ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, CONNECTICUT DELAWARE, ILLINOIS, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, VERMONT, AND WASHINGTON AND THE COMMONWEALTH OF MASSACHUSETTS

January 21, 2020

Stephanie Rice
Attention: NPR-A IAP/EIS
Bureau of Land Management
222 West 7th Ave., Stop #13
Anchorage, AK 99513-7504
srice@blm.gov

Via Email, Online Portal, and Overnight Mail

RE: Comments on National Petroleum Reserve in Alaska Integrated Activity Plan Draft Environmental Impact Statement, 84 Fed. Reg. 64,919 (Nov. 25, 2019)

Dear Ms. Rice:

The undersigned Attorneys General of the States of California, Connecticut, Delaware, Illinois, Maryland, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington and the Commonwealth of Massachusetts (hereinafter, "the States") respectfully submit these comments on the U.S. Bureau of Land Management's ("BLM") November 21, 2019 Draft Integrated Activity Plan ("Draft Plan") and Environmental Impact Statement ("2019 Draft EIS" or "Draft EIS") regarding the National Petroleum Reserve ("Reserve"), 84 Fed. Reg. 64,919 (Nov. 25, 2019). If adopted, the Draft Plan could open an additional 6.6 million acres of Reserve land to new oil and gas leasing, including crucial wildlife habitat that BLM designated off-limits to leasing less than seven years ago. This potential new leasing plan threatens to decimate populations of birds that breed in the Reserve and migrate through or spend the winter in the undersigned States. Expanded leasing would also, according to BLM's own estimate, increase downstream greenhouse gas emissions from drilling activities in the Reserve by up to seventy-five percent, thus exacerbating climate impacts in the undersigned States and undermining our efforts to address these impacts by reducing our own emissions. As discussed further below, the Draft Plan and Draft EIS fail to meet governing legal requirements under the Administrative Procedure Act ("APA"), National Environmental Policy Act ("NEPA"), and the Naval Petroleum Reserves Production Act ("Reserve Act"). BLM must correct these legal defects or withdraw the Draft Plan.

INTRODUCTION

BLM's proposal to expand leasing in the Reserve is the latest front in the federal government's efforts to promote fossil fuel development in the American Arctic despite longstanding environmental protections and the growing climate impacts of such dirty fuels. Last September, BLM issued a Final EIS for a proposed oil and gas leasing program in the Arctic National Wildlife Refuge's Coastal Plain, ending a forty-year ban on leasing in that fragile ecosystem. 84 Fed. Reg. 50,472 (Sept. 25, 2019) ("Arctic Refuge EIS"). BLM's Arctic Refuge lease plan threatens to irreparably damage vitally important habitat for migratory birds, caribou,

polar bears, and other wildlife and corrupt the nation's largest national wildlife refuge in order to elevate oil and gas interests. With the Draft Plan for the Reserve, BLM likewise seeks to open key wildlife habitat to new development, including the Teshekpuk Lake wetlands complex, which supports breeding shorebirds in numbers greater than any other location in the global Arctic. The land BLM seeks to lease in the Reserve also supports vulnerable caribou herds, which provide an irreplaceable food resource for Alaska Native subsistence hunters in the region.

Recognizing these values, BLM in 2013 promulgated an Integrated Activity Plan that prohibited oil and gas leasing in much of the Reserve's most important wildlife habitat. In the 2013 Plan, BLM determined that these protections were required to meet a Reserve Act requirement to "assure the maximum protection of" the Reserve's important ecological values "to the extent consistent with … exploration of the reserve," 42 U.S.C. § 6504(a). At the same time, the 2013 Plan allowed leasing in one half of the Reserve's 23 million acres.

BLM now seeks to undo the careful evaluation it completed in 2013. The Draft Plan, if adopted, would open millions of acres of additional land to leasing, including potentially the entire Teshekpuk Lake wetlands complex and huge areas of caribou habitat in the Reserve's southwestern quadrant. This dramatic shift is a blatant attempt to promote the parochial interests of the oil and gas industry at the expense of Alaska Native subsistence hunters and some of our nation's most important ecological treasures. The proposed expansion, which, according to BLM's estimate, could result in total downstream emissions exceeding the equivalent of one billion metric tons of carbon dioxide, will exacerbate climate impacts and threaten to upend the undersigned States' efforts to curb these impacts by reducing our own emissions.

The Draft Plan's proposed leasing expansion is so misguided that the Trump Administration's own U.S. Fish and Wildlife Service ("FWS" or "the Service") has urged BLM to reverse course. In a letter regarding BLM's proposal, the Service wrote that it "continues to support the 2013 Record of Decision as regards to continued protection of sensitive areas," including Teshekpuk Lake. Letter from Sarah C. Conn, FWS, to Stephanie Rice, BLM, at 1 (Feb. 15, 2019) ("FWS Scoping Letter") (attached as Exhibit 1). The Service explained: "We believe full protection of these areas is necessary to sustain the biodiversity and ecologic integrity of the North Slope/coastal plain, especially given the likely impacts of climate change and increased coastal erosion." FWS Scoping Letter at 2.

Even if BLM were inclined to ignore the warnings of the federal government's own expert wildlife agency, the Draft Plan suffers from multiple legal defects that prevent the agency from adopting it in its current form. First, BLM cannot rationally justify allowing new leasing in areas the agency deemed critical for caribou and migratory birds less than seven years ago. The status of the Reserve's wildlife has, if anything, deteriorated since 2013, due to the ongoing impacts of climate change. The time is therefore ripe for more habitat protection, not less.

Second, BLM fails to rationally analyze the impacts that expanded leasing would have on the Reserve's migratory birds. In particular, BLM does not meaningfully explain how bird impacts will differ among the Draft EIS alternatives, which propose radically different management regimes. Third, BLM fails to fully analyze the cumulative impacts of expanded leasing in the Reserve with proposed leasing on the Coastal Plain of the Arctic National Wildlife

Refuge. This omission is puzzling, because the Arctic Refuge leasing program threatens impacts to similar habitat and many of the same species affected by the Draft Plan. Fourth, BLM fails to fully evaluate the Draft Plan's potential climate impacts, including by quantifying and disclosing the economic and social costs of the projected increase in greenhouse gas emissions.

BLM must correct these legal deficiencies or withdraw its proposal to expand oil and gas leasing in the Reserve's important ecological areas. Given the irreplaceable ecological value of the wildlife habitat at stake here, the undersigned States urge BLM to stay the course and maintain—or consider expanding—the protections established by the 2013 Integrated Activity Plan.

BACKGROUND

I. The National Petroleum Reserve

The National Petroleum Reserve is an expansive swath of land in the Arctic region of Alaska, extending from the Brooks Range to the south to the Arctic Ocean to the north. At over 23 million acres—an area larger than the State of Maine— the Reserve is the largest single unit of public land in the United States.

Despite the use of "petroleum" in its name, the Reserve "includes some of the most valuable fish and wildlife habitats on the Arctic Coastal Plain." FWS Scoping Letter at 1. (The Arctic Coastal Plain is an extensive ecosystem of low-lying tundra and wetlands in northern Alaska.) The Reserve provides critical breeding and staging habitat for staggering numbers of migratory birds, including an estimated six million shorebirds representing "10% or more of the global populations of Black-bellied Plover, Semipalmated Plover, and Dunlin." Letter from Josh Avey, Pacific Flyway Council, to Ryan Zinke, Department of Interior (Oct. 10, 2018) ("Pacific Flyway Council Letter") (attached as Exhibit 2). The Reserve is also home to "[s]ome of the highest densities of nesting raptors anywhere in North America." Id. The Utukok River Uplands and Colville River areas, for example, support nesting golden eagles, gyrfalcons, arctic peregrine falcons, and rough-legged hawks. Id. Birds that use the Reserve include species that migrate through, stop to feed or rest, or overwinter in the undersigned States, including snow geese, red knots, short-eared owls, black-bellied plovers, American golden-plovers, semipalmated sandpipers, brant, long-billed dowitchers, whimbrel, snow bunting, tundra swan, and Pacific loons. See National Petroleum Reserve-Alaska, Final Integrated Activity Plan / Environmental Impact Statement, vol. 1 at 249-251, 254, 259-60, 263-65, 267, 276-77, 332, 333-34 (Nov. 2012) ("2012 Final EIS").

In particular, the Teshekpuk Lake area, located in the Reserve's northeastern quadrant, offers world-class habitat for breeding waterbirds and shorebirds. "Teshekpuk Lake is the largest lake in Alaska's Arctic and the largest thermokarst lake in the world." Audubon Alaska, 2017 Assessment of Wildlife Values in the Teshekpuk Lake Wetlands Complex within the National Petroleum Reserve-Alaska at 1 ("2017 Audubon Assessment") (attached as Exhibit 3). (Thermokarst forms when permafrost near the surface thaws, creating depressions in the tundra that can support ponds and lakes. 2019 Draft EIS at 3-54.) The lake is surrounded by a "network of smaller lakes and wetlands" which "collectively form the Teshekpuk Lake wetlands

complex." 2017 Audubon Assessment at 2. According to BLM, although the complex makes up less than a fifth of the Reserve, it provides habitat for more than half of its aquatic birds and for "42 percent of the aquatic birds on the Arctic Coastal Plain." 2019 Draft EIS at 3-123. "[B]reeding densities of shorebirds" in the Teshekpuk Lake area "are the highest known in any region of the international global Arctic." Id.

As many as 100,000 geese use the Teshekpuk Lake area every year for molting habitat. Pacific Flyway Council Letter. These include "[a]s many as 40,000 Greater White-fronted Geese, 37,000 Brant, and thousands of Cackling Geese and Snow Geese." 2017 Audubon Assessment at 3. In all, "[a]bout 30 percent of the entire Pacific Brant population uses the Teshekpuk Lake area for breeding and molting." Id. at 1. The Teshekpuk Lake area's unique habitat provides "ideal conditions" for molting geese: because molting birds are temporarily flightless, they rely on the area's "remote, deep-water lakes," which are far-removed from predators that might prey on the vulnerable birds. Id. at 3. Many of these birds migrate to Washington, Oregon, and California during the winter. Id.

The Teshekpuk Lake area also provides breeding habitat for all four species of eiders, including ESA-listed Steller's and spectacled eiders; and three species of loons, including vulnerable yellow-billed loons. 2017 Audubon Assessment at 6, 7. The Reserve as a whole "supports nearly 100 percent" of the breeding population of Steller's eiders in North America. 2019 Draft EIS at 3-125.

Despite long-standing protection for Teshekpuk Lake and other wildlife habitat, the outlook for bird species in the Reserve remains uncertain, even under status quo land management. A 2018 analysis by scientists at the U.S. Fish & Wildlife Service found that the populations of spectacled and Steller's eiders in the Arctic Coastal Plain have likely declined over the past 25 years. Wilson et al., FWS, Abundance and Trends of Waterbird Breeding Populations on the Arctic Coastal Plain, Alaska, 1986-2017, at 1 (Oct. 2018) ("FWS, Waterbird Abundance") (attached as Exhibit 4). So have populations of long-tailed ducks and black scoters. Id.

Climate change will exacerbate conditions for these and other bird species. "Bird habitats worldwide are threatened by climate change, though species for which breeding is restricted to the Arctic regions may be the most vulnerable to climate change." 2012 Final EIS, vol. 1 at 278. Among other impacts, "[i]ncreased summer temperatures could lead to the conversion of aquatic habitats into dryer habitat types resulting in a loss of not only habitat quantity but also habitat quality in terms of potential decrease in food resources." Id. Coastal erosion caused by climate change further "has the potential to significantly decrease the terrestrial habitat" used by waterfowl and shorebirds for molting, "foraging, nesting, brood-rearing, and staging" for migration. Id. at 279.

The Reserve also encompasses key habitat for two caribou herds that provide important subsistence food sources for Alaska Natives living in the region. According to a recent estimate by the Alaska Department of Fish and Game, the caribou herd in the Teshekpuk Lake region "provides approximately 95 percent of the caribou harvested by the communities of Utqiagvik (formerly Barrow) and Atqasuk and approximately 85 percent of the caribou harvested by

Nuiqsut." 2017 Audubon Assessment at 2 (citing Alaska Department of Fish & Game, Caribou Management Report, at 17-11 through 17-28 (2015) (excerpt attached as Exhibit 5)). Like migratory birds in the area, the Reserve's caribou are threatened by climate change, which could reduce forage availability and increase the prevalence of insects that harass the animals during the summer months. 2017 Audubon Assessment at 9.

Alaska Natives in the area, who are concerned about protecting the Reserve's ecological and subsistence values, have resisted increased oil and gas development in the Reserve. Nuiqsut, which is located in the eastern fringe of the Reserve, is already experiencing significant impacts to its traditional use of caribou and other animals, along with sociocultural impacts from increasing oil and gas development. The Native Village of Nuiqsut has therefore called for a halt to additional oil and gas development while it studies the effects of the development that already surrounds the community. Eilperin, Facing catastrophic climate change, they still can't quit Big Oil, Washington Post (Dec. 13. 2019) (attached as Exhibit 6); Richards, BLM analysis shows climate price of Alaska drilling, E&E News (Dec. 13, 2019) (attached as Exhibit 7). The Western Arctic Caribou Herd Working Group, a coalition of "subsistence users representing 40 communities within the range of the [Western Arctic Caribou Herd], [and] other Alaska hunters, guides, transporters, conservationists, and reindeer hunters," has likewise argued against expanded leasing in the Reserve's caribou habitat. Letter from Vern Cleveland, Western Arctic Caribou Herd Working Group, to Stephanie Rice, BLM, at 1, 5 (Jan. 22, 2019) (attached as Exhibit 8).

II. The 2013 Integrated Activity Plan and BLM's Proposal to Expand Oil and Gas Leasing in the Reserve

Recognizing the Reserve's important ecological values, BLM in 2013 adopted an Integrated Activity Plan for the Reserve, which prohibits oil and gas leasing in key wildlife habitat, including the Teshekpuk Lake region and important caribou habitat in the southwestern part of the Reserve. Secretary of Interior Ken Salazar explained that these leasing prohibitions were necessary to protect "critical areas for sensitive bird populations … and for the roughly 400,000 caribou" that occupy the region. Record of Decision, National Petroleum Reserve-Alaska Integrated Activity Plan, at iv (Feb. 21, 2013) ("2013 Record of Decision") (attached as Exhibit 9). At the same time, BLM provided for leasing on over half of the Reserve—about 11.8 million acres—to accommodate oil and gas developers. Id.

On November 22, 2019, BLM issued the Draft EIS for its proposed Integrated Activity Plan revision. The proposed revision would allow oil and gas leasing on as much as 6.6 million additional acres of the Reserve—an area nearly the size of Massachusetts—including all of Teshekpuk Lake and surrounding wetland areas and a significant portion of formerly-protected caribou habitat in the southwestern portion of the Reserve. See 2019 Draft EIS at 2-1; Figure 1. Equally troubling, the proposed expansion could, according to BLM's own estimate, increase greenhouse gas emissions caused by fossil fuel production in the Reserve by as much as seventy-five percent, causing total lifetime emissions equivalent to over one billion metric tons of carbon dioxide. 2019 Draft EIS at 3-5 through 3-6.

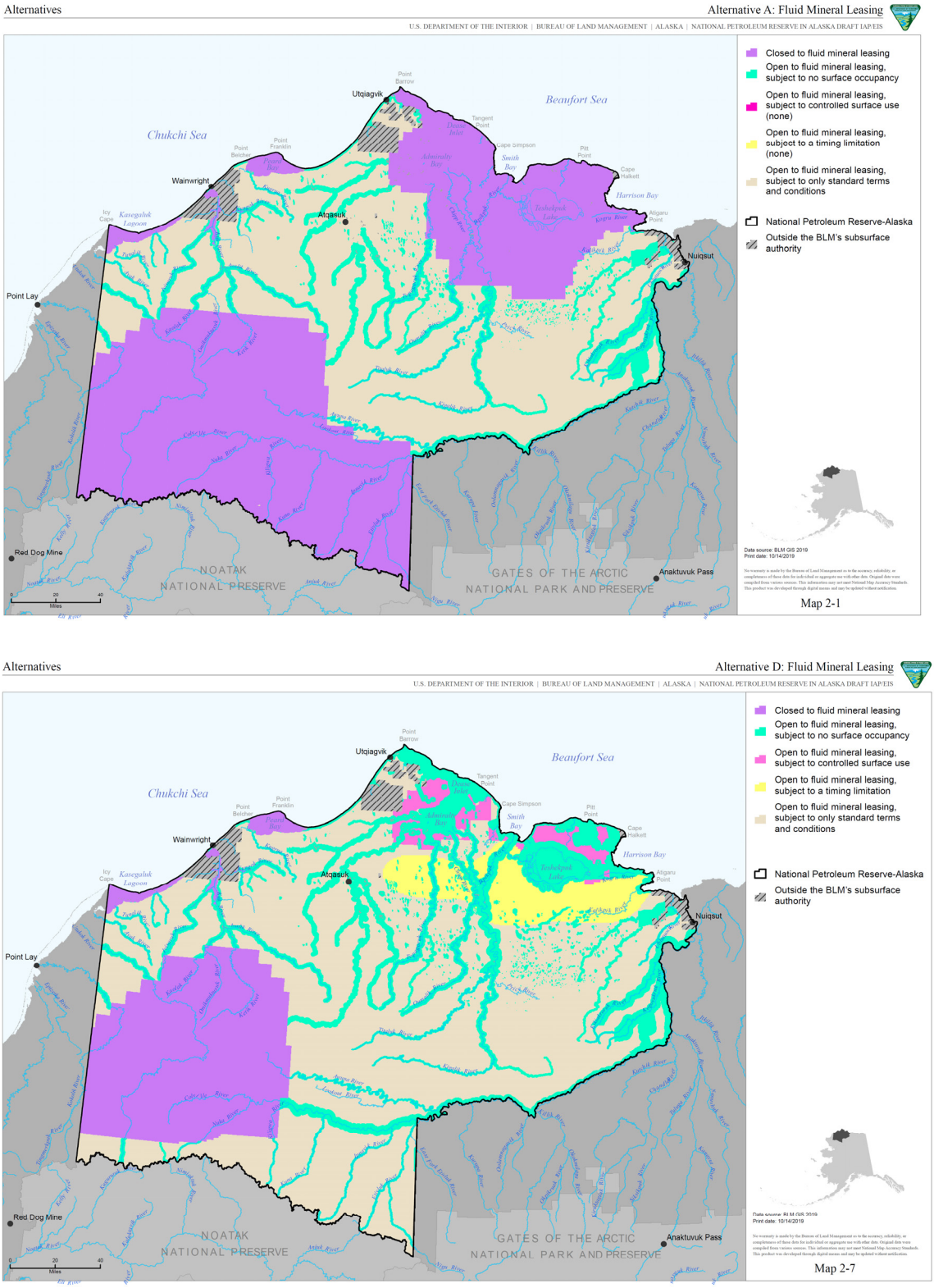

Figure 1: Comparison of management under the 2013 Integrated Activity Plan (top) and the most extreme management alternative proposed in the Draft EIS (bottom). Areas closed to leasing are shaded in purple; all other areas are open to leasing. (Source: 2019 Draft EIS, Appendix A.)

STATUTORY BACKGROUND

I. National Environmental Policy Act

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Congress enacted NEPA in 1969 "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). NEPA has two fundamental purposes: (1) to guarantee that agencies take a "hard look" at the consequences of their actions before the actions occur by ensuring that "the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts;" and (2) to ensure that "the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989).

To achieve these purposes, NEPA requires the preparation of a detailed environmental impact statement for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA's implementing regulations broadly define such actions to include "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a). In preparing environmental impact statements, federal agencies must consider all of the direct, indirect, and cumulative impacts of their proposed actions. Diné Citizens Against Ruining Our Env't v. Bernhardt, 923 F.3d 831, 851 (10th Cir. 2019); 40 C.F.R. §§ 1508.7, 1508.8(a)-(b).

The "heart of the environmental impact statement" is its analysis of alternatives to the agency's proposed action. 40 C.F.R. § 1502.14. Agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives," including by presenting "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." 42 U.S.C. § 1502.14; accord League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 689 F.3d 1060, 1069 (9th Cir. 2012).

II. Administrative Procedure Act

Under the Administrative Procedure Act, courts will set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious where the agency has: (i) "relied on factors which Congress has not intended it to consider"; (ii) "entirely failed to consider an important aspect of the problem"; (iii) "offered an explanation for its decision that runs counter to the evidence before the agency"; or (iv) offered an explanation "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1983). When promulgating a management plan, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Id. (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

Where, as here, an agency decides to change an existing policy, it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate" when "its new policy rests upon factual findings that contradict those which underlay its prior policy." FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009). While the agency need not show that a new policy or rule is "better" than the one it replaced, it still must demonstrate that the new policy "is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates." Id. (emphasis omitted).

III. The Naval Petroleum Reserves Production Act

The Naval Petroleum Reserves Production Act ("Reserve Act" or "Act") governs BLM's management of the Reserve. Although the Act instructs BLM to conduct oil and gas leasing in the Reserve, 42 U.S.C. § 6506a(a), it also requires stringent measures to protect the Reserve's critical environmental values. Thus the Reserve Act provides that any development in areas of the Reserve that the Interior Secretary has found have "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. § 6504(a). The Act specifically identifies Utukok River and Teshekpuk Lake as areas requiring "maximum protection" under this provision. Id. In addition to protection for these so-called "special areas," BLM regulations implementing the Reserve Act require the agency to take those actions that it "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." 43 C.F.R. § 2361.1(a).

COMMENTS ON THE DRAFT INTEGRATED ACTIVITY PLAN AND EIS

The Draft Plan and Draft EIS are unlawful because BLM cannot justify additional leasing under the Reserve Act's governing mandate to "assure the maximum protection" of the Reserve's environmental and subsistence values consistent with oil and gas exploration and development. 42 U.S.C. § 6504(a). The Draft EIS further violates NEPA and the APA because it fails to identify BLM's preferred alternative; fails to rationally analyze the impacts of expanded leasing on migratory birds; fails to analyze and disclose the cumulative impacts of new leasing in the Reserve with the impacts of BLM's proposed leasing program in the Arctic National Wildlife Refuge; and fails to fully analyze the Draft Plan's potential climate impacts. BLM must correct these legal defects and circulate a new, lawful Draft EIS for an additional round of public comment. Otherwise, BLM must withdraw the Draft Plan.

I. BLM Should Identify its Preferred Alternative

At the outset, the Draft EIS fails to identify BLM's preferred management alternative—that is, which of the alternatives discussed in the Draft EIS BLM intends to select at this time. The NEPA regulations require BLM to "[i]dentify [its] preferred alternative or alternatives, if one or more exists, in the" Draft EIS, 40 C.F.R. § 1502.14(e), "so that agencies and the public

can understand the lead agency's orientation." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

Here, BLM has proposed alternatives that range from slightly reducing the total area available for leasing (Alternative B) to opening nearly the entire Reserve to oil and gas development (Alternative D). Given that broad range of possibilities, none of which BLM has identified as a preferred alternative, it is not clear at all whether BLM intends to vastly expand new leasing or more or less maintain the status quo. Without knowing what BLM intends to do, it is impossible for the public to fully understand or comment intelligently on BLM's proposal. See Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1486 (9th Cir. 1992) ("It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.").

BLM should therefore identify a preferred alternative and recirculate the Draft EIS for an additional round of public comment, so that commenters have a meaningful opportunity to comment on BLM's proposal. See Riverbend Farms, 958 F.2d at 1486.

II. BLM Cannot Lawfully Justify Allowing Additional Oil and Gas Leasing in the Reserve

BLM cannot lawfully justify additional leasing in those areas of the Reserve that were closed under the 2013 Integrated Activity Plan. Although the Reserve Act instructs BLM to conduct oil and gas leasing in the Reserve, it also requires the agency to ensure that "[a]ny exploration within" the Reserve's important ecological areas "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 exploration of the reserve." 42 U.S.C. § 6504(a). The Act specifically requires protection for the Teshekpuk Lake wetlands complex. Id.

Based on the best available science at the time, the 2013 Integrated Activity Plan sought to adhere to the Act's mandate to protect the Reserve's environmental values while allowing for oil and gas development. In the 2013 Plan, BLM determined that prohibiting leasing in about half of the Reserve, including the Teshekpuk Lake area in the northeast and caribou habitat in the southwest, was necessary to assure "maximum protection" of the Reserve's ecologically important areas. Secretary Salazar explained in the Record of Decision for the 2013 Plan that prohibiting leasing in these areas "protects lands of importance for caribou calving and insect relief … and a variety of waterbirds and shorebirds." 2013 Record of Decision at 20. In particular, the leasing restrictions are required to protect the lands "nearest Teshekpuk Lake that are most heavily used by calving caribou and molting geese." Id.

BLM adopted these leasing prohibitions despite acknowledging that the Teshekpuk Lake complex includes some of the Reserve's "most promising" areas "for oil discoveries." 2013 Record of Decision at 19. Specifically, the so-called "Barrow Arch," a major oil-bearing geological structure in Alaska's Coastal Plain "along which all producing oil on the North Slope has been found, runs north of [Teshekpuk Lake] from the southeast to the northwest." Id. To account for this high oil and gas value, BLM decided to allow oil and gas leasing on the eastern edge of the wetlands complex, noting that these opened lands "are close to existing leases" and thus "offer the greatest promise for oil and gas development." Id. at 20-21. Thus, BLM

concluded, making this limited portion of the Teshekpuk Lake area available for new oil and gas development, while leaving the rest of the area untouched, "constitutes a proper balancing of BLM's management responsibilities for" the Reserve. Id. at 21.

BLM now seeks to allow additional leasing in the Teshekpuk Lake complex and other protected areas. The Draft EIS fails to provide any explanation or justification for BLM's proposal to lift prior leasing prohibitions in ecologically important parts of the Reserve. See FCC v. Fox Television Stations, Inc., 556 U.S. at 515.

BLM cannot rationally justify abandoning the 2013 Plan's leasing prohibitions. The facts underlying BLM's 2013 Record of Decision have not changed. Teshekpuk Lake continues to provide exceptional habitat for migratory birds and other animals and the southwestern portion of the Reserve continues to support a caribou herd that is critical to Alaska Native subsistence hunters in the region. BLM considered these values, and the potential for oil development in Teshekpuk Lake and elsewhere in the Reserve, and determined that prohibiting leasing was required to comply with the Reserve Act. 42 U.S.C. § 6504(a).

If anything, conditions are worse now for the Reserve's wildlife than they were in 2013. As discussed, climate change has already had, and will continue to have in the coming years, significant impacts on the Arctic and on caribou and migratory birds. Recent reports also confirm that several of the area's sensitive bird species have likely experienced population decline over the last decade. See FWS, Waterbird Abundance at 1. Compounding this problem, the Interior Department recently abandoned a decades-old policy of prohibiting the accidental killing of migratory birds, thus giving the green light to oil and gas developers to cause greater impacts to birds in the Reserve than they have before. See Memorandum from Principal Deputy Solicitor to Secretary of Interior Re: The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dec. 22, 2017) (attached as Exhibit 10).

These impacts will add to the devastating impacts from BLM's proposal to open the Arctic National Wildlife Refuge's Coastal Plain to oil and gas development. New development in the Reserve and the Refuge could destroy or degrade vast amounts of vital migratory bird habitat, leaving many of our nation's migratory birds with little haven for breeding and rearing their young. These impacts, which are in addition to the potential impacts BLM considered when it adopted the 2013 Integrated Activity Plan, militate for more protection in the Reserve—not less.

As discussed above, the Trump Administration's own Fish and Wildlife Service agrees that BLM should not expand leasing in the Reserve's important habitat. In a scoping letter regarding BLM's proposal to revise the Integrated Activity Plan, the Service affirmed that it "continues to support the 2013 Record of Decision as regards to continued protection of sensitive areas," including Teshekpuk Lake, the Colville River Special Area, and the Utukok River Uplands. FWS Scoping Letter at 1-2. The Service explained: "We believe full protection of these areas is necessary to sustain the biodiversity and ecologic integrity of the North Slope/coastal plain, especially given the likely impacts of climate change and increased coastal erosion." FWS Scoping Letter at 2. The Pacific Flyway Council has likewise pressed the Interior Department to maintain protections for Teshekpuk Lake and other key habitat in the Reserve, citing these areas' "exceptional importance to wildlife." Pacific Flyway Council Letter.

It is unlawful for BLM to move forward with its proposed leasing expansion when the expert agencies charged with protecting the nation's sensitive wildlife have urged BLM to turn back. See Platte River Whooping Crane Critical Habitat Maint. Tr. v. FERC, 876 F.2d 109, 117 (D.C. Cir. 1989) (holding agency acted unlawfully when it ignored FWS's "expert opinion" regarding potential threats to whooping cranes). For all these reasons, BLM cannot lawfully justify any new oil and gas leasing in the Reserve's currently-protected areas. 42 U.S.C. § 6504(a).

III. BLM Fails to Rationally Analyze Migratory Bird Impacts

BLM's Draft EIS further fails to rationally analyze impacts to migratory birds, as required by NEPA. 42 U.S.C. § 4332(2)(C); W. Watersheds Project v. Grimm, 921 F.3d 1141, 1144 (9th Cir. 2019) ("NEPA requires federal agencies to assess and publicly disclose the environmental impacts of proposed federal actions.").

As discussed, the Reserve provides critical breeding, molting, and staging habitat for prodigious numbers of shorebirds and waterfowl. These include species that migrate through or overwinter in the undersigned States, such as snow geese, red knots, short-eared owls, black-bellied plovers, American golden-plover, semipalmated sandpipers, brant, long-billed dowitchers, whimbrel, snow bunting, tundra swan, and Pacific loons. See 2012 Final EIS, vol. 1 at 249-251, 254, 259-60, 263-65, 267, 276-77, 332, 333-34.

The Draft EIS's analysis of impacts to the Reserve's migratory birds is deficient in three principal respects.

A. The Draft EIS fails to rationally evaluate potential climate impacts to the Reserve's birds

First, the Draft EIS does not rationally analyze the potential impacts of climate change to the Reserve's migratory birds. The Draft EIS seeks to present these impacts as essentially a wash, or even a net boon, for the birds. In the process, the Draft EIS attempts to minimize the expected negative impacts of climate change, and thus presents an irrationally rosy portrait of future conditions for the Arctic's migratory birds. For example, the Draft EIS asserts that "warmer spring temperatures" will allow "some birds to arrive and nest earlier" and produce "replacement clutches and double broods in some species." 2019 Draft EIS at 3-132 through 3-133. The longer breeding season will also, according to BLM, benefit loon and tundra swan chicks, which are slow to develop. Id. at 3-133. Thus, BLM asserts, warmer temperatures will result in "higher nesting success" for certain species. Id. The Draft EIS further acknowledges that "[a]rrival and breeding of birds in the arctic may not coincide with peaks in insect production … or forage quality in vegetation … , resulting in mismatches in timing of reproduction with forage conditions," but quickly adds that "some species appear to have flexibility in timing arrival and egg laying to adjust to forage production based on local conditions." Id.

This unduly optimistic description of climate impacts conflicts with BLM's admission in the Final EIS for BLM's anticipated Refuge leasing program that climate change effects "combined with development-related impacts across the ranges of many bird species may result in extinction" within the next 85 years. Arctic Refuge EIS at 3-116. Although the Arctic Refuge

EIS is fatally flawed in numerous respects—including in its analysis of impacts to migratory birds—see Comments submitted by Attorney General of Washington, et al., to Nicole Hayes, BLM, Re: Draft Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program (Mar. 13, 2019), its acknowledgment that climate change impacts to migratory birds will be severe highlights the inadequacy of BLM's treatment of those same impacts in the Draft EIS for the Reserve.

The Draft EIS's analysis of climate impacts on migratory birds is further inconsistent with the EIS accompanying the 2013 Integrated Activity Plan. There, BLM wrote that "[b]ird habitats worldwide are threatened by climate change, though species for which breeding is restricted to the Arctic regions may be the most vulnerable to climate change." 2012 Final EIS, vol. 1 at 278. Coastal erosion caused by climate change in particular "has the potential to significantly decrease the terrestrial habitat" used by waterfowl and shorebirds for molting, "foraging, nesting, brood-rearing, and staging" for migration. Id. at 279. "Increased summer temperatures could lead to the conversion of aquatic habitats into dryer habitat types resulting in a loss of not only habitat quantity but also habitat quality in terms of potential decrease in food resources (invertebrate and plant)." Id. at 278; see also Fourth National Climate Assessment, Chapter 26: Alaska, at 1197 (June 2019) (attached as Exhibit 11) (describing impacts of coastal erosion and conversion of tundra habitat to shrubland). The proliferation of shrubs and trees in areas previously covered in tundra plants could also reduce available breeding habitat for species, such as shorebirds, that cannot nest in shrubby areas. 2012 Final EIS, vol. 1 at 279. BLM's 2012 analysis further acknowledges that changes in the timing of insect emergence and forage availability could have severe impacts on arctic birds: for example, the "potential disconnect between invertebrate abundance and bird nutritional needs may cause decreases in bird productivity and survival … and have a negative effect on bird body condition during the molt and pre-migration periods." Id. The Draft EIS, by contrast, omits or attempts to downplay these expected impacts.

The Draft EIS states that it is "incorporat[ing]" its analysis of climate change impacts from the Arctic National Wildlife Refuge Final EIS "by reference," Draft EIS at 3-131, but that analysis too is insufficient. BLM must therefore revise its climate analysis to provide "a reasonable, good faith, and objective presentation" of potential climate impacts to migratory birds, including by accounting for BLM's findings in the 2012 Final EIS for the Reserve, which contradict the 2019 Draft EIS's findings. Nat. Res. Def. Council v. U.S. Forest Serv., 421 F.3d 797, 811 (9th Cir. 2005) (such revision may be necessary "[w]here the information in the initial EIS was so incomplete or misleading that the decisionmaker and the public could not make an informed comparison of the alternatives") (quotation omitted); Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1225 (9th Cir. 2008) (holding environmental assessment was unlawful where agency's conclusion that rule's climate impacts would not be significant lacked adequate support).

B. The Draft EIS fails to rationally analyze the migratory bird impacts of its proposed management alternatives

The Draft EIS's analysis of the differences in migratory bird impacts among the Draft EIS alternatives is even more lacking. NEPA requires agencies to "present the environmental

impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14; see id. § 1502.14(b) (EIS must "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits."). This alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14; accord Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank, 693 F.3d 1084, 1099 (9th Cir. 2012).

The Draft EIS, in a section titled "Impacts Common to All Alternatives," provides a general discussion of the sorts of harms that might befall migratory birds due to oil and gas production in the Reserve. See 2019 Draft EIS at 3-133 through 3-148. The Draft EIS does not, however, explain how such impacts will vary among the four alternatives discussed in the document. Instead, the Draft EIS provides an estimate of how many birds would be present in areas open to leasing under each alternative—and nothing more. Id. at 3-149 through 3-151. Merely counting the birds in areas open to leasing does not help the public or BLM understand the extent to which each alternative will kill birds, devastate their habitat, or prevent them from breeding successfully. BLM's limited analysis thus does not rationally explain the difference in impacts among the alternatives BLM has proposed. Nat. Res. Def. Council, 421 F.3d at 813 (holding Forest Service violated NEPA where it failed "to present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the EIS").

Again, this alternatives analysis contrasts starkly with the analysis supporting BLM's 2013 Integrated Activity Plan. There, BLM explained in extensive detail how each alternative would affect migratory birds. 2012 Final EIS, vol. 2 at 165-87 (alternative A); 399-407 (alternative B-1); id., vol. 3 at 32-41 (alternative B-2); 149-58 (alternative C); 262-71 (alternative D). BLM must provide a similarly thorough analysis before it may proceed with any revision of the 2013 Integrated Activity Plan.

Understanding the full extent of migratory bird impacts, and in particular how these impacts will differ among the management alternatives discussed in the Draft EIS, is essential for BLM to make an informed decision about how to manage the Reserve going forward. See Robertson, 490 U.S. at 349; Nat. Res. Def. Council, 421 F.3d at 812 ("Presenting accurate market demand information was necessary to ensure a well-informed and reasoned decision, both of which are procedural requirements under NEPA."). Such information is also essential to the public's understanding of the consequences of BLM's ill-advised proposal to abandon protections for the Reserve's world-class bird habitat. Wildlands v. U.S. Forest Serv., 791 F. Supp. 2d 979, 991 (D. Or. 2011) ("The public is entitled to be accurately informed of the impact of the proposed action … and to have a meaningful opportunity to weigh in on the proposal during the period for public review and comment."); Nat. Res. Def. Council, 421 F.3d at 813. BLM must therefore recirculate a new Draft EIS with a full accounting of potential migratory bird impacts, thus providing the public with a meaningful opportunity to comment on BLM's proposal. Wildlands, 791 F. Supp. 2d at 991.

C. The Draft EIS fails to rationally analyze cumulative bird impacts

The Draft EIS further fails to fully disclose cumulative migratory bird impacts. An environmental impact statement must disclose all of the environmental impacts of an agency proposal, including cumulative impacts. See Diné Citizens Against Ruining Our Env't, 923 F.3d at 851. Cumulative impacts are "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 … or person undertakes such other actions." 40 C.F.R. § 1508.7; Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989, 995-97 (9th Cir. 2004) (holding environmental assessment unlawful where it failed to fully address the cumulative impacts of a timber sale with other timber sales and roadbuilding projects).

As discussed, BLM has proposed to conduct a leasing program in the Arctic National Wildlife Refuge's Coastal Plain. BLM has already issued a Final EIS for this proposed leasing, and a Record of Decision authorizing lease sales is expected in the near future. Leasing in the Refuge Coastal Plain would cause additional migratory bird impacts that will be cumulative with impacts caused by leasing in the nearby National Petroleum Reserve. See Arctic Refuge EIS at 3-118 through 3-136. The proposed Refuge leasing would also allow 174 or more miles of gravel road construction, extensive and harmful ice road construction, 212 or more miles of oil and gas pipeline construction, nearly 300 acres of gravel pits and stockpiles, and seismic activity across much of the Refuge Coastal Plain. Arctic Refuge EIS at ES-5 through ES-6. All of this additional development will harm migratory birds and other wildlife and degrade their habitat.

Despite BLM's expected decision to authorize leasing in the Arctic National Wildlife Refuge in the near future, the Draft EIS for the Reserve fails to rationally evaluate the cumulative impacts of such leasing on migratory birds. In particular, the Draft EIS's discussion of such cumulative impacts does not even mention the proposed Refuge leasing program. 2019 Draft EIS at 3-151 through 3-152 (migratory birds). The Draft EIS thus fails to comply with NEPA's requirement to consider and disclose all the cumulative impacts of BLM's proposed leasing expansion. See 40 C.F.R. § 1508.7 (agency must consider cumulative impacts of "past, present, and reasonably foreseeable future actions"); Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 997. BLM must address this legal defect before it may finalize its Draft Plan.

IV. The Draft EIS Fails to Adequately Analyze Climate Impacts

BLM's analysis of the Draft Plan's potential climate impacts is likewise incomplete and unlawful. In the Draft EIS, BLM provides estimates of the direct and indirect downstream greenhouse gas emissions for each project alternative. See 2019 Draft EIS at G-10 through G-18. The Draft Plan will, according to BLM, increase downstream greenhouse gas emissions from drilling activities in the Reserve by up to seventy-five percent under a "high development" scenario for alternative D, which opens up the greatest Reserve area for leasing. Id. at 3-5 through 3-6. Drilling activities could therefore, by BLM's estimate, result in total downstream emissions exceeding the equivalent of one billion metric tons of carbon dioxide. Id. at 3-5.

This limited climate impact analysis fails to satisfy NEPA because it does not rationally evaluate the economic and social effects of greenhouse gas emissions associated with the Draft

Plan or the cumulative impacts of expanded Reserve drilling with anticipated drilling in the Arctic Refuge Coastal Plain.

A. BLM fails to rationally assess the economic impacts of increased greenhouse gas emissions under the Draft Plan

The Draft EIS fails to assess the potential economic and social impacts of increased greenhouse gas emissions associated with expanded leasing in the Reserve, using the social cost of carbon protocol or any other method. 2019 Draft EIS at 3-6. None of BLM's reasons for not calculating the social cost of carbon have merit and the agency's refusal to quantify the Draft Plan's climate costs violates NEPA and APA requirements. See Wild Fish Conservancy v. Irving, 221 F. Supp. 3d 1224, 1234 (E.D. Wash. 2016) (agency violated APA requirement to consider all "important aspect[s] of the problem" where it "failed to consider the potential effects of climate change on stream flows").

NEPA requires agencies to fully evaluate the impacts of a proposed action, including its economic impacts. See Columbia Basin Land Prot. Ass'n v. Schlesinger, 643 F.2d 585, 595 (9th Cir. 1981). The social cost of carbon protocol is a federally-developed tool to assist agencies in evaluating the economic and social benefits of reducing carbon dioxide emissions when analyzing the impacts of agency actions. See 2019 Draft EIS at G-9.

BLM asserts that it is not required to calculate the social cost of carbon because, according to BLM, NEPA "does not require a cost benefit analysis." 2019 Draft EIS at G-9. However, BLM concedes that it must consider all the economic and social effects of its actions, id. at G-9, and it cannot do so without fully analyzing the economic and social costs of increased greenhouse gas emissions associated with the Draft Plan. Here, BLM takes pains to quantify the economic growth the Draft Plan would generate, 2019 Draft EIS at 3-304 through 3-314, but fails to provide a similarly detailed analysis of the economic impacts of greenhouse gas emissions. BLM's analysis of economic impacts is therefore incomplete and arbitrary. High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1195 (D. Colo. 2014) ("It is arbitrary to offer detailed projections of a project's upside while omitting a feasible projection of the project's costs."); Ctr. for Biological Diversity, 538 F.3d at 1198 (agency "cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs" in failing to analyze the benefits of reducing greenhouse gas emissions); Wild Fish Conservancy v. Irving, 221 F. Supp. 3d at 1234.

BLM's other reasons for rejecting the social cost of carbon protocol also lack a reasonable basis. First, BLM asserts that because the NEPA review process is not a rulemaking process for which the social cost of carbon tool was originally created and because federal policy has changed, BLM has no obligation to calculate the social cost of carbon. 2019 Draft EIS at G-9. This reasoning is inconsistent with legal precedent requiring agencies to fully analyze the economic impacts of their actions, independent of any federal policy. Columbia Basin Land Prot. Ass'n, 643 F.2d at 595; High Country Conservation Advocates, 52 F. Supp. 3d at 1195; Ctr. for Biological Diversity, 538 F.3d at 1198. Second, BLM's contention that the social cost of carbon protocol is not useful because it generates a range of dollar cost figures lacks support and contradicts BLM's statement elsewhere in the Draft EIS that it sometimes describes impacts

"using ranges of potential impacts." 2019 Draft EIS at F-1. Moreover, NEPA does not allow federal agencies to simply refuse to quantify carbon costs based on such claims of uncertainty or incomplete information. See Sierra Club v. FERC, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (NEPA "necessarily involves some reasonable forecasting" and "agencies may sometimes need to make educated assumptions about an uncertain future.") (quotation omitted); Ctr. for Biological Diversity, 538 F.3d at 1200 (even where "there is a range of values, the value of carbon emissions reduction is certainly not zero."); High Country Conservation Advocates, 52 F. Supp. 3d at 1192 (explaining that even with "a wide range of estimates about the social cost of [greenhouse gas] emissions," federal agencies acted arbitrarily in not quantifying the costs). For these reasons, BLM must fully evaluate the climate costs of increased emissions under the Draft Plan, including by using the social cost of carbon protocol or another similar method.

B. The Draft EIS Inadequately Analyzes Cumulative Climate Impacts

The Draft EIS further fails to discuss the cumulative climate impact of expanded leasing in the Reserve with anticipated drilling in the Arctic National Wildlife Refuge's Coastal Plain. See Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 997.

As discussed, BLM has proposed to begin a leasing program in the Arctic Refuge in the near future. Such leasing will result in additional greenhouse gas emissions that will be cumulative with any emissions from expanded leasing under the Draft Plan for the Reserve. See Arctic Refuge EIS at 3-6 through 3-9. However, the Draft EIS's analysis of the cumulative climate impacts does not even mention the proposed Arctic Refuge leasing program. 2019 Draft EIS at 3-6 through 3-7 (greenhouse gas emissions). The Draft EIS thus fails to analyze and disclose all of the Draft Plan's potential climate impacts, as required by NEPA. See 40 C.F.R. § 1508.7 (agency must consider cumulative impacts of "past, present, and reasonably foreseeable future actions"); Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 997.

CONCLUSION

For the reasons stated, the Draft Plan and Draft EIS fail to comply with NEPA, APA, and Reserve Act requirements, and cannot be finalized in their current form. BLM must therefore correct these fundamental legal defects or withdraw its proposal to revise the 2013 Integrated Activity Plan. Given the Reserve's crucial ecological and subsistence values, the undersigned States urge BLM to maintain the 2013 Integrated Activity Plan's protections and abandon its misguided proposal to allow additional oil and gas leasing in the Reserve.

Sincerely,

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