

No. 23-3624 (consolidated with No. 23-3627)
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY *et al.*,
Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT *et al.*,
Defendants-Appellees,

CONOCOPHILLIPS ALASKA, INC. *et al.*,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska

No. 3:23-cv-00061-SLG

Hon. Sharon L. Gleason

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, Greenpeace, Inc., and Natural Resources Defense Council hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

This appeal concerns the Bureau of Land Management’s (BLM) approval of the Willow Master Development Plan (“Willow” or “Project”). Willow is an enormous new oil drilling project on vibrant but sensitive federal land in America’s Arctic that would lock in oil production, and unsustainable climate pollution, for decades to come. It would cause the release of more than 239 million metric tons of greenhouse gas emissions over its lifetime—the carbon equivalent of adding 1.8 million gas-powered cars to the road for thirty years.¹ BLM itself acknowledges that Willow’s climate impact is significant; that climate change is already adversely affecting the National Petroleum Reserve-Alaska (“Reserve”); and that U.S. climate policy calls for the urgent reduction of greenhouse gas emissions. In addition to its climate harms, the Project’s infrastructure will damage a biologically rich and culturally important area already suffering the effects of permafrost thaw and sea ice loss.

After the district court vacated a prior approval, BLM approved the Project anew in March 2023, without meeting its legal obligations to grapple fully with the Project’s climate impacts. BLM refused to consider any Project alternatives that would meaningfully constrain Willow’s oil production and resulting greenhouse gas emissions. It obscured Willow’s full climate repercussions by omitting from

¹ See <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator>.

its analysis the downstream greenhouse gas emissions of other reasonably foreseeable future oil production that Willow—as a hub for further development—is designed to facilitate. It failed to explain how its decision not to meaningfully reduce the effects of Willow’s downstream carbon emissions fulfills its statutory obligation to protect the Reserve’s surface resources. BLM, the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) (collectively, “the Services”) also failed to conduct a consultation required by the Endangered Species Act (ESA) on the impacts of Willow’s greenhouse gas emissions on polar bears, ringed seals, and bearded seals—Arctic species threatened by climate change.

These serious defects prevented decisionmakers and the public from understanding Willow’s true carbon footprint and its consequences for the Reserve and beyond and resulted in a lack of action to address them. The Court should set aside the federal government’s unlawful review and approval of the Project and remand for further analyses.

JURISDICTIONAL STATEMENT

Plaintiffs’ claims arise under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-47; the Naval Petroleum Reserves Production Act (“the Reserves Act”), 42 U.S.C. §§ 6501-08; the ESA, 16 U.S.C. §§ 1531-44; and the Administrative Procedure Act, 5 U.S.C. §§ 701-06. 7-ER-1611–1623 (¶¶171-

226). The district court had subject-matter jurisdiction to hear these claims and award appropriate relief under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), and 28 U.S.C. §§ 2201-02 (declaratory judgment). The district court issued a final order and judgment dismissing Plaintiffs' claims with prejudice on November 9, 2023. 1-ER-4–112; 1-ER-2–3.

Plaintiffs filed their timely notice of appeal of the district court's order and judgment on November 14. 7-ER-1633–1645; *see also* Fed. R. App. P.

4(a)(1)(B)(ii). This Court has jurisdiction over Plaintiffs' appeal of the district court's final order and judgment, which disposes of all parties' claims, under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Did BLM violate NEPA when it evaluated an unreasonably narrow range of action alternatives premised on the arbitrary constraint that all alternatives must allow for full oil field development?

2. Did BLM violate NEPA when it failed to analyze Willow's indirect, growth-inducing effects stemming from the reasonably foreseeable future oil development and consequent downstream greenhouse gas emissions Willow will facilitate?

3. Did BLM violate the Reserves Act when it failed to adequately explain or justify how its decision to approve Willow, without meaningfully

limiting the Project's oil production and ensuing climate harm, satisfied the agency's substantive duties under the Act to protect the Reserve's surface resources?

4. Did BLM, NMFS, and FWS violate the ESA when they failed to consult on the greenhouse gas emissions caused by Willow, and did BLM violate the ESA when it relied on unlawful consultations that did not consider such effects in approving Willow?

STATEMENT REGARDING ADDENDUM

All pertinent statutes, regulations, and other legislative and executive materials are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

I. Background

A. Willow will cause significant harm to the climate and the Reserve.

Willow would develop several oil and gas leases held by ConocoPhillips Alaska, Inc. (ConocoPhillips) within the Bear Tooth Unit in the northeastern portion of the Reserve. *See* 5-ER-911; 6-ER-1162. If completed, it will include 199 wells placed across three drill sites, a central processing facility, an operations center, an airstrip, and a network of gravel roads, ice roads, and pipelines. 6-ER-1161. It will produce 576 million barrels of oil over its thirty-year lifespan. *See* 6-ER-1170, 1241. Together, construction and operation of this massive

Project will accelerate climate change and cause lasting and devastating impacts to a fragile ecosystem and the many wildlife species and people who rely on it.

Fossil-fuel combustion is the primary driver of the climate crisis. *See* 5-ER-944; 4-ER-777. And this crisis is already here. *See* 4-ER-776–777, 779. Climate change impacts are especially pronounced in Alaska’s Arctic, which is warming at nearly four times the rate of the rest of the planet. 4-ER-845; *see also* 4-ER-867–868. Increased average temperatures, decreased sea ice and snow cover, and thawing permafrost are well documented; those conditions are only expected to worsen. 5-ER-941–943; *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 679 (9th Cir. 2016) (finding “no debate” that temperatures will continue to increase and effects will be “particularly acute in the Arctic”).

Willow’s significant carbon footprint will exacerbate the climate crisis—contributing to impacts felt both globally and in the North Slope in Alaska’s Arctic. 4-ER-721–725; *see also* 4-ER-776–779. “[T]o avoid the worst impacts of climate change,” scientists and policymakers agree that urgent and significant reductions in greenhouse gas emissions are necessary. 4-ER-776. Yet Willow will result in more than 239 million metric tons of direct and indirect greenhouse gas emissions over its lifetime. 6-ER-1170. Willow will cause additional greenhouse gas emissions by spurring further development in the Reserve, unlocking potentially *billions* more barrels of oil for consumption. 4-ER-863; 4-ER-777–778.

These emissions threaten further climate harm to the Reserve and its resources. The Reserve is an extraordinary, ecologically sensitive landscape home to numerous species, including polar bears, caribou, and millions of migratory birds. 4-ER-714–715. It is also central to the traditional practices of Alaska Native peoples. 5-ER-975–983; 5-ER-1134–1136. Climate change is already putting these resources and practices at risk. For example, climate change “is believed to be one of the key factors in causing [a] 56% decline in populations of migratory caribou . . . in the Arctic over the last two decades,” diminishing a critical food resource for subsistence hunters. 4-ER-784. Climate change is also destroying the sea ice that polar bears, bearded seals, and ringed seals need to survive. *See* 6-ER-1392–1394 (polar bear); 7-ER-1556–1557 (bearded seal); 7-ER-1564 (ringed seal). All three species are protected as threatened under the ESA because of existing and projected sea ice loss. Unless current emissions trends are curbed, most of the world’s polar bear populations will go extinct within this century, including both Alaska populations, which could be extinct as soon as 2050. *See, e.g.*, 4-ER-793–798; 4-ER-799–805. The Project will compound these harms.

Willow will also cause substantial near-term harm to the Reserve, including to the Teshekpuk Lake Special Area—one of the most productive wetland complexes in the Arctic, providing key calving, foraging, and insect-relief grounds

for caribou, 4-ER-714—and the Colville River Special Area—the largest river delta in northern Alaska, providing critical nesting and hunting areas for peregrine falcons, golden eagles, and rough-legged hawks, 4-ER-715. To date, oil and gas development in the Reserve has largely been limited to areas closest to existing infrastructure on state lands. Willow and its network of pipelines, well pads, and roads will change that, pushing such development farther west and into the Teshekpuk Lake and Colville River Special Areas. *See* 4-ER-716–717; 5-ER-907, 930. Among other impacts, industrialization of these areas will disturb and displace caribou, “significantly restrict[ing]” Alaska Native peoples’ subsistence activities. 5-ER-1146–1147; *see also* Dkt. 10.1 at 13-19.

B. Congress recognized and protected the Reserve’s ecological and subsistence values through the Reserves Act.

The Reserves Act reflects Congress’s intent to safeguard the Reserve’s invaluable surface resources, even while providing for oil and gas development. In the early 1900s, the federal government established four naval petroleum reserves—including Naval Petroleum Reserve No. 4 on Alaska’s North Slope—to ensure a future oil supply for national defense. *See* H.R. Rep. No. 94-81, pt. 1 at 5-6 (1975); Exec. Order 3797-A (1923). In 1976, Congress revised the status of these reserves through the Reserves Act, as the nation sought to meet its increasing total energy needs beyond national defense. As to Reserve Nos. 1, 2, and 3—all of which were producing some oil already, H.R. Rep. No. 94-81, pt. 2 at 7 (1975)—

Congress directed the Secretary of the Navy “to further explore, develop, and operate” them, “produc[ing] such reserves at the maximum efficient rate” for up to six years. Pub. L. No. 94-258, § 201(3), 90 Stat. 303, 308 (1976).

But Congress treated Reserve No. 4 differently: it transferred jurisdiction over that reserve, which had remained “largely unexplored and almost completely undeveloped,” H.R. Rep. No. 94-81, pt. 2 at 7-8, from the Secretary of the Navy to the Secretary of the Interior, redesignating it as the National Petroleum Reserve Alaska. Pub. L. No. 94-258, §§ 102-103, 90 Stat. at 303 (codified at 42 U.S.C. §§ 6502-6503(a)). In doing so, Congress recognized that the Reserve—home to an “historic and current calving ground of the Arctic caribou herd,” the “best waterfowl nesting area on the North Slope,” and “highly scenic” lands—was better managed as public lands by the Department of the Interior. H.R. Rep. No. 94-81, pt. 1 at 8-9; *see also id.* at 9 (noting that “the Navy should not retain exclusive jurisdiction over 22 million acres of Alaska public lands in the guise of an essentially unexplored petroleum reserve”).

More importantly, unlike the other three naval petroleum reserves, Congress expressly prohibited any development or production on the Reserve until it authorized such activities. Pub. L. No. 94-258, § 104(a), 90 Stat. at 304. And though Congress required the Department of the Interior to further explore the Reserve, it mandated that “[a]ny exploration” within designated areas containing

“significant subsistence, recreational, fish and wildlife, or historical or scenic value”—such as the Teshekpuk Lake and Colville River Special Areas—“assure the maximum protection of such surface values” consistent with the Act’s exploration requirements. *Id.*, § 104(b), 90 Stat. at 304 (codified at 42 U.S.C. § 6504(a)); *see also* H.R. Rep. No. 94-942 at 21 (1976) (explaining that the Act requires exploration to “cause the least adverse influence on fish and wildlife”).

Congress reiterated the importance of preserving the Reserve’s ecological value in 1980, when it opened exploration to private parties by requiring the Department of the Interior to conduct “an expeditious program of competitive oil and gas leasing.” *See* Pub. L. No. 96-514, 94 Stat. 2957, 2964 (1980) (codified at 42 U.S.C. § 6506a(a)). Mindful of the environmental risks, Congress mandated that, in approving such activities, the Department of the Interior impose “such conditions, restrictions, and prohibitions” as it “deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects” on the Reserve’s surface resources. *Id.*, 94 Stat. at 2964 (codified at 42 U.S.C. § 6506a(b)). That command echoes Congress’s intent in 1976 that the Department of the Interior “take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances through the reserve,” and not just in designated special areas. H.R. Rep. No. 94-942 at 21. Congress further required that “any . . . production” be subject to the Act’s maximum protection requirements.

Pub. L. No. 96-514, 94 Stat. at 2965 (codified at 42 U.S.C. § 6506a(n)(2)).

Congress was therefore clear that private activities on the Reserve must comply with the Act’s environmental protection mandates: that is, private production cannot proceed unless “reasonably foreseeable and significantly adverse effects” on surface resources are “mitigate[d],” 42 U.S.C. § 6506a(b), and the “maximum protection” of surface values in designated areas is “assure[d],” *id.* § 6504(a).

C. The federal government’s analyses of Willow do not adequately evaluate or mitigate the Project’s harms to the climate and the Reserve.

BLM first approved Willow in October 2020. 5-ER-910–911. This Court initially enjoined implementation of that approval pending appeal of a preliminary injunction denial. *Sovereign Iñupiat for a Living Arctic v. BLM*, Nos. 21-35085 & 21-35095, 2021 WL 4228689, at *2 (9th Cir. Feb. 13, 2021). The district court subsequently vacated the approval, holding, in relevant part, that (1) BLM violated NEPA by restricting the Project alternatives it considered based on the mistaken view that ConocoPhillips had a right to extract all the oil from its leases; (2) BLM violated NEPA by failing to assess the Project’s full climate consequences; and (3) FWS violated the ESA by relying on unspecified mitigation measures in its biological opinion for the polar bear and by issuing an arbitrary and capricious incidental take statement for the bear. *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739, 762-70, 799-805 (D. Alaska 2021).

On remand, BLM released a draft Supplemental Environmental Impact Statement (SEIS) in July 2022. 4-ER-690. Public comments identified serious deficiencies in the agency's analysis, including BLM's failure to consider alternatives that would substantially reduce Willow's oil production and resultant climate impacts, to impose measures to mitigate Willow's emissions, and to fully examine the climate impacts from reasonably foreseeable future development facilitated by the Project. *See, e.g.*, 4-ER-709–710; 4-ER-726–728, 736–741, 762; 4-ER-777–778, 781–782, 791. The final SEIS, published in February 2023, 4-ER-693, did not correct these defects. The Services concluded their ESA reviews on January 13 and March 2, respectively. 6-ER-1175. NMFS issued a letter of concurrence, concluding that Willow is not likely to adversely affect the Beringia distinct population segment of the bearded seal, the Arctic ringed seal, or their critical habitat. 7-ER-1505. FWS issued a biological opinion, concluding that Willow is not likely to jeopardize the polar bear or adversely modify its critical habitat. 6-ER-1319; 7-ER-1470, 1471.

The Services' consultations do not consider, let alone mitigate, Willow's climate impacts.

BLM signed a Record of Decision (ROD) approving the Project on March 12. 6-ER-1185. Though the ROD adopts a modified Project alternative in an effort to reduce Willow's environmental impacts, 6-ER-1167–1168, it neither cures

the inadequacies of the agencies' underlying reviews nor reconciles Willow's climate impacts with the agencies' legal obligations.

II. Procedural history

Plaintiffs filed this case in the district court on March 15, 2023, two days after BLM published the ROD. CR 1 at 1, 38 (¶160). Plaintiffs alleged that BLM violated NEPA and the Reserves Act and that BLM and the Services violated the ESA, and sought vacatur of the agencies' actions. *Id.* at 41-51 (¶¶169-216), 52.² Because ConocoPhillips intended to immediately begin gravel mining and road construction, Plaintiffs filed a motion for a preliminary injunction. CR 24 at 17-21. The district court denied Plaintiffs' motion on April 3. CR 82 at 3. Plaintiffs appealed and sought injunctive relief pending appeal from the district court on April 4. CR 83; CR 84. The district court denied Plaintiffs' motion on April 5, CR 87 at 2, and Plaintiffs filed a motion for injunction pending appeal in this Court on April 6, *CBD v. BLM*, No. 23-35227, Dkt. 5-1. The Court denied Plaintiffs' motion on April 19. *Id.*, Dkt. 29 at 2.

ConocoPhillips subsequently began its planned construction activities. CR 197-11, ¶3. Because the activities that were the subject of Plaintiffs' preliminary injunction motion were scheduled to be completed in late April,

² Plaintiffs filed an amended complaint to add their ESA claims against BLM on June 23, 2023. 7-ER-1622–1623 (¶¶219-226).

Plaintiffs dismissed their appeal, *see* Case No. 23-35227, Dkt. 31 at 2, and the parties proceeded to brief the case on the merits in the district court on a schedule that would resolve the merits prior to the next construction season.

On November 9, the district court issued an order and judgment dismissing Plaintiffs' claims and denying Plaintiffs' request for vacatur. 1-ER-4-112; 1-ER-2-3. Plaintiffs appealed. 7-ER-1633-1645.

ConocoPhillips intended to resume significant construction activities as early as December 21, Dkt. 24.16, ¶7, with the goal of completing almost half the Project's entire footprint this winter, *see* CR 197 at 18. Because these activities will cause substantial irreparable harm to Plaintiffs, Plaintiffs moved for an injunction pending appeal in the district court on November 17. CR 190. The district court denied Plaintiffs' motion on December 1. CR 208 at 3. Plaintiffs moved for reconsideration on December 3, CR 209, which the district court denied on December 6, CR 216 at 4.

Plaintiffs filed a motion for injunction pending appeal in this Court on December 6. Dkt. 10.1. A motions panel denied Plaintiffs' motion without prejudice to renewal before the merits panel on December 18, and consolidated the case with Case No. 23-3627. Dkt. 37.1 at 2. The Court expedited these cases under General Order 3.3(g), recognizing their urgent nature. *Id.* at 2-3.

Plaintiffs have renewed their request for injunctive relief pending this Court’s final decision on the merits of their appeal concurrently with this opening merits brief.

STANDARD OF REVIEW

This Court “review[s] the district court’s summary judgment de novo, applying the same standards that applied in the district court.” *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). The Administrative Procedure Act provides the standard of review for the claims at issue. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002). Under this standard, the Court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Critical to that inquiry is whether there is ‘a rational connection between the facts found and the conclusions made’” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 481 (9th Cir. 2011) (citation omitted). The Court must conduct “a thorough, probing, in-depth review,” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citation omitted), and cannot “‘rubber-stamp’ . . . administrative decisions . . . inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute,” *Ocean Advocs. v. U.S.*

Army Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005) (first alteration in the original, citation omitted).

SUMMARY OF THE ARGUMENT

Plaintiffs have standing to bring this challenge.

BLM violated NEPA's requirement to evaluate a reasonable range of alternatives because it predicated its assessment on the flawed premise that it must allow ConocoPhillips to extract all economically viable oil from its leases and assessed only a narrow range of action alternatives that each allowed nearly identical oil production.

BLM violated NEPA's requirement that it assess the indirect, growth inducing effects of its decision to approve Willow because, although it acknowledged that Willow is a hub for future oil development in the Reserve, it failed to assess the downstream greenhouse gas emissions of the development Willow is designed to catalyze.

BLM violated the Reserves Act because it failed to explain or justify how its decision not to meaningfully reduce Willow's downstream greenhouse gas emissions fulfills its statutory mandates to protect the Reserve's surface resources.

BLM, NMFS, and FWS violated the ESA because they failed to consult on the effects of Willow's greenhouse gas emissions on polar bears, bearded seals,

and ringed seals; and BLM unlawfully relied on consultations that failed to consider such effects in approving Willow.

These serious defects centrally undermine the federal government's decision to approve Willow by preventing decisionmakers and the public from understanding the Project's true greenhouse gas emissions and consequences, resulting in a lack of action to address them. The Court should set aside the federal government's unlawful review and approval of the Project and remand for further analyses.

ARGUMENT

I. Plaintiffs have standing to challenge BLM's approval of Willow and the agencies' underlying environmental reviews.

Plaintiffs are a coalition of member-based non-profit organizations committed to protecting the Reserve from the detrimental effects of fossil fuel development. 3-ER-409, 411–417 (¶¶2, 4, 10-23); 3-ER-428, 430–433 (¶¶1-4, 9-15); 3-ER-436–440 (¶¶2-9); 3-ER-447–452 (¶¶2-3, 6-12); 3-ER-459–461 (¶¶3, 8-11). Plaintiffs bring this suit on behalf of their members, including those who use the Project site and surrounding areas of the Reserve and the species dependent on those areas, for recreation, aesthetic value, cultural and subsistence practices, and professional pursuits, and who are harmed by Willow and the federal government's inadequate analyses and approval of it. 2-ER-113b–131, 133, 138–146, 148, 151, 154–165, 169–170, 173–174 (¶¶3, 6, 10, 12-39, 44, 55, 58, 60-65, 67-69, 77, 81,

86-95, 97-100, 103, 109-114, 121); 2-ER-261–279 (¶¶3-39); 3-ER-357a–371 (¶¶2, 5, 8-33); 3-ER-373–374, 376–394 (¶¶3-5, 13-63); 2-ER-287–298 (¶¶3-12, 14-29); 3-ER-399–407 (¶¶1, 3-20); 3-ER-410, 419–425 (¶¶7, 27-31, 33-44); *see also Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180-84 (2000). An order setting aside the ROD and related review documents would redress these harms by halting Project implementation and allowing BLM and the Services to reconsider their decisions. *See Save Bull Trout v. Williams*, 51 F.4th 1101, 1106-07 (9th Cir. 2022); *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001).

II. BLM violated NEPA by failing to consider a reasonable range of alternatives.

BLM’s alternatives analysis rests on a flawed premise: that it must allow ConocoPhillips to extract all economically viable quantities of oil from its leases. That premise conflicts with BLM’s resource protection mandates under the Reserves Act and led the agency to evaluate an unlawfully narrow set of alternatives in the SEIS that all maximize Willow’s oil production while placing damaging infrastructure within the Teshekpuk Lake and Colville River Special Areas.

BLM has neither disputed that its alternatives analysis rests on the full development premise nor defended the lawfulness of this constraint. Instead, it has argued that it complied with NEPA because it considered and rejected, in an

appendix, proposed alternatives that would lessen impacts and ultimately approved a Project that did not allow full field development. But BLM's rejection of proposed alternatives rests on the same flawed conclusion that it must allow full development; and its ultimate decision that (nominally) does *not* allow full development both (i) shows that the SEIS's full development premise is arbitrary and (ii) was itself constrained because it could not stray far from the SEIS's alternatives.

A. The SEIS's range of alternatives is based on an arbitrary constraint.

NEPA requires agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives” to a proposed action. *Or. Nat. Desert Ass’n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010) (alteration in original) (citing 40 C.F.R. § 1502.14³). “The existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” *Id.* (citation omitted). BLM failed to meet this standard here.

ConocoPhillips proposed a project design (Alternative B) that would allow it to extract 628.9 million barrels of oil over Willow's lifetime. 5-ER-1089. BLM evaluated in detail two other alternatives, C and D, that would likewise produce 628.9 million barrels of oil, and a third, Alternative E, that would produce 613.5

³ This brief cites the NEPA regulations as codified in 2019. *See* Dkt. 20.1 at 18 n.4.

million barrels—a mere three-percent drop. *See id.*; *see also* 4-ER-688 (ConocoPhillips admitting that oil production and ensuing carbon emissions of each action alternative for Willow are “essentially the same”). To accomplish those levels of production, each alternative placed scores of oil wells and miles of ice roads, pipelines, and gravel roads and other infrastructure within the Special Areas. 5-ER-918, 930, 936; 5-ER-1091–1093; 4-ER-679. That is true even of Alternative E: though it eliminated one drill pad from the Teshekpuk Lake Special Area and deferred another drill pad to the south to reduce surface impacts and slightly reduce greenhouse gas emissions, it compensated by shifting a third pad farther north into the Special Area to retain reservoir access and by increasing the number of wells on certain pads. 5-ER-917–918, 1091; 4-ER-679.

As no party has disputed, *see* 2-ER-334–336; 2-ER-322–323; 2-ER-303–306; 2-ER-311–312; Dkt. 20.1 at 25-28; Dkt. 21.1 at 12-13; Dkt. 24.1 at 14-16, BLM assessed the impact of only this narrow range of alternatives in its SEIS because it limited its analysis to alternatives that would “[f]ully develop” the oil field, meaning those that would not “strand” economically viable quantities of oil. 4-ER-876–877; *see also* 5-ER-1002, 1012 (describing alternatives screening criteria that lessee must “fully develop” the oil field). The agency thus declined to evaluate alternatives that would have meaningfully reduced Willow’s oil production and greenhouse gas emissions while offering greater protections to

surface resources—including an alternative that, according to BLM, would have eliminated all infrastructure from the Teshekpuk Lake Special Area and reduced greenhouse gas emissions by 30 percent. 4-ER-682; *see* 4-ER-729–735; 4-ER-781; 4-ER-707–710; 4-ER-658–659; 4-ER-661 (Environmental Protection Agency’s (EPA) and Plaintiffs’ proposed alternatives). Indeed, BLM repeatedly conveyed this rationale to ConocoPhillips and other stakeholders, asserting that it would not carry forward alternatives that resulted in less than full field development. *See, e.g.*, 4-ER-684; 4-ER-669; 4-ER-674–675; 4-ER-666; 5-ER-1048–1049, 1055 (citing economic viability constraint as justification for eliminating three alternative components from further study).

The economic viability constraint that so significantly narrowed the range of alternatives considered was arbitrary because no authority compels full field development. BLM’s alternatives analysis based on this constraint thus violates NEPA. *See CBD v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1218-19 (9th Cir. 2008) (agency violated NEPA where the alternatives were all constrained by the agency’s misapprehension of its statutory authority and thus hardly differed in terms of fuel consumption, energy use, and environmental effects). In fact, the district court previously held that BLM violated NEPA when it used a similar constraint—that ConocoPhillips “had the right to extract all possible oil and gas

from its leases”—to limit the alternatives evaluated when it first approved Willow in 2020. *Sovereign Inupiat for a Living Arctic*, 555 F. Supp. 3d at 805.

The district court erred when it reached a different conclusion following BLM’s second approval, despite the similar constraint. Nothing in the Reserves Act, its implementing regulations, ConocoPhillips’ leases, or the Project’s purpose and need statement required BLM to maximize Willow’s oil recovery—particularly at the expense of the Reserve’s surface resources. The district court effectively moved the “maximum” in the statutory provision, 42 U.S.C. § 6504(a), from protection of Reserve surface values, where Congress put it, to expansion of development, which in fact Congress made subject to the protection mandate, *see id.* § 6506a(n)(2).

In fact, Congress made clear in the Reserves Act that no development could occur unless the Reserve and its resources were protected. *See supra* pp. 7-10. The Act and regulations direct BLM to protect the Reserve’s surface resources—particularly in special areas—and authorize BLM to limit, reject, or suspend development projects as needed. *See, e.g.*, 42 U.S.C. §§ 6503(b), 6504(a), 6506a(b); 43 C.F.R. §§ 2361.1(a), (e)(1), 3135.2(a)(1), (3), 3137.21(a)(4), 3137.73(b); *see also* H.R. Rep. No. 94-942 at 20 (vesting Secretary with responsibility to “carefully control[]” fossil fuel activity in the Reserve to “protect[]” the area’s “natural, fish and wildlife, scenic and historical values”).

True, the Reserves Act and its implementing regulations direct BLM to conduct an “expeditious program of competitive leasing.” 42 U.S.C. § 6506a(a); 43 C.F.R. § 3130.0-1 (similar). But that directive—long since met with 19 lease sales offering more than 60 million acres in aggregate since 1980, *see* 88 Fed. Reg. 62,025, 62,028 (Sept. 8, 2023)—is a far cry from an obligation to fully extract the oil on every lease.

ConocoPhillips’ lease terms and this Court’s caselaw reflect that same authority to limit development. *See* 3-ER-468 (§§ 4, 6) (BLM may “specify rates of development and production in the public interest” and impose measures to “minimize[] adverse impacts” to ecological and cultural resources); *N. Alaska Env’t Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006) (stating that, while BLM cannot preclude development altogether within an entire Reserve planning area, it “can condition permits for drilling on implementation of environmentally protective measures, and we assume it can deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available”);⁴ *Conner v. Burford*, 848 F.2d 1441, 1448-49 (9th Cir. 1988) (recognizing that while lessees possess development rights, BLM can limit activity to avoid environmental impacts).

⁴ Though *Kempthorne* upheld the alternatives considered there, BLM had not constrained the range of alternatives it assessed based on a misapprehension of its authority, 457 F.3d at 978-79, as it did here.

Contrary to the district court’s conclusion, 1-ER-26–27, the regulation BLM relied on in the SEIS to support its economic viability constraint, 43 C.F.R. § 3137.71(b)(1), likewise poses no barrier. As Defendants themselves acknowledged in their brief below, that regulation simply imposes an obligation on ConocoPhillips to describe its plans to fully develop a pooled or “unitized” oil field; it does not speak to ConocoPhillips’ lease rights or compel BLM to approve full development. *See* 2-ER-335 n.7. The district court also erred in concluding that BLM’s full field development criteria was needed to avoid piecemeal analysis. 1-ER-26–27. BLM’s obligation to evaluate the maximum possible impacts of ConocoPhillips’ development plan under NEPA in no way excused it from also evaluating alternatives that would have produced lesser impacts.

Nor does the Project’s purpose and need dictate full field development. The Project’s purpose is “to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources in the Willow reservoir . . . while providing maximum protection to significant surface resources within the [Reserve].” 5-ER-911. Even ConocoPhillips admitted that this purpose is satisfied by an alternative that “allow[s] for *some* development of oil.” 7-ER-1631. For example, the alternative component that BLM considered but rejected, which would have removed infrastructure from the Teshekpuk Lake

Special Area while still allowing recovery of 71 percent of the oil reservoir, *supra* pp. 19-20, satisfies this purpose.

In sum, BLM's economic viability constraint is inconsistent with the Reserves Act and unsupported by Willow's purpose and need statement, and it unlawfully limited the agency's alternatives analysis under NEPA. *See Nat'l Highway Traffic Safety Admin.*, 538 F.3d at 1218-19 (rejecting alternatives analysis that rested on agency's mistaken view that it lacked statutory authority to adopt more environmentally protective option); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1053 (9th Cir. 2013) (faulting BLM for failing to consider alternatives that would feasibly meet project goals "while better preserving" monument resources).

B. BLM's dismissal of more protective alternatives does not remedy the flaw.

The Court should reject the argument, accepted by the district court, 1-ER-23–27, 32, that BLM satisfied NEPA's alternatives requirement because the SEIS contains an appendix that lists, but does not develop or analyze, a number of proposed alternatives. First, BLM rejected alternatives that would reduce oil production and greenhouse gas emissions and remove infrastructure from the Teshekpuk Lake Special Area on the arbitrary basis that they did not allow full field development. *See* 5-ER-1048–1049 (component numbers 43-46); 5-ER-1055–1056. Second, cursorily considering and then eliminating protective

alternative components is no substitute for conducting a detailed evaluation of the components and their environmental impacts as actual alternatives alongside the other Project alternatives. *See Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 877 (9th Cir. 2022) (summary dismissal of alternatives did not satisfy NEPA obligation to “give full and meaningful consideration to all reasonable alternatives” (citation omitted)); *Abbey*, 719 F.3d at 1052 (“consider[ing] and then dismiss[ing]” alternative components “without detailed analysis” did not “cure” the “inadequacies of the other alternatives analyzed”).

C. BLM’s ROD demonstrates that the SEIS’s full development principle is arbitrary and that it constrained BLM’s ultimate choice.

In its ROD, BLM belatedly backed away from the full field development principle that constrained its alternatives development in the SEIS. The Project BLM approved, a modified Alternative E—which disapproved rather than deferred the southern drill pad, 6-ER-1159—did *not* allow ConocoPhillips to fully develop the field. Rather, it precluded development on several of ConocoPhillips’ leases. *Compare* 5-ER-1086 (overlay of oil pool and drilling reach of Alternative E), *with* 4-ER-676 (map suggesting leases H-015, H-016, and H-108, at a minimum, would not recover any oil under modified Alternative E (which disapproved drill pad BT5)); Dkt. 20.1 at 24 (Defendants acknowledging that decision precluded oil extraction on some leases). BLM’s ultimate decision not to permit full field

development demonstrates that neither the law nor the Project's purpose and need compelled it, and thus demonstrates that it was arbitrary for BLM to consider only full field development alternatives in the SEIS.

The small modifications BLM made in the ROD do not remedy its NEPA violation. BLM recognized that “measures to limit greenhouse gas emissions and thereby reduce climate impacts” are “especially important in the [Reserve], given the significant effects of climate change on the Arctic and the North Slope,” 6-ER-1169, and it recognized the importance of limiting direct disturbance to surface resources, 6-ER-1167. But BLM could only go so far in considering changes that would reduce Willow's harms to the climate and to surface resources in light of the limited alternatives analyzed in the SEIS; anything more meaningful than the change it adopted would have required further NEPA analysis. *See* 40 C.F.R. § 1502.9(c)(1)(i); *Russell Country Sportsman v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (an agency may modify a proposed action without issuing an SEIS only if the modified action is a “minor variation of one of the alternatives discussed in the draft EIS,” and “qualitatively within the spectrum of alternatives that were discussed in the draft”). Thus, as BLM acknowledged, the approved Project is only a “minor variation,” 6-ER-1160, 1167, of the Alternative E assessed in the SEIS: it still produces 92 percent as much oil as ConocoPhillips' proposal and includes infrastructure in both Special Areas, *see* 6-ER-1163, 1165–

1166, 1168–1169, 1171. Had BLM assessed a range of alternatives consistent with its statutory authority—that is, unconstrained by the mistaken view that it must allow full field development—it could have ultimately approved a much more protective version of the Project. *See Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 725, 728-30 (9th Cir. 1995) (“While we cannot predict what impact the elimination of [an inapplicable requirement] will have on the [agency’s] ultimate . . . decisions, clearly it affects the range of alternatives to be considered.”).

BLM’s cramped assessment of alternatives in the SEIS rested on an arbitrary premise—unsupported by governing law—that the agency was required to authorize full development of the oil field underlying ConocoPhillips’ leases. The analysis thus violates NEPA and demonstrably limited BLM’s ability to adopt a decision that protects the Reserve and its irreplaceable ecological values.

III. BLM violated NEPA by failing to assess downstream emissions from reasonably foreseeable future oil development caused by Willow.

Willow will facilitate future oil development in the Reserve—as much as three billion barrels—and thereby cause additional downstream greenhouse gas emissions beyond those from oil produced by Willow itself. The district court’s decision, and Defendants’ and Intervenors’ arguments below, that the SEIS adequately accounted for these emissions as cumulative impacts by tiering to a programmatic EIS, ignores the distinction between NEPA’s separate requirements

to consider indirect effects and cumulative impacts. These downstream greenhouse gas emissions are reasonably foreseeable indirect effects of the Project, which BLM was required to specifically disclose and assess in the SEIS. Its failure to do so violated NEPA.

NEPA requires BLM to assess the reasonably foreseeable “indirect effects” of its actions. 40 C.F.R. § 1508.8(b). Indirect effects include “growth inducing effects and other effects related to induced changes in the pattern of land use.” *Id.* In other words, an agency must assess the impacts of future development its action will facilitate. *See City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (development induced by highway interchange); *Ocean Advocs.*, 402 F.3d at 869-70 (increased tanker traffic resulting from refinery dock expansion). This necessarily includes the foreseeable downstream emissions from that future development. *See CBD v. Bernhardt*, 982 F.3d 723, 737-38 (9th Cir. 2020) (*Liberty*) (foreseeable greenhouse gas emissions are indirect effects that must be considered in NEPA analysis); *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1177-79 (D.C. Cir. 2023) (agency must consider greenhouse gas emissions from new oil production facilitated by rail line despite uncertain drilling locations).

There is a clear and meaningful distinction between this requirement to consider indirect effects under 40 C.F.R. § 1508.8(b) and NEPA’s separate requirement to consider cumulative impacts under 40 C.F.R. § 1508.7. *See Barnes*

v. U.S. Dep't of Transp., 655 F.3d 1124, 1136-39, 1141 (9th Cir. 2011) (analyzing cumulative and indirect growth-inducing effects separately). Indirect effects are “effects . . . caused by the action” itself, including “growth inducing effects,” over which the permitting agency has control. 40 C.F.R. § 1508.8(b). A cumulative impacts analysis evaluates the impacts of an action together with “other past, present, and reasonably foreseeable future actions” regardless of the cause of or authority responsible for those actions. *Id.* § 1508.7. In that respect, an indirect effects analysis is functionally different than a cumulative impacts analysis, which concerns impacts that are additive to—but not caused by—the project at hand. Because indirect effects are caused by the agency’s action, understanding them is especially critical. *See City of Davis*, 521 F.2d at 676-77 (analysis of indirect effects “indispensable” when “address[ing] the major environmental problems likely to be created by a project”).

The record demonstrates that Willow will cause additional downstream greenhouse gas emissions by facilitating future oil development. ConocoPhillips told its investors it has already “identified up to 3 billion [barrels of oil equivalent] of nearby prospects and leads . . . that could leverage the Willow infrastructure.” 4-ER-863; *see also* 4-ER-858 (showing West Willow discovery and Soap, Juniper, and Harpoon prospects on company leases west of Willow). And the company has touted Willow as the “Next Great Alaska Hub” that “unlocks the west.” 4-ER-858.

BLM's Integrated Activity Plan (IAP), analyzing Reserve-wide impacts, also shows Willow in a high hydrocarbon potential area, where vast swaths of land have been leased for development. 7-ER-1503, 1504. Recognizing this potential for substantial facilitated development, EPA urged BLM to conduct a "more robust analysis of [ConocoPhillips'] adjacent oil prospects and the reasonably foreseeable actions related to these prospects" that would function as "potential satellite locations that tie into the proposed Willow development." 4-ER-778.

BLM has acknowledged this future development is a "growth inducing impact[]" of Willow. 5-ER-985. The SEIS explains that Willow "may result in additional development opportunities to the south and west of the Project area," that its "existence . . . makes exploration of these areas more attractive," and that it makes development of future discoveries in these areas more likely. *Id.* BLM even made "support[ing] reasonably foreseeable future development" a core consideration of its alternatives analysis. 5-ER-1034; *see also* 5-ER-1037 (rejecting alternative component in part because it "would not support reasonably foreseeable future development"); 5-ER-1083 (including Project component specifically that would accommodate future development). The SEIS characterizes the most imminent facilitated project—West Willow—as a reasonably foreseeable future action, 5-ER-986–987, that "would occur as part of any Willow alternative," 5-ER-1124.

BLM has sufficient information to assess the emissions consequences of these potential induced projects, including their timing, location, and estimated oil production. *See* 5-ER-986–987; 5-ER-1124–1125; 4-ER-777–778; 4-ER-856–858; 4-ER-863.

Given the available information, BLM should not have “ignore[d] this foreseeable effect entirely.” *Liberty*, 982 F.3d at 740; *see also City of Davis*, 521 F.2d at 675-76 (once “substantial questions have been raised about [a project’s] environmental consequences,” the agency “should not be allowed to proceed . . . in ignorance of what those consequences will be”). Yet BLM did just that. It provided no analysis of greenhouse gas emissions from consumption of the billions of additional barrels of other oil development Willow is likely to catalyze. Nor did it “explain[] more specifically why it could not have done so.” *Liberty*, 982 F.3d at 740 (citation omitted). For West Willow in particular, the SEIS inexplicably failed to consider downstream emissions despite providing a specific estimate of the future development’s oil production—analyzing the 48,500 metric tons of *direct* greenhouse gas emissions from West Willow’s drilling activity, but omitting any estimate or analysis of the likely millions of metric tons of emissions that would result from processing and burning the 75 million barrels of oil BLM expects West Willow to produce. 5-ER-987–989, 1124–1125.

Tiering to BLM's programmatic 2020 IAP EIS in the SEIS's discussion of cumulative impacts cannot remedy BLM's failure. The IAP EIS has a different purpose: it analyzes potential cumulative emissions from many projects across the entire 23-million-acre Reserve over many decades under hypothetical scenarios for development. 7-ER-1489–1490, 1496–1498. It is not meant to, and does not, address the potential downstream emissions that Willow will cause by facilitating further development. Indeed, because the IAP EIS's analysis aggregates impacts from many potential projects, it hides the effects induced by Willow itself. It is those induced effects of the decision at hand that must be included in an indirect effects analysis and that are essential for the public and the decisionmaker to understand as a part of the Willow decision. *See Barnes*, 655 F.3d at 1136-38 (rejecting management plan aviation traffic forecast as substitute for analyzing demand induced by new runway); *City of Davis*, 521 F.2d at 676-77. That critical information cannot be found in the IAP EIS.

The district court's decision to the contrary ignored the distinction between cumulative and indirect effects. 1-ER-37–45. The district court also misconstrued Plaintiffs' argument as focused on only the West Willow development. 1-ER-38–39. Plaintiffs' argument is, and has consistently been, that BLM failed to analyze downstream greenhouse emissions from any reasonably foreseeable future oil

production induced by Willow, including not only oil produced at West Willow, but also much larger volumes from other areas. 2-ER-351–356.⁵

BLM’s failure to fully disclose and analyze all the reasonably foreseeable greenhouse gas emissions that will flow from its decision to approve Willow deprived the agency and public of essential information that could have affected BLM’s ultimate decision, *Liberty*, 982 F.3d at 740, and violated NEPA’s requirement to assess indirect effects, *see Barnes*, 655 F.3d at 1136-39.

IV. BLM violated the Reserves Act.

To effectuate Congress’s goal of protecting the Reserve’s unique ecological values, *supra* pp. 7-10, the Reserves Act requires BLM to limit Willow’s “reasonably foreseeable and significantly adverse effects” to the Reserve’s surface resources, 42 U.S.C. § 6506a(b), and to afford “maximum protection” to designated areas, *id.* § 6504(a). Despite acknowledging its statutory obligations, the Project’s massive downstream greenhouse gas emissions, and the harm to the Reserve’s surface resources from such emissions, however, BLM failed to adequately explain or justify how its approval of Willow satisfied the Act’s mandates, particularly where options to further limit Willow’s climate harms were available.

⁵ The district court’s focus on cumulative impacts and only West Willow reflects the arguments made before that court by the plaintiffs in the related *Sovereign Inupiat for a Living Arctic* case. 3-ER-464–466.

Willow will generate massive greenhouse gas emissions that will cause “reasonably foreseeable and significantly adverse” climate harms to the Reserve’s surface resources, such as its wetlands and vegetation, water resources, and wildlife. *Id.* § 6506a(b). Contrary to the district court’s finding, 1-ER-46, the record shows that BLM itself linked Willow’s emissions to climate harms to the Reserve’s surface resources. First, BLM admitted that Willow will contribute significantly to climate change. *See* 5-ER-959; *see also* 6-ER-1170 (describing Willow’s expected production and associated carbon emissions). Second, BLM acknowledged that climate harms are “amplified in the Arctic” and on the North Slope. *See* 5-ER-941–942; *supra* pp. 8-10. Third, BLM recognized that climate change will adversely affect the Reserve’s surface resources. *See, e.g.*, 5-ER-1016 (noting that the “overall net impacts of climate change” on caribou in Alaska’s Arctic “are likely to be negative”); 5-ER-942 (explaining that further warming will lead to thawing permafrost, reduced snow cover and sea ice, and increased risk of wildfires and insect outbreaks in the Arctic and on the North Slope). BLM therefore concluded in the ROD that, “given the significant effects of climate change on the Arctic and the North Slope,” it is “especially important” to impose measures to “limit greenhouse gas emissions and thereby reduce climate impacts” from Willow. 6-ER-1169.

Consistent with that conclusion, BLM took modest steps to limit Willow’s greenhouse gas emissions, but it stopped short. BLM elected to impose some mitigation measures to address Willow’s direct emissions—*i.e.*, emissions resulting from the construction and operation of Project infrastructure. *See, e.g.*, 5-ER-944–947 (defining direct emissions and listing lease stipulations and required operating procedures intended to reduce climate change impacts “associated with the construction, drilling, and operation of oil and gas facilities”).

However, it arbitrarily rejected proposed measures to meaningfully limit the Project’s *indirect*, or downstream, emissions—*i.e.*, emissions from the transport, processing, and combustion of oil it produces—which are ten times greater. *See* 5-ER-944 (defining indirect emissions); 5-ER-953, Tbl. 3.2.6 (quantifying direct and indirect emissions from Alternative E); *see also* 6-ER-1170 (quantifying indirect emissions from Alternative E as modified and approved). For example, it flatly rejected EPA’s suggestion to reduce Willow’s lifetime from 30 to 20 years or less, 4-ER-776, proclaiming that “[a]ll project alternatives are designed and evaluated based on a full 30-year field life,” 6-ER-1241. It also refused to consider alternatives that would meaningfully reduce total oil production or delay production. *See* 4-ER-730, 734–735 (public comment suggesting these alternatives); *supra* pp. 11, 19-20.

BLM instead relied in the ROD on its approval of a slightly modified Project that reduced downstream emissions by a mere five percent, *supra* pp. 25-27, and pointed to that minor improvement to assert that its approval complied with the Reserves Act. *See* 6-ER-1169–1170 (declaring that the decision “strikes a balance” between development and protection, where the approved Project results in “fewer overall greenhouse gas emissions” than the evaluated alternatives). But declaring that the approved Project was the best of the limited set of options is not sufficient to explain *how* the approved Project satisfies the Act’s substantive mandates to protect the Reserve’s surface resources, particularly given the availability of options to meaningfully reduce Willow’s emissions (by more than a mere five percent). An agency may not offer “mere lip service or verbal commendation of a standard but then fail[] to abide the standard in its reasoning and decision.” *NRDC v. Pritzker*, 828 F.3d 1125, 1135 (9th Cir. 2016). BLM’s error is even more egregious given its own apparent conclusion—in making a final decision that departed from any alternatives analyzed in the SEIS—that none of the SEIS’s alternatives was sufficient to meet its statutory obligations. And the SEIS cannot explain the sufficiency of the final decision, because the SEIS did not even consider the option BLM ultimately selected.

Although BLM recognized that the Reserves Act compelled it to take steps to limit Willow’s climate’s harms, it nowhere explains how, in the face of Willow’s

devastating climate impacts, the modest steps it took fulfilled the agency’s substantive, ecological protection mandates under the Reserves Act. That violates the Reserves Act and Administrative Procedure Act. *See id.* at 1139 (courts do not defer to agency decisions that are “inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute” (citation omitted)); *Nat’l Parks Conservation Ass’n v. EPA*, 788 F.3d 1134, 1143 (9th Cir. 2015) (agency determination “unsupported by any explained reasoning” is arbitrary and capricious).

V. BLM and the Services’ failure to consult on Willow’s greenhouse gas emissions violated the ESA.

BLM and the Services arbitrarily refused to assess in an ESA-required consultation the additional impacts of Willow’s greenhouse gas emissions on threatened polar bears, bearded seals, and ringed seals already at grave risk due to the cumulative effects of such emissions. Instead, BLM asserted that the science was not precise enough to evaluate such impacts, and the Services agreed—based not on any evaluation of the relevant science to determine whether Willow’s greenhouse gas emissions are likely or not likely to adversely affect these species, but on their categorical refusal to perform a consultation on the effects of greenhouse gas emissions.

The failure to consult is particularly glaring considering available information indicating that if current emission trends continue, two-thirds of all

polar bear populations will likely be lost by 2050 (within Willow’s lifetime), including both bear populations in Alaska. 4-ER-694–700; 4-ER-793–798; 4-ER-799–805. This means that agency decisions made today involving substantial greenhouse gas emissions are critical to the polar bear’s survival. The agencies’ failure to consult on the Project’s most significant harms to the climate-threatened species Willow will directly affect violated Section 7 of the ESA, 16 U.S.C. § 1536(a)(2).

A. The ESA’s consultation process serves vital purposes.

This Court has “described Section 7 as the ‘heart of the ESA.’” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1019-20 (9th Cir. 2012) (citation omitted). Section 7(a)(2) requires all federal agencies to ensure that any action they authorize, fund, or carry out “is not likely to jeopardize the continued existence of any [listed species] or result in the destruction or adverse modification of [critical] habitat.” 16 U.S.C. § 1536(a)(2).

The ESA, its implementing regulations, and the Services’ Consultation Handbook set forth clear procedural requirements and guidance to ensure these mandates are met. Agencies must “use the best scientific . . . data available” throughout the consultation process. *Id.*

At the first step of consultation, the action agency (here, BLM) must determine “whether any action may affect listed species or critical habitat.”

50 C.F.R. § 402.14(a). Whenever any action crosses that low threshold, some form of consultation with the Services is required. *Karuk Tribe*, 681 F.3d at 1027.

“*Any possible effect*, whether beneficial, benign, adverse or of an undetermined character” is sufficient to meet the “may affect” threshold. *Id.* (citation omitted).

Only when an agency action will truly have “no effect” on listed species is consultation not required. *Id.*

If an agency concludes its activity “may affect” any listed species, it must initiate consultation with the Services on those potential effects. If the agency believes its action “is not likely to adversely affect” any listed species, it can seek the Services’ concurrence in writing with that finding. 50 C.F.R. §§ 402.13(c), 402.14(a)-(b). This is known as “informal consultation,” *id.* § 402.13(a), and is appropriate when an action’s impacts are “expected to be discountable, insignificant, or completely beneficial,” 4-ER-814–815, 835–836. The informal consultation process can lead to “modifications to the action” that “avoid the likelihood of adverse effects to listed species or critical habitat.” 50 C.F.R. § 402.13(b); *see also* 4-ER-835 (Services’ explanation that informal consultation can be used “to try to eliminate any residual adverse effects” on listed species). Critically, in this informal consultation process, the Services must make a determination whether adverse effects are likely and must do so based not just on

the action agency’s biological assessment, but on “other pertinent information.” 4-ER-835.

Only if the Services conclude that all adverse effects are not likely can they avoid a fuller examination of those effects in a formal biological opinion that analyzes whether the “effects of the action,” together with the “environmental baseline” and “cumulative effects,” are likely to jeopardize the species’ continued existence or destroy or adversely modify critical habitat. *See generally* 50 C.F.R. § 402.14; *see also id.* § 402.02 (defining these terms).

When an agency is already engaged in consultation for particular effects of a project, this Court has instructed that the Services must apply their expertise to determine whether any other impact from that project also “may affect” the species—a very low standard that is met if the available information indicates that consequences to listed species from that impact are “plausible.” *CBD v. BLM*, 698 F.3d at 1101, 1121-22 (9th Cir. 2012). This is also consistent with how FWS described its task here: analyzing “*potential* effects of the proposed Project on . . . polar bears.” 6-ER1310 (emphasis added).

Once the “may effect” threshold has been cleared, the Services must then determine whether those other effects are likely to adversely affect the species. *See CBD v. BLM*, 698 F.3d at 1124 (holding a biological opinion unlawful where FWS failed to “appl[y] its expertise to the question of whether [an impact from a

project beyond those considered in the biological opinion] may adversely affect listed fish species”).

If so, the Services must consider all the “reasonably certain” consequences from such effects in the biological opinion, including those that “occur later in time” and are “outside the immediate area involved in the action”; if not, the Services must substantiate the not likely to adversely affect conclusion. *See* 50 C.F.R. §§ 402.02, 402.13(c), 402.14(g)(3)-(4). Any other rule would allow action agencies to hide potential impacts from consultation simply by failing to mention them in their initial “may affect” determination or by pre-determining a possible effect is not reasonably certain to occur, undermining the process Congress intentionally established. *See City of Tacoma v. Fed. Energy Regul. Comm’n*, 460 F.3d 53, 75 (D.C. Cir. 2006) (describing that the Section 7 consultation process “reflects Congress’s awareness that [the Services] are far more knowledgeable than other federal agencies about the precise conditions that pose a threat to listed species”).

This Court has repeatedly recognized the importance of complying with the ESA’s procedural requirements. *See, e.g., Karuk Tribe*, 681 F.3d at 1019-20. The consultation process “offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly

factored into the decision-making process as intended by Congress.” *NRDC v. Houston*, 146 F.3d 1118, 1128-29 (9th Cir. 1998).

This Court has also recognized the importance of analyzing incremental impacts to ESA-listed species, as any other approach would allow species to “be gradually destroyed, so long as each step on the path to destruction is sufficiently modest.” *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). But this “slow slide into oblivion is one of the very ills the ESA seeks to prevent.” *Id.*; *see also Friends of Animals v. FWS*, 28 F.4th 19, 32 (9th Cir. 2022) (addressing biological opinions on actions that resulted in the added destruction of 0.04 percent of spotted owl critical habitat). As the Services have similarly explained:

where numerous actions impact a species . . . a series of biological opinions can be used like building blocks to first establish a concern, then warn of potential impacts, and finally result in a jeopardy call. Successive biological opinions can be used to monitor trends . . . , making predictions of the impacts of future actions more reliable.

4-ER-838.

B. The agencies failed to follow the consultation procedures for Willow’s greenhouse gas emissions.

BLM and the Services violated the requirements of the consultation process, never reaching the decision point of “not likely to adversely affect” or “likely to adversely affect” for Willow’s greenhouse gas emissions. Instead, the agencies pre-determined the outcome to enable all three of them to ignore their obligations

to consult regarding this effect on polar bears and bearded and ringed seals. But the agencies cannot reasonably “insure” against jeopardy to polar bears or ice seals, or the degradation of their critical habitat, 16 U.S.C. § 1536(a)(2), without making any assessment of the full extent to which Willow will add to the principal threat facing the species.

The continuing decline of Arctic sea ice is the primary threat to polar bears and ice seals. In fact, myriad sources of incremental and cumulative sea ice loss from climate change—driven by human-caused greenhouse gas emissions—is the primary reason each species received ESA protections in the first place. 6-ER-1394, 1397–1398 (polar bear); 7-ER-1556–1557 (bearded seal); 7-ER-1565 (ringed seal). And most of the sea ice off Alaska is designated as critical habitat for these species, meaning protecting these areas is “essential” to the species’ conservation. 16 U.S.C. § 1532(5); *see also* 6-ER-1403–1405, 1421 (polar bear); 7-ER-1509, 1534 (bearded and ringed seals).

Willow will substantially increase greenhouse gas emissions. Indeed, BLM repeatedly acknowledged in its NEPA evaluation that Willow’s emissions, and its contribution to climate impacts, will be significant. *See* 5-ER-959; *see also* 6-ER-1170 (describing Willow’s expected production and associated emissions). Such emissions will increase the sea ice loss driving the species toward extinction. *See* 4-ER-840–844.

While BLM assessed some of Willow’s impacts on listed species in its biological assessments sent to the Services, those assessments did “not discuss how Willow’s [greenhouse gas] emissions may affect these species.” 1-ER-103. Only after receiving public comments pointing out the need for consultation on the full range of impacts, and just weeks before it approved Willow, did BLM assert in a short memorandum to the Services that it need not consult on greenhouse gas emissions. 6-ER-1274–1279. In doing so, BLM did not deny that its approval of the Project (even apart from the indirect effects the agency failed to consider in its NEPA analysis) *will* contribute in some manner to the ongoing loss of sea ice on which polar bears and seals are dependent. Rather, without even saying what kind of legal finding it was making vis-à-vis the ESA regulations (*i.e.*, “no effect,” “may affect,” or “may affect but not likely to adversely affect”), BLM declared that, because it lacked the scientific “precision” to evaluate “*precise* effects to *individual* animals” in specific areas, it need not consult with the Services on Willow’s emissions. 6-ER-1277–1278 (emphasis added).

The Services summarily agreed—without conducting any analysis of their own—that consultation about the effects of Willow’s emissions was not necessary. As such, neither FWS nor NMFS included such effects in their consultations analyzing Willow’s other impacts. *See* 6-ER-1311 to 7-ER-1480; 7-ER-1505–1546. This flouted the Services’ obligations to apply their expertise to the question

of whether, and to what extent, Willow’s greenhouse gas emissions are likely to adversely affect polar bears and ice seals.

There can be no doubt that the greenhouse gas emissions from a massive oil project in the Arctic that BLM admits will have significant climate impacts “may” affect climate-threatened polar bears and ice seals such that the Services should have considered these effects in the consultations on Willow. *See supra* p. 43. Indeed, the available science indicates that such effects are certainly “plausible.” For example, a leading study (Notz & Stroeve 2016) determined that each metric ton of emissions results in a sustained loss of approximately three-square meters of September Arctic sea ice. 4-ER-840–844; *see also* 6-ER-1416 (FWS noting that “the decline of [summer] sea ice habitat due to changing climate, driven primarily by increasing atmospheric concentrations of greenhouse gases, is the primary threat to polar bears.”). This means that the more than 239 million metric tons of greenhouse gas emissions from Willow, 6-ER-1170, will lead to the loss of several hundred square kilometers of sea ice. Another study (Molnar *et al.* 2020)—that neither BLM nor the Services ever mentioned—analyzed how many “days that polar bears can fast before cub recruitment and/or adult survival are impacted and decline rapidly.” 4-ER-799–805. The study assesses anticipated increases in ice-free days in different Arctic regions, under different emissions scenarios, to project

when these reproduction and survival thresholds will be exceeded in different polar bear populations. *Id.*

Together, this science, and other information available to the Services, show not only that impacts to polar bears and ice seals from Willow's emissions are plausible, but that there is a direct link between increased greenhouse gas emissions and increased ice-free days, rendering the effects to these species from Willow's emissions reasonably foreseeable.

That Willow's climate impacts on polar bears and ice seals are only a fraction of the *cumulative* greenhouse gas emissions threatening these species with extinction does not excuse the agencies from complying with the consultation process for such effects. The agencies must still evaluate, based on the best available science, the extent of such effects, and whether and how to minimize and mitigate them. *See Conner*, 848 F.2d at 1453 (citation omitted) (holding that under the ESA, the Service must consider "all the possible ramifications of the agency action" based on the best available scientific information). Yet the Services skipped this step entirely. And while the agencies may be able to articulate a reasonable, science-based rationale for limiting consultations on greenhouse gas

emissions in some circumstances as a part of making the likely/not likely adverse effects determinations, they have not done so here.⁶

A closer examination of NMFS's and FWS's responses to BLM's memo, detailed in the following sections, underscores the arbitrary and unlawful nature of the agencies' approach.

C. NMFS's concurrence with BLM regarding Willow's effects on bearded and ringed seals was arbitrary.

The entirety of NMFS's review of Willow's greenhouse gas emissions is the single sentence found in its emailed response to BLM's memo: "Without commenting on the conclusion that BLM has drawn, we agree that the scope of the ESA Section 7 consultation with respect to [greenhouse gas] emissions is appropriate." 7-ER-1547. In other words, it agreed no consultation at all was necessary for Willow's greenhouse gas emissions. This naked conclusion cannot survive basic Administrative Procedure Act review. Indeed, it does not even begin to engage in a reasoned analysis of the facts before the agency, let alone set forth a "satisfactory explanation," *Native Ecosystems Council*, 418 F.3d at 965 (citation

⁶ Other federal agencies have established thresholds for greenhouse gas emissions that trigger various statutory requirements. *See, e.g.*, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg. 14,104, 14,115 (Mar. 11, 2022) (Federal Energy Regulatory Commission establishing 100,000 metric tons or more per year of carbon dioxide equivalent as the de facto threshold for significance for NEPA evaluations of liquified natural gas projects).

omitted), for why NMFS deemed it “appropriate” to disregard Willow’s climate-related effects on bearded and ringed seals.

Any notion that this error was “harmless,” 1-ER-107–108, contravenes this Court’s repeated recognition of the importance of following the consultation process (which includes consideration of the best available science), and its instruction that “[t]he failure to respect the [consultation] process mandated by law cannot be corrected with post-hoc assessments of a done deal.” *Houston*, 146 F.3d at 1129. NMFS’s conclusory, unexplained rationale for allowing BLM to avoid consultation on this issue, and NMFS’s resulting failure to consider the issue in its letter of concurrence, were unlawful.

D. FWS’s failure to consult on the additive impacts of Willow’s greenhouse gas emissions on polar bears was arbitrary.

Because FWS’s biological opinion does not at all consider the additive harmful impact to polar bears of Willow’s contribution to climate change, Defendants must rely on FWS’s email, hastily drafted just two days after BLM sent its memo, as the basis for sidestepping that evaluation. But that email only compounds the arbitrary nature of FWS’s approach to this vitally important issue.

FWS’s email treated BLM’s memo as a “no effect” determination for Willow’s greenhouse gas emissions. *See* 6-ER-1273. FWS stated that it could not as a policy matter agree with a “no effect” conclusion, but nevertheless agreed with BLM that such climate effects need not be considered, without ever determining

based on the best current science whether Willow’s emissions are likely, or not likely, to adversely affect the polar bear. *See id.* FWS’s justifications for its position are inadequate.

First, FWS stated that when it listed the emperor penguin in 2022, FWS was “unable to draw a causal link between the effects of specific [greenhouse gas] emissions and take of the emperor penguin.” *Id.* (citation omitted). But “[w]hether [Willow’s greenhouse gas emissions] effectuate a ‘taking’ under Section 9 of the ESA is a distinct inquiry from whether they ‘may affect’ a species or its critical habitat under Section 7.” *Karuk Tribe*, 681 F.3d at 1028. Moreover, that FWS believes there is insufficient evidence to link greenhouse gas emissions to take of penguins in Antarctica for purposes of creating “more specific [take] regulations,” 87 Fed. Reg. 64,700, 64,704 (Oct. 26, 2022), says nothing about how Willow’s emissions might affect polar bears in the Arctic—a matter the ESA required FWS to address in the Willow-specific consultation.

The second rationale in FWS’s email was its “consistently held . . . position since . . . 2008,” clearly referring to a legal memorandum authored by then-Solicitor of the Interior, David Bernhardt (“M-Opinion”). The M-Opinion concluded based on statements from the U.S. Geological Survey (USGS) at that time that “it is *currently* beyond the scope of existing science to identify a specific source of CO₂ emissions and designate it as the cause of specific climate impacts at

an exact location.” 6-ER-1303 (emphasis added). After discussing whether sufficient causal connections allowed for assessments of specified localized impacts—the nearly identical rationales stated by BLM in its memo—the M-Opinion concluded that:

Based on the USGS statement, and its continued scientific validity, . . . where the effect at issue is climate change in the form of increased temperatures, a proposed action that will involve the emission of [greenhouse gases] cannot pass the “may affect” test and is not subject to consultation under the ESA

6-ER-1309.

Whatever its validity at the time it was issued, the M-Opinion by its own words—basing its conclusions on the state of climate science in 2008 and not even mentioning sea ice loss—limits any applicability or relevance 15 years later. It cannot be used as a permanent excuse to avoid conducting any scientific assessment of the effects of greenhouse gas emissions on polar bears, particularly given scientific advances since 2008. Rather than grappling with (or even citing) any of the current science, FWS’s email largely echoed the M-Opinion to disclaim any need to consider Willow’s most significant threat to polar bears. Specifically, FWS stated “that an estimate of a project-caused decrease in sea ice occurring somewhere in the Arctic, without more specific information . . . does not enable us to predict any ‘effects of the action’” on polar bears. 6-ER-1273. In doing so, FWS essentially acknowledged that Willow’s emissions will affect polar bears in

some manner, but that it did not have to consider such effects because the “specific” or “precise” effect is not determinable. This rationale unlawfully allowed FWS to avoid consultation on this issue altogether and ignore how Willow will contribute to the single gravest threat to polar bears, flouting the ESA.

In enacting the ESA, Congress recognized that the Services would not always be able to quantify or precisely evaluate the impacts of an action on listed species. That is why the statute requires reliance on the *best available* science, not perfect data, *see* 16 U.S.C. § 1536(a)(2), and why Congress recognized that addressing some types of threats would need surrogates and other qualitative approaches, *see Or. Nat. Desert Ass’n v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2007).

As such, consultations are routinely required or completed where the action agency and the Services do not (and will never) have precise information about the action’s impacts. National consultations on pesticide registrations are required even though no one could ever predict if, where, or when innumerable third parties might choose to apply them, let alone know for certain that a particular listed species will be present at the exact time a pesticide will be used. *See Ctr. for Food Safety v. Regan*, 56 F.4th 648, 652 (9th Cir. 2022). Likewise, consultations have been required on the potential use of fire retardants nationwide even though the timing and location of wildfires—let alone the specific suppression techniques

used at a given moment—could never be predicted with any granularity or precision. *See, e.g., Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241, 1256-57 (D. Mont. 2005). Similarly, the D.C. Circuit rejected a “no effect” determination due to “the lack of a reasonable causal connection” between the approval of the Renewable Fuel Standard (implemented through countless actions of third parties in the Midwest) and impacts to listed species in the Gulf of Mexico a thousand miles downstream. *Growth Energy v. EPA*, 5 F.4th 1, 30-32 (D.C. Cir. 2021).

By requiring consideration of the best available science, the ESA simply does not allow FWS to “use insufficient evidence as an excuse for failing to comply with” its obligation to consider Willow’s climate impacts on polar bears. *Brower v. Evans*, 257 F.3d 1058, 1071 (9th Cir. 2001); *see also Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000) (“Even if the available scientific . . . data were quite inconclusive, [the agency] may—indeed must—still rely on it” (citation omitted)). Indeed, this Court has already rejected the notion that the Services must wait until they have “highly specified data” regarding the impacts of sea ice loss on a species before acting to protect that species. *Alaska Oil and Gas Ass’n*, 840 F.3d at 683. And it has also already rejected FWS’s attempt to avoid analyzing all consequences to listed species from oil and gas leasing based on the lack of information regarding the “precise

location” of activity under those leases where FWS had relevant information regarding the behavior and habitat needs of the impacted species. *Conner*, 848 F.2d at 1453. In doing so, the Court noted the importance of consultations in the face of incomplete information for species with “large home ranges . . . to avoid piecemeal chipping away of habitat.” *Id.* at 1454.

The same is true here. That the available information does not show precisely where sea ice loss will occur is no defense to FWS’s failure even to consider how such habitat loss could affect polar bears in its consultation. *See, e.g., Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1233-34 (E.D. Wash. 2016) (“The fact that there is no model or study specifically addressing the effects of climate change [in a particular area] does not permit the agency to ignore this factor.”). That the available studies do not show sea ice loss will occur within the “action area” is likewise no excuse. *Contra* 1-ER-111. The “action area” for purposes of ESA consultation must include “all areas to be affected directly or indirectly by the [] action” under review, 50 C.F.R. § 402.02; it cannot be used to constrain the analysis of reasonably foreseeable impacts from Willow.⁷

⁷ This Court’s decision in *CBD v. BLM* makes clear the district court was also wrong to agree with FWS that because the agency engaged in formal consultation on some of Willow’s impacts on polar bears, it is absolved from independently evaluating whether there are other impacts from Willow that might affect polar bears that should have also been evaluated through the consultation process. *Contra* 1-ER-102; *see supra* p. 40.

In short, here, the ESA required FWS to use whatever information is available “to develop projections” about the impacts of Willow’s emissions on polar bears. *Conner*, 848 F.2d at 1454. FWS did not, as its two-day review of BLM’s memo illustrates. Its failure to do so was arbitrary, and this Court should remand to the agency with direction to proceed to the next step of the analysis required by the ESA to properly determine whether Willow’s emissions are likely to adversely affect polar bears.

E. BLM’s reliance on the consultations violates the ESA.

For the above-stated reasons, the Willow ESA consultations are unlawful. Thus, BLM’s reliance on the ESA consultations to authorize Willow, *see, e.g.*, 6-ER-1175, was also unlawful. *Liberty*, 982 F.3d at 751.

VI. Vacatur is the presumptive remedy and is merited here.

When a court finds an agency’s decision unlawful under the Administrative Procedure Act, vacatur is the standard remedy. 5 U.S.C. § 706(2)(A) (courts “shall . . . set aside” unlawful agency action); *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (vacatur “normally accompanies a remand”). Conversely, remand without vacatur is appropriate only in “rare,” *Humane Soc’y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010), or “limited circumstances,” *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (citation omitted).

To evaluate whether such rare circumstances exist, courts consider, *inter alia*, whether vacatur risks environmental harm, *see Pollinator Stewardship Council*, 806 F.3d at 532, and whether vacatur would lead to results that are inconsistent with the governing statute, *see Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (*per curiam*). Courts also “weigh the seriousness of the agency’s errors against the disruptive consequences of an interim change that may itself be changed.” *Nat’l Family Farm Coal. v. EPA*, 960 F.3d 1120, 1144 (9th Cir. 2020) (citation omitted). These factors warrant vacatur here, and Defendants cannot carry their burden of proving otherwise. *See All. for the Wild Rockies*, 907 F.3d at 1121-22 (burden is on defendants to “overcome” the presumption of vacatur).

First, vacatur would not cause any environmental harm. This is not a situation in which the agencies promulgated standards to protect natural resources or endangered species, such that vacatur of those standards would cause more environmental harm than leaving them in place. *Cf. Cal. Cmty. Against Toxics*, 688 F.3d at 993-94 (declining to vacate air quality plan in part to avoid pollution from interim use of diesel generators); *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (declining to vacate ESA listing decision to prevent the “potential extinction” of a species). Rather, vacatur would simply halt

construction during the remand, preventing further environmental harm from on-the-ground activities.

Second, vacatur is fully consistent with the purposes of NEPA, the Reserves Act, and the ESA. NEPA “emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decisionmaking to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 927 (9th Cir. 2015) (citations omitted). Similarly, BLM is obligated to carefully consider and minimize adverse impacts on the Reserve’s surface resources *before* approving oil and gas activities. *See* 42 U.S.C. § 6506a(b). And “the ‘language, history, and structure’” of the ESA “‘indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.’” *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987) (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978)).

Third, BLM’s and the Services’ errors are serious. For example, BLM’s failure to consider a reasonable range of alternatives strikes at “the heart” of the agency’s NEPA analysis, *Or. Nat. Desert Ass’n*, 625 F.3d at 1100, and substantially constrained both the outcome of the agency’s decision and the public’s understanding of how the decision balanced oil production against the need to protect the Reserve’s environmental values. *Supra* pp. 25-27. So too with

the agencies' failures to consult on Willow's carbon emissions and their effects on polar bears and ice seals: far from a procedural technicality, that omission undercuts the "heart of the ESA," *Kraayenbrink*, 632 F.3d at 495, by failing to ensure that the ESA's substantive protections for these species are effectuated. *Supra* pp. 41-46. The agencies' other legal errors, detailed above, are equally serious. Given these "fundamental flaws," vacatur is appropriate because it is "unlikely that the same [decision] would be adopted on remand" or because, at least, "a different result may be reached." *Pollinator Stewardship Council*, 806 F.3d at 532. And even if there were uncertainty on this point, it does not "tip the scale." *NRDC v. EPA*, 38 F.4th 34, 52 (9th Cir. 2022).

Finally, ConocoPhillips' and other stakeholders' anticipated assertions of disruptive consequences during a remand period are either baseless or a normal consequence of vacatur. Consequences to ConocoPhillips are purely financial and largely "self-inflicted," resulting from the company's "own decisions about how to proceed in the face of litigation." *Sierra Club v. Trump*, 929 F.3d 670, 706 (9th Cir. 2019), *stay granted on other grounds by Trump v. Sierra Club*, 140 S. Ct. 1 (2019). It and other Intervenors have argued that even a temporary delay in construction would jeopardize the entire Project by putting ConocoPhillips' leases at risk of expiration. But, as the district court recognized, the Reserves Act provides that no lease "shall expire" where the lessee fails to produce oil "due to

circumstances beyond [its] control,” *see* CR 82 at 36 n.144 (quoting 42 U.S.C. § 6506a(i)(6)), and vacatur is such a circumstance. Any alleged consequences that would result only if Willow were terminated—such as lost tax revenue from Project operations or weakened energy security—are therefore irrelevant to the vacatur inquiry.

Potential harm to other Intervenors from Project delay, such as near-term job losses, are the kind of economic impacts that, even if significant, do not by themselves present the “rare” or “limited” circumstances in which remand without vacatur might be appropriate. *See, e.g., Nat’l Family Farm Coal.*, 960 F.3d at 1145 (holding seriousness of agency’s error “compel[led]” vacatur, despite resulting economic harm to innocent third-party stakeholders); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 985 F.3d 1032, 1051, 1053 (D.C. Cir. 2021) (affirming vacatur given the “seriousness of the NEPA violation,” even though shutting down pipeline operations would economically harm company and other entities).

CONCLUSION

For the foregoing reasons, the Court should reverse the district court’s decision dismissing Plaintiffs’ claims with prejudice; declare that the federal government’s approval and underlying environmental reviews of Willow violated

NEPA, the Reserves Act, the ESA, and the Administrative Procedure Act; and vacate and remand those actions to the agencies.

Respectfully submitted this 29th day of December, 2023.

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**CERTIFICATE OF COMPLIANCE FOR BRIEFS PURSUANT TO
FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND FORM 8**

9th Cir. Case No. 23-3624

I am the attorney or self-represented party.

This brief contains 13,082 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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complies with the word limit of Cir. R. 32-1.

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is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *s/ Erik Grafe*

Date: December 29, 2023

ADDENDUM

ADDENDUM

ADDENDUM

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STATUTES

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

...

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

....

42 U.S.C.A. § 6503

§ 6503. Transfer of jurisdiction, duties, property, etc., to Secretary of the Interior from Secretary of Navy

...

(b) Protection of environmental, fish and wildlife, and historical or scenic values; promulgation of rules and regulations

With respect to any activities related to the protection of environmental, fish and wildlife, and historical or scenic values, the Secretary of the Interior shall assume all responsibilities as of April 5, 1976. As soon as possible, but not later than the effective date of transfer, the Secretary of the Interior may promulgate such rules and regulations as he deems necessary and appropriate for the protection of such values within the reserve.

.....

42 U.S.C.A. § 6504

§ 6504. Administration of reserve

Effective: August 8, 2005

(a) Conduct of exploration within designated areas to protect surface values

Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.

.....

42 U.S.C.A. § 6506a

§ 6506a. Competitive leasing of oil and gas

Effective: August 8, 2005

(a) In general

The Secretary shall conduct an expeditious program of competitive leasing of oil and gas in the Reserve in accordance with this Act.

(b) Mitigation of adverse effects

Activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska.

...

(n) Environmental impact statements

...

(2) Initial lease sales

The detailed environmental studies and assessments that have been conducted on the exploration program and the comprehensive land-use studies carried out in response to sections¹ 6505(b) and (c) of this title shall be deemed to have fulfilled the requirements of section 102(2)(c)² of the National Environmental Policy Act (Public Law 91-190), with regard to the first two oil and gas lease sales in the National Petroleum Reserve-Alaska: *Provided*, That not more than a total of 2,000,000 acres may be leased in these two sales: *Provided further*, That any exploration or production undertaken pursuant to this section shall be in accordance with section 6504(a) of this title.

¹ So in original. Probably should read “section”.

² So in original. Probably should be “102(2)(C)”.

PUBLIC LAW 94-258—APR. 5, 1976

90 STAT. 303

Public Law 94-258
94th Congress

An Act

To authorize the Secretary of the Interior to establish on certain public lands of the United States national petroleum reserves the development of which needs to be regulated in a manner consistent with the total energy needs of the Nation, and for other purposes.

Apr. 5, 1976
[H.R. 49]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Naval Petroleum Reserves Production Act of 1976".

Naval Petroleum
Reserves
Production Act of
1976.
42 USC 6501
note.
42 USC 6501.

TITLE I—NATIONAL PETROLEUM RESERVE IN ALASKA

DEFINITION

SEC. 101. As used in this title, the term "petroleum" includes crude oil, gases (including natural gas), natural gasoline, and other related hydrocarbons, oil shale, and the products of any of such resources.

DESIGNATION OF THE NATIONAL PETROLEUM RESERVE IN ALASKA

SEC. 102. The area known as Naval Petroleum Reserve Numbered 4, Alaska, established by Executive order of the President, dated February 27, 1923, except for tract Numbered 1 as described in Public Land Order 2344, dated April 24, 1961, shall be transferred to and administered by the Secretary of the Interior in accordance with the provisions of this Act. Effective on the date of transfer all lands within such area shall be redesignated as the "National Petroleum Reserve in Alaska" (hereinafter in this title referred to as the "reserve"). Subject to valid existing rights, all lands within the exterior boundaries of such reserve are hereby reserved and withdrawn from all forms of entry and disposition under the public land laws, including the mining and mineral leasing laws, and all other Acts; but the Secretary is authorized to (1) make dispositions of mineral materials pursuant to the Act of July 31, 1947 (61 Stat. 681), as amended (30 U.S.C. 601), for appropriate use by Alaska Natives, (2) make such dispositions of mineral materials and grant such rights-of-way, licenses, and permits as may be necessary to carry out his responsibilities under this Act, and (3) convey the surface of lands properly selected on or before December 18, 1975, by Native village corporations pursuant to the Alaska Native Claims Settlement Act. All other provisions of law heretofore enacted and actions heretofore taken reserving such lands as a Naval Petroleum Reserve shall remain in full force and effect to the extent not inconsistent with this Act.

42 USC 6502.

43 CFR app.

43 USC 1601
note.

TRANSFER OF JURISDICTION

SEC. 103. (a) Jurisdiction over the reserve shall be transferred by the Secretary of the Navy to the Secretary of the Interior on June 1, 1977.

42 USC 6503.

(b) With respect to any activities related to the protection of environmental, fish and wildlife, and historical or scenic values, the Secretary of the Interior shall assume all responsibilities as of the date

90 STAT. 304

PUBLIC LAW 94-258—APR. 5, 1976

Rules and
regulations.

of the enactment of this title. As soon as possible, but not later than the effective date of transfer, the Secretary of the Interior may promulgate such rules and regulations as he deems necessary and appropriate for the protection of such values within the reserve.

(c) The Secretary of the Interior shall, upon the effective date of the transfer of the reserve, assume the responsibilities and functions of the Secretary of the Navy under any contracts which may be in effect with respect to activities within the reserve.

(d) On the date of transfer of jurisdiction of the reserve, all equipment, facilities, and other property of the Department of the Navy used in connection with the operation of the reserve, including all records, maps, exhibits, and other informational data held by the Secretary of the Navy in connection with the reserve, shall be transferred without reimbursement from the Secretary of the Navy to the Secretary of the Interior who shall thereafter be authorized to use them to carry out the provisions of this title.

(e) On the date of transfer of jurisdiction of the reserve, the Secretary of the Navy shall transfer to the Secretary of the Interior all unexpended funds previously appropriated for use in connection with the reserve and all civilian personnel ceilings assigned by the Secretary of the Navy to the management and operation of the reserve as of January 1, 1976.

ADMINISTRATION OF THE RESERVE

Petroleum
production,
prohibition.
42 USC 6504.
Explorations.

SEC. 104. (a) Except as provided in subsection (e) of this section, production of petroleum from the reserve is prohibited and no development leading to production of petroleum from the reserve shall be undertaken until authorized by an Act of Congress.

(b) Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve.

(c) The Secretary of the Navy shall continue the ongoing petroleum exploration program within the reserve until the date of the transfer of jurisdiction specified in section 103(a). Prior to the date of such transfer of jurisdiction the Secretary of the Navy shall—

(1) cooperate fully with the Secretary of the Interior providing him access to such facilities and such information as he may request to facilitate the transfer of jurisdiction;

(2) provide to the Committees on Interior and Insular Affairs of the Senate and the House of Representatives copies of any reports, plans, or contracts pertaining to the reserve that are required to be submitted to the Committees on Armed Services of the Senate and the House of Representatives; and

(3) cooperate and consult with the Secretary of the Interior before executing any new contract or amendment to any existing contract pertaining to the reserve and allow him a reasonable opportunity to comment on such contract or amendment, as the case may be.

(d) The Secretary of the Interior shall commence further petroleum exploration of the reserve as of the date of transfer of jurisdiction specified in section 103(a). In conducting this exploration effort, the Secretary of the Interior—

Information,
submittal to
congressional
committees.

Contracts.

(1) is authorized to enter into contracts for the exploration of the reserve, except that no such contract may be entered into until

TITLE II—NAVAL PETROLEUM RESERVES

Sec. 201. Chapter 641 of title 10, United States Code, is amended as follows:

(1) Immediately before section 7421 insert the following new section:

“§ 7420. Definitions

10 USC 7420.

“(a) In this chapter—

“(1) ‘national defense’ includes the needs of, and the planning and preparedness to meet, essential defense, industrial, and military emergency energy requirements relative to the national safety, welfare, and economy, particularly resulting from foreign military or economic actions;

“(2) ‘naval petroleum reserves’ means the naval petroleum and oil shale reserves established by this chapter, including Naval Petroleum Reserve Numbered 1 (Elk Hills), located in Kern County, California, established by Executive order of the President, dated September 2, 1912; Naval Petroleum Reserve Numbered 2 (Buena Vista), located in Kern County, California, established by Executive order of the President, dated December 13, 1912; Naval Petroleum Reserve Numbered 3 (Teapot Dome), located in Wyoming, established by Executive order of the President, dated April 30, 1915; Naval Petroleum Reserve Numbered 4, Alaska, established by Executive order of the President, dated February 27, 1923 (until redesignated as the National Petroleum Reserve in Alaska under the jurisdiction of the Secretary of the Interior as provided in the Naval Petroleum Reserves Production Act of 1976); Oil Shale Reserve Numbered 1, located in Colorado, established by Executive order of the President, dated December 6, 1916, as amended by Executive order dated June 12, 1919; Oil Shale Reserve Numbered 2, located in Utah, established by Executive order of the President, dated December 6, 1916; and Oil Shale Reserve Numbered 3, located in Colorado, established by Executive order of the President, dated September 27, 1924;

“(3) ‘petroleum’ includes crude oil, gases (including natural gas), natural gasoline, and other related hydrocarbons, oil shale, and the products of any of such resources;

“(4) ‘Secretary’ means the Secretary of the Navy;

“(5) ‘small refiner’ means an owner of a refinery or refineries (including refineries not in operation) who qualifies as a small business refiner under the rules and regulations of the Small Business Administration; and

“(6) ‘maximum efficient rate’ means the maximum sustainable daily oil or gas rate from a reservoir which will permit economic development and depletion of that reservoir without detriment to the ultimate recovery.”

(2) Section 7421 (a) is amended—

10 USC 7421.

(A) by striking out “of the Navy”;

(B) by striking out “and oil shale”;

(C) by striking out “for naval purposes” and inserting in lieu thereof “for national defense purposes”; and

(D) by striking out “section 7438 hereof” and inserting in lieu thereof “this chapter”.

(3) The text of section 7422 is amended to read as follows:

10 USC 7422.

“(a) The Secretary, directly or by contract, lease, or otherwise, shall explore, prospect, conserve, develop, use, and operate the naval petroleum reserves in his discretion, subject to the provisions of subsection

(c) and the other provisions of this chapter; except that no petroleum leases shall be granted at Naval Petroleum Reserves Numbered 1 and 3.

“(b) Except as otherwise provided in this chapter, particularly subsection (c) of this section, the naval petroleum reserves shall be used and operated for—

“(1) the protection, conservation, maintenance, and testing of those reserves; or

“(2) the production of petroleum whenever and to the extent that the Secretary, with the approval of the President, finds that such production is needed for national defense purposes and the production is authorized by a joint resolution of Congress.

“(c) (1) In administering Naval Petroleum Reserves Numbered 1, 2, and 3, the Secretary is authorized and directed—

“(A) to further explore, develop, and operate such reserves;

“(B) commencing within ninety days after the date of enactment of the Naval Petroleum Reserves Production Act of 1976, to produce such reserves at the maximum efficient rate consistent with sound engineering practices for a period not to exceed six years after the date of enactment of such Act;

“(C) during such production period or any extension thereof to sell or otherwise dispose of the United States share of such petroleum produced from such reserves as hereinafter provided; and

“(D) to construct, acquire, or contract for the use of storage and shipping facilities on and off the reserves and pipelines and associated facilities on and off the reserves for transporting petroleum from such reserves to the points where the production from such reserves will be refined or shipped.

Any pipeline in the vicinity of a naval petroleum reserve not otherwise operated as a common carrier may be acquired by the Secretary by condemnation, if necessary, if the owner thereof refuses to accept, convey, and transport without discrimination and at reasonable rates any petroleum produced at such reserve. With the approval of the Secretary, rights-of-way for new pipelines and associated facilities may be acquired by the exercise of the right of eminent domain in the appropriate United States district court. Such rights-of-way may be acquired in the manner set forth in the Act of February 26, 1931, chapter 307 (46 Stat. 1421; 40 U.S.C. 258(a)), and the prospective holder of the right-of-way is ‘the authority empowered by law to acquire the lands’ within the meaning of that Act. Such new pipelines shall accept, convey, and transport without discrimination and at reasonable rates any petroleum produced at such reserves as a common carrier. Pipelines and associated facilities constructed at or procured for Naval Petroleum Reserve Numbered 1 pursuant to this subsection shall have adequate capacity to accommodate not less than three hundred fifty thousand barrels of oil per day and shall be fully operable as soon as possible, but not later than three years after the date of enactment of the Naval Petroleum Reserves Production Act of 1976.

“(2) At the conclusion of the six-year production period authorized by paragraph (1) (B) of this subsection the President may extend the period of production in the case of any naval petroleum reserve for additional periods of not to exceed three years each—

“(A) after the President requires an investigation to be made, in the case of each extension, to determine the necessity for continued production from such naval petroleum reserve;

“(B) after the President submits to the Congress, at least one hundred eighty days prior to the expiration of the current production period prescribed by this section, or any extension thereof,

Investigation.

Report to
Congress.

PUBLIC LAW 96-514—DEC. 12, 1980

94 STAT. 2957

Public Law 96-514
96th Congress

An Act

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1981, and for other purposes.

Dec. 12, 1980
[H.R. 7724]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior and related agencies for the fiscal year ending September 30, 1981, and for other purposes, namely:

Department of
the Interior and
related agencies.
Appropriations,
fiscal year 1981.

TITLE I—DEPARTMENT OF THE INTERIOR

LAND AND WATER RESOURCES

BUREAU OF LAND MANAGEMENT

MANAGEMENT OF LANDS AND RESOURCES

For expenses necessary for protection, use, improvement, development, disposal, cadastral surveying, classification, and performance of other functions, as authorized by law, in the management of lands and their resources under the jurisdiction of the Bureau of Land Management, \$343,962,000.

ACQUISITION, CONSTRUCTION, AND MAINTENANCE

For acquisition of lands and interests therein, and construction and maintenance of buildings, recreation facilities, roads, trails, and appurtenant facilities, \$14,768,000, to remain available until expended.

PAYMENTS IN LIEU OF TAXES

For expenses necessary to implement the Act of October 20, 1976 (31 U.S.C. 1601), \$103,000,000, of which not to exceed \$400,000 shall be available for administrative expenses: *Provided*, That this appropriation may be used to correct underpayments in the previous fiscal year to achieve equity among all qualified recipients.

OREGON AND CALIFORNIA GRANT LANDS

For expenses necessary for management, protection, and development of resources and for construction, operation, and maintenance of access roads, reforestation, and other improvements on the revested Oregon and California Railroad grant lands, on other Federal lands in the Oregon and California land-grant counties of Oregon, and on adjacent rights-of-way; and acquisition of lands or interests therein including existing connecting roads on or adjacent to such grant lands; an amount equivalent to 25 per centum of the aggregate of all receipts during the current fiscal year from the

94 STAT. 2964

PUBLIC LAW 96-514—DEC. 12, 1980

EXPLORATION OF NATIONAL PETROLEUM RESERVE IN ALASKA

42 USC 6508.

42 USC 6504.

43 USC 1712,
1782.

42 USC 6502.

43 USC 1337.

For necessary expenses of carrying out the provisions of section 104 of Public Law 94-258, and for conducting hereafter and with funds appropriated by this Act and by subsequent appropriation Acts, notwithstanding any other provision of law and pursuant to such rules and regulations as the Secretary may prescribe, an expeditious program of competitive leasing of oil and gas in the National Petroleum Reserve in Alaska, \$107,001,000, to remain available until expended: *Provided*, That (1) activities undertaken pursuant to this Act shall include or provide for such conditions, restrictions, and prohibitions as the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the National Petroleum Reserve in Alaska (the Reserve); (2) the provisions of section 202 and section 603 of the Federal Lands Policy and Management Act of 1976 (90 Stat. 2743) shall not be applicable to the Reserve; (3) the first lease sale shall be conducted within twenty months of the date of enactment of this Act: *Provided*, That the first lease sale shall be conducted only after publication of a final environmental impact statement if such is deemed necessary under the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4332); (4) the withdrawals established by section 102 of Public Law 94-258 are rescinded for the purposes of the oil and gas leasing program authorized herein; (5) bidding systems used in lease sales shall be based on bidding systems included in section 205(a)(1) (A) through (H) of the Outer Continental Shelf Lands Act Amendments of 1978 (92 Stat. 629); (6) lease tracts may encompass identified geological structures; (7) the size of lease tracts may be up to sixty thousand acres, as determined by the Secretary; (8) each lease shall be issued for an initial period of up to ten years, and shall be extended for so long thereafter as oil or gas is produced from the lease in paying quantities, or as drilling or reworking operations, as approved by the Secretary, are conducted thereon; and (9) all receipts from sales, rentals, bonuses, and royalties on leases issued pursuant to this Act shall be paid into the Treasury of the United States: *Provided*, That 50 per centum thereof shall be paid by the Secretary of the Treasury semiannually, as soon as practicable after March 30 and September 30 each year, to the State of Alaska for (a) planning, (b) construction, maintenance, and operation of essential public facilities, and (c) other necessary provisions of public service: *Provided further*, That in the allocation of such funds, the State shall give priority to use by subdivisions of the State most directly or severely impacted by development of oil and gas leased under this Act.

Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the National Petroleum Reserve in Alaska which do not interfere with operations under any contract maintained or granted previously. Any information acquired in such explorations shall be subject to the conditions of 43 U.S.C. 1352(a)(1)(A).

Judicial review
Publication in
Federal
Register.

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. Any proceeding on such action

PUBLIC LAW 96-514—DEC. 12, 1980

94 STAT. 2965

shall be assigned for hearing at the earliest possible date and shall be expedited by such Court.

The detailed environmental studies and assessments that have been conducted on the exploration program and the comprehensive land-use studies carried out in response to sections 105 (b) and (c) of Public Law 94-258 shall be deemed to have fulfilled the requirements of section 102(2)(c) of the National Environmental Policy Act (Public Law 91-190), with regard to the first two oil and gas lease sales in the National Petroleum Reserve-Alaska: *Provided*, That not more than a total of 2,000,000 acres may be leased in these two sales: *Provided further*, That any exploration or production undertaken pursuant to this section shall be in accordance with section 104(b) of the Naval Petroleum Reserves Production Act of 1976 (90 Stat. 304; 42 U.S.C. 6504).

42 USC 6505.

42 USC 4332.

ADMINISTRATIVE PROVISIONS

The amount appropriated for the Geological Survey shall be available for purchase of not to exceed 22 passenger motor vehicles, of which 19 shall be for replacement only; reimbursement to the General Services Administration for security guard services; contracting for the furnishing of topographic maps and for the making of geophysical or other specialized surveys when it is administratively determined that such procedures are in the public interest; construction and maintenance of necessary buildings and appurtenant facilities; acquisition of lands for observation wells; expenses of the U.S. National Committee on Geology; and payment of compensation and expenses of persons on the rolls of the Geological Survey appointed, as authorized by law, to represent the United States in the negotiation and administration of interstate compacts.

BUREAU OF MINES

MINES AND MINERALS

For expenses necessary for conducting inquiries, technological investigations and research concerning the extraction, processing, use and disposal of mineral substances without objectionable social and environmental costs; to foster and encourage private enterprise in the development of mineral resources and the prevention of waste in the mining, minerals, metal and mineral reclamation industries; to inquire into the economic conditions affecting those industries; to promote health and safety in mines and the mineral industry through research; and for other related purposes as authorized by law, \$139,428,000, of which \$107,726,000 shall remain available until expended.

ADMINISTRATIVE PROVISION

The Secretary is authorized to accept lands, buildings, equipment, and other contributions from public and private sources and to prosecute projects in cooperation with other agencies, Federal, State, or private: *Provided*, That the Bureau of Mines is authorized during the current fiscal year, to sell directly or through any Government agency, including corporations, any metal or mineral product that may be manufactured in pilot plants operated by the Bureau of Mines, and the proceeds of such sales shall be covered into the Treasury as miscellaneous receipts.

REGULATIONS

40 C.F.R. § 1502.9 (2019)

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in §1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

...

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

.....

40 C.F.R. § 1502.14 (2019)

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§1502.15) and the Environmental Consequences (§1502.16), it should 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. In this section agencies shall:

- (a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.
- (b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.
- (c) Include reasonable alternatives not within the jurisdiction of the lead agency.
- (d) Include the alternative of no action.
- (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
- (f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1508.7 (2019)

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.8 (2019)

§ 1508.8 Effects.

Effects include:

...

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

43 C.F.R. § 2361.1

§ 2361.1 Protection of the environment.

(a) The authorized officer shall take such action, including monitoring, as he deems 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.

...

(e)(1) To the extent consistent with the requirements of the Act and after consultation with appropriate Federal, State, and local agencies and Native organizations, the authorized officer may limit, restrict, or prohibit use of and access to lands within the Reserve, including special areas. On proper notice as determined by the authorized officer, such actions may be taken to protect fish and wildlife breeding, nesting, spawning, lambing or calving activity, major migrations of fish and wildlife, and other environmental, scenic, or historic values.

....

43 C.F.R. § 3130.0–1

§ 3130.0–1 Purpose.

These regulations establish the procedures under which the Secretary of the Interior will exercise the authority granted to administer a competitive leasing program for oil and gas within the National Petroleum Reserve—Alaska.

43 C.F.R. § 3135.2

§ 3135.2 Under what circumstances will BLM require a suspension of operations and production or approve my request for a suspension of operations and production for my lease?

(a) BLM will require a suspension of operations and production or approve your request for a suspension of operations and production for your lease(s) if BLM determines that—

(1) It is in the interest of conservation of natural resources;

. . . ; or

(3) It mitigates reasonably foreseeable and significantly adverse effects on surface resources.

. . . .

43 C.F.R. § 3137.21

§ 3137.21 What must I include in an NPR–A unit agreement?

Effective: March 5, 2008

(a) Your NPR–A unit agreement must include—

...

(4) A provision that acknowledges BLM’s authority to set or modify the quantity, rate, and location of development and production; . . .

.....

43 C.F.R. § 3137.71

§ 3137.71 What must I do to meet continuing development obligations?

...

(b) No later than 90 calendar days after meeting initial development obligations, submit to BLM a plan that describes how you will meet continuing development obligations. You must submit to BLM updated continuing obligation plans as soon as you determine that, for whatever reason, the plan needs amending.

(1) If you have drilled a well that meets the productivity criteria, your plan must describe the activities to fully develop the oil and gas field.

....

43 C.F.R. § 3137.73

§ 3137.73 What will BLM do after I submit a plan to meet continuing development obligations?

Within 30 calendar days after receiving your proposed plan, BLM will notify you in writing that we—

...

(b) Rejected your plan and explain why. This will include an explanation of how you should correct the plan to come into compliance; . . .

.....

50 C.F.R. § 402.02

§ 402.02 Definitions.

Effective: October 28, 2019

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

50 C.F.R. § 402.13

§ 402.13 Informal consultation.

Effective: October 28, 2019

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

(c) If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(1) A written request for concurrence with a Federal agency's not likely to adversely affect determination shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs.

(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60-day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

50 C.F.R. § 402.14

§ 402.14 Formal consultation.

Effective: October 28, 2019

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) Exceptions.

(1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

...

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

...

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

LEGISLATIVE HISTORY

- 11

94TH CONGRESS } HOUSE OF REPRESENTATIVES } REPT. NO. 94-
 1st Session } } 81 PART I

AUTHORIZING THE SECRETARY OF THE INTERIOR TO ESTABLISH ON CERTAIN PUBLIC LANDS OF THE U.S. NATIONAL PETROLEUM RESERVES THE DEVELOPMENT OF WHICH NEEDS TO BE REGULATED IN A MANNER CONSISTENT WITH THE TOTAL ENERGY NEEDS OF THE NATION AND FOR OTHER PURPOSES

MARCH 18, 1975.—Ordered to be printed

Mr. HALEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H.R. 49]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 49) To authorize the Secretary of the Interior to establish on certain public lands of the United States national petroleum reserves the development of which needs to be regulated in a manner consistent with the total energy needs of the Nation, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is as follows:

Page 1, beginning on line 3, strike out all after the enacting clause and insert in lieu thereof the following:

That in order to develop petroleum reserves of the United States which need to be regulated in a manner to meet the total energy needs of the Nation, including but not limited to national defense, the Secretary of the Interior is authorized to establish national petroleum reserves on any reserved or unreserved public lands of the United States (except lands in the National Park System, the National Wildlife Refuge System, the Wild and Scenic Rivers System, the National Wilderness Preservation System, areas now under review for inclusion in the Wilderness System in accordance with provisions of the Wilderness Act of 1964, and lands in Alaska other than those in Naval Petroleum Reserve #4).

Sec. 2. No national petroleum reserve that includes all or part of an existing naval petroleum reserve shall be established without prior consultation with the Secretary of Defense, and when so established, the portion of such naval reserve included shall be deemed to be excluded from the naval petroleum reserve.

Upon the inclusion in a national petroleum reserve of any land which is in a naval petroleum reserve on the date of enactment of this act, any equipment, facilities, or other property of the Department of the Navy used in operations on the land so included and any records, maps, exhibits, or other informational data held by the Secretary of the Navy in connection with the land so included shall be transferred from the Secretary of the Navy to the Secretary of the Interior who shall thereafter be authorized to use them to carry out the purposes of this Act.

The Secretary of the Interior shall assume the responsibilities and functions of the Secretary of the Navy under any contract which now exists with respect to activities on a naval petroleum reserve to which the United States is a party.

SEC. 3. (a) The oil and gas in the national petroleum reserves in the contiguous forty-eight states established pursuant to this section may be developed under terms and conditions prescribed by the Secretary of the Interior. The Secretary of the Interior shall use competitive bidding procedures with prior public notice of not less than 30 days of the terms and conditions for any contract, lease, or operating agreement for development and production of oil and gas from a national petroleum reserve. Such terms and conditions and also plans for the development of each area of the national petroleum reserves shall be published in the Federal Register, but shall not become effective until sixty days after final notice has been published and submitted to the Congress (not counting days on which either the House of Representatives or the Senate is not in session for three consecutive days or more) and then only if neither the House of Representatives nor the Senate adopts a resolution of disapproval. Each proposed Plan of development and each amendment thereof shall explain in detail the method of development and production proposed, shall provide for disposal and transportation of the oil consistent with the public interest, and shall give full and equal opportunity for development of or acquisition of, or exchange for, the oil and gas by qualified persons including major and independent producers or refiners alike. Each proposed plan of development by the Secretary shall also explain the relative needs for developing the oil and gas resources in order to meet the total energy needs of the Nation, compared with the need for prohibiting such development in order to further some other public interest.

(b) Any oil or gas produced from such petroleum reserves, except such oil or gas which is either exchanged in similar quantities for convenience or increased efficiency of transportation with persons or the government of an adjacent foreign state, or which is temporarily exported for convenience or increased efficiency of transportation across ports of an adjacent foreign state and reenters the United States, shall be subject to all of the limitations and licensing requirements of the Export Administration Act of 1969 (Act of Dec. 30, 1969; 83 Stat. 841) and, in addition, before any oil or gas subject to this section may be exported under the limitations and licensing requirement and penalty and enforcement provisions of the Export Administration Act of 1969 the President must make and publish an express finding that such exports will not diminish the total quality or quantity of oil and gas available to the United States and are in the national interest and are in accord with the Export Administration Act of 1969.

(c) The Secretary of the Interior is authorized to enter into contracts for the sale of oil and gas which is produced from the National Petroleum Reserves and which is owned by the United States. Such contracts shall be issued by competitive bidding, they shall be for periods of not more than one-year's duration, and in amounts which, in the opinion of the Secretary, shall not exceed those which can be effectively handled by the purchasers.

(d) The Secretary of the Interior is hereby authorized and directed to explore for oil and gas on Naval Petroleum Reserve No. 4 and he shall report annually to Congress on his plan for exploration of such Reserve: *Provided*, That no development leading to production shall be undertaken unless authorized by Congress.

(e) Any pipeline which carries oil or gas produced from the national petroleum reserves shall be subject to the common carrier provisions of Section 28 (r) of the Mineral Leasing Act of 1920, (41 Stat. 449), as amended (30 U.S.C. Section 185), regardless of whether the pipeline crosses public lands.

PURPOSE

H.R. 49 proposes to authorize the Secretary of the Interior to establish on certain public lands of the United States national petroleum reserves the development of which needs to be regulated in a manner consistent with the total energy needs of the Nation, and for other purposes.

EXPLANATION AND NEED

The bill seeks to accomplish three things:

First, to authorize the Secretary of the Interior to establish national petroleum reserves on the public lands.

Second, to authorize the Secretary to prepare plans for development and production of oil and gas on such reserves in the lower forty-eight states, subject to Congressional acceptance of any production plan.

Third, to direct the Secretary to explore for oil and gas on the 22 million-acre Naval Petroleum Reserve No. 4 in Alaska, and to report his findings annually to Congress. However, the bill expressly prohibits the Secretary from allowing any leasing, development, or production from this Alaskan reserve until further action by Congress.

Potential Oil and Gas Production on Public Lands

H.R. 49 proposes that public lands heretofore set aside as Naval Petroleum Reserves may be reviewed by the Secretary of the Interior. After consultation with the Secretary of Defense he is authorized to establish national petroleum reserves, which may include all or part of a Naval Petroleum Reserve. Subsequently the Secretary of the Interior is authorized to proposed to Congress a plan for the development and production of any area within a national petroleum reserve. Such proposed plans would take effect 60 days after publication in the Federal Register unless rejected by either body of Congress.

The potential 300,000 barrels per day of production from Elk Hills could replace a like amount of imported crude oil. At current prices this would reduce our balance of payments deficit by about \$1.3 billion and return to the U.S. Treasury approximately \$1.0 billion per year.

Committee Jurisdiction

Jurisdiction over public lands in the House of Representatives is the responsibility of the Committee on Interior and Insular Affairs. H.R. 49 deals with establishing national petroleum reserves on any reserved or unreserved public lands, with certain specified exceptions. These exceptions are lands in the National Park System, National Wildlife Refuge System, Wild and Scenic Rivers System, Wilderness Preservation System and lands under review for inclusion in the Wilderness System, and lands in Alaska except those in Naval Petroleum Reserve No. 4.

Naval Petroleum Reserves are public lands set aside by Executive Order and used for a specific purpose. Their development and production for their oil potential is covered by statute (10 U.S.C. 7421, *et seq.*). Under the House Rules, this statute puts them under the jurisdiction of the House Committee on Armed Services.

Any production of oil and gas for other than national defense purposes from a Naval Petroleum Reserve requires an act of Congress because current law limits production from these reserves to national defense needs. This has been interpreted to mean a declaration of war. H.R. 49, by authorizing a naval petroleum reserve to be included in a

national petroleum reserve, would lift these restrictions on production and would permit the reserves to be developed in order to meet the total energy needs of the nation, including but not limited to national defense.

Similar bills, i.e., H.R. 11840 and H.R. 16800, were introduced in the 93d Congress. After extensive hearings held by the Subcommittee on Public Lands, the substance of H.R. 11840 was approved by the Subcommittee as part of the broader Public Land Policy and Management Act, H.R. 16800. However, no final Committee action was taken on this legislation in the 93d Congress.

The Committee is aware of the jurisdictional overlapping of H.R. 49 insofar as the Naval Petroleum Reserves is concerned. A letter from the Honorable Melvin Price, Chairman of the Armed Services Committee, on this question is included as a part of this report, together with the response of the Chairman of this Committee. This Committee believes that the urgent national need for immediate action to produce more domestic oil and natural gas weighs heavily against any further delay through duplicating this Committee's hearings and consideration. Debate on amendments or a substitute for H.R. 49, offered on the House Floor, could give the House an opportunity to decide on a policy for establishment and development of national petroleum reserves on the public lands. If this is done without further delay, domestic petroleum production could be increased by 160,000 barrels per day in less than six months, and 300,000 barrels within a year according to administration officials.

The Committee respectfully notes that the House Armed Services Committee's Investigating Subcommittee held hearings on Elk Hills on October 17 and 18, 1973, during the 93d Congress. They recommended that the reserve only be put in readiness for military use. This Committee is not insensitive to the views and prerogatives of the Committee on Armed Services; however, the Members strongly urge immediate consideration of H.R. 49 by the House. It is in this format that H.R. 49 as well as the position of the Armed Services Committee together with the President's recommendations in his Energy Independence Act of 1975, can be fully and adequately debated and considered.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, D.C., March 3, 1975.

(Letter from Chairman of Committee on Armed Services to Chairman of Committee on Interior and Insular Affairs)

HON. JAMES A. HALEY,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I have learned that H.R. 49, a bill to authorize the Secretary of the Interior to establish on certain public lands of the United States national petroleum reserves, has been favorably reported by the Subcommittee on Public Lands of your Committee. That bill would authorize the Secretary of the Interior to include within the national petroleum reserves the existing Naval Petroleum Reserves.

5

As you know, House Rule X, Clause 1(c)(4), grants this Committee jurisdiction over the conservation, development and use of Naval Petroleum Reserves. That jurisdiction was reaffirmed as recently as last October, when the House adopted H. Res. 988. In view of the exclusive jurisdiction of this Committee, I respectfully submit that the action taken by the Subcommittee on Public Lands clearly exceeded its jurisdiction and that of the Interior Committee. Accordingly, I request that the Interior Committee specifically exclude the Naval Petroleum Reserves from the provisions of the bill when it is presented for Committee action. I would also appreciate it if you would call this matter to the attention of the membership of your Committee by having this letter read when H.R. 49 comes before the Committee.

In the event that the Interior Committee approves the bill without specifically excepting the Naval Petroleum Reserves from its provisions, I request that this letter be made a part of the Interior Committee report on the bill.

Sincerely,

MELVIN PRICE,
Chairman.

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., March 7, 1975.

(Letter from Chairman of Committee on Interior and Insular Affairs
to Chairman of Committee on Armed Services)

HON. MELVIN PRICE,
*Chairman, House Committee on Armed Services, Room 2120, Rayburn
Building, Washington, D.C.*

DEAR MR. CHAIRMAN: H.R. 49, the bill to which you refer in your letter of March 3, has been scheduled for consideration by the Full Committee at our next regular meeting, Wednesday, March 12, at which time I assume the members will be aware of your position since you provided them with copies of your letter to me.

As to propriety of considering this legislation, we can only operate under the assumption that we have jurisdiction over a matter that has been referred to us by the Speaker. The bill of course provides that no petroleum reserve that includes an existing Naval Petroleum Reserve can be established without prior consultation with the Secretary of Defense.

At such time as any report on this bill is drafted, your request that your letter be made a part of that report will of course be considered.

Sincerely,

JAMES A. HALEY,
Chairman.

Historical Need for Naval Petroleum Reserves Has Changed

In the first quarter of this century four Naval Petroleum Reserves were created from public lands to assure that, in time of war, the Navy's ships would have adequate petroleum supplies. Naval Petro-

H.R. 51

leum Reserve No. 1 at Elk Hills (established in September 1912); Naval Petroleum Reserve No. 2 (established in December 1915) at Buena Vista are both in California. Naval Petroleum Reserve No. 3 (established in December 1912) is Teapot Dome in Wyoming. Naval Petroleum Reserve No. 4 consisting of 22 million acres located on the north slope of the Brooks Range in Alaska was established in February 1923. Of the first three reserves, only Elk Hills, with 1.5 billion barrels, has any appreciable reserve.

The Defense Production Act of 1950, as amended, adequately protects the nation's defense needs. Under the terms of that Act, the President is authorized to assign priorities to any defense-related contracts or orders, including all fuels. The nation's entire supply of fuel could be immediately reserved and held for military use if necessary the minute the President establishes such a priority. Therefore, a reserve controlled by the Navy, but limited to use only during time of war, has lost the significance it once had.

Each of the three reserves in the lower forty-eight states is adjacent to other producing areas. Due to past and present production Buena Vista has been virtually depleted, with a reserve of only 51 million barrels remaining. Reserves in Teapot Dome are estimated to be only 50 million barrels. The relative insignificance of the amount of oil remaining in these two reserves make them reserves for the Navy in name only.

The case at Elk Hills is different. It can be put into production within sixty days. Production of 160,000 barrels per day could be obtained in less than six months and the reserve is capable of production of 300,000 barrels per day within one year. The Committee notes that this amount represents approximately 40 percent of the President's goal of reducing U.S. dependence on foreign crude imports by 800,000 barrels per day within one year. The total reserve is estimated to be 1.5 billion barrels of oil and over 1.2 trillion cubic feet of natural gas.

Drainage From the Elk Hills Reserve

Navy and Interior officials, private geologists and petroleum engineers, alike, all agreed in testimony that drainage from a partially developed petroleum field is difficult and sometimes impossible to prevent. Navy, in 1974, and again in February of this year, testified there was some drainage from Elk Hills. In this regard, two actions are now being litigated between the Navy and private oil companies to prevent further drainage through production from wells outside of the boundaries of the reserve.

To prevent such drainage, the Navy must either enjoin the production of oil on the adjoining lands outside of the reserve, or attempt to "jawbone" agreements with private interests to slow down production from, or vacate, active wells, or drill offset wells within the reserve and commence their own production. H.R. 49 would permit a production plan subject to Congressional approval. Such a plan would not only permit production within the reserve but would also free up production from wells on adjoining lands outside the reserve now enjoined by court action, thus ending the current litigation. This would mean an additional production of 20,000 barrels per day of oil by private companies on private lands now foreclosed by court order.

Joint U.S. and Standard Oil of California Ownership of Elk Hills Reserve Oil and Gas

The Elk Hills reserve is in joint ownership and, as a result of this, a unit plan contract between the Navy and the Standard Oil Company of California allocates 79 percent of the ownership to the Federal government and 21 percent to Standard. Since production ceased following World War II, standby maintenance has been provided for the existing wells through an operating agreement between the two parties which designates Standard as the operator of the field. However, the terms of the operating agreement permit its cancellation by either party. On February 14 of this year, Standard notified the Navy that it was exercising its right of cancellation.

Whether the Navy or another Federal agency manages Elk Hills, any new operating agreement must be negotiated with another company. Navy has testified that the unit plan contract and the operating agreement with Standard are equitable. The unit plan contract would remain in effect under any plan of production.

Known reserves of gas in Elk Hills exceed 1.2 trillion cubic feet which would become available for sale as oil production proceeded. There appears to be little need to stress the existing natural gas shortage in the Nation.

Protection of the Public Interest and Assuring Opportunity for Independent Oil Refiners to Have Equitable Access to Oil Produced on a National Petroleum Reserve

H.R. 49 provides that any plan of production proposed by the Secretary of the Interior from a national petroleum reserve in the lower forty-eight states can become effective only after being published in the Federal Register and submitted to Congress for 60 days during which time either body of Congress may veto it by adopting a resolution of disapproval. Any plan of production proposed by the Secretary can develop and produce such reserves either through a Federal agency, or by contracting or leasing with a private company on the basis of competitive bidding only.

The need for variation in any proposed production plans is evident because of the variations in conditions and circumstances of the petroleum reserves and supplies. As was pointed out previously, a reserve such as Teapot Dome has little oil left, requiring secondary treatment to recover the remaining oil, while Elk Hills permits primary production in several proven zones.

In any production plan, H.R. 49 requires that the small independent oil refiners, or purchasers of natural gas, have equitable opportunity to buy the product in amounts suitable to their needs, through purchase contracts limited to a year's duration. It also provides that any pipeline carrying oil or gas produced from a national petroleum reserve must be operated as a common carrier, thus assuring accessibility of the pipeline to the small independent companies. These protections are intended to guarantee small independent companies a viable opportunity to participate in the benefits of production from such national petroleum reserves.

Oil or gas produced from a national petroleum reserve cannot be exported under H.R. 49, except under the limitations and licensing

requirements of the Export Administration Act of 1969 and, in addition, unless the President makes a finding that such sale to a foreign country is in the national interest.

Potential of Naval Petroleum Reserve No. 4 in Alaska

The Committee finds that early exploration for oil and gas in Naval Petroleum Reserve No. 4 is essential. H.R. 49 directs the Secretary to undertake such exploration. However, production is out of the question for a number of years due to a lack of transportation. There are other matters to be considered before Congress makes a final judgment on the production of oil and gas contained in this reserve. These lands may have substantial values, including recreation, wildlife and other mineral deposits, in addition to any oil and gas.

Current oil development in Alaska is principally in the Prudhoe Bay area. That field involves leases issued by the State of Alaska to private oil companies and will pay royalties to the owners of the land. There could well be other fields found as extensions to the Prudhoe Bay field or in other areas of Alaska which could be developed under existing law and regulations and would return substantial revenues to the Federal government as well as to the State and the natives.

Exploration by the Navy within Naval Petroleum Reserve No. 4 is presently proceeding at a snail's pace. Navy has only two exploratory wells on this year's schedule, although they have programmed 24 more over the next 7 years at an estimated cost of \$382 million. Little is known of the potential oil or gas reserves in Naval Petroleum Reserve No. 4. Estimates range as high as 20-30 billion barrels of oil, but the Committee recognizes that these are little more than preliminary estimates until additional exploration has been accomplished.

Transportation facilities for oil or gas from this reserve will not be possible for at least five years and probably longer. The Trans-Alaskan Pipeline will begin operation in mid-1977, but any connection to it or expansion of it by looping to carry more than the oil produced in the Prudhoe Bay field is a major construction effort that would require another two to four years beyond 1977. A pipeline to carry natural gas from the North Slope of Alaska would require even more time.

It is vital to the national interest to assess the amount and location of potential oil and gas available in this 22 million acre reserve. There is the possibility of finding other minerals and there are wildlife and many other values on this large tract of public land that will have to be considered. For example, an area on the western side of the reserve is an historic and current calving ground of the Arctic caribou herd. The northeastern coastal plain area is considered to be the best waterfowl nesting area on the North Slope. Finally, lands in and adjacent to the Brooks Range are highly scenic. These areas should all receive consideration in any plans for development. In the Committee's opinion, the Secretary of the Interior is best qualified to make judgments regarding these other values.

The Department of the Interior administers more than 300 million acres of public land in Alaska. Some of this land is yet to be selected by the Natives and the State as permitted in the Alaskan Native Claims Settlement Act and the Alaska Statehood Act. Much of the

other public land in Alaska may be designated as wilderness, wild and scenic river, wildlife refuge, national park or national forest lands.

The Committee believes Congress must determine policy for this vast area of our largest State, and it believes also that the Department of the Interior should be guided by new law concerning public land policy. Certainly, the Navy should not retain exclusive jurisdiction over 22 million acres of Alaska public lands in the guise of an essentially unexplored petroleum reserve.

H.R. 49 would direct a more sensible and logical approach to the consideration of all of the public lands by integrating the management of Naval Petroleum Reserve No. 4 into the Department of the Interior. That Department could then determine the oil and gas potential on this reserve, together with its other values. Congress should determine all the relative values, including continuation of all or parts of it as a national petroleum reserve.

Meanwhile, production from proven reserves in the lower forty-eight States could proceed subject to Congressional review of the production plans.

BUDGET ACT COMPLIANCE

Under the provision of Rule X, clause 3 (b), and clause 1 (e) (3) (c), and sections 308(a) and 403 of the Congressional Budget Act of 1974, the Committee recognizes that some costs will be incurred as a result of the enactment of H.R. 49 (see Current and Five Subsequent Fiscal Year Cost Estimate), but it notes that the income will far exceed the costs.

CURRENT AND FIVE SUBSEQUENT FISCAL YEAR COST ESTIMATE

Pursuant to Rule XIII, Clause 7, of the Rules of the House of Representatives, the Committee estimates the cost to be incurred by the Federal Government during the current and the five subsequent fiscal years as a result of the enactment of this legislation would be as follows:

This bill would mean production of oil and gas from national petroleum reserves within the contiguous 48 states subject to a plan developed by the Secretary of Interior which would come before Congress for 60 days and be subject to a veto by either body. The Committee estimates that outlays for developing plans by the Secretary would not exceed \$2 million per year.

The bill also directs the Secretary of the Interior to explore for oil and gas on Naval Petroleum Reserve No. 4 in Alaska and report annually to Congress on his findings but does not allow any production. The Committee estimates that the Secretary of the Interior will expend nothing during the current fiscal year for exploration of this area, but up to \$50 million may be spent in each of the succeeding five fiscal years. However, it must be pointed out that these costs could vary considerably depending on the Secretary's findings as presented in his annual report to the Congress and on the determination by Congress of the Secretary's actual needs for exploration in Naval Petroleum Reserve No. 4. Even without enactment of H.R. 49, Navy estimates exploration costs of \$382 million over the next seven years. Cost estimates for H.R. 49 substantially replace Navy's projected costs.

94TH CONGRESS } <i>1st Session</i>	HOUSE OF REPRESENTATIVES	{ REPT. 94- 81 Part 2
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AUTHORIZING THE SECRETARY OF THE INTERIOR TO ESTABLISH
ON CERTAIN PUBLIC LANDS OF THE UNITED STATES NATIONAL
PETROLEUM RESERVES THE DEVELOPMENT OF WHICH NEEDS TO
BE REGULATED IN A MANNER CONSISTENT WITH THE TOTAL
ENERGY OF THE NATION, AND FOR OTHER PURPOSES

APRIL 18, 1975.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. HÉBERT, from the Committee on Armed Services,
submitted the following

REPORT

[To accompany H.R. 49]

The Committee on Armed Services, to whom was referred the bill (H.R. 49) sequentially, following its consideration and report to the House by the Committee on Interior and Insular Affairs (Rept. No. 94-81, Part I), which bill would authorize the Secretary of the Interior to establish on certain public lands of the United States national petroleum reserves the development of which needs to be regulated in a manner consistent with the total energy needs of the Nation, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

AMENDMENTS TO THE AMENDMENT OF THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS TO H.R. 49

- Page 3, between lines 14 and 15, insert the following: "TITLE I".
- Page 3, line 15, strike out "That in" and insert "SEC. 101. In".
- Page 3, line 21, insert "the Naval Petroleum Reserves," immediately before "the National Park System,".
- Page 4 line 1, insert a period immediately after "Alaska".
- Page 4, strike out line 2.
- Page 4, strike out line 3 and all that follows down through line 22.
- Page 4, line 23, strike out "Sec. 3." and insert "SEC. 102."
- Page 7, lines 5 and 6, strike out "on Naval Petroleum Reserve Numbered 4".
- Page 7, line 7, strike out "of such reserve".
- Page 7, after line 15, insert the following:

revised House rules, and the request of the Chairman of the Armed Services Committee, referred H.R. 49 sequentially to the House Armed Services Committee for a period ending no later than April 19, 1975.

It is also pertinent to note in this regard that following the President's State of the Union Message on January 15, 1975, in which he asked for production of Elk Hills Naval Petroleum Reserve in amounts up to 300,000 barrels per day, H.R. 2633 and H.R. 2650 were introduced on February 4, 1975 as the President's Energy Independence Act of 1975. Title I of those identical bills applied to the Naval Petroleum Reserves. Title I of those bills was referred to the Committee on Armed Services, with other titles to the Committee on Interstate and Foreign Commerce, Committee on Ways and Means and Committee on Banking, Currency and Housing. It is significant that no part of these bills was referred to the Committee on Interior and Insular Affairs.

BACKGROUND

The Establishment and Location of the Reserves

There are four naval petroleum reserves: No. 1, Elk Hills; No. 2, Buena Vista Hills, in Kern County, Calif.; No. 3, Teapot Dome, Wyo.; No. 4, on the North Slope in Alaska, immediately to the west of the Prudhoe Bay commercial oil field. All of those reserves were established between 1912 and 1923.

In addition, there are three naval oil shale reserves: Nos. 1 and 3 in Colorado; No. 2 in Utah, established in 1916 and 1924.

Those oil shale reserves are undeveloped. The only current activity at any of those reserves is in providing shale for use in an experimental retort process of Paraho Development Corp.

Approximately 20 percent of Naval Petroleum Reserve No. 1 at Elk Hills is owned by Standard Oil Co. of California. It has been operated under a unit plan contract since 1944, which has kept the field largely shut-in.

There are over 1 billion barrels in proven reserves in this field, and 1.2 billion thousand cubic feet of gas reserve. There are more than 1,000 wells in existence on NPR No. 1. It has a current production capability of 160,000 barrels per day, which could be expanded by further development of the field to 400,000 barrels per day.

Since June 1974, 42 new wells have been drilled at Elk Hills. They have proved an additional 100 million barrels of reserve. In 1974 the U.S. income from this reserve was \$2.5 million.

NPR No. 2 is located at Buena Vista Hills, Calif. Two-thirds of this reserve is privately owned and one-third is U.S. owned. There are more than 20 million barrels proven reserve remaining at Buena Vista Hills. It is fully developed and producing. The United States presently derives 647 barrels per day in royalty oil at NPR No. 2. In 1974 U.S. income from this reserve was \$1.5 million.

NPR No. 3 is located at Teapot Dome, Wyo. It is wholly-owned by the United States. It has a proven reserve of 42.5 million barrels. There are 150 wells on the reserve. It has a present production capability of 2,000 barrels per day. The 1974 income of the United States from Teapot Dome production was \$1.1 million.

NPR No. 4 is located on the North Slope in Alaska. It is wholly owned by the United States. It is largely unexplored and almost com-

pletely undeveloped. The reserve is estimated at between 10 billion and 33 billion barrels. However, only 100 million barrels of reserves have been proven. The rest, of course, must be proven in subsequent exploration.

The exploration program in fiscal year 1975 consists of 3,500 miles of seismic exploration and two exploratory wells. One gas well has been completed, and is capable of producing 500,000 cubic feet of gas per day. The second exploration well was started on March 17 of this year.

Existing Law

Chapter 641, title 10, United States Code, deals with Naval Petroleum Reserves. Section 7422 grants the Secretary of the Navy exclusive jurisdiction and control of the reserves and directs him to explore, prospect, conserve, develop, use and operate those reserves.

The production of the reserves is limited to that which is necessary for protection, conservation, testing and maintenance. For any production beyond that, the Secretary of the Navy must find that it is needed for national defense, that finding must be approved by the President and the production must be authorized by joint resolution of Congress.

Recent Committee Oversight Actions

During October 1973 the Investigating Subcommittee conducted hearings following a public statement by President Nixon that Naval Petroleum Reserve No. 1 at Elk Hills should be opened up to meet the fuel needs of the west coast. In its report on November 13, 1973, the Subcommittee indicated that an energy crisis was upon the Nation and that the statutory restriction on the use of the Naval Petroleum Reserves should not be amended.

During the period January through May 1974 a Special Subcommittee on Department of Defense Energy Resources and Requirements, chaired by Congressman Otis G. Pike (D-NY) held extensive hearings on the overall defense energy question, with particular reference to the Naval Petroleum Reserves. In its principal findings the Subcommittee held that production of Elk Hills Petroleum Reserve beyond the statutory limits was not warranted at that time and that the exploration and development of Reserves 1 and 4 at Elk Hills and Alaska must be completed as rapidly as time and resources permit. That report showed particular concern over the inadequate response to fulfilling defense petroleum needs when the Defense Production Act of 1950 was invoked during the 1973 fuel crisis.

READINESS AND DELIVERABILITY

Elk Hills (Reserve No. 1)

Two figures have been popularly used in discussing the oil to be delivered from Elk Hills—160,000 barrels per day and 300,000 barrels per day. The facts are that with *present* facilities the maximum amount of deliverable oil is 30,000 barrels per day, which is a constraint resulting from the fact that only one pipeline exists to carry the oil off

94TH CONGRESS } HOUSE OF REPRESENTATIVES } REPORT
 2d Session } } No. 94-942

DEVELOPMENT OF CERTAIN NATIONAL PETROLEUM RESERVES

MARCH 23, 1976.—Ordered to be printed

Mr. MELCHER, from the committee of conference,
 submitted the following

CONFERENCE REPORT

[To accompany H.R. 49]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 49) to authorize the Secretary of the Interior to establish on certain public lands of the United States national petroleum reserves the development of which needs to be regulated in a manner consistent with the total energy needs of the Nation, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

That this Act may be cited as the "Naval Petroleum Reserves Production Act of 1976".

TITLE I—NATIONAL PETROLEUM RESERVE IN ALASKA

DEFINITION

SEC. 101. As used in this title, the term "petroleum" includes crude oil, gases (including natural gas), natural gasoline, and other related hydrocarbons, oil shale, and the products of any of such resources.

DESIGNATION OF THE NATIONAL PETROLEUM RESERVE IN ALASKA

SEC. 102. The area known as Naval Petroleum Reserve Numbered 4, Alaska, established by Executive order of the President, dated February 27, 1923, except for tract Numbered 1 as described in Public Land Order 2344, dated April 24, 1961, shall be transferred to and administered by the Secretary of the Interior in accordance with the provisions of this Act. Effective on the date of transfer all lands within

JOINT STATEMENT OF THE COMMITTEE OF CONFERENCE

INTRODUCTION

The Committee of Conference on the bill (H.R. 49) which involves the establishment of a National Petroleum Reserve in Alaska under the jurisdiction of the Secretary of the Interior and the production of petroleum from the naval petroleum reserves by the Secretary of Navy, met seven times to resolve the differences between the House bill and the Senate amendment. In addition, many hours of informal negotiations were involved in reaching agreement on the text of the legislation explained below. This revised text is in the form of a complete substitute for the two different versions approved by the House and Senate.

COMPARISON OF MAJOR ISSUES AND FINAL RECOMMENDATION

The differences between H.R. 49 as passed by the House and as amended by the Senate are so great as to make a side-by-side comparison impractical. The two versions of the bill sought to achieve somewhat different objectives through different agencies. However, both bills sought to solve a long-existing issue of great national importance, *viz.* how the petroleum resources owned by the United States government in the public lands reserved for the four naval petroleum reserves can best serve the public interest.

OBJECTIVE

The House version of H.R. 49 authorized the Secretary of the Interior to establish a system of national petroleum reserves on the reserved and unreserved public lands of the United States (with certain stated exemptions). Under the House bill, lands in the naval petroleum reserves could be included in this new system after consultation with the Secretary of Defense and thereby be excluded from the naval petroleum reserves. In the forty-eight contiguous States development and production of petroleum in the new national petroleum reserves was to be undertaken by the Secretary of the Interior either directly or through competitive bidding procedures.

The Senate amendment, on the other hand, authorized production from these Naval Petroleum Reserves 1, 2, and 3 under the jurisdiction of the Navy for a period of five years with the objectives of (1) assuring the readiness of the reserves to produce in the future and (2) using the proceeds from the sale of the petroleum produced to permit complete development of the reserves and to partially offset the costs associated with a strategic energy reserve system designed to store an immediately available quantity of petroleum for emergency use. During the period of production authorized in the Senate

The Senate amendment also contained the complete authority establishing a strategic reserve system. Since approval of H.R. 49, by the House and Senate, the Energy Policy and Conservation Act, providing for the establishment of a strategic reserve, has been enacted into law. In recognition of this fact, the Committee of Conference approved a modified approach which authorizes the President to place *all or any* part of the petroleum produced from the naval petroleum reserves in the authorized strategic storage facilities or exchange it for petroleum of equal value to be so stored.

It was agreed that there should be established a special account in the Treasury consisting of revenues derived from the disposition of petroleum from the naval petroleum reserves, the proceeds from internal sales of petroleum within the Department of Defense, appropriations made by Congress for such reserves and any royalties or other revenues derived from the operation of such reserves. This special account is not to be the exclusive source of funds for the conduct of activities authorized by this Act, but monies credited to it are to be available as offsetting receipts to reduce outlay requirements for (1) the Secretary of the Navy in connection with expenses incident to the operation of the naval petroleum reserves, (2) the Secretary of the Interior in connection with exploration and study costs associated with the National Petroleum Reserve in Alaska, and (3) the Administrator of the Federal Energy Administration in connection with the procurement of petroleum for, and construction and operation of facilities associated with, the Strategic Petroleum Reserve. The conferees were aware that anticipated receipts would not offset the outlay requirements of all three of the agencies eligible to utilize the funds, and the President, in all likelihood, will find it necessary to apportion the available monies between the three agencies. The conferees expect the Budget Committees to consider all of these funds under the "Natural resources, environment, and energy functional" category.

CONGRESSIONAL OVERSIGHT

Both versions of H.R. 49 provided for oversight responsibilities to be vested either in the Interior and Insular Affairs Committees (under the House language) or in the Armed Services Committees (under the Senate language). The Committee of Conference agreed that continued Congressional oversight over all aspects of the implementation of this legislation would be important. Since Naval Petroleum Reserve No. 4 in Alaska is to be transferred to the Interior Department, the Committee is recommending that all contracts, plans, reports, etc. involving this area be referred directly to the Committees on Interior and Insular Affairs. Similarly, since the other reserves are to remain under the administrative jurisdiction of the Secretary of the Navy, all such contracts, plans, reports, etc. dealing with them will be directed to the Committees on Armed Services.

SECTION BY SECTION ANALYSIS

TITLE I—NATIONAL PETROLEUM RESERVE IN ALASKA

SEC. 101 defines the term "petroleum" to include crude oil, gases of all kinds (natural gas, hydrogen, carbon dioxide, helium and any

others), natural gasoline, and related hydrocarbons (tar sands, asphalt, propane, butane, etc.), oil shale and the products of such resources.

SEC. 102 provides that, except for surface of the lands in Tract 1 as described in Public Land Order 2344 which are being used for the Naval Arctic Research Laboratory, all of the public lands whether previously reserved or unreserved within the exterior boundaries of Naval Petroleum Reserve No. 4 as established by Executive Order 3797A of February 27, 1923, will be transferred to the administrative jurisdiction of the Secretary of the Interior from the Secretary of the Navy, but Federal agencies conducting authorized activities not inconsistent with the Act may be permitted to continue such activities to the extent they do not interfere with the administration of the land by the Secretary. All lands within this new "National Petroleum Reserve in Alaska" are statutorily withdrawn from all forms of entry and disposition under the public land laws and mining and mineral leasing laws. It is the specific intent of this provision that all lands be explicitly excluded from the provisions of the Mineral Leasing Act of 1920.

The intent of this section is to insure that all of the lands within the exterior boundaries of the reserve remain withdrawn from all uses inconsistent with the purposes of this legislation. The statutory withdrawal includes *all* lands within the boundaries of the 1923 Executive Order in order to override the unexpected interpretation of that order by the United States Court of Appeals for the Ninth Circuit in *Arnold v. Morton*. Express recognition is given to certain existing uses, e.g., the continued operation of the South Barrow gas field. Inasmuch as the Alaska Native Claims Settlement Act authorized native village corporations to select certain Federally owned land in Alaska, including the right to apply for surface rights within the Naval Petroleum Reserve until December 18, 1975, this legislation authorizes the Secretary to convey such surface interests if the selections were made on or before that date, but in no event does the legislation authorize the disposition of the subsurface mineral estate within the national petroleum reserve to any person or group, except for mineral materials (e.g., sand, gravel, and crushed stone, which for the purpose of this legislation are considered to be a part of the subsurface mineral estate) which the Secretary may permit to be used for maintenance or development of local services by native communities or for use in connection with activities associated with administration of the reserve under this Act.

SEC. 103 provides that jurisdiction over Naval Petroleum Reserve No. 4 shall be transferred to the Secretary of the Interior on June 1, 1977, at which time it shall be redesignated as the National Petroleum Reserve in Alaska. Responsibility for the protection of the natural, fish and wildlife, scenic and historical values of the area is vested in the Secretary of the Interior immediately upon enactment of this Act so that any activities which are or might be detrimental to such values will be carefully controlled. When complete jurisdiction over the reserve is transferred on June 1, 1977, the Secretary of the Interior will assume all rights and obligations incurred under contracts executed by the Secretary of the Navy with respect to activities in the reserve.

To make this transfer of jurisdiction orderly, the legislation requires that all equipment, facilities, and property associated with explora-

tion of the reserve be transferred by the Secretary of the Navy, without reimbursement, to the Secretary of the Interior and provides that any unexpended funds previously appropriated for use in connection with the reserve be transferred to the Secretary of the Interior for use in connection with the reserve as intended by the Congress when such appropriations were made. In this connection the legislation also transfers the civilian personnel ceilings assigned to the management and operation of the reserve to the Interior Department. It is not expected that non-civilian Navy personnel will transfer to the Department of the Interior, but it is intended that the number of positions allocated to the management and operation of the reserve will continue at approximately the same level after the transfer takes place so that activities at the reserve will continue at least at their current level.

Sec. 104 makes it absolutely clear that only exploration is authorized at the National Petroleum Reserve in Alaska. After the studies are completed and transmitted to the Congress, as required by the legislation, then the Congress will determine how future development and production will take place. Until authorized by the Congress, there will be no production of petroleum from this reserve, except for a limited quantity from the South Barrow gas field which is essential to the Native village of Barrow and other communities and installations near Point Barrow.

The legislation makes it clear that the Secretary may designate certain areas—including specifically the Utukok River area and the Teshekpuk Lake area—where special precautions may be necessary to control activities which would disrupt the surface values or disturb the associated fish and wildlife habitat values and related subsistence requirements of the Alaska Natives.

It is the intention of this provision to immediately authorize the Secretary to require that the exploration activities within these designated areas be conducted in a manner designed to minimize adverse impacts on the values which these areas contain. While “maximum protection of such surface values” is not a prohibition of exploration-related activities within such areas, it is intended that such exploration operations will be conducted in a manner which will minimize the adverse impact on the environment.

To this end, the Secretary is expected to take into consideration the needs of resident and migratory wildlife and to schedule exploration activities in a manner which, and at such seasons as, will cause the least adverse influence on fish and wildlife. In scheduling exploration activities in such an area the Secretary should take steps to minimize any adverse effects on native subsistence requirements and associated fish and wildlife values. Specifically, he should conduct exploration activities in these areas during times of the year when the caribou calving season and the nesting and molting seasons of the birds can be avoided.

While this provision suggests that certain areas should receive special consideration, the Members of the Committee of Conference do not mean to imply that the Secretary should ignore the environmental ramifications of exploration activities in other areas. On the contrary, it is expected that the Secretary will take every precaution to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve.

Until the actual transfer of the reserve to the Department of the Interior, the legislation requires the Secretary of the Navy to continue the ongoing exploration program within the reserve. In other words, the Members of the Committee of Conference agreed that since the Secretary of the Navy is to continue administration of this reserve until June 1, 1977, he should move forward on the exploration program which for fiscal year 1977 envisions the drilling of five exploratory wells and the completion of approximately 3,000 miles of seismic surveys.

There is every reason to believe that he will be able to cooperate with the Secretary of the Interior in carrying forward the exploration program and the Members of the Committee of Conference expect them to work together for the full season prior to the transfer so that a continuity of operations without lost time will be assured.

Since the Secretary of the Interior is required to assume responsibility for the conduct of operations under contracts negotiated by the Secretary of the Navy, after June 1, 1977, it is expected that all new contracts or amendments to existing contracts after enactment of this legislation will be closely coordinated between the two Secretaries. The Committee of Conference did not give the Secretary of the Interior a veto power over such contracts or changes, because it is generally understood that no new contracts are anticipated in the foreseeable future and because it is recognized that in the interests of good management, the Secretaries would establish a responsible and reasonable working relationship which will protect the public interest in the activities within the reserve.

Once the transfer is effected, the legislation authorizes the Secretary of the Interior to enter into contracts which he deems necessary to carry out the exploration activities contemplated. Such contracts are to be reviewed by the Attorney General for their legal sufficiency and consistency with the antitrust laws. The Secretary is precluded from entering any contract which the Attorney General determines would unduly restrict competition or be inconsistent with the antitrust laws. For the purposes of adequate oversight over such proposed actions, the Secretary is required to transmit all plans, or substantial amendments to plans, to the Committees on Interior and Insular Affairs of the House of Representatives and Senate and to report annually to such Committees on the progress of, and future plans for, exploration of the reserve.

Public Law 93-153, which modernized the law relating to rights-of-way over Federal lands and authorized the Trans-Alaska oil pipelines, included a specific requirement (section 403) that the Secretary of the Interior take affirmative action to assure that no person would, on the grounds of race, creed, color, national origin, or sex be excluded from activities carried out under authority of Title II of that Act. The Committee of Conference expects both the Secretary of the Interior and the Secretary of Navy to follow the principles set out in section 403 of P.L. 93-153 in implementing H.R. 49.

The legislation specifically authorizes the Secretary of the Navy to develop and continue the operation of the South Barrow gas field in order to supply gas at reasonable and equitable rates to the nearby villages and facilities near Point Barrow. Once the transfer of the reserve is effected, the Secretary of the Interior is authorized to take all

necessary actions to continue such service, including the development of additional fields, if necessary. The Secretary is not expected to amortize the investment in this field, on the contrary he is expected to set the rates for this service at a level which is reasonable from the point of view of the Federal Government and equitable from the point of view of the users.

The equitable rate should take into consideration the special conditions which exist in this area. The Committee recognizes that this is an isolated area in an Arctic environment where the source and supply of energy is critically important. Certainly, the village of Barrow should never be charged a rate exceeding the rate charged other users. On the contrary, the Secretary should take into consideration the average disposable income of the residents of the village and other factors in determining what the "equitable rate" might be and could, in fact, determine that a rate lower than the rate for other users should be charged on the basis of equity.

SEC. 105 deals with the study of the reserve. First, it provides that the study authorized by the Energy Policy and Conservation Act of December 22, 1975, will be completed and transmitted to the Committees on Interior and Insular Affairs. This study should be useful in identifying promising alternatives for more detailed consideration in the study called for by section 105(b). In addition, the President through appropriate executive departments or agencies and in consultation with the State of Alaska shall make a detailed study of the petroleum resources in the reserve to determine the best procedures for the development, production, transportation and distribution of such petroleum resources. In developing this study the President is to consider alternative procedures for the development and production of the reserve and the economic and environmental consequences of each. Periodic reports on the implementation of this study provision and annual reports of his findings and conclusions will be transmitted to the Committees on Interior and Insular Affairs of the House of Representatives and the Senate. The study is to be completed no later than January 1, 1980.

In addition the legislation provides for the creation of a task force to conduct a study to determine the values of, and best uses for, the lands within the reserve. This study differs from the President's study discussed above in that it is a comprehensive review of all resource values, other than petroleum, which the lands within the reserve contain. In addition to considering the importance of this area to the natives who depend upon this area for subsistence, this task force is directed to consider the natural, scenic, wildlife, and wilderness values which it contains as well as the potential for minerals, other than petroleum, and other values. The task force is to include representation of various interested Federal agencies, a representative of the State of Alaska and a representative of the Arctic Native Slope Community, the latter to be selected jointly by the affected native corporation, borough and villages. It will be the responsibility of the Secretary to prepare and submit the report of the task force, together with his recommendations, to the Committees on Interior and Insular Affairs within three years after enactment of H.R. 49, but it shall contain the concurring or dissenting views of any non-Federal representative who submits his views in writing to the Secretary within 30 days after

the Secretary announces his intention to forward the report as required by the legislation. It is not intended that either study authorized by this Act should preclude any action by either Secretary which this legislation otherwise authorizes.

SEC. 106 provides that if the Congress enacts legislation authorizing development leading to production, then the Secretary shall consult with the Attorney General in formulating regulations, developing plans, and on all contracts or operating agreements relating to development, production or sale of petroleum from the reserve to be sure that they are consistent with the antitrust laws. While this provision would become applicable if the Congress authorizes production at the reserve, this section is not intended to delay or interfere in any way with the exploration program or to preclude any geologic, geophysical, seismic or other activity necessary to carry out the purposes of this Act.

SEC. 107 authorizes the appropriation of such sums as may be necessary to carry out the provisions of this title and provides that, under certain circumstances, the Secretary may aid affected communities experiencing substantially increased needs for municipal services and facilities as the direct result of the exploration and study activities authorized by the legislation. Before implementing this provision, the Secretary is required to consult with the other Federal departments or agencies to determine what financial aid is otherwise available.

TITLE II—PRODUCTION OF NAVAL PETROLEUM RESERVES

SEC. 201 is a series of amendments to chapter 641 of title 10 of the United States Code—i.e. the chapter dealing with the naval petroleum reserves.

Amendment 1 adds a new section to the chapter defining the following terms:

“National defense” includes not only military emergencies, but also economic emergencies such as the one which occurred during the Arab embargo of 1973.

“Naval Petroleum Reserves” are defined to include the four existing petroleum reserves and the three oil shale reserves, but Naval Petroleum Reserve No. 4 in Alaska is included in this definition only until it is transferred to the Secretary of the Interior on June 1, 1977, when it is to be redesignated as the National Petroleum Reserve in Alaska in accordance with the provisions of title I of the Act.

The term “petroleum” is defined exactly the same way as in title I.

“Maximum efficient rate” implies that production shall be conducted in a manner which will assure the most efficient development to maximize ultimate recovery of petroleum from the reservoir. The Members of the Committee of Conference recognize that the Secretary of Navy retains, under the unit plan contract at NPR #1, the full and absolute power to determine the rate of development, as well as the volume and rate of production consistent with the objectives of this Act and do not intend to alter or limit this power by the use of the term “economic development” in this definition.

To eliminate any possible confusion over the term “small refiner”, the legislation incorporates, by reference, the standards applied by

OTHER AUTHORITIES

Executive Order

WHEREAS there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast and,

WHEREAS the present laws designed to promote development seem imperfectly applicable in the region because of its distance, difficulties, and large expense of development and,

WHEREAS the future supply of oil for the Navy is at all times a matter of national concern,

NOW, THEREFORE, I, WARREN G. HARDING, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby set apart as a Naval Petroleum Reserve all of the public lands within the following described area not now covered by valid entry, lease or application:

Commencing at the most northwestern extremity of the point of land shown on the maps of Alaska as Icy Cape, approximately lat. $76^{\circ} 21'$, long. $161^{\circ} 46'$; thence extending in a true south course to the crest of the range of mountains forming the watershed between the Noatak River and its northern tributaries and the streams flowing into the Arctic Ocean; thence eastward along the crest of this range of mountains to a peak at the head of the northermost of the two eastern forks of Midas Creek (Pl. 1, U.S.G.S., Bull. 536), at approximately lat. $67^{\circ} 50'$, long. $156^{\circ} 08'$; thence in a true north course to a point at the highest high water on the western or right bank of the Colville River; thence following said highest highwater mark downstream along said Colville River and the western bank of the most western slough at its mouth to the highest highwater mark on the Arctic coast. From here, following the highest highwater mark westward to the point of beginning.

The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore, except in the case of Plover Islands, from Point Tangent to Point Barrow (Pl. 3, U.S.G.S., P.P. 109), long. approximately $154^{\circ} 50'$, where it shall be the highest highwater mark on the outer shore of the islands forming the groups and extending between the most adjacent points of these islands and the sandspits at either end. In cases where the barrier reef is over three miles off shore the boundary shall be the highest highwater mark of the coast of the mainland.

Said lands to be so reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President.

The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith.

WARREN G HARDING

THE WHITE HOUSE,

Feb. 27, 1923.

[No. 3797-A.]