Kuukpik

February 21, 2024

Representative Thomas Baker
State Capital Room 411
Juneau, Alaska 99801

Representative Baker:

Attached is Kuukpik Corporation's comment letter on the proposed rule for Special Areas within the National Petroleum Reserve – Alaska.

Regards,

Andrew Mack

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CEO, Kuukpik Corporation

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Kuukpik

December 7, 2023

Tracy Stone-Manning
Director of the Bureau of Land Management
U.S. Department of the Interior
Bureau of Land Management
1849 C St. NW
Room 5646
Washington, DC 20240
Attn: 1004-AE-92

Via email to BLM_HQ_PRA_Comments@blm.gov

Re: Management and Protection of the National Petroleum Reserve: Alaska, Proposed Rule RIN 1004–AE

Dear Ms. Stone-Manning:

Kuukpik is the Alaska Native Village Corporation for Nuiqsut. In that capacity, Kuukpik is responsible for defending the social and cultural traditions of the Kuukpikmiut—the Indigenous people of the Colville River Delta—while also providing for the economic well-being of its shareholders. As you saw and heard when you visited Nuiqsut last year, Kuukpik has pursued those sometimes seemingly conflicting goals by attempting to facilitate balance between Nuiqsut's subsistence lifestyle and the oil and gas development that has been taking place all around us for nearly three decades. Although nothing is more important to Kuukpik than preserving and fostering the subsistence lifestyle that has sustained the Kuukpikmiut for generations, the reality is that, if done correctly, oil and gas development can bring much needed benefits to our community and shareholders—benefits that residents *need* if they are to continue to grow and develop as a community and as a people.

We know BLM understands this at some level. Throughout the Administration's public outreach on the Proposed NPR-A Special Area Rule ("Proposed Rule"), one word has been repeated more than any other: "balance." We've heard BLM Alaska staff and management talk repeatedly about how important it is for the final rule to "balance" oil and gas activity with protecting subsistence resources and activities. We've heard how the applicable laws require

BLM to "balance" maximum protection of surface areas with expeditious oil and gas development. Kuukpik agrees with those goals.

In fact, Kuukpik has historically only supported balanced and responsible oil and gas development. Even where we were skeptical of proposals, we have worked with developers to reduce impacts as much as reasonably possible and to ensure that Nuiqsut receives benefits from the projects. If that can be achieved, Kuukpik will support a project despite the impacts it may have.

We have also sought balance by thinking outside the box. For example, as part of its ultimate support for the Willow Project, Kuukpik secured a mitigation measure that requires BLM to explore and implement long-term, durable protection for a million of acres of prime caribou and waterfowl habitat around Teshekpuk Lake. That proposal—Mitigation Measure No. 27, which is a Nuiqsut-led initiative completely unrelated to the Proposed NPR-A Special Area Rule at issue here—is specifically designed and calibrated to offset impacts to the subsistence resources that will be most impacted by Willow specifically.

Through these kinds of strategic and targeted approaches, Kuukpik has succeeded in fostering economic activity in and around Nuiqsut, bringing infrastructure to the community, and facilitating development for the benefit of residents throughout the North Slope, all while maintaining a healthy and thriving subsistence lifestyle. Achieving that balance is the crux of everything Kuukpik tries to do with respect to oil and gas development.

Recently, a third group has grown increasingly loud, pulling in another direction: activists and NGOs that have apparently decided they want to end oil and gas development in the NPR-A, no matter what. These groups have no real connection to Nuiqsut, have never been there, *will* never go there, but have nevertheless decided that the balance Kuukpik and Nuiqsut have been able to strike with industry over the past 30 years is no longer sufficient. They have taken it upon themselves to stop oil and gas development in an area that has long managed just fine without them.

These voices don't speak for Kuukpik, and they don't speak for Nuiqsut. No single entity does. But if one thing is clear from Kuukpik's work over the past 30 years, it's that extreme and absolute positions don't work here. Kuukpik and most of the people we represent do not support ending oil and gas development—just like we wouldn't support allowing developers free reign to drill wherever they see dollar signs buried thousands of feet below the tundra. Rather, Kuukpik and Nuiqsut seek balance. Just as we always have.

The Proposed Rule does not achieve that. It is not balanced.

Kuukpik therefore does not support the Proposed Rule as currently drafted. It is too extreme, too unclear in many important respects, and too politically untenable to serve as a long-term regulatory regime for the NPR-A. A rule that is not balanced and acceptable to most local stakeholders (including—whether the Administration likes it or not—oil and gas developers) will

be replaced as soon as this Administration is out of office. Those who support the Proposed Rule should understand that reality as they decide whether to continue pushing this rule forward.

A rule that is reasonable, balanced, and fair would be much more likely to achieve meaningful results. We would therefore prefer to see a final rule that doesn't foreclose so much development up front, but rather, leaves a realistic path the carry out projects that would provide benefits without having unnecessary or unjustified impacts on subsistence. Because *we can have both*: we can have a thriving subsistence culture in Nuiqsut and across the North Slope, and we can have the oil and gas development that supports so many communities and families in the region. We therefore urge the Department of Interior to listen carefully to the local stakeholders who have lived with these issues and challenges for most of their lives, nearly all of whom oppose the Proposed Rule.

I. The Proposed Rule will not achieve the Administration's goals.

Having participated extensively in every IAP process since 1998, Kuukpik understands as well as anyone—and better than most—the need for balance when it comes to managing the NPR-A. For example, during the NEPA process for the 2013 IAP, Kuukpik advocated for specific, targeted protections for different areas between Nuiqsut, Teshekpuk Lake, and the Beaufort Sea coast.[1] The protections we sought were commensurate with the sensitivity and importance of each specific area. We identified areas where leasing should continue to be deferred and others where we believed leasing was acceptable, but only with certain infrastructure limitations. When Preferred Alternative B-2 was released, it included many of these suggestions, which was good. But B-2 was also *overly* protective in several respects, most notably by designating between 500,000 and 1 million acres of marginal habitat as "unavailable for leasing" even though BLM's own EIS did not support that highest level of protection for these areas.[2]

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[1] See, e.g., Kuukpik's June 15, 2012, Comments on the Draft EIS for the NPR-A IAP/EIS, pp. 30-37.

[2] See Kuukpik's November 2, 2012, Preliminary Comments on Preferred Alternative B-2 of the Draft IAP/EIS for the NPR-A, pp. 2-3:

> In our view, the management plan currently in effect (Alternative A) erred on the side of not providing sufficient protections to key land and wildlife resources in NPR-A. In our Joint Comment Letter, we sought to make the existing management plan more restrictive and protective of the environment and wildlife and Native culture in several areas by (1) extending the Teshekpuk Lake leasing deferral, (2) adding additional caribou calving grounds and migration corridors to the areas off limits to leasing, (3) supporting creation of a one mile coastal buffer, (4) proposing creation of a BLM working group for Chukchi and Beaufort Sea pipeline routing and design, with membership including the city, Native village and village corporation for each affected village (plus the North Slope Borough and Arctic Slope Regional Corporation), (5) broadening the purpose of the Teshekpuk

Kuukpik urged the Obama Administration not to prohibit leasing in those marginal habitat areas—not because we categorically support development in those areas, but because simply taking huge areas off the table for development is not balanced, appropriate, or even successful at stopping development. Rather, experience shows that instituting overly aggressive protective measures typically sets in motion a regulatory pendulum that invariably swings back *hard* in the other direction. This backlash can quickly undo whatever good the protections might otherwise have accomplished.

And indeed, that is exactly what happened. The next administration promptly threw the Obama Administration's plan out in favor of an IAP that opened nearly the entire NPR-A to leasing and surface infrastructure. That's exactly what Kuukpik sought to avoid when we argued against the overly restrictive aspects of Alternative B-2.[3] Kuukpik believes it would have been

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> Lake Special Area to include caribou and shorebirds, and (6) closing administrative loopholes in existing protections. Alternative A is too lax and needs to be fixed.
>
> Alternative B-2, by contrast, fixes some of these problems, which is good. But B-2 then proceeds to go overboard in the direction of prohibiting oil and gas leasing and development, creating restrictions as to some lands that are unnecessary under BLM's own scientific wildlife data. We think that the current Teshekpuk Lake Special Area should be expanded, but B-2 more than doubles its size from 1.75 million acres, to 3.76 million acres, almost all of which is unavailable to leasing. Comparing the areas B-2 would make unavailable to leasing to key areas mapped by BLM as crucial for caribou and for sensitive types of wildfowl (such as Spectacled Eider, Steller's Eider, black brant, yellow billed loons, and others) shows that much of the "unavailable to leasing" area is not critical to any of these species. In other words, B-2 errs on the side of excessive restrictions.

[3] *Id.*:

> [T]he B-2 approach is so restrictive that it is a politically unstable and unbalanced management plan that is unlikely to survive a change in future administrations. So far removed from a happy medium are some of B-2 restrictions that it would be that much easier for a future administration to replace them. By treating these less valuable areas the same as the truly critical areas within the banks of Teshekpuk Lake and to the north, east, and near south of Teshekpuk Lake, B-2 would make it that much easier to relax the protections of those critical areas as it relaxed those for the relatively non-critical areas to the south of the Lake....
>
> The adoption of Alternative B-2 would all but assure that there will be another IAP/EIS process when a new president comes into office, whether next year or four years from now. A more balanced preferred alternative than B-2 would have a much greater likelihood of continuing in effect and sparing the federal government and all the stakeholders yet another round of IAP/EIS process.

more effective to adopt an IAP that was more balanced and reasonable, and which industry and stakeholders could potentially have accepted long-term as a compromise. Such a compromise might not have been thrown out and replaced as soon as the political winds shifted.[4]

Kuukpik's goal continues to be achieving a balanced middle ground that can endure for the long-term. We think that should be DOI's goal as well. Kuukpik would support balanced regulations that restrict development where and to the extent it is necessary, but only if they *also* facilitate reasonable oil and gas development in the National Petroleum Reserve.

This position may seem unusual in light of Kuukpik's proposal to set aside a million acres of land around Teshekpuk Lake. That proposal—which is now known as Mitigation Measure No. 27 of the Willow Record of Decision and has **nothing** to do with this Proposed NPR-A Special Area Rule—would prohibit oil and gas development on about a million acres around Teshekpuk Lake. Mitigation Measure No. 27 ("MM27") is a recent example of a balanced and reasonable solution that is designed to offset and be commensurate with the impacts development is likely to have on the Teshekpuk Lake Caribou Herd. In light of those anticipated impacts, prohibiting development in the area that has been consistently identified as the Herd's single most important habitat is a reasonable tradeoff—it's balanced. MM27 focuses the highest level of protection on the area that needs it most. But it also implicitly acknowledges that this highest level of protection is not appropriate everywhere—or even in every location hat is "important" for caribou and waterfowl—by not over-reaching. This single core area would be permanently protected, but everywhere else would remain subject to the more nuanced and adaptive management that exists elsewhere in the NPR-A.

Kuukpik takes a similarly nuanced view of the Proposed Rule. We could support certain reasonable elements of the rule, but we fear that much of the Proposed Rule is overly broad and more likely to lead to unproductive litigation rather than win-win outcomes. As currently written, the Proposed Rule is likely to unnecessarily stifle development that realistically *could* be accomplished without significant negative impacts on subsistence users. Climate activists and policy makers in Washington may not care about that, but local residents who actually live in the NPR-A do care. Many Nuiqsut residents want to see responsible development continue, so long as the benefits continue to outweigh the impacts. Even those that are more skeptical at least recognize that projects should be evaluated on a case-by-case basis, not simply foreclosed by a sweeping regulation drafted thousands of miles away.

Even those whose sole goal is to stop development in the NPR-A should appreciate that an unbalanced rule without any meaningful local support will not achieve their goal. Enacting this Proposed Rule would only ensure that it either dies in court or is repealed and replaced at the

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[4] Of course, in this particular case, President Biden was able to re-institute the Obama-era restrictions, limiting the impact that the Trump-era replacement had on the ground.

earliest possible opportunity. So pushing this Proposed Rule through without modifications that are supported by local residents ultimately doesn't make sense for anyone.

II. The Proposed Rule must not interfere with subsistence access to Special Areas.

Whether or not the Proposed Rule can survive long-term, Kuukpik has significant concerns that would arise immediately if the Proposed Rule is adopted as-is. Kuukpik views the Proposed Rule through a very specific lens, one that is different from every other stakeholder that BLM will hear from: How would this rule affect Nuiqsut? This is the fundamental question for Kuukpik, just as it always is when some new policy or project is proposed in the NPR-A. As the neighboring landowner, the decisions made in the NPR-A affect Kuukpik, its Board and shareholders, and the entire community more than anyone else. It's therefore critical that BLM and the Administration consider very specifically how this Proposed Rule will affect the people of Nuiqsut.

One of the consistent concerns Kuukpik has heard and discussed within the community is the Proposed Rule's potential impacts on people's ability to practice subsistence in the NPR-A. This is perhaps the most important single item affecting Kuukpik's opinion of the Proposed Rule. Kuukpik will categorically oppose any version of this rule that would allow BLM to prohibit access in the NPR-A or its Special Areas for subsistence purposes.

The Proposed Rule as currently drafted appears to do precisely that. Proposed Section 2361.50(b) states, "The Bureau will provide appropriate access to and within Special Areas for subsistence purposes to the extent consistent with assuring maximum protection of all significant resource values that are found in such areas." FR 62042. This phrasing is extremely troubling because it gives BLM discretion to decide not only what level of access to and within Special Areas is "appropriate," but also because it subverts access for subsistence users to "assuring maximum protection of all significant resource values that are found" there. In other words, if BLM perceives a conflict between subsistence and any "significant resource value," BLM could deny or restrict access to subsistence users just because it decides it is "appropriate" to do so. That's frightening to the community, and it's just plain wrong. North Slope residents—most of them Alaska Natives who have used these lands for thousands of years without impediment or problem—have always had unfettered access to the NPR-A and its Special Areas for subsistence purposes. Indeed, subsistence is one of the resource values that Special Areas are supposed to ensure and protect.[5]

Proposed Section 2361.50(b) must be re-written to make it clear that BLM's authority to designate and manage Special Areas (or any other land use management authority in the NPR-A)

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[5] 42 USC 6504(a); see also proposed section 2361.5 defining "significant resource value" to include subsistence and 2361.20(a)(5); (b)(5), (d)(4) and (e)(2), each citing subsistence as an additional "significant resource value" for which each referenced special area should be managed.

shall never be used to restrict access for local subsistence users.[6] On the contrary, the rule should be modified where necessary to promote and ensure subsistence access.[7] Kuukpik will adamantly oppose implementation of a rule that makes subsistence uses subservient to other, amorphous and undefined "values," or which grants BLM discretion to limit subsistence access in the manner currently proposed. Period.

III. "Maximum Protection" does not mean "no development".

Many of the substantive imbalances in the Proposed Rule appear to flow from the same underlying flaw in interpreting and implementing 42 USC 6504(a)'s "maximum protection" language. The Proposed Rule's introduction and summary repeatedly reference this phrase to justify many (if not most) of the standards and processes created by the rule that have not been part of BLM's past practices. This consistent focus on "maximum protection" has led to an imbalanced Proposed Rule because it has not been properly weighed against competing NPRPA purposes.

A. A presumption that cannot be overcome is not a presumption; it's a prohibition.

42 USC 6504(a) states that oil and gas activities in Special Areas of the National Petroleum Reserve "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 development of the Reserve.[8] Kuukpik understands DOI's position that "[t]he 'maximum protection' standard is an unusually high protective bar" because it is a somewhat unique statutory phrase. FR 62027. But "maximum protection" is not so unique that it justifies being interpreted and implemented as "no development" as the Proposed Rule often seems to do.

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[6] This isn't to say the government has no role to play in managing subsistence resources. Certainly, if the TLCH was facing a population crisis, for example, it might be appropriate to evaluate narrowly tailored, temporary rules to manage that crisis. But such restrictions would need to be examined very carefully and employed only as a very last resort, with consultation from biologists and Native subsistence users, not simply announced in a land use planning decision like this Rule seems to contemplate.

[7] See 88 Fed. Reg. 173, 62026, 62037 ("[T]his section would require the BLM to provide appropriate access to and within Special Areas for subsistence purposes..."). Kuukpik would like to see more definitive language here, such as clarifying, for example, that access by motorized vehicle (snow machines, ATV's, etc.) will never be denied in favor of some other preference for nonmotorized recreation, or that access during certain important subsistence periods (such as fall migration) will be given additional preference over other uses.

[8] Kuukpik agrees that the statute applies to development, not just exploration. 88 Fed. Reg. 173, 62028-62029; *N. Alaska Env't Ctr. v. Norton*, 361 F. Supp. 2d 1069, 1072 (D. Alaska 2005), aff'd sub nom. *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969 (9th Cir. 2006) ("Congress has recognized the Reserve as a potential source for oil and gas exploration *and production* while simultaneously assuring that environmental concerns would not be overlooked.") (emphasis added).

The clearest example is where the Proposed Rule essentially converts lands within Special Areas that are currently "available" for leasing and new infrastructure to "unavailable" for those activities. It does so by establishing a presumption that, as written, is either impossible to overcome or so subject to litigation as to be unworkable. On currently "available" lands, the Proposed Rule would "presume [leasing and new infrastructure] should not be permitted" unless "specific information…clearly demonstrates that those activities can be conducted with no or minimal adverse effects on significant resource values."[9] This seems to be an impossible standard to satisfy. Indeed, every word or phrase appears to raise the bar higher: "specific information," "clearly demonstrates," "no" adverse effects, or at best, "minimal adverse effects…" These are not common or normal regulatory phrases either.

Typically, a regulation like this would give more discretion to authorized BLM officers to deal with individual proposals or situations. The heightened standards in this proposed section (i.e., "specific information," "clearly demonstrates") are also unnecessarily stringent and seem designed only to create an endless debate in litigation. The regulation should therefore incorporate more moderate and nuanced language. Overcoming the presumption by showing that there would not be "unreasonable impacts," for example, would allow for judgment and balancing, rather than a one-sided evaluation of whether a proposal has "no or minimal impacts."

Proposed Section 2361.40(c) as currently drafted doesn't allow for that kind of balancing. The only way to have "no impacts" is to have no development. It's not clear that "minimal impacts" expands the window very much, especially when read in the context of BLM's interpretation of the "maximum protection" language. This phrasing therefore would likely effectively convert lands within Special Areas that are currently "available" for leasing and new infrastructure into lands that are *not* available even though the 2013 and 2022 IAP NEPA processes didn't require or support that designation.

Don't misunderstand: Kuukpik is comfortable taking certain *limited* areas off the table for development. Our proposal in MM27 to permanently prevent development around Teshekpuk Lake in the core of the TLSA, if successful, would be even more restrictive than the current Proposed Rule in that specific area. But that's a special case that is focused *narrowly* on the most important core habitat. It is also designed specifically to offset Willow's impacts on the Herd.

The Proposed Rule lacks that specificity and nuance. Rather, it just takes millions of acres off the table for development by creating a "presumption" that appears nearly impossible to overcome, or which at a minimum, will create uncertainty and lawsuits. The goal of the regulation should be to create a balanced management system that works, not keep lawyers employed.

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[9] 88 Fed. Reg. 173, 62042, Sec. 2361.40(c).

Kuukpik understands DOI wants to limit impacts within Special Areas, but treating "maximum protection" as though it effectively means "no oil and gas development" is not reasonable in principle and not consistent with the statute BLM is trying to implement. The text of the relevant statute doesn't require "maximum protection," full stop. Rather, it requires activities in Special Areas to "be conducted in a manner which will assure the maximum protection of such surface values to the extent consistent with" the Act's competing requirement to develop oil and gas in the NPR-A. 42 USC 6504(a). At the risk of keeping those same lawyers employed, this point requires some statutory analysis: under the plain language of the statute, "maximum protection" of Special Areas is to be assured "to the extent" possible while nevertheless expeditiously developing the oil and gas reserves in those same Special Areas. In other words, the requirement to assure maximum protection must yield in certain cases where it would prevent expeditious development of resources.

This interpretation is supported by other relevant statutes and regulations that show Congress did not intend for "maximum protection" to serve as a bar to development; more like a hurdle). For example, BLM is also required to "avoid unnecessary surface damage and to minimize ecological disturbances throughout the reserve," and prevent "unnecessary or undue degradation." 43 USC 1732(b); H.R. Rep. 94-942. at 21 (1976) (quoted at FR 62028). By using words like "unnecessary" and "undue," Congress implicitly recognized that some impacts are necessary, unavoidable, and will occur as BLM implements the competing requirements to ensure protection of surface resources while also developing the petroleum resources that make this area so valuable economically. Treating "maximum protection" as though it effectively requires "no impacts" entirely ignores these acknowledgements and statutory directives.

B. A presumption should allow limited development where the benefits outweigh the impacts.

So where does that leave us? Kuukpik supports applying heightened protections in Special Areas, and even doing so through a presumption against development. But there must be a realistic way to overcome that presumption. Otherwise, the rule is neither balanced nor consistent with hierarchy of priorities established in 42 USC 6504.

In fact, Kuukpik has previously suggested a presumption with standards that would work much better and be consistent with the law.[10] Kuukpik has previously argued (in the context of

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[10] Kuukpik's Scoping Letter on the Willow MDP (Sept. 28, 2018), p. 6-7:

> The TLSA and TLCHA were set aside precisely because of the importance of these northern coastal areas to migrating caribou—caribou that are essential subsistence resources not just to Nuiqsut but throughout the North Slope (both as a result of migrations and sharing of harvests between villages). In order for CPAI's proposed locations to be acceptable, CPAI would have to demonstrate compelling reasons why it must drill in these areas instead of from less sensitive areas. This type of presumption

the original Willow proposal) that there should be a presumption against new infrastructure in Special Areas. An applicant should then bear the burden to explain "why it cannot avoid locating new infrastructure in the Special Area, and if doing so is unavoidable, to go above and beyond what would normally be required to provide 'maximum protection' for caribou and subsistence users who depend on them."[11] We went on to suggest that BLM "critically examine alternatives" and require the applicant to "justify" impacts in the Special Areas, giving "very little weight" to cost concerns in that analysis.[12]

These standards would be more reasonable and more consistent with 42 USC 6504 than the current proposed Section 2361.40(c). Using these standards, BLM would still presume there should not be any development in Special Areas that are available for leasing and new infrastructure, but there would be a realistic path for an applicant to overcome that presumption. The burden would be on the applicant to demonstrate that it cannot avoid locating some infrastructure in Special Areas, that all of the infrastructure proposed to be constructed there is "necessary," and that the oil and gas resources to be accessed justify the impacts. If, after critical examination of alternatives and consultations with local residents, BLM determines that some impacts cannot be avoided, and that the benefits outweigh the impacts, the project could proceed, but only with "maximum protective" measures. This approach would create a more reasonable and realistic path to developing limited portions of Special Areas, but also leave available the whole host of mitigation measures that BLM and other federal agencies have available to limit impacts. That is a balanced system that Kuukpik could support.

C. BLM can limit impacts through other means than simply prohibiting development.

The last point above is key and highlights another shortcoming of the Proposed Rule: the rule seems to insist on an all or nothing approach. Proposed Section 2361.30(a)(6), for example, requires the BLM to ignore all possible mitigation measures when deciding whether to designate a special area. In other words, if BLM is presented with an area that is believed to qualify for

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against any development in these areas is appropriate to require CPAI to demonstrate why it absolutely cannot avoid causing impacts to these areas.

[11] *Id.* at p. 13-14:

> By law, any activities in these areas must be conducted in a manner that will "assure the maximum protection of such surface values to the extent consistent with the requirements of the Act for exploration of the reserve." 42 USC § 6504 (emphasis added). Since CPAI correctly notes that this does not prohibit development entirely, if the special designation is to mean anything at all, it must mean that the burden is on CPAI to explain why it cannot avoid locating new infrastructure in the Special Area, and if doing so is unavoidable, to go above and beyond what would normally be required to provide "maximum protection" for caribou and subsistence users who depend on them.

[12] *Id.*

Special Area status (which is itself an entirely subjective decision), it cannot consider any lesser level of protection, mitigation measures, or conditions to determine whether to designate the area as a Special Area. So, it cannot, for example, evaluate the importance and sensitivity of the area by reference to any other area, or in the context of whether lesser protective measures than designation as a Special Area is appropriate. Rather, if an area meets the threshold "importance," it must be designated as a Special Area, which under the Proposed Rule essentially carries with it a moratorium on future development. This means every application for a Special Area is effectively an "all or nothing" question. 42 USC 6504(a) does not require this all or nothing approach. FR 62034.

Prohibiting all future development is BLM's most extreme, least adaptable mitigation measure. It shouldn't be treated as a primary mitigation measure to be employed in broad strokes. Rather, preventing development should be seen as the apex of a "mitigation hierarchy" in which the restrictions on development that are applied to particular area are commensurate with that area's sensitivity and importance. Only the most sensitive and important locations, such as the Teshekpuk Lake area that Kuukpik has identified, can appropriately be closed off from development entirely. Areas that are somewhat less critical, but still important enough to qualify as Special Areas, may be available for development, but only subject to the presumption described in the previous subsection of this letter. Lands outside Special Areas would not be subject to the presumption but would still be protected through the multitude of both general and site-specific mitigation measures that are available to BLM and other agencies.

This mitigation hierarchy approach applies restrictions using a scalpel, not a machete. It allows for balance and individualized analysis, not sweeping categorizations and predetermined outcomes. This is more consistent with the balanced approach that Kuukpik and other local stakeholders want to see in the NPR-A. It's also more consistent with Congress's acknowledgement that some impacts are anticipated and acceptable in order to continue developing the NPR-A. The Proposed Rule's excessive focus on preventing development for the sake of "maximizing protections" ignores these acknowledgments.

IV. Section by section comments on the Proposed Rule.

The remainder of our comments are less conceptual and will therefore focus on specific sections of the Proposed Rule.

A. 2361.20

Proposed section 2361.20 would codify the current boundaries of the Special Areas. Given the consequences of a Special Area designation under the current version of the Proposed Rule (and the high bar currently proposed for de-listing an area), it's absolutely imperative that

BLM examine carefully the areas that should be included now, not just rely on the 2012-13 analysis. DOI should not just assume the current boundaries are optimal; indeed, Kuukpik strongly believes that the boundary of the TLSA needs to be changed, at a minimum.[13]

B. 2361.30

This section establishing processes and standards for designating and changing special area boundaries is also flawed. First, as noted above, Paragraph (a)(6)'s requirement to designate special area solely on the basis of whether various "significant resource values" are present is based on an extreme reading of 42 USC 6504 and forces unbalanced decisions to be made.

This section also lacks detailed standards or guidance to determine whether an area's resource values are "significant" enough to qualify for special area status. This is particularly problematic given the low bar that seemed to be applied in 2012-13 and the drastic consequences of designatiing a Special Area under the current Proposed Rule. Given the de facto bar on development that designation creates, it is critical to define the standards that will be applied to determine what areas require that level of protection.

The Proposed Rule *does* define a standard for removing lands from a Special Area, but that definition is unworkable. Section 2361.30(b) states that an area can be removed from a Special Area only "when the significant resource values that supported the designation are no longer present; (e.g., if important wildlife habitat that supported the designation was no longer present." This condition (like the "no impact" standard above) is either poorly drafted or sets an unrealistic bar. It is nearly impossible to think of a scenario where the "resource values" that once justified designation as a Special Area could become "no longer present." Does this mean all the caribou are gone, for example? That no subsistence hunters use the area anymore? Or was it intended to mean something different entirely?

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[13] *See* Kuukpik's November 2, 2012 Comments on the Preliminary Comments on Preferred Alternative B-2 of the Draft IAP/EIS for the NPR-A, p. 4:

> Our position is that all of the 27 full or partial townships in the three southernmost rows south of Teshekpuk Lake (designated Townships 8 North, 9 North and 10 North) should be available for leasing. Specific protections and activity restrictions could be created for areas needing protection, such as the area of higher density Spectacled Eider use running north to south along the Ikpikpuk River (Map 3.3.8-1) or for some of the highest density Yellow-billed Loon areas (Map 3.3.8-4). Seasonal activity restrictions designed to avoid impacts on wildfowl species during the few months that they are present in these areas can be announced prior to leasing, and only those oil companies willing to operate within those constraints need bid on any tracts in those area. To us, such restrictions make far more sense than taking all of those lands off the table altogether.

Either way, this standard is either impossible to satisfy or would be subject to so much uncertainty and litigation that it would not be worth trying to utilize. This language should be changed to include a less absolute standard, such as one that depends on changing conditions, new information, and other factors that, when considered objectively and holistically by BLM and local stakeholders, justify the decision to recategorize lands if appropriate.

Next, DOI's legal position that "BLM cannot remove lands from the Teshekpuk Lake and Utukok River Uplands Special Areas unless directed to do so by statute" is categorically wrong. Proposed Section 2361.30(b). This position is based on a completely implausible reading of the NPRPA.[14] The referenced provision vaguely refers to exploration "within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary...." At most, this statute suggests that unspecified "areas" near or around Teshekpuk Lake and the Utukok River Uplands must be managed according to higher standards than other areas. But it was BLM that chose to implement that directive by inventing the concept of "special areas." See FR 62027. Nothing in the NPRPA suggests these formal "Special Areas" are required to exist at all, much less that they cannot be changed except by act of Congress. Further, it was BLM, not Congress, who set the boundaries for those special areas. The current special area boundaries—the ones DOI is now claiming can only be changed by statute—are entirely a product of administrative decision-making. In fact, they have been changed in every single IAP since 1998 at a minimum, and very likely before that. Unless DOI is prepared to say that every other time it changed those boundaries was a violation of the NPRPA, it must abandon the position that the current boundaries can only be changed by statute.

Finally, re-evaluating special areas every five years is overly burdensome and unnecessary. We struggle to understand how conditions in any particular area could change so drastically in five years that adding or removing lands will be justified. The whole point of designating special areas seems to be to preserve it against essentially *any* significant impacts. How, then, is it realistic to think that such changes will nevertheless occur in such a short period of time? Or that areas that were not critical just five years earlier would suddenly be so important that they require the highest level of protection? Although we don't dispute that changes are occurring in the Arctic and in NPR-A as a result of development and climate change and the like, it's simply not realistic to think they are changing *that* fast.

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[14] 88 Fed. Reg. 173, 62034 and 62042 (citing Pub. Law 94-158, sc. 104(b), 90 Stat. 304 (1976)); 42 U.S.C. 6504(a): "Any exploration within the Utukok River, the Teshekpuk Lake areas, and other areas designated by the Secretary of the Interior 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."

Indeed, the Biden Administration recently re-adopted the IAP from 2013 with virtually no changes based in part on its own findings that there was no new information or circumstances that would support changing the management regime that had been implemented in 2013.[15] That decision included and applied to the Special Area boundaries.[16] This recent example shows that there is unlikely to be meaningful changes in conditions on the ground that would support significant regulatory changes more than every ten years or so.[17]

We therefore believe it would be more appropriate to evaluate Special Areas no more than once every ten years. It would also be logical to conduct these evaluations in the context of preparing a holistic IAP. We assume an EIS would continue to be prepared for each IAP. Ten-year periods make sense in that context as well. This would bring some stability and medium-term certainty to managing the NPR-A, and at least slightly reduce the frequency of which stakeholders must engage in these large-scale planning efforts and NEPA processes.

C. 2361.40

This Section deals with management of Special Areas and contains many of the new processes and standards that implement DOI's extreme reading of the "maximum protection" requirement. This occurs in obvious ways, such as subsection (c)'s proposal to essentially convert "lands allocated as available" for development into areas where development is suddenly presumptively prohibited. But it also occurs in more subtle ways, such as subsection (e)'s requirement to "consider any uncertainty" associated with adverse impacts. This is a thinly veiled codification of the Precautionary Principal that has long been used to justify excessive regulation.[18] It should be deleted. Similarly, subsection (b) requires BLM to take steps "at each stage" in the decision-making process "to avoid the adverse effects" of any proposed oil and gas activities. Requiring decision makers to "avoid" impacts—as opposed to, for example, "reducing," "minimizing" or "mitigating" impacts—suggests a preference for denying activities rather than allowing them to proceed but reducing the impacts as much as possible. This language should be changed to allow for balancing and reducing impacts, not just "avoiding" them.

Subsection 2361.40(f) is another item that will do little more than keep lawyers employed. This section requires BLM to prepare a Statement of Adverse Effect anytime it "determines that it cannot avoid adverse effects to a special area's significant resource values."

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[15] NPR-A IAP ROD, April 2023, p. 2, 15, 22.

[16] *Id.* at 4-5.

[17] Rather, the changed conditions that nearly always prompt regulatory change in the NPR-A are political.

[18] Cass R. Sunstein, "Beyond the Precautionary Principle" U. Penn. L. Rev., vol. 151 no. 3, 1003-58 (2003).

The Statement would be required to undergo public comment, to which the BLM would be required to respond. All of these elements are recipes for litigation and abuse, and will not provide any obvious benefit. The Statement would be prepared at the end of an application process (perhaps for a "Use Authorization;" see proposed section 2361.70)—a process that already includes myriad opportunities for public involvement, comment, and response by BLM. What is the purpose of soliciting and responding to comments on a decision document at the end of an application process? Simple: to draw out the administrative process, to stall activity, and to create more documents that environmental groups can nitpick and file frivolous lawsuits over.

In fact, the main result of the Proposed Rule may be more litigation. That's the downside of BLM's effort to create new standards and to codify the practices it is currently following. Informal practices may not be perfect, but for the most part, they also aren't subject to specific regulations that can form the basis for lawsuits against BLM. That will change under the Proposed Rule. Every process the Proposed Rule creates, every detailed list it sets out, every standard it sets will be just as likely to be used *against* BLM by anti-development litigation groups as it is to deliver actual benefits. Kuukpik appreciates the value of having standards and processes, but we also recognize that this codification effort will be even more ripe for abusive litigation than the current system is.

Even seemingly innocuous provisions could cause these problems. For example, Kuukpik supports subsection (h)'s requirement to consult with tribes and ANCs regarding activities in Special Areas. But will outside groups be able to use this provision to challenge BLM's actions with respect to a particular project, by arguing for example, that BLM was required to consult with some entity far away from the project site because some other group arguably has "historic or cultural ties to the Special Area?" Unfortunately, the amount of excessive and baseless litigation filed by outside groups seeking to frustrate development in the NPR-A over the past few years suggests this is exactly what will happen.

That said, Kuukpik could support a few other portions of Section 2361.40 if other sections were moderated. For example, Kuukpik generally agrees with the proposal to simply adopt and apply the K Stipulations (listed on FR62035-36) to new oil and gas leases and infrastructure. On the whole, these stipulations are familiar and reasonable. But these stipulations are only relevant if, for example, the presumption against new infrastructure in proposed Section 2361.40(c) is modified in the manner we describe above. Otherwise, there won't *be* any new infrastructure to apply the K Stipulations to.

We also wish to note our objection again to the unnecessarily large area that is included in the TLSA, which this section would codify. We believe this rulemaking process should include a fresh analysis of what lands should be included in the Special Areas before those areas are formally codified.

We do not believe "materials sites such as sand and gravel" should be included in the definition of "permanent oil and gas facilities." FR 62036. Sand and gravel pits are not

necessarily oil and gas related, nor are they "permanent" infrastructure as contemplated in the Proposed Rule. Rather, materials sites are typically used for one or more seasons and can then be nearly entirely reclaimed by spreading out the overburden and allowing the depleted material site to be filled in naturally with water. These features become useful habitat for birds and other wildlife and have minimal, or no, long term negative impacts. These sites should therefore not be lumped together with oil and gas production facilities because they have very little in common with those types of facilities and minimal negative impacts in the long term. From a practical standpoint, prohibiting use of sand or gravel resources under the guise of preventing new oil and gas infrastructure may have significant unintended consequences as well, such as forcing companies to obtain gravel from much farther away from a project even though it would be less environmentally damaging to access gravel in a nearby Special Area.

Finally, the Proposed Rule should be revised to make it more clear that community infrastructure projects—particularly the Community Winter Access Trail or future similar projects—are not prohibited within Special Areas, and that there is no presumption against such local projects. Subsection 2361.40(d)(2) suggests these types of projects could be approved within Special Areas, but this provision is tucked into a list of "exceptions" applicable to areas that are closed to leasing or new infrastructure. That may be adequate, but it would be preferable to expand or elevate this provision in a way that more clearly exempts local, non-oil and gas projects from the restrictions in the Proposed Rule, not just the infrastructure prohibitions.

D. 2361.60

Kuukpik supports and appreciates the proposal to increase and pursue opportunities for co-stewardship in Special Areas. We do not believe this provision should authorize co-stewardship with any non-Native or non-local "organizations."

IV. The Proposed Rule could push more development onto Kuukpik lands.

If BLM decides to publish the rule without the changes Kuukpik has suggested, an unintended consequence may be that more development will occur on or near Kuukpik land. Due to the restrictive nature of the Special Areas as proposed, any infrastructure built to access oil underneath the areas is likely to be on lands just outside the Special Areas. This could create a funnel that concentrates more oil and gas infrastructure between the Teshekpuk Lake and Colville River Special Areas in particular. Much of the land between the two Special Areas is owned by Kuukpik. Therefore, Kuukpik and its shareholders may well be asked to shoulder more of the impacts of development under this Proposed Rule.

Conclusion

Kuukpik does not support the Proposed Rule as currently written because it is unlikely to lead to balanced outcomes. It is also unlikely to achieve its goals because it doesn't appear to have any support among those who will be most affected by it: the people of the North Slope. Kuukpik hopes DOI will revise and publish another draft rule. Only by prioritizing balance,

fixing critical language and interpretation errors, and removing potential bars to subsistence users could Kuukpik fully support this rule.

Thank you for your consideration. We look forward to additional discussions with BLM going forward.

Sincerely,

KUUKPIK CORPORATION

By: Joe Nukapigak
Joe Nukapigak
President