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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATURAL RESOURCES DEFENSE COUNCIL <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Case No. 3:18-cv-00031-SLG
)	
RYAN ZINKE <i>et al.</i> ,)	
)	
<i>Defendants,</i>)	
)	
and)	
)	
CONOCOPHILLIPS ALASKA, INC.,)	
)	
<i>Intervenor-Defendant.</i>)	
)	

PLAINTIFFS' PRINCIPAL BRIEF UNDER LOCAL RULE 16.3(c)(1)

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Plaintiffs Natural Resources Defense Council, Center for Biological Diversity, Greenpeace, Inc., and Friends of the Earth challenge the Bureau of Land Management's (BLM) decisions to hold oil and gas lease sales in the National Petroleum Reserve-Alaska (NPR-A or Reserve) in 2016 and 2017. BLM failed to take the required hard look at the lease sales' effects on climate change and to consider lease sale alternatives that could reduce environmental impacts. This failure hindered the agency's ability to make fully informed decisions about whether, where, and when to lease in this biologically rich and fragile landscape. Plaintiffs bring this action to require BLM to assess the environmental impacts of, and alternative approaches to, the lease sales in the Reserve.

INTRODUCTION

The Western Arctic, managed by BLM as the 23-million-acre Reserve, is recognized as a globally important ecological resource that is home to bears, muskoxen, caribou, and millions of migratory birds. The lakes and lagoons of the Reserve, including Teshekpuk Lake, are the birthplace of millions of birds that fly to all 50 states and five continents. The Reserve provides calving, insect relief, and migration areas for two of Alaska's largest caribou herds—the Western Arctic and Teshekpuk caribou herds—which provide vital subsistence resources for more than 40 communities in northern and western Alaska. Communities in the Reserve rely heavily on subsistence harvest for nutrition and as a source of cultural cohesion. Polar bears, spectacled eiders, and Steller's eiders—all listed under the Endangered Species Act—call the Reserve home. Coastal areas of the Reserve provide designated critical habitat for polar bears, as well as important habitat for other marine mammals, including Pacific walruses and ice seals. Like the rest of the Arctic, the Reserve is warming rapidly, damaging its fragile ecosystems.

In 2016 and 2017, BLM held oil and gas lease sales in the Reserve pursuant to the

Integrated Activity Plan and Environmental Impact Statement (Plan EIS) the agency adopted in 2013. While the Plan EIS provides a planning framework for the oil and gas leasing program in the Reserve, BLM reserves until the lease sale phase decisions about the size, location, and timing of leases. Notwithstanding the critical decisions BLM faced when it decided which areas—if any—to make available for leasing in 2016 and 2017, BLM performed no new or additional NEPA analysis in conjunction with the lease sales. Instead, the agency purported to support its leasing decisions with documents called Determinations of NEPA Adequacy (DNA), which relied entirely on the Plan EIS, and determined that no additional analysis of alternatives or impacts was necessary at this next lease sale stage. In forgoing NEPA analysis at the lease sale stage in 2016 and 2017, BLM acted arbitrarily and capriciously and not in accordance with law and violated NEPA in at least two key respects: (1) it failed to take a hard look at the effects of the lease sales on greenhouse gas emissions and climate change; and (2) it failed to develop and compare a reasonable range of lease sale alternatives.

BACKGROUND

I. CLIMATE CHANGE AND THE ARCTIC

Development in the Arctic happens against the backdrop of a dramatically changing climate. Climate change is affecting the Reserve, and oil and gas drilling in the Reserve will, in turn, affect the climate. Scientists recognize that the Arctic is warming twice as fast as the rest of the world. Ex. 23 at 8. It is virtually certain that human activities contribute to this warming. *Id.* at 10. By the end of the 21st century in the Reserve, summer temperatures are predicted to increase by six degrees Fahrenheit, and winter temperatures are expected to increase by as much as 18 degrees Fahrenheit. Ex. 10 at 79. This warming has myriad effects, including sea level rise, coastal erosion, increased storm effects, retreat of sea ice, and melting permafrost. *Id.* at

79-80.

Many of climate change's effects create feedback loops that further increase warming. As permafrost thaws, it is releasing additional greenhouse gases—carbon dioxide and methane—resulting in additional warming. Ex. 23 at 10. This effect alone makes it harder to meet international policy goals for the reduction of greenhouse gas pollution. *Id.* Arctic sea ice has decreased by at least three and a half percent per decade since the early 1980s, has become thinner by at least four feet, and is melting at least 15 more days each year. *Id.* Scientists predict ice-free summers by the 2040s. *Id.* Climate change is also likely causing more wildfires in the Arctic, and the risk of wildlife is expected to increase. *Id.* at 16. Increased fire activity may deplete carbon stores and create an additional source of greenhouse gas pollution; it may also further degrade permafrost by blackening the ground, reducing surface albedo, and removing protective vegetation. *Id.* at 17. Climate change has also contributed to reduced snow cover, which causes the ground to absorb more heat, leading to additional warming. *Id.*

There is a broad, international scientific consensus that in order to avoid the worst impacts of climate change, the world must aggressively reduce greenhouse gas emissions. Ex. 24. There is a finite amount of carbon dioxide that can be released into the atmosphere before the earth's temperature exceeds the globally recognized limit to which the nations of the world have agreed to avoid the worst effects of climate change; this is the earth's carbon budget. Ex. 19 at 6. Scientists have calculated that, globally, proven fossil fuel reserves—if extracted and burned—would release enough carbon dioxide to exceed this limit several times over. Ex. 20 at 1. Consequently, the vast majority of fossil fuels must remain in the ground. *Id.* A 2015 study concluded that to stay within the limit to avoid the worst effects of climate change, all Arctic fossil fuels should be classified as unburnable. *Id.* at 4.

II. THE NATURAL VALUES OF THE RESERVE AND BLM'S OBLIGATION TO PROTECT THEM

As long as it has been managed by the Department of the Interior, the Reserve has been recognized as a unique and valuable ecosystem that deserves protection. In 1923, President Warren G. Harding set aside 23.7 million acres in northern Alaska as the Naval Petroleum Reserve Numbered 4, to be administered by the Navy as an assured future oil supply for defense purposes. In 1976, President Gerald Ford signed the Naval Petroleum Reserves Production Act (NPRPA). Pub. L. No. 94-258, 90 Stat. 303 (1976). Among other things, the NPRPA transferred jurisdiction over the Naval Petroleum Reserve Numbered 4 from the Secretary of the Navy to the Secretary of the Interior and renamed it the National Petroleum Reserve-Alaska.

In making the transfer, Congress expressly recognized that the protection of the unique natural, fish and wildlife, scenic, and historical values of the Reserve would better be evaluated and managed under the authority of the Secretary of the Interior. The NPRPA requires that any oil exploration activities conducted within areas designated by the Secretary of the Interior as containing “any significant subsistence, recreational, fish and wildlife, or historical or scenic value” be conducted in a manner that assures “maximum protection” of these surface values. *Id.* § 104(b), 90 Stat. at 304 (codified at 42 U.S.C. § 6504(a)).

In 1977, the Secretary of the Interior adopted regulations for management and protection of the Reserve. Management and Protection of the National Petroleum Reserve in Alaska, 42 Fed. Reg. 28,720, 28,720 (June 3, 1977). The regulations indicate that BLM may protect the surface values of the Reserve by limiting, restricting, or prohibiting the use of and access to lands within the Reserve, including “special areas.” 43 C.F.R. § 2361.1(e)(1) (1977). In 1977, the Secretary of the Interior designated Teshekpuk Lake, the Colville River, and the Utukok River Uplands as special areas within the Reserve. 42 Fed. Reg. 28,723, 28,723 (June 3, 1977).

The regulations also require BLM to “take such action . . . necessary to mitigate or avoid unnecessary surface damage and to minimize ecological disturbance throughout the reserve to the extent consistent with the requirements of the Act for the exploration of the reserve.” 43 C.F.R. § 2361.1(a). “[W]ater, air, vegetation, and mineral values are components of the environment and must be protected and managed.” 42 Fed. Reg. at 28,721.

In passing the NPRPA, Congress recognized that “[t]he northeastern coastal plain area [of the Reserve] is considered to be the best waterfowl nesting area on the North Slope” of Alaska. H.R. Rep. No. 94-81, pt. 1, at 8 (1975). For example, the Teshekpuk Lake watershed provides nesting habitat for many migratory waterfowl species, including northern pintails, long-tailed ducks, king eiders, Pacific brant, greater white-fronted geese, tundra swans, and three species of loons—Pacific, red-throated, and yellow-billed. Ex. 10 at 85-95, 113. The Teshekpuk Lake Special Area provides essential molting habitat for significant populations of migratory Pacific brant, greater white-fronted geese, and Canada geese. *Id.* at 88-92. Spectacled and Steller’s eiders, both listed as threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, are found in the Reserve, and spectacled eiders have relatively high nesting densities in areas around Teshekpuk Lake. *Id.* at 112, 110.

The Teshekpuk Lake area also encompasses major calving grounds for the 40,000 caribou of the Teshekpuk caribou herd. *Id.* at 99-100; Ex. 2 at 4. The population has declined from a high of nearly 69,000 in 2008. Ex. 2 at 4. This caribou herd is an important food resource for local Alaska Native families. Ex. 10 at 103.

The Colville River is the largest of Alaska’s rivers that flow to the Arctic Ocean. The river and its tributaries provide important habitat for moose, brown bears, wolverines, and many species of anadromous and freshwater fish. Ex. 1 at 5-6. It is a vital source of subsistence

resources for area residents and is a spectacularly scenic area with substantial recreation values and potential for remote wilderness experiences. *Id.* The Colville River is known for high concentrations of song birds and birds of prey, and it is recognized as one of the most significant regional habitats for raptors in North America. *Id.*

III. THE INTEGRATED ACTIVITY PLAN AND BLM'S MANAGEMENT OF THE RESERVE

BLM manages oil and gas activities in the Reserve pursuant to a multi-step process. Answer, Doc. 14 at 8, ¶37. It first promulgates “activity plans,” which are programmatic management plans that zone areas of the Reserve for various purposes and impose limits on the manner in which oil and gas activities may take place in areas in which oil and gas leasing is permitted. Answer, Doc. 14 at 8, ¶37; *see also* Ex. 10 at 5. It then determines each year whether and where to hold lease sales in any portions of areas that the activity plans have designated as open for leasing. Answer, Doc. 14 at 8, ¶37; *See also, e.g.,* Ex. 7. For areas where leases are sold, BLM then reviews exploration plans submitted by lessees, and, if oil or gas are discovered on the leases, it reviews development plans for developing and producing these fossil fuels. Answer, Doc. 14 at 8, ¶37. Each of these steps constitutes a distinct agency decision.

In 2013, the Department of the Interior issued its first-ever comprehensive management plan covering the entire Reserve. The Record of Decision (ROD) for the Integrated Activity Plan (Plan) designated approximately 52 percent (11.8 million acres) of the Reserve as available for oil and gas leasing and prohibited oil and gas leasing and development on approximately 11 million acres. Ex. 11 at 4. It expanded existing special areas and added the Peard Bay Special Area. *Id.* The Plan's leasing prohibitions cover most of the lands within the five designated special areas but leave open some tracts, including in the Colville River Special Area and the

Teshekpuk Lake Special Area. *Id.* at 13.

The management plan was developed through an EIS process. The Plan EIS analyzed five management alternatives. Ex. 10 at 19. Alternative A was the no-action alternative, which would have continued separate management of the Northwest and Northeast Reserve under their own management plans. *Id.* at 20. Alternatives B-1 and B-2 (the preferred alternative) designated as open for leasing about half the Reserve and substantially increased special areas and areas designated as unavailable for leasing over the status quo. *Id.* at 21, 23. Alternative C would have designated as open for leasing more than three-quarters of the Reserve. *Id.* at 26. Alternative D would have designated as open all of the Reserve for leasing. *Id.* at 27.

The Record of Decision (ROD) chose Alternative B-2 from the Plan EIS and made “lands within NPR-A available for oil and gas leasing.” Ex. 11 at 7, 10. In line with its programmatic nature, the Plan EIS did not decide the size, location, or timing of any future lease sale. Rather, it stated that “the first sale, as well as any subsequent sale, might offer only a portion of the lands identified in the record of decision as available, making possible a phased approach to leasing and development.” Ex. 10 at 14. The Plan EIS did not analyze or compare alternative approaches to leasing and development in the areas open to leasing.

The Plan EIS did not calculate or analyze the effects of greenhouse gas emissions from the consumption of oil and gas produced from the program areas. The Plan EIS observed that “[t]he assessed resources of billions of barrels of oil and tens of trillions of cubic feet of gas indicate that the NPR-A has been determined to have considerable resources.” *Id.* at 82. A 2010 U.S. Geological Survey assessment estimated technically recoverable oil resources at almost one billion barrels, with a one in 20 chance of recovering 2.7 billion barrels from the Reserve. *Id.* at

83-84.¹ Yet the Plan EIS did not assess the effects of consuming oil and gas produced from the program areas. The EIS considered only the greenhouse gas emissions of oil and gas operations—i.e., emissions from supply trucks, aircraft shuttling crew members, etc.—within the Reserve, deeming them “minuscule.” *Id.* at 136, 179. It concluded: “since the specific effects of the proposed action, which may or may not contribute to climate change, cannot be determined, it is not possible to determine whether any particular action will lead to significant climate-related environmental effects.” *Id.* at 179.

IV. THE 2016 AND 2017 LEASE SALES AND ONGOING OIL AND GAS EXPLORATION, DEVELOPMENT, AND PRODUCTION IN THE NORTHEASTERN RESERVE

BLM has held annual lease sales under the current Plan since 2013. Ex. 7 at 1. Every year, BLM makes decisions about whether, where, and when to lease. Ex. 10 at 14. Each lease sale since the adoption of the Plan has offered different numbers and configurations of tracts within the areas the Plan classified as open to leasing. Lease sales between 2013 and 2015 ranged in size from 1.4 million to 4.5 million acres and offered leases in different parts of the Reserve from year to year. *See, e.g.*, Ex. 14; Ex. 4; Ex. 15; Ex. 5; Ex. 16.

In 2016, BLM offered leases in a relatively targeted area of 145 tracts, encompassing 1.45 million acres, much of which was in the Northeastern Reserve. Ex. 6. At the 2016 lease sale, BLM sold an additional 614,000 acres, nearly doubling the 895,000 total acres already leased in the Reserve. Ex. 2 at 3. All of the new leases are in the northeastern corner of the Reserve, and a significant portion of this new acreage is in or near the Teshekpuk Lake Special Area or the Colville River Special Area. Ex. 12.

¹ A December 2017 assessment significantly increased this number. Ex. 8 at 3.

The 2017 lease sale offered all 900 available tracts in the Reserve, encompassing approximately 10.3 million acres, and seven tracts received bids. Ex. 7, Ex. 13. All seven of these tracts abut previously leased areas in the northeastern corner of the Reserve, near ConocoPhillips' ongoing projects. Ex. 13.

BLM's lease sale decisions in 2016 and 2017 resulted in concentrated lease-buying in the Northeastern Reserve, which includes areas in and around the Teshekpuk Lake Special Area, the Colville River Special Area, and the community of Nuiqsut. Ex. 12; Ex. 13. This part of the Reserve and surrounding state lands and waters have seen an increase in oil and gas exploration and development in recent years. Greater Mooses Tooth 1, the first oil field development project on federal leases in the Reserve, was recently permitted for development, and the nearby Greater Mooses Tooth 2 development is in the NEPA process. In addition to this ongoing development, there are several recent discoveries in and around the Northeastern Reserve, including Pikka-Horseshoe on state lands just east of the Reserve; the Willow discovery within the reserve, just west of the Greater Mooses Tooth developments; and Smith Bay, which is less than a mile offshore from the Reserve. Ex. 22 at 1-2. Exploration of these prospects has already increased industrial activity in and around the Northeastern Reserve, and their development will further industrialize the landscape and affect its significant biological, cultural, and scenic values. For example, ongoing and future development in the Northeastern Reserve could draw down and pollute fish habitat, Ex. 9 at 37, block fish movements, *id.* at 39, deplete bird habitat and forage areas, *id.* at 42, disturb caribou, *id.* at 45, and kill or displace nesting spectacled eiders, which are listed as threatened under the Endangered Species Act, *id.* at 48.

Areas around Teshekpuk Lake, the Colville River, and the community of Nuiqsut are especially vulnerable. For example, Teshekpuk Lake provides essential nesting and molting

habitat for migratory birds from all over the world, and these birds are vulnerable to the effects of oil and gas development. Gravel mining and deposition necessary for constructing oil and gas infrastructure destroys bird habitat, encroaching upon molting areas for brant and nesting grounds for ducks, geese, and shorebirds near Teshekpuk Lake. Ex. 10 at 137-38. Aircraft flying at low altitudes may disturb molting geese in the vicinity of the lake. *Id.* at 49. Molting demands energy and leaves geese flightless, making them especially vulnerable to disruptions, and some never become habituated to human activities. Ex. 3 at 7-8.

Oil and gas infrastructure near Teshekpuk Lake, including south and east of the lake, could also displace caribou from areas that are essential for calving and rearing, insect relief, and migration at various times of the year. Ex. 10 at 57, 63-64, 150-51. The use of heavy equipment and aircraft could disturb caribou that are calving or fleeing swarms of insects. *Id.* at 64, 65-66. Seismic surveys would likely drive away caribou overwintering in the eastern Reserve, resulting in energy expenditures during a difficult time of year. *Id.* at 146. Muskoxen near Teshekpuk Lake would be vulnerable to disturbance from seismic surveys, as they typically reduce movements and conserve energy during the winter. *Id.*

The Colville River is biologically and geologically unique and is recognized as one of the most significant raptor habitats in North America. *Id.* at 117. Allowing leasing in and near the Colville River Special Area, therefore, may have outsized impacts. Industry infrastructure located near the Colville River could compromise raptor nest sites and impair foraging habitats such as ponds, lakes, wetlands, and streambanks. *Id.* at 69, 138. Gravel mining from cliffs along the river would likely destroy nesting habitat. *Id.* at 44, 138. Power lines can electrocute raptors that become ensnared. *Id.* at 45. Motorized vehicles, aircraft, heavy equipment, and seismic surveys may disturb nesting arctic peregrine falcons and gyrfalcons. *Id.* at 48, 50, 55. Moose

and muskoxen that concentrate along the Colville River in winter could expend energy to avoid seismic surveys and exploratory drilling activities. *Id.* at 146, 148, 155. If pipelines near the river were built too low, they might impede moose movements. *Id.* at 160.

BLM has recognized that ongoing and future development in the Northeastern Reserve is harming and will increasingly harm the people who live in Nuiqsut and who depend on the biological resources of the Reserve for food and cultural cohesion. *E.g.*, Ex. 9 at 54-55, 65; Ex. 10 at 171-72. When BLM recently permitted Greater Mooses Tooth 1, it waived important stipulations and best management practices from the Plan EIS. Ex. 17 at 7. As a result, BLM's ROD for the development concluded that it would significantly restrict subsistence. *Id.* at 8. The Greater Mooses Tooth 1 final EIS rated subsistence impacts as major because of their intensity, duration, and extent, and because of the importance of the resource, and it also noted that the intensity and overall degree of impact would be higher than previously anticipated. Ex. 9 at 34.

Oil and gas exploration in the Northeastern Reserve can, among other things, harm subsistence by displacing animals through ice roads, seismic activities, and helicopter overflights; harm fish by removing the water they need from lakes and streams; and create a risk of oil spills. Ex. 10 at 172. Oil and gas development can create high-intensity, long-term, and widespread impacts on subsistence activities. *Id.* at 170, 172-73. For example, BLM predicts that over the long-term, oil and gas development may reduce caribou habitat and displace the caribou on which the community of Nuiqsut relies. Ex. 9 at 54-55. The cultural loss to Nuiqsut may reverberate across generations, as community members may not be able to pass on hunting knowledge to their children. *Id.*

Different leasing configurations and sizes can also affect the level of indirect effects from

greenhouse gas pollution, which will act cumulatively and synergistically with the direct effects of development and lead to severe impacts on infrastructure, travel, landforms, sea ice, river navigability, habitat, availability of fresh water, and availability of subsistence resources. *Id.* at 56.

Notwithstanding the important values at stake and the differing effects of various lease sale configurations BLM might have chosen within the area open to leasing, BLM did not perform a NEPA analysis at the lease sale stage. Starting in 2014, BLM has purported to fulfill its NEPA obligations at the lease sale phase by producing DNAs. Ex. 4, Ex. 5, Ex. 6, and Ex. 7. These determinations are very brief documents stating that the Plan EIS is adequate in all respects to serve as the required environmental review under NEPA for each new lease sale decision. *See id.* Thus, BLM has declined to do any specific NEPA analysis for either the 2016 or the 2017 lease sale.

PLAINTIFFS' INTERESTS

Plaintiffs have standing to bring this case because their members have standing in their own right, the interests at stake are germane to Plaintiffs' organizational purposes, and the lawsuit does not require the participation of individual members. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Members of plaintiff groups use and enjoy—and intend to continue to use and enjoy—the Reserve, including areas affected by the 2016 and 2017 lease sales, for various purposes, including recreation, wildlife viewing, education, research, photography, subsistence, hunting and fishing, and/or aesthetic and spiritual enjoyment. *See* Ex. 25 at ¶¶5-8; Ex. 28 at ¶¶10-16, 19, 24; Ex. 30 at ¶¶3-13. Members of plaintiff groups also enjoy or otherwise use migratory wildlife from the Reserve, both in the areas affected by the 2016 and 2017 lease sales, and in the species'

broader ranges. *See* Ex. 26 at ¶¶25. The 2016 and 2017 lease sales will directly and irreparably injure these interests. *See* Ex. 25 at ¶¶9-13, 26-34, 38-40, 45-48, 53-55, 63-65; Ex. 28 at ¶¶20-29; Ex. 30 at ¶¶16-27.

The defendants' unlawful actions adversely affect plaintiffs' organizational interests in their members' use and enjoyment of the Reserve's public lands and resources. Each of the plaintiff groups monitors the use of public lands and wildlife in the Reserve and compliance with the law respecting these lands; educates its members and the public concerning the management of these lands; and advocates policies and practices that protect the natural values and sustainable resources of these lands. *See* Ex. 26 at ¶¶5-23; Ex. 27 at ¶¶5-14; Ex. 29 at ¶¶4-6; Ex. 31 at ¶¶3-6. It is impossible to achieve these organizational purposes fully without adequate information and public participation in the processes required by law for the management of these public lands. *See* Ex. 26 at ¶¶27; Ex. 27 at ¶¶16; Ex. 29 at ¶¶8. The interests and organizational purposes of the plaintiffs will therefore be directly and irreparably injured by defendants' violations of law in holding the 2016 and 2017 lease sales without adequate environmental review and disclosure. *See* Ex. 26 at ¶¶24-26; Ex. 27 at ¶¶15-16; Ex. 29 at ¶¶7-10; Ex. 31 at ¶¶6. The harm and threat of harm to Plaintiffs' members' recreational, educational, research, subsistence, hunting and fishing, and/or aesthetic and spiritual enjoyment and other interests in and around the lease sale areas, as well as to Plaintiffs' educational and informational interests in a lawful public administrative process, represent a concrete injury in fact that is fairly traceable to the actions challenged in this litigation and redressable by the relief they seek. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000).

ARGUMENT

I. STANDARD OF REVIEW

Review of an agency's compliance with NEPA is governed by the Administrative Procedure Act, which requires courts to set aside agency actions, findings, and conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir. 2004). In reviewing the adequacy of a NEPA document, courts apply a "rule of reason" to ensure that the agency has taken a "hard look" at the potential environmental consequences of the proposed action. *Id.* at 992-93. This requires that "the agency . . . examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Because the scope of NEPA analysis is predominantly a legal question, the agency's determination is subject to a reasonableness standard and is not entitled to deference. *See San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1028 (9th Cir. 2006).

A decision would normally be arbitrary if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* at 43. Similarly, an action may be arbitrary if the agency's reasoning is not supported by evidence in the record. *See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1201-03 (9th Cir. 2008); *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1037-38 (9th Cir. 2001).

A decision may be arbitrary if the agency failed to consider an obvious alternative, thereby ignoring an important aspect of the problem. *See, e.g., State Farm*, 463 U.S. at 48 (“At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.”); *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993) (“[A]n agency has ignored relevant factors where its action amounts to an artificial narrowing of options which is antithetical to reasoned decisionmaking.”) (quotations marks omitted). An agency’s decision also may be arbitrary if it reflects “a clear error of judgment.” *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974)).

“The reviewing court should not attempt itself to make up for such deficiencies: ‘We may not supply a reasoned basis for the agency’s action that the agency itself has not given.’” *State Farm*, 463 U.S. at 43 (quoting *Sec. Exch. Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

II. BLM HAS NOT TAKEN A HARD LOOK AT THE CLIMATE EFFECTS OF THE LEASE SALES

NEPA requires BLM to take a hard look at the direct, indirect, and cumulative impacts of the 2016 and 2017 lease sales. When analyzing a project that leads to the development of fossil fuels, this impacts analysis must include an assessment of the reasonably foreseeable greenhouse gas emissions from the combustion of those fuels, as well as the effects of those emissions. BLM violated NEPA because it failed to assess the greenhouse gas emissions that may result from the 2016 and 2017 lease sales and the effects of those emissions.

A. NEPA requires BLM to assess the indirect and cumulative climate effects from burning the oil that may be produced as a result of the leases sales.

Oil and gas leasing in the Reserve is likely to lead to the combustion of fossil fuels that will result in greenhouse gas emissions and climate effects. NEPA therefore requires BLM to

assess the reasonably foreseeable indirect and cumulative climate impacts of holding the 2016 and 2017 lease sales in the Reserve.

NEPA's requirement that agencies prepare an EIS seeks to make certain that agencies "will have available, and will carefully consider, detailed information concerning significant environmental impacts," and that "the relevant information will be made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). By preparing an EIS that in "form, content and preparation foster[s] both informed decision-making and informed public participation," NEPA obligates federal agencies to take a "hard look" at potential environmental impacts. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). Agencies satisfy the "hard look" requirement when they engage in "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the action. *Ctr. for Biological Diversity*, 538 F.3d at 1194 (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998), *overruled on other grounds by The Lands Council v. McNair*, 537 F.3d 981, 997 (9th Cir. 2008)).

NEPA requires that environmental analyses be conducted at "the earliest possible time." 40 C.F.R. § 1501.2; *see also Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) ("NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done."). NEPA requires "reasonable forecasting," which includes the consideration of "reasonably foreseeable future actions . . . even if they are not specific proposals." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (citation omitted). "Because speculation is implicit in NEPA," agencies may not "shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry."

Id. (internal quotations omitted).

NEPA requires an assessment of direct, indirect, and cumulative effects. Indirect effects are those “caused by the action, and later in time or further removed in distance, but still reasonably foreseeable.” *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of the Interior*, 588 F.3d 718, 725 (9th Cir. 2009) (quoting 40 C.F.R. § 1508.8(b)). Cumulative effects are the incremental effects of the action in combination with “other past, present, and reasonably foreseeable future actions.” *See Klamath-Siskiyou*, 387 F.3d at 993 (quoting 40 C.F.R. § 1508.7). The cumulative impact analysis “must be more than perfunctory”; it must provide a “useful analysis of the cumulative impacts of past, present, and future projects.” *Kern*, 284 F.3d at 1075 (internal citation omitted).

It is now well established that when an agency considers a decision that has the potential to cause greenhouse gas emissions that contribute to climate change, NEPA requires it to analyze and disclose the effects of these emissions as reasonably foreseeable indirect and cumulative effects. In *Center for Biological Diversity*, the Ninth Circuit held that “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” 538 F.3d at 1217. There the court held that the EPA must assess the climate impacts of a fuel economy rule (CAFE) “in light of other CAFE rulemakings and other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions.” *Id.*

Numerous other courts have affirmed the necessity of analyzing the climate consequences of fossil fuel projects under NEPA because climate effects are their reasonably foreseeable indirect effects and because these effects will act cumulatively with other effects. For example, the D.C. Circuit recently held that greenhouse gas emissions were a reasonably

foreseeable indirect effect of approving fossil fuel pipeline projects and that the Federal Energy Regulatory Commission was required to analyze the significance of the effect as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). The court pointed out that the consumption of fossil fuels was not just “reasonably foreseeable” but was “the project’s entire purpose.” *Id.* at 1372; *see also, e.g., WildEarth Guardians v. Bureau of Land Mgmt.*, 870 F.3d 1222, 1233-34 (10th Cir. 2017) (rejecting BLM’s argument that it could ignore the climate effects of extracting coal in Wyoming’s Powder River Basin because, if BLM had not issued the leases in question, demand would be met with coal from another source); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (holding that NEPA required an agency deciding whether to approve a railroad line providing access to coal mining areas to disclose and analyze the indirect impacts of future combustion of the mined coal); *Mont. Env’tl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1094-99 (D. Mont. 2017), *amended in part, adhered to in part sub nom. Mont. Env’tl. Info. Ctr. v. U.S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 5047901 at *6 (D. Mont. Nov. 3, 2017) (holding that an agency must quantify the indirect and cumulative costs of greenhouse gas emissions from a fossil-fuels-extraction project if it quantifies the benefits in a NEPA document); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1196-98 (D. Colo. 2014) (holding that NEPA required analysis of the indirect climate effects of burning fossil fuels that could be produced as a result of land management decision).

B. The climate effects analysis should inform BLM's leasing decisions under the NPRPA and NEPA.

NEPA requires BLM to account for the climate costs of its lease sales so that it may make fully informed decisions under the NPRPA that help BLM to protect, restore, and enhance the environment. The purpose of NEPA is to help agencies make better, more informed decisions. 40 C.F.R. § 1500.1(c) (“Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.”). “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” *Id.* An agency, therefore, is required to develop alternatives that avoid or minimize harm to the environment or enhance the quality of the environment. 40 C.F.R. § 1502.1; *see also Native Ecosystems Council*, 418 F.3d at 965.

The NPRPA charges BLM with conducting an oil and gas leasing program that protects the important environmental, fish and wildlife, and historical and scenic values of the Reserve. 42 U.S.C. § 6503(b). BLM’s regulations require that the agency complete a NEPA analysis before selecting tracts for leasing. 43 C.F.R. § 3131.2(b). When selecting tracts, BLM is required to consider several factors, including “environmental information.” *Id.* BLM must take any action it deems necessary to minimize ecological disturbance throughout the Reserve, consistent with the program of leasing. 43 C.F.R. § 2361.1(a). “[W]ater, air, vegetation, and mineral values are components of the environment” that BLM “must . . . protect[] and manage[].” 42 Fed. Reg. 28,720, 28,721 (June 3, 1977).

Conducting a proper climate effects analysis would help BLM fulfill its mandates under NEPA and the NPRPA to protect the environment and consider environmental information in

making its leasing decisions. It would provide environmental information necessary to BLM's decision, 43 C.F.R. § 3131.2(b); it would give BLM the opportunity to formulate alternatives that might be more environmentally protective, 40 C.F.R. § 1502.1; and it might lead BLM to reduce the climate impacts of its lease sale decision to minimize ecological disturbance, 43 C.F.R. § 2361.1(a), and to protect, restore, and enhance the environment, 40 C.F.R. § 1500.1.

As explained below, the Plan EIS contains the information necessary to estimate the amount of greenhouse gas pollution that may result from leasing different areas in the Reserve. There are many tools available to estimate the costs of this pollution. While it may underestimate costs, one readily available tool has been developed by the Interagency Working Group on Social Cost of Carbon. Ex. 18 at 3. It has produced estimates for the social cost of carbon in order to “allow agencies to incorporate the social benefits of reducing carbon dioxide (CO₂) emissions into cost-benefit analyses of regulatory actions.” *Id.* The working group puts a range of dollar values on greenhouse gas pollution, *id.* at 3-4, and these dollar values represent the economic toll of environmental and social harms. The social cost of carbon is one among many tools available to BLM to help assess climate costs. To make fully informed decisions under NEPA and the NPRPA, BLM must utilize such tools and other available information about the climate consequences of various leasing decisions. A full accounting of the climate impacts could, for example, lead BLM to lease fewer tracts to meet its mandate to protect the environment. *See, e.g.*, 40 C.F.R. § 2361.1(a); 40 C.F.R. § 1502.1; 40 C.F.R. § 1500.1. It would also fulfill NEPA's mandate to inform the public and “facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2(d).

C. BLM failed to assess the climate effects from burning the oil that may be produced as a result of the leases sales.

Notwithstanding NEPA's clear mandate to take a hard look at the climate effects of the lease sales and BLM's duty to consider environmental factors such as climate change in making its leasing decisions, BLM has not done so. Neither the Plan EIS, nor any of the lease sale DNAs, assesses the climate impacts of the lease sales. BLM's attempts to excuse these failures by claiming a lack of information are both factually unsupported and legally inadequate. BLM has the information necessary to make reasonable forecasts about the lease sales' greenhouse gas emissions and their climate consequences, as NEPA requires. BLM's failure to take a hard look at the climate effects of the lease sales renders its NEPA analysis arbitrary and unlawful.

BLM must analyze the climate effects of the 2016 and 2017 lease sales because the consumption of fossil fuels is a reasonably foreseeable consequence of the decision to lease in a given area; in fact, the production—and eventual consumption—of fossil fuels is the purpose of the lease sales. *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d at 1372; *see also* Ex. 10 at 2 (“The preferred alternative establishes a broad platform for development over the course of the plan, provides very significant access to known hydrocarbon resources, [and] recognizes the congressional mandate in the transfer act to protect important and special surface values.”); *see also id.* at 5 (“The BLM developed the plan for the entire NPR-A to address the nation's need for production of more oil and gas through additional leasing in the NPR-A, and to protect surface values consistent with the exploration and development of oil and gas.”).

Given the quantity of fossil fuels estimated to be in the Reserve, the greenhouse gas pollution that may result from burning the oil developed under the 2016 and 2017 lease sales is significant. In the Plan EIS, BLM observed that “[t]he assessed resources of billions of barrels of oil and tens of trillions of cubic feet of gas indicate that the NPR-A has been determined to

have considerable resources.” Ex. 10 at 82. The 2010 U.S. Geological Survey Assessment of Undiscovered Oil and Gas in the National Petroleum Reserve in Alaska (2010 USGS Assessment)² estimated technically recoverable oil resources at almost one billion barrels, with a one in 20 chance of recovering 2.7 billion barrels from the Reserve. *Id.* at 83-84.

Notwithstanding the fact that the 2016 and 2017 lease sales were held for the purpose of developing and eventually burning fossil fuels that create greenhouse gas emissions, BLM has never analyzed the climate impacts of these end-use emissions. The DNAs for the lease sales state that “greenhouse gas impacts are similar and unchanged from the discussion and analysis found in the [Plan EIS]” and that “greenhouse gas emissions related to exploratory wells and potential development on any parcels offered in this sale has [sic] been discussed and analyzed in the document.” Ex. 6 at 3, Ex. 7 at 3, Ex. 8 at 8. The Plan EIS, however, does not assess the effects of consuming the oil and gas produced from the program areas. The EIS considers only the greenhouse gas emissions of oil and gas operations within the Reserve, deeming them “minuscule.” Ex. 10 at 136, 179. It concludes that “since the specific effects of the proposed action, which may or may not contribute to climate change, cannot be determined, it is not possible to determine whether any particular action will lead to significant climate-related environmental effects.” *Id.* at 179. The 2016 DNA similarly attributes the lack of climate analysis in the Plan EIS to missing information: “The IPA [sic] did not quantify GHG emissions because data remains unavailable about the development potential in the NPR-A.” Ex. 6 at 4.

² In December 2017, USGS completed a new 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 USGS Assessment). Ex. 22. The 2017 USGS Assessment reflects a higher estimate for technically recoverable oil. BLM has included references to the new assessment in its revised 2017 DNA, Ex. 8 at 1, 3-4, but it has not utilized the assessment to calculate the reasonably foreseeable greenhouse gas emissions from the 2017 lease sale.

BLM's primary excuse for failing to analyze such effects—lack of data—is unsupported and legally inadequate. The Plan EIS itself contains the oil and gas potential estimates necessary to project the greenhouse gas emissions from the lease sales. As part of its development scenario in the Plan EIS, BLM projected the amounts of economically recoverable undiscovered oil and gas in eight economic zones within the Reserve, based on estimates provided by the USGS. Ex. 10 at 123-124, 127, Fig. 4-12. BLM explained that despite the estimates' uncertainty, they "are necessary to provide the basis for identifying areas for possible future leasing and projecting reasonably foreseeable exploration and development scenarios for impact analysis." *Id.* at 123. BLM further explained that "[b]ecause the exact locations of commercial fields are unknown within the respective economic zone, it is assumed that the petroleum endowment is distributed evenly over the geographic extent of the economic zone." *Id.* at 127. According to BLM, this is a reasonable assumption because "the opportunity to discover new fields is relatively uniform throughout each of the geologic plays assessed by the USGS in assigning estimated resources for the economic zones." *Id.* at 127-28. BLM then applied the percentage of areas available for leasing within each economic zone under each alternative to determine how much oil and gas might be produced. *Id.* at 127-29.

BLM has provided no explanation why it could not use these development forecasts to calculate potential greenhouse gas emissions for its lease sales. NEPA requires agencies to make reasonable forecasts, and while BLM did so for development scenarios, it failed to apply these development forecasts to greenhouse gas emissions. *See Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d at 1374 (Although quantifying the fuels that would be consumed "necessarily involves some reasonable forecasting, . . . agencies may sometimes need to make educated assumptions about an uncertain future.") (internal quotation marks omitted); *see also N. Plains*

Res. Council, Inc., 668 F.3d at 1079 (“[W]e must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.”). Moreover, BLM had more information about the potential resource potential of particular areas when it conducted the 2016 and 2017 lease sales than it had when it published the Plan EIS, potentially making an even better estimate possible. BLM’s failure to analyze the reasonably foreseeable effects of the lease sales’ very purpose violates NEPA. *See Sierra Club v. Fed. Energy Regulatory Comm’n*, 867 F.3d at 1372.

BLM attempts to put off the analysis by claiming that it might assess the climate impacts of its leasing decisions when it permits development on the leases. Ex. 6 at 4. But BLM cannot wait until its assessment of specific development projects to analyze the greenhouse gas impacts of the lease sales. NEPA requires that environmental analyses be conducted at “the earliest possible time.” 40 C.F.R. § 1501.2; *see also Kern*, 284 F.3d at 1072 (“NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done.”). Since BLM did not assess climate effects at the programmatic stage, the lease sale stage is the last opportunity for the agency to do so in a way that might inform its decisions because it is the stage at which BLM commits to selling leases that in its view contain a development right. *See Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) (“[T]he government must complete an EIS before it makes an irretrievable commitment of resources by selling non-NSO leases.”). Moreover, the connected and cumulative impacts of the development projects that will result from these lease sales must be considered in a single environmental review “to prevent an agency from dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Great Basin Mine Watch v. Hankins*,

456 F.3d 955, 969 (9th Cir. 2006) (internal quotation marks omitted); *see also* 40 C.F.R. § 1508.25(a); *Klamath-Siskiyou*, 387 F.3d at 999.

In sum, BLM failed to take a hard look at the reasonably foreseeable indirect and cumulative climate impacts of the 2016 and 2017 lease sales. BLM's NEPA analysis is therefore arbitrary and unlawful.

III. BLM DID NOT CONSIDER A REASONABLE RANGE OF ALTERNATIVES AT THE LEASE SALE PHASE

BLM violated NEPA in failing to consider a reasonable range of alternatives at the lease sale stage. The Plan ROD opened certain areas in the Reserve to future leasing, but it did not decide when, where, and whether to lease in those areas. To the contrary, BLM stated in the Plan EIS that it would employ a phased approach to leasing, making only certain lands available at each lease sale, based on information available at the time of a lease sale. In keeping with the programmatic nature of the Plan EIS, the alternatives examined at that phase considered which areas should be permanently protected and which protections should apply to areas open for leasing. The Plan EIS did not make decisions about which areas to lease in specific lease sales or weigh different leasing alternatives in the areas left open to leasing. Because when it comes to leasing BLM must make decisions about where, when, and whether to lease, based on everything it knows at that time, NEPA requires BLM to consider a reasonable range of leasing alternatives when it holds a lease sale.

A. NEPA requires BLM to consider reasonable alternatives at the lease sale phase.

The alternatives section is the “heart of the [EIS.]” 40 C.F.R. § 1502.14; *Ilio‘ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006). An agency is required to develop alternatives that would avoid or minimize harm to the environment. *Native Ecosystems Council*

v. U.S. Forest Serv., 418 F.3d 953, 965 (9th Cir. 2005). An agency must also “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. An EIS must include this sharply defined comparison of alternatives so that both government agencies and the public can easily assess environmental trade-offs and make fully informed decisions “based on [an] understanding of environmental consequences.” *Id.* § 1500.1(c).

In order to meet these standards, agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,” devoting “substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(a),(b); *see also Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011). Although an EIS need not consider an infinite range of alternatives, it must include all reasonable or feasible ones, *Carmel–By–The–Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997), and a range of alternatives that is “sufficient to permit a reasoned choice,” *Methow Valley Citizens Council v. Reg’l Forester*, 833 F.2d 810, 815 (9th Cir. 1987), *rev’d on other grounds, Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). While an agency may elect to consider an alternative either in a programmatic environmental document or a site-specific analysis, it must consider every reasonable alternative at some point. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050-51 (9th Cir. 2013); *‘Ilio ‘ulaokalani Coal.*, 464 F.3d at 1097. NEPA also obliges an agency to revisit its alternatives analysis whenever there are “changed circumstances [that] affect the factors relevant to the development and evaluation of alternatives,” and “account for such change in the alternatives it considers.” *Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813-14 (9th Cir. 2005).

It is at the lease sale phase that BLM weighs the various factors it is required to consider about which tracts to offer, 43 C.F.R. § 3131.2(b), and makes decisions about “[t]he timing of and the lands offered for lease in the . . . sales, if any.” Ex. 10 at 14. A range of alternatives that may have been adequate for the decision to classify land at the programmatic level may well be inadequate for the decision to dispose of land, where the agency has discretion to pursue a variety of courses of action. *See Friends of the Bitterroot, Inc. v. U.S. Forest Serv.*, 900 F. Supp. 1368, 1373 (D. Mont. 1994) (“The fact the Beaverhead Forest Plan designates certain land as suitable for timber management does not . . . obligate the Forest Service to proceed with the timber harvesting, nor does it preclude the Forest Service from exercising its discretion to consider other courses of action.”); *Ayers v. Espy*, 873 F. Supp. 455, 467-68 (D. Colo. 1994) (holding that the agency needed to consider a reasonable alternative at the timber sale phase and noting that the forest plan at issue “does not eliminate the uneven-age method [of logging] from the range of acceptable alternatives”).

B. BLM failed to consider reasonable alternatives at the lease sale phase.

BLM’s regulations require it to conduct a NEPA analysis before offering tracts for leasing. 43 C.F.R. § 3131.2(b). “The NEPA process is intended to help public officials make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c). In deciding which tracts to offer, the NPRPA requires BLM to consider a variety of factors, including environmental information, resource potential, and industry interest. 43 C.F.R. § 3131.2(b). NEPA, in turn, requires BLM to develop alternatives that avoid or minimize harm to the environment or enhance the quality of the environment. 40 C.F.R. § 1502.1; *see also Native Ecosystems Council*, 418 F.3d at 965. BLM was therefore required to consider a reasonable

range of leasing alternatives when it made decisions about whether, when, and where to lease. *W. Watersheds Project*, 719 F.3d at 1050-51.

The Plan ROD and EIS did not make decisions about future lease sales and thus did not explore all reasonable alternatives for possible future lease sales. The Plan ROD only “makes . . . lands within NPR-A available for oil and gas leasing.” Ex. 11 at 10. It is at the lease sale phase, therefore, that BLM weighs various factors and determines whether, when, and where to lease. In the Plan EIS, BLM stated that “the first sale, as well as any subsequent sale, might offer only a portion of the lands identified in the record of decision as available, making possible a phased approach to leasing and development.” Ex. 10 at 14. BLM explained that before conducting each lease sale, it would make a new decision about whether, when, and where to lease: “The timing of and the lands offered for lease in the second and subsequent sales, if any, would depend *in part* on the response to the first sale and the results of the exploration that follows.” *Id.* (emphasis added). As this BLM statement reflects, there are other factors that BLM must consider in addition to the information from prior sales, including environmental information. 43 C.F.R. § 3131.2(b).

The way BLM has implemented the Plan ROD illustrates that it makes a new decision about where to lease each time it offers a new lease sale. In 2016, BLM offered leases in a relatively targeted area of 145 tracts, encompassing 1.4 million acres, Ex. 6 at 1, but in 2017 BLM offered all 900 available tracts in the Reserve, encompassing approximately 10.3 million acres, Ex. 7 at 1. Yet, the agency has not done any assessment in an EIS or otherwise of the differential effects of these very different approaches to leasing.

In its DNAs for the 2016 and 2017 lease sales, BLM stated that the range of alternatives analyzed in the Plan EIS was appropriate with respect to the lease sales, given the

“environmental concerns, interests, and resource values” at the time of the sales. Ex. 6 at 2-3, Ex. 7 at 2, Ex. 8 at 3. These determinations do not satisfy NEPA because none of the Plan EIS alternatives provided a comparison of the environmental impacts of different lease sale configurations and timing within the areas open to leasing. *See* 40 C.F.R. § 1502.14. This omission deprives BLM of the opportunity to properly weigh the factors, including environmental information, that it is required to consider under both NEPA and the NPRPA before holding a lease sale. 40 C.F.R. § 1500.1(c), 43 C.F.R. § 3131.2(b). It also deprives BLM of the opportunity to consider alternatives that minimize ecological and environmental impacts, as required by NEPA and the NPRPA. 40 C.F.R. § 1502.1, 43 C.F.R. § 2361.1(a). For example, when faced with the climate impacts of various leasing alternatives, BLM might have chosen an alternative that minimizes greenhouse gas emissions; or when faced with the evidence of impacts to sensitive resources in the Northeastern Reserve that are already feeling the stress of development, BLM might have chosen an alternative that minimizes or eliminates tracts in those areas.

Comparing reasonable leasing alternatives at the lease sale phase is especially important because each time BLM makes a decision about whether, where, and when to lease, it must incorporate any new information bearing on the factors it must consider, including information from prior lease sales. *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 813-815 (9th Cir. 2005). New information about the location of recent industry interest and discoveries, the unanticipated level of impacts from exploration and development in the Northeastern Reserve, and other environmental changes including climate change and declining caribou herds, oblige BLM to assess and compare alternatives that might limit impacts. *See Sierra Club v. United States*, 23 F. Supp. 2d 1132, 1145 (N.D. Cal. 1998) (concluding that it would be

reasonable for the Park Service to consider an alternative that was not considered in its general management plan because new information about flooding had changed the need for facilities in certain areas).

The record shows that commenters repeatedly suggested that BLM consider protective leasing alternatives that would take into account current information about impacts to limit environmental harm. For example, before the 2017 lease sale, commenters suggested that “BLM should employ the precautionary principle and not lease any tracts to the south or west of the Teshekpuk Lake Special Area” to protect declining caribou herds. Ex. 2 at 4. Before the 2016 lease sale, commenters asked BLM to either not hold a lease sale or to consider an alternative that eliminated specific tracts in the Teshekpuk Lake Special Area. Ex. 1 at 7. Another comment letter asked BLM to consider an alternative that would “avoid further impacts [to Alaska Native Village of Nuiqsut] by avoiding further leasing within the community’s subsistence use area . . .”. Ex. 21 at 3. As the comment letters demonstrate, these alternatives were reasonable and had the potential to reduce impacts. But instead of considering reasonable lease sale alternatives, BLM proceeded with the 2016 and 2017 lease sales with no alternatives analysis, resulting in decisions to offer some of the most vulnerable tracts in 2016 and all of the tracts available for leasing in 2017.

BLM’s failure to consider reasonable alternatives that took into account all available information at the point that it decided where, when, and whether to hold lease sales, was arbitrary and a violation of NEPA.

IV. PLAINTIFFS ASK THE COURT TO VACATE THE LEASE SALE AND THE LEASES ISSUED THEREUNDER.

BLM did not complete the proper NEPA review before holding the 2016 and 2017 lease

sales. Its decision to hold the lease sales without discharging its NEPA obligations was arbitrary and unlawful. Accordingly, Plaintiffs request that the Court declare the NEPA review unlawful and vacate the lease sale decisions and leases issued thereunder. In the alternative, Plaintiffs request that the Court: (1) remand to BLM with the direction to comply with NEPA and reconsider its leasing decisions based on a proper NEPA review, and (2) enjoin further activities on the leases pending such compliance.

A. Plaintiffs ask the court to vacate the lease sale decisions and cancel the leases.

The normal remedy under the APA for an unlawful agency action is vacatur. 5 U.S.C. § 706(2)(A). *See also Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015); *Cal. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1095-96, 1106 (9th Cir. 2011); *Se. Alaska Conservation Council v. U.S. Army Corps of Eng’rs*, 486 F.3d 638, 654-55 (9th Cir. 2007), *rev’d and remanded on other grounds sub nom.* Because the 2016 and 2017 lease sales were held, and leases issued, in the absence of the proper analysis under NEPA, plaintiffs ask the Court to vacate them. *See Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978), *vacated in part on other grounds*, 439 U.S. 922 (1978) (“Government leases issued in violation of the law may, in appropriate cases, be invalidated.”) (citation omitted). Although the Court retains discretion to remand without vacatur where vacatur would cause harm to the environment, *see, e.g., Pollinator Stewardship Council*, 806 F.3d at 532 (citing *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995)), or thwart the objective of the statute at issue, *W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980), there is no reason to depart from the normal remedy of vacatur in this case. *Cf. Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 993-94 (9th Cir. 2012) (noting vacatur, denied in the case, would result in “the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent”). Vacating the leases

would, if anything, be environmentally beneficial, and it would implement the purpose of NEPA to “help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1.

The deficiencies in the NEPA analysis are significant and go to the heart of BLM’s decisions about whether, when, and where to hold lease sales in the Reserve. Proper analysis and disclosure about the reasonably foreseeable climate impacts and a comparison of reasonable leasing alternatives could each “have led [the Secretary] to reject altogether a lease sale” in the Reserve. *Alaska*, 580 F.2d at 485. Vacatur of the leasing decisions and cancellation of the leases issued under them will preserve the full opportunity for the Secretary to choose among alternatives, as is contemplated by NEPA. *Id.*; *Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983) (Breyer, J.) (“[W]hen a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.”).

B. Alternatively, Plaintiffs ask the Court to enjoin activities on the leases until BLM complies with its NEPA obligations and reconsiders its lease sale decisions.

In the alternative, Plaintiffs ask the Court to remand to BLM and order the agency to comply with its NEPA obligations and consider anew its lease sale decisions in light of the NEPA analysis, without regard to lessee investment. To support this fresh look, Plaintiffs ask the Court to enter an injunction prohibiting activities on the leases purchased in the 2016 and 2017 lease sales while BLM complies with its NEPA obligations. A plaintiff seeking a permanent injunction must demonstrate that: (1) it is likely to suffer an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) considering the

balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018). Because Plaintiffs seek an injunction that may be lifted after BLM complies with NEPA, the first prong of the injunction test matches the preliminary injunction test: Plaintiffs must show that they are likely to suffer irreparable harm in the absence of relief. *Nat'l Wildlife Fed'n.*, 886 F.3d at 817. In order to show that a harm is likely, “[t]here must be a sufficient causal connection between the alleged irreparable harm and the activity to be enjoined, and showing that the requested injunction would forestall the irreparable harm qualifies as such a connection.” *Id.* at 819 (internal quotation marks omitted). Plaintiffs “need not further show that the action sought to be enjoined is the exclusive cause of the injury.” *Id.* (internal quotation marks omitted).

1. Plaintiffs will suffer irreparable harm in the absence of an injunction.

Leaseholders have conducted, and will continue to conduct, studies and exploration activities on the leases sold in the 2016 and 2017 lease sales. These activities irreparably harm Plaintiffs and their members. It is also likely that leaseholders will conduct development and production activities on some of the leases. These activities will also irreparably harm Plaintiffs and their members.

“[Exploration] activities include seismic exploration, ice road construction, and well testing.” Ex. 9 at 65. Seismic activities can disturb animals, making wildlife viewing, photography, study, and hunting more difficult. *Id.* Ice road construction requires substantial fresh water use from local fish-bearing lakes and results in summer air traffic. *Id.* BLM has

characterized the effects of these activities as “adverse.” *Id.* Exploration drilling can also lead to the displacement of animals, as well as “impacts to overwintering fish from water withdrawals, river crossings, and fuel spills near ice airstrips; and increased time, effort, and expense during hunting.” Ex. 10 at 172. Summer activities associated with exploration drilling can also result in displacement of animals and hunting disruptions. *Id.* The Plan EIS concludes that these exploration activities may “have substantial health effects” on people who rely on subsistence activities. *Id.* at 173.

Development activities include “potential oil spills, seismic noise, road and air traffic disturbance, and construction activities.” Ex. 9 at 55. These activities harm wildlife that Plaintiffs’ members use and enjoy for wildlife viewing, study, photography, and hunting and fishing activities. *See* Ex. 25 at ¶¶5-8; Ex. 28 at ¶¶10-16, 19, 24; Ex. 30 at ¶¶3-13. For example, BLM has explained that oil and gas activities in the Northeastern Reserve can be expected to remove water and pollute fish habitat, Ex. 9 at ¶37, block fish movements, *id.* at ¶¶66, 39, deplete bird habitat and forage areas, *id.* at 42, reduce caribou habitat and disturb caribou, especially calving mothers, *id.* at ¶45, destroy yellow-billed loon habitat, *id.* at ¶48, and kill or displace nesting threatened spectacled eiders, *id.*

These activities will irreparably harm Plaintiffs’ members who, for example, study yellow-billed loons, guide wilderness tours, and rely on caribou for sustenance. *See* Ex. 28 at ¶¶10-16, 19, 24; Ex. 30 at ¶21; Ex. 25 at ¶¶1, 8-9. These activities can have high-intensity, long-term, and widespread impacts on important hunting and fishing activities in which Plaintiffs’ members engage. Ex. 9 at 55; *see also* Ex. 25 at ¶¶9-13, 26-34, 38-40, 43, 45-48, 53-55. BLM has previously concluded that the loss of hunting and fishing opportunities in the Northeastern Reserve can result in stress within households, family groups, and the community and “could

have impacts on future generations, as harvesters may no longer be able to teach younger hunters about subsistence uses in traditional harvesting areas.” Ex. 9 at ¶¶54-55, 63-65; *see also* Ex. 25 at ¶¶10-12, 26-34, 39, 43.

In addition to the direct effects of exploration and development on the leases, an indirect effect of the lease sales—greenhouse gas emissions that lead to climate change—acts cumulatively to increase the severity of harms to Plaintiffs and their members. For example, the loss of permafrost caused by climate change works synergistically and cumulatively with oil and gas activities to have severe impacts on “infrastructure, travel, landforms, sea ice, river navigability, habitat, availability of fresh water, and availability of [fish and wildlife resources].” Ex. 9 at 56. This will directly harm Plaintiffs and their members. *See* Ex. 25 at ¶¶35-37; Ex. 28 at ¶¶20, 23, 26; Ex. 30 at ¶¶22-23, 26. The cumulative effects of climate change and oil and gas activities’ direct effects will also lead to long-term changes to caribou distribution, productivity, and abundance. Ex. 9 at 66.

Should activities on the leases be allowed to continue, Plaintiffs’ members are likely to miss opportunities to study, view, photograph, and enjoy wildlife that is affected by exploration and development activities. *See* Ex. 28 at ¶¶20-29; Ex. 30 at ¶¶16-21, 26-27. Plaintiffs’ members are also likely to miss subsistence hunting opportunities, which will cause them to lose food resources and money. *See* Ex. 25 at ¶¶9-13, 26-34, 38-40, 45-48; Ex. 30 at ¶25. These are irreparable harms, and BLM’s 2016 and 2017 lease sale decisions increase the likelihood, intensity, and severity of these harms.

2. *Oil and gas exploration and drilling activities make legal remedies inadequate.*

The Supreme Court has instructed that “[e]nvironmental injury, by its nature, can seldom

be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Amoco Prod. Co. v. Vill of Gambell*, 480 U.S. 531, 545 (1987); *see also Soda Mountain Wilderness Council v. Bureau of Land Mgmt.*, 534 F. App’x 680, 684-85 (9th Cir. 2013) (quoting *Amoco* and issuing injunction when agency failed to consider a reasonable alternative). The loss of fish, birds, and caribou, and their habitat, “if indeed incorrect in law, cannot be remedied easily if at all.” *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

3. *The balance of equities tips sharply in favor of Plaintiffs.*

“[W]hen environmental injury is ‘sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.’” *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (quoting *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988)). The proper inquiry under this factor is to weigh plaintiffs’ irreparable injuries against “only the portion of the [economic] harm that would occur while the [] injunction is in place” *League of Wilderness Defenders*, 752 F.3d at 765. This is appropriate because, if BLM affirms the leases after undergoing the proper NEPA review, the only economic harm to defendants is the cost of moving economic benefits “to a future year, rather than the present.” *Id.* at 765-66. Leaseholders may experience some limited economic harm associated with a pause in activities during BLM’s completion of NEPA review on remand, if BLM concludes that the leases may stay in place. However, such potential monetary harm is not normally considered irreparable. *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) (“It is well established . . . monetary injury is not normally considered irreparable.”). In the absence of an injunction, severe harms to the environment and to Plaintiffs’ and their members’ interests are ongoing and sufficiently likely. *See Alliance for*

the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding that project’s prevention of plaintiffs’ use and enjoyment of the project area “is hardly a *de minimis* injury”). Thus, the balance of equities tips toward Plaintiffs, who face the immediate loss of recreation, work, and subsistence resources and traditions, while the leaseholders potentially face only delay in their economic activities, and even then only if BLM were to decide on remand that some leases should stand.

4. *An injunction advances the public interest.*

Finally, the public interest also favors the granting of an injunction. When plaintiffs seek injunctive relief from oil and gas activities, “the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns.” *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc), *overruled on other grounds by Winter v. Natural Res. Def. Council* 55 U.S. 7, 20 (2008). The Ninth Circuit has also “recognized the public interest in careful consideration of environmental impacts before major federal projects go forward, and . . . [has] held that suspending such projects until that consideration occurs ‘comports with the public interest.’” *Alliance for the Wild Rockies* 632 F.3d at 1138 (quoting *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 588 F.3d 718, 728 (9th Cir. 2009)). Requiring BLM to comply with its legal obligations before leaseholders are allowed to conduct activities that are likely to irreparably harm Plaintiffs’ members is in the public interest.

CONCLUSION

BLM approved the 2016 and 2017 lease sales in violation of NEPA. Plaintiffs request that the Court vacate the lease sales and the leases thereunder, or, in the alternative, remand to BLM with the direction to comply with NEPA and enjoin all activities under the leases pending completion of NEPA review and reconsideration of its leasing decisions.

Respectfully submitted this 4th day of June, 2018.

s/ Rebecca Noblin

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EARTHJUSTICE

*Attorneys for Plaintiffs Natural Resources Defense
Council, Center for Biological Diversity,
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2018, a copy of foregoing PLAINTIFFS' PRINCIPAL BRIEF UNDER LOCAL RULE 16.3(c)(1), with attachments, was served electronically on Ryan P. Steen and Michelle-Ann C. Williams.

s/ Rebecca Noblin

Rebecca Noblin

TABLE OF EXHIBITS

Exhibit No.	AR Bates Nos.	Description
1	2750-61	Alaska Wilderness League <i>et al.</i> , Comments on the 2016 National Petroleum Reserve-Alaska Oil and Gas Lease Sale (May 2, 2016)
2	4487-98	Alaska Wilderness League <i>et al.</i> , Comments on the 2017 National Petroleum Reserve-Alaska Oil and Gas Lease Sale (Aug. 31, 2017)
3	5393-5404	Audubon Alaska, Comments on the 2017 National Petroleum Reserve-Alaska Oil and Gas Lease Sale (Sept. 6, 2017)
4	11554-57	Bureau of Land Management (BLM), Determination of NEPA Adequacy, Oil and Gas Lease Sale in the National Petroleum Reserve-Alaska (Nov. 7, 2014)
5	11673-76	BLM, Determination of NEPA Adequacy, Oil and Gas Lease Sale in the National Petroleum Reserve-Alaska (Oct. 8, 2015)
6	2903-08	BLM, Determination of NEPA Adequacy, Oil and Gas Lease Sale in the National Petroleum Reserve-Alaska (Nov. 2, 2016)
7	9513-16	BLM, Determination of NEPA Adequacy, Oil and Gas Lease Sale in the National Petroleum Reserve-Alaska (Sept. 26, 2017)
8	9723-31	BLM, Revised Determination of NEPA Adequacy, Oil and Gas Lease Sale in the National Petroleum Reserve-Alaska (Feb. 28, 2018)
9	9852-11553	BLM, Final Supplemental Environmental Impact Statement for the Alpine Satellite Development Plan for the Proposed Greater Mooses Tooth One Development Project (Oct. 2014) (excerpts)
10	2-2616	BLM, National Petroleum Reserve-Alaska, Final Integrated Activity Plan/ Environmental Impact Statement (Nov. 2012) (excerpts)
11	3412-3525	BLM, National Petroleum Reserve-Alaska, Integrated Activity Plan, Record of Decision (Feb. 21, 2013) (excerpts)
12	3040	BLM, National Petroleum Reserve in Alaska Sale Map – 2016 Lease Sale (Dec. 14, 2016)

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- 13 9703 BLM, National Petroleum Reserve in Alaska 2017 Sale Map (Dec. 2017)
- 14 9851 BLM, NPR-A Sale 2013 Bid Recap (Nov. 6, 2013)
- 15 11558 BLM, NPR-A Sale 2014 Bid Recap (Nov. 19, 2014)
- 16 11677 BLM, NPR-A Sale Bid Recap (Nov. 18, 2015)
- 17 11559-11668 BLM, Supplemental Environmental Impact Statement for the Alpine Satellite Development Plan for the Proposed Greater Mooses Tooth One Development Project, Record of Decision (Feb. 2015) (excerpts)
- 18 8650-84 Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (Aug. 2016)
- 19 8708-19 International Energy Agency, World Energy Outlook 2012: Executive Summary (2012)
- 20 8720-35 C. McGlade & P. Elkins, *The geographical distribution of fossil fuels unused when limiting global warming to 2 °C*, 517 NATURE 187 (Jan. 8, 2015)
- 21 2764-68 The Wilderness Society, Comments on the 2016 National Petroleum Reserve-Alaska Oil and Gas Lease Sale (May 2, 2016)
- 22 11691-94 U.S. Geological Survey, 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 (Dec. 2017)
- 23 8775-9447 U.S. Global Change Research Program, Climate Science Special Report (CSSR), Fifth-Order Draft (5OD) (June 28, 2017) (excerpts)
- 24 8736-67 Paris Agreement (Dec. 12, 2015)
- 25 Declaration of Rosemary Ahtuanguaruak
- 26 Declaration of Brendan Cummings
- 27 Declaration of Timothy Donaghy

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28	Declaration of Jeffrey Scott Fair
29	Declaration of Marcelin E. Keever
30	Declaration of Dan Ritzman
31	Declaration of Gina Trujillo