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ALASKA

George R. Lyle, Adam D. Harki, and Traci N. Bunkers[†]

I. LEGISLATION

The Alaska State Legislature was scheduled to convene its Second Regular Session of the Thirty-First Legislative Session from January 21, 2020, through May 20, 2020. However, on March 29, 2020, the Alaska State Legislature, like other state legislatures, suspended its session effective immediately, in response to the coronavirus pandemic (“COVID-19”). While the suspension was initially continued through May 18, 2020, the Alaska Legislature formally adjourned on May 20, 2020. Given the adjournment, the legislature did not pass any substantive oil and gas legislation.

Despite the interruptions to the legislative session caused by COVID-19, a significant oil and gas measure will go before Alaskan

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voters in the November 3, 2020, General Election in the form of Ballot Measure 1, the North Slope Oil Production Tax Increase Initiative.¹ Ballot Measure 1 would increase taxes on oil production fields that: (1) are located above sixty-eight degrees north latitude, an area known as the Alaska North Slope (“ANS”); (2) have a lifetime output of at least 400 million barrels of oil; and (3) have had an output of at least 40,000 barrels per day in the preceding calendar year.²

The ballot initiative would tax oil production using an alternative gross minimum tax or an additional production tax, whichever is greater for each month and each field.³ The alternative gross minimum tax would be 10% of the gross value of oil at the point of production where the average per-barrel price for ANS crude oil for sale on the U.S. West Coast is less than \$50. The alternative gross minimum tax would increase by 1% per \$5 increment increase in the average per-barrel price for ANS crude oil, with a maximum increase of 15%. The additional production tax would be the difference between the average production tax value of oil per month and \$50, multiplied by the volume of taxable oil produced by the producer for that month and multiplied by 15%. The additional production tax formula would also eliminate the per-taxable-barrel credit.⁴ Lastly, the ballot initiative would also require that filings and information submitted to the Alaska Department of Revenue relating to the initiative’s taxes be matters of public record.⁵

II. CASE LAW

A. Cases of the State of Alaska

1. *Ballot Measures on the Ballot*, ALASKA DIV. OF ELEC., <https://www.elections.alaska.gov/Core/ballotmeasuresonballot.php> [https://perma.cc/C8UV-ZVEH].

2. An Act Relating to the Oil and Gas Production Tax, Tax Payments, and Tax Credits, B. 19OGTX (Alaska 2019), <https://www.elections.alaska.gov/petitions/19OGTX/19OGTX%20-%20The%20Bill.pdf> [https://perma.cc/UFQ5-BMBA].

3. *Id.*

4. *Id.*

5. *Id.*

1. ConocoPhillips Alaska, Inc. (“ConocoPhillips”) and Anadarko Petroleum Corp. (“Anadarko”) v. State of Alaska, Department of Natural Resources (“DNR”)⁶

In this superior court appeal of a final administrative order issued by the Commissioner of the DNR, ConocoPhillips and Anadarko (“Appellants” or “Lessees”) appealed the DNR’s March 2, 2018, “Reconsideration of April 16, 2015, NPSL Decision.” In the March 2018 decision, the DNR Commissioner applied DNR regulation 11 AAC 83.235 to redetermine volume allocations for Appellants’ Net Profit Share Leases (“NPSLs”). The Commission also applied the regulation to reopen decades-old reports to apply a higher interest rate to the redeterminations and set the interest accrual date as the date of the original reports, rather than the redetermination date. Appellants argued that the application of the DNR regulation was impermissibly retroactive and violated the parties’ leases, as well as the contract clauses of the Alaska and United States Constitutions.⁷ The court agreed.

a. Background

The NPSLs at issue entitled the state to a percentage of the net profit from hydrocarbon that is allocated to individual land tracts. Under the NPSLs, the state was specifically entitled to royalties and net profit shares that were periodically audited or redetermined on a per-unit, per-lease basis to ensure that the state was neither underpaid nor overpaid.⁸

Under the NPSLs and relevant regulations, the state had six years to audit Appellants’ records to verify the accuracy of net profit share payments.⁹ Eleven AAC 83.245, which was enacted five years before the parties entered into the NPSLs in 1984 and which was incorporated into the parties’ leases by reference, provides, in relevant part:

(b) Each lessee shall file NPSL reports, including supporting documentation as required, on forms prescribed by the department, together with the

6. ConocoPhillips Alaska, Inc. v. Dep’t of Nat. Res., No. 3AN-18-05628 CI (Alaska Super. Ct. Apr. 13, 2020). Mr. Lyle and Mr. Harki of Guess & Rudd, P.C., co-authors of this article, represented co-appellant Anadarko before the DNR and the Alaska Superior Court.

7. *Id.* at 1–2.

8. *Id.* at 2.

9. *Id.*

appropriate payment, if any, due the state on each NPSL, not later than 60 days following the end of each month. . . .

(d) *Interest will be charged at a variable rate per year equal to the prime rate as announced from time to time by the Bank of America, San Francisco, California, plus 1.25 percent a year on the amount of the net profit share payment due the state from the due date of the net profit share payment until the payment is received by the state.*

(e) Records pertaining to development costs incurred before the start of commercial production, which are not included in NPSL reports filed under (b) of this section must be kept and maintained for four years after the expiration of the calendar year in which commercial production begins *Records of the information required in (b) of this section, including a lessee's standard or joint accounting system records, must be kept and maintained for six years after the expiration of the calendar year in which the NPSL reports were filed with the state under (b) of this section*

(f) Upon notice to the lessee, the state has the authority to audit the lessee's records *The audit period will remain open for the same period of time as specified in (e) of this section for record retention*¹⁰

The leases also provided that the applicable versions of the regulations were “as those regulations exist on the effective date of this lease,” as set forth in Paragraph 40:

SHARE OF NET PROFIT. The lessee shall pay to the State of Alaska 30% of the net profit derived from this lease. For the purpose of this paragraph, calculation of the net profit will be determined in accordance with 11 AAC 83.201 through 11 AAC 83.295 as those regulations exist on the effective date of this lease, which by reference are made a part of this lease.

10. ALASKA ADMIN. CODE tit. 11, § 83.245 (2020) (emphasis added).

The administrative appeal focused on the interplay between 11 AAC 83.245(d)–(f) and Paragraph 40 of the lease.

In 1991, seven years after the parties entered into the NPSLs, the legislature enacted AS 38.05.135(d)–(e), which sets forth a different, higher interest rate for over- and under-payment of royalties and net profit share.¹¹ After 1991, DNR completed four volumetric redeterminations involving the relevant NPSLs but did not require Appellants to prepare or file any retroactive NPSL reports or to make any interest payments for any volumetric adjustments. Instead, the parties continued their practice of applying the interest rate set forth in 11 AAC 83.245 and the leases—not the higher rate established in AS 38.05.135(d).¹² However, this practice unilaterally changed in 2014 when DNR implemented 11 AAC 83.235, which provides, in relevant part:

When the quantity of oil or gas previously allocated to a NPSL or to a NPSL lessee’s working interest ownership is retroactively redetermined due to a retroactive change approved by the commissioner in volumetric tract production allocation factors or due to the correction of a volumetric error, all revenues, costs, and expenses previously determined by volumetric tract production allocation factors, including interest on the development account, must be retroactively restated for the development account, the production revenue account, and the net profit payment account in accordance with that quantity redetermination¹³

Thereafter, on July 17, 2014, DNR approved a redetermination that altered the volumes allocated under the relevant NPSLs.¹⁴ On August 11, 2014, ConocoPhillips sent a letter to DNR Commissioner asking whether the DNR intended to apply 11 AAC 83.235 to the 2014 Redetermination. The Commissioner responded on August 19, 2014, stating that ConocoPhillips should assume that the regulation applies. Anadarko objected to the application in November 2014.¹⁵

11. *ConocoPhillips*, Case No. 3AN-18-05628 CI at 5.

12. *Id.* at 6.

13. ALASKA ADMIN. CODE tit. 11, § 83.235 (2020).

14. *ConocoPhillips*, Case No. 3AN-18-05628 CI at 6.

15. *Id.* at 7.

On April 16, 2016, the DNR Commissioner issued a formal decision stating that DNR would apply 11 AAC 83.235, the Lessees must refile their NPSL reports for the period between September 2009 and January 2014, and the Lessees must pay interest at the AS 38.05.135(d)–(e) rate of 11% per annum compounded quarterly on any amounts the Lessees owed due to refiling or redetermination. The DNR adopted this same position in 2016 and 2017 with respect to the 1991–2009 and 2010–2012 timeframes.¹⁶ The Lessees moved for reconsideration of the April 2015 decision, and on January 19, 2018, the DNR Commissioner issued a “Final Decision on Reconsideration of the Commissioner’s Clarification of 11 AAC 83.235 and its Application to Existing Net Profit Share Leases, Dated April 16, 2015,” affirming the 2015 decision in its entirety.¹⁷ The Lessees appealed, and in response, the DNR Commissioner issued a letter indicating that he was vacating his decision and would provide a “revised final decision” within ten days. The Commissioner released a second, revised decision (the “Decision”) on March 2, 2018, that omitted “Finding 9” of the Decision, which acknowledged DNR’s position that it was not bound by the six-year audit limitation of 11 AAC 83.245(d).¹⁸ The Lessees filed second appeal regarding the March Decision, and the cases were consolidated.

b. *The Application of 11 AAC 83.235 to Pre-Existing Leases Violates Alaska Law and the Contracts Clause of the Federal and State Constitutions*

Applying the substitution of judgment standard of review, the court found that DNR’s application of 11 AAC 83.235 (2014) and AS 38.05.135 (1991) to the leases executed in 1984 was an impermissible, retroactive application that modified the Appellants’ lease rights and violated the Contracts Clauses of the United States and Alaska Constitutions. The court applied Alaska’s presumption against retroactive legislation, as established in Alaska case law and Alaska’s version of the Administrative Procedure Act (the “APA”).¹⁹ The court ruled that, by ignoring the six-year limitation period established by 11 AAC 83.245(e)–(f); the parties’ twenty-seven-year-long relationship; and the effect that DNR’s interpretation would have on the Lessees,

16. *Id.*

17. *Id.*

18. *Id.* at 8.

19. *Id.* at 12.

the decision advocating the application of the 2014 regulation was impermissibly retroactive as applied to the 1984 Leases.²⁰

The court also held that DNR's application of 11 AAC 83.235 and AS 38.05.135(d) violated the Contracts Clauses of the federal and state Constitutions. The court analyzed whether such application impaired the parties' contractual relationship and whether any impairment was substantial. The court found that DNR's:

desired method . . . does indeed modify Lessees' lease rights by eliminating the six-year audit period and by attempting to apply the higher interest rate to prior years The bottom line is that DNR's recent change in position defeats Lessees' reasonable expectations under the leases and alters Lessees' financial obligations. This satisfies the second and third parts of the contracts clause analysis.²¹

Having found a substantial impairment, the court further found that DNR's position, predicated on financial gain, was insufficient to impair the leases, and not reasonably necessary.²² Given the impermissible nature of DNR's proposed application, the court reversed the DNR Commissioner's March 2, 2018, Decision.²³ The DNR chose not to appeal the court's ruling.

B. Cases of the United States District Court for the District of Alaska

*1. Native Village of Nuiqsut v. Bureau of Land Management, et al.*²⁴

In *Native Village of Nuiqsut*, the plaintiffs²⁵ sought to invalidate the Bureau of Land Management's ("BLM") approval of the 2018–2019 winter exploration activity undertaken by ConocoPhillips in the National Petroleum Reserve-Alaska ("NPR-A"). The NPR-A is located on ANS and consists of 23.6 million acres. The United States

20. *Id.* at 15–16.

21. *Id.* at 18, 20–21.

22. *Id.* at 22.

23. *Id.* at 23.

24. *Native Village of Nuiqsut v. Bureau of Land Mgmt.*, 432 F. Supp. 3d 1003 (D. Alaska 2020).

25. Plaintiffs include the Native Village of Nuiqsut, Alaska Wilderness League, Center for Biological Diversity, Friends of the Earth, Natural Resources Defense Council, and Sierra Club; *Id.* at 1011.

District Court for the District of Alaska denied the plaintiffs' requested relief.

a. Background

Pursuant to the National Petroleum Reserve Protection Act ("NPRPA"),²⁶ the Secretary of the Interior is required to "conduct an expeditious program of competitive leasing of oil and gas in the [NPR-A]."²⁷ The NPRPA provides that exploration within designated areas "containing any significant subsistence, recreational, fish and wildlife, or historical or scenic value, shall be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with the requirements of this Act for the exploration of the reserve."²⁸ The Teshekpuk Lake Special Area, which includes Teshekpuk Lake and its watershed, is one such designated area.

After the discovery of a large oil field near the eastern border of the NPR-A, additional discoveries in the northeastern portion of the NPR-A led to the creation of the Greater Mooses Tooth ("GMT") and the Bear Tooth exploratory units. Thereafter, in 2012, BLM published a final integrated activity plan ("IAP") and environmental impact statement ("EIS") (the "2012 IAP/EIS") to govern management of "all BLM-managed lands in the [NPR-A]."²⁹ The subsequent Record of Decision ("ROD") adopted Alternative B-2 of the IAP/EIS, which made 11.8 million acres of the NPR-A available for oil and gas leasing but kept much of the Teshekpuk Lake Special Area closed to leasing. The ROD also adopted several lease stipulations and best management practices ("BMPs"), or mitigation measures, that were "required, implemented, and enforced at the operational level for all authorized (not just oil and gas) activities in the planning area."³⁰

In 2004, the BLM prepared an EIS and approved ConocoPhillips's proposal to construct satellite drill pads in the NPR-A, including two within the GMT unit (GMT1 and GMT2). BLM completed a supplemental EIS to analyze revisions that ConocoPhillips made to its plan for the GMT1 drill pad in October 2014, and the BLM subsequently approved the revisions in a February 2015 ROD. Three years later, BLM approved revisions to ConocoPhillips's plan for GMT2 after completing a supplemental EIS in August 2018 and

26. 42 U.S.C. § 6501 et seq. (2012).

27. 42 U.S.C. § 6506a(a) (2012).

28. 42 U.S.C. § 6504(a) (2012).

29. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1012.

30. *Id.* at 1013.

issuing a ROD approving the revisions in October 2018. In 2013, 2015, 2017, and 2018, BLM approved a series of winter exploratory drilling programs within the NPR-A, after completing an Environmental Assessment (“EA”) and making a finding of no significant impact (“FONSI”) or a finding of no new significant impact (“FONNSI”) beyond those already considered in previous EISs.³¹

In August 2018, ConocoPhillips completed an Exploration and Appraisal Program describing its planned activities for the 2018–2019 winter season to “explore and appraise oil and gas potential on” leases it owned within the NPR-A, west of Nuiqsut, and GMT1 and GMT2 in the Bear Tooth unit.³² In support, ConocoPhillips submitted to BLM an application for a right-of-way grant, requests to deviate from several of the 2012 IAP/EIS BMPs, and applications for permits to drill up to six exploration wells in or near the Bear Tooth unit.

BLM published a final EA on December 6, 2018 (“2018 EA”), which proposed approving ConocoPhillips’s various applications and requests and tiered to the 2012 IAP/EIS and the supplemental EISs for the GMT1 and GMT2 drill pads. BLM subsequently issued a FONNSI and released a ROD authorizing ConocoPhillips to conduct exploration drilling and testing at up to eight well sites and to build associated infrastructure.³³ ConocoPhillips also received approval to engage in geotechnical exploration near the GMT1 and GMT2 projects.³⁴

Nuiqsut is a predominantly Alaska Native community of roughly 500 people located on the eastern border of the NPR-A. The court noted that Nuiqsut’s proximity to petroleum development resulted in increased conflicts with the community’s traditional ways of life and that many of ConocoPhillips’s activities during the winter of 2018–2019 occurred in the general vicinity of Nuiqsut.

The plaintiffs filed their complaint against the defendants³⁵ on March 1, 2019, claiming that BLM’s environmental analysis of ConocoPhillips’s 2018–2019 winter exploration plan was deficient and seeking declaratory and injunctive relief. The plaintiffs filed an

31. *Id.*

32. *Id.*

33. *Id.* at 1014.

34. *Id.*

35. Defendants included Bureau of Land Management, Nichelle Jones, David Bernhardt and Ted Murphy, as well as Intervenor Defendant ConocoPhillips Alaska, Inc; *Id.* at 1011 n.1.

amended complaint on March 26, 2019, which raised the following claims:

- i. That BLM's FONNSI for the winter exploration program, and its decision not to prepare an EIS, did not consider impacts to the Teshekpuk Caribou Herd and subsistence activity and thus violated the National Environmental Policy Act ("NEPA")³⁶ and the Administrative Procedure Act ("APA");³⁷
- ii. That BLM's FONNSI and decision not to prepare an EIS failed to consider the cumulative impacts of the winter exploration program, and thus violated NEPA and the APA;
- iii. That BLM's failure to consider the winter exploration program and geotechnical exploration program in a single EIS violated NEPA, its implementing regulations, and the APA;
- iv. That BLM failed to consider appropriate alternatives to the proposed winter exploration plan, in violation of NEPA, its implementing regulations, and the APA;
- v. That BLM failed to consider alternatives to the winter exploration plan that would reduce the impact to subsistence, in violation of the Alaska National Interest Lands Conservation Act ("ANILCA"),³⁸ and the APA.³⁹

*b. Plaintiffs' Claims*⁴⁰

i. Impacts to Caribou and Subsistence

The court rejected the plaintiffs' allegation that it was arbitrary and capricious for BLM to issue a FONNSI and authorize the program without first completing an EIS, finding that significant consideration was given to impacts on caribou and subsistence uses.

36. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1015; 42 U.S.C. § 4332(C) (2012).

37. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1015; 5 U.S.C. § 706(2) (2012).

38. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1016; 16 U.S.C. § 3120(a) (2012).

39. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1016.

40. After determining that all Plaintiffs, with the exception of Friends of the Earth and the Center for Biological Diversity, possessed standing, the Court addressed each of the Plaintiffs' substantive claims in the applicable context, noting that the parties' briefing did not "track" the five claims set forth in the Amended Complaint.

The court noted that the 2018 EA characterized caribou as a “minimally impacted” species and that the 2012 IAP/EIS described the Teshekpuk Caribou Herd in detail, discussing population trends, seasonal distribution, calving success, and where the herd typically winters. The court also found that the 2012 IAP/EIS discussed the potential impacts of exploration activities on caribou for each of the five alternatives it considered.⁴¹

While the court agreed with the plaintiffs that portions of the record reflected uncertainty about the extent of winter exploratory impact on the caribou herd, the court nonetheless found that the plaintiffs failed to establish that the 2018 EA’s discussion of caribou was inadequate or that BLM’s decision to issue a FONNSI was arbitrary and capricious. Specifically, the court found that the 2018 EA adequately explained the bases for its conclusion that ConocoPhillips’s winter exploration program would have minimal impacts on the caribou that “would not affect herd distribution or reduce populations.”⁴²

The court also rejected the plaintiffs’ claims that the defendants violated NEPA by “fail[ing] to either prepare an EIS or supply a convincing statement of reasons explaining why the effects to subsistence from winter exploration will be insignificant.”⁴³ The court found that the 2018 EA took the requisite “hard look” at the proposed action’s impacts to subsistence activities, given that both the 2012 IAP/EIS and 2018 GMT2 SEIS discussed subsistence use by Nuiqsut residents. The court also found that, because the 2018 EA tiered to the 2012 findings, no further analysis of impacts to subsistence was necessary.⁴⁴ Consequently, the EA’s analysis was reasonable, and the issuance of a FONNSI with respect to subsistence uses was neither arbitrary nor capricious.⁴⁵

ii. Cumulative Impacts

The court also dismissed the plaintiffs’ claim that the 2018 EA fails to justify its conclusion that cumulative impacts to caribou and subsistence activities from the winter exploration and related projects would be insignificant.

Under NEPA, an agency must consider “cumulative effects, which ‘result[] from the incremental impact of the action when added to other

41. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1027.

42. *Id.* at 1029–30.

43. *Id.* at 1031, 1046.

44. *Id.* at 1035–36.

45. *Id.*

past, present, and reasonably foreseeable actions”⁴⁶ To satisfy this requirement, an EA’s analysis of cumulative impacts “must give a sufficiently detailed catalogue of past, present, and future projects and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.”⁴⁷

While the EA did not contain a section analyzing the cumulative impacts on caribou or geotechnical explanation, the court found that the 2018 EA sufficiently discussed cumulative impacts of all proposed projects in the winter exploration project area. The court again noted that the EA’s cumulative impacts section was tiered to the 2012 IAP/EIS, the 2014 GMT1 SEIS, and the 2018 GMT2 SEIS, all of which included a detailed discussion of the expected cumulative impacts to subsistence caused by oil and gas exploration and development activities.⁴⁸ As such, the FONNSI was not arbitrary and capricious with respect to cumulative impacts.⁴⁹

iii. Alternatives Under NEPA

The court also rejected the plaintiffs’ claim that the defendants violated the NEPA by failing to consider appropriate alternatives in the 2018 EA. The court noted that under NEPA, an agency is only required to include a brief discussion of reasonable alternatives in an EA,⁵⁰ and therefore the court found that the 2018 EA’s consideration of only two alternatives (the preferred alternative and the no-action alternative) did not render the EA deficient because “no statutory and regulatory requirements establish the minimum number of alternatives that an agency must consider.”⁵¹

Likewise, the court also rebuffed the plaintiffs’ argument that the failure to consider each of the alternatives in detail rendered the EA inadequate. The court noted that the determination of whether an alternative is reasonable and appropriate depends on the stated purpose for the proposed action: “[s]o long as all reasonable alternatives have been considered and an appropriate explanation is

46. *Id.* at 1036, 1036 n.230; 40 C.F.R. § 1508.7 (2012).

47. *Native Village of Nuiqsut*, 432 F. Supp. 3d at 1036.

48. *Id.* at 1039–40.

49. *Id.* at 1040.

50. *Id.* at 1040 (citing *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)).

51. *Id.* at 1041 (citing *Native Ecosys. Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005)).

provided as to why an alternative was eliminated, the regulatory requirement is satisfied.”⁵² The court found that the 2018 EA identified the need for proposed action and explained that the purpose of the proposed action was to provide reasonable access to and use of public lands to allow the applicant to explore and appraise oil and gas potential.⁵³

The court also determined that the 2018 EA further explained that it considered but omitted from analysis an alternative that would reduce the number of wells approved for drilling, noting that “[t]he proposed action itself . . . significantly limits alternatives for the location and timing of exploration” and that “[l]ocations of leases with oil and gas prospects limit the options for feasible drill site locations and access routes.”⁵⁴ The EA indicated that a “fewer-wells” alternative “would be contrary to the terms of [ConocoPhillips’s] leases, which allow[] the company to have a drilling program on its leases after going through the review process for particular wells.”⁵⁵ Therefore, the court held that the EA provided an “appropriate explanation” for eliminating an alternative that would authorize fewer wells, particularly in light of the EA’s conclusion that a “fewer-wells” alternative “would not meet the purpose and need” of the proposed action.⁵⁶

The court also rejected the plaintiffs’ claim that the 2018 EA was incomplete because it failed to include an alternative requiring ConocoPhillips to comply with all of the 2012 IAP/EIS’s BMPs. The court held that the 2018 EA considered a “proper range of alternatives” because the two alternatives considered in 2018 EA authorized meaningfully different levels of activity. The court noted that Ninth Circuit precedent establishes that an EA considering only a preferred alternative and a no-action alternative can satisfy an agency’s duty under NEPA.

iv. Alternatives Under ANILCA

Finally, the court rejected the plaintiffs’ final claim that BLM did not consider alternatives that would reduce or eliminate the use of lands necessary for subsistence in violation of ANILCA. Section 810(a) of ANILCA provides that:

52. *Id.*

53. *Id.*

54. *Id.* (quoting 2018 EA, AR8495).

55. *Id.* at 1041–42.

56. *Id.* at 1042.

the head of the Federal agency having primary jurisdiction over such lands...shall evaluate the effect of such use, occupancy or disposition on subsistence uses and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.⁵⁷

The court found that BLM fulfilled its obligation because the 2018 EA contained an ANILCA section 810 evaluation that described the winter exploration program and evaluated its effect on subsistence uses and needs, as well as effects on harvestable fisheries and wildlife resources.⁵⁸ The court also considered that the evaluation sufficiently addressed other alternatives by providing that “no other lands [were] appropriate for this specific purpose” and that the no-action alternative was “contrary to the current [a]dministration’s policy and [ConocoPhillips’s] lease rights.”⁵⁹

Based on the foregoing, the court upheld the 2018 EA and ROD authorizing ConocoPhillips’s 2018–2019 winter exploration in the NPR-A and denied the plaintiffs’ requests for declaratory relief and vacatur of the 2018 EA and the ROD.⁶⁰ The plaintiffs appealed the ruling on March 9, 2020.⁶¹

2. National Audubon Society et al. v. Bernhardt et al.⁶²

National Audubon Society was one of two lawsuits filed in August 2020 following the August 17, 2020, ROD for oil and gas leasing in the Arctic National Wildlife Refuge (“ANWR”) Coastal Plain.⁶³ The

57. *Id.* at 1044 (citing 16 U.S.C. § 3120(a)).

58. *Id.* at 1044, 1046.

59. *Id.* at 1044 (quoting 2018 EA ANILCA Evaluation, AR8581-86).

60. *Id.* at 1046.

61. See Notice of Appeal by Alaska wilderness League, Friends of the Earth, Native Village of Nuiqsut, Natural Resources Defense Council, and Sierra Club, Native Vill. of Nuiqsut v. Bureau of Land Mgmt., (D. Alaska Mar. 9, 2020) (No. 3:19-cv-0056-SLG).

62. See Compl., Nat’l Audobon Soc’y v. Bernhardt, (D. Alaska Aug. 24, 2020) (No. 3:20-cv-00206-TMB), 2020 WL 4982493.

63. While these cases were filed in 2020 and have not been resolved, they are included herein based on their relevance to ANWR.

plaintiffs⁶⁴ filed suit against the defendants,⁶⁵ alleging that the ROD and final EIS violate the NEPA, the Endangered Species Act, the National Wildlife Refuge System Administration Act, the Alaska National Interest Lands Conservation Act, and the Administrative Procedure Act.

The plaintiffs asked the court to declare that defendants violated the above laws and that the defendants' actions were arbitrary, capricious, and not in accordance with the procedure required by law. The plaintiffs further asked the court to set aside the defendants' final EIS for the plan, as well as any actions taken by the defendants in reliance on the final EIS.⁶⁶

3. *Gwich'in Steering Committee, et al. v. Bernhardt, et al.*⁶⁷

The second lawsuit regarding the ANWR ROD, *Gwich'in Steering Committee*, was brought by the plaintiffs⁶⁸ against the defendants⁶⁹ In seeking declaratory and injunctive relief, the plaintiffs requested that the court find the defendants' actions in issuing the EIS, ROD, and ANILCA Section 810 Final Evaluation to be arbitrary, capricious, an abuse of discretion or not in accordance with law, and without observance of procedure required by law. The plaintiffs asked the court to "vacate and set aside as unlawful any and all agency approvals and underlying analysis documents, including the final EIS, ROD, ANILCA Section 810 Final Evaluation, and BiOp, as well as any decisions and documents based on the unlawful actions, including decisions to lease and leases."⁷⁰ The plaintiffs also sought an

64. Plaintiffs include National Audubon Society, Natural Resources Defense Council, Center for Biological Diversity, and Friends of the Earth.

65. Defendants include David Bernhardt in his official capacity as Secretary of the Interior, the Bureau of Land Management, and the U.S. Fish and Wildlife Service.

66. Compl. At 21, *Nat'l Audobon Soc'y v. Bernhardt*, (D. Alaska Aug. 24, 2020) (No. 3:20-cv-00206-TMB), 2020 WL 4982483.

67. Compl., *Gwich'in Steering Comm. v. Bernhardt* (D. Alaska Aug. 24, 2020) (No. 3:20-cv-00204-JWS).

68. Plaintiffs include the Committee, as well as Alaska Wilderness League, Alaska Wildlife Alliance, Canadian Parks & Wilderness Society-Yukon, Defenders of Wildlife, Environment America Inc., Friends of Alaska National Wildlife Refuges, National Wildlife Federation, National Wildlife Refuge Association, Northern Alaska Environmental Center, Sierra Club, The Wilderness Society, and Wilderness Watch.

69. Defendants include David Bernhardt in his official capacity as Secretary of the Interior, the U.S. Department of the Interior, the Bureau of Land Management, and the U.S. Fish and Wildlife Service.

70. Compl. At 69, *Gwich'in Steering Comm. v. Bernhardt* (D. Alaska Aug. 24,

injunction prohibiting BLM from authorizing any activities under the Coastal Plain leasing program that rely on the documents implicated in the lawsuit.⁷¹

2020) (No. 3:20-cv-00204-JWS).

71. *Id.*