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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL CENTER, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, *et al.*, Defendants, and CONOCOPHILLIPS ALASKA, INC., Intervenor-Defendant.	Case No.: 3:18-cv-00030-SLG

CONOCOPHILLIPS ALASKA'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND CROSS-MOTION FOR SUMMARY JUDGMENT [1]

[1] Pursuant to L.R. 16.3, this response brief in opposition shall be deemed a cross-motion for summary judgment.

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I. INTRODUCTION

This is one of two lawsuits challenging the decision by the Bureau of Land Management ("BLM") to offer leases for sale in 2017 (the "2017 Lease Sale") in the National Petroleum Reserve in Alaska (the "Petroleum Reserve" or "NPR-A"). BLM offered the 2017 Lease Sale pursuant to a comprehensive Integrated Activity Plan finalized in 2013 (the "2013 IAP") and in accordance with the requirements of the Naval Petroleum Reserves Production Act of 1976 ("NPRPA"), 42 U.S.C. § 6501, *et seq*. BLM's 2013 IAP is the product of President Obama's directive to conduct annual oil and gas lease sales in the Petroleum Reserve, and is supported by a comprehensive, multi-volume, environmental impact statement (the "2012 IAP EIS") of more than 2,000 pages, issued pursuant to the National Environmental Policy Act ("NEPA"). The "most important decisions" and "key issues" identified in the 2013 IAP and 2012 IAP EIS specifically addressed "what lands should be made available for oil and gas leasing."[2] In the 2013 IAP, BLM identified approximately 11.8 million acres of the Petroleum Reserve (approximately 52%) that would be "available" for oil and gas leasing, while closing approximately 11 million acres to leasing to protect other resource values.[3] Consistent with President Obama's mandate and the 2013 IAP, BLM offered annual lease sales in 2013, 2014, 2015, 2016, and 2017.

In the 2017 Lease Sale, BLM decided to offer lease sales on 10.3 million acres of the 11.8 million acres made available by the 2013 IAP. The 2017 Lease Sale was "part of the preferred alternative previously analyzed in the IAP/EIS."[4] Although BLM offered 10.3 million acres for lease in 2017, it received bids on less than 80,000 acres. Prior to finalizing these lease

[2] AR 0006, 0007.
[3] AR 0036, 0037.
[4] AR 9514.

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sales, BLM reviewed the 2012 IAP EIS to make sure that there was no new information demonstrating significant environmental impacts that were not addressed in the 2012 IAP EIS. BLM found no such new information, and documented that determination in the administrative record.

Plaintiffs Northern Alaska Environmental Center, *et al.* (collectively, "NAEC") did not challenge the 2012 IAP EIS, the 2013 IAP, or any of the lease sales issued in 2013, 2014, 2015, or 2016. Having remained silent for years while BLM carried out its transparent plan for leasing in the NPR-A, only now does NAEC object, arguing that the 2017 Lease Sale violates NEPA on two equally unmeritorious grounds.

NAEC's *first* claim is that the 2012 IAP EIS was not sufficiently "site-specific" and a subsequent site-specific NEPA analysis was required prior to the 2017 Lease Sale. This claim is procedurally and substantively flawed. Procedurally, NAEC is time-barred from challenging the adequacy of the 2012 IAP EIS. The NPRPA places a strict 60-day limitations period on any challenge to the "adequacy" of any EIS "concerning oil and gas leasing in the National Petroleum Reserve—Alaska."[5] NAEC has missed its filing deadline by nearly five years. Substantively, NAEC's "site-specific" argument was already litigated and rejected in *Northern Alaska Environmental Center v. Kempthorne*.[6] In that case, the court held that the same type of hypothetical NEPA analysis performed here by BLM (on a prior leasing program in the Petroleum Reserve) was sufficient "at the leasing stage," and rejected NAEC's arguments that NEPA required a "site specific analysis" prior to leasing.[7]

[5] 42 U.S.C. § 6506a(n)(1).
[6] 457 F.3d 969 (9th Cir. 2006).
[7] *Id*. at 975-77.

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NAEC's *second* claim is that BLM failed to take a hard look at the direct, indirect, and cumulative impacts of the 2017 Lease Sale in light of new information. This claim is similarly without merit. Although an agency may have a duty to review new information that comes to light after the completion of a final EIS, "[a]n agency is not required to prepare a [supplemental EIS] every time new information comes to light."[8] Rather, the established standard triggering a duty to supplement an EIS is whether there is significant new information that presents a "*seriously* different picture of the likely environmental harms stemming from the proposed project."[9] NAEC does not even cite this standard, let alone demonstrate that it is met. As explained below, BLM reviewed the "new" information identified by NAEC and reasonably explained in the record why none of that information warrants a supplemental EIS. Nothing more is required by NEPA.

For these reasons, and those discussed more fully below, NAEC fails to demonstrate any NEPA violation. Intervenor-Defendant ConocoPhillips Alaska, Inc. ("CPAI") respectfully requests that this Court grant summary judgment in favor of BLM and CPAI, and uphold the leases issued under a competitive leasing program that has spanned two presidential administrations over the past six years, following an approach that was approved by the Ninth Circuit over a decade ago.

[8] *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1157 (9th Cir. 2008).
[9] *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012) (emphasis added; internal quotation marks and citation omitted).

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II. BACKGROUND

A. NEPA and Determinations of NEPA Adequacy.

NEPA declares "a national policy . . . to promote efforts which will prevent or eliminate damage to the environment."[10] NEPA is a "procedural statute, designed to achieve its stated policy 'by focusing Government and public attention on the environmental effects of proposed action.'"[11] Regulations promulgated by the Council for Environmental Quality ("CEQ") provide guidance on the application of NEPA.[12]

NEPA requires federal agencies to issue an EIS before undertaking "major federal action significantly affecting the quality of the human environment."[13] Preparation of an EIS ensures that an agency gives proper consideration to the environmental consequences of a proposed action, and the relevant information is made available to the public.[14] NEPA requires agencies to take "'a "hard look" at the potential environmental consequences of [its] proposed action.'"[15]

An EIS is inherently predictive and necessarily requires the agency to exercise its reasoned judgment in predicting future events.[16] As a result, an EIS involves some uncertainty as to future effects.[17] This "uncertainty is an inherent problem with multi-stage projects such as oil

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[10] 42 U.S.C. § 4321.

[11] *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1070 (D. Alaska 2014).

[12] *Id*.

[13] 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1508.11.

[14] *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003); *Douglas Cty. v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995).

[15] *See League of Wilderness Defenders—Blue Mountain Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012) (quoting *League of Wilderness Defenders Blue Mountain Biodiversity Project v. Allen*, 615 F.3d 1122, 1135 (9th Cir. 2010)).

[16] *See League of Wilderness Defenders*, 689 F.3d at 1076-77.

[17] *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (a "quotient of uncertainty . . . is always present when making predictions about the natural world").

and gas programs, which include separate leasing, exploration, and development stages."[18] Courts give "great deference" to predictive judgments made by the agencies in these circumstances, so long as the "agency complies in good faith with the requirements of NEPA and issues an EIS indicating that the agency has taken a hard look at the pertinent environmental questions."[19]

When a particular proposed action "has already been subject to NEPA review, an agency may be required to prepare a supplemental analysis."[20] The CEQ's regulations explain that a supplemental NEPA analysis may be required if "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[21] Similarly, BLM's NEPA regulations encourage the use of existing NEPA documents,[22] and provide that it may use an "existing environmental analysis . . . in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives."[23] This requires an "evaluation" of whether "new circumstances, new information or changes in the action or its impacts . . . may result in *significantly different* environmental effects."[24]

[18] *N. Alaska Envtl. Ctr.*, 457 F.3d at 977 (quoting *N. Slope Borough v. Andrus*, 642 F.2d 589, 600 (1980)).
[19] *Id.*
[20] *Friends of Animals v. Bureau of Land Mgmt.*, No. 2:16-cv-1670-SI, 2018 WL 1612836, at *10 (D. Or. Apr. 2, 2018).
[21] 40 C.F.R. § 1502.9(c).
[22] 43 C.F.R. § 46.120.
[23] 43 C.F.R. § 46.120(c).
[24] *Id.* (emphasis added).

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BLM's NEPA Handbook explains the procedures for making the supplementation decision through a "determination of NEPA Adequacy" (or "DNA").[25] According to BLM's Handbook, a DNA "confirms that an action is adequately analyzed in existing NEPA document(s) and is in conformance with the land use plan."[26] The NEPA Handbook instructs officials to review existing environmental documents and answer several questions geared at determining whether a prior document adequately analyzes a proposed action.[27] The NEPA Handbook recommends the use of a "DNA Worksheet" that "documents the review to determine whether existing NEPA documents can satisfy the NEPA requirements for the proposed action."[28]

B. The Petroleum Reserve.

President Harding established the Naval Petroleum Reserve No. 4 on Alaska's North Slope in 1923.[29] In 1976, Congress enacted the NPRPA and transferred authority over the Petroleum Reserve from the Navy to the Secretary of Interior.[30] The Petroleum Reserve, which is administered by BLM, was subsequently renamed the National Petroleum Reserve in Alaska (often abbreviated to "NPR-A").[31] The Petroleum Reserve remains the largest single unit of public land in the United States, encompassing approximately 23.6 million acres (22.8 million acres of which are under federal management), an area roughly the size of the state of Indiana.[32]

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[25] *Friends of Animals*, 2018 WL 1612836, at *9.

[26] *See* U.S. Department of the Interior, Bureau of Land Management, National Environmental Policy Act Handbook, H-1790-1, § 5.1 (Jan. 30, 2008) ("NEPA Handbook").

[27] *Id*.

[28] *Id*. at § 5.1.3.

[29] *N. Alaska Envtl. Ctr.*, 457 F.3d at 973-74.

[30] *Id*. at 973.

[31] *Id*.

[32] *Id*.

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In 1980, Congress amended the NPRPA to direct the Secretary of the Interior to carry out an "expeditious program of competitive leasing of oil and gas" within the Petroleum Reserve, while recognizing the need to protect the environment.[33] The desire for expeditious development was driven by the fuel crisis of the 1970s[34] and the recognition that "we can no longer delay efforts which would increase the domestic supply of oil and gas and lessen the reliance on imports."[35] At the time, the administration was projecting that "it would be at least 5 years before any actual leasing could take place."[36] But the "[m]embers of the Appropriations Committees of both the House and the Senate . . . determined that such a delay is intolerable" and, accordingly, Congress amended the Act to "expeditiously move to a private exploration program."[37]

Among other measures intended to ensure expeditious development, the 1980 amendments "assure[d] minimum delays" by including "language providing for accelerated judicial review."[38] Challenges to *all* federal oil and gas lease decisions were already subject to a 90-day limitations period.[39] The 1980 amendments at 42 U.S.C. § 6506a(n)(1) accelerated that timetable for NEPA-related lawsuits, expressly requiring that

> [a]ny action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) concerning oil and gas leasing in the National Petroleum Reserve-Alaska shall be barred unless brought in the

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[33] Department of the Interior Appropriations Act, Fiscal Year 1981 (Pub. L. No. 96-514) (codified at 42 U.S.C. § 6506a(a)).

[34] *N. Alaska Envtl. Ctr.*, 457 F.3d at 973.

[35] 126 Cong. Rec. 29,489 (1980) (statement of Sen. Stevens).

[36] *Id.*

[37] *Id.*

[38] S. Comm. Rep. No. 96-985 at 34, 96th Cong. 2d Sess. (Sept. 23, 1980) (hereinafter "Senate Committee Report").

[39] 30 U.S.C. § 226-2 ("No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.").

> appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.[40]

Thus, any challenge to the adequacy of an EIS concerning oil and gas leasing must be promptly filed within 60 days or "be barred."

The NPRPA also ensures that environmental concerns and values are served in a variety of ways, including the protection of areas "designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value[.]"[41] Pursuant to this provision, five "Special Areas" have been established: the *Teshekpuk Lake Special Area* to protect migratory waterfowl and shorebirds, important caribou habitat, and subsistence uses; the *Colville River Special Area* to protect the arctic peregrine falcon nesting areas; the *Utukok River Uplands Special Area* to protect important habitat of the Western Arctic Herd of caribou; the *Kasegaluk Lagoon Special Area* to protect marine mammal habitat; and the *Peard Bay Special Area* to protect high-value marine mammal, shorebird, and water bird habitats.[42]

For portions of the Petroleum Reserve where leasing is allowed, BLM's administration occurs through a three-phase process: (1) leasing; (2) exploration; and (3) development.[43] Each stage is subject to independent decision-making and approval by BLM (as well as by other local, state, and federal agencies), and each stage requires review and analysis under NEPA.[44]

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[40] 42 U.S.C. § 6506a(n)(1).

[41] 42 U.S.C. § 6504(b).

[42] AR 0031, 0035.

[43] *N. Alaska Envtl. Ctr.*, 457 F.3d at 977; *see* 43 C.F.R. pts. 3000, 3130, 3150, 3160.

[44] *N. Alaska Envtl. Ctr.*, 457 F.3d at 977.

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The lease sale is just the first step towards exploration and development, and the leases do not themselves authorize any on-the-ground activity.[45] At the leasing stage, BLM determines which lands to make available for leasing, which lands to defer or make unavailable, and which protective stipulations and other mitigation measures to apply to protect surface resources.[46] In the Petroleum Reserve, as elsewhere, the "leasing stage" involves both the lease plan and the lease sales held under that plan.[47]

At the exploration stage, the leaseholder may conduct surface-disturbing activities such as geophysical exploration, seismic surveys, or the drilling of subsurface or exploratory wells, but only after obtaining additional permits from BLM.[48] BLM may approve the exploration plan as submitted or reject it, or impose "[a]dditional stipulations needed to protect surface resources and special areas . . . at the time the surface use plan and permit to drill are approved."[49] Exploration activities are subject to NEPA review and analysis.

The development stage depends on the results of exploration because "until the lessees do exploratory work, the government cannot know what sites will be deemed most suitable for exploratory drilling, much less for development."[50] The development stage may involve more extensive surface activities and requires BLM's approval of a drilling and surface use operations plan.[51] The development plan and other approvals such as Army Corps permitting are subject to additional NEPA review and analysis.[52]

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[45] AR 3434.
[46] *Id.*
[47] *N. Alaska Envtl. Ctr.*, 457 F.3d at 966-67.
[48] 43 C.F.R. pts. 3150, 3160.
[49] 43 C.F.R. §§ 3131.3, 3162.3-1(h)(1), (2).
[50] *N. Alaska Envtl. Ctr.*, 457 F.3d at 976.
[51] 43 C.F.R. § 3162.3-1.
[52] *See, e.g., Kunaknana*, 23 F. Supp. 3d at 1072-73.

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Historically, BLM split the Petroleum Reserve into two areas and issued leasing plans for those areas. For example, on January 22, 2004, BLM issued the Northwest NPR-A IAP and associated EIS addressing BLM's "plan to offer long term oil and gas leases" in the Northwest Planning Area.[53] In conducting that analysis, BLM realized that it "had no way of knowing what, if any, areas subsequent exploration would find most suitable for drilling."[54] Accordingly, instead of addressing specific parcels, BLM "projected two hypotheticals, representing each end of the available spectrum of possibilities" for development of offered leases.[55] This Court and the Ninth Circuit affirmed this approach in *Northern Alaska Environmental Center v. Kempthorne*, finding that this level of analysis was appropriate for the "lease stage."[56] BLM issued lease sales in 2004, 2006, 2008, 2010, 2011, and 2012, all of which were premised on the two regional plans and the IAP EISs prepared with those plans.[57]

C. The 2012 IAP EIS.

On May 14, 2011, President Obama directed the Department of Interior to conduct annual oil and gas lease sales in the Petroleum Reserve.[58] BLM responded by developing and finalizing the 2013 IAP, which covers the entire Petroleum Reserve.[59] The 2013 IAP updated and superseded the prior IAPs.[60] The 2013 IAP makes approximately 11.8 million acres available for oil and gas leasing.[61] The 2013 IAP also makes approximately 11 million acres *not* available for oil and gas leasing.[62] The 2013 IAP expands the Teshekpuk Lake Special Area from 1.75 million acres to 3.65 million acres, expands the Utukok River Uplands Special Area from 3.97 million acres to 7.06 million acres, and creates a new 107,000-acre Peard Bay Special

[53] *N. Alaska Envtl. Ctr.*, 457 F.3d at 972.
[54] *Id.* at 974.
[55] *Id.*
[56] *Id.* at 977.
[57] *See* https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/alaska.

Area.[63] The 2013 IAP also establishes performance-based stipulations and best management practices applicable to oil and gas activities in the Petroleum Reserve, and restricts surface infrastructure (even in many areas open to leasing).[64]

The 2013 IAP is supported by the robust and comprehensive 2012 IAP EIS.[65] The 2012 IAP EIS "analyzes a range of management options for the entire NPR-A."[66] The "key issues" in the 2012 IAP EIS involve "decisions on the location and amount of oil and gas leasing and protection of surface resources."[67] To that end, the 2012 IAP EIS "contains five alternatives that provide a broad range of oil and gas leasing availability, surface protections, and Special Area designations."[68] These alternatives include:

- Alternative A is the no action alternative. Under Alternative A, BLM would continue to manage the Petroleum Reserve under the existing programs. This alternative would allow leasing of 57% (13 million acres) of the Petroleum Reserve, and leave existing Special Area protections in place.[69]
- Alternative B-1 emphasizes the protection of surface resources while making 48% (11 million acres) of the Petroleum Reserve available for leasing. Alternative B-1 would enlarge three Special Areas and create one new Special Area. It would also recommend Congressional designation of all or portions of 12 rivers for inclusion in the National Wild and Scenic Rivers System.[70]

[58] AR 0006.
[59] AR 3412-3525.
[60] AR 0006.
[61] AR 3417.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] AR 0001-2622.
[66] AR 0006.
[67] AR 0007.
[68] AR 0008.
[69] AR 0033-0034.
[70] AR 0034-0036.

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- Alternative B-2 is similar to alternative B-1 and was developed in response to public comments (including those from NAEC). The alternative would make 52% (11.8 million acres) of the Petroleum Reserve available for leasing. Alternative B-2 would enlarge two Special Areas and create one new Special Area.[71]

- Alternative C makes 75% (17.9 million acres)of the Petroleum Reserve available for leasing. This alternative would protect approximately 4.4 million acres in the southern part of the Petroleum Reserve, and in the existing Kasegaluk Lagoon Special Area and newly created Peard Bay Special Area.[72]

- Alternative D would maximize leasing opportunities within the Petroleum Reserve. All lands would be made available for leasing. Lands within Special Areas would still receive special protections, but would be less restrictive than other alternatives.[73]

The similar Alternatives B-1 and B-2 set aside substantially more areas for conservation than the pre-2013 status quo (Alternative A). Environmental organizations, including Plaintiffs, stated that they "strongly support full implementation of Alternative B" because it "is the balanced approach to development and conservation for the Reserve."[74] The State of Alaska and industry groups, on the other hand, opposed Alternatives B and C, and supported Alternative D as more consistent with the development policies of the NPRPA.[75] BLM ultimately sided with the environmental organizations and selected Alternative B-2 for the 2013 IAP, explaining that "[t]his decision makes approximately 11.8 million acres of the approximately 22.8 million acres of subsurface managed by BLM in the NPR-A available for oil and gas leasing."[76]

[71] AR 0036-0039.

[72] AR 0039-0040.

[73] AR 0040-0041.

[74] AR 2106, 2185; *see* AR 1744, 2025.

[75] *See* AR 1768-1769, 2084, 2140, 2147. The North Slope Borough took a middle-ground position, arguing for a variation on Alternative A and disagreed with the environmental groups' support for Alternative B and with the State and industry groups' support for Alternative D. *See* AR 1752. BLM's final decision was more aligned with the environmental groups than with the North Slope Borough, the State, or industry groups.

[76] AR 3421.

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As with the 2004 EIS approved by this Court in *Northern Alaska Environmental Center v. Kempthorne*, the 2012 IAP EIS recognized the difficulties associated with predicting the on-the-ground impacts of future development from the proposed set of leasing alternatives due to the "many uncertainties associated with projecting future petroleum exploration and development."[77] To "address these uncertainties, the BLM has made reasonable assumptions" based on the following: (1) a 2011 United States Geological Service ("USGS") economic assessment (the "2011 USGS economic analysis"); (2) BLM's "own knowledge of the largely undiscovered petroleum endowment of the planning area and current industry practice"; and (3) BLM's "professional judgment."[78] BLM worked carefully and conservatively "to minimize the chance that the resultant impact analysis will understate potential impacts."[79] For example, BLM made price assumptions "at the upper level of current government projections," thereby making development seem more likely (for planning purposes), and assumed that the "amount of infrastructure" needed by each development would be at "upper, but reasonable, limits."[80]

In addition, the 2012 IAP EIS makes numerous assumptions that contemplate "an optimistic set of development scenarios."[81] For instance, BLM assumed that (1) "[m]ultiple lease sales would be held," (2) "[i]ndustry would aggressively lease and explore the tracts offered," and (3) "[s]everal industry groups would independently explore and develop new fields."[82] The

[77] AR 0581.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*

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2012 IAP EIS then proceeds to carefully discuss the on-the-ground activities associated with this likely development scenario for each of the five alternatives.[83]

In expressly "authoriz[ing] multiple lease sales," BLM explained that the first lease sale based on the 2012 IAP EIS "most likely would occur in 2013, with subsequent annual lease sales."[84] The 2012 IAP EIS was clear that "[r]eaders should bear in mind, however, that the first sale, as well as any subsequent sale, might offer only a portion of the lands identified in the record of decision."[85] The 2012 IAP EIS explained that "[p]rior to conducting each additional sale, the agency would conduct a determination of the existing NEPA documentation's adequacy."[86] Based on that review, "[i]f the BLM finds its existing analysis to be adequate for a second or subsequent sale, the NEPA analysis for such sales may require only an administrative determination of NEPA adequacy."[87] But future activities requiring BLM approval such as a "proposed exploratory drilling plan" or "proposed construction of infrastructure for development of a petroleum discovery . . . would require further NEPA analysis."[88]

Numerous environment groups, including NAEC, commented at length on the Draft IAP EIS, and BLM responded to their comments with detailed explanations and with changes to the 2012 IAP EIS.[89] No party challenged or appealed the 2013 IAP or the 2012 IAP EIS within the 60-day deadline set forth in 42 U.S.C. § 6506a(n)(1). In fact, no party challenged the 2013 IAP,

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[83] AR 0585-0614.
[84] AR 0023.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *See, e.g.*, AR 2002-2010 (responses to comments by NAEC including commitments to make revisions and modifications to final EIS).

the 2012 IAP EIS, or any of the annual lease sales held thereunder until the present lawsuit and its companion lawsuit were filed this year.

D. The 2017 Lease Sale and Determinations of NEPA Adequacy.

As contemplated by the 2012 IAP EIS, BLM proceeded to conduct annual lease sales from 2013 through 2018. On December 6, 2017, BLM offered 900 tracts encompassing approximately 10.3 million acres, all located within the 11.8 million acres made available by the 2013 IAP.[90] Of those 900 tracts, only seven received bids (all by CPAI),[91] comprising approximately 79,998 acres (or about 0.8% of the 10.3 million acres offered for lease).[92]

Before conducting the 2017 Lease Sale, BLM documented its determination of NEPA adequacy in September 2017, as expressly contemplated in the 2012 IAP EIS.[93] BLM followed the instructions in its NEPA Handbook and used the "DNA Worksheet" to evaluate whether there was new information impacting the 2012 IAP EIS.[94] The DNA Worksheet explains that there "is no new information or circumstances that would substantially change the analysis for the proposed lease sale," and that the direct, indirect, and cumulative effects from the 2017 Lease Sale "are similar and essentially unchanged from those identified in the multiple sale analysis in the NPR-A IAP/EIS."[95] Accordingly, BLM reasonably concluded "that the existing NEPA documentation fully covers the proposed action and constitutes BLM's compliance with the

[90] AR 9513.

[91] CPAI and Anadarko E&P Onshore, LLC ("Anadarko") jointly purchased all seven leases in the 2017 Lease Sale. CPAI has since acquired all of Anadarko's interest in those leases.

[92] AR 9711.

[93] AR 0023; AR 9513-9516.

[94] AR 9514.

[95] AR 9514; AR 9515.

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requirements of NEPA."[96] BLM similarly documented its NEPA compliance with DNAs for the 2013, 2014, 2015, and 2016 lease sales, none of which were challenged by NAEC.[97]

After BLM conducted its 2017 Lease Sale, but before BLM signed or finalized any of the leases, the USGS on December 22, 2017 published a four-page *Assessment of Undiscovered Oil and Gas Resources in the Cretaceous Nanushuk and Torok Formations, Alaska North Slope and Summary of Resource Potential of the National Petroleum Reserve in Alaska 2017* (the "2017 USGS assessment").[98] This assessment addressed recently announced oil and gas discoveries in and near the Petroleum Reserve, and "upwardly revised" the USGS's "estimates of mean undiscovered, technically recoverable oil and gas resources for those formations."[99] Because BLM had not yet taken final action on the leases, BLM considered this new information to determine whether the 2012 IAP EIS "remain[s] adequate to provide NEPA compliance."[100]

BLM carefully reviewed the information in the 2017 USGS assessment as well as additional issues identified by NAEC in its complaint (filed February 2, 2018),[101] in an updated DNA Worksheet (the "Revised DNA Worksheet"). BLM again concluded that that this new information does not alter its view of the impacts of the 2017 Lease Sale, and documented that

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[96] AR 9516.

[97] *See* U.S. Department of the Interior, Bureau of Land Management, Alaska Oil and Gas Lease Sales (2017), https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/alaska.

[98] AR 11691-11694.

[99] AR 9723.

[100] *Id.*

[101] As BLM explains in its briefing, NAEC prematurely filed its complaint before BLM executed the 2017 leases, and thus before final agency action subject to review under 5 U.S.C. § 706(2)(A), thereby providing an additional ground for dismissing the present case.

review in the Revised DNA Worksheet, signed on February 21, 2018. BLM then signed the seven leases for the 2017 Lease Sale on the next day, February 22, 2018.[102]

III. STANDARD OF REVIEW OF AGENCY ACTION

NAEC asserts that the 2017 Lease Sale violates NEPA. It seeks judicial review of BLM's decision under the Administrative Procedure Act ("APA"), which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[103] The APA directs courts to "hold unlawful and set aside" an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[104] The Supreme Court has held that "[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[105] "The NEPA process involves an almost endless series of judgment calls [and] [t]he line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts."[106]

IV. ARGUMENT

A. NAEC Is Time-Barred from Challenging the Adequacy of the 2012 IAP EIS.

NAEC's lead argument is that the 2012 IAP is not sufficiently "site-specific," too "vague" on specific impacts, or otherwise not "sufficiently detailed" to support lease sales, and

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[102] AR 9732 (Lease Serial No. AA-094578 for Tract 2017-L-079); AR 9737 (Lease Serial No. AA-094579 for Tract 2017-L-080); AR 9742 (Lease Serial No. AA-094580 for Tract 2017-L-081); AR 9747 (Lease Serial No. AA-094581 for Tract 2017-L-083); AR 9752 (Lease Serial No. AA-094582 for Tract 2017-L-108); AR 9757 (Lease Serial No. AA-094583 for Tract 2017-L-110); AR 9762 (Lease Serial No. AA-094584 for Tract 2017-L-111).

[103] 5 U.S.C. § 702; *see also Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003) (en banc) ("The Administrative Procedure Act ('APA') governs judicial review of agency action.").

[104] 5 U.S.C. § 706(2)(A).

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

[106] *Coal. on Sensible Transp. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987).

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that BLM was therefore required to develop a "site-specific" EIS prior to authorizing lease sales.[107] Putting aside the fatal substantive flaws with this argument (set forth below), this challenge to the adequacy of the 2012 IAP EIS is time-barred by the NPRPA.

The NPRPA places a strict limitations period on any challenge to the adequacy of an EIS:

> Any action seeking judicial review of the adequacy of any program or site-specific environmental impact statement under section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) concerning oil and gas leasing in the National Petroleum Reserve-Alaska shall be barred unless brought in the appropriate District Court within 60 days after notice of the availability of such statement is published in the Federal Register.[108]

The "notice of availability" for the 2012 IAP EIS was published in the Federal Register on December 28, 2012.[109] Any action challenging the adequacy of the 2012 IAP EIS therefore had to be filed by February 26, 2013.

NAEC missed this deadline by nearly five years. NAEC's "site-specific" arguments squarely challenge the "adequacy" of the 2012 IAP EIS and "concern[] oil and gas leasing." NAEC argues that the 2012 IAP EIS is not sufficiently "site-specific" (*e.g.*, "BLM did not assess the site-specific impact at either the land use-planning stage or the leasing stage") and that BLM "resisted calls for the IAP to be more site specific."[110] NAEC contends that the 2012 IAP EIS was not "sufficiently site specific" to support leasing decisions, did not sufficiently "examine what those impacts would look like if development moved forward in specific areas," and was otherwise too "vague" to support a lease sale.[111] NAEC made the same arguments in its comments on the proposed 2017 Lease Sale (arguing that "[t]he analysis in the IAP was not

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[107] Memorandum in Support of Plaintiffs' Motion for Summary Judgment (Dkt. 36) ("NAEC Br.") at 22-25.

[108] 42 U.S.C. § 6506a(n)(1); *see also* 43 C.F.R. § 3130.0-2 (stating the same limitations period).

[109] 77 Fed. Reg. 76,515 (Dec. 28, 2012).

[110] NAEC Br. at 23-24.

[111] *Id.* at 22-25.

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sufficiently site-specific to meet BLM's NEPA obligations for the lease sale").[112] Because these arguments challenge the adequacy of the 2012 IAP EIS, they are time-barred.

NAEC cannot avoid the statute of limitations by characterizing its case as a challenge to the adequacy of BLM's DNA Worksheets. That is so "because a DNA is 'not [a] new NEPA analys[is],'" and "the fate of any action justified by a DNA 'must rise or fall on the contents of the previously issued NEPA documents.'"[113] Accordingly, NAEC's present NEPA claims are (and can only be) a challenge to the adequacy of the 2012 IAP EIS, and those claims are time-barred.

In the 2012 IAP EIS, BLM clearly expressed its intent that no further site-specific NEPA analysis was required prior to issuing leases. The 2012 IAP EIS stated that the 2013 IAP will "authorize multiple lease sales," and that "all lands that the record of decision determines to be available for leasing would be offered in the first and subsequent lease sales."[114] The 2012 IAP EIS also explained that BLM would *not* conduct additional NEPA analysis prior to the first sale, or each subsequent sale, so long as BLM continued to find the "existing analysis to be adequate."[115] Thus, the fundamental and express premise of the 2012 IAP EIS is *that no additional NEPA analysis would be performed prior to individual sales*, unless and until BLM determined that the 2012 IAP EIS needed to be supplemented or revised. If NAEC disagreed with that approach to analyzing the impacts of lease sales, it was required to challenge that decision within the NPRPA's limitations period.

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[112] AR 4489.

[113] *Friends of Animals v. United States Bureau of Land Mgmt.*, 232 F. Supp. 3d 53, 57 (D.D.C. 2017) (quoting *S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1264 (D. Utah 2006)).

[114] AR 0023.

[115] *Id.*

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Nor is there any credible argument that BLM's subsequent lease decisions in 2017 somehow reopened the opportunity to challenge the 2012 IAP EIS.[116] Congress was clear that the statute of limitations period is triggered by the date that the "notice of the availability of such statement is published in the Federal Register," and that period has indisputably expired.[117] Moreover, while BLM did make a determination of NEPA "adequacy" for the 2017 Lease Sale, that determination of adequacy is limited by BLM regulation to considering whether "new circumstances, new information or changes in the action or its impacts . . . may result in *significantly different* environmental effects."[118] A DNA does not reopen the original NEPA analysis itself or supplement an existing NEPA document; it simply reviews new information and new circumstances to see if additional NEPA analysis is needed.[119]

Furthermore, allowing NAEC to collaterally attack the adequacy of the 2012 IAP EIS through a subsequent lease sale would frustrate the purpose of the NPRPA statute of limitations for NEPA challenges. As set forth above, in passing the 1980 amendments to the NPRPA, Congress carefully considered balancing the need for expedited permitting and environmental protection, and came down in favor of measures to "assure minimum delays" and provide "accelerated judicial review" of NEPA decisions.[120] Indeed, the very issue that NAEC raises now (the need for a more specific analysis) was raised in public comments on the 2012 IAP EIS and rejected by BLM.[121] NAEC had a full and fair opportunity to challenge the adequacy of the

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[116] *See Sierra Club v. Slater*, 120 F.3d 623, 630-31 (6th Cir. 1997) (rejecting argument that final decision on EIS "somehow became un-final by virtue of the fact that it was later necessary to evaluate the necessity for a supplemental EIS").

[117] 42 U.S.C. § 6506a(n)(1).

[118] 43 C.F.R. § 46.120(c) (emphasis added).

[119] *Id.*

[120] Senate Committee Report at 34.

[121] *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. The plan

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2012 IAP EIS by timely filing a lawsuit within 60 days after the EIS was published. NAEC was on notice that the 2012 IAP EIS would cover "subsequent annual lease sales" and that BLM would not conduct a site-specific analysis until "BLM receives an application to approve an action on the ground."[122]

NAEC has slept on its rights. NAEC allowed the period for challenging the 2012 IAP EIS to expire. NAEC allowed four other individual lease sales in 2013, 2014, 2015, and 2016 to proceed without a "site-specific" EIS unchallenged. NAEC's "site-specific" arguments are time-barred and fail as a matter of law.

B. NAEC's "Site-Specific" Arguments Have No Legal Merit.

Even if the statute of limitations did not apply (and it does), NAEC's demand for a more site-specific EIS is still without merit. The principle thrust of NAEC's argument is that NEPA requires a "site-specific" EIS prior to the issuance of any leases, and that BLM could not simply rely on the "programmatic" EIS issued in 2012.[123] As detailed below, there are many fatal flaws with this argument, including the fact that NAEC already made and lost this same argument before both this Court and the Ninth Circuit.

Most fundamentally, the argument makes no practical or pragmatic sense. The "key" issue decided in the 2013 IAP, and evaluated in the 2012 IAP EIS, was which lands to make "available for oil and gas leasing."[124] The 2012 IAP EIS fully evaluated the expected impacts of making 11.8 million acres "available" for leasing using a hypothetical development scenario.[125]

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describes impacts in the context of the environment, such as types of habitat and size of species population. Site-specific analysis will occur when BLM receives an application to approve an action on the ground.").

[122] AR 0023; AR 1881.

[123] NAEC Br. at 18.

[124] AR 0006, 0007.

[125] *See supra* Section II.C.

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Under NAEC's theory, BLM, having just completed a 2,000-plus-page EIS in December of 2012 on the decision to make 11.8 million acres of land "available for oil and gas leasing," should have *immediately* turned around and completed *another* EIS in 2013 to decide which of the *available* lands should be made *available* in a lease sale (and then absurdly repeated that same time-consuming NEPA process analysis every year thereafter). BLM made the decision as to which lands should be "available for oil and gas leasing" in 2013 and analyzed the impacts in the 2012 IAP EIS. The law is clear that BLM is "not required to make a new assessment under NEPA every time it takes a step that implements a previously studied action," or needlessly "repeat" that exercise over and over again for each annual lease sale.[126]

Additionally, it is hard to understand how repeating the NEPA analysis for each lease sale (as NAEC apparently claims is required) on an annual basis would make that analysis any more "site-specific." The 2012 IAP EIS evaluated the impacts of leasing 11.8 million acres. The 2017 Lease Sale offered 10.3 million acres for sale. BLM had no better way in 2017 to evaluate the site-specific impacts of a 10.3 million acre sale than it did in 2012 for 11.8 million acres, and would simply have had to repeat the hypothetical analysis used in the 2012 IAP EIS. Indeed, the results of the 2017 Lease Sale confirm the inherent problems with developing a more exacting site-specific analysis at the lease sale stage: BLM offered 10.3 million acres for lease, but received bids on *less than 80,000 acres*. The results of NPR-A lease sales are entirely unpredictable.

NEPA does not require the absurd process suggested by NAEC, and the Ninth Circuit has already rejected nearly identical arguments in *Northern Alaska Environmental Center v.*

[126] *Mayo v. Reynolds*, 875 F.3d 11, 16, 21 (D.C. Cir. 2017) (rejecting argument that agency needed to conduct a new NEPA analysis each year for a multi-year program).

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Kempthorne.[127] It that case, NAEC challenged the adequacy of the EIS prepared for a prior IAP in the Petroleum Reserve (a regional equivalent of the 2012 IAP EIS) and argued "that by not undertaking a parcel by parcel analysis of the environmental consequences of projected exploration and drilling, BLM had failed to satisfy the NEPA requirement of site specific analysis."[128] The Ninth Circuit rejected NAEC's claim, affirming the use of a hypothetical development scenario and pragmatically observing that "until the lessees do exploratory work, the government cannot know what sites will be deemed most suitable for exploratory drilling, much less for development."[129] The Ninth Circuit explained that this hypothetical analysis "at the leasing stage" (*i.e.*, development of the regional IAP) satisfied NEPA, and concluded that NAEC's position was an impossible "'chicken or egg' conundrum in that if plaintiffs' interpretation of its requirements were adopted, NEPA could never be satisfied in the circumstances of this case."[130] NAEC has therefore litigated and lost this argument, and the law is settled that "[a]n agency is not required at the lease sale stage to analyze potential environmental effects on a site-specific level of detail."[131]

NAEC implausibly relies on *Conner v. Burford*—just as it unsuccessfully did in *Northern Alaska Environmental Center v. Kempthorne*.[132] As the Ninth Circuit explained in *Northern Alaska Environmental Center v. Kempthorne*, "*Conner* is of no assistance to plaintiffs," because *Conner* "did not discuss the degree of site specificity required in the EIS."[133] Rather, *Conner*

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[127] *N. Alaska Envtl. Ctr.*, 457 F.3d at 974.

[128] *Id.*

[129] *Id.* at 976.

[130] *Id.* at 974, 976.

[131] *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 493-94 (9th Cir. 2014).

[132] *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988); *N. Alaska Envtl. Ctr.*, 457 F.3d at 976 ("Plaintiffs place principal reliance on *Conner*, but we do not believe it advances their position in this case.").

[133] *N. Alaska Envtl. Ctr.*, 457 F.3d at 976.

addressed only "whether [an EIS] had to be completed at all" because BLM had issued leases *without conducting any EIS*.[134] Here, as in *Northern Alaska Environmental Center v. Kempthorne*, BLM prepared the 2012 IAP EIS to cover subsequent leasing decisions, including the 2017 leasing decision.[135]

NAEC tries to distinguish *Northern Alaska Environmental Center v. Kempthorne* by incorrectly arguing that the "court assumed that, after issuing the leases, BLM still had the ability to prohibit or deny leases."[136] The Ninth Circuit found that once the leases issued, "the government cannot, however, consistent with current statutory imperatives, forbid all oil and gas development," and that the "leasing program thus does constitute an irretrievable commitment of resources."[137] Therefore, "[a]n EIS is undeniably required, and, indeed one has been prepared."[138] Similarly, here, the 2013 IAP decided which parcels to make "available" for leasing. This is an "irretrievable commitment of resources" requiring an EIS, and BLM prepared an EIS, just as it did in *Northern Alaska Environmental Center v. Kempthorne.*

Finally, NAEC's flawed legal arguments are further belied by its mischaracterizations of the record and misunderstanding of the 2012 IAP EIS. NAEC selectively quotes the Record of Decision ("ROD") to suggest that the 2012 IAP EIS is only "suitably specific for broad-scale

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[134] *Id.*

[135] NAEC claims that "*Conner* instructs" that "BLM needed to conduct a site-specific analysis prior to the lease." NAEC Br. at 22. *Conner* makes no such instruction. As the court in *Northern Alaska Environmental Center v. Kempthorne* explains, *Conner* addressed only the need for an EIS at all, not "the degree of site specificity required in the EIS." 457 F.3d at 976.

[136] NAEC Br. at 24.

[137] *N. Alaska Envtl. Ctr.*, 457 F.3d at 966.

[138] *Id.* NAEC also makes much ado about the difference between "NSO" leases and "non-NSO" leases. However, the court in *Northern Alaska Environmental Center v. Kempthorne* already decided that NPR-A leases are more like "non-NSO" leases, meaning an EIS has to be prepared for those lease sales, *and* that an EIS that projected hypothetical development scenarios on those leases (exactly as prepared here) was sufficient at the "leasing stage." *Id.* at 977.

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management decisions made in this ROD."[139] But the ROD's "broad-scale management decision[]" was expressly to make *all 11.8 million acres* "available for oil and gas leasing" and, accordingly, the 2012 IAP EIS evaluates the environmental impacts associated with leasing all 11.8 million acres.[140] As BLM stated, "[t]he impact analysis provides suitable specificity of analysis for broad scale management decisions, *such as determinations of what lands to make available for leasing.*"[141] The 2012 IAP EIS therefore fully supports the decision to lease all 11.8 million acres made available for leasing, including the 10.3 million acres at issue in the 2017 Lease Sale.

NAEC also cherry-picks the 2012 IAP EIS to suggest that the document contemplated future "site-specific" NEPA analyses.[142] But the future "site-specific" analysis contemplated in the EIS is expressly for *permits* for "action on the ground" activities such as exploration and development.[143] For all leases issued under the 2013 IAP, "[a]ll surface disturbing activities such as exploratory drilling, road/pipeline construction, seismic acquisition, and overland moves require additional authorization(s) issued subsequent to leasing,"[144] and those subsequent authorizations will require site-specific NEPA analysis.[145] This is precisely the framework approved in *Northern Alaska Environmental Center v. Kempthorne*, in which the Ninth Circuit

[139] NAEC Br. at 162 (citing AR 3434).
[140] AR 3434.
[141] AR 1881(emphasis added).
[142] NAEC Br. at 23.
[143] AR 3434; AR 0023 (identifying specific actions that will require subsequent site-specific NEPA review).
[144] AR 9614 (Lease Stipulations and Best Management Practices).
[145] AR 3434.

affirmed that a hypothetical analysis was appropriate for the "leasing stage" and that the need for greater "site analysis" will arise at "the exploration and permit stages."[146]

In sum, the applicable law is well settled and dispositive. In *Northern Alaska Environmental Center v. Kempthorne*, the Ninth Circuit held that a NEPA review of a leasing plan that utilizes a hypothetical analysis, just as was performed here, constitutes lawful NEPA review at the "lease stage." Thus, even if NAEC had timely challenged the adequacy of the 2012 IAP EIS (and it did not), its desire for a more exacting site-specific analysis at the lease stage is foreclosed by binding precedent.

C. BLM Was Not Required to Supplement the 2012 IAP EIS.

NAEC's alternative argument is that there is "new information" available about the direct, indirect, and cumulative impacts of the lease sales, and that BLM did not take a sufficiently "hard look" at that new information before issuing the 2017 Lease Sale.[147] NAEC again starts with from the wrong premise. As set forth above, BLM's 2012 IAP EIS was intended to (and did) cover all subsequent lease sales.

BLM is only required to supplement an EIS if "(i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on

[146] *N. Alaska Envtl. Ctr.*, 457 F.3d at 977-78. Indeed, this is precisely what has occurred in the Petroleum Reserve. BLM prepared a detailed and comprehensive Supplemental EIS analyzing the environmental impacts from development of the GMT-1 project, which went unchallenged. *See* U.S. Department of the Interior, Bureau of Land Management, SEIS, Record of Decision (Feb. 20, 2015), https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=50912. BLM has similarly prepared a Draft SEIS analyzing the environmental impacts from development of the GMT-2 project, and will finalize the SEIS before the project begins. *See* U.S. Department of the Interior, Bureau of Land Management, Draft SEIS (June 21, 2018), https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage&currentPageId=94250.

[147] NAEC Br. at 25-44.

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the proposed actions or its impacts."[148] This "new information" must present "a *seriously* different picture of the environmental landscape."[149] Similarly, the "new circumstances, new information or changes in the action or its impacts" require supplementation only if they demonstrate "*significantly different* environmental effects."[150] One of the core purposes of a DNA is to document whether or not a supplemental EIS is required.[151] BLM appropriately conducted that review, documented its review in DNA Worksheets, and reasonably concluded that supplementation is not required here. There have been no "changes in the proposed action," and the five new categories of information identified by NAEC do not demonstrate "significantly different environmental effects." Accordingly, BLM and CPAI are entitled to summary judgment on this issue.

1. NAEC Overlooks the Standard Applicable to Supplementation.

As threshold issue, NAEC fails to cite the binding regulatory standards for NEPA supplementation, let alone argue that those standards required BLM to supplement the 2012 IAP EIS. NAEC also fails to address the deferential standard of review applied by courts to agency decisions not to supplement.

The court's "role in reviewing an agency's decision not to prepare an EIS is a 'limited' one, 'designed primarily to ensure that no arguably significant consequences have been

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[148] 40 C.F.R. § 1502.9(c).

[149] *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (explaining that a supplemental impact statement is "only required where new information 'provides a *seriously* different picture of the environmental landscape'" (quoting *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 274 (D.C. Cir. 2002))).

[150] 43 C.F.R. § 46.120(c) (emphasis added).

[151] NEPA Handbook § 5.1 ("You may also use the DNA to evaluate new circumstances or information prior to issuance of a decision to determine whether you need to prepare a new or supplemental analysis"); AR 9725 (DNA Worksheet asking whether the EIS remains "valid in light of any new information or circumstances"); *Friends of Animals*, 232 F. Supp. 3d at 62 (relying on discussion in DNA to reject argument that BLM should have supplemented EIS).

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ignored."'[152] As this Court has explained, "[w]hether an SEIS is required is a classic example of a factual dispute the resolution of which implicates substantial agency expertise."[153] Courts must affirm an agency decision "not to supplement" an EIS under NEPA so long as that decision "was not 'arbitrary or capricious.'"[154] The decision as to whether to supplement an EIS "requires a high level of technical expertise," and courts "must defer to the informed discretion of the responsible federal agencies."[155] In deciding whether an agency decision not to supplement is arbitrary or capricious, "the reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[156] This inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one."[157]

NAEC entirely ignores these well-established standards. BLM carefully reviewed each piece of "new" information identified by NAEC and provided its reasoned explanation in the record. NAEC identifies no "clear error in judgment" or information that was overlooked by BLM in its DNA Worksheets. NAEC simply *disagrees* with BLM's conclusions in the DNA and Revised DNA Worksheets, and, ultimately, with the Obama Administration's decision in 2013 to make these lands available for leasing. However, "NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency, as NEPA was not intended to

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[152] *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1323 (D.C. Cir. 2015) (quoting *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006)).

[153] *Kunaknana*, 23 F. Supp. 3d at 1089-90 (internal quotation marks and citation omitted).

[154] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989).

[155] *Id.* (internal quotation marks and citation omitted); *see also Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.").

[156] *Marsh*, 490 U.S. at 378 (internal quotation marks and citation omitted).

[157] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

resolve fundamental policy disputes."[158] NAEC has failed to demonstrate that supplementation is required.

2. The Revised DNA Worksheet Is Part of the Record and Must Be Considered.[159]

Instead of addressing the applicable legal standard for supplementation based on the record, NAEC asks the Court to ignore the Revised DNA Worksheet. But NAEC concedes that the Revised DNA Worksheet is part of the agency record and cites no legal authority for the proposition that a reviewing court can simply disregard portions of the accepted administrative record. The Court's "review is limited to 'the administrative record already in existence, not some new record made initially in the reviewing court.'"[160] The Court must review the "record that was actually before the agency," not a different version of the record preferred by NAEC.[161]

NAEC's justification for its novel position is that the Revised DNA Worksheet was signed too late in the process (or is somehow *post hoc*) and should have been completed prior to offering the 2017 Lease Sale. However, NAEC overlooks the relevant procedural history. BLM completed its original DNA in September of 2017, in advance of the 2017 Lease Sale.[162] On December 22, 2017, 16 days after the sale occurred, the USGS released the 2017 USGS assessment. BLM had not yet signed the leases, and, therefore, its lease decision was not yet final as of that date.[163] BLM believed that this 2017 USGS assessment warranted discussion and

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[158] *Mayo*, 875 F.3d at 24 (internal quotation marks and citations omitted).

[159] NAEC also challenges the adequacy of the original DNA Worksheet issued on September 26, 2017. But the 2018 Revised DNA Worksheet expressly "supersedes" the prior DNA Worksheet. AR 9723. Accordingly, NAEC's challenge to that earlier DNA Worksheet are moot.

[160] *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

[161] *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012).

[162] AR 9516.

[163] AR 9723 (footnote 1).

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issued the Revised DNA Worksheet prior to finalizing the leases.[164] The Revised DNA Worksheet plainly states (and NAEC does not refute) that BLM undertook this review "prior to deciding whether to issue leases under the 2017 lease sale."[165]

At bottom, NAEC's "post hoc" argument misunderstands the function of the DNA Worksheet. The DNA Worksheet is not itself a decisional document; it merely documents the review made by the agency. As the DNA Worksheet states, "[t]he signed conclusion of this Worksheet is part of an interim step in the BLM's internal decision process and does not constitute an appealable decision."[166] Similarly, BLM's NEPA Handbook explains that the "DNA worksheet is not itself a NEPA document" and instead merely "documents the review to determine whether the existing NEPA documents can satisfy the NEPA requirements for the proposed action currently under consideration."[167] Accordingly, the DNA Worksheet is not a *decision* in the record; the DNA Worksheet *is the record* that supports BLM's conclusion that the prior NEPA analysis is adequate.

Indeed, as this Court previously explained, an agency making a supplementation decision "must only 'make a reasoned decision documented in the record'. . . . No specific form of documentation is required."[168] Nor is there a timing requirement for the DNA, and the explanation for the decision not to supplement can be made in the final ROD.[169] Thus, the Ninth

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[164] *Id.*

[165] *Id.*

[166] AR 9731.

[167] NEPA Handbook § 5.1.3.

[168] *Kunaknana*, 23 F. Supp. 3d at 1090 n.208 (ellipsis in original; citation omitted); *see also Price Road Neighborhood Ass'n, Inc. v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997) (noting neither NEPA nor CEQ regulations discuss how agencies should make determination whether SEIS is required).

[169] *Nat. Res. Def. Council, Inc. v. Evans*, 232 F. Supp. 2d 1003, 1043-44 (N.D. Cal. 2002) (affirming agency's decision not to prepare SEIS based on agency's satisfactory explanation for that decision in

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Circuit has affirmed an agency decision not to supplement, even when the agency skipped the DNA assessment altogether and simply noted in the final ROD that the selected alternative was "fully analyzed" in the EIS.[170]

The question presented is not *when* the Revised DNA Worksheet was signed, but whether the record "contain[s] a reasoned explanation for the agency's decision not to prepare an SEIS."[171] Here, the necessary reasoned explanation is provided in the record in the Revised DNA Worksheet. Nothing more is required.[172]

3. None of the Information Identified by NAEC Meets the Standard Requiring Supplementation of the 2012 IAP EIS.

In any event, the five categories of information identified by NAEC fail to present a "seriously different picture of the likely environmental harms stemming from the" leasing program as evaluated in the 2012 IAP EIS.[173] As set forth below, the five categories identified by NAEC do not demonstrate that the "remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered."[174]

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a ROD); *Protect Our Cmtys. Found. v. Black*, 240 F. Supp. 3d 1055, 1068 (S.D. Cal. 2017) (affirming decision not to supplement based on the ROD).

[170] *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 854-55 (9th Cir. 2013) (finding no error where agency did not complete supplemental information report [the Forest Service analogue to a DNA] because the ROD provided "adequate documentation of the Forest Service's reasoned decision that no SEIS was required").

[171] *Kunaknana*, 23 F. Supp. 3d at 1090.

[172] NAEC further tries to confuse the issue by claiming that BLM's regulations at 43 C.F.R. § 3131.2 require NEPA compliance before lease tracts are selected for sale. NAEC Br. at 26. For the reasons discussed above, this argument misses the point. BLM complied with NEPA prior to selecting leases for sale by preparing the 2012 IAP EIS. The 2017 Lease Sale "is part of the preferred alternative previously analyzed in the IAP/EIS." AR 9724. BLM thus complied with its regulations by conducting a full EIS before selecting leases for sale. In contrast, there is no regulation that establishes when or how the decision to supplement must be made.

[173] *Tri-Valley CAREs*, 671 F.3d at 1130 (internal quotation marks and citation omitted).

[174] *Marsh*, 490 U.S. at 374 (citation omitted).

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a. The 2017 USGS assessment does not require a supplemental EIS.

Plaintiffs first contend that the 2017 USGS assessment is "significant information" because it upwardly revised the USGS estimates for technically recoverable oil in "areas near and in the Reserve nearly six-fold" and that this information "should have been considered as part of a NEPA analysis."[175] But NAEC does not explain how USGS's revised analysis of the amount of oil in the ground in and around the Petroleum Reserve paints a "seriously different picture of the likely environmental harms stemming from the" leasing program as evaluated in the 2012 IAP EIS.[176] The relevant inquiry is not how much oil is in the ground, or technically recoverable, but how much *development* (and associated environmental impact) is likely to occur in the Petroleum Reserve as a result of the leasing program.

BLM carefully considered the 2017 USGS assessment in the Revised DNA Worksheet and reasonably concluded that it did not change its NEPA analysis.[177] Principally, BLM explained that the 2017 USGS assessment and the 2011 USGS economic analysis estimated different variables, and were "much like comparing apples and oranges."[178] One estimates what is "technically recoverable" and the other what is "economically recoverable."[179] BLM reasonably determined that that the 2011 USGS economic analysis (which considered the real-world cost of development) was more instructive, and the fact that more oil may be technically recoverable (but economically unfeasible) did not give BLM reason to alter the "hypothetical reasonably foreseeable development scenario" utilized in the 2012 IAP EIS.[180]

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[175] NAEC Br. at 32-33.

[176] *Tri-Valley CAREs*, 671 F.3d at 1130 (internal quotation marks and citation omitted).

[177] AR 9726.

[178] *Id.*

[179] *Id.*

[180] *Id.*

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This is all that is required of BLM. Although NAEC may disagree with BLM's explanations and conclusions about the relative importance of technical versus economic recoverability on future development scenarios, this is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise."[181] Because BLM explained its reasoning in the record, the Court "must defer to the [BLM's] finding that a supplemental [EIS] was not required."[182]

b. The Willow discovery does not warrant a supplemental EIS.

NAEC next contends that that CPAI's discovery at Willow within the Petroleum Reserve "has the potential to significantly magnify the direct and indirect, and cumulative impacts to subsistence and other resources in the region," and therefore "should have been fully considered in a NEPA analysis" before issuing the 2017 leases.[183] This argument also fails because BLM rationally explained its decision not to supplement in the Revised DNA Worksheet. BLM carefully reviewed the Willow discovery in the Revised DNA Worksheet, and concluded that the "size and scope" of the Willow discovery and the "resulting amount of oil and gas infrastructure and activity that is likely required to develop it are very much in line with" the effects of the leasing program as estimated in the 2012 IAP EIS.[184]

NAEC mistakenly argues that the 2012 IAP EIS failed to address the new central processing unit that may be required by Willow because the 2012 IAP EIS supposedly contemplated *zero* new central processing units in the Greater Moose Tooth and Bear Tooth units.[185] The flaw in this argument is that it relies on 2012 IAP EIS Table 4-7, which only applies

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[181] *Kunaknana*, 23 F. Supp. 3d at 1089-90 (internal quotation marks and citation omitted).
[182] *Tri-Valley CAREs*, 671 F.3d at 1130.
[183] NAEC Br. at 34-37.
[184] AR 9727.
[185] NAEC Br. at 36.

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to expected development for *existing* discoveries in the Greater Moose Tooth and Bear Tooth units.[186] It does not apply to "undiscovered" oil and gas. For "undiscovered" oil and gas, 2012 IAP EIS Table 4-13 projected *eight new central processing facilities* in the Petroleum Reserve.[187] Willow was an "undiscovered" oil reserve at the time of the 2012 IAP EIS. Thus, the addition of *one* new central processing facility for the Willow discovery is plainly in line with the expectation that the leasing program would result in up to *eight* new central processing facilities. When, as here, "[a]ll the environmental effects seen during the years after the promulgation of [a] Plan and EIS had been anticipated and analyzed in the original environmental assessment," an agency has "no duty to prepare a supplemental or new EIS."[188]

NAEC's arguments about the size of the Willow discovery are also mistaken. NAEC claims that the Greater Moose Tooth and Bear Tooth units were only expected to produce 120 million barrels of oil, and that Willow could produce an estimated 300 million barrels. However, the 120 million barrel estimate for Greater Moose Tooth and Bear Tooth units applies to "discovered" oil and gas, not "undiscovered" oil and gas.[189] For undiscovered oil, BLM estimated 491 million barrels of production from the Petroleum Reserve.[190]

Furthermore, even if the amount of oil discovered actually *substantially exceeded* the amount of oil discoveries projected in the 2012 IAP EIS, BLM was still not required to prepare a supplemental NEPA document. In *Theodore Roosevelt Conservation Partnership v. Salazar*, the D.C. Circuit rejected similar arguments that BLM was required to supplement an EIS for a leasing program on the grounds that the EIS estimated 1,440 wells, but BLM approved projects

[186] AR 0588.

[187] AR 0606-0610 (Table 4-13); *see also* AR 0610-0613 (Table 4-14 – combining tables 4-7 and 4-13).

[188] *Mayo*, 875 F.3d at 22.

[189] AR 0585.

[190] AR 0594.

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"far exceed[ing] th[at] projection."[191] The court explained that the estimate was not a "hard cap on the actual number of wells that can be drilled," and that the EIS simply serves as an "analytical baseline for evaluating . . . impacts, not a point past which further exploration and development is prohibited."[192] Instead, the relevant question was not the number of wells, but whether "the environmental impact of that drilling has exceeded the impact contemplated" by the EIS.[193]

As was the case in *Theodore Roosevelt*, the 2012 IAP EIS states that "estimates of oil and gas resources are necessary to provide the basis for identifying areas for possible future leasing and projecting reasonably foreseeable exploration and development scenarios for impact analysis."[194] Regardless of the size of the discovery, the expected environmental impacts (one central processing facility supported by satellite wells) is within the scope of environmental effects contemplated by the 2012 IAP EIS, and the actual development of that project will be the subject of a detailed supplemental EIS. In sum, the size of the Willow discovery does not paint a "*seriously* different picture of the likely environmental harms stemming from the" leasing program as evaluated in the 2012 IAP EIS.[195]

c. The "other" developments identified by NAEC do not warrant a supplemental EIS.

NAEC next asserts that discoveries outside of the Petroleum Reserve at Pikka and Horseshoe, and at Smith Bay, raise concerns about significant cumulative impacts with actions inside the Petroleum Reserve that were not contemplated in the 2012 IAP EIS. However, again,

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[191] 616 F.3d 497, 509 (D.C. Cir. 2010).

[192] *Id.* (internal quotation marks and citation omitted).

[193] *Id.*

[194] AR 0590.

[195] *Tri-Valley CAREs*, 671 F.3d at 1130 (emphasis added; internal quotation marks and citation omitted).

none of these potential projects paint a "seriously different picture of the likely environmental harms stemming from the proposed project."[196]

NEPA requires a federal agency conducting a NEPA analysis to consider the cumulative impacts of a proposed action. Cumulative impacts are defined 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."[197] The 2012 IAP EIS devotes nearly 300 pages to evaluating the cumulative effects of the leasing program.[198] The "spatial domain" of the cumulative impact analysis was not limited to the Petroleum Reserve, but extends "across much of the North Slope" including "the contiguous State and Native lands to the east of the NPR-A that have potential cumulative relationships with resources and peoples in the NPR-A."[199] The cumulative impact analysis also included future actions so long as those actions were "reasonably foreseeable" and not "speculative."[200]

BLM reasonably determined that the discoveries at Pikka/Horseshoe and Smith Bay do not require BLM to update its analysis. Starting with Smith Bay, as BLM explains in its Revised DNA Worksheet, the possibility of developing this "potential discovery" is far too uncertain at this time to qualify as a cumulative impact.[201] The discovery is presently "unsubstantiated given that the wells were not flow tested" and without "additional delineation wells."[202] Moreover, Caelus estimates that only 30-40% of its unsubstantiated discovery may be technically recoverable, and the "amount of leases or acreage that could possibly be committed to an

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[196] *Id.* (internal quotation marks and citation omitted).
[197] 40 C.F.R. § 1508.7.
[198] AR 1371-1666.
[199] AR 1372.
[200] *Id.*
[201] AR 9727.
[202] *Id.*

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exploratory unit to potentially develop this prospect is unknown."[203] These future impacts (if they occur at all) are too speculative at this time to qualify as reasonably foreseeable cumulative impacts *at all*, let alone significant new information showing a "*seriously* different picture of the likely environmental harms stemming from the" 2017 Lease Sale.[204]

Again, the D.C. Circuit's decision in *Theodore Roosevelt* is instructive. In that case, the plaintiffs argued that BLM was required to include two proposed development projects in its cumulative impacts analysis for a leasing program, relying on the fact that BLM had issued a notice of intent to produce an EIS for those projects in the Federal Register.[205] The D.C. Circuit rejected the argument, finding that the "incipient notion . . . expressed in notices of intent to prepare an EIS for each did not establish reasonable foreseeability of the incremental impact of those projects."[206] As the court explained, oil and gas projects "in their infancy have uncertain futures," and oftentimes BLM does not know "the actual scope of the project, much less its environmental impact, until several years after the [BLM] published its notice of intent to prepare an EIS."[207]

These uncertainties apply with greater force here. Smith Bay is a "potential discovery" that is "unsubstantiated," and at this point in time "it is questionable whether it is economically viable."[208] The plans to develop that discovery are far less advanced that those found to be

[203] *Id.*

[204] *Tri-Valley CAREs*, 671 F.3d at 1130 (internal quotation marks and citation omitted). And even if development of Smith Bay was not speculative at this time, that potential development of Smith Bay was discussed as a possibility in the 2012 IAP EIS. AR 1389.

[205] 616 F.3d at 512.

[206] *Id.* at 513.

[207] *Id.*

[208] AR 9727, 9729-9730.

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speculative in *Theodore Roosevelt*. Accordingly, the potential development of Smith Bay presents no basis for triggering a supplemental EIS.

As for the future development of Pikka and Horseshoe, NAEC fails to provide any evidence that these developments (if they ultimately take place) present a "seriously different picture of the likely environmental harms stemming from the" 2017 Lease Sale.[209] The 2012 IAP EIS evaluated *200 years* of cumulative impacts from oil and gas (and non-oil and gas) activities all across the North Slope from 1900 through 2100, including, specifically, past and future development in the areas where Pikka and Horseshoe are located.[210] This included an analysis of the cumulative impacts of producing 16.4 billion barrels in the area studied between 1977 and 2012 and the projected cumulative impacts of producing 11.24 billion barrels of oil between 2012 and 2100.[211] NAEC fails to explain why the Pikka/Horseshoe discovery (potentially up to one billion barrels), assuming that it is fully developed, will paint a seriously different picture of the cumulative impacts discussed in the 2012 IAP EIS. Accordingly, the Revised DNA Worksheet appropriately and reasonably concluded that this future development would not meaningfully alter BLM's analysis of the anticipated impacts of the development of the Petroleum Reserve. [212]

The Seventh Circuit's decision in *Habitat Education Center v. U.S. Forest Service* [213] is also instructive. In that case, the plaintiffs argued that the EIS for two timber projects had to be supplemented to account for a third project that was proposed after the draft EIS issued. The court rejected that argument for two reasons. First, the court found that "the record is devoid of

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[209] *Tri-Valley CAREs*, 671 F.3d at 1130 (internal quotation marks and citation omitted).
[210] AR 1372, 1400-1401.
[211] AR 1414 (Table 4-39).
[212] AR 9727.
[213] 673 F.3d 518 (7th Cir. 2012).

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any new scientific evidence that might have caused the [agency] to reassess the assumptions underlying its previous cumulative impacts analysis."[214] Second, the court reasoned that the "environment remains protected against the cumulative impacts of all three projects together because the future action must eventually be analyzed as a 'present' action, taking into account the other two, now 'past,' projects."[215]

The reasoning in *Habitat Education Center* applies here. NAEC has submitted no "new scientific evidence" showing (and provided no explanation demonstrating) how or why the scope of any reasonably foreseeable development at Pikka and Horseshoe seriously undermines the assumptions in the 2012 IAP EIS. Indeed, the 2012 IAP EIS projected significant and continued development in the area of Pikka and Horseshoe (including significant gas development that has yet to come to pass).[216] Furthermore, as was the case in *Habitat Education Center*, any impacts that are not presently capable of analysis will not go unaddressed because the Pikka/Horseshoe development is subject to its own detailed EIS and the impact of that development, along with any development that has actually occurred or is likely to occur in the Petroleum Reserve, will be evaluated. BLM's supplementation decision was not arbitrary and capricious under these circumstances.

d. The results of the 2016 Lease Sale do not warrant a supplemental EIS.

NAEC next argues that the results of the prior lease sale in 2016 (the "2016 Lease Sale") are "new information" because that sale resulted in the leasing of over 600,000 acres (about 5% of the 11.8 million acres made available for oil and gas leasing). But leasing of this magnitude

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[214] *Id.* at 531.

[215] *Id.* at 529; *see also Nat. Res. Def. Council v. FAA*, 564 F.3d 549, 562 (2nd Cir. 2009) (rejecting claim that supplementation is required, in part, because cumulative impact from future project "may itself become the object of an appropriate study under . . . NEPA").

[216] AR 1411-1412.

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(indeed far greater than this magnitude) was contemplated in the 2012 IAP EIS. The 2012 IAP EIS evaluated leasing alternatives ranging from leasing 11 million acres of the Petroleum Reserve (Alternative B-1) to leasing the *entire* 22.8 million acres of the Petroleum Reserve (Alternative D). There is no plausible argument that the leasing of 600,000 acres presents a seriously different picture of the environmental consequences when the 2012 IAP EIS evaluated the environmental consequences of leasing up to 22.8 million acres and the 2013 IAP authorized the preferred alternative of leasing up to 11.8 million acres.

Indeed, the 2012 IAP EIS conservatively assumed that "[m]ultiple lease sales would be held," and that "[i]ndustry would aggressively lease and explore the tracts offered."[217] BLM explains in the Revised DNA Worksheet that "the IAP/EIS anticipated and accounts for this potential level of leasing, particularly in the Northeastern area of the NPR-A where the 66 newly leased tracts are located and the highest development potential exists."[218] For development under the preferred alternative, the 2012 IAP EIS estimated, among many other things, the construction of 20 exploratory oil wells, 56 exploratory gas wells, eight central processing units, 14 oil production pads, 566 miles of in-field gravel road, 29 runways, 21 gravel production pad/central processing gas compressor facilities, hundreds of miles of oil and gas pipelines, and 59,342 miles of ice roads.[219] Development of the Petroleum Reserve to date does not remotely approach this scenario.[220]

Accordingly, here again, the "record is devoid of any new scientific evidence that might have caused the [agency] to reassess the assumptions underlying its previous cumulative impact

[217] AR 0518.

[218] AR 9728.

[219] AR 0610-0613 (Table 4-14).

[220] *Mayo*, 875 F.3d at 22 ("All the environmental effects seen during the years after the promulgation of the 2007 Plan and EIS had been anticipated and analyzed in the original environmental assessment. Therefore, the Park Service had no duty to prepare a supplemental or new EIS.").

analysis."[221] Although NAEC may disagree with BLM's conclusions, this is "a classic example of a factual dispute the resolution of which implicates substantial agency expertise."[222] Because BLM explained its reasoning in the record, the Court "must defer to the [BLM's] finding that a supplemental [EIS] was not required."[223]

e. The Greater Moose Tooth-1 project does not require supplementation of the 2012 IAP EIS.

Lastly, NAEC argues that the Greater Moose Tooth-1 supplemental EIS found greater-than-expected impacts to subsistence users, and that those impacts require a new analysis. This is also a "a classic example of a factual dispute," and BLM has appropriately explained its decision that supplementation is not required. As BLM explains, the subsistence findings for Greater Moose Tooth-1 "involved a unique risk to subsistence use because the proposed project was to be located in the Fish Creek Setback, a critical subsistence use area for residents of Nuiqsut," that was otherwise protected from "permanent oil and gas facilities" under the 2012 IAP EIS.[224] The supplemental EIS for Greater Moose Tooth-1 identified and evaluated a "mitigation package" that "will serve to compensate for additional adverse impacts to subsistence resources and uses due to routing the road and pipeline through the Fish Creek setback."[225] BLM used its expert discretion to reasonably conclude that these mitigated impacts do "not constitute significant new information, and would not substantially change the analysis of potential subsistence impacts resulting from NPR-A leasing and development as described and analyzed in

[221] *Habitat Educ. Ctr.*, 673 F.3d at 531.
[222] *Kunaknana*, 23 F. Supp. 3d at 1089-90 (internal quotation marks and citation omitted).
[223] *Tri-Valley CAREs*, 671 F.3d at 1130.
[224] AR 9729.
[225] AR 11562.

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the 2012 IAP/EIS."[226] Because BLM rationally explained its reasoning in the record, the Court "must defer to the [BLM's] finding that a supplemental [EIS] was not required."[227]

Moreover, the circumstances of Greater Moose Tooth-1 actually confirm why a supplement to the 2012 IAP EIS would make little sense. As the Ninth Circuit explained in *Northern Alaska Environmental Center v. Kempthorne*, at the lease sale stage, the precise effects of leasing specific parcels are "unidentifiable, because the parcels likely to be affected are not yet known."[228] Instead, "such analysis must be made at later permitting stages when the sites, and hence more site specific effects, are identifiable."[229] That is precisely what happened with Greater Moose Tooth-1, and the site-specific impacts associated with necessary construction in an otherwise protected setback were addressed at the site-specific level.[230] This is how the multi-stage leasing program is supposed to work. And, in fact, no one challenged the Greater Moose Tooth-1 project.

In sum, NAEC has identified no information that significantly alters the evaluation of direct, indirect, and cumulative impacts analyzed in the 2012 IAP EIS. This Court should deny its motion for summary judgment.

D. Vacatur Is Not the Appropriate Remedy.

NAEC requests the Court to vacate BLM's 2017 Lease Sale and the leases issued pursuant to that sale.[231] As an initial matter, if this Court finds any merit in the claims asserted by NAEC, CPAI requests the opportunity to more fully address the appropriate remedy through supplemental briefing and argument. CPAI has made a substantial investment in the Petroleum

[226] AR 9729.
[227] *Tri-Valley CAREs*, 671 F.3d at 1130.
[228] 457 F.3d at 977.
[229] *Id.*
[230] AR 9729.
[231] NAEC Br. at 44.

Reserve, and, as relevant here, has invested millions of dollars by submitting the winning high bids at the 2017 Lease Sale. Because the Court's determination of a remedy in this case (should that be necessary) could have serious and far-reaching consequences, CPAI respectfully submits that focused briefing on the remedy after the merits have been decided would better inform that important determination. Notwithstanding this request, CPAI generally addresses below the reasons why the Court should deny NAEC's request for vacatur.

Although an agency action that is held to be unlawful can be set aside under the APA,[232] vacatur is "a species of equitable relief," and "courts are not mechanically obligated to vacate agency decisions that they find invalid."[233] "Whether agency action should be vacated depends on how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[234] As a general matter, vacatur is not warranted here because the NEPA violations alleged by NAEC are relatively minor and curable, and vacatur would have highly disruptive consequences to a competitive leasing process that is an important part of Alaska's economy.

1. The NEPA Violations Alleged by Plaintiffs Are Not So Serious as to Warrant Vacatur.

NAEC's contention that BLM's 2017 Lease Sale violated NEPA is based on two narrow procedural issues, both pertaining to whether BLM is required to perform additional

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[232] 5 U.S.C. § 706(2)(A).

[233] *Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1017 (E.D. Cal. 2013); *see also Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("Although the district court has power to do so, *it is not required to set aside every unlawful agency action*." (emphasis added)); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures."); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("[G]uided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect.").

[234] *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

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environmental analysis before conducting the lease sale. These narrow alleged deficiencies are not the type of "fundamental flaws" that would prevent BLM from making the same or substantially similar decisions on remand.[235] Before conducting the 2017 Lease Sale, BLM carefully evaluated the adequacy of the existing NEPA documentation and properly relied on the comprehensive 2012 IAP EIS to support its decisions. It is hard to image how any additional (and unnecessary) NEPA analyses, as demanded by NAEC, would materially change BLM's decision. Even if the Court finds that additional NEPA analysis is required, the existing NEPA documentation is nonetheless sound and informative in numerous aspects. The agency and the public were already apprised of the likely consequences of the 2017 Lease Sale on environmental impacts.

Moreover, to the extent there is any error in BLM's NEPA analysis, the seriousness of any such error(s) can be "minimized" by the fact that "additional analysis can be completed at the site-specific level before any ground-disturbing actions take place."[236] As discussed above, the lease sale is just the first step towards exploration and development and does not itself authorize any ground-disturbing activities. Each of the subsequent exploration and development stages is subject to independent decision-making and approval by BLM and requires additional

[235] *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) ("We have also looked at whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such *fundamental flaws* in the agency's decision make it unlikely that the same rule would be adopted on remand." (emphasis added)); *see also Allied-Signal*, 988 F.2d at 151 (declining to vacate because there was "at least a serious possibility that the [agency would] be able to substantiate its decision on remand").

[236] *Pac. Rivers Council*, 942 F. Supp. 2d at 1019, 1021 (finding the error in agency's NEPA analysis was not so serious as to warrant vacatur, in part, because "additional analysis can be completed at the site-specific level before any ground-disturbing actions take place").

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NEPA review.[237] Therefore, any NEPA violation during the lease sale stage can be mitigated by additional environmental analysis at a later time and thus is not so serious as to warrant vacatur.

2. Vacatur Would Have Significant Disruptive Consequences.

Vacatur of the 2017 Lease Sale and the leases would have significant disruptive consequences not only to CPAI's investment-backed expectations but also to BLM's management of millions of acres of public land. The Ninth Circuit has made clear that in considering whether vacatur is appropriate, courts should consider economic and other practical concerns.[238] CPAI has already invested hundreds of millions of dollars in the Petroleum Reserve. The 2017 Lease Sale was a competitive sealed bid process; CPAI purchased seven leases for a total amount of over $1 million.[239] CPAI also incurred substantial pre-sale investment in anticipation of the 2017 Lease Sale, including spending millions of dollars in staff time and contractor fees to collect and analyze seismic data.[240] CPAI's substantial investment in data collection and analysis provided it with a competitive advantage in identifying and bidding on the most prospective areas.[241] Vacating these leases will raise serious practical concerns: it will deprive CPAI of its competitive position because in the event of any re-sale of the leased areas, all of CPAI's competitors would know which parcels CPAI values the most and how much it was willing to pay for particular areas.[242] Furthermore, if the leases are invalidated, CPAI will incur additional costs from delay. In *California Communities Against Toxics*, the Ninth Circuit

[237] *N. Alaska Envtl. Center*, 457 F.3d at 977.

[238] *Cal. Cmtys. Against Toxics*, 688 F.3d at 994 ("If saving a snail warrants judicial restraint, so does saving the power supply." (citation omitted)).

[239] Declaration of John F. Schell, Jr. (Dkt. 12) ("Schell Decl.") ¶ 7. *See supra* note 91.

[240] *Id.* at ¶ 10.

[241] *Id.*

[242] *Id.*

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made clear that delaying planned projects is a disruptive consequence that must be considered in determining whether vacatur is warranted.[243]

Additionally, the Court should consider the "unnecessarily harsh result" of divesting CPAI of its property rights if the leases are vacated.[244] The Petroleum Reserve is a key area of interest and investment for CPAI. Losing the leases and the exclusive rights under those leases to explore for and potentially develop and produce oil will impair CPAI's long-term business plans in the area.[245]

Vacatur of the 2017 Lease Sale and the leases will also have disruptive impacts on BLM's management of the Petroleum Reserve. If BLM ultimately decides that leasing the relevant areas is appropriate, it will need to undertake a new lease sale and yet again offer the same areas for lease. This will require BLM to undertake a variety of duplicative tasks and incur additional costs, causing an unnecessary waste of "significant expenditure of public resources."[246]

Under these circumstances, because the NEPA violations alleged by NAEC are minor and vacatur will have significant disruptive consequences, the Court should deny NAEC's request to vacate the 2017 Lease Sale, should it find any merit in NAEC's claims. CPAI also respectfully reiterates its request for a fuller opportunity to address this important issue, if necessary, after the Court has ruled on the merits.

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[243] 688 F.3d at 993-94.

[244] *Conner*, 848 F.2d at 1461 n.50 (clarifying district court's remedy order to *not* set aside oil and gas leases in order to avoid the unnecessarily harsh result of completely divesting the lessees of their property rights).

[245] Schell Decl. ¶¶ 3, 4.

[246] *Idaho Farm Bureau*, 58 F.3d at 1405-06 (noting expenditure of public resources constitutes equitable concern weighing against vacatur).

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V. CONCLUSION

For the foregoing reasons, the Court should deny NAEC's motion for summary judgment and enter judgment in favor of BLM and CPAI.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2018, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court of Alaska by using the CM/ECF system. Participants in this Case No. 3:18-cv-00030-SLG who are registered CM/ECF users will be served by the CM/ECF system.

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