tooth
IAP	Integrated Activity Plan
NEPA	National Environmental Policy Act
Northern Center	Northern Alaska Environmental Center
NPRPA	Naval Petroleum Reserves Production Act
NSO	No Surface Occupancy
Reserve/NPR-A	National Petroleum Reserve–Alaska
RMS	Regional Mitigation Strategy
ROD	Record of Decision
RMS	Regional Mitigation Strategy
USGS	U.S. Geological Survey

INTRODUCTION

The National Petroleum Reserve–Alaska (Reserve or NPR-A) is the largest and one of the wildest expanses of public lands in the United States. It stretches across the Western Arctic from the Chukchi and Beaufort Seas to the north and the foothills of the Brooks Range to the south. Mostly undeveloped, the Reserve provides rich habitat for grizzly and polar bears, wolves, hundreds of thousands of migratory birds and waterfowl, and multiple caribou herds. The wildlife it supports provide key subsistence resources for numerous communities in the Western Arctic and Alaska.

The Bureau of Land Management (BLM) adopted the first comprehensive management plan, called the Integrated Activity Plan (IAP), for the entire Reserve in 2013. The IAP set out broad guidance for how BLM would manage an oil and gas program while also meeting its statutory obligation to protect the wildlife and other surface values of the Reserve. In December of 2017, BLM conducted an oil and gas lease sale in the Reserve. Prior to the lease sale, numerous organizations, including the plaintiffs in this lawsuit (collectively, Northern Center), raised concerns with BLM's compliance with the National Environmental Policy Act (NEPA) for the lease sale. Specifically, Northern Center asked BLM to conduct a site-specific analysis of the potential environmental impacts of additional leasing in the Reserve, particularly in light of new information regarding new oil discoveries and development, and the related increased impacts. Northern Center also stated that, given all of the new discoveries and potential for increased impacts from development, BLM needed to take a hard look at the direct, indirect, and cumulative impacts of further leasing and development in the region.

Despite Northern Center's comments to BLM, the agency failed to prepare any sort of NEPA analysis to thoroughly analyze the significant and foreseeable site-specific and direct, indirect, and cumulative effects of oil and gas development that could result from the lease sale. Instead, BLM prepared only a Determination of NEPA Adequacy (DNA)[1] that concluded, without any analysis or any indication the agency ever evaluated the new information or potential impacts of further leasing, that there was no new information or changes that required

[1] A DNA is an administrative convenience created by BLM and cannot substitute for a required NEPA analysis. BUREAU OF LAND MGMT., NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK H-1790-1, at § 5.1.3 (2008) [hereinafter BLM NEPA HANDBOOK], *available at* https://www.ntc.blm.gov/krc/uploads/366/NEPAHandbook_H-1790_508.pdf (stating a DNA is "not itself a NEPA document"); *see also infra* notes 96–100 and accompanying text.

the agency to prepare any additional environmental analysis under NEPA. BLM then held the lease sale and issued leases that did not retain agency authority to prohibit future surface activities on the leases. After the filing of this lawsuit, after BLM had already accepted the bids, and after ConocoPhillips Alaska, Inc. (ConocoPhillips) had already signed the leases, BLM attempted to fix the problems with its NEPA analysis by issuing a revised DNA briefly addressing the new information Northern Center and others raised in their comments. But this document was also insufficient to satisfy BLM's legal duties under NEPA.[2]

By proceeding with the lease sale without first preparing a site-specific NEPA analysis and without taking a hard look at the potential direct, indirect, and cumulative impacts of the lease sale, particularly in light of new information and developments in the region, BLM violated NEPA. Additionally, BLM's attempt to fix its NEPA violations by issuing a revised DNA in response to this lawsuit, but after the lease sale, violates BLM's regulations under the Naval Petroleum Reserves Production Act (NPRPA). Accordingly, this Court should grant Northern Center's motion for summary judgment and vacate the leases and the underlying decision documents.

JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1361 (action to compel a mandatory duty), and 2201 (declaratory relief). The Administrative Procedure Act (APA) provides a right to judicial review of BLM's decision.[3]

PLAINTIFFS' INTERESTS

Plaintiffs have standing to bring this action because they and their members will suffer injuries in fact, those injuries are traceable to BLM's actions, and they would be redressed by a favorable decision of this Court setting aside the leases as an arbitrary and unlawful agency action.[4] Each plaintiff organization in this lawsuit has as its mission to protect public lands and

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[2] *See* BLM NEPA HANDBOOK, *supra* note 1, § 5.1.3 (stating a DNA is "not itself a NEPA document").

[3] *See* 5 U.S.C. §§ 702, 704.

[4] *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–84 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The zone of interests test for APA cases is also satisfied in this case because each statute BLM violated is intended to protect wildlife and habitat conservation interests and to ensure BLM fully considered its obligation to protect surface resources in the Reserve prior to making any decisions related to oil and gas activities. *See*

wildlife.[5] Members of the organizations visit, live in, or otherwise use and enjoy the Reserve, including areas offered for sale and areas ultimately leased in the 2017 lease sale.[6] These uses include recreation, wildlife viewing, hunting, subsistence use, scientific research, and guiding.[7] These members are injured by BLM's decision to allow leasing and failure to conduct an in-depth environmental review prior to offering the leases because BLM's decision allows for expanded oil and gas development and industrial activity in the region without full compliance with the law, which harms members' ability to continue to use and enjoy the Reserve's natural environment and wildlife.[8] A favorable decision from the Court would redress these injuries by ensuring that BLM fully assesses the potential impacts of oil and gas development prior to conducting any leasing.

Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1353–54 (9th Cir. 1994) (describing the zone of interests test for APA cases); *City of Las Vegas v. Fed. Aviation Admin.*, 570 F.3d 1109, 1114 (9th Cir. 2009) (noting that plaintiffs' interests in the environment fall within NEPA's zone of interests).

[5] *See* Decl. of Adam Michael Kolton in Supp. of Pls.' Mot. for Summ. J. ¶ 4 [hereinafter Kolton Decl.]; Decl. of Nicole Whittington-Evans in Supp. of Pls.' Mot. for Summ. J. ¶ 5 [hereinafter Whittington-Evans Decl.]; Decl. of Elisabeth Balster Dabney in Supp. of Pls.' Mot. for Summ. J. ¶ 8 [hereinafter Dabney Decl.]; Decl. of Mark Salvo in Supp. of Pls.' Mot. for Summ. J. ¶ 4 [hereinafter Salvo Decl.]; Decl. of Daniel Ritzman in Supp. of Pls.' Mot. for Summ. J. ¶¶ 6, 10 [hereinafter Ritzman Decl.] (all filed concurrently); *see also Friends of the Earth*, 528 U.S. at 181 (explaining that an organization can maintain a lawsuit on behalf of its members if its members would have standing, the interests at stake are germane to the organization's purposes, and individual member participation is not required).

[6] Kolton Decl. ¶ 11; Whittington-Evans Decl. ¶ 11; Dabney Decl. ¶ 19; Salvo Decl. ¶ 20; Ritzman Decl. ¶ 21; Decl. of Rosemary Ahtuangaruak in Supp. of Pls.' Mot. for Summ. J. ¶ 2 [hereinafter Ahtuangaruak Decl.]; Decl. of Jeffrey Scott Fair in Supp. of Pls.' Mot. for Summ. J. ¶ 7 [hereinafter Fair Decl.]; Decl. of Michael Wald in Supp. of Pls.' Mot. for Summ. J ¶¶ 4–6, 8 [hereinafter Wald Decl.].

[7] Kolton Decl. ¶ 12; Whittington-Evans Decl. ¶ 13; Dabney Decl. ¶ 19; Salvo Decl. ¶ 20; Ritzman Decl. ¶ 22; Ahtuangaruak Decl. ¶¶ 6–9, 12–13, 17; Fair Decl. ¶¶ 7–15; Wald Decl. ¶¶ 4–6, 9.

[8] Kolton Decl. ¶¶ 15–16; Whittington-Evans Decl. ¶ 20; Dabney Decl. ¶¶ 19–20; Salvo Decl. ¶ 21; Ritzman Decl. ¶¶ 22, 32–35; Ahtuangaruak Decl. ¶¶ 10–13, 16–26; Fair Decl. ¶¶ 20–27; Wald Decl. ¶¶ 11–18.

FACTUAL BACKGROUND

I. THE RESERVE CONTAINS EXCEPTIONAL WILDLIFE, FISH, AND OTHER CONSERVATION VALUES.

The Reserve is a public land unit with outstanding conservation and environmental values. At approximately 22.8 million acres — an area roughly the size of Indiana — it is the largest single public land unit in the country.[9] The Reserve provides rich habitat for caribou, grizzly and polar bears, wolves, and a range of migratory birds and waterfowl.[10] It is also home to the Western Arctic and Teshekpuk Lake Caribou Herds, which are a key subsistence resource to numerous communities in the Reserve and across northwest Alaska.[11]

The Reserve was first set aside in 1923 as a petroleum reserve for the U.S. Navy.[12] But in 1976, it was re-designated and Congress passed a new law, the Naval Petroleum Reserves Production Act (NPRPA). This new law recognized the exceptional ecological values in the Reserve.[13] The NPRPA mandated consideration and protection of these conservation values as well.[14] Under this law, Congress instructed the Secretary of the Interior to designate as Special Areas any areas containing "significant subsistence, recreational, fish and wildlife, or historical or scenic values."[15] The Secretary designated multiple Special Areas — including the Teshekpuk Lake and Colville River Special Areas — to ensure "maximum protection" of the environment, fish and wildlife, and historical or scenic values.[16]

The Teshekpuk Lake Special Area is one of the most productive wetland complexes in the Arctic and provides vital nesting habitat for hundreds of thousands of migratory birds.[17] The Teshekpuk Lake area, along with the neighboring Smith Bay marine habitat, supports the highest density of shorebirds in the circumpolar Arctic, including threatened spectacled eiders, Steller's eiders, yellow-billed loons, dunlins, and American golden-plovers.[18] Thousands of greater white-

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[9] *See* Administrative Record (AR) 4489.
[10] AR 256–319.
[11] AR 296, 301, 305.
[12] AR 371–72.
[13] AR 372.
[14] 42 U.S.C. §§ 6503(b), 6504(a), 6506a(b).
[15] 42 U.S.C. § 6504(a).
[16] AR 19–20, 3423.
[17] *See* AR 31, 35, 209, 273, 2019.
[18] *See* AR 273, 276–78, 332, 335, 340, 2019.

fronted geese, brant, Canada geese, and Snow geese molt in the Teshekpuk Lake area each summer.[19] This region is also the primary calving grounds for the Teshekpuk Lake Caribou Herd, an important subsistence resource for communities on the North Slope.[20] The Colville River Delta is the largest and most ecologically rich river delta in northern Alaska.[21] The cliffs along the Colville River provide critical nesting sites and adjacent hunting areas for peregrine falcons, gyrfalcons, golden eagles, and rough-legged hawks.[22] In short, the habitat, subsistence, and conservation values of the Reserve are remarkable.

II. NEPA REVIEW FOR BLM'S MANAGEMENT PLAN FOR THE RESERVE CONSIDERED IMPACTS AT A HIGH LEVEL AND DID NOT CONSIDER SITE-SPECIFIC IMPACTS.

BLM adopted the first-ever management plan covering the entire Reserve in 2013.[23] This plan, called the Integrated Activity Plan (IAP), established broad directives for how BLM would manage the resources and values in the Reserve.[24] As part of the process for adopting the IAP, BLM prepared an environmental impact statement (EIS) pursuant to NEPA to look at various management and land-allocation alternatives for the Reserve.[25] In issuing the Record of Decision (ROD) for the IAP, BLM adopted Alternative B-2. Although Alternative B-2 protected many of the wildlife, habitat, and subsistence values of the Reserve, it also made approximately 11.8-million acres of the Reserve available for oil and gas leasing and development.[26] Alternative B-2 also incorporated stipulations and best management practices applicable to oil and gas and other activities in the Reserve.[27]

In the EIS, BLM examined a hypothetical development scenario and hypothetical layouts for oil and gas facilities to evaluate potential impacts to surface resources at the programmatic

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[19] *See* AR 266–69.
[20] AR 31, 298, 3417.
[21] *See* AR 241.
[22] AR 31, 284.
[23] *See* AR 3412–3525 (Record of Decision for the Integrated Activity Plan). Prior plans had been adopted that covered sections but not the entire Reserve: the Northeast and Northwest planning areas. No plan had ever been adopted that covered the Southern planning area, which encompasses the Utukok Uplands region.
[24] *See* AR 1–2622 (Integrated Activity Plan / EIS).
[25] *Id.*
[26] AR 3431.
[27] AR 3458–3513.

level.[28] These hypothetical development designs included likely infrastructure — such as drill pads, airstrips, processing facilities, and pipelines — for various types of developments that might occur broadly in the Reserve.[29] BLM developed two categories of hypothetical development scenarios: one for areas with known petroleum resources and a second for areas with unknown oil and gas potential.[30] The majority of the 2017 lease sale was within areas with unknown oil and gas potential.[31]

The analysis of impacts for areas with known petroleum resources was focused on two existing oil and gas units near Nuiqust and the area around Umiat (along the southeast border of the Reserve). At the time that the IAP was adopted, the only planned development in the Reserve was on the extreme eastern boundary near Nuiqsut, tied to the Alpine development on state lands just outside the Reserve and within the Colville River Delta.[32]

For the potential development of unknown oil and gas resources, BLM relied on the U.S. Geological Survey's (USGS) estimate of potential oil and gas resources, which assigned approximate resource estimates for different economic zones in the Reserve.[33] Importantly, for these unknown oil and gas resource areas, BLM's hypothetical development scenario did not propose or consider specific areas where development of unknown resources might take place. BLM also did not evaluate the site-specific impacts of development occurring in specific areas.[34]

BLM also analyzed the potential impacts of the IAP on subsistence only at the programmatic level.[35] BLM concluded there would be no significant restrictions to subsistence uses in the Reserve from oil and gas activities.[36] According to BLM, any impacts would remain

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[28] AR 580–81.

[29] AR 559–66.

[30] AR 585–614.

[31] *See* AR 3582.

[32] *See* AR 586–87 (indicating Colville Delta-5, the first oil development within the boundaries of the Reserve, was planned, but not constructed, as of the time BLM drafted the IAP/EIS).

[33] AR 590–97.

[34] One commenter asked for BLM to provide a greater level of specificity in the various hypothetical development scenarios by including scenario maps. AR 1987. BLM declined, stating that "[m]aps depicting locations of undiscovered oil and gas accumulations, even for illustrative purposes, would be misleading." AR 2006.

[35] AR 3444–48; AR 2243–71.

[36] AR 3444; AR 2254. This finding was separate from its finding when taking into consideration the potential cumulative impacts from other past, present, and reasonably

localized and would not significantly affect subsistence species, access to subsistence species, or subsistence use.[37] BLM determined that the IAP contained adequate stipulations and best management practices to ensure that significant restrictions to subsistence uses and needs would not occur.[38]

III. A PROJECT DECISION TIERED TO THE IAP, GMT-1, FOUND THERE WOULD BE SIGNIFICANT IMPACTS TO SUBSISTENCE AND REQUIRED MITIGATION TO ADDRESS THOSE IMPACTS.

In 2015, BLM approved ConocoPhillips' permit for the Greater Mooses Tooth 1 (GMT-1) development.[39] The project included a drilling pad and road that would extend ConocoPhillips' oil and gas infrastructure at the Alpine development and Colville Delta-5 (CD-5) satellite further west into the Reserve.[40] In making the decision, BLM waived a protective provision in the IAP that would have kept oil and gas infrastructure out of an established buffer around Fish Creek, an important subsistence use area for the community of Nuiqsut.[41]

In its GMT-1 decision, BLM found that there would be significant impacts to subsistence users and other values from the project that could not be fully mitigated by the stipulations and best-management practices in the IAP.[42] To address these impacts, including major impacts to subsistence uses, BLM required additional compensatory mitigation funding of $8 million from ConocoPhillips.[43] These funds were to be used to support BLM's development of a regional mitigation strategy (RMS) for the northeastern region of the Reserve and to finance compensatory mitigation projects to address the major impacts to subsistence that could not be mitigated.[44]

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foreseeable future development in the region; taking into consideration those potential cumulative impacts, BLM found those impacts may significantly restrict subsistence. AR 3444.

[37] AR 2251.

[38] AR 3444; AR 2254.

[39] AR 11559–11668 (GMT-1 Record of Decision).

[40] AR 11566; AR 11621 (containing a map showing the general location of proposed and existing infrastructure at Alpine and in the northeast corner of the Reserve).

[41] AR 11567.

[42] AR 11586–87, 11589, 11599.

[43] AR 11598, 11619.

[44] AR 11599.

BLM drafted the RMS to serve as a roadmap for mitigating impacts from both GMT-1 and future oil and gas projects in the northeast Reserve.[45] The RMS would also consider the foreseeable future land uses, including oil and gas developments enabled by the existence of GMT-1, and the foreseeable impacts from those developments on the resources and values in the region.[46] The objectives of the RMS included maintaining functioning habitat to sustain abundant fish and wildlife populations, ensuring continued access to important subsistence use areas, and identifying potential mitigation measures or projects to address foreseeable impacts in the region.[47] The RMS could also be used to identify additional opportunities for avoidance or additional protections for areas with important values.[48] BLM anticipated designing the RMS so that any avoidance, minimization, and compensatory mitigation measures it identified could be incorporated into future decisions that could result in additional habitat loss or degradation.[49] BLM issued a draft RMS in 2016, but has yet to issue a final.[50]

IV. THERE HAVE BEEN OTHER SIGNIFICANT DEVELOPMENTS SINCE NEPA REVIEW OF BLM'S MANAGEMENT PLAN THAT WARRANT NEPA REVIEW.

Since the IAP was adopted in 2013, there have been a number of other discoveries and development activities that have the potential to significantly expand the cumulative impacts of development within and around the Reserve. Caelus Energy announced a substantial find of over one-billion barrels of oil in state waters immediately off the coast of the Reserve in Smith Bay in

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[45] *Id.*

[46] AR 11599–600.

[47] AR 11600.

[48] *Id.*

[49] AR 11600–01.

[50] *See* Bureau of Land Mgmt., NPR-A Regional Mitigation Strategy Website, https://www.blm.gov/programs/planning-and-nepa/plans-in-development/alaska/npr-a_rms (last visited May 31, 2018); BUREAU OF LAND MGMT., DRAFT REGIONAL MITIGATION STRATEGY (2016), *available at* https://www.blm.gov/sites/blm.gov/files/Planning_Alaska_DRAFT_NPR-A%20RMS_final.pdf. The court can take judicial notice of agency websites and agency documents. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015) ("We may take judicial notice of 'official information posted on a governmental website, the accuracy of which [is] undisputed.'" (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1101 n.6 (9th Cir. 2011))); *Dent v. Holder*, 627 F.3d 365, 371 (9th Cir. 2010) (stating that case law in the circuit "does not prevent us from taking judicial notice of the agency's own records"); *see e.g.*, *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1112 n.14 (9th Cir. 2010) (taking "judicial notice of [] public documents" authored by BLM).

2016.[51] In early 2017, ConocoPhillips announced a 300-million-barrel oil discovery at the Willow prospect in the northeastern part of the Reserve,[52] which could more than double the amount of infrastructure and industrial activity in the northeast part of the Reserve. Armstrong Energy, Inc. (Armstrong) announced a major onshore discovery at the Nanushuk-Pikka prospect in 2015, and upgraded its estimate for the discovery in 2017.[53] Hailed as one of the largest onshore oil discoveries on the North Slope in decades, Nanushuk lies on state lands immediately adjacent to the Reserve and the community of Nuiqsut.[54] The company is now in the permitting process for the Nanushuk project.[55]

In May of 2017, Secretary of the Interior Ryan Zinke signed Secretarial Order 3352. This order called for initiating a process to evaluate reopening the IAP to open additional areas in the Reserve to oil and gas leasing and development.[56] The Secretarial Order also directed BLM to evaluate how to maximize the number of tracts it offers during the 2017 lease sale in the Reserve.[57] Secretarial Order 3352 also called for development of a plan to update the existing USGS assessments of undiscovered and technically recoverable oil and natural gas resources on Alaska's North Slope, with a focus on federal lands in the Reserve.[58] USGS issued an updated assessment shortly after the lease sale that significantly increased the estimates of potential oil resources in and around the Reserve.[59]

V. BLM CONDUCTS ANNUAL LEASE SALES WITHOUT REQUIRED ADDITIONAL NEPA REVIEW.

Since the adoption of the IAP (BLM's programmatic document for the Reserve), BLM has conducted lease sales every year.[60] The results of the lease sales between 2013 and 2015

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[51] AR 11692.

[52] AR 11691; ConocoPhillips' Answer to First Am. Compl. ¶ 42, ECF No. 33.

[53] AR 11691.

[54] U.S. Army Corps of Eng'rs, Nanushuk Project EIS Website, http://www.nanushukeis.com (last visited May 31, 2018) [hereinafter Nanushuk Website] (showing the location of the Nanushuk project). The court can take judicial notice of information on an agency website. *See* cases cited *supra* note 50.

[55] *See* Nanushuk Website, *supra* note 54.

[56] AR 3536.

[57] *Id.*

[58] AR 3537.

[59] AR 11691–94.

[60] *See* AR 9851; AR 11558; AR 11677; AR 11684–90.

were relatively small.[61] At the 2016 lease sale, companies bid on tracts totaling over 600,000 acres.[62] The 2016 lease sale nearly doubled the existing leased acreage in the Reserve, which was roughly 895,000 acres.[63] The majority of the tracts were in an area extending south and west from ConocoPhillips' existing units and related oil developments in the northeast corner of the Reserve, and included a substantial number of acres within the boundaries of the Teshekpuk Lake and Colville River Special Areas.[64]

Prior to the 2017 lease sale, BLM solicited comments and nominations from industry and the public on which tracts to include in the lease sale or which areas to protect.[65] BLM asked for comments on all tracts within the Reserve, including those closed to oil and gas development under the IAP.[66] Several organizations, including Northern Center, submitted comments urging BLM not to conduct any further leasing until after the completion of a site-specific environmental analysis to ensure BLM fully understood the impacts of development in the region.[67] Northern Center asserted that BLM was required to analyze the significant and foreseeable effects of oil and gas development in the region and to take a hard look at all the direct, indirect, and cumulative impacts of leasing additional areas.[68] This included information about new discoveries and developments in the region.[69] Northern Center also asked BLM not to conduct any further leasing in the northeast area of the Reserve until the agency had issued a final RMS to ensure there were adequate protections and mitigation measures in place to protect important subsistence and ecological resources, and to ensure BLM fully understood the potential cumulative and other impacts of development.[70] During the comment period, companies interested in leasing also submitted comments on which tracts should be made available for lease.[71]

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[61] AR 9851 (22 tracts receiving bids at the 2013 lease sale); AR 11558 (7 tracts receiving bids at the 2014 lease sale); AR 11677 (6 tracts receiving bids at the 2015 lease sale).

[62] AR 11684.

[63] AR 4489.

[64] *Id.*

[65] AR 3579.

[66] *Id.*

[67] AR 4488–89, 4491.

[68] AR 4488–89.

[69] AR 4489.

[70] AR 4491.

[71] *See* Fed. Defs.' Notice of Lodging Am. Admin. R. at 9, ECF No. 28 (showing multiple

After the comment period, BLM issued a Detailed Statement of the Sale. In that document, the agency identified the specific tracts it would offer for lease.[72] BLM offered 900 tracts, covering approximately 10.3 million acres.[73] This was the largest number of tracts ever offered for an oil and gas lease sale in the Reserve. It included all the tracts that could be leased under the IAP.[74]

Before identifying which areas to offer for lease, BLM prepared a Determination of NEPA Adequacy (DNA). The DNA was not available for public comment.[75] The DNA tiered to the NEPA analyses for the IAP and a 2008 Special Area Management Plan for the Colville River Special Area.[76] When BLM issued the DNA, the agency had information available to it to evaluate all of the discoveries and new information raised by Northern Center. In the DNA, BLM summarily concluded that it did not need to do any additional NEPA analysis. BLM provided conclusory statements that the existing analysis was adequate and there was no new information that would change the analysis for the lease sale.[77] BLM also stated that the direct, indirect, and cumulative impacts from the 2017 lease sale would be similar and essentially unchanged from those considered in the IAP.[78]

BLM held the lease sale on December 6, 2017.[79] ConocoPhillips and its partner Anadarko bid on seven tracts totaling approximately 80,000 acres.[80] BLM accepted ConocoPhillips and Anadarko's bids on January 23rd,[81] and ConocoPhillips and Anadarko signed the leases on February 1st and 5th, respectively.[82] On February 22nd, after the filing of

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companies submitted proprietary lease-tract nominations to BLM that were withheld from the record).

[72] AR 9538–699.

[73] AR 9711.

[74] *See* AR 9537.

[75] Fed. Defs.' Answer to First Am. Compl. ¶ 49, ECF No. 34 (admitting the DNA was not available for public comment).

[76] AR 9513.

[77] AR 9514.

[78] AR 9515.

[79] AR 9711.

[80] *Id.*

[81] AR 11695.

[82] AR 9735–36; AR 9740–41; AR 9745–46; AR 9750–51; AR 9755–56; AR 9760–61; AR 9765–66.

this lawsuit, BLM issued a revised DNA for the lease sale.[83] The revised DNA offered a justification for why the information BLM had known about but not considered in the original DNA, such as the revised USGS assessment, recent oil and gas discoveries in and around the Reserve, the results of the 2016 lease sale, and the GMT-1 decision, would not have changed the decision to offer the lease sale and enter into the leases.[84] BLM signed the leases on February 22nd.[85]

STATUTORY BACKGROUND

I. NEPA REQUIRES ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF AGENCY ACTIONS TO ENSURE INFORMED DECISIONS WHEN THE AGENCY HAS THE ABILITY TO ADDRESS THOSE IMPACTS.

NEPA is "our basic national charter for protection of the environment."[86] NEPA's analysis and disclosure goals are two-fold: (1) to ensure informed agency decision making, and (2) to ensure public involvement.[87] NEPA requires that federal agencies prepare a detailed EIS for any major Federal action that may significantly affect the quality of the human environment.[88] By focusing the agency's attention on the environmental consequences of its proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[89] NEPA "is not designed to postpone analysis of an environmental consequence to the last possible moment;" it is "designed to require such analysis as soon as it can reasonably be done."[90]

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[83] AR 9723–31.

[84] AR 9723–9731.

[85] *See, e.g.*, AR 9732.

[86] 40 C.F.R. § 1500.1(a).

[87] *Robertson v. Methow Valley Citizens Council* (*Methow Valley*), 490 U.S. 332, 349 (1989); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1063 (9th Cir. 2002); *see also Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998) (stating that NEPA emphasizes "coherent and comprehensive up-front environmental analysis to ensure informed decision making to [ensure] that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct'" (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989))).

[88] 42 U.S.C. § 4332; 40 C.F.R. § 1508.18(b)(4).

[89] *Methow Valley*, 490 U.S. at 349.

[90] *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).

In order to determine whether a project's impacts may be significant enough to require an EIS, an agency may first prepare an environmental analysis (EA).[91] An EA "[s]hall include brief discussions of the need for the proposal . . . [and] of the environmental impacts of the proposed action and alternatives."[92] If the EA reveals that "the agency's action *may* have a significant effect upon the . . . environment, an EIS must be prepared."[93] Conversely, if the agency concludes in the EA that there will not be significant impacts, it issues a Finding of No Significant Impact (FONSI) and foregoes an EIS.[94] In such cases, the agency must adequately explain its decision by supplying a "convincing statement of reasons" in the FONSI why the action's effects are insignificant.[95]

BLM sometimes completes a Determination of NEPA Adequacy (DNA) to document its review of whether existing NEPA documents and reviews are sufficient to cover the proposed action.[96] DNAs are "an administrative convenience created by the BLM."[97] They are not a NEPA document itself.[98] BLM guidance states that a DNA may only be utilized when, among other conditions, "the direct, indirect, and cumulative effects that would result from implementation of the new proposed action [are] similar (both quantitatively and qualitatively) to those analyzed in the existing NEPA document."[99] A DNA cannot be used to address site-specific environmental effects not previously considered in a NEPA document.[100]

To comply with NEPA, an agency must take a "hard look" at the direct, indirect, and cumulative environmental impacts of a proposed action.[101] To satisfy the "hard look" standard, the EIS must provide a "scientific and analytic basis" for comparing the alternatives,[102] meaning

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[91] 40 C.F.R. §§ 1501.4, 1508.9; *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

[92] 40 C.F.R. § 1508.9.

[93] *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (internal quotation marks omitted), *overruled on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

[94] 40 C.F.R. §§ 1501.4, 1508.9.

[95] *Blue Mountains Biodiversity Project*, 161 F.3d at 1212.

[96] BLM NEPA HANDBOOK, *supra* note 1, § 5.1.3.

[97] *S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1255 (D. Utah 2006).

[98] *Id.*; BLM NEPA HANDBOOK, *supra* note 1, § 5.1.3.

[99] BLM NEPA HANDBOOK, *supra* note 1, § 5.1.2–.3.

[100] *See, e.g.*, *S. Utah Wilderness All.*, 166 IBLA 270 (Aug. 16, 2005).

[101] *Blue Mountains Biodiversity Project*, 161 F.3d at 1211; *see also* 40 C.F.R. §§ 1502.16, 1508.8, 1508.25(c).

[102] 40 C.F.R. § 1502.16.

the agency must provide "some quantified or detailed information."[103] "General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."[104]

There are generally two levels of NEPA-analysis that are completed with planning and management decisions: programmatic and site-specific. For programmatic review, an agency "develops alternative management scenarios responsive to public concerns, analyzes the costs, benefits and consequences of each alternative in an [EIS] and adopts an amendable [management] plan to guide management of multiple use resources."[105] The other scope of NEPA review is a site-specific review, "during which individual site specific projects, consistent with the [management] plan, are proposed and assessed."[106]

In the oil and gas context, projects and agency review typically follow a tiered process, with NEPA review beginning broad and becoming more site-specific at each later step. As part of the "earliest and broadest level of decision-making, [BLM] develops land use plans," such as the Integrated Activity Plan (IAP) for the Reserve.[107] Broad land use plans are not normally used to make site-specific implementation decisions.[108] BLM next holds lease sales and issues leases for the use of a specific area.[109] Third, the lessee may apply for a permit to drill to develop its lease.[110] The level of detail required by NEPA at each step varies, and depends on the nature and scope of the proposed action.[111]

NEPA requires that agencies evaluate the environmental consequences of a project at an early stage of the planning process.[112] While agencies can "defer detailed analysis until a

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[103] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998).

[104] *Id.* at 1380; *see* 40 C.F.R. § 1502.22(a); *Nat'l Parks Conservation Ass'n*, 241 F.3d at 722.

[105] *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 800 (9th Cir. 2003) (quoting *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 923 n.2 (9th Cir. 1999)).

[106] *Id.*

[107] *Pennaco Energy, Inc. v. U.S. Dep't of the Interior*, 377 F.3d 1147, 1151 (10th Cir. 2004).

[108] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 70 (2004).

[109] *New Mexico ex. rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 716 (10th Cir. 2009).

[110] *Id.*

[111] *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982).

[112] *Id.*

concrete development proposal crystallizes the dimensions of a project's probable environmental consequences,"[113] agencies are required to undertake site-specific analysis. As the Ninth Circuit explained, the key inquiry is not "*whether* the project's site-specific impact should be evaluated in detail, but *when* such detailed evaluation should occur."[114] Although a programmatic EIS is required to provide "sufficient detail to foster informed decision-making," an agency is not required to fully evaluate site-specific impacts "until a critical decision has been made to act on site development."[115] An agency reaches the threshold triggering site-specific review when it "proposes to make an irreversible and irretrievable commitment of the availability of resources to a project at a particular site."[116] Once this critical decision-point is reached, "any vague prior programmatic statements are no longer enough" to satisfy NEPA.[117] Relatedly, an agency cannot defer the analysis of foreseeable impacts by asserting that the consequences are unclear or that the agency will analyze the impacts at a later point in time when there is a development proposal if it is going to make an irretrievable commitment of resources.[118]

II. THE NAVAL PETROLEUM RESERVES PRODUCTION ACT AND REGULATIONS REQUIRE THE PROTECTION OF IMPORTANT VALUES IN THE RESERVE AND REVIEW OF IMPACTS PRIOR TO HOLDING A LEASE SALE.

The Naval Petroleum Reserves Production Act (NPRPA) governs BLM's overall management of the surface values and subsurface resources in the Reserve.[119] The NPRPA is, in many ways, a multi-use directive for BLM management. BLM has a broad obligation to protect the surface values of the Reserve.[120] Under the NPRPA, BLM administers a competitive oil and gas leasing program in the Reserve, but is also required to "include or provide for such

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[113] *Id.*

[114] *Id.* (emphasis added).

[115] *Friends of Yosemite Valley*, 348 F.3d at 800 (quoting *N. Alaska Envtl. Ctr. v. Lujan* (*NAEC*), 961 F.2d 886, 890–91 (9th Cir. 1992)); *see also Block*, 690 F.2d at 761 ("The standards normally applied to assess an EIS require further refinement when a largely programmatic EIS is reviewed.").

[116] *Block*, 690 F.2d at 761.

[117] *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006).

[118] *Kern*, 284 F.3d at 1072.

[119] 42 U.S.C. §§ 6501–6508.

[120] *See, e.g.*, 42 U.S.C. § 6504(a) (indicating oil and gas activities in and around Teshekpuk Lake and other areas designated by the Secretary as having significant subsistence, recreational, fish and wildlife, or historical or scenic value are required to be conducted in a manner that assures "maximum protection of such surface values").

conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources."[121]

The Reserve-specific regulations BLM adopted pursuant to the NPRPA detail the manner in which BLM is to conduct lease sales and protect the surface values in the Reserve.[122] The regulations indicate that BLM is required to take any actions deemed "necessary to mitigate or avoid unnecessary surface damage and to minimize ecological disturbance" in the Reserve.[123] These actions may include limiting, restricting, or prohibiting the use of and access to lands in the Reserve or actions to "protect fish and wildlife breeding, nesting, spawning, lambing of calving activity, major migrations of fish and wildlife, and other environmental, scenic, or historic values."[124]

For lease sales, BLM first issues a call for nominations and public comments on lease tracts to offer and areas that should receive special concern and analysis.[125] As part of this step, companies can identify those tracts or areas that they are potentially interested in bidding on. Prior to selecting which tracts the agency will offer in the lease sale, BLM is required to complete its environmental review under NEPA.[126] When identifying the specific tracts to offer, BLM must consider "available environmental information, multiple-use conflicts, resource potential, industry interest, information from appropriate Federal agencies," and other information.[127] BLM is also required to develop and make public mitigation measures, including lease stipulations and information for lessees, to address adverse impacts.[128] Any regular or special stipulations and conditions are included in the notice of sale and incorporated into the

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[121] 42 U.S.C. § 6506a(a)–(b).

[122] 43 U.S.C. § 6506a(o); 43 C.F.R. §§ 2361.0-1 to 2361.3; 43 C.F.R. §§ 3130.0-1 to 3132.5-2.

[123] 43 C.F.R. § 2361.1(a).

[124] *Id.* § 2361.1(e)(1).

[125] *Id.* § 3131.2(a).

[126] *Id.* § 3131.2(b) ("The State Director, after completion of the required environmental analysis (see 40 CFR 1500–1508), shall select tracts to be offered for sale."). The NPRPA contemplates that BLM would conduct both a programmatic and site-specific level environmental analysis prior to making leasing decisions. *See* 42 U.S.C. § 6506a(n)(1) (imposing a 60-day statute of limitations for any action "seeking judicial review of the adequacy of any program or site-specific environmental impact statement . . . concerning oil and gas leasing").

[127] 43 C.F.R. § 3131.2(b).

[128] *Id.* §§ 3131.2, 3131.3.

leases issued.[129] Once BLM completes the NEPA review and considers whether to impose additional protections, it then issues the detailed statement of the sale and holds the lease sale.[130] The detailed statement of sale includes a description of the tracts offered, the lease terms, and information on the conditions and special stipulations.[131] If BLM accepts a company's bid, the agency sends written notice of the final decision on the bid along with copies of the leases to the lessee.[132] The lessee and BLM then execute the leases.[133]

SUMMARY JUDGMENT AND ADMINISTRATIVE PROCEDURE ACT STANDARD OF REVIEW

Challenges to agency decisions brought in U.S. District Court are resolved through summary judgment motions.[134] Resolution of the claims requires review of the agency administrative record, which provides the facts against which to determine the legal questions and measure the reasonableness of the agency's action.[135] The role of the Court "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."[136]

Agency decisions are reviewed under the Administrative Procedure Act (APA). Under the APA, the Court sets aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law."[137] An agency's decision is arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

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[129] *Id.* § 3131.2–.3.
[130] *Id.* § 3131.4-1.
[131] *Id.* § 3131.4-1(c).
[132] *Id.* § 3132.5(e).
[133] *Id.* § 3132.5(e), (h).
[134] Fed. R. Civ. P. 56(c); *see* Local R. 16.3(c).
[135] *See City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) (stating that "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did" (citation omitted) (internal quotation marks omitted)).
[136] *Id.* (internal quotation marks omitted) (citation omitted).
[137] 5 U.S.C. § 706(2)(A), (D).

product of agency expertise.[138]

Although the court may not substitute its judgment for that of the agency, the court must ensure that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[139]

ARGUMENT

I. BLM VIOLATED NEPA BY FAILING TO CONDUCT A SITE-SPECIFIC ANALYSIS PRIOR TO HOLDING THE 2017 LEASE SALE.

BLM was obligated to conduct a site-specific NEPA analysis prior to holding the 2017 lease sale. NEPA requires that federal agencies evaluate the environmental consequences of their actions before making a decision "so that the action can be shaped to account for environmental values."[140] Here, BLM issued leases that did not reserve the agency's ability to prohibit future activities, *i.e.*, it made an irretrievable commitment of resources. Because BLM did not retain the authority to fully preclude surface disturbing activities on the leases, BLM was required to conduct a site-specific NEPA analysis prior to holding the lease sale and issuing the leases. BLM's failure to conduct this site-specific analysis prior to the lease sale violated NEPA. This section addresses each of these points in turn.

A. BLM Was Required to Conduct a Site-Specific Analysis Before It Issued Leases that Do Not Reserve the Authority to Fully Preclude Surface Activities.

The need to do a site-specific analysis at the lease sale stage is triggered by the type of lease the agency is offering. When an agency decides to issue a lease that expressly retains the right to preclude surface activities, it does not constitute an irretrievable commitment of resources and the agency is not required to do a site-specific NEPA analysis.[141] However, when an agency decides to issue a lease that does not contain an express provision reserving the agency the authority to preclude surface occupancy, it constitutes an irretrievable commitment of

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[138] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[139] *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[140] *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988).

[141] *Conner v. Burford*, 848 F.2d 1441, 1448 (9th Cir. 1988).

resources and a site-specific NEPA analysis is required.[142] BLM made an irretrievable commitment of resources by deciding to issue the leases without a provision reserving the authority to preclude all surface activities on those leases.

The Ninth Circuit in *Conner v. Burford* discussed in depth the point at which an agency makes an irretrievable commitment of resources in the oil and gas leasing context. In *Conner*, the court examined two types of oil and gas leases. Some of the leases contained "no surface occupancy" (NSO) stipulations, which allow BLM to prohibit lessees from occupying or using the surface of the leased land.[143] The second category of leases only "authorize[d] the government to impose reasonable conditions on drilling, construction, and other surface-disturbing activities," but did not "authorize the government to preclude such activities altogether."[144] The Ninth Circuit held that the NSO leases did not constitute an irretrievable commitment of resources requiring preparation of an EIS.[145] Conversely, the leases without the NSO provision did not reserve the right for the government to prevent all surface-disturbing activity, and instead "specifically limit[ed] government control over post-leasing activities to reasonable regulations which are consistent with oil and gas production."[146] The court reasoned that, "[b]y relinquishing the 'no action' alternative without the preparation of an EIS, the government subvert[ed] NEPA's goal of insuring that federal agencies infuse in project planning a thorough consideration of environmental values."[147] As such, the Ninth Circuit concluded that the sale of the leases without the NSO provision constituted the point of commitment because the

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[142] *Sierra Club v. Peterson*, 717 F.2d 1409, 1414–15 (D.C. Cir. 1983) ("[O]nce the land is leased, the Department no longer has the authority to *preclude* surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose 'mitigation' measures upon a lessee who pursues surface disturbing exploration and/or drilling activities. None of the stipulations expressly provides that the Department or the Forest Service can *prevent* a lessee from conducting surface disturbing activities. Thus, with respect to the smaller area with which we are here concerned, the decision to allow surface disturbing activities has been made at the *leasing stage* and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.").

[143] *Conner*, 848 F.2d at 1444.

[144] *Id.*

[145] *Id.* at 1448.

[146] *Id.* at 1449.

[147] *Id.* at 1451.

government was no longer able to prohibit activities and significant impacts on the environment.[148]

In reaching its conclusion, the court in *Conner* relied on the D.C. Circuit's decision in *Sierra Club v. Peterson*. In *Peterson*, the D.C. Circuit examined leases, some of which contained an NSO stipulation and some of which did not.[149] The agency did not do site-specific analysis for either category of lease. The agency argued that it was unable to evaluate the consequences of drilling and other surface disturbing activities at the leasing stage, before the submission of site-specific proposals.[150] The court responded that, if the agency "is in fact concerned that it cannot foresee and evaluate the environmental consequences of leasing without site-specific proposals, then it may delay preparation of an EIS provided that it reserves both the authority to *preclude* all activities pending submission of site-specific proposals and the authority to *prevent* proposed activities if the environmental consequences are unacceptable."[151] If the agency did not retain the authority to preclude surface disturbing activities, then the agency was required to prepare an EIS assessing the full environmental consequences at the point of commitment — i.e., at the lease sale stage.[152] Because the leases with the NSO provision preserved the agency's authority to preclude surface disturbing activities on those lands, the Court held that NEPA review was not triggered.[153] For those leases without the NSO provision, the decision to lease was the point when there was an irreversible and irretrievable commitment of resources requiring NEPA because the agency could no longer preclude surface activities.[154]

Here, BLM made an irretrievable commitment of resources because the leases did not contain an NSO or equivalent provision. Neither the lease template in the Detailed Statement of Sale nor the leases BLM ultimately issued to ConocoPhillips contain NSO provisions. Instead, both the template and the leases state that BLM is "granting the exclusive right to drill for, mine,

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[148] *Id.*; *see also Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1227 (9th Cir. 1988) (stating that the sale of non-NSO leases, which do not "reserve to the government the absolute right to prevent all surface-disturbing activity," cannot be sold without preparation of an EIS because they are an irretrievable commitment of resources (quoting *Conner*, 848 F.2d at 1449)).

[149] *Sierra Club v. Peterson*, 717 F.2d at 1411–12 (D.C. Cir. 1983).

[150] *Id.* at 1415.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 1412.

[154] *Id.* at 1412, 1414.

extract, remove and dispose of all the oil and gas . . . together with the right to build and maintain necessary improvements thereupon for the term indicated below, subject to renewal or extension . . . ."[155] While the leases are subject to regulations and orders adopted after issuance of the leases, those can only be imposed on the lessee to the extent the provisions are "not inconsistent with lease rights granted or specific provision[s]" of the lease.[156] Similarly, while the leases include language requiring the minimization of impacts,[157] the leases do not contain a provision expressly reserving the right for BLM to deny future development proposals. The lease stipulations and best management practices drawn from the IAP contain provisions that allow BLM to restrict infrastructure and other surface activities in designated areas in the Reserve,[158] but there is no stipulation or best management practice that retains the agency's authority to fully preclude surface disturbing activities. While BLM may have some authority to require mitigation or other adjustments to proposed activities, it may not fully preclude surface disturbing activities and no longer has "the full range of options for dealing with surface activities."[159] As such, the leases are equivalent to the non-NSO leases at issue in *Conner*. Because BLM did not retain the authority to fully preclude surface disturbing activities on the leases, BLM was required to conduct a site-specific NEPA analysis prior to holding the lease sale and issuing the leases.

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[155] AR 9697; AR 9732; AR 9737; AR 9742; AR 9747; AR 9752; AR 9757; AR 9762.

[156] AR 9697; AR 9732; AR 9737; AR 9742; AR 9747; AR 9752; AR 9757; AR 9762.

[157] AR 9698 ("Lessee shall conduct operations in a manner that minimizes adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users. Lessee shall take reasonable measures deemed necessary by lessor to accomplish the intent of this section. To the extent consistent with the lease rights granted, such measures may include, but are not limited to, modification to siting or design of facilities, timing of operations, and specification of interim and final reclamation measures. Lessor reserves the right to continue existing uses and to authorize future uses upon or in the leased lands, including the approval of easements or rights-of-way. Such uses shall be conditioned so as to prevent unnecessary or unreasonable interference with the rights of lessee."); AR 9733; AR 9738; AR 9743; AR 9748; AR 9753; AR 9758; AR 9763.

[158] AR 9609–64 (ex.C.).

[159] *See, e.g.*, *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140, 1153 (N.D. Cal. 2013) (stating that the sale of a non-NSO oil and gas lease was the point of commitment because, while the government may have had some ability to require mitigation or relocation of the activity, it "no longer ha[d] the absolute ability to prohibit potentially significant impact on the surface environment" and "no longer [held] the full range of options for dealing with surface activities after selling the non-NSO leases").

B. BLM Failed to Conduct a Site-Specific Analysis Prior to Conducting the 2017 Lease Sale.

Because BLM made an irretrievable commitment of resources when it decided to issue leases without an NSO or similar provision, it was obligated to conduct a site-specific analysis before it offered the leases. But prior to the lease sale, BLM did not conduct a site-specific EIS or even a site-specific EA. When an agency transitions from making a programmatic-level decision, like adopting the IAP, to an implementation decision that constitutes an irretrievable commitment of resources, like issuing the 2017 leases, the agency is required to prepare a thorough, site-specific environmental analysis.[160] BLM's failure to do so violates NEPA. Like the agencies in *Connor* and *Peterson*, BLM issued a programmatic management plan EIS (the IAP), but did not conduct a site-specific analysis prior to making an irretrievable commitment of resources. As *Connor* instructs, BLM needed to conduct a site-specific analysis prior to the lease sale.[161]

The 2013 IAP covered the entire, 22.8-million-acre Reserve. The IAP stated that it was sufficiently detailed only for purposes of the broad, programmatic decisions allowed in the management plan: "The impact analysis undertaken for the NPR-A plan and presented in the Final NPR-A IAP/EIS . . . is suitably specific for broad-scale management decisions made in this ROD."[162] BLM's analysis in the IAP of the potential development and impacts outside of the areas with known petroleum resources was for the entire Reserve.[163] It did not examine what those impacts would look like if development moved forward in specific areas.[164] Although that analysis may have been appropriate for the programmatic IAP, BLM could no longer rely on those vague statements when issuing leases in a specific area without an NSO provision. Once BLM moved forward with issuing non-NSO leases and tied its hands as to future development

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[160] *Block*, 690 F.2d at 761; *see also Pit River Tribe*, 469 F.3d at 784 (stating that, once an agency makes a critical decision to irretrievably commit resources, "any vague prior programmatic statements are no longer enough").

[161] 848 F.2d at 1444, 1451 (stating that, "unless surface-disturbing activities may be absolutely precluded, the government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases").

[162] AR 3434.

[163] *See supra* Factual Background Part II.

[164] AR 580–609.

decisions, it was obligated to do a site-specific analysis of the potential impacts prior to conducting additional leasing in the Reserve.

The IAP does not purport to be the site-specific evaluation required to make project-level decisions. BLM expressly acknowledged that "[g]reater site-specific analysis will occur when BLM receives an application to approve an action on the ground" and that such analysis would "be done through subsequent NEPA reviews and analysis, which will be conducted before BLM issues permits or approvals for any on-the-ground activity."[165] BLM even resisted calls for the IAP to be more site-specific and reiterated multiple times that the level of specificity was sufficient for purposes of the broad management decisions made in the IAP.[166]

These statements show that BLM recognized further site-specific analysis would be necessary at later stages. And while the agency may only be recognizing that later site-specific analysis is required for permitting decisions, under the law, if the agency is going to issue non-NSO leases that prevent the BLM from being able to prohibit activities on leases when projects are proposed, the agency needs to do that site-specific analysis at the lease-sale stage. If BLM believes that it does not have sufficient information to conduct that analysis until projects are proposed, it must retain the authority to say "no." Otherwise, the agency cannot meet its mandates for informed and public decision making under NEPA and protecting Reserve surface values under the NPRPA.

The Ninth Circuit's decision in *Northern Alaska Environmental Center v. Kempthorne* supports the conclusion that a site-specific analysis is required in this case. In *Kempthorne*, environmental groups challenged BLM's failure to conduct a site-specific NEPA analysis prior to conducting a lease sale in the northwest area of the Reserve.[167] Prior to conducting the first lease sale, BLM completed an EIS that looked at the possible impacts of drilling in the northwest area, but did not analyze the impacts of leasing specific parcels.[168] The groups argued BLM was

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[165] AR 3434.

[166] *See, e.g.*, AR 1881 ("The impact analysis provides suitable specificity of analysis for broad scale management decisions, such as determinations of what lands to make available for leasing. Site-specific analysis will occur when BLM receives an application to approve an action on the ground."); AR 1883 ("Site-specific analysis, including on the areas likely to be avoided and the total acreage that would be avoided, can more realistically be provided when BLM receives an application to approve an action on the ground."); AR 2006.

[167] 457 F.3d 969 (2006).

[168] *Id*. at 974.

required to conduct a parcel-by-parcel analysis of the environmental effects before the lease sale.[169] While the court held BLM was not required to conduct a parcel-by-parcel examination of the environmental effects, the court did not denounce the need to conduct site-specific review. The court simply stated that the level of site-specific review required at the lease sale stage is not so focused that the agency must look parcel-by-parcel and determined that the analysis in that case was sufficiently site-specific.[170] Importantly, the court assumed that, after issuing the leases, BLM still had the ability to prohibit or deny later applications for activities.[171] In other words, the court assumed that the leases were non-NSO leases.

Here, BLM did not asses the site-specific impacts at either the land-use planning stage or leasing stage. BLM also did not issue leases that retained the authority for BLM to later prohibit or deny later applications for activities outright, as the court assumed was the case for the leases in *Kempthorne*. The result is that BLM avoided the disclosure and analysis of potential impacts at the last point when the agency still had the full range of decision-making options available.[172] *Conner* and *Kempthorne* instruct that a site-specific analysis was required at this stage. Deferring all site-specific analysis to the drilling stage for non-NSO leases forecloses BLM's ability to prevent impacts altogether at that later point in time, regardless of the seriousness of those impacts or availability of mitigation.[173] It instead limits the authority of the agency to attempting to reduce harm, which may not always be possible. As discussed next, a site-specific analysis

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[169] *Id*. at 976.

[170] *Id.* at 977.

[171] *Id.* at 976.

[172] *See, e.g.*, *Conner*, 848 F.2d at 1444, 1451; *Block*, 690 F.2d at 761, 763 (stating that NEPA "requires that the evaluation of a project's environmental consequences take place at an early stage in the project's planning process" before the agency makes an irretrievable commitment of resources and explaining that the promise of a site-specific EIS in the future is meaningless if later analysis cannot consider wilderness preservation as an alternative to development).

[173] *See, e.g.*, *Peterson*, 717 F.2d at 1414 (explaining that, because the agency no longer had the authority to fully preclude surface disturbing activities under the leases, even if there were significant environmental impacts, the decision to allow surface disturbance was made at the leasing stage and therefore needed to be fully evaluated under NEPA at that point in time); *Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1153 ("[B]ecause BLM will no longer hold the full range of options for dealing with surface activities after selling the non-NSO leases, BLM was required to conduct a thorough NEPA analysis to determine whether the sale would have a substantial environmental impact.").

was even more crucial here, where significant developments occurred and new facts became known after completion of the IAP that indicated greater direct, indirect, and cumulative impacts than BLM originally anticipated in the IAP. In sum, while BLM may not have been obligated to engage in a site-specific level of analysis at the programmatic management plan stage via the IAP, it was required to do so once it decided to offer non-NSO leases in the 2017 lease sale.[174] The agency's failure to do so violates NEPA.[175]

II. BLM FAILED TO TAKE A HARD LOOK AT THE DIRECT, INDIRECT, AND CUMULATIVE IMPACTS AND NEW INFORMATION PRIOR TO THE 2017 LEASE SALE, IN VIOLATION OF NEPA AND THE NPRPA.

BLM also violated NEPA and the NPRPA by failing to take a hard look at the potential direct, indirect, and cumulative impacts of its decision prior to holding the 2017 lease sale. Northern Center raised numerous concerns about the need for the agency to assess the potential impacts of leasing in light of new developments and decisions that indicated the potential impacts of oil development were greater than originally anticipated.[176] By the time of the 2017 lease sale, massive new discoveries indicated oil resources extended further west and in greater quantities than previously assumed, and that the potential scale and impacts of development were greater than originally understood at the time of the IAP. Despite this, BLM provided only

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[174] *Friends of Yosemite Valley*, 348 F.3d at 800 (indicating that a programmatic plan must provide "sufficient detail to foster informed decision-making," but "site-specific impacts need not be fully evaluated until a critical decision has been made to act on site development" (quoting *NAEC*, 961 F.2d at 890–91)); *Pit River Tribe*, 469 F.3d at 784 (stating that once a critical decision is made to act on site development, "any vague prior programmatic statements are no longer enough"); *Block*, 690 F.2d at 761 (stating that "[w]hen a programmatic EIS has already been prepared, we have held that site-specific impacts need not be fully evaluated until a 'critical decision' has been made to act on site development" — meaning, the agency proposes to make an "irreversible and irretrievable commitment" of resources (quoting *Sierra Club v. Hathaway*, 579 F.2d 1162, 1168 (9th Cir. 1978))).

[175] *Conner*, 848 F.2d at 1451; *see also Peterson*, 717 F.2d at 1415 ("To comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed. If the Department retains the authority to preclude *all* surface disturbing activities pending submission of a lessee's site-specific proposal as well as the authority to refuse to approve proposed activities which it determines will have unacceptable environmental impacts, then the Department can defer its environmental evaluation until such site-specific proposals are submitted. If, however, it is unable to *preclude* activities which might have unacceptable environmental consequences, then the Department cannot issue leases sanctioning such activities without first preparing an EIS.").

[176] AR 4487–98.

conclusory statements in its original Determination of NEPA Adequacy (DNA) that there was no new information and that there was no change in the potential direct, indirect, and cumulative impacts beyond what was analyzed in the IAP. After the filing of this lawsuit and after BLM had already accepted the bids, BLM tried to address and dismiss the new information identified by Northern Center in a revised DNA. However, BLM was obligated under the NPRPA and its regulations to conduct its NEPA analysis prior to conducting the 2017 lease sale. BLM's failure to do so was contrary to both NEPA and the NPRPA. Even if the court ultimately examines the revised DNA, BLM's explanation for why the new information was not significant and did not require additional NEPA analysis was still arbitrary and capricious. BLM was required to assess the direct, indirect, and cumulative impacts, particularly in light of new information that indicated those potential impacts would be far greater than originally anticipated, in a NEPA analysis prior to holding the lease sale. BLM failed to take this hard look. This section addresses each of these points in turn.

A. The Relevant Document for Analyzing BLM's Decision Is the Original DNA.

Under the BLM's NPRPA regulations, the agency was obligated to comply with NEPA and conduct its NEPA analysis prior to holding the 2017 lease sale.[177] In an effort to satisfy this obligation, BLM issued a DNA prior to the lease sale.[178] That DNA had very little discussion, and consisted mainly of conclusory statements. After the lease sale was held, the bids accepted, the leases transmitted and signed by the lessees, and this lawsuit filed, BLM issued a revised DNA.[179] The revised DNA cannot be used to support BLM's challenged leasing-decision because the review did not occur at a point in time when it could meaningfully influence the lease sale and decision-making process, and was issued in violation of BLM's regulation.

BLM has Reserve-specific regulations that set out how the agency should conduct lease sales. Those regulations specifically require BLM to conduct its NEPA review prior to selecting tracts and holding the lease sale: "The State Director, after completion of the required environmental analysis (see [the NEPA regulations at] 40 CFR 1500–1508), shall select tracts to

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[177] 43 C.F.R. § 3131.2(b).

[178] AR 9513–16.

[179] AR 9723–31; AR 9732–66 (showing the leases were signed by ConocoPhillips February 1, 2018).

be offered for sale."[180] When selecting tracts to be offered for sale, "the State Director shall consider available environmental information, multiple-use conflicts, resource potential, industry interest, information from appropriate Federal agencies and other available information."[181] BLM is also required to develop measures to mitigate adverse impacts, including regular and special lease stipulations and information for lessees, and to make such measures public in the notice of sale, before the lease sale.[182] When adopting these regulations, BLM confirmed that its intent was for all NEPA review to occur prior to the selection of any tracts for a lease sale. The proposed regulation later codified at 43 C.F.R. § 3131.2 did not include an express cross-reference to the NEPA regulations.[183] As a result of a public comment on the regulation, BLM modified the proposed regulation "to make it clear that the tract selection process will include the environmental analysis process required by the National Environmental Policy Act and the regulations in 40 C.F.R. 1500-1508" and clarified that the leasing process in the Reserve is subject to NEPA.[184] The regulations reflect the fact that the NEPA analysis is intended to inform not only the specific question of what tracts to offer but also the broader question of what lease terms may be necessary to meet the agency's management obligations to protect special areas and special values in the Reserve.[185]

BLM created the revised DNA after it had already made the decision to issue the leases — further underscoring the fact that the agency did not take a hard look at the information at a point in time that could meaningfully influence the decision-making process. BLM accepted ConocoPhillips and Anadarko's bids and transmitted copies of the final leases for signature on

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[180] 43 C.F.R. § 3131.2(b).

[181] *Id.*

[182] *Id.*

[183] Oil and Gas Leasing – National Petroleum Reserve–Alaska; Proposed Rulemaking Authorizing Oil and Gas Leasing in the National Petroleum Reserve–Alaska, 46 Fed. Reg. 37724, 37725 (July 22, 1981) (stating in the proposed regulation at 43 C.F.R. 3131.2(b) that "[t]he State Director, in consultation with the Regional Conservation Manager, shall select tracts to be offered for sale. In making the selection, the State Director shall consider available environmental information, multiple-use conflicts, resource potential, industry interest, information from appropriate Federal agencies and other available information").

[184] Procedures for Leasing of Oil and Gas in the National Petroleum Reserve; Alaska, 46 Fed. Reg. 55494, 55495 (Nov. 9, 1981).

[185] 42 U.S.C. §§ 6504(a), 6506a(a)–(b); *see also* 43 C.F.R. § 2361.1(a), (e)(1).

January 23rd, almost a full month before creating the revised DNA.[186] That was the point in time when BLM made a final decision on the bids and committed the agency.[187] BLM's only responsibility past that point was to execute the leases within 15 days of receiving the signed leases and any necessary payments.[188] At the point in time when it created the revised DNA, BLM no longer retained the discretion to deny the leases outright or condition their issuance. An explanation that post-dates the lease sale and bid acceptance, which can no longer inform how the agency conducts the lease sale or what stipulations or mitigation measures may be necessary, cannot ensure that the agency looked at all available information prior to moving forward with the lease sale. One of the key requirements of NEPA is for agencies to conduct their review to ensure that the review can make an "important contribution to the decisionmaking process" and will not be used to justify a decision that has already been made.[189] The revised DNA cannot justify the legal flaws in the lease sale after the lease sale already took place.

BLM's attempt to fix the deficiencies in its DNA to justify the agency's decision not to do any NEPA review after the lease sale and after any such analysis could meaningfully influence the decision-making process is contrary to its own regulations. Agencies are required to comply with their own regulations.[190] BLM failed to do so here. Because BLM violated its

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[186] AR 11695–773; AR 9723–31. ConocoPhillips signed the leases on February 1 and Anadarko signed them on February 5. *See, e.g.*, AR 9735–36.

[187] 43 C.F.R. 3132.5(e) ("Written notice of the final decision on the bids shall be transmitted to those bidders whose deposits have been held in accordance with instructions set forth in the notice of sale. If a bid is accepted, 2 copies of the lease shall be transmitted with the notice of acceptance to the successful bidder. The bidder shall, not later than the 15th day after receipt of the lease, sign both copies of the lease and return them, together with the first year's rental and the balance of the bonus bid, unless deferred, and shall file a bond, if required to do so. Deposits shall be refunded on rejected bids.").

[188] 43 C.F.R. 3132.5(h) ("When the executed lease is returned to the authorized officer, he/she shall within 15 days of receipt of the material required by paragraph (e) of this section, execute the lease on behalf of the United States.").

[189] 40 C.F.R. § 1502.5.

[190] *See, e.g.*, *Confederated Tribes & Bands of Yakima Indian Nation v. Fed. Energy Regulatory Comm'n*, 746 F.2d 466, 474 (9th Cir. 1984) ("It is a well-known maxim that agencies must comply with their own regulations."); *Memorial, Inc. v. Harris*, 655 F.2d 905, 910 n.14 (9th Cir. 1980); *see also Black v. Interstate Commerce Comm'n*, 737 F.2d 643, 652 n.3 (7th Cir. 1984) ("When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. . . . For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules."); *Panhandle E. Pipe Line Co. v. Fed. Energy Regulatory Comm'n*, 613 F.2d

regulation and because the revised DNA is an after-the-fact attempt to justify a decision that was already made, it was not done at a point that could meaningfully inform the agency's decision and it should not be relied on. In evaluating whether BLM met its NEPA obligations for the lease sale, this Court should look to the original DNA only.

B. In the Original DNA, BLM Failed to Take a Hard Look at the Potential Direct, Indirect, and Cumulative Impacts and New Information.

BLM failed to take a hard look at relevant information related to the potential direct, indirect, and cumulative impacts of the lease sale and other developments in the region. Several groups, including Northern Center, identified serious concerns for BLM about the need for the agency to assess the direct, indirect, and cumulative impacts of the lease sale in light of recent developments in the region.[191] NEPA requires an agency not only take a hard look at the environmental consequences prior to making a decision, but that it also "inform the public that it has indeed considered environmental concerns in its decisionmaking process."[192] When an agency decides not to prepare an EIS, it must put forth a "convincing statement of reasons" to explain its decision and demonstrate its decision was based on a reasoned consideration of the relevant factors.[193] Agencies cannot avoid meeting their NEPA obligations "by making conclusory assertions that an activity will have only an insignificant impact on the environment."[194] BLM's cursory statements in the original DNA are insufficient to demonstrate that that the agency took a hard look at any of the new information prior to conducting the lease sale.

1120, 1135 (D.C. Cir. 1979) (stating that the agency should not "have authority to play fast and loose with its own regulations" and "[i]t has become axiomatic that an agency is bound by its own regulations").

[191] AR 4489.

[192] *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[193] *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (quoting *Blue Mountains Biodiversity Project*, 161 F.3d at 1212); *see also Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 846 (9th Cir. 2003) (stating that the court can uphold a decision of "less than ideal clarity if the agency's path may be reasonably discerned," but cannot "supply a reasoned basis for the agency's action that the agency itself has not given" or "attempt to make up for deficiencies in the agency's decision" (quoting *Cioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1525 (9th Cir. 1995))).

[194] *Ocean Advocates*, 402 F.3d at 864; *see also Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004).

In its comments, Northern Center pointed to a number of significant developments and discoveries both in and around the Reserve that the agency needed to consider, including the Willow and Smith Bay discoveries, the nearby Nanushuk development, USGS's then-pending reassessment of the recoverable oil and gas resources, the results of the 2016 lease sale, the GMT-1 decision, and the fact that BLM was in the process of developing an RMS for the northeast corner of the Reserve to address the significant impacts to subsistence from development in the region.[195] None of these significant developments were known or analyzed at the time of the IAP.[196] Northern Center also raised substantial questions about the potential for additional leasing to have a significant effect on the environment that should be analyzed in a NEPA analysis.[197] Despite all these concerns, BLM did not conduct *any* additional NEPA analysis prior to the 2017 lease sale. Instead, it issued a DNA.

In its DNA, BLM provides only the conclusory statement that there "is no new information or circumstances that would substantially change the analysis for the proposed lease sale."[198] BLM also stated that the "direct, indirect, and cumulative impacts of this proposed action are similar and essentially unchanged from those identified in the multiple sale analysis in the NPR-A IAP/EIS" and that BLM's monitoring of activities since the completion of the IAP "indicate[s] that impacts are consistent with those that were anticipated and analyzed."[199] At no point did BLM discuss any of the concerns raised by Northern Center related to the new information or the need for BLM to evaluate the direct, indirect, and cumulative effects of the lease sale in light of recent developments in the region. The conclusory statements in the DNA are insufficient to show that BLM considered any of the significant information raised by Northern Center. These are precisely the type of conclusory statements courts have rejected as insufficient to show the agency has taken a hard look for purposes of NEPA.[200]

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[195] AR 4489.

[196] *See* discussion *infra* Argument Part II.C.

[197] AR 4489; *see Ctr. for Biological Diversity*, 937 F. Supp. 2d at 1154 ("[T]o prevail on a claim that the agency violated its statutory duty to prepare an EIS, a plaintiff need not show that significant effects will in fact occur. It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment.").

[198] AR 9514.

[199] AR 9515.

[200] *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 995 ("This conclusory presentation does not offer any more than the kind of 'general statements about possible effects

BLM's decision that no additional NEPA review was required was contrary to the evidence before the agency. As discussed next, the new information was significant and was neither known nor considered as part of the analysis in the IAP. Because the IAP did not address the concerns specific to this new and significant information, BLM could not rely on broad statements in a DNA that prior NEPA was sufficient.[201] The agency was required to conduct further environmental analysis.[202] BLM's reliance on a DNA and its conclusory statements in that DNA were insufficient to meet BLM's NEPA duties.

C. BLM Was Required to Consider the Potential for Increased Direct, Indirect, and Cumulative Impacts and New Information Related to Those Potential Impacts in a NEPA analysis.

Northern Center and others raised substantial questions related to the environmental significance of a wide array of new information and the potential for there to be significantly greater direct, indirect, and cumulative impacts compared to what was considered at the time of the IAP. Specifically, Northern Center flagged the following new information and changing circumstances as requiring additional NEPA review: 1) the fact that USGS was in the process of revising its resource estimates; 2) information about other major discoveries in the region, including the Willow, Nanushuk, and Smith Bay discoveries; 3) the results of the 2016 lease sale; 4) the GMT-1 decision, which required additional mitigation for significant adverse impacts to subsistence; and 5) the fact that BLM was in the process of completing a Regional Mitigation Strategy for the northeast region. Despite all of this new information, BLM concluded that no additional NEPA review was required and issued a Determination of NEPA Adequacy (DNA).[203] This does not satisfy BLM's NEPA duties.[204] There were substantial questions about the potential impacts to be far greater than originally anticipated, and BLM could not simply

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and some risk' which we have held to be insufficient to constitute a 'hard look.'" (quoting *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1128 (9th Cir. 2004)); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 558–59 (9th Cir. 2000) (holding that the agency violated NEPA because there was nothing in the record indicating the agency evaluated in a timely manner the need to supplement its original EIS).

[201] AR 9514–15.

[202] *See, e.g.*, BLM NEPA HANDBOOK, *supra* note 1, § 5.1.2.

[203] AR 9513–16.

[204] *See generally* BLM NEPA HANDBOOK, *supra* note 1, § 5.1.3 (stating a DNA is "not itself a NEPA document").

dismiss this information in a non-NEPA document such as a DNA.[205] All of this information should have been considered in a NEPA analysis prior to the lease sale.

As discussed above, BLM attempted to fix its NEPA violations by inserting a revised DNA into the record after it conducted the 2017 lease sale and after it had already made the decision to issue the leases.[206] Because this was contrary to the process set out in BLM's regulations under the NPRPA,[207] this court should look to the original DNA to evaluate BLM's NEPA compliance. However, even if the court examines the revised DNA, BLM's explanation in that document for why the information was not significant and did not require further environmental review under NEPA was still arbitrary and capricious. This section addresses why each of these pieces of information was significant and discusses why BLM's conclusions in the revised DNA were arbitrary and contrary to the evidence before the agency.

1. New Information Related to New Discoveries in the Reserve and the Revision of the USGS Report Was Significant.

BLM ignored new information about the overall scale of potential development in the region based on new discoveries. A number of discoveries in and around the Reserve between 2015 and 2017 showed that oil resources were greater than previously assumed at the time of the IAP.[208] These significant discoveries indicated the scale of development in the region and the resulting direct, indirect, and cumulative impacts were likely to be far greater than previously contemplated.

At the time of the lease sale, USGS was in the process of revising its estimates of the potential oil and gas resources in and around the Reserve to account for all of these new discoveries.[209] The new USGS report ultimately increased the undiscovered oil estimates for areas in and near the Reserve nearly six-fold, from approximately 1.5 billion barrels in 2010 (which was considered in the IAP) up to 8.7 billion barrels of technically recoverable

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[205] *See, e.g.*, *id.* (indicating that, if the direct, indirect, and cumulative effects that would result from implementation of the new proposed action are not similar both quantitatively and qualitatively to those analyzed in the existing NEPA document, the agency must prepare an EA or EIS).

[206] *See supra* Argument Part II.A.

[207] *See supra* Argument Part II.A.

[208] *See* AR 9769–72.

[209] *See* AR 11691–94.

resources.[210] This information is significant and should have been considered as part of a NEPA analysis.

BLM acknowledges that USGS substantially revised upward its estimate of the mean quantity of undiscovered, technically recoverable oil resources in and near the Reserve.[211] The revised DNA states that USGS drastically increased these estimates in large part because of the number of "recent, larger than anticipated oil discoveries in these formations."[212] BLM attempts to dismiss the significance of this information by stating that the analysis and hypothetical development scenario in the IAP was based on the estimated amount of economically recoverable undiscovered oil and gas resources, and not the amount of technically recoverable undiscovered oil and gas resources.[213] BLM now states that looking at the technically recoverable reserves in the updated assessment and comparing it to the economically recoverable reserves in the IAP is like comparing "apples to oranges."[214] This explanation should be rejected because it conflicts with BLM's previous acknowledgment of the significance of the estimates for both the technically and economically recoverable oil estimates in the Reserve.

As part of its analysis of the potential development scenario in the programmatic EIS for the Integrated Activity Plan (IAP), BLM looked at the fact that, in 2010, USGS significantly decreased its estimates of technically recoverable oil to less than ten percent of its previous estimate.[215] In doing so, BLM identified the clear link between the estimates of technically and economically recoverable oil: "The USGS's reduction in its estimate of technically recoverable oil resulted in the agency also reducing its projections of the scale of economically viable oil developments."[216] BLM also recognized the significance of the technically recoverable oil estimates to its overall assessment of the potential oil and gas impacts in the Reserve and stated

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[210] AR 9725.

[211] *Id.*

[212] *Id.* ("The new USGS report estimates 8.7 billion barrels of mean undiscovered, technically recoverable oil . . . . This undiscovered oil estimate is substantially higher than a cited 1.5-billion-barrel estimate for the study area that USGS discerned from its 2005 and 2010 assessments (i.e., an almost six-fold increase for these formations), owing primarily to recent, larger than anticipated oil discoveries in these formations.").

[213] AR 9725–26.

[214] AR 9726.

[215] AR 7, 557, 3437.

[216] AR 557.

that, "[i]f at some future time . . . new exploration in the NPR-A or new technologies suggest that more oil could be recovered from the Reserve, it could be appropriate to reconsider the balance between oil and gas leasing and surface resource protection in this ROD."[217] Given its previous statements clearly linking the two, BLM cannot now ignore the fact that a substantial revision to the technically recoverable resources is also likely to result in a substantial revision to the economically recoverable resources in the Reserve. Likewise, the agency cannot hide behind a statement that it is like comparing "apples to oranges." BLM must conduct the analysis and engage apples to apples to inform its decision-making. This is particularly true when the Willow discovery alone — at an estimated 300 million barrels — amounts to roughly two-thirds of the total amount of economically recoverable oil BLM estimated industry would develop on federal lands across the entire Reserve in the IAP.[218] The revised estimates indicate that there is a significant increase in the amount of potential oil development that is likely to occur in and around the Reserve. This will in turn result in significantly greater direct, indirect, and cumulative impacts. This is significant information that was not known or considered in the IAP. BLM should have assessed this information as part of a NEPA analysis for the 2017 lease sale. Its conclusion to the contrary is arbitrary and capricious and should be rejected.

2. New Information About the Willow Discovery Was Significant.

Northern Center also raised substantial questions related to the potential direct, indirect, and cumulative impacts of additional development and leasing activities in light of the Willow Discovery. At 300-million barrels, the Willow prospect will be an expansive new development in the Reserve. This development was not considered in the IAP and is located in an area that the IAP did not even identify as having a potential oil reservoir.[219] The Willow discovery also shows

[217] AR 3437.

[218] *See* discussion *infra* Argument Part II.C.2; AR 594 (estimating in the IAP the total amount of economically recoverable oil on federal lands for the entire Reserve was 491 million barrels); *see also* AR 9771 (estimating in the 2010 USGS assessment that there were 896 million barrels of undiscovered, technically recoverable oil resources in the Reserve).

[219] *See* AR 9727 (indicating Willow would involve a new central processing facility and satellite drill pads); AR 1394 (stating that the Alpine Development, which consists of a central processing facility and six satellite pads, was originally estimated to contain 365 million barrels of oil); AR 586 (failing to show in Figure 4-11 any oil accumulations in the vicinity of the Willow prospect, which is located roughly another 10 miles west of the Spark-Rendezvous prospect and the potential GMT-2 project, which is only around 17 miles southwest of Alpine).

that large oil resources potentially extend further west into the Reserve than originally assumed at the time of the IAP.[220]

In the IAP, BLM's analysis of the potential impacts and hypothetical development scenario was based on the assumption that industry would develop the following prospects in the northeast corner of the Reserve: the Lookout and Spark-Rendezvous oil prospects via the GMT-1 and GMT-2 pads, approximately 10–20 miles southwest of ConocoPhillips' planned development at CD-5 and the existing Alpine Development area; a condensate discovery at Pioneer, east of GMT-2; and two other gas accumulations at Scout and Hunter.[221] BLM also assumed there would be no new central processing facility in those units.[222] BLM assumed that the total amount of oil that industry would develop from the Greater Mooses Tooth and Bear Tooth units was up to 120 million barrels of oil, and assumed that the total amount of economically recoverable oil on federal lands for the entire Reserve was 491 million barrels.[223] This was in part based on USGS's 2010 estimate of the resources in the Reserve, which was significantly lower than prior estimates. USGS lowered this number in large part because USGS assumed (based on exploratory well drilling) there was limited oil development potential in the area extending further out from GMT-1 and GMT-2 (approximately 15–20 miles away from Alpine).[224]

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[220] *See* AR 591 (indicating there was an "abrupt transition from oil to gas just 15–20 miles west of the Alpine field and poor reservoir quality in key formations"); AR 11691 (indicating more recent discoveries at Willow, Pikka-Horseshoe, and Smith Bay indicated the potential for large oil accumulations was greater than previously thought).

[221] AR 586–88 (indicating the Lookout prospect would be developed as GMT-1 and the Spark-Rendezvous accumulation would be developed from the GMT-2 pad); *see also* AR 586 (containing a map showing the approximate location of the potential prospects). The IAP also assumed no gas production would occur for at least 20 years and would only occur if there was a gas pipeline. AR 582.

[222] AR 588 (showing in Table 4-7 that BLM only accounted for additional production pads and related infrastructure, but not for an additional central production facility).

[223] AR 585, 594; *see also* AR 586 (containing a map showing the approximate location of the potential prospects).

[224] AR 591 (indicating there was an "abrupt transition from oil to gas just 15–20 miles west of the Alpine field and poor reservoir quality in key formations"); *see also* AR 11691 (explaining how numerous exploration wells had previously identified only small oil pools of less than 10 million barrels in key formations in and around the Reserve, but that the oil discoveries announced during 2015–2017 at Willow, Pikka-Horseshoe, and Smith Bay indicated the potential for large oil accumulations was greater than previously thought).

USGS's 2010 assessment did not account for there being a significant oil discovery at Willow, roughly 28 miles away from Alpine.[225] The discovery of a large oil prospect at Willow called into question USGS's previous assumptions about the potential for development further west in the Reserve, and led in part to the massive increase in its estimate of the potential oil resources.[226]

The Willow prospect alone is now estimated to be at least 300 million barrels of oil[227] — almost two-thirds the total amount of oil the BLM previously assumed would be economically recoverable from the entire Reserve.[228] ConocoPhillips plans to bring Willow into production by approximately 2023 and will potentially try to connect that infrastructure back to other developments like GMT-2 and Alpine.[229]

BLM's dismissal of new information about the Willow prospect is contrary to what the agency considered in the IAP. In the revised DNA, BLM now claims that the IAP fully accounted for Willow as part of its analysis of the Greater Mooses Tooth Unit.[230] This is not accurate. Neither the Willow project nor anything remotely resembling the size and scale of the Willow project was considered in the IAP. The IAP did not account for an additional central processing facility or additional oil infrastructure on this scale or at these locations.[231] In its summary of potential development in the Greater Mooses Tooth and Bear Tooth units, the IAP indicates there would not be an additional central processing facility.[232] The IAP lists that there would be five satellite production pads in those units, but none of the five production pads the agency discusses (GMT-1, GMT-2, and three possible condensate/gas pads) include anything

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[225] *See* AR 11691 (showing the approximate location of Willow in Figure 1); *see also* BUREAU OF LAND MGMT., ENVIRONMENTAL ASSESSMENT: DOI-BLM-AK-R000-2018-0001EA, at 9 fig.1 (2017), *available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/91574/126583/154229/Final_ConocoEA_2017_to_2018.pdf (showing the approximate location of the Willow discovery in the vicinity of the Tinmiaq and West Willow wells). The court can take judicial notice of agency documents. *See* cases cited *supra* note 50.

[226] *See* AR 11691 (discussing the shift in USGS's understanding of the potential for large oil and gas resources in and around the Reserve).

[227] AR 9727.

[228] AR 585.

[229] *See* AR 4489.

[230] AR 9727.

[231] *See, e.g.*, AR 588 (Table 4-7).

[232] *Id.* (Table 4-7) (listing "0 acres" would be impacted from construction of a central production facility).

similar to the Willow project.[233] Unlike those projects, the Willow project is a significant *oil* discovery, is located further west of the oil resources known at the time of the IAP, and in itself will require a central processing facility and multiple satellite drill pads — none of which were accounted for in the IAP. The potential direct, indirect, and cumulative impacts from an oil project of this scale and in this location were not considered in the IAP.[234] BLM's conclusion that this development was already accounted for in the IAP was "contrary to the evidence" before the agency.[235]

The Willow project has the potential to significantly magnify the direct, indirect, and cumulative impacts to subsistence and other resources in the region. The Willow project and its impacts should have been fully considered in a NEPA analysis prior to BLM conducting further leasing in the region. BLM's conclusion to the contrary is arbitrary and capricious and should be rejected.

3. New Information About Other Developments in the Region Was Significant.

Northern Center also raised substantial questions related to the potential impacts of other discoveries that could significantly increase the cumulative impacts to subsistence and other resources in the Reserve. These included both the Pikka and Horseshoe discoveries, as well as the Smith Bay discovery.[236] Armstrong Energy's Pikka and Horseshoe discoveries to the east of the Reserve on state land were announced in 2015 and 2017.[237] Combined, they are one of the largest onshore oil and gas discoveries in decades and hold a total of more than 1 billion barrels

[233] *See id.* (Table 4-7); *see also* AR 586–87 (discussing the five potential developments in the Mooses Tooth and Bear Tooth Units); AR 586 (containing a map showing the approximate location of the potential prospects).

[234] *See generally* BLM NEPA HANDBOOK, *supra* note 1, § 5.1.2 (indicating the agency must prepare a new EA or EIS if the direct, indirect, and cumulative effects that would result from implementation of the new proposed action are not similar both quantitatively and qualitatively to those analyzed in the existing NEPA document).

[235] *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).

[236] AR 11691 (containing a map in Figure 1 showing the general locations of these discoveries).

[237] AR 11691.

of oil.[238] Both Armstrong and its successors are already in the process of permitting infrastructure related to this massive new development.[239]

In the revised DNA, BLM attempts to dismiss the significance of this information by stating that the project is not likely to result in the extension of any development into the Reserve.[240] BLM cannot avoid analyzing the potential cumulative impacts of this significant new discovery by simply dismissing it on the ground that it is outside the Reserve. Additional development on adjacent lands is likely to have significant direct, indirect, and cumulative impacts to the resources and values in the Reserve and on the community of Nuiqsut. BLM's obligation to analyze the cumulative impacts under NEPA extends beyond a limited analysis of potential impacts and projects within the boundaries of the Reserve; it must take into account all reasonably foreseeable future actions as part of its cumulative impacts analysis.[241] In 2017, at the time BLM held the lease sale, the development of the Pikka and Horseshoe discoveries was a reasonably foreseeable future action.[242] As such, BLM was obligated to consider the potential direct, indirect, and cumulative impacts of the lease sale in light of this new information.

BLM acknowledges that the project has some potential to cumulatively combine with the effects of development in the Reserve, but states the IAP already considered exploration would occur outside the Reserve and that exploration might lead to discoveries and development.[243] This is incorrect and inconsistent with other BLM statements. The IAP did not consider a discovery and development project of this scale or its potential cumulative impacts. The IAP

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[238] AR 9727; AR 11691–94.

[239] *See* AR 11691 (showing in figure 1 the approximate locations of the Pikka and Horseshoe discoveries relative to the boundary of the Reserve); Nanushuk Website, *supra* note 54 (showing a map of the proposed Nanushuk/Pikka development relative to the existing Alpine development and the border of the Reserve).

[240] AR 9727.

[241] *See, e.g.*, *Kern*, 284 F.3d at 1077–78 (holding that BLM could not limit its analysis to the limited geographic area in which it proposed to take an action and instead was obligated to take a broader look at the potential cumulative impacts from reasonably foreseeable future actions in the region).

[242] *See* 40 C.F.R. § 1508.7 (defining cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" and stating that such impacts "can result from individually minor but collectively significant actions taking place over a period of time").

[243] AR 9728.

references broadly that additional oil could be produced from existing fields and from undeveloped pools adjacent areas east of the Reserve.[244] However, as BLM itself acknowledged, this discovery was larger than anticipated in the IAP.[245] The significant scale of this discovery is in large part why USGS decided to revise its estimates of potential resources for the region.[246] Because a discovery of this scale, immediately adjacent to the northeast corner of the Reserve, was not contemplated or known at the time of the IAP, BLM needed to consider the significant cumulative effects of this project as part of a NEPA analysis prior to conducting the lease sale. BLM's conclusion to the contrary is arbitrary and capricious and should be rejected.

BLM's analysis of the new information related to Smith Bay is also arbitrary and fails to take into account the full scope of potential impacts from oil and gas activities in Smith Bay. The discovery at Smith Bay is estimated to contain more than 1 billion barrels of oil.[247] Smith Bay — similar to Willow and Nanushuk — was a significantly larger discovery than anticipated at the time of the IAP and is one of the three major discoveries that led USGS to substantially revise its estimate of the potential oil resources in the region.[248] Development activity in Smith Bay, immediately adjacent to the Reserve, is likely to have significant impacts on the adjacent Teshekpuk Lake Special Area.

BLM dismissed the significance of the Smith Bay discovery in the revised DNA, saying BLM has always known of oil within the region since one company drilled in the area in 2006.[249] BLM also dismissed the significance of any new information related to Smith Bay because federal lands located near Smith Bay are closed to leasing under the IAP, asserting that, as a result, there would not be impacts from exploration and production from federal leases within the Reserve.[250] BLM's focus on the fact that no leasing is allowed on federal lands south of Smith Bay misses the point. The federal lands are open to other types of oil and gas activities and

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[244] AR 1411.

[245] AR 9725.

[246] AR 11691 (stating that "[m]ultiple oil discoveries announced during 2015–2017 indicate that the potential for large oil accumulations in both formations is greater than previously thought" and discussing the significant discovery at Pikka and Horseshoe).

[247] AR 11692.

[248] *See* AR 11691–92.

[249] AR 9727.

[250] *Id.*

infrastructure in support of oil and gas activities.[251] On-shore activities and infrastructure related to development in Smith Bay could have significant cumulative effects on important wildlife, such as the Teshekpuk caribou herd, that depend on the area.[252] The cumulative effects from the Smith Bay development are significant and should have been taken into consideration in a NEPA analysis prior to BLM moving forward with the 2017 lease sale. BLM's conclusion to the contrary is arbitrary and capricious and should be rejected.

4. New Information Related to the 2016 Lease Sale Was Significant.

There was also significant new information related to the 2016 lease sale. The 2016 lease sale resulted in the sale of over 600,000 acres of additional oil and gas leases in the Reserve, nearly doubling the 895,000 acres leased at that time.[253] BLM attempts to dismiss the significance of this information in the revised DNA by asserting that the IAP already accounted for this level of leasing, that there was more acreage under lease at the time BLM completed the IAP, and that 34 of the 66 tracts leased in 2016 were also leased at the time of the IAP but subsequently relinquished.[254] Each of these justifications is unfounded and arbitrary.

In dismissing the significance of the 2016 lease sale, BLM ignores the significance of not only what was leased in the 2016 lease sale, but who leased it and where. While the total leased acreage at the time of the IAP might have been greater than the total leased acreage following the 2016 lease sale, the distribution of those leases and likelihood of development on those leases is very different from the IAP scenario.[255] Almost all the leases acquired in the 2016 lease sale were obtained by ConocoPhillips and its partner Anadarko — the primary company already

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[251] AR 3523.

[252] *Id.* (showing the area south of Smith Bay is closed to leasing, but open to potential infrastructure applications).

[253] AR 4489, 9728.

[254] AR 9728–29.

[255] The distribution of leases in 2012 was quite different than it was after the 2016 lease sale. *Compare* Bureau of Land Mgmt., National Petroleum Reserve in Alaska Sale Map: 2012 Lease Sale Tracts (2012), https://www.blm.gov/sites/blm.gov/files/uploads/Oil_Gas_Alaska_2012_NPR-A_Lease_Sale_Tract_Map_10052012.pdf, *with* Bureau of Land Mgmt., National Petroleum Reserve in Alaska Sale Map: 2016 Lease Sale (2016) [hereinafter 2016 Lease Map], *available at* https://www.blm.gov/sites/blm.gov/files/uploads/Oil_Gas_Alaska_NPR-A_LeaseSaleResults_Map_12142016.pdf. The court can take judicial notice of agency documents. *See* cases cited *supra* note 50.

moving forward aggressively with development in the Reserve. The new leases were in a block extending out from ConocoPhillips' existing acreage and developments at Alpine and Greater Mooses Tooth.[256] ConocoPhillips acquired this significant block of leases right before it announced its massive discovery at the Willow prospect in early 2017.

As discussed above, the economics and potential for development in this area was very different when the IAP was adopted. The 2010 USGS assessment dramatically reduced its estimates of the potential oil and gas resources in the Reserve based on that fact that exploration drilling revealed there was an abrupt transition from oil to gas and reduced reservoir quality starting 15–20 miles west of Alpine.[257] This is in large part why the estimates for total oil quantities likely to be developed in the region were so low in the IAP. USGS further recognized that, in the absence of a gas pipeline, "exploration has waned and several petroleum companies have relinquished assets in the NPRA."[258]

By the time of the 2017 lease sale, massive discoveries and new acquisitions indicated there was a significant resurgence in interest in development in the region, and new information indicated that oil resources extended further west into the Reserve than previously assumed. The acquisition of such a significant number of acres by ConocoPhillips, in an area extending out from existing development and in an area previously thought to contain primarily gas resources and no large oil deposits, raises significant questions about the potential for increased cumulative impacts. These significant cumulative impacts should have been assessed as part of a NEPA analysis prior to BLM moving forward with conducting additional leasing in the region. BLM's conclusion to the contrary is arbitrary and capricious and should be rejected.

5. New Information Related to the GMT-1 Project and the Potential Cumulative Impacts to Subsistence in the Northeast Region Was Significant.

There was significant new information related to the potential impacts of the GMT-1 project and other development in the northeastern corner of the Reserve, specifically impacts to subsistence. In adopting the programmatic IAP, BLM originally determined that the stipulations and best management practices in the IAP were sufficient to ensure that there would not be

[256] 2016 Lease Map, *supra* note 255.
[257] AR 9769.
[258] *Id.*

significant impacts to subsistence uses and needs.[259] But, in 2015, when making the first oil development decision after adoption of the IAP for the GMT-1 project, BLM found exactly the opposite. BLM found that there would be major impacts to subsistence uses from that project, and those impacts could not be fully mitigated by the avoidance and minimization stipulations in the IAP.[260] BLM required not only payment of compensatory mitigation funds, but also preparation of a Regional Mitigation Strategy (RMS) to address the foreseeable impacts — including cumulative impacts — of GMT-1 and future projects.[261] BLM anticipated there would likely be similar and increased cumulative impacts extending beyond the GMT-1 project from more developments in the region.[262] One purpose of the RMS was to identify if additional areas needed to be off limits to leasing or development and whether additional mitigation measures should be incorporated into future development decisions to address those impacts.[263]

All of these issues were highly relevant to the question of whether, where, and how additional leasing and development should occur in the Reserve. Despite this, BLM now asserts in the revised DNA that the GMT-1 conclusion that there would be significant impacts to subsistence did not take into account the offsetting effects from the compensatory mitigation.[264] This explanation should be rejected because it is contrary to the findings in the GMT-1 decision itself. The GMT-1 decision recognized that there were likely to be significant adverse impacts to subsistence and other values from continued development in the region, beyond just the GMT-1 project.[265] The GMT-1 ROD specifically recognized that future projects like GMT-2 were likely to have similar and cumulative impacts to subsistence and other values.[266] The anticipated

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[259] AR 3444.

[260] *See, e.g.*, AR 11599 (indicating BLM required development of the RMS and compensatory mitigation funds for the GMT-1 project because there were "major impacts to subsistence uses that [could not] be fully mitigated by avoidance and minimization stipulations in the 2013 NPR-A IAP/EIS ROD").

[261] *Id.*

[262] *See* AR 11600.

[263] *See* AR 11599–601.

[264] AR 9729.

[265] *See, e.g.*, AR 11299.

[266] *See, e.g.*, *id.* ("The potential direct and indirect impacts of GMT2 would be very similar to that of GMT1 and these impacts would be additive. However, it is likely that development of GMT2 would make it feasible to develop other oil drill sites further west (i.e., most immediately in the Bear Tooth Unit). In that case, the impacts of GMT2 would be considered synergistic. Considered together with development east of the Colville Delta (Kuparuk and Prudhoe), in the

impacts to subsistence and other values were not solely due to the fact that the GMT-1 project was located within a subsistence area that ordinarily should have been closed to development activities under the IAP.

Incredibly, BLM's revised DNA fails to recognize, let alone discuss, the fact that the GMT-1 decision required preparation of an RMS. In permitting GMT-1, BLM found that that there might be similar and compounded impacts from future developments in the region, finding that the impacts would be "additive" and "synergistic."[267] Because of that, BLM required preparation of the RMS to set out a framework for more effectively addressing and compensating for these foreseeable impacts.[268] BLM anticipated designing the RMS so that any identified avoidance, minimization, and compensatory mitigation measures could be incorporated via NEPA review into future decisions in the region that could result in additional habitat loss or degradation.[269] In other words, in the GMT-1 ROD, BLM identified that there were not only impacts to subsistence beyond what was considered and forecasted in the IAP, but that there was a need to develop additional measures through an RMS to address and compensate for impacts from development beyond just the GMT-1 project. The fact that BLM was in the process of developing an RMS for the entire northeast region to address unforeseen impacts was significant and should have been considered as part of a NEPA analysis prior to the lease sale.

Delta (CD1, CD2, CD3, and CD4), west of the Delta with CD5 and GMT1, and additional development further west, the cumulative impacts of GMT2 would include an extension of the corridor of industrial development between Nuiqsut and the coast. The westward expansion of industry could place Nuiqsut in an even more disadvantageous position regarding the Teshekpuk Herd. An access road to GMT2, like that to GMT1, would have some countervailing effects, but these would be outweighed by the adverse impacts of additional development within the area. If GMT1 is developed, it is likely that the pre-development GMT2 area will have an even higher value for subsistence because it will become one of the increasingly rare areas near town without industrial development.").

[267] *Id.*

[268] AR 11599.

[269] AR 11600–01 ("The RMS will be designed such that BLM will include the identified avoidance, minimization and compensatory mitigation recommendations in future NEPA analysis for BLM management actions and third party actions, in this region of the NPR-A, that could foreseeably result in additional habitat loss and degradation, and result in outcomes that benefit subsistence users most directly impacted by the GMT1 project, including members of the Native Village of Nuiqsut.").

In sum, all of this new information raised substantial questions about the potential impacts of development in the region that should have been considered in a NEPA analysis prior to the lease sale. BLM's conclusion to the contrary is arbitrary and capricious and should be rejected.

III. THE COURT SHOULD SET ASIDE BLM'S DECISION AND VACATE THE 2017 LEASES.

Under the APA, when an agency action "is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," "[t]he reviewing court shall . . . hold unlawful and set aside [the] agency action."[270] The Supreme Court and the Ninth Circuit have repeatedly held that vacatur is the proper remedy under the APA.[271] The faults with BLM's failure to comply with NEPA are not merely harmless error and vacatur is appropriate.[272]

None of the very limited circumstances justifying departure from vacatur apply here. In *California Communities Against Toxics*, the Ninth Circuit adopted the D.C. Circuit's two-part test to determine when departure from the standard remedy of vacatur is appropriate.[273] The two

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[270] 5 U.S.C. § 706; *see, e.g.*, *Pit River Tribe*, 469 F.3d at 788 (stating that an oil and gas lease extension approval "must be undone" and the rest of the approval process set aside where the agencies violated their duties under NEPA and the National Historic Preservation Act).

[271] *See, e.g.*, *Fed. Commc'n Comm'n v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law.'" (citation omitted)); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded.'" (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973))); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) (indicating the appropriate remedy under the APA when an agency does not follow Congress' clear mandate is to vacate); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 (9th Cir. 2007) ("Under the APA, we must set aside [the agency's] action if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2002) ("[A]gency action taken without observance of procedure required by law will be set aside." (quoting *Metcalf*, 214 F.3d at 1141)); *see also Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1185–86 (9th Cir. 2004) ("Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand."); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 976 (D. Alaska 2011), *rev'd on other grounds*, 746 F.3d 970 (9th Cir. 2014).

[272] *See Cal. Wilderness Coal.*, 631 F.3d at 1095 (explaining that vacating the agency action is the appropriate remedy "[w]hen a court determines that an agency's action failed to follow Congress's clear mandate"); *Monsanto Co.*, 561 U.S. at 165 (urging courts to employ the remedy of vacatur before considering the "drastic and extraordinary" relief of an injunction).

[273] *Cal. Cmtys. Against Toxics v. U.S. Envtl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir.

factors the Ninth Circuit considers are (1) the seriousness of the agency's error, and (2) "the disruptive consequences of an interim change that may itself be changed."[274] The Ninth Circuit has only found remand without vacatur warranted by equity concerns in very limited circumstances, specifically when serious environmental harm is likely to result from vacatur of the underlying decision.[275]

Here, vacatur is the appropriate remedy and the exceptions do not apply. Vacatur would not cause any harm to the environment. To the contrary, vacatur could make the resulting decision more protective of the environment. Vacatur is also wholly consistent with the purposes behind NEPA to ensure that the agency takes a hard look at the potential environmental consequences prior to making a decision and does not just provide an after-the-fact explanation for a decision that it already made.[276] Here, the court should set aside BLM's decision and vacate the leases, and enter a declaratory judgment that BLM was obligated to conduct a NEPA analysis

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2012).

[274] *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The burden is on the party seeking remand without vacatur to show that deviation from the standard rule of vacatur is warranted. The test from *California Communities* functions as an equitable defense, so a defendant has the burden of raising and proving those factors outweigh the presumptive or ordinary remedy of vacatur. *See Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1138–39 (9th Cir. 2006) (stating that a party asserting an equitable defense "must show" its applicability).

[275] *Cal. Cmtys. Against Toxics*, 688 F.3d at 993–94 (declining to vacate the permits where vacatur could actually cause more of the exact type of environmental harm the Clean Air Act was intended to prevent); *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("In *rare circumstances*, when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating." (emphasis added)); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (refusing to vacate an invalid rule because vacatur would cause "potential extinction of an animal species"); *W. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency*, 633 F.2d 803, 813 (9th Cir. 1980) (describing its remand without vacatur as "unusual" and expressing concern that vacating the agency decision might "thwart[] . . . operation of the Clean Air Act" during reconsideration); *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("[T]he Ninth Circuit has only found remand without vacatur warranted by equity concerns *in limited circumstances*, namely [when] serious irreparable environmental injury [will occur if the decision is vacated]." (emphasis added)).

[276] *See, e.g.*, *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009) (stating that, in circumstances where the "required explanation of the agency's action is totally absent, vacatur is indicated lest remand invite wholly *post hoc* rationalization" (internal quotation marks omitted) (quoting *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 798 n.2 (D.C. Cir. 1983))).

looking at the potential site-specific and direct, indirect, and cumulative effects of leasing prior to holding the lease sale.

CONCLUSION

BLM issued oil and gas leases that did not retain BLM's authority to unilaterally deny a later permit application. Without this retained authority, BLM was required to conduct a site-specific NEPA analysis to fully consider the potential impacts of oil and gas activities prior to the lease sale. The agency's failure to conduct a site-specific analysis violates NEPA. There have also been significant new developments and information since the programmatic NEPA analysis in 2013 that indicate the direct, indirect, and cumulative impacts of additional leasing would be far greater than originally assumed or previously analyzed. To satisfy its obligations under NEPA and the NPRPA, BLM needed to prepare a NEPA analysis to fully examine the potential direct, indirect, and cumulative impacts in light of this information prior to holding the lease sale.

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and declare that BLM violated NEPA and the NPRPA by failing to prepare a NEPA analysis prior to conducting the 2017 lease sale. This Court should set aside BLM's DNAs and decision record for the leases, void any leases and approvals issued in reliance on those documents, and enter a declaratory judgment that BLM was obligated to analyze the potential site-specific and direct, indirect, and cumulative impacts in a NEPA analysis prior to holding the 2017 lease sale.

Respectfully submitted this 4th day of June, 2018.

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CERTIFICATE OF SERVICE

I certify that on June 4, 2018, I caused a copy of PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

s/ Suzanne Bostrom
Suzanne Bostrom