No. 23-3624 (consolidated with No. 23-3627)

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.

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, 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
Case Nos. 3:23-cv-00058 & 3:23-cv-00061 (Hon. Sharon L. Gleason)

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTEREST OF *AMICI CURIAE* [1]

Amici Curiae are currently-elected members of the United States House of Representatives and the United States Senate, who support the correct application of the nation's laws. *Amici* rely on federal agencies to properly implement the environmental and land use laws that Congress has enacted, and are dedicated to ensuring the success of the federal government in combatting climate change. Any failure to comply with federal statutes harms *Amici*'s interests in protecting national security and solving environmental crises, and the faithful application of statutes Congress designed to promote informed agency decision-making.

Amici Curiae ("*Amici*") are the following members of Congress:

Representative Becca Balint of Vermont (VT-AL),

Representative Nanette Diaz Barragán of California (CA-44),

Representative Donald S. Beyer, Jr. of Virginia (VA-08),

Representative Earl Blumenauer of Oregon (OR-03),

Representative Steve Cohen of Tennessee (TN-09),

Representative Diana DeGette of Colorado (CO-01),

Representative Raúl Grijalva of Arizona (AZ-07),

[1] No counsel for any party authored this brief in whole or in part and no person other than *Amici* and their counsel made a monetary contribution to its preparation and submission. *Amici* seek leave of Court to file pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

Representative Jared Huffman of California (CA-02),

Representative Ro Khanna of California (CA-17),

Representative Mike Levin of California (CA-49),

Representative Alexandria Ocasio-Cortez of New York (NY-14),

Representative Katie Porter of California (CA-47),

Senator Edward J. Markey of Massachusetts,

Senator Jeff Merkley of Oregon,

Senator Bernie Sanders of Vermont,

Senator Peter Welch of Vermont, and

Senator Ron Wyden of Oregon.

SUMMARY OF THE ARGUMENT

Section I. The Willow Project would lock in thirty years of extraction on federally-owned and managed lands—those meant to benefit all Americans.

Section II. Congressional and administrative efforts to combat the climate crisis represent the shifting needs of the nation. Due to national security and environmental considerations, modern-day United States policy embodies a pressing need to reduce national reliance on non-renewable energy sources—policy that is undermined by the Willow Project. Given this reality, today, the Project is not "consistent with the total energy needs of the Nation," as intended by Congress. H.R. Rep. No. 94-81, pt. 1, at 1 (1975) (emphasis added).

Section III. The Willow Project is inconsistent with congressional intent underlying the nation's environmental and land use statutes. The district court erred in giving disproportionate weight to a specific provision of the Naval Petroleum Reserves Production Act, while the federal agencies violated their duties under the National Environmental Policy Act and Endangered Species Act by failing to appropriately consider the greenhouse gas emissions associated with the Project.

* * *

The Project violates the nation's laws, and Congress's intent behind them.

ARGUMENT

I. The Willow Project would take place on public lands that belong to all Americans.

Amici possess a special interest in this case because the Willow Master Development Plan ("Willow Project" or "Project")—would lock in thirty years of extraction on federal lands—lands meant to benefit all Americans. The National Petroleum Reserve-Alaska ("Reserve"), where the Project would exist, is a vast, over 23-million acre, federally-owned parcel situated on Alaska's North Slope.[2] It "is the Nation's largest single unit of public land." 1-ER-5.

[2] *National Petroleum Reserve in Alaska*, Bureau of Land Mgmt., https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/about/alaska/NPR-A (last visited Jan. 4, 2024).

The North Slope of Alaska and its abutting sea line, where the Project would exist, contains some of the nation's most pristine tundra. It serves as home to terrestrial mammals such as muskoxen and caribou, marine mammals such as beluga whales and polar bears, and millions of migratory birds such as the yellow-billed loon.[3] The Project would invade these species' homes and migratory paths with hundreds of wells, an airstrip, a processing facility, and hundreds of miles of roads and pipeline. *See, e.g.*, 5-ER-887, 895–903, 6-ER-1161. Within the Reserve, "over 40 Indigenous communities continue to rely on subsistence activities in the reserve, harvesting caribou, shore and waterbirds, and many other fish and wildlife species, with many communities subsisting primarily from food harvested from the [area]."[4]

Where federal lands are implicated, special legal protections apply. This is by congressional design, because, in the words of U.S. Interior Secretary Deb Haaland, "public lands belong to every single American, not just one industry."[5] The scope of

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[3] *See generally Willow Master Development Plan Supplemental Environmental Impact Statement*, at App'x E.11–13, Bureau of Land Mgmt. (2023), *available at* https://eplanning.blm.gov/public_projects/109410/200258032/20073067/250079249/Willow%20FSEIS_Vol%2013_App%20E.9%20to%20E.13.pdf.

[4] *Biden-Harris Administration Takes Major Steps to Protect Arctic Lands and Wildlife in Alaska*, U.S. Dep't of the Interior (Sept. 6, 2023), https://www.doi.gov/pressreleases/biden-harris-administration-takes-major-steps-protect-arctic-lands-and-wildlife-alaska (last visited Jan. 4, 2024).

[5] *What is the controversy behind the Alaska Willow oil project?*, PBS (Mar. 13, 2023), https://www.pbs.org/newshour/nation/what-is-the-controversy-behind-the-alaska-willow-oil-project (quoting Secretary Haaland from interview).

the Project would not only impact local land, species, and Alaskans and Indigenous communities, but all Americans who own the land.

When weighing the public interest surrounding this Project, *Amici* implore the Court to view the relevant interests on a national scale given the federal nature of the lands and the global effects implicated.

II. The Willow Project is inconsistent with United States policy and modern-day congressional intent to reduce national reliance on non-renewable energy sources.

In line with reality, current U.S. policy requires the reduction of greenhouse gas emissions. Overwhelming evidence demonstrates that climate change is occurring at "an increasingly rapid pace" and that fossil fuel combustion "will wreak havoc on the Earth's climate if unchecked." *Juliana v. U.S.*, 947 F.3d 1159, 1166 (9th Cir. 2020). To avoid climate change's most catastrophic impacts, the United States must immediately transition away from fossil fuels. Researchers have warned that "[t]here is no practical emission space . . . to develop *any* new production facilities of any kind" in any nation if attempting to meet the IPCC's warming limit of 1.5°C[6]—a sentiment echoed by the International Energy Administration.[7]

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[6] Dan Calverley & Kevin Anderson, *Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets* (2022), *available at* https://pure.manchester.ac.uk/ws/portalfiles/portal/213256008/Tyndall_Production_Phaseout_Report_final_text_3_.pdf (emphasis added).

[7] *Net Zero by 2050*, Int'l Energy Admin. (2021), https://www.iea.org/reports/net-zero-by-2050 ("there are no new oil and gas

The Willow Project, however, is estimated to produce 576 million barrels of oil, resulting in an estimated 239 million metric tons of greenhouse gas emissions from the transportation, processing, and downstream combustion of the oil over thirty years. *See, e.g.*, 6-ER-1170, 1241. This would be the carbon equivalent of the annual emissions of over 60 coal-fired power plants.[8] While these figures are enormous standing alone, they do not include the downstream emissions from reasonably foreseeable future oil and gas development that the Project is likely to put in motion.

The United States is already experiencing the effects of a changing climate. A national report, the Fifth National Climate Assessment, details that weather extremes have been exacerbated due to climate change across every region of the United States. Warming temperatures, longer lasting heatwaves, and "other extremes, including heavy precipitation, drought, flooding, wildfire, and hurricanes, are becoming more frequent and/or severe, with a cascade of effects in every part of the country."[9] The area where the Project is slated—the Arctic Circle—is warming

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fields approved for development in our pathway, and no new coal mines or mine extensions are required").

[8] *See, e.g.*, *Greenhouse Gas Equivalencies Calculator*, U.S. Env't Prot. Agency, https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator (last visited Dec. 29, 2023).

[9] *Fifth National Climate Assessment*, *Overview*, U.S. Global Change Rsch. Program (2023), https://nca2023.globalchange.gov/.

four times faster than the global average. *See, e.g.*, 4-ER-845. Some of the world's fastest sea ice loss is occurring along the Alaskan coast.[10]

The economic, let alone humanitarian, cost to society and American taxpayers is enormous—seen in lost property value and infrastructure damage. According to the Fifth National Climate Assessment:

> In the 1980s, the country experienced, on average, one (inflation-adjusted) billion-dollar disaster every four months. Now, there is one every three weeks, on average. **Between 2018 and 2022, the US experienced 89 billion-dollar events. Extreme events cost the US close to $150 billion each year**—a conservative estimate that does not account for loss of life, healthcare-related costs, or damages to ecosystem services.[11]

The Bureau of Land Management's own estimate suggests that the Willow Project will cause up to $18 billion in net climate damages. 5-ER-956.

In no uncertain terms, the national public interest lies in mitigating, abating, and reducing the harms of climate change—not exacerbating it. The window in which to act responsibly is closing.

Congress is aware of this responsibility.

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[10] *Fourth National Climate Assessment*, *Chapter 11: Arctic Changes and their Effects on Alaska and the Rest of the United States*, U.S. Global Change Rsch. Program (2017), https://science2017.globalchange.gov/chapter/11/ (collecting sources).

[11] *Fifth National Climate Assessment*, *Overview*, U.S. Global Change Rsch. Program (citations omitted).

A. Recent efforts—including the Inflation Reduction Act—evidence a broad congressional and administrative intent to transition the United States away from fossil fuel development.

The current tone of the United States government is overwhelmingly one of leadership regarding climate action. In one of the first actions of his presidency, President Joseph R. Biden Jr. asserted that fighting climate change is "more necessary and urgent than ever" and committed to deploying the "full capacity" of the government to combat the climate crisis. Exec. Order No. 14008, 86 Fed. Reg. 7619, 7619, 7622 (Feb. 1, 2021).

The Administration set a target for the United States to achieve a 50 to 52 percent reduction in net greenhouse gas pollution below 2005 levels by 2030, 5-ER-943, and emphasized the need to move away from fossil fuels and toward renewable and sustainable energy, 86 Fed. Reg. 7619 at 7620–21, 7624. The Administration has further committed to advance and prioritize environmental justice. *See* Exec. Order No. 13990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021). Late last year, during the release of the Fifth National Climate Assessment, the Biden Administration announced over $6 billion in climate resiliency investments for communities.[12]

[12] *Fact Sheet: Biden-Harris Administration Releases Fifth National Climate Assessment and Announces More Than $6 Billion to Strengthen Climate Resilience Across the Country*, The White House (Nov. 14, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/14/fact-sheet-biden-harris-administration-

Congress has also acted decisively, developing a Climate Crisis Action Plan to aggressively pursue net-zero by or before 2050 and net-negative greenhouse gas emissions in the years after 2050.[13] To help accomplish these critical goals, Congress passed the Inflation Reduction Act of 2022 ("IRA"), Pub. L. No. 117-169, 136 Stat. 1818 (2022), the most significant piece of climate change legislation in U.S. history. The IRA invests nearly $370 billion in energy security, clean energy, and climate programs.[14]

B. National security lies at the forefront of the United States' concerns regarding greenhouse gas emissions.

These federal efforts are motivated not only by humanitarian and environmental considerations, but also national security concerns. As stated by Secretary of Defense Lloyd J. Austin III, "[t]oday, no nation can find lasting security

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releases-fifth-national-climate-assessment-and-announces-more-than-6-billion-to-strengthen-climate-resilience-across-the-country/.

[13] *Solving the Climate Crisis: The Congressional Action Plan for a Clean Energy Economy and a Healthy, Resilient, and Just America* 3, House Select Comm. on the Climate Crisis—Majority Staff Rep. (2020), *available at* https://bonamici.house.gov/sites/evo-subsites/bonamici-evo.house.gov/files/documents/Climate_Crisis_Action_Plan.pdf (last visited Jan. 4, 2024).

[14] *See Summary: The Inflation Reduction Act of 2022*, U.S. Senate Democrats, https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf (last visited Jan. 4, 2024).

without addressing the climate crisis. We face all kinds of threats in our line of work, but few of them truly deserve to be called existential. The climate crisis does."[15]

On January 27, 2021, President Biden ordered the Secretary of Defense to develop "an analysis of the security implications of climate change," and the Secretary of Homeland Security to "consider the implications of climate change in the Arctic," and "along our Nation's borders." 86 Fed. Reg. 7619 at 7621.

In contrast to the Alaska congressional proponents of the Project, *see, e.g.*, ECF No. 25.1, undersigned *Amici* believe that the Project weakens national security rather than strengthens it. The references to "energy security" made by the Alaska delegation, *see, e.g.*, *id.* at 9–12, harken to decades past, and do not comprehensively capture modern national security concerns or the energy goals of the federal government.

Undersigned *Amici* believe the best way to enhance national security is to adopt a view of "energy security" as it exists today, not as it existed decades ago. Security implications from greenhouse gas emissions are not remote—and affect the nation and Alaska alike. As stated in the National Defense Authorization Act for Fiscal Year 2018, "[i]t is the sense of Congress that . . . climate change is a direct threat to the

[15] David Vergun, *Defense Secretary Calls Climate Change an Existential Threat*, U.S. Dep't of Def. (Apr. 22, 2021), https://www.defense.gov/news/news-stories/article/article/2582051/defense-secretary-calls-climate-change-an-existential-threat/.

national security of the United States and is impacting stability in areas of the world . . . where" the United States military operates. Pub. L. No. 115-91, 131 Stat. 1283, 1358 (2017). Extreme weather events linked to climate change have already affected Department of Defense infrastructure, including air force bases and military installations.[16] "In the Marshall Islands, an Air Force radar installation built on an atoll at a cost of $1,000,000,000 is projected to be underwater within two decades." Pub. L. No. 115-91, 131 Stat. at 1358.

"In the Arctic," specifically, "climate change is dramatically altering the natural environment and creating a new frontier of geostrategic competition."[17] Related to these geostrategic concerns, "under current projections, the perceived opening of the Arctic could result in the DoD being called upon to operate at a volume and tempo beyond the current capacity."[18] Numerous Department of

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[16] David Vergun, *Defense Secretary Calls Climate Change an Existential Threat*, U.S. Dep't of Def.

[17] *Department of Defense Climate Risk Analysis* 5, Off. of the Under Sec'y for Pol'y (Strategy, Plans, & Capabilities), U.S. Dep't of Def. (2021), https://media.defense.gov/2021/oct/21/2002877353/-1/-1/0/dod-climate-risk-analysis-final.pdf.

[18] *Report to Congress on Military Structures in Permafrost Areas* 2, Off. of the Under Sec'y of Def. (Acquisition and Sustainment), U.S. Dep't of Def. (2019), https://www.acq.osd.mil/eie/downloads/fim/2019%20report%20to%20congress%20on%20military%20structures%20in%20permafrost%20areas.pdf.

Defense assets in Alaska are predicted to be affected:[19] "The combination of melting sea ice, thawing permafrost, and sea-level rise is eroding shorelines, . . . is damaging radar and communication installations, runways, seawalls, and training areas." Pub. L. No. 115-91, 131 Stat. at 1358.

III. The Willow Project is inconsistent with congressional statutory intent.

The Project is not only inconsistent with the congressional and administrative policy goals outlined above, it is inconsistent with the congressional intent underpinning our nation's environmental and land use laws. These laws emphasize caution, protection, and flexibility in light of the nation's current priorities rather than maximization of the Project's oil recovery.

A. The district court erred in giving disproportionate weight to certain portions of the NPRPA's text.

In its opinion, the district court disproportionately focused on one portion of congressional intent behind the Naval Petroleum Reserves Production Act of 1976 ("NPRPA"), 42 U.S.C. § 6501 *et seq.*, to the exclusion of others. Specifically, the district court gave repeated and undue emphasis to the "expeditious" clause of the NPRPA, i.e., the statutory language directing the Secretary of the Interior to

[19] *Fifth National Climate Assessment*, *Chapter 29: Alaska*, U.S. Global Change Rsch. Program.

"conduct an expeditious program of competitive leasing of oil and gas in the Reserve." 1-ER-8 (quoting the NPRPA).

This focus undermined the court's analysis in two fundamental ways: (1) the court minimized other aspects of congressional intent within the very same statute, namely the environmental provisions of the statute; and (2) the court diminished and made ancillary the congressional intent that underpins NEPA—a statute that must be applied with robust standalone analysis, regardless of Congress's intentions with respect to the Reserve.

1. Congress intended for any development to be meted against environmental protections and the "energy needs of the Nation."

First, although the court accepted that the NPRPA requires the Secretary to "mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the" Reserve and to "assure the maximum protection" of designated special areas, *see id.* at 1-ER-8, it downplayed these provisions in subservience to the "expeditious" clause. Legislative history confirms that this subservience, especially in light of the nation's current needs, does not align with the congressional intent of taking a "sensible and logical approach" to the management of the Reserve. *See* H.R. Rep. No. 94-81, pt. 1, at 9.

Congress historically afforded special consideration to the Naval Petroleum Reserve-Alaska—highlighting it as a resource not only due to its oil potential, but for

its abundant natural diversity. *See generally* Plaintiffs-Appellants' Br. at 7–10, ECF No. 46.1. The environmental protection provisions in the NPRPA are important, intentional inclusions of Congress. And legislative history underscores the extent to which Congress intended the Secretary to minimize damage to the land: the "1976 Conference Committee's statement" included "that 'it . . . *expected* . . . the Secretary will take *every precaution* to avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve' and not solely in Special Areas." 88 Fed. Reg. 62,025, 62,027 (Sept. 8, 2023) (quoting H.R. Rep. No. 94–942 (1976) (emphasis added)). Congress's transfer of jurisdiction over the Reserve to the Secretary of the Interior meant that the Secretary had to "assume all responsibilities" for "any activities related to the protection of environmental, fish and wildlife, and historical or scenic values" and "promulgate such rules and regulations as [they] deem[] necessary and appropriate for the protection of such values within the reserve." 42 U.S.C. § 6503(b). When authorizing the Secretary to lease oil and gas in the Reserve, Congress not only included a mitigation requirement for foreseeable significantly adverse effects on surface resources, but also included language that the Secretary can provide for "conditions, restrictions, and *prohibitions*" as necessary to provide for such protection. 42 U.S.C. § 6506a(b) (emphasis added).

The court, however, repeatedly downplayed these environmental considerations with respect to the "expeditious" clause. The according analysis was

pre-determinative, viewing the Project's significant harms as an almost mandatory inevitability despite Congress granting the Secretary the ability to implement "restrictions" and "prohibitions." In one example of the court doing so, it acknowledged the "maximum protection" requirement according to Congress's intent, only to then conclude that a designated special area, to be afforded a *maximum* amount of protection, would inevitably *have* to be developed for oil and gas:

> Although Congress directed "maximum protection" be accorded to significant surface values in the TLSA and other Special Areas while undertaking oil and gas activities in the NPR-A, it still clearly envisioned that the TLSA would be developed for oil and gas production. So it is with this Congressional objective of NPR-A oil and gas development in mind—even in Special Areas, though with greater protections in those areas—that BLM's alternatives analysis is evaluated.

1-ER-10 (citations omitted).

This is not what Congress intended.

Situating the "expeditious" requirement in history and the energy crisis of the 1970s sheds important light on the congressional intent behind the NPRPA—and confirms that Congress was motivated by the pressing energy needs and administrative goals of a moment in time, while also predicting and envisioning the shifting needs of a nation. Indeed, the legislative preamble to the NPRPA contemplated that there would be shifting needs over time, with a congressional committee emphasizing that the development of any reserves "need[ed] to be

regulated in a manner *consistent with the total energy needs of the Nation*," and that "it believe[d] also that the Department of the Interior should be guided by new law concerning public land policy." H.R. Rep. No. 94-81, pt. 1 at 1, 9 (emphasis added). Today, the country faces a drastically different set of energy needs and goals. Congress built flexibility into the statute to accommodate this reality.

Naval Petroleum Reserves were originally created in the early twentieth century to ensure that during wartime, "the Navy's ships would have adequate . . . supplies." *Id.* at 6. The need for the Navy to control these Reserves was eventually made obsolete due to the Defense Production Act of 1950, which gave the President the authority to "immediately" reserve and hold "[t]he nation's entire supply of fuel . . . for military use if necessary." *Id.*

Then, approximately fifty years ago, the nation's needs shifted once again. As a result of the Organization of the Petroleum Exporting Countries oil embargo, the United States sought to expand its domestic oil production to combat fuel shortages and reduce the nation's growing reliance on foreign oil imports.[20] In 1976, Congress enacted the NPRPA, transferring management of the Reserve from the Navy to the

[20] Gerald R. Ford, *Statement on Signing the Naval Petroleum Reserves Production Act of 1976* (Apr. 5, 1976), *available at* https://www.presidency.ucsb.edu/documents/statement-signing-the-naval-petroleum-reserves-production-act-1976 (emphasizing the importance of "energy independence" and noting the need to take "immediate action to produce more oil here in the United States").

Secretary of the Interior. *See* Pub. L. No. 94-258, 90 Stat. 303, 303 (1976) (codified at 42 U.S.C. § 6503(a)). In 1980, Congress amended the NPRPA to include the "expeditious" clause, directing the Secretary of the Interior to conduct "an expeditious program of competitive leasing of oil and gas in the [Petroleum Reserve]." Pub. L. No. 96-514, 94 Stat. 2957, 2964 (1980) (codified at 42 U.S.C. § 6506a(a)). Congress's intent at the time of using the "expeditious" language was, as this Court has acknowledged, "driven by the fuel crisis of the previous decade." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006); *see also* H.R. Rep. No. 94-81, pt. 1, at 4 (noting that there was an "urgent national need for immediate action to produce more domestic oil and natural gas"). At the time, the President had a "goal of reducing U.S. dependence on foreign crude imports by 800,000 barrels per day within one year." *Id.* at 6.

Even during the height of the fuel crisis, Congress desired that adverse effects of development be mitigated. As the Bureau of Land Management has acknowledged, "Congress sought to strike a balance between exploration and 'the protection of environmental, fish and wildlife, and historical or scenic values' in the NPR-A." 88 Fed. Reg. 62,025, 62,026 (citation omitted). The congressional committee noted at the time of transfer to the Secretary of the Interior that there were important "matters" with respect to the Alaska Reserve for Congress to consider, as the "lands may have substantial values, including recreation" and "there

are wildlife and many other values on this large tract of public land that will have to be considered" during exploration:

> 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.

H.R. Rep. No. 94-81, pt. 1, at 8.

This context matters. As time moves forward, so do a nation's priorities and exigencies. Half a century later, America's "energy needs" and Presidential goals have changed. Addressing climate change and transitioning America's economy to clean energy is among Congress's and this Administration's highest priorities. Today, the nation is faced with a climate crisis rather than an oil crisis. Myopically focusing on the "expeditious" clause paints a simpler picture of Congress's NPRPA intent than is reality. Congress always intended for agencies and decisionmakers to consider a multitude of factors, including environmental considerations, and the nation's needs at a moment in time.

2. The court infused its NEPA analysis with the "expeditious" clause.

Second, by repeatedly infusing the "expeditious" language and policy objectives of the NPRPA into its National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* analysis, the court diminished and made ancillary the separate and

important congressional intent that underpins NEPA, rather than allowing for a standalone environmental analysis as warranted. NEPA demands a robust analysis, demanding consideration of a wider range of alternatives as is also consistent with Congress's intentions with respect to the Reserve under the NPRPA.

Fatally deterministic in deference to the perceived "expeditious" objectives of the NPRPA, the inevitability with which the district court viewed the Project undercuts the reality that the Project is nonetheless subject to our nation's strict environmental protection requirements. On multiple occasions, the court gave deference to the Bureau of Land Management's decision by situating it within the language of the NPRPA's "expeditious" terminology, rather than by engaging in a range of alternatives analysis demanded by NEPA's requirements, and the environmental provisions of the NPRPA. *See, e.g.*, 1-ER-10 (noting that the Project alternatives analyzed were consistent with "the purpose and need statement that recognizes *the rights and responsibilities of the lessee*" rather than whether the lessee met certain requirements (emphasis added)); *id.* ("An alternative that would leave considerable quantities of economically recoverable oil in the ground is quite simply inconsistent with the Congressional policy objective of resource extraction in the NPR-A."); *id.* at 1-ER-11 (finding that the Bureau's consideration only of certain alternatives was "consistent with the NPRPA's directives" rather than focusing on NEPA's requirements or the NPRPA holistically).

It bears stating plainly: any congressional intent relevant to the "expeditious" clause in NPRPA does not supersede the congressional intent of the nation's bedrock environmental statutes and considerations. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1083 (9th Cir. 2014) (observing that where "two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective," and proceeding to analyze NEPA alongside other statutes (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974))); *see also Floyd v. Am. Honda Motor Co.*, 966 F.3d 1027, 1034 (9th Cir. 2020) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." (quoting *Epic Sys. Corp. v. Lewis*, 584 U.S. —, 138 S. Ct. 1612, 1624 (2018) (cleaned up))).[21]

That is to say, any congressional intent in the NPRPA regarding oil production is not afforded greater weight than the environmental protection intentions of NEPA and the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* A NEPA and ESA assessment must be done in full, not in deference to or with reduced

[21] Similarly, Congress enacted the Alaska National Interest Lands Conservation Act ("ANILCA") for the purposes of conservation and subsistence protection. *See* 16 U.S.C. §§ 3101(a)–(c), 3111–12, 3120(a). ANILCA Section 810 substantively mandates consideration of alternatives that reduce adverse effects on subsistence. *See generally* SILA Plaintiffs-Appellants' Br. at 33–43, ECF No. 40.1.

weight given the text of other statutes. If their requirements are not met, the Project cannot go forward as planned and must be reevaluated.

* * *

As elaborated upon above, the district court committed error in affording the "expeditious" provision disproportionate weight, and by infusing its NEPA analysis with a deference to that provision of the NPRPA to the exclusion of other relevant NPRPA provisions and environmental statutes. As elaborated upon below, the Bureau of Land Management ignored NEPA's bedrock principle of informed decision-making by failing to properly consider vast greenhouse gas emissions linked to its decision. The U.S. Fish and Wildlife and the National Marine Fisheries Service (together, "the Services") employed an outdated policy to downplay the impacts of immense greenhouse gas emissions on species in peril precisely due to the effects of climate change.

B. NEPA requires an analysis of downstream greenhouse gas emissions catalyzed by the Willow Project.

Approximately fifty years ago, Congress and the American public began to recognize that outsized focus on economic growth had spurred myopic planning that contributed to a significant decline in our nation's environment and species. At that time, in passing NEPA, the "basic national charter for protection of the environment," 40 C.F.R. § 1500.1 (1978)—the unanimous view of one congressional committee noted that "[t]oday [(1969)] it is clear that we cannot continue on this

course. Our natural resources—our air, water, and land—are not unlimited. We no longer have the margins for error that we once enjoyed." S. Rep. No. 91-296, at 5 (1969). If the margins for error were slim in 1969, they are vanishingly so now in the face of the climate crisis.

Congress passed NEPA in a moment of environmental crisis. By the late 1960s, poor and non-existent planning had led to devastating environmental consequences, as one congressional committee understood: "[o]ne of the major factors contributing to environmental abuse and deterioration is that actions—often actions having irreversible consequences—are undertaken without adequate consideration of, or knowledge about, their impact on the environment." *Id.* at 9. In the face of this environmental degradation, Congress adopted NEPA to "restor[e] and maintain[] environmental quality" for present and future generations. 42 U.S.C. § 4331(a). Congress enshrined in NEPA the fundamental idea that agencies must fully consider the environmental and social impacts of their proposed projects prior to making final decisions. *See id.* § 4332.

In the face of the climate crisis, a full analysis of climate change impacts must be an integral part of NEPA's environmental review. Congress designed NEPA to handle crises such as climate change. The Council on Environmental Quality

("CEQ")[22] has recognized this, asserting in interim guidance that "[c]limate change is a fundamental environmental issue, and its effects . . . fall squarely within NEPA's purview." 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023).

The Bureau of Land Management's reliance on a distorted interpretation of NEPA in its FSEIS blinded the agency to the significant downstream greenhouse gas emissions from future oil and gas development likely to occur as a result of the Willow Project. The agency acknowledged that the Project is likely to lead to future development in the Reserve. *See* 5-ER-985–988. Yet it did not analyze the downstream greenhouse gas emissions from these future projects as part of its consideration of the Project's indirect effects. *See* Plaintiffs-Appellants' Br. at 27–33.

In reality, the Willow Project is only the starting point for development plans in the area. *See* 5-ER-485 (acknowledging that infrastructure needed for the Project "may result in additional development opportunities to the south and west of the Project area if [ConocoPhillips] or other North Slope operators use Project infrastructure as a jumping-off point for new development [p]rojects"). ConocoPhillips has described Willow as the "next great Alaska hub" and stated that

[22] CEQ is charged with promulgating regulations to implement NEPA. CEQ's regulations, at 40 C.F.R. §§ 1500–08, are binding on all federal agencies, *id.* § 1500.3(a). The Bureau of Land Management initially followed CEQ's 2016 GHG Guidance when developing the draft SEIS but followed the 2023 Interim CEQ Guidance after that Guidance was completed in January 2023. 5-ER-950–51.

the project's infrastructure could help it leverage up to 3 billion barrels of oil from areas near Willow—more than five times the amount of oil the Project itself will produce. *See* 4-ER-858, 862.

This reality makes the congressional intent underlying NEPA that much more vital to uphold. Downstream emissions constitute reasonably foreseeable indirect effects under NEPA. *See* 40 C.F.R. § 1508.1(g)(2) (explaining that "indirect effects" are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable").

Courts have rightfully found that agencies must consider downstream greenhouse gas emissions under NEPA. *See, e.g.*, *San Juan Citizens All. v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242–43 (D.N.M. 2018) (collecting cases). This is not a new requirement; it is well-settled that an agency must evaluate a project's growth-inducing effects in order to effect congressional intent. *See* 40 C.F.R. § 1508.1(g)(2) (explaining that indirect effects "may include growth inducing 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"); *see also City of Davis v. Coleman*, 521 F.2d 661, 674–75 (9th Cir. 1975) (describing consideration of growth-inducing indirect effects in NEPA analysis as "indispensable" and noting that failure to consider growth-inducing effects was "precisely the kind of situation Congress had in mind when it enacted NEPA").

The Bureau of Land Management's NEPA analysis also ignored the fact that the Project's environmental impacts are inconsistent with the types of shifting national policies on climate change illustrated herein. The 2023 interim CEQ guidance affirms that NEPA reviews should account for national policies on climate change and greenhouse gas reduction goals. 88 Fed. Reg. 1196, 1197, 1201, 1203.

Ultimately, the Bureau's failure to consider the emissions generated by reasonably foreseeable future oil and gas development is antithetical to NEPA's purposes to "prevent or eliminate damage to the environment and biosphere," 42 U.S.C. § 4321, and "restor[e] and maintain[] environmental quality," *id.* § 4331(a). Agencies cannot meet Congress's goal of protecting the environment if they fail to take a hard look at actions that worsen the climate.

C. The ESA requires consideration of impacts to ESA-listed species from greenhouse gas emissions.

Congress designed ESA Section 7 to "institutionaliz[e] . . . caution" among federal agencies and place the protection and recovery of listed species above competing federal goals. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Section 7 requires federal agencies to consult with the Services to ensure, based on the "best scientific and commercial data available," that their proposed actions are not likely to jeopardize listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(a)(2). Section 7 consultation is mandatory whenever a proposed agency action "may affect" listed species or critical habitat. 50 C.F.R. § 402.14(a).

Despite the Willow Project's significant implications for climate change, the agencies refused to consider the climate impacts of the Project's carbon emissions on listed species, including species listed because climate change threatens their sea ice habitat. *See, e.g.*, 7-ER-1423–64 (discussing impacts on spectacled eiders and polar bears); 7-ER-1527–28 (explaining that the Arctic ringed seal was listed on the ESA "primarily due to expected impacts on the population within the foreseeable future due to climate-driven declines in sea ice and snow cover"). The Bureau of Land Management gave itself permission to acknowledge—but ultimately ignore—the effects stemming from emissions connected with the Project. *See* 6-ER-1276–79 (Bureau of Land Management memorandum concluding that the scope of ESA Section 7 consultation should not include the Project's greenhouse gas emissions). The Services agreed with this analysis. *See* 6-ER-1273 (agreeing with the Bureau of Land Management's ESA Section 7 scope memorandum); 7-ER-1547–49 (same).

These decisions contravene the ESA's precautionary approach to managing threatened and endangered species that Congress specifically emphasized in constructing the mandatory duties applicable to federal agencies under Section 7. The idea that agencies can overlook the impacts of immense carbon emissions on climate-vulnerable endangered species stems from an outdated former Administration memorandum. *See* 6-ER-1303–09. This memorandum crafted, in principle, a "precision exception" to Section 7 requirements that require federal

agencies to consider the impacts of their actions that "may affect" listed species. *Id.* Reasoning that science (in 2008) could not link the effects of given greenhouse gas emissions to specific impacts in precise locations, the memorandum concluded that the effects of greenhouse gas emissions linked to a proposed federal action need not be the subject of ESA Section 7 consultation. *See* 6-ER-1309; *see also* 6-ER-1307.

The facts of this case starkly illustrate the consequences of this climate change carve-out to Section 7. BLM does not deny that carbon emissions linked to the Willow Project are likely to exacerbate the impacts of climate change on the ecosystem affected by the Project, acknowledging that these emissions may produce "a marginal season decrease in sea ice extent somewhere in the Arctic." 6-ER-1277. Nonetheless, citing a "lack of a linear relationship between sea ice loss and impacts to polar bears and associated listed species and/or their habitat," 6-ER-1278, the Bureau of Land Management determined that carbon emissions linked to the Project do not meet the Section 7 regulations' definitions of effects that must be considered in Section 7 consultation. To meet this threshold, according to the Bureau of Land Management, "more specificity would be necessary" regarding the details of links between sea ice loss and impacts on polar bears, and the agency would need "similar additional, granular information" on effects on ice-dependent seals. 6-ER-1278.

The Bureau of Land Management's and the Services' actions are inconsistent with both the ESA's clear requirements and Congress's intent in creating a hedge

against extinction. First, ignoring emissions-related climate effects on listed species misinterprets the threshold for ESA Section 7 consultation. Neither the ESA nor cases interpreting the statute allow for federal agencies to ignore effects on listed species simply because the agencies believe they cannot describe such effects with sufficient precision. The "*may affect*" test is a "relatively low threshold," and "'*[a]ny possible effect*, whether beneficial, benign, adverse or of an undetermined character' triggers the requirement." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (en banc) (emphasis in original) (quoting *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018–19 (9th Cir. 2009) (citation omitted)). Even where a project's effects may have only a small or uncertain impact on listed species, that can be sufficient to trigger ESA consultation. *See Am. Fuel & Petrochemical Mfrs. v. Env't Prot. Agency*, 937 F.3d 559, 598 (D.C. Cir. 2019) ("EPA concluded that it is impossible to know whether the 2018 Rule will affect listed species or critical habitat. That is not the same as determining that the 2018 Rule 'will not' affect them."); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1273–74 (E.D. Cal. 2010) (finding NMFS's jeopardy analysis inadequate, noting "the court cannot conclude that global warming's potential impacts are so slight that NMFS could ignore them without discussion").

Further, Congress structured the ESA to deal with uncertainty, and the agencies charged with implementing the statute have numerous ways to deal with

incomplete information in working to conserve listed species. Anticipating that factors unknown in 1973 could imperil biodiversity, Congress included a catch-all criterion among the factors the Services must consider in making ESA listing decisions. *See* 16 U.S.C. § 1533(a)(1)(E) (including as ESA-listing criterion, "other natural or manmade factors affecting [the species] continued existence"). Lawmakers also allowed the Services to act without definitive scientific information, directing them to use the best science available to make important decisions under the law. *See* 16 U.S.C. § 1536(a)(2) (requiring agencies to use "the best scientific and commercial data available" in ESA consultations).

Ultimately, the Bureau of Land Management's and the Services' efforts in this case to exclude greenhouse gas emissions from their ESA consultations are a departure from what Congress envisioned: a flexible tool capable of adapting itself to new emergencies in order to place the protection and recovery of listed species within reach.

CONCLUSION

For these reasons, the district court's judgment should be reversed.

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Respectfully submitted,

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I hereby certify that on January 5, 2024, I caused to be electronically filed the foregoing Brief of *Amici Curiae* Members of Congress with the Clerk of Court using the CM/ECF system which will send notification and electronic service of the same to all counsel of record.

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