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"Supplement"

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**U.S. District Court**

**District of Alaska**

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**Case Name:** National Audubon Society et al v. Dirk Kempthorne et al  
**Case Number:** 1:05-cv-8  
**Filer:** Henri Bisson  
Bureau of Land Management  
United States Fish and Wildlife Service  
United States Department of the Interior  
Tom Melius  
Dirk Kempthorne

**Document Number:** 100

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SUPPLEMENT *Defendants' Supplemental Brief* by Dirk Kempthorne, Henri Bisson, Bureau of Land Management, United States Department of the Interior, Tom Melius, United States Fish and Wildlife Service [99] Order on Motion for Hearing,, [49] MOTION for Summary Judgment filed by Sierra Club,, The Wilderness Society,, Center for Biological Diversity,, National Audubon Society,, Alaska Wilderness League,, Northern Alaska Environmental Center,, Natural Resources Defense Council,, (Attachments: # (1) Exhibit 1# (2) Exhibit 2# (3) Exhibit 3# (4) Exhibit 4)(Dunsmore, Dean)

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

NATIONAL AUDUBON SOCIETY, ALASKA )  
WILDERNESS LEAGUE, et al. )

Plaintiffs, )

v. )

GALE NORTON, Secretary of the )  
Interior; HENRI BISSON, et al. )

Defendants, )

No. 1:05-cv-00008-JKS

DEFENDANTS' SUPPLEMENTAL BRIEF

Defendants submit this brief pursuant to the Order Re: Additional Briefing on Preliminary Decision (Docket Entry No. 99). For the reasons set forth herein, the court's Memorandum Decision [*Preliminary*](“Prelim D”)<sup>1/</sup> should be modified, and the court should find that defendants adequately complied with both NEPA, 42 U.S.C. § 4321 *et seq.*, and the ESA, 16 U.S.C. §§ 1531-1544, before BLM entered a decision to amend the BLM's 1998 NE Plan for oil and gas leasing in the 4.6-million acre NE NPRA.

Defendants note a factual statement that should be modified in the Prelim D. On page 11 the Court states that leasing has been deferred in Teshekpuk Lake “for at least ten years.” Leasing has been deferred in the Lake, but there is no durational limit on that deferral. ROD at 10.

**I. THE ANALYSIS OF CUMULATIVE IMPACTS WAS UNDER NEPA ADEQUATE**

The court proposes to find BLM's consideration of cumulative impacts associated with activities on the NW NPRA inadequate on two grounds: one, the FEIS does adequately consider those impacts, and two, defendants are judicially estopped from contending that a comprehensive analysis of those impacts is not required by reason of the position they took in the *NAEC* case. For the reasons that follow, we respectfully maintain that these proposed conclusions should be modified.

**A. Judicial estoppel is not applicable.** Judicial estoppel precludes a party from assuming a contrary position in a second proceeding if that a party assumed a different position in a legal proceeding and succeeded in the prior litigation on that position. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). For judicial estoppel to apply, the later position must be clearly inconsistent within its earlier position, the party must have been successful in persuading the first court to accept the earlier position, and the party seeking to assert the inconsistent position must derive an unfair advantage on the opposing party if not estopped. *Zedner v. United States*, 126 S. Ct. 1976, 1987 (2006); *New Hampshire v. Maine*, 532 U.S. at 750-51. The purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately

<sup>1/</sup> Unless other wise specified, defendants will utilize herein the same acronyms as set forth in the Glossary of Acronyms, pages iii-iv to Defendants' Brief (Docket Entry No. 86).

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changing their positions in response to the needs of the moment. *New Hampshire v. Maine*, 532 U.S. at 750. In this instance, defendants have neither taken an inconsistent position, nor changed their position. Further, they did not prevail on the actual argument they presented in the *NAFC* case.

The issue raised by plaintiffs in *Northern Alaska Environment Center et al. v. Gale Norton et al.*, No. 1:04-cv-00006-JKS, was that the EIS at issue in that case was inadequate because it did not consider impacts within the NW NPRA of oil and gas production that will be made possible because of proposed changes in the leasing plan for the NE NPRA. Exhibit 1 hereto at 4-7. There was no dispute that the NW FEIS did not consider such impacts. In response to Plaintiffs' Opening Brief on Counts I-V (Exhibit 1) in that case, defendants contended only that there was no duty to consider those impacts because at the time of the finalization of the NW FEIS any such impacts were speculative, as there was no pending proposal to amend the existing plan for leasing in the NE NPRA or change the conditions that would be imposed on any leases issued under the 1998 NE Plan. Exhibit 2 hereto at 3-8. Defendants did not contend in that brief that these impacts would be considered in the EIS being prepared for amendments to NE NPRA leasing plan. *Id.*<sup>2/</sup> Nor did they contend that the cumulative impact analysis of the NW FEIS is adequate if the EIS being prepared for possible amendments to the 1998 NE Plan addresses cumulative impacts in the NW NPRA in. *Id.*

This court rejected defendants' contentions that amendment of the 1998 NE Plan was speculative and observed that BLM had a proposal to amend the 1998 NE Plan at the time of the completion of the NW FEIS. 362 F. Supp.2d at 1081-82. The Court then concluded that the NW FEIS was sufficient as these impacts would be considered in the EIS being prepared for any 1998 NE plan amendments.<sup>2/</sup>

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<sup>2/</sup> No oral argument was presented to this court in that case on the merits of plaintiffs' claims.

<sup>1/</sup> This conclusion may have been generated by Intervenor's argument in response to plaintiffs' cumulative impacts contentions that "To require otherwise would be to impose upon BLM the impractical task of identifying and analyzing alternatives in advance of the very process designed (continued...)

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On appeal, the Court of Appeals affirmed this Court's decision on this issue and agreed that the cumulative impacts analysis in the EIS for the NW NPRA is sufficient as cumulative impacts on the NW NPRA from amendments of the 1998 NE Plan will be addressed in the EIS being prepared for those amendments. *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 979-80 (9th Cir. 2006).<sup>2/</sup> However, defendants did not make that contention.<sup>3/</sup> Before the Ninth Circuit, defendants made the same argument that it did in this court in response to plaintiffs' brief (Exhibit 1); that at the time of the issuance of NW FEIS there was no proposal to amend the 1998 NE Plan sufficient to require consideration of the impacts of the amendment in the NW FEIS. Exhibit 4 hereto at 2-4.

Accordingly, the prerequisites for applying the doctrine of equitable estoppel against the defendants are not present in this case, and we urge that the preliminary decision be modified as appropriate.

The preliminary decision states that if the assumptions made by two courts were incorrect, then defendants had a duty to advise them. Prelim D at 14. As shown in Part B below, it is defendants' position that the impacts of amendments to the 1998 NE Plan on the NW NPRA are addressed in the FEIS. Therefore, in defendants' view, there has not been a reason to advise the courts about their assumptions. Further, as the FEIS was already to the public at the time of the briefing and argument of the appeal, plaintiffs were free to argue that the FEIS failed to consider the impacts in NW NPRA associated with modification of the 1998 NE Plan.

**B. Cumulative Impacts Were Adequately Considered. Before addressing the**

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<sup>2/</sup> (...continued)  
by Congress to accomplish that purpose." Exhibit 3 hereto at 6. Plaintiffs had already acknowledged that BLM could prepare separate EISs for the NW and NE NPRA. Exhibit 1 at 2-3.

<sup>1/</sup> On September 8, 2006, plaintiffs filed a Petition For Panel Rehearing in that case.

<sup>2/</sup> Nor was this contention made at oral argument before the Court of Appeals. In fact, issues related to cumulative impacts were not discussed at that argument. These representations are based on counsel's listening to the audio recording of that argument. That recording is available on the Court of Appeals website: [www.ca9.us.courts.gov](http://www.ca9.us.courts.gov). That argument was held on September 15, 2005.

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cumulative impact analysis on amendments to the 1998 NE Plan, defendants respectfully address a misunderstanding in the preliminary decision. Defendants have not admitted that modifications in the ROD to the 1998 NE Plan constitute a "relaxation of environmental protection in the NE NPRA." Prelim D at 14. That is an unsubstantiated characterization made by plaintiffs. The ROD only provides for different forms of conditions on future leases in the NE NPRA, but continues to provide the same "if not greater" protection for the NE NPRA. Defendants' Brief (Docket Entry No. 68) at 20-21, 38-39. Moreover, as discussed below at 6-7, *infra*, the administrative record does not support plaintiffs' allegation that an alleged "relaxation in regulations" will have any actual impact on development in the NW NPRA.

There is no dispute that NEPA requires the FEIS on amendments to the 1998 NE Plan to consider the additional environmental impacts in the NW NPRA that could result from the changes proposed in the NE Plan. Defendants have not contended that this analysis may be delayed until a latter phase, but only that the consideration of cumulative impacts in the FEIS, including those associated with additional development in the NW NPRA, was adequate for the leasing phase. Defendants' Brief (Docket Entry No. 86) at 22. Further, this consideration was not limited just to economic effects and physical activity. *See* Prelim D at 13.

The scope of the discussion of cumulative impacts is described in 2 FEIS at 4-418 to 4-419. The geographic domain of that analysis is the entire North Slope which includes all of the NPRA. *Id.* at 4-419. Thus, the analysis specifically includes both the NW NPRA as well as the South Planning Area of the NPRA. *id.* at 4-442 to 4-443, and leases issued in the NW NPRA. *Id.* at 4-451. Depending on the resource or activity, the cumulative impacts throughout the entire North Slope are discussed on either a quantitative or qualitative basis, *id.* 4-419 to 4-420. Within this framework, the FEIS analyzes the cumulative impacts of the proposed amendment to the 1998 NE Plan in the entire North Slope, including the NW NPRA on a resource by resource basis. These cumulative impacts are discussed for air quality, 2 FEIS at 4-471 to 4-473; paleontological resources, *id.* at 4-474 to 4-477; soil resources, *id.* at 4-477 to 4-481; water resources, *id.* at 4-481 to 4-484; vegetation, *id.* at 4-487 to 4-492; wetlands and floodplains, *id.* at 4-492 to 4-496; fish, *id.* at 4-496 to 4-502; birds, *id.* at 4-503 to 4-512; terrestrial mammals

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including caribou, *id.* at 4-512 to 4-519; marine mammals, *id.* at 4-519 to 4-525; threatened and endangered species, *id.* at 4-525 to 4-537; cultural resources, *id.* at 4-538 to 4-542; subsistence, *id.* at 4-542 to 4-557; sociocultural systems, *id.* at 4-557 to 4-562; environmental justice, *id.* at 4-562 to 4-566; coastal zone management, *id.* at 4-566 to 4-572; recreational resources, *id.* at 4-573 to 4-575; visual resources, *id.* at 4-576 to 580; and economy, *id.* at 4-580 to 4-588.

These analyses are often mostly qualitative, but quantitative information is provided for many of the resources, including paleontological resources, *id.* at 4-475, soil resources, *id.* at 4-479; water resources, *id.* at 4-484; and fish, *id.* at 4-501; (additional 4,000 acres for each of these resources impacted by the year 2050 because of development in both the NW NPRA and the South NPRA). Similar analysis and discussion is provided for vegetation, *id.* at 4-490 (additional 9,200 acres affected by dust, changes in hydrology and thermocast and an additional 9,200 acres directly impacted by development); birds, *id.* at 4-508 (additional 9,200 acres affected by dust, changes in hydrology and thermocast, an additional 4,000 acres directly impacted by oil and gas activities, 9,200 acres indirectly impacted by development, and direct and indirect impacts to bird habitat on 0.43 percent of the arctic coastal plain and 0.10 percent of the North Slope); terrestrial mammals, *id.* at 4-516 (impacts on caribou on entire North Slope including development in the NW NPRA and the South NPRA, additional 3,500 acres covered by gravel, 500 acres impacted by gravel mines, additional 9,200 acres indirectly affected by dust, changes in hydrology and thermocast, an additional 4,000 acres of habitat impacted by oil and gas activities between 2030 and 2050, an additional 9,200 acres indirectly impacted by development, 21,000 acres direct impact, 36,000 acres indirect impact, and possible disruption to the movement of caribou with the construction of any pipeline in the NW NPRA); threatened and endangered species, *id.* at 4-527, 4-535 (possible impacts to bowhead whales from increased vessel traffic to supply both off shore and onshore facilities on the North Slope and possible impacts to eiders from surface disturbances on the North Slope including direct impacts to an additional 4,000 acres of eider habitat and 9,200 acres of indirect impacts from development); and *id.* at 5-540 cultural resources (impacts from up to 1,000 acres of additional gravel infrastructure on the North Slope in the next fifty years) and *id.* at 4-546 (possible increase in areas considered off-limits to

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subsistence within the entire arctic coastal plain).

The extensive discussion of these potential cumulative impacts for the entire North Slope, therefore, includes all of the NPRA and not only either just the NW or NE NPRA. This discussion clearly shows that BLM conducted the required "hard look" at those impacts given the limited nature of information available at the leasing stage. Applying the standards recognized in *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969 (9<sup>th</sup> Cir. 2006), the Court should find the cumulative impact analysis in the FEIS is in compliance with NEPA.

## II. The Court's Preliminary Decision Incorrectly Finds A Violation Of The Endangered Species Act.

A. FWS Correctly Evaluated The Effects Of The Potential Development In The Northwest Planning Area In The Baseline Of The Northeast Biological Opinion. The Court's Preliminary Memorandum Decision overlooks one point that is essential to a proper analysis of the NE Biop. The ESA creates an on-going duty to reevaluate the effects of an action:

[I]f (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) "new information" reveals effects of the action that may affect listed species or critical habitat "in a manner or to an extent not previously considered; (c) if the action is subsequently modified in a manner that causes an effect that was not considered in the biological opinion; or (d) a new species is listed or critical habitat designated that may be affected by the action.

50 C.F.R. § 402.16(a)-(d). What this means is that the entire NW Biop must be revisited if there is evidence that the effects of the estimated 1260 MMbbl economic potential for recovering oil in the hypothetical scenario (e.g., more than 8 fields) is likely to be exceeded. See NW FEIS at V 5-16. As a consequence, 1260 MMbbl scenario is the correct scenario to be in the baseline for the NE Biop because it cannot and will not be exceeded without a new consultation regarding the overall effects of oil and gas development on the eiders in NW NPRA.

Even if an alleged "relaxation of regulations" has occurred in the NE NPRA, that would not amount to evidence that the development actually is likely to exceed the 1260 MMbbl scenario. At best, it is a red flag alerting to the possibility that additional development may occur in the future. As we set out in our initial brief, no significant exploration has occurred in the NW NPRA under the NW ROD to give any indication of the actual commercial potential for

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development. Moreover, previous exploration efforts did not result in any commercial development. NW FEIS at IV-45. As the Ninth Circuit recognized, at the leasing stage, "there is no way of knowing what plans for development, if any, may eventually materialize." *Northern Alaska Environmental Center v. Kempthorne* ("NAEC"), 457 F.3d 969, 977 (9<sup>th</sup> Cir. 2006) ("NAEC").

Further, the record shows that Mineral Management Service ("MMS") and BLM stated that the regulations in the NE NPRA constrain development in the NW NPRA because the supporting infrastructure, e.g., pipelines, must pass through the Northeast Planning Area. NW FEIS at IV-69 (20 percent "lost opportunity" is attributable to restrictive regulations in the Northeast Planning Area because "most of the support for Northwest operations must pass" through that area). No evidence exists that the regulations have changed in a manner that would in any way affect basis for the constraints that BLM and MMS identified in their assumptions regarding the 1260 MMbbl scenario.<sup>2/</sup> In fact, as we pointed out previously, the projected pipeline paths from the Northwest through the Northeast do not even pass through the Teshelkpuk Lake area. See Defs' Brief (Docket Entry 86) at 39, n.31; NW FEIS Map 108. Plaintiffs apparently read more into the basis for the MMS and BLM assumption but the administrative record does not support that reading.

The evidence for whether reinitiation is required will come from the future consultations regarding actual on-the-ground activities. See NW ROD, Appendix at B-13 (Stipulation J-1) ("BLM will not approve any ground disturbing activities that may affect any [listed] species or critical habitat until it completes its obligation under applicable requirements of the [ESA] including completion of any required procedures for conference or consultation."); *Conner v. Burford*, 848 F.2d 1441, 1458, n. 42 (9<sup>th</sup> Cir. 1988) (recognizing that future consultations would provide a more accurate assessment of post-leasing activities because the comprehensive biological opinion it ordered "will rely on incomplete information as to the exact location, scope

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<sup>2/</sup> BLM found that the level of protection afforded by the performance-based regulations adopted in the NE Amended ROD to be "similar to, or even greater than, the level of resource protection provided in the 1998 Northeast IAP/EIS." Defs' Brief (Docket Entry 86) at 38-39.

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and timing of future oil and gas activities"). If, from the evidence of what is actually happening, it appears likely that development will exceed the 1260 MMbbl scenario, BLM will reinstate consultation on oil and gas development in the entire Northwest Planning Area.

Finally, nothing in the ESA or the ESA regulations requires the action agency or the consulting agency to re-evaluate the findings of each biological opinion in the environmental baseline to see if anything has changed. The environmental baseline is intended to provide "a snapshot of a species' health at a specified point in time" without the proposed action under consideration.<sup>1/</sup> U.S. FWS and National Marine Fisheries Service, "Endangered Species Consultation Handbook", 1998 at 4-22. Thus, while it should identify the past, present, and expected factors affecting the current health of listed eiders, the environmental baseline is not intended to be a re-analysis of the effects of the each biological opinion or action in the baseline. So long as a biological opinion remains in effect, FWS should be able to rely on its analysis without having to conduct a new evaluation as part of its baseline analysis.

If the action agency or consulting agency had to re-evaluate each and every completed biological opinion and action in the baseline, as the Court's preliminary decision would seem to require, it would be a staggering task. Such a task would make it impossible to complete consultation within the 135 days provided for by the statute. See 16 U.S.C. § 1536(b)(1). To impose such an interpretation of the regulations here serves no purpose (1) in the context of a lease sale which has no on-the-ground effects; (2) where all future on-the-ground activities in the Northwest and Northeast Planning Areas will undergo consultation before they can be commenced; (3) where consultation regarding the lease sales in both the Northwest and Northeast Planning Areas themselves will have to be reinitiated if the assumptions in the biological opinions will be exceeded; and (4) where the leases themselves will be heavily conditioned with specific stipulations and operating procedures to protect the eider from any

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<sup>1/</sup> The effects of the proposed action are then considered in light of the environmental baseline and non-federal future actions to make the jeopardy determination. 50 C.F.R. § 402.02 (definitions of "effects of the action" and "cumulative effects") and § 402.14(g)(4).

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development whether it occurs today, tomorrow, or twenty years in the future.<sup>1/</sup>

**B. The Biological Opinion Correctly Evaluated Cumulative Effects.** Unlike NEPA, the Endangered Species Act does not require an evaluation of future federal actions in a biological opinion. NEPA defines the term "cumulative impact" to mean

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (federal or non-federal) or person undertakes such other actions.

40 C.F.R. § 1508.7. By contrast, the ESA defines the term "cumulative effects" to mean:

[T]hose effects of future State or private activities, **not involving federal activities**, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

50 C.F.R. § 402.02. Thus, unlike under NEPA, the consulting agency is not required to look at the future Federal authorization of development on public lands. Therefore, the fact that FWS did not look at the effect of the so-called "relaxation of regulations" in the Northeast Planning Area on any development that possibly may occur in the Northwest Planning Area beyond that assumed in the Northwest Planning Area Biological Opinion is not a violation of the ESA. environmental protection in the Plan, on development in the NW NPRA is premised on an assumption that the NE Plan reduces protection. The claim is not supported by the record and, even if it were, the alleged cumulative impact is theoretical and speculative.

**III. NO INJUNCTION SHOULD BE ENTERED**

Since, as shown above, the Court should find that BLM adequately complied with both NEPA and the ESA before modifying the 1998 NE Plan, no injunction should be entered. However, even if the Court should find a legal error, an injunction of the proposed lease sale would not be appropriate. Plaintiffs' claim that the EIS for the NE plan does not adequately examine the cumulative impact of the NE Plan amendment, particularly a relaxation of environmental protection in the Plan, on development in the NW NPRA is premised on an assumption that the NE Plan reduces protection. The claim is not supported by the record and,

<sup>1/</sup> See e.g., 3 FEIS, at D-17.

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even if it were, the alleged cumulative impact is theoretical and speculative. As we explained on page 43 of Defendants Brief (Docket Entry 86), citing *Amoco Production Co. v. Gambell*, 480 U.S. 531, 553-54 (1987), injunctive relief may be imposed only if plaintiff can show irreparable injury. Further, any relief should be "narrowly tailored" to remedy the specific violation. *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 800 (9th 2005). Plaintiffs have not shown irreparable injury from the violation they allege. At most, any remedy should require the agency to supplement the EIS on the NE Plan if evidence emerges that amendment of the Plan increases development in the NW NPRA. This remedy would be consistent with the obligation under NEPA to supplement an EIS when significant new information becomes known. 40 C.F.R. § 1502.9(c)(1).

The Court proposes to vacate both the ROD and the FEIS. Prelim D at 26. Any relief should, at most, vacate only the ROD. The ROD is the decision document, not the FEIS. If BLM still wishes to proceed with modifications to the 1998 NE Plan, the form of further NEPA analysis should be left to the discretion of the agency. BLM could elect to prepare a new integrated EIS, or prepare a supplemental EIS. Vacation of the FEIS could arguably eliminate the latter option.

Dated this 15th day of September 2006.

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**CERTIFICATE OF SERVICE**

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/s/ Dean K. Dunsmore  
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UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

NORTHERN ALASKA ENVIRONMENTAL  
CENTER, *et al.*,

Plaintiffs,

v.

GALE NORTON, Secretary of the Interior, *et al.*,

Defendants, and

ARCTIC SLOPE REGIONAL CORPORATION, *et al.*,

Intervenor-Defendants.

Case No. J04-0006 CV (JKS)

**PLAINTIFFS' OPENING BRIEF ON COUNTS I-V**

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BLM perform its analysis in an EIS that is subject to comment and circulated to the public and decision maker. Merely asserting that it has based its decisions on expert advice cannot fulfill BLM's obligations under NEPA.

D. BLM Arbitrarily Constrained the Other Impacts it Considered in the Cumulative Case by Refusing To Consider Other Reasonably Foreseeable Actions.

The final EIS violates NEPA by failing to analyze the cumulative impacts of other reasonably foreseeable future actions. In addition to the direct impacts of a proposed action, "NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with 'past, present and reasonably foreseeable future actions.'" Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (quoting 40 C.F.R. § 1508.7). "NEPA emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" Blue Mountains Diversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (internal citation omitted). The NEPA obligation to consider cumulative impacts attaches to every EIS and is independent of the requirement that related projects be considered in a single comprehensive EIS. See Northern Alaska Environmental Center v. United States Army Corps of Engineers, No. A98-0217 (D. Alaska May 25, 1999) (noting that the "concept of a comprehensive or programmatic EIS" and the requirement of "consideration of cumulative impacts . . . are two different concepts . . ."). As the Ninth Circuit has explained, "the obligation to wrap several cumulative action proposals into one EIS for decision making purposes is separate and distinct from the requirement to consider in the environmental review of one particular proposal, the cumulative impact of that one proposal when taken together with other proposed or reasonably foreseeable actions." Native Ecosystems Council v. Dombeck, 304 F.3d at 896 n.2 (quoting Terence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act*, 20 *Envtl. L.* 611, 633 (1990)). Here, Plaintiffs are not arguing that BLM needed to prepare a single comprehensive EIS

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covering all of the NPR-A or all of the North Slope. Rather, Plaintiffs assert that the cumulative impacts analysis contained in the Northwest EIS is incomplete because it failed to include reasonably foreseeable future actions.

Although the EIS at issue here purports to analyze cumulative impacts as required by NEPA, *see* 1 FEIS IV-401 to IV-404, the cumulative impacts scenario fails to take account of some reasonably foreseeable actions that will affect the same resources affected by the Northwest leasing decision. To fulfill NEPA's purposes, cumulative impacts must be analyzed as long as they are reasonably foreseeable. *See* 40 C.F.R. § 1508.7 ("Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."). "NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather it is designed to require such analysis as soon as it can reasonably be done." *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002). Here, BLM refused to analyze the impacts of opening more land in the Northeast around Teshekpuk Lake to oil development, and stripping the plan of stipulations that protect resources.

Well before the final EIS in question here was published, BLM announced its intent to consider weakening the wildlife protection measures in the Northeast plan for lands immediately adjacent to the Northwest Planning Area. On April 15, 2003, it issued a press release stating "BLM announced plans to amend its 1998 land use plan for 4.6 million acres of public land in the northeast corner . . ." Ex. 4 at 1 (BLM 4/15/03 Press Release). The press release described the purpose of the amendments as to evaluate exploration and development opportunities in areas that are now closed and to consider changing the current prescriptive stipulations. *See id.* A little over two months later, BLM published in the Federal Register a "Notice of Intent to Amend the Northeast National Petroleum Reserve Alaska Integrated Activity Plan." Ex. 3 (68 Fed. Reg. 37,173 (June 23, 2003)).

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Despite this proposal, BLM explicitly refused to analyze in the Northwest EIS any potential changes to the Northeast plan stating,

Future changes to existing habitat protections around Teshekpuk Lake are not discussed in the cumulative impact analysis because such changes are speculative at this time and beyond the scope of this document. Any proposed changes would be addressed in a separate NEPA document and any decisions on changes would be made subsequent to that NEPA process.

2 FEIS at VII-194 (response to comment 213-204).

1. *BLM's Proposal To Amend the Plan for the Northeast Planning Area Is a Reasonably Foreseeable Future Action that Must Be Analyzed in the Cumulative Case.*

BLM's own proposal to remove mitigation measures imposed by the Northeast plan and open protected areas around Teshekpuk Lake is clearly a "reasonably foreseeable" future action that needs to be analyzed in the Northwest EIS. See Muckleshoot Indian Tribe v. Forest Service, 177 F.3d 800, 811 (9th Cir. 1999); Neighbors of Cuddy Mtn v. United States Forest Service, 137 F.3d 1372, 1380 (9th Cir. 1998); Thomas v. Peterson, 753 F.2d 754, 760 (9th Cir. 1985). BLM refused to consider changes to the protections in the Northeast plan based on its statement that "such changes are speculative at this time and beyond the scope of this document." 2 FEIS at VII-40, VII-194 (response to comment 213-204). Thus, BLM attempts to raise the bar for when consideration of future proposals is required from "reasonably foreseeable" to already approved.

Courts repeatedly have held that when, as here, a proposal is in the planning stage, it must be considered in the cumulative impacts analysis.<sup>9</sup> See, e.g., Muckleshoot Indian Tribe, 177 F.3d at 812

<sup>9</sup> In the briefing on Plaintiffs' motion for a preliminary injunction, Defendants attempted to distinguish these cases, portraying them as further along in the planning process. This recharacterization of the cases is incorrect. In both Muckleshoot Indian Tribe and Tenakee Springs v. Clough, the Ninth Circuit held that proposals were foreseeable enough to require analysis in the cumulative impacts section of the EIS for another project before the agencies had initiated the EIS process for the proposal by publishing a notice of intent in the Federal Register. See Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d at 812; Tenakee Springs v. Clough, 915 F.2d at 1313; see also Pls.' Prelim. Inj. Reply at 27-29.

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(finding land exchange proposed before decision in question was "reasonably foreseeable"); Neighbors of Cuddy Mtn., 137 F.3d at 1380 (finding proposed timber sales "reasonably foreseeable"); Tenakee Springs v. Clough, 915 F.2d 1308, 1313 (9th Cir. 1990) (citing notice of intent in the Federal Register as evidence of reasonably foreseeable proposals); Thomas, 753 F.2d at 760 (finding timber sales were reasonably foreseeable when "Forest Service issued EA's for, and approved, two of the timber sales nine and sixteen months after it issued the [EA challenged]"). For instance, in Muckleshoot Indian Tribe, the Ninth Circuit found that a land exchange "was not remote or highly speculative," when the proposal had been announced five months before the agency issued the final EIS challenged. Id. at 812. Here, BLM announced its intent to amend the Northeast plan in April of 2003, more than six months before it issued the Northwest final EIS. See Ex. 4 at 1 (BLM 4/15/03 Press Release). Indeed, it has even begun the formal NEPA process. It is untenable for BLM to assert that although its proposal is definite enough for it to engage in a costly NEPA process, it is too speculative to require analysis in the Northwest EIS.

In a similar case, the District of Nevada rejected BLM's argument that a proposal in the NEPA process was too speculative to require inclusion in the cumulative analysis. See Western Land Exch. Project v. United States Bureau of Land Mgt., 315 F. Supp. 2d 1068, 1095 n.10 (D. Nev. 2004). The court stated:

BLM contends in its reply that the Toquop plant is "in the preliminary planning stage" and therefore "hardly ripe ... for meaningful cumulative impact analysis." BLM neglects the very next sentence of the EA, however, in which it states that "an EIS is currently being prepared by the BLM for this project." If the project was "ripe" enough to deserve its own EIS, it was clearly "ripe" enough to be analyzed as a reasonably foreseeable future project in other NEPA documents. Indeed, it seems that BLM should have possessed some information regarding the project's impacts, given that the agency was in the process of preparing an EIS for it. Furthermore, the agency's decision to prepare an EIS in and of itself shows that BLM regarded the potential impact of the project to be significant, either individually or cumulatively.

Id. (citations omitted).

BLM cannot wait to analyze the cumulative impacts of the Northwest plan and the Northeast proposal in the EIS it is preparing for the Northeast proposal. See Thomas, 753 F.2d at 760. It is not

"appropriate to defer consideration of cumulative impacts to a future date. 'NEPA requires consideration of the potential impact of an action before the action takes place.'" Neighbors of Cuddy Mtn., 137 F.3d at 1380 (quoting Tenakes Springs v. Clough, 915 F.2d at 1313). Allowing agencies to wait to analyze reasonably foreseeable future actions undermines the very purpose of NEPA's cumulative impacts requirement. See Thomas, 753 F.2d at 760 ("A central purpose of an EIS is to force the consideration of environmental impacts in the decisionmaking process.") Based upon this rationale, the Ninth Circuit in Thomas rejected the Forest Service's contention that it did not need to include a cumulative impacts analysis for future proposals because it would perform separate EISs for the future projects. See id.

2. *There Is A Clear Potential for Cumulative Impacts Here that Must Be Analyzed.*

Opening more of the Teshekpuk Lake Special Area to leasing and scaling back stipulations in the Northeast Plan threaten serious cumulative impacts to resources and subsistence users in the area. For example, opening the Teshekpuk Lake area to leasing could have serious impacts on the Teshekpuk Lake Herd, which is the caribou herd most relied upon by subsistence users in the region. See Ex. 21 at 2-3 (AR 5590, Kuukpik DEIS Comments at 11-12) (discussing importance of TLH caribou for subsistence and native corporation's concerns about herd). The final EIS discloses that leasing in the Northwest will have a considerable effect on the Teshekpuk Lake Herd. The final EIS states:

If several lease sales were to occur under the Preferred Alternative, . . . [a]n increase in the number or miles of roads and pipelines with development under multiple sales is expected to further impede movements of TLH caribou to insect-relief areas along the coast. This effect is expected to persist over the life of the oil fields and may reduce productivity of the TLH.

2 FEIS at V-136.

The FEIS makes clear that its proposal to open further areas in the Teshekpuk Lake area and to relax stipulations has potential cumulative impacts on the Teshekpuk Lake Herd, but fails to analyze such impacts. The final EIS notes that "[o]ngoing and future lease sales in NPR-A could

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expose a large number of the TLH calving and summering caribou to exploration and development activities." 1 FEIS at IV-440. Ironically, BLM responded to comments by the Western Arctic Caribou Herd Working Group, Audubon Alaska, and Kuukpik Corporation expressing concern over the impacts on the Teshekpuk Lake Herd by touting the protections of the Northeast plan that it is now planning to reduce:

Currently, 51 to 74 percent of the defined TLH calving grounds [located in the Northeast] is either closed to leasing or designated as no surface occupancy. Stipulations provide additional protection for caribou in the Northeast NPR-A. Given this protection of calving grounds and proposed stipulations in the TLH insect-relief habitat with the Northwest NPR-A Planning Area, cumulative impacts to this caribou herd should not be significant.

Id. at VII-198.

Based on the clear potential for cumulative impacts on the Teshekpuk Lake Herd, and BLM's explicit acknowledgement that the protective measures in the Northeast plan play a role in reducing impacts to the caribou herd, it was unreasonable for the agency to refuse to discuss its own proposal to change those measures.

## II. FWS AND BLM HAVE FAILED TO MEET THEIR OBLIGATIONS UNDER ESA

The Endangered Species Act imposes on federal agencies a strict substantive duty to ensure that its actions do not jeopardize the continued existence of a species listed, like the Steller's and spectacled eiders, as threatened or endangered under the Act. Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2000). To facilitate compliance with this strict substantive standard, the Act requires agencies whose actions may affect a listed species to engage in a consultation process with FWS, which results in a biological opinion from the FWS indicating whether an action may cause jeopardy to the species. 16 U.S.C. § 1536(b)(3)(A). "If the biological opinion concludes that the proposed action is likely to jeopardize a protected species, the action agency must modify its proposal."

Conner, 848 F.2d at 1452. In this case, the FWS and BLM have not met their obligations under the ESA to protect the Steller's and spectacled eiders.

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CENTER, NATIONAL AUDUBON SOCIETY,  
et al.

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GALE NORTON, Secretary of the  
Interior; HENRI BISSON, Bureau of  
Land Management State Director;  
et al.

Defendants,

No. J04-0006-CV(JKS)

DEFENDANTS' BRIEF  
ON COUNTS I-V

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the ROD places surface restrictions on both permanent and temporary facilities in the stream bed and 3/4 and 1/2 mile from the center line of various rivers including the Meade River, ROD Appendix B-14 & Map 1 at 9, The FEIS thus provided sufficient detail to allow BLM to impose these restrictions.

Plaintiffs contend (Plfs' Brief at 28) that the FEIS only discloses total acreage impacts on wetlands associated with seismic surveys. That is incorrect. The FEIS, after detailing what seismic surveys are, 1 FEIS IV-52 thru 53, describes the impacts of seismic activities on soils, vegetation and on wetlands generally for all alternatives. 1 FEIS IV-82, 83, 92-93, 124-25, 126, 158-60, 282-3, 284, 297-98, 344-45, 346, 357-58, 399-401; 2 FEIS V-14, 48-49, 171-73. While the FEIS does not state that these impacts will occur at a particular site, it does state that the greater impacts will likely be concentrated on the northern portions of the Northwest Planning Area so that "marsh wetland" will be affected and tussock wetlands will be affected less. 2 FEIS V-48-49. Given what is known of the area that was offered for lease, and could potentially be explored and developed, the information provided as to impacts on wetlands is more than sufficient.

Plaintiffs complain (Plfs' Brief at 28) about a lack of detail regarding the location of subsistence cabins. The location of such cabins and campsites areas are mapped. 3 FEIS Maps 75, 85. This information led to the imposition of specific conditions to reduce potential displacement of subsistence users from their traditional areas. 2 FEIS VII-203-31, 233.<sup>16/</sup>

#### IV. THE FEIS ADEQUATELY ASSESSES CUMULATIVE IMPACTS

The task of selecting the scope of an EIS is assigned to the special competency of the agency. *Kleppe v. Sierra Club*, 427 U.S. 390, 413-14 (1976); *Selkirk Conservation Alliance v. Fosgren*, 336 F.3d 944, 958 (9<sup>th</sup> Cir. 2003). This includes consideration of cumulative impacts. *Id.* A cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to past, present, and reasonably foreseeable

<sup>16/</sup> The FEIS contains detailed maps showing the various subsistence use areas. 2 FEIS 233, 3 FEIS Maps 65-80, 85, 94, 96.

future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7, *Accord Earth Island Institute v. United States Forest Service*, 351 F.2d 1291, 1306 (9<sup>th</sup> Cir. 2003). Reasonably foreseeable includes only "proposed actions." *Lands Council v. Powell*, 379 F.3d 738, 746 (9<sup>th</sup> Cir. 2004).

The FEIS specifically addressed cumulative impacts.<sup>12/</sup> 1 FEIS IV-401 thru 503. Plaintiffs contend that this analysis is inadequate because it did not consider the potential cumulative impacts of possible changes in the stipulations, restrictions and conditions set forth in the Northeast National Petroleum Reserve-Alaska Integrated Activity Plan/Environmental Impact Statement Record of Decision, October 7, 1998.<sup>20/</sup> Pifa' Brief at 35-40. BLM did not address these impacts in the FEIS because they were deemed too speculative and beyond the scope of the FEIS.

The issue is whether the potential impacts of any future changes in the Northeast Planning Area ROD were sufficiently foreseeable at the time the Northwest FEIS was prepared that they should have been discussed in the FEIS. *Lands Council v. Powell*, 379 F.3d 738, 746 (9<sup>th</sup> Cir. 2004). This in turn depends on whether there was a proposal to change the Northeast conditions. *Id.*

Plaintiffs rely solely on timing to support the contention that there was an existing proposal to change the Northeast Planning Area ROD. Prior to the issuance of the FEIS and

<sup>12/</sup> The cumulative impacts analysis is described in Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Rule 12(h) suggestion of Lack of Jurisdiction at 27-31. It included consideration of future leasing, exploration and development in the Northeast planning area of the NPR-A. 1 FEIS IV-413, 3 FEIS Tables IV-16 and IV-25 (future federal lease sales considered in the cumulative effects analysis included the Federal OCS, Northeast NPR-A and Northwest NPR-A); 1 FEIS IV-406, IV-409, IV-410 (cumulative effects analysis considered additional "exploration and development in the Northeast NPR-A" even while the FEIS candidly acknowledged that "the amount, nature and location of such development is unknown.")

<sup>20/</sup> This ROD and the EIS prepared prior to its entry are in litigation in *The Wilderness Society et al. v. Gale Norton et al.*, No. 1:98-CV02395(RWR) (D. D.C.).

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the ROD for the Northwest Planning Area in November 2003, BLM had issued a press release on April 15, 2003, Exhibit 4 to Plfs' Brief, and on June 23, 2003, it published a notice of intent to amend the Northeast National Petroleum Reserve-Alaska Integrated Activity Plan/Environmental and to prepare an accompanying EIS. 68 Federal Register 37173, Exhibit 3 to Plfs' Brief. One of the purposes of this notice was to "assist in early scoping and later development of alternatives for the IAP/EIS." *Id.*<sup>21/</sup>

The press release and scoping notice are not sufficient to constitute a proposal. A proposal is defined in the CEQ's regulations as follows:<sup>22/</sup>

*Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. (Latter emphasis added)*

40 C.F.R. § 1508.23. Both prongs of the regulation must be satisfied. The agency must have a goal it is actively pursuing and it must be far enough along in defining the goal that its effects can be meaningfully evaluated. Plaintiffs ignore the fact that in each of the cases they cite, the record before the agency showed that specific proposed timber sales or land exchanges were sufficiently definite at the time of the NEPA analysis to be evaluated meaningfully as the CEQ regulations require.

BLM declined to speculate as to the outcome of the Northeast amendment process that had just been initiated. 2 FEIS VII-194. While BLM was nearing completion of the FEIS for the Northwest NPR-A study area (notice of the FEIS was published on November 28, 2003 in 68 Fed. Reg. 66824-25), the agency was only in the very early stages of soliciting

<sup>21/</sup> "Scoping" is a specific step in the EIS preparation process. 40 C.F.R. § 1501.7. A notice of intent must precede scoping and preparation of an EIS.

<sup>22/</sup> NEPA created the Council on Environmental Quality (CEQ). 42 U.S.C. § 4342. In partial fulfillment of its role under NEPA, CEQ promulgated regulations for implementation of NEPA which are codified at 40 C.F.R. Parts 1501-1508. Federal agencies are to comply with these regulations. 40 C.F.R. § 1501.4. The courts also give substantial deference to these regulations. *Methow Valley Citizens Council*, 409 U.S. at 355; *Center for Biological Diversity*, 349 F.3d at 1166.

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information from the public on a wide range of topics that might be included in an amendment of the Northeast NPR-A IAP. Any conjecture on the outcome of that process was, "speculative at this time." 2 FEIS VII-194 ("[f]uture changes to existing habitat protections around Teshekpuk Lake are not discussed in the cumulative impacts analysis because such changes are speculative at this time and beyond the scope of this document.")

The "call for information" in the June 2003 Federal Register notice was many steps removed from any actual amendment to the Northeast Plan and possible future development impacts. BLM had not yet proposed a preferred approach or released a draft EIS on any proposed amendment. At the time that decisions were being made on the Northwest NPR-A IAP/EIS, all that had occurred was giving of notice that BLM was "preparing an amendment" and it was seeking "information and comments on specific issues to be addressed." 68 Fed. Reg. 37173.

Even if, at the conclusion of any future Northeast amendment process, BLM ultimately decides to offer new areas in the Northeast NPR-A for lease, the areas that might be offered and the nature of the protective stipulations and conditions of any lease offering might be were not known at the time of the FEIS.

Under NEPA, agencies "need not consider potential effects that are highly speculative or indefinite." *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1163 (9<sup>th</sup> Cir. 1998); *Sierra Club v. Marsh*, 976 F.2d 763, 768 (1<sup>st</sup> Cir. 1992). See also *Churchill County v. Norton*, 276 F.3d 1060, 1080 (9<sup>th</sup> Cir. 2001) *opinion modified, rehearing denied*, 282 F.3d 1055 (9<sup>th</sup> Cir. 2002), *cert denied*, 537 U.S. 822 (2002) (where uncertainty existed as to the extent of future actions, it was not arbitrary and capricious for the agency to find it would be speculative to analyze their cumulative impacts). NEPA does not require the agency "to consider the possible impacts of less imminent actions when preparing an impact statement on proposed actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410, note 20 (1976):

"Should contemplated actions later reach the stage of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment, and the condition of that environment presumably will reflect earlier proposed actions and their effects."

Given the very preliminary stage the June 23, 2003 Federal Register notice signaled, and the very broad range of topics on which the agency was seeking input in order to develop an amendment, it was reasonable for BLM to conclude that it was too early in the process to incorporate any specific amendment assumed by plaintiffs (i.e., decreased habitat protection for Teshekpuk Lake caribou) into the cumulative effects analysis for the Northwest NPR-A plan.

The cases cited by plaintiffs do not support their argument. The early request for general scoping information in BLM's Federal Register notice was a far cry from the "virtual certainty of the transaction and its scope" that the court found existed in *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 812 (9<sup>th</sup> Cir. 1999). In *Muckleshoot*, the court referred to specific documents that gave detailed descriptions of the Plum Creek land exchange and held that "the record reflects that the Forest Service was all but certain that the National Forest lands . . . would be included in the . . . exchange." *Id.* (Emphasis added.) Here, by contrast, the notice of intent for the Northeast amendment was indefinite and tentative, soliciting public input generally on "areas to be considered for oil and gas leasing" as well as an exceedingly broad array of other issues which might or might not be included in the amendment. 68 Federal Register 37173 (June 23, 2003). The "meaningful evaluation" of a proposal contemplated by the CEQ regulations, 40 C.F.R. § 1508.23, was impossible at this early, undefined stage, as BLM recognized. 2 FEIS VII-94.

Plaintiffs' reliance on *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9<sup>th</sup> Cir. 1990), *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1378 (9<sup>th</sup> Cir. 1998), and *Thomas v. Peterson*, 753 F.2d 754, 760 (9<sup>th</sup> Cir. 1985), is equally unavailing. The Federal Register notices at issue in the *Tenakee Springs* case made available 280 million board feet of timber for immediate harvest in the next two years in five specific sub-areas of the National Forest. *Id.* at 1313. In *Cuddy Mountain*, the agency failed to adequately consider in its cumulative effects analysis the combined effects of three specifically identified timber sales in the same area as the Cuddy Mountain timber sale. *Id.* at 1378. The issue of what constitutes reasonably foreseeable future actions was not even addressed in *Cuddy Mountain*.

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Finally, *Thomas v. Peterson* involved an issue not even in dispute in this case—whether an EA on a logging road proposal should have included an analysis of timber sale proposals because they are “connected actions” or “cumulative actions” and whether they must be evaluated together in an EIS. 753 F.2d at 758-760. See 40 C.F.R. § 1508.25(a)(1) and (2) (defining connected and cumulative actions).<sup>21/</sup> The court determined that the logging road had no “independent utility . . . such that the agency might reasonably consider constructing only the segment in question.” *Id.* *Thomas v. Peterson* does not discuss the issue of what constitutes reasonably foreseeable future action for purposes of a cumulative effects analysis.

In contrast, the Federal Register notice published by BLM announced only that the agency was seeking information on a broad array of issues that might be addressed in a future amendment to the Northeast NPR-A plan. See 68 Fed. Reg. 37173. There was no imminent prospect of leasing activity in the Teshekpuk Lake area that is in any way comparable to the pending timber sales and land exchange in the cases cited by plaintiffs in their brief. Many more interim steps would be necessary, including an actual proposal to amend the Northeast plan, before any oil and gas leasing might become more than “an extremely tentative possibility.” *Park County Resources Council v. U.S. Dept. of Agriculture*, 817 F.2d 609, 623 (10<sup>th</sup> Cir. 1987).

In *Lands Council v. Powell*, 379 F.3d 738, 746 (9<sup>th</sup> Cir. 2004), the Court of Appeals affirmed a decision that certain timber sales were not yet reasonably foreseeable for cumulative impact purposes. In so doing, the court noted that these sales had not been scoped at the time of the NEPA analysis at issue. *Id.* The court also indicated that if one of the timber sales had been scoped at the time of the final EIS and Record of Decision, it “should have been included as a reasonably foreseeable activity.” *Id.* n. 8. However, the proposed timber sales at issue in the *Lands Council* case were identified specifically by geographic location

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<sup>21/</sup> Plaintiffs explain that they are not arguing that the Northwest leasing plan and the possible Northeast amendment were “cumulative actions” that had to be evaluated together in a single EIS. Plfs’ Brief at 35-36.

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and were far more definite than mere possible changes to the Northeast plan in this case. The *Lands Council* case should not be read as setting forth a *per se* rule that a Federal Register notice commencing scoping is a proposal sufficient to constitute a foreseeable activity, as that would read out of existence the additional requirement in 40 C.F.R. § 1508.23, that the activity must be sufficiently described that it "can be meaningfully evaluated" in order for it to be a proposal.

#### V. THE FEIS ADEQUATELY DISCUSSES ALTERNATIVES

An agency is required to explore and objectively evaluate all reasonable alternatives in an EIS, and for alternatives eliminated from detailed study briefly discuss the reasons for their elimination. 40 C.F.R. § 1502.14(a). *Accord Westlands Water District v. United States Department of the Interior*, 376 F.3d 853, 868 (9<sup>th</sup> Cir. 2004). A court's review of the range of alternatives in an EIS is also reviewed under the "rule of reason." *Westlands Water District*. An agency is not required to undertake a separate analysis of alternatives that are not significantly distinguishable from the alternatives actually considered or that have similar consequences. *Id.* An agency is not required to consider alternatives that are "inconsistent with the basic policy objectives for the management of the area." *Id.* NEPA requires only that the FEIS "estimate the impacts of a likely or probable development alternative." *Northern Plains Resources Council v. Lujan*, 874 F.2d 661, 666 (9<sup>th</sup> Cir. 1989). "The 'touchstone' for courts reviewing challenges to an EIS under NEPA 'is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.'" *Westlands Water District*, 376 F.3d at 872, quoting, *California v. Block*, 690 F.2d 753, 767 (9<sup>th</sup> Cir. 1982).

Plaintiffs allege two deficiencies in the alternatives analysis. First, plaintiffs argue that the FEIS failed to consider a "middle-ground" alternative, which would allow for some oil and gas exploration and development in the planning area, while at the same time protecting some of the most important wildlife areas by placing them off limits to leasing. Plfs' Brief at 12, 14. Second, plaintiffs argue that the FEIS did not adequately explain why an alternative submitted by one of the plaintiff organizations during the public comment process (the

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

NORTHERN ALASKA ENVIRONMENTAL  
CENTER; et al.,

Case No. J04-006 CV (JKS)

Plaintiffs,

v.

GALE NORTON, Secretary of the Interior, et  
al.,

Defendants,

and

ARCTIC SLOPE REGIONAL  
CORPORATION, CONOCOPHILLIPS  
ALASKA, INC. and ANADARKO  
PETROLEUM CORPORATION,

Intervenor-Defendants.

**INTERVENOR-DEFENDANTS' CONSOLIDATED OPPOSITION  
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON  
COUNTS I-V AND CROSS-MOTION FOR SUMMARY JUDGMENT**

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**4. The FEIS Analyzes All Reasonably Foreseeable Cumulative Impacts**

Plaintiffs contend that BLM should have evaluated the "cumulative impacts" of a June 2003 Notice of Intent ("NOI") announcing the agency's plan to seek proposals for amending the Northeast Planning Area Integrated Activity Plan ("Northeast IAP"). Plaintiffs assert that potential amendments to the Northeast IAP were "definite enough" at the time the FEIS for the Northwest Planning Area was issued to constitute "reasonably foreseeable future actions." Yet the record demonstrates that, at the time in question, BLM was merely commencing a scoping process for the purpose of formulating proposals for future consideration. NEPA does not require federal agencies to consider purely speculative future measures in evaluating cumulative impacts. Because the "actions" plaintiffs believe must be analyzed were not identified when the FEIS was issued, the Court must reject plaintiffs' cumulative impacts argument.

**a. The NOI does not constitute a "reasonably foreseeable future action"**

Plaintiffs have failed to establish that the NOI represents a "reasonably foreseeable future action." 40 C.F.R. § 1508.7 (directing federal agencies to consider incremental impact of proposed action when added to reasonably foreseeable future actions). Because NEPA regulations do not elaborate on what constitutes a "reasonably foreseeable future action," BLM must "make that judgment in the first instance." Kern v. Bureau of Land Mgmt., 284 F.3d 1062, 1079 (9th Cir. 2002); Northern Alaska Envtl. Ctr. v. U.S. Army Corps of Eng'rs, Civ. No. A98-217 (D. Alaska, Decision on Review dated May 26, 1999) (agency must "apply its experience and expertise to the facts developed in the record" in order to decide whether an action is reasonably foreseeable) (attached hereto Ex. R). BLM's determination that an action is not "reasonably foreseeable" is, therefore, entitled to deference unless the Court finds that the

why the minimum elevation for pipelines was raised from five feet in Northeast to seven feet in Northwest. Pls.' Br. at 34 n.8. Although five feet is generally regarded as adequate, the Kuukpiik Corporation requested a minimum elevation of eight feet and BLM settled on seven. See FEIS at VII-59. Finally, plaintiffs complain that an ROP regarding exploratory drilling in the beds of water bodies, unlike its Northeast counterpart, contains an exception if the lessee can demonstrate on a site-specific basis that impacts would be minimal, or it is determined that there is no feasible or prudent alternative. Pls.' Br. at 33-34. The FEIS, however, describes a rigorous process for processing any requested exception. FEIS at II-14 - II-16. Thus, the record does not substantiate plaintiffs' suggestion that the process for obtaining an exception to the Northwest Planning Area ROPs is less rigorous than the process outlined for obtaining exemption from lease or permit stipulations in the Northeast Planning Area.

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agency acted arbitrarily or capriciously or made a clear error of judgment. Kern, 284 F.3d at 1079; id. at 1075 (court must defer to agency's determination of what actions are reasonably foreseeable so long as agency's decision is "fully informed and well-considered") (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998)) (additional citations omitted).

While agencies are required to consider future actions that are "all but certain" in scope, they need not hypothesize about speculative measures. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 812 (9th Cir. 1999). As the Ninth Circuit recently explained,

Our precedent defines "reasonably foreseeable" in this context to include *only* "proposed actions"... The agency is required to analyze the cumulative effects of projects that it is already proposing. For any project that is not yet proposed, and is more remote in time, however, a cumulative effects analysis would be both speculative and premature.

Lands Council, 379 F.3d at 746 (emphasis added) (future harvests identified by plaintiffs were not "reasonably foreseeable" where none had been proposed as of date of final EIS);<sup>25</sup> see also United States v. Southern Florida Water Mgmt. Dist., 28 F.3d 1563, 1573 (11th Cir. 1994) (NEPA analysis when no specific federal action has been proposed "would be premature and serve no useful purpose"); Inland Empire, 88 F.3d at 764 ("NEPA does not require the government to do the impractical").

In an attempt to fit the NOI at issue in this case within the category of "virtually certain" actions requiring consideration, plaintiffs characterize it as a "definite" proposal to lease lands in the Northeast Planning Area while weakening existing environmental protections. See Pls.' Br. at 36. The record contradicts this assertion. Rather than proposing particular lands for leasing or recommending specific alterations to prescriptions, the NOI merely announced BLM's intent to engage in a NEPA planning process with two "objectives" in mind:

- (1) To consider changing the current prescriptive stipulations . . . into a mixture of prescriptive and performance-based stipulations; and, (2) to

<sup>25</sup> While plaintiffs may attempt to use Lands Council to assert that a scoping notice constitutes *per se* evidence of a reasonably foreseeable action, the Court must bear in mind that determination of reasonably foreseeable actions is highly fact specific. Ex. R (Northern Alaska Envtl. Ctr., Civ. No. A98-217). As the NOI at issue here and the case cited below demonstrate, the content of scoping notices, and thus the certainty of the actions defined therein, can vary considerably.

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evaluate additional lands for exploration and development opportunities that could provide access to new oil discoveries, while remaining sensitive to biological and subsistence values.

68 Fed. Reg. 37,173, 37,174 (June 23, 2003) (emphasis added) (attached hereto as Ex. S). The NOI sought suggestions for lands that should be considered for leasing, so as to aid the agency "in early scoping and later development of alternatives." *Id.* at 37,173. This early scoping process consisted of a public comment period, which continued through the end of October 2003, and a series of public meetings held through November 2003, for the purpose of identifying "issues and environmental concerns that the Amended IAP/EIS should address." See Ex. T. Thus, the "proposal" that plaintiffs describe as "definite" was, in fact, a proposal to engage in a process to develop a proposal.<sup>26</sup> *Id.*; Lands Council, 379 F.3d at 746 (only "proposed actions" are considered reasonably foreseeable under Ninth Circuit precedent).

Case law relied upon by plaintiffs falls well short of equating an intent to develop a proposal with a "reasonably foreseeable future action." Plaintiffs, for example, cite to Muckleshoot, 177 F.3d 800, for the proposition that "reasonably foreseeable" actions include proposals "in the planning stage." Pls.' Br. at 37. The action at issue in Muckleshoot, however, was a particular land exchange, which had been described in detail and identified in maps prior to the issuance of the EIS in question. The court held that the Forest Service was required to consider this exchange in a cumulative impacts analysis, "[g]iven the virtual certainty of the transaction and its scope." Muckleshoot, 177 F.3d at 812. Similarly, in City of Tenakee Springs v. Clough, the court held that the Forest Service was required to analyze cumulative environmental impacts of "timber harvest operating plans scheduled for implementation." 915 F.2d 1308, 1313 (9th Cir. 1990). The court found that the Forest Service's Notice of Intent to conduct the sales, which detailed the areas to be offered and the number of board feet to be made available, contained sufficiently specific information to mandate a cumulative impacts analysis. *Id.*; see also Blue Mountains, 161 F.3d at 1214-15 (Forest Service required to consider cumulative impacts of five logging projects identified by name with estimated sale quantities and

<sup>26</sup> Specifically, in describing this pre-planning process, BLM stated that: "It is important to understand that BLM HAS NOT made any decisions" to (1) change the meaning or intent of any existing Northeast [NPR-A] stipulations; (2) open additional lands for oil and gas leasing; and; (3) reduce setbacks or buffer zones. See Ex. U (original emphasis).

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timelines); Native Ecosystems Council v. Dornbeck, 304 F.3d 886, 896-97 (9th Cir. 2002) (Forest Service must evaluate cumulative effects of road density amendments in conjunction with timber sales where amendments were necessary to implement sales). Finally, in Western Land Exchange Project v. Bureau of Land Mgmt., 315 F. Supp. 2d 1068 (D. Nev. 2004), unlike in the present case, the court determined the agency must consider cumulative effects of power plant because the agency was already well into the process of drafting an EIS for the project.<sup>27</sup> Id. at 1095 n.10.

Significantly, the Muckleshoot court, in ruling that a cumulative impacts analysis of a proposed land exchange was required, noted that the exchange at issue had not been considered in the Forest Service's earlier programmatic EIS. The reason for this omission was that the exchange had not been "identified with any certainty" at the time of the EIS, thus it "simply was not concrete enough to allow for adequate analysis." Muckleshoot, 177 F.3d at 810-12. Thus, the court required a later-in-time analysis when the exchange was "all but certain." Id. Likewise, here BLM's proposal to develop a proposal was not "concrete enough to allow for adequate analysis" at the time the FEIS was issued, yet full NEPA evaluation will nevertheless occur when a specific proposal and appropriate alternatives have been formulated. Id.; see FEIS at VII-4, VII-194 (although changes to existing Northeast IAP habitat protections were speculative at time of FEIS, any changes ultimately proposed will be fully considered through on-going Northeast IAP NEPA process).<sup>28</sup>

<sup>27</sup> Other cases relied upon by plaintiffs are inapposite. Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), for example, does not address the requirements of a cumulative impacts analysis, but instead discusses when a comprehensive EIS is required for multiple actions. See 753 F.2d at 759-60. The court rejected the Forest Service's contention that future timber sales were too speculative to require comprehensive consideration along with construction of a logging road, given that the purpose of the road was to provide access for future logging. Id. The court further found that the timber sales "were in fact at an advanced stage of planning." Id.; Neighbors of Cuddy Mountain, 137 F.3d 1372, is similarly off-point. Neighbors involved specific timber sales, which were discussed by the Forest Service in a cumulative impacts analysis, although, as the Ninth Circuit found, in an overly general manner that did not satisfy NEPA's "hard look" requirement. See id. at 1378-79. The issue of what constitutes a "reasonably foreseeable" future action was not addressed. Id.

<sup>28</sup> Plaintiffs' repeated assertion that the NOI proposes to "strip" the Northeast IAP of environmental protections is mistaken. See Pls.' Br. at 36. BLM recently released a draft EIS for the Amended Northeast Planning Area IAP ("DEIS"). See <http://nenpra.cnrs.com/>

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In sum, BLM's decision to refrain from conjecture and speculation and to instead conduct review after formulating a specific proposal is fully consistent with NEPA and is entitled to deference. Kern, 284 F.3d at 1075 (court must defer to agency's "fully informed and well-considered" determination of whether action is reasonably foreseeable); Northern Alaska Envtl. Ct., Civ. No. A98-217 at 28 (affirming Corps' "reasonable construction of the concept of what is reasonably foreseeable"); To require otherwise would be to impose upon BLM the impractical task of identifying and analyzing alternatives in advance of the very process designed by Congress to accomplish that objective. Plaintiffs' attempt to "raise the bar" on what constitutes "reasonably foreseeable future action," so as to require theoretical analysis of proposals to develop proposals, should be rejected. See Pls.' Mot. Prelim. Inj. at 23; Inland Empire, 88 F.3d at 764 (NEPA does not require agencies "to do the impractical"); Inland Empire Pub. Lands Council v. Schultz, 992 F.2d 977, 981-82 (9th Cir. 1993) (Forest Service did not abuse its discretion in excluding 1,200 harvestable acres from cumulative impacts analysis where the scope of any future harvest was speculative); Pub. Utils. Comm'n of California v. Fed. Energy Regulatory Comm'n, 900 F.2d 269, 283 (D.C. Cir. 1990) (although impacts from successive similar pipeline impacts were "a theoretical possibility," construction of only one pipeline was "reasonably foreseeable;" thus FERC properly limited its cumulative effects analysis to one pipeline); Southern Florida Water Mgmt. Dist., 28 F.3d at 1573 (NEPA analysis of nonspecific proposal would "serve no useful purpose").

**C. FWS's Biological Opinion Complies with the ESA**

As required by the ESA, BLM consulted with FWS regarding the effects of the Preferred Alternative on two eider duck species protected under the ESA.<sup>29</sup> To aid FWS in its analysis of

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nepa/documents\_DEIS.htm. Significantly, the DEIS concluded that revising protective measures for Northeast Planning Area to match those applicable in the Northwest would not result in any additional adverse environmental consequences. See Ex. V at 3 (DEIS at 2-34); see also Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1025-26 (9th Cir. 1980) (failure to consider data report available before release of final supplemental EIS was harmless error where agency later determined potential environmental effects identified in report were not significant).

<sup>29</sup> BLM consulted with FWS regarding the Alaskan breeding population of the Steller's eiders and the spectacled eider. Both species are listed under the ESA as "threatened." A "threatened species" is one which is likely to become an endangered species within the

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effects, BLM provided FWS with a comprehensive Biological Assessment ("BA").<sup>30</sup> At the conclusion of the consultation, FWS issued a lengthy biological opinion (the "BiOp") finding that BLM's decision to open the Northwest Planning Area to oil and gas leasing, and all reasonably foreseeable effects of post-leasing activities (i.e., exploration, development, production, and abandonment), were not likely to jeopardize the listed eider species. ROD at App. C.

Rotely applying legal theories plucked from the Ninth Circuit's decision in Connor v. Burford to the very different facts of this case, plaintiffs contend that FWS's BiOp is inadequate because it allegedly fails to address the full scope of the proposed action and, instead, unlawfully relies upon promises of future consultations. Compl., Count V; Pla.' Br. at 41-47. Plaintiffs also erroneously claim that the BiOp relied upon an assumption that eider densities were both uniform and "average" across the Northwest Planning Area. Pla.' Br. at 47-50. However, BLM's BA and FWS's BiOp demonstrate both that the requirements of Connor have been fully met and that FWS used "high-end," rather than "average," densities when analyzing the effects of proposed action on listed eider species.

1. The Endangered Species Act

The purpose of the ESA is to provide for the conservation of threatened and endangered species and their ecosystems. 16 U.S.C. § 1531(b). The ESA directs all federal agencies to use their authorities to further this purpose. *Id.* § 1531(c)(1). FWS shares responsibility with the National Marine Fisheries Service (collectively, the "Services") for administering ESA programs. 50 C.F.R. § 402.01(b). The Services' ESA duties include, but are not limited to, consulting with other federal agencies over action that may affect listed species.<sup>31</sup> 16 U.S.C.

foreseeable future. 16 U.S.C. § 1532(20). An "endangered species" is one that is in danger of extinction throughout all or a significant portion of its range. *Id.* § 1532(6).

<sup>30</sup> FWS regulations define and detail the purposes of a BA. 50 C.F.R. §§ 402.02, 402.12. BLM's BA appears in Appendix 10 as an unnumbered attachment to a transmittal memorandum from BLM to FWS, dated October 2, 2003. FEIS, App. at 20-21. The BA is cited herein as "FEIS, App. 10, BA §\_\_." FWS's BiOp can be found in the ROD at App. C.

<sup>31</sup> ESA consultations must also address effects to designated "critical habitat" of listed species. However, in this instance, there are no designated critical habitats for any ESA-listed species within the action area of BLM's decision.

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No. 05-35085

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NORTHERN ALASKA ENVIRONMENTAL CENTER, ET AL.,

Plaintiff-Appellants,

v.

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.,

Defendant-Appellees,

and

ARCTIC SLOPE REGIONAL CORPORATION, ET AL.,

Intervenor-Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

BRIEF FOR THE DEFENDANT-APPELLEES GALE NORTON, ET AL.

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Because an EIS need not discuss every conceivable alternative or alternatives that are not significantly distinguishable from each other, BLM was not required to consider the Audubon proposal further. *Westlands Water District*, 376 F.2d at 871; *Headwaters, Inc.*, 914 F.2d at 1181.

D. BLM was not required to evaluate as a cumulative effect the possible changes in restrictions applicable in the Northeast Planning Area. – Under NEPA, BLM was required to evaluate any cumulative impact, which is defined as “the impact on the environment that results from the incremental impact of the action when added to past, present, and reasonably foreseeable future actions . . . .” 40 C.F.R. § 1508.7. The FEIS here specifically addressed cumulative impacts. FEIS IV-401 thru 503 (SER 687-789). That evaluation included consideration of future leasing, exploration and development in the Northeast Planning Area of the NPR-A. FEIS IV-406 (cumulative effects analysis considered additional “exploration and development in the Northeast NPR-A”), IV-409, IV-410, IV-413; Tables IV-16 and IV-25 (SER 692, 695, 696, 699, 1483, 1494). NAEC contends (Br. 35-39) that this analysis is inadequate because it did not consider the potential cumulative impacts of possible specific changes in the stipulations, restrictions and conditions set forth in the 1998 ROD for the Northeast Planning Area.

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Under NEPA, agencies "need not consider potential effects that are highly speculative or indefinite." *Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1163 (9th Cir. 1998), quoting *Sierra Club v. Marsh*, 976 F.2d 763, 768 (1st Cir. 1992). See also *Churchill County v. Norton*, 276 F.3d 1060, 1080 (9th Cir. 2001) *opinion modified, rehearing denied*, 282 F.3d 1055 (9th Cir. 2002). NEPA does not require the agency "to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions." *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 20 (1976).

NABC relies solely on timing to support the contention that possible changes in the Northeast Planning Area ROD were reasonably foreseeable. Prior to the issuance of the FEIS for the Northwest Planning Area in November 2003, BLM had issued a press release on April 15, 2003, and on June 23, 2003, it published a notice of intent to amend the Northeast ROD and to prepare an accompanying EIS. (ER 44, 129-130). One of the purposes of this notice was to "assist in early scoping and later development of alternatives for the IAP/EIS." (ER 129).

BLM reasonably declined to speculate as to the outcome of the Northeast amendment process that had just been initiated. FEIS VII-194. While BLM was nearing completion of the FEIS for the Northwest NPR-A study area, the agency was only in the very early stages of soliciting information from the public on a

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wide range of topics that might be included in an amendment of the Northeast NPR-A IAP. Any conjecture on the outcome of that process was, "speculative at this time." FEIS VII-194 (ER 555) ("[f]uture changes to existing habitat protections around Teshekpuk Lake are not discussed in the cumulative impacts analysis because such changes are speculative at this time and beyond the scope of this document.")

The "call for information" in the June 2003 Federal Register notice was many steps removed from any actual amendment to the Northeast Plan and possible future development impacts. BLM had not yet proposed a preferred approach or released a draft EIS on any proposed amendment. At the time that decisions were being made on the Northwest NPR-A IAP/EIS, all that had occurred was giving of notice that BLM was "preparing an amendment" and it was seeking "[i]nformation and comments on specific issues to be addressed." 68 Fed. Reg. 37173 (ER 129). Even if, at the conclusion of any future Northeast amendment process, BLM ultimately decides to offer new areas in the Northeast NPR-A for lease, the areas that might be offered and the nature of the protective stipulations and conditions of any lease offering were not known at the time of the FEIS. Given the very preliminary stage the June 23, 2003 Federal Register notice signaled, and the very broad range of topics on which BLM agency was seeking input, it was reasonable

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for BLM to conclude that it was too early in the process to incorporate any specific amendment assumed by NAEC (i.e., decreased habitat protection for Teshekpuk Lake caribou) into the cumulative effects analysis for the Northwest NPR-A plan.

The cases relied on by NAEC do not support their contrary argument. In each case, the record showed that specific proposed timber sales or land exchanges were before the agencies at the time of the NEPA analysis at issue in those cases. The early request for general scoping information in BLM's Federal Register notice was a far cry from the "virtual certainty of the transaction and its scope" that the court found existed in *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 812 (9th Cir. 1999). Here, the notice of intent for the Northeast amendment was indefinite and tentative, soliciting public input generally on "areas to be considered for oil and gas leasing" as well as an exceedingly broad array of other issues which might or might not be included in the amendment. 68 Fed. Reg. 37173 (ER 129). Many more interim steps would be necessary, including an actual proposal to amend the Northeast plan, before any oil and gas leasing might become more than "an extremely tentative possibility." *Park County Resources Council v. U.S. Dept. of Agriculture*, 817 F.2d 609, 623 (10th Cir. 1987).

Further, the Federal Register notices in the *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990), made available 280 million board

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feet of timber for immediate harvest in the next two years in five specific sub-areas of the National Forest. *Id.* at 1313. In *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1378 (9th Cir. 1998), the agency failed to adequately consider the combined effects of three specifically identified timber sales in the same area as the Cuddy Mountain timber sale. *Id.* at 1378. The issue of what constitutes reasonably foreseeable future actions was not even addressed in *Cuddy Mountain*.

Finally, *Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985), involved a different issue – whether an EA on a logging road proposal should have included an analysis of timber sale proposals because they are “connected actions” or “cumulative actions” and whether they must be evaluated together in an EIS. 753 F.2d at 758-760. *Id.* *Thomas v. Peterson* does not discuss the issue of what constitutes reasonably foreseeable future action for purposes of a cumulative effects analysis.

E. The FEIS contains a reasonable discussion of mitigation. – An EIS must include a discussion of possible mitigation measures in sufficient detail that the environmental consequences of the measures are fairly evaluated. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 351-53; *Westlands Water District*,