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SENT VIA EMAIL & EPLANNING PORTAL¹

Stephanie Rice, Project Manager
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Re: Willow Master Development Plan Draft Supplemental Environmental Impact Statement – BLM’s Decision-Making Authority

Dear Ms. Rice:

The Bureau of Land Management (BLM) faces a critical choice in considering whether to approve ConocoPhillips Alaska, Inc.’s (ConocoPhillips) Willow Project in the National Petroleum Reserve-Alaska (Reserve). Approving the project, which would result in more than 280 million metric tons of carbon dioxide equivalent, would undermine urgently needed efforts to speed the transition away from fossil fuels in response to the climate crisis. It would also be contrary to the Biden administration’s promise to take urgent action to combat the climate crisis.² Indeed denying approval of the project may be critical to achieving the U.S. goal of reducing greenhouse gas (GHG) emissions by 50 percent below 2005 levels by 2030, and achieving net-zero GHG emissions by 2050.³ Yet BLM is proceeding as if it has no choice—as if it must approve some version of ConocoPhillips’ proposal.

¹ Due to size, attachments will be mailed by U.S. Mail on a thumb drive.

² See Exec. Order No. 14008: Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7622 (Jan. 27, 2021).

³ Exec. Order No. 14057: Catalyzing Clean Energy Industries and Jobs through Federal Sustainability, 86 Fed. Reg. 70,935, 70,935 (Dec. 8, 2021); The United States of America Nationally Determined Contribution, Reducing Greenhouse Gases in the United States: A 2030 Emissions Target at 1 (undated).

Throughout its draft supplemental environmental impact statement (DSEIS), BLM asserts or implies that it lacks authority to limit ConocoPhillips' activities.⁴ As an apparent consequence of this limited view of its own authority, BLM again evaluates only action alternatives that are different configurations of ConocoPhillips' preferred project, each of which would produce approximately the same amount of oil, resulting in the same GHG emissions. And it fails to give real consideration to the no action alternative. The DSEIS removes language stating the agency could not choose the no action alternative, but the Alaska National Interest Lands Conservation Act (ANILCA) section 810 analysis still includes this incorrect assertion, stating that the no action alternative is "included in the analysis for baseline comparison, but BLM does not have the authority to select this alternative because [ConocoPhillips'] leases are valid and provide the right to develop the oil and gas resources therein."⁵ In addition, BLM's assertions that it must allow ConocoPhillips to develop economically viable oil on every lease suggests that the agency is not seriously considering the no action alternative.

BLM's apparent position that it cannot meaningfully limit ConocoPhillips' activities on its leases and cannot select the no action alternative has no basis in the law. As explained in detail below, the agency has broad authority under the National Petroleum Reserves Production Act of 1976 ("Reserves Act"), and consistent with ConocoPhillips' leases, to prohibit oil and gas activity and to suspend leases as it determines necessary to protect the environment. This includes the authority to select the no action alternative because the proposed Willow project will have unacceptable, unmitigable impacts on the climate and the surface resources of the Reserve. Importantly, this is not a choice about whether to ever allow development of ConocoPhillips' leases, it is a choice about whether to approve a particular project. In this context, BLM's authority is clear.

I. BLM has authority under the Reserves Act to select the no action alternative.

The Reserves Act provides that BLM "shall include or provide for such conditions, restrictions, and prohibitions as the Secretary [of the Interior] deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [Reserve]."⁶ Moreover, the statute gives BLM unfettered discretion to suspend all operations on existing leases or units.⁷ These provisions create an obligation to protect the environment in the

⁴ E.g., BLM, Willow Master Development Plan, Draft Supplemental Environmental Impact Statement at 7 (June 2022) (DSEIS) ("BLM must allow access to at least some of the subsurface resource under all of [ConocoPhillips'] leases with a demonstrated development potential."); *id.* at 8 (asserting that agency "may not permit a development proposal that would strand an economically viable quantity of oil"); *id.*, App. D.1 at 29, 30, 38 (asserting that agency is "obligated to approve development of leases in some form").

⁵ *Id.*, App. G at 4.

⁶ 42 U.S.C. § 6506a(b) (emphasis added).

⁷ *Id.* § 6506a(k)(2).

Reserve, and provide the agency with broad authority and discretion to fulfill that obligation by conditioning, restricting, or even prohibiting oil and gas development activities.

Contrary to several statements in the DSEIS, the Reserves Act's requirement to "conduct an expeditious program of competitive leasing of oil and gas in the Reserve"⁸ has no bearing on the decision now before the agency.⁹ BLM has already held a leasing program in the Reserve, many times over, since the statute was passed. Regardless, the provision does not address, much less require that the agency permit projects proposed on existing leases. Instead, as discussed, the relevant Reserves Act provisions provide BLM with the authority to limit or reject a development proposal.

BLM's regulations implementing the Reserves Act do not limit the scope of BLM's discretion to restrict or prohibit oil and gas development proposals. To the contrary, the regulations support the agency's broad authority and discretion to avoid environmental harm, including by denying approval of a development proposal.¹⁰ Indeed, denying approval of an individual project does not approach the outer limits of BLM's authority, which includes the authority to suspend operations and production "in the interest of conservation of natural resources" or to mitigate "reasonably foreseeable and significantly adverse effects on surface resources."¹¹

Courts have further confirmed that BLM's authority under the Reserves Act is broad and extends to significantly limiting or rejecting a development proposal if impacts are too significant and cannot be mitigated. As the district court explained in its decision vacating BLM's previous Willow authorization, BLM's assertion that it lacked authority to limit ConocoPhillips' activities is "inconsistent with [the agency's] statutory responsibility to mitigate adverse effects."¹² Instead, ConocoPhillips' rights to develop oil and gas on the leases it holds are "subject to certain conditions, including applicable regulations in effect as of lease issuance and lease stipulations."¹³ As explained above, the applicable regulations provide BLM with considerable authority to restrict or prohibit development activities. The Ninth Circuit has explained, in even clearer terms, that "[t]he government can condition permits for drilling on implementation of environmentally protective measures, and *we assume it can deny a specific application altogether* if a particularly sensitive area is sought to be developed and mitigation

⁸ *Id.* § 6506a(a).

⁹ *See* DSEIS at 2-3; *id.*, App. D.1 at 21 ("The BLM is unable to postpone Project permitting based on regulatory requirements applicable to the [Reserve] found in 42 USC 6506(a). Deferral of a project authorization would be inconsistent with the directives of the [Reserves Act] to expeditiously carry out an oil and gas leasing program.").

¹⁰ 43 C.F.R. § 2361.1(a), (e)(1); *see id.* § 3162.3-1(h)(2) (BLM may "[r]eturn the application and advise the applicant for the reasons for disapproval.").

¹¹ *Id.* § 3135.2(a)(1), (3).

¹² *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, 555 F. Supp. 3d 739, 769 (D. Alaska 2021).

¹³ *Id.* at 768.

measures are not available.”¹⁴ The court relied on this conclusion to hold that a decision to offer areas for lease did not require a parcel-by-parcel analysis of the effects of exploration and development since BLM did not, by leasing, commit to permitting any particular exploration or development.¹⁵

II. ConocoPhillips’ lease rights cannot and do not negate BLM’s authority to restrict or prohibit oil and gas development; instead, the leases reinforce BLM’s authority.

As an initial matter, ConocoPhillips’ leases cannot prevent BLM from implementing its statutory obligation to condition, restrict, or prohibit activities as it determines necessary to protect other resources or to mitigate adverse environmental effects. Congress expressly created BLM’s obligation to protect surface resources, which it owes to the public, and it did not authorize BLM to contract out of that responsibility through a lease agreement with a private party.¹⁶ But it would not be necessary to resolve a conflict between BLM’s statutory obligations and the terms of the leases in order to deny approval of the Willow Project, because BLM’s authority to do so is consistent with the leases.

As the district court noted, ConocoPhillips’ leases are expressly subject to conditions, including BLM’s regulatory authority.¹⁷ “The leases do not grant the lessee the unfettered right to drill wherever it chooses or categorically preclude BLM from considering alternative development scenarios.”¹⁸ Instead, the lease “[r]ights granted are subject to applicable laws, the terms, conditions, and attached stipulations of this lease, the Secretary of the Interior’s regulations and formal orders in effect as of lease issuance.¹⁹ As discussed, the regulations in effect at the time the leases were issued authorize BLM to restrict or prohibit activity, and even to suspend the leases entirely if BLM determines that doing so is necessary to protect the surface resources of the Reserve.²⁰ Additionally, the terms of the leases themselves authorize BLM to condition and restrict development. For example, BLM “reserves the right to specify rates of development and production,”²¹ and that BLM may require measures to “minimize adverse impacts to the land, air, and water, to cultural, biological, visual and other resources, and to other land uses or users.”²²

¹⁴ *N. Alaska Env’t Ctr. v. Kempthorne*, 457 F.3d 969, 976 (9th Cir. 2006) (emphasis added).

¹⁵ *Id.* at 977.

¹⁶ *See* 42 U.S.C. § 6506a(b).

¹⁷ *Sovereign Inūpiat*, 555 F. Supp 3d at 768.

¹⁸ *Id.*

¹⁹ *See* BLM, Offer to Lease and Lease for Oil and Gas, Tract No. 2008-H-017 at 1 (Dec. 16, 2008) (Sample Willow Lease) (attached).

²⁰ *Supra* pp. 2-3.

²¹ Sample Willow Lease at 2, § 4.

²² *Id.* at 2, § 6.

ConocoPhillips' leases do not provide it the right to economically viable oil production. BLM has asserted that it "may not permit a development proposal that would strand an economically viable quantity of oil."²³ The DSEIS does not provide support for this assertion, and there is no such requirement in the leases or applicable regulations. While the leases grant "the exclusive right to drill for . . . all of the oil and gas . . . in the lands described,"²⁴ as discussed, the right is subject to conditions.²⁵ In evaluating whether conditions, restrictions, or prohibitions on proposed activities are necessary to protect surface resources, the statute does not authorize BLM to consider whether its decision would affect the economic viability of producing oil under the leases.²⁶ Moreover, BLM's own internal communications acknowledge the agency "is allowed to consider an alternative that reduces the amount of recoverable oil."²⁷

ConocoPhillips purchased these leases knowing that there was a significant risk that economically viable production of all oil under the leases would not be possible. Many oil and gas leases are never developed, and absent such risks, the price of the leases would presumably be much higher than the approximately five dollars per acre ConocoPhillips paid for its Willow leases.²⁸ Part of that risk comes from the technical, geologic, and market factors that may affect the economic viability of production, but part of the risk also comes from the express conditions of the leases that they are subject to BLM's authority to restrict or prohibit development if the agency determines doing so is necessary to protect surface resources in the Reserve.

Additionally, choosing the no action alternative and denying approval of ConocoPhillips' Willow Project, would not deny ConocoPhillips the opportunity ever to develop oil on the same leases. The company would be free to submit a different proposal down the line that could address the climate and other impacts that are unacceptable in the current proposal

III. ConocoPhillips' obligation to develop its leases is not a right to develop and also does not negate BLM's authority to protect surface resources.

The DSEIS contains several statements suggesting that because ConocoPhillips has certain regulatory obligations to develop its leases, BLM must allow the company to "fully develop"

²³ DSEIS at 8.

²⁴ Sample Willow Lease at 1.

²⁵ See *Sovereign Iñupiat*, 555 F. Supp 3d at 768.

²⁶ 42 U.S.C. § 6506a(b).

²⁷ S. Rice, BLM, Email to E. Kunnan *et al.*, Re: Meeting Materials for Willow Alternative Response Workshop (Nov. 5, 2021), Attachment: Willow Cooperating Agency Meeting – Alternatives Response (attached).

²⁸ See Sample Willow Lease at 1.

the oil on its leases.²⁹ The lessee's obligations to develop its leases exist alongside its obligations to comply with all other applicable rules and regulations. Further, these statements confuse ConocoPhillips' obligations with rights. As explained in the previous section, ConocoPhillips generally has no right to fully develop its leases. More importantly, as the district court confirmed, ConocoPhillips certainly has no right to fully develop its leases in whatever manner it chooses or through a single development proposal.³⁰

While a leaseholder is required to meet certain initial and continuing development obligations, these obligations do not create rights to fully develop the leases,³¹ much less the right to have any particular proposed development project approved. An obligation or duty is connected to a corresponding right held by the party to which the obligation is owed, it does not create a right in the party owing the obligation.³² In this case, ConocoPhillips is obligated to demonstrate to BLM that it has met certain continuing development obligations.³³ But BLM retains its regulatory authority to restrict ConocoPhillips' activities on its leases, even if that could interfere with the company meeting certain development obligations. In such circumstances, BLM can release ConocoPhillips from those obligations.³⁴

Moreover, ConocoPhillips does not have an obligation to fully develop its leases. Instead, its obligations are conditional, as discussed, and at most obligate it to undertake one of several discrete actions on leases.³⁵ In addition, these limited, conditional obligations apply to

²⁹ See DSEIS at 8 (“Fully develop’ the targeted oil and gas field: This screening criterion derives directly from language contained in 43 CFR 3137.71(b)(1), which address the lessee’s obligation to BLM in their development proposal. BLM may not permit a development proposal that would strand an economically viable quantity of oil; however, this does not require 100 [percent] resource extraction.”).

³⁰ *Sovereign Inñupiat*, 555 F. Supp 3d at 768 (“The leases do not grant the lessee the unfettered right to drill wherever it chooses or categorically preclude BLM from considering alternative development scenarios.”); see *supra* pp. 4-5.

³¹ 43 C.F.R § 3137.71.

³² See Black’s Law Dictionary, *Obligation* (11th ed. 2019) (“A legal or moral duty to do or not do something.”); *id.*, *Duty* (“A legal obligation that is owed or due to another and that needs to be satisfied; that which one is bound to do, and for which somebody else has a corresponding right.”).

³³ 43 C.F.R § 3137.71.

³⁴ See *id.* § 3137.72 (providing that BLM will extend time to meet development obligations if it determines it “is in the interest of conservation” and that “reasons beyond [the applicant’s] control prevented [it] from performing the initial or a continuing development obligation.”).

³⁵ *Id.* § 3137.71(a) (“Continuing development includes the following operations—(1) drilling, testing, or completing additional wells to the primary target or other unit formations; (2) drilling or completing additional wells that establish production of oil and gas; (3) recompleting wells or other operations that establish new unit production; or (4) Drilling existing wells to a deeper target.”).

ConocoPhillips' Beartooth Unit as a whole, not to each and every individual lease tract within the unit.³⁶ Similarly, the fact that ConocoPhillips' leases have 10-year terms, which BLM cites as a basis to refuse consideration of delaying permitting,³⁷ does not mean that BLM must allow the company to develop its leases within that time, because the terms of the leases may be extended.³⁸

IV. Willow's environmental impacts, including its climate consequences, are unacceptable and justify selecting the no action alternative.

The contribution of GHG emissions from Willow will cause effects in the Reserve that are significantly adverse. Vast record evidence shows the impacts of a warming climate on the Reserve's resources are severe and accelerating. As the single largest fossil fuel extraction project currently proposed on federal public land, Willow would not only contribute more GHG emissions than any other project in the nation over which BLM has authority, it would also emit on average more GHGs every year than nearly every other single point source (power plants) of GHG emissions in the United States.³⁹ Only 13 out of 5,194 single point sources would contribute more emissions, meaning Willow would add more GHG emissions annually than over 99.7 percent of all single point sources in the country.⁴⁰

BLM cannot dismiss the significance of these emissions on the basis that they are a small fraction of global emissions, which is true for any single project, because it ignores the global nature of the problem posed by climate change.⁴¹ BLM must assess the significance of the impacts of Willow on the climate, including on the Reserve's resources.

The substantial GHG emissions from this project will have a direct impact on the Reserve's resources. For example, research demonstrates an "observed linear relationship" of about three square-miles of sea-ice loss per metric ton of carbon dioxide emissions.⁴² Emissions also appear

³⁶ *Id.* § 3137.10(a) & (b).

³⁷ DSEIS, App. D.1 at 21.

³⁸ 43 C.F.R. § 3135.1-5.

³⁹ See U.S. Energy Information Administration, Annual emissions by plant and region, 2020 Carbon Dioxide Emissions at Electric Power Plants (released Nov. 1, 2021) (attached).

⁴⁰ See *id.*; cf. *350 Mont. v. Haaland*, 29 F.4th 1158, 1171 (9th Cir. 2022) (holding that an agency must properly consider the significance of a project's GHG emissions where that project would "generate more GHGs annually than the largest single point source of GHG emissions in the United States.") (internal quotation marks omitted).

⁴¹ See, e.g., *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77 (D.D.C. 2019) (directing BLM to place GHG emissions "in the context of local and regional oil and gas consumption").

⁴² D. Notz & J. Stroeve, *Observed Arctic sea ice loss directly follows anthropogenic CO₂ emission*, 354 SCIENCE 747 (2016) (attached).

to demonstrate a direct relationship with permafrost thaw.⁴³ As such, any decision to mitigate emissions will have a direct impact on the permafrost thaw and sea ice extent in the area, which will affect polar bears and other species in the Reserve. For example, any reduction in sea ice extent has a significant effect on the Reserve's polar bear population, which is one of the most vulnerable polar bear populations in the world.⁴⁴ The sea ice loss results in reduced survival, reproductive success, and body size, increased fasting and nutritional stress, and increased time on land exposing bears to nutritional stress and land-based threats.⁴⁵ Without a change in course, by mid-century, the Reserve's bears have "a high probability of becoming greatly decreased"⁴⁶ if not entirely extirpated.⁴⁷

In addition to the impacts caused by its GHG emissions, the Willow Project will have significant adverse effects on subsistence practices and it threatens important fish, migratory bird, and caribou habitat, among other impacts.⁴⁸

Because the Willow Project would have unacceptable impacts to the climate and surface resources in the Reserve that cannot be mitigated, BLM can and should exercise its authority to select the no action alternative. We urge BLM to do so.

Sincerely,



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⁴³ D. J. Nicolsky *et al.*, *Applicability of the ecosystem type approach to model permafrost dynamics across the Alaska North Slope*, 122 J. GEOPHYS. RES. EARTH SURF. 50 (2017) (attached); *see also* University of Alaska Fairbanks, Geophysical Institute, Permafrost Map, <https://permamap.gi.alaska.edu/> (showing mean annual ground temperature in years 2040-49 based on expected warming) (attached).

⁴⁴ S. G. Hamilton & A. E. Derocher, *Assessment of Global Polar Bear Abundance and Vulnerability*, 22 ANIMAL CONSERVATION 83, 88 (2019) (attached).

⁴⁵ U.S. Fish and Wildlife Service, Stock Assessment, POLAR BEAR (*Ursus maritimus*): Southern Beaufort Sea Stock (June 2021) (attached).

⁴⁶ *Id.* at 14.

⁴⁷ S. C. Amstrup *et al.*, *Forecasting the Range-wide Status of Polar Bears at Selected Times in the 21st Century* (2007) (attached).

⁴⁸ *See* Alaska Soles – Great Old Broads for Wilderness *et al.*, Comments on the Willow Master Development Plan Draft Supplemental Environmental Impact Statement (Aug. 29, 2022).