

Submission of The Inuvialuit Game Council (IGC), Wildlife Management Advisory Council (North Slope) (WMAC(NS)), Wildlife Management Advisory Council (Northwest Territories) (WMAC(NWT)), and Fisheries Joint Management Committee(FJMC)

This is the submission of The Inuvialuit Game Council (IGC), Wildlife Management Advisory Council (North Slope) (WMAC(NS)), Wildlife Management Advisory Council (Northwest Territories) (WMAC(NWT)) and the Fisheries Joint Management Committee (FJMC), to the Department of the Interior’s “Notice of Intent To Prepare an Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska” (2018), 83 Federal Register 17562.

This submission has five parts and an appendix. Part 1 describes who we are and the scope of the submission. Part 2 addresses shared Inuvialuit and Canadian interests that may be affected by the proposed leasing. Part 3 examines the obligation under US law to consider these interests as part of scoping and as part of all subsequent EIS related activities. Part 4 examines the obligation under international law to consider these interests as part of scoping and as part of all subsequent EIS related activities. Part 5 provides a concluding statement. Appendix 1 provides a non-exhaustive list of issues to be considered and some guiding questions for how the EIS might address the interests conveyed in this submission.

Part 1: Who we are & Scope of Submission

Who we are

The Inuvialuit Game Council (IGC), Wildlife Management Advisory Council (North Slope) (WMAC(NS)), Wildlife Management Advisory Council (Northwest Territories) (WMAC(NWT)), and Fisheries Joint Management Committee (FJMC), are wildlife, fish, and marine mammal management bodies established under the Inuvialuit Final Agreement (IFA) – a modern day land claim agreement protected under the Canadian Constitution.

Signed in 1984 between Canada and the Inuvialuit, the agreement was a direct response to Inuvialuit concerns over increased oil and gas development in Canada’s Western Arctic. The IFA sets out Inuvialuit land, harvesting and resource management rights within the Inuvialuit Settlement Region (ISR) – an area that encompasses the coastal plain adjacent to the Arctic National Wildlife Refuge and nearshore and offshore waters from the Yukon/Alaskan border to the Northwest Territories/Nunavut border. One of the primary principles of the IFA is “to protect and preserve Arctic wildlife, environment and biological productivity” (IFA 1.(c)). By upholding this principle, Inuvialuit harvesting and subsistence rights and continued use of the land for traditional practices are maintained.

Under the IFA, Inuvialuit are integrated in wildlife and environmental management bodies (IFA 14.(4)), participating with membership that is equal to that of the federal and territorial

governments. The recommendations and decisions of these joint management bodies are a means of protecting and conserving wildlife populations upon which the sustainability of Inuvialuit communities depends.

The following sections describe the specific mandates of the four IFA bodies who are signatories to this submission:

Inuvialuit Game Council (IGC)

The Inuvialuit Game Council represents the collective Inuvialuit interests in all matters related to the management of wildlife and wildlife habitat in the ISR. Under the IFA, the IGC has a specific responsibility to “review and advise government on any proposed Canadian position for international purposes that affects wildlife in the region” (IFA 14.(74)(e)).

Wildlife Management Advisory Council – North Slope (WMAC(NS))

WMAC(NS) provides advice to appropriate ministers and any other appropriate bodies (e.g. screening committees) on all matters relating to wildlife policy and the management, regulation and administration of wildlife, habitat and harvesting for the Yukon North Slope (IFA 12.(57)). Under the IFA, the Yukon North Slope (the entire northern Yukon between Alaska and Northwest Territories, including the nearshore and offshore waters) is established as a special conservation area with the primary purpose of conserving wildlife, habitat and traditional subsistence use (IFA 12.(2)). Any development proposals relating to the Yukon North Slope have to be screened to determine if they could have significant negative impact to wildlife, habitat or the ability of Inuvialuit to harvest wildlife (IFA 12.(3)(a)).

Wildlife Management Advisory Council - Northwest Territories (WMAC(NWT))

The WMAC(NWT) provides advice to the appropriate ministers and any other appropriate bodies (e.g. screening committees) on all matters relating to wildlife policy and the management, regulation and administration of wildlife, habitat and harvesting in the ISR within the Northwest Territories (IFA 14.(60)). Specifically, the Council provides advice on any proposed Canadian position for international purposes that affects wildlife in the Western Arctic Region and provides advice on measures required to protect habitat that is critical for wildlife and harvesting (IFA 14. (60)(e)&(g)).

Fisheries Joint Management Committee(FJMC)

The FJMC provides advice to the appropriate ministers and any other appropriate bodies (environmental screening committees) on all matters related to fisheries policy and the management, regulation, and administration of fish, marine mammals and their habitats in the ISR, the Western Arctic Region and the Beaufort Sea (IFA 14. 64).

Scope of Submission

This submission is in response to the Department of the Interior’s “Notice of Intent To Prepare an Environmental Impact Statement for the Coastal Plain Oil and Gas Leasing Program, Alaska” (2018), 83 Federal Register 17562. The proposed Coastal Plain Oil and Gas Leasing Program has the potential to significantly impact several transboundary wildlife populations shared by Alaska and the Inuvialuit Settlement Region that IGC, WMAC(NWT) and WMAC(NS) have

management responsibilities for. These include, but are not limited to, Porcupine Caribou, polar bear, beluga and bowhead whales, seals, fish species, migratory bird species and grizzly bear. Inuvialuit beneficiaries rely on many of these species for subsistence and traditional harvesting.

The Notice of Intent provides in part that:

The BLM is undertaking a Coastal Plain Oil and Gas Leasing EIS to implement the leasing program pursuant to the Tax Act (Pub. L. 115–97, Dec. 22, 2017). The Leasing EIS will serve to inform BLM’s implementation of the Tax Act, including the requirement to hold not fewer than two lease sales area-wide. It may also inform post-lease activities, including seismic and drilling exploration, development, and transportation of oil and gas in and from the Coastal Plain. Specifically, the Leasing EIS will consider and analyze the potential environmental impacts of various leasing alternatives, including the areas to offer for sale, and the terms and conditions (i.e., lease stipulations and best management practices) to be applied to leases and associated oil and gas activities to properly balance oil and gas development with existing uses and conservation of surface resources, and to limit the footprint of production and support facilities on Federal lands to no more than 2,000 surface acres. The area comprising the Coastal Plain includes approximately 1.6 million acres within the approximately 19.3 million-acre Arctic National Wildlife Refuge.

The purpose of the public scoping process is to determine concerns and to identify the significant issues related to implementing an oil and gas leasing program within the Coastal Plain. Our submission includes information that we hope will influence the development of the proposed action and alternatives and guide the environmental analysis.

Under the Notice of Intent, the BLM is supposed to work collaboratively with interested parties to identify the management decisions best suited to local, regional, and national needs and concerns, as well as to develop a proposed action and alternatives consistent with the following criteria:

- *The EIS will consider all Federal lands and waters within the area defined by Congress as the Coastal Plain;*
- *The EIS will address oil and gas leasing and will use scoping to identify issues, impacts and potential alternatives to be addressed;*
- *Under the Tax Act, not fewer than two lease sales, each to include not fewer than 400,000 acres area-wide of the areas with the highest potential of hydrocarbons, must occur by December 2024;*
- *The BLM will consider subsistence resources and users, as well as potential actions to minimize adverse impacts to subsistence in accordance with section 810 of the Alaska National Interest Lands Conservation Act (ANILCA); and*
- *The EIS will appropriately consider the surface management of the Coastal Plain*

We understand that the term “Coastal Plain” refers to the 1002 Lands located within the Arctic National Wildlife Refuge (ANWR). The purpose of this submission is to ensure that the EIS that is prepared, and any subsequent actions, take full account of:

- *All Inuvialuit and Canadian interests that may be affected by the proposed leasing*
- *Our shared interests in the health, resilience and integrity of the shared ecosystem of the north slope of Alaska and Yukon (and related marine areas).*

The submission takes the view that the Department has an obligation to ensure that these interests are scoped into the EIS and fully addressed. This obligation arises under United States domestic law and under international law.

Part 2: Shared Inuvialuit and Canadian Interests

The 1002 area within ANWR is part of the contiguous Arctic Coastal Plain that stretches from eastern Alaska across to the Mackenzie Delta in the Northwest Territories. Inuvialuit have lived on both sides of the Canada/U.S. border on the Arctic Coastal Plain for millennia. Indeed, the ancestors of many Inuvialuit families were born on Barter Island and strong family connections to Kaktovik relatives remain today. Participation in land claims processes with their respective countries resulted in the current designations of Inupiat (U.S.) and Inuvialuit (Canada). However, as Inuit, families and communities have shared connections to the land and wildlife resources of the 1002 area of the Coastal Plain and depend on them for subsistence and cultural purposes.

Maps from the Inuit Land Use and Occupancy project produced in the 1970s (Figure 1) as well as recent Inuvialuit Land use and occupancy maps produced by WMAC(NS) and the Aklavik Hunters and Trappers Committee (Figure 2) document historic and contemporary use of the Coastal Plain in Canada. Travel routes into Alaska were outside of the geographical scope of these studies, but movement across the border by boat is a regular occurrence for Inuvialuit and Inupiat who visit family and friends. Many Aklavik Inuvialuit tell stories about travelling, watching the weather, safe havens, and changing conditions along the 200 km of coastline from Herschel Island to Kaktovik. There are also many well-known and documented burial places, cabin sites, and other cultural use sites all along this important traditional travel route¹.

¹ Wildlife Management Advisory Council (North Slope) and Aklavik Hunters and Trappers Committee. 2018. *Yukon North Slope Inuvialuit Traditional Use Study*. Wildlife Management Advisory Council (North Slope), Whitehorse, Yukon. 124 + xvi pp.

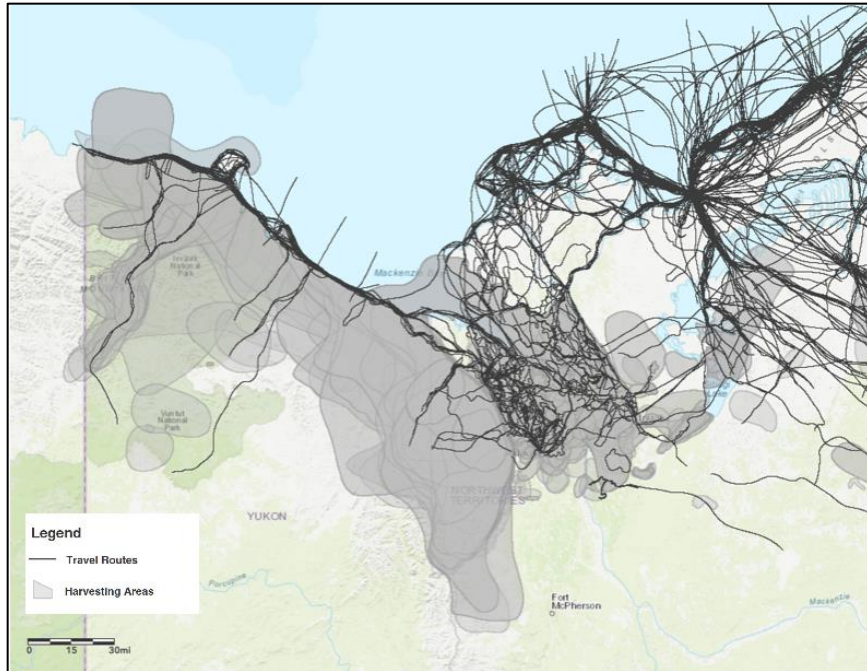


Figure 1. Documented Inuvialuit land use from early 1900 to 1974, reproduced from Freeman (1976)²

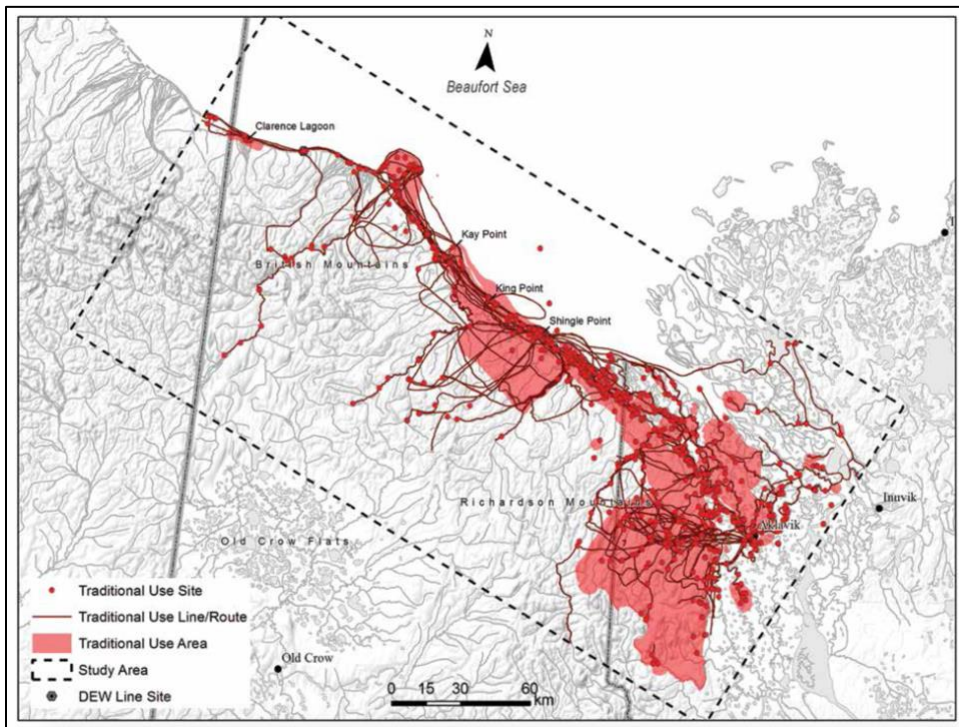


Figure 2. Contemporary Inuvialuit land use of Yukon North Slope by Aklavik residents ³

² Freeman, M. M. (Ed.). (1976). *Inuit land use and occupancy project: a report*. Supply and Services Canada.

³ Wildlife Management Advisory Council (North Slope) and Aklavik Hunters and Trappers Committee. 2018. *Yukon North Slope Inuvialuit Traditional Use Study*. Wildlife Management Advisory Council (North Slope), Whitehorse, Yukon. 124 + xvi pp.

Inuvialuit are active participants in the management of the Coastal Plain. The Aklavik, Inuvik and Tuktoyaktuk Community Conservation Plans⁴ (CCPs) and the Yukon North Slope Wildlife Conservation and Management Plan⁵ identify Ivvavik National Park and the area east of the Babbage River withdrawn from disposition for oil and gas and mineral exploration and development as having specific conservation value to Inuvialuit residents, based on its importance to Porcupine caribou, furbearers, waterfowl, grizzly bear, Dall's sheep, raptors, and fish. The CCPs provide management recommendations from the community working groups for this region and other important areas for individual species as part of the integrated wildlife management system in the Inuvialuit Settlement Region.

It is imperative to recognize that Inuvialuit use of the North Slope and coastal lands and waters goes beyond its representation on maps; Inuvialuit have a deep cultural connection to these lands and the resources they support. Inuvialuit traditional knowledge is a rich, contextual, and continuous body of knowledge that is the cumulative knowledge, experience, and wisdom of generations. This knowledge and understanding of the region and its wildlife must be considered in the evaluation of the effects of a leasing program.

In addition to the protections for Inuvialuit subsistence rights provided in the IFA, significant international agreements were developed and signed in order to protect critical transboundary populations and ensure their conservation. They include:

- *Convention for the Protection of Migratory Birds in the United States and Canada*;
- *Agreement on the Conservation of Polar Bears* (1973);
- *1987 Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd* (hereafter referred to as the *International Porcupine Caribou Agreement*);
- *Inuvialuit- Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea* (1988) (hereafter referred to as the *Inuvialuit- Inupiat Polar Bear Management Agreement*);
- *Inuvialuit-Inupiat Beaufort Sea Beluga Whale Agreement* (2000); and
- *2008 Memorandum of Understanding between Environment and Climate Change Canada and the United States Department of the Interior for the Conservation and Management of Shared Polar Bear Populations*.

⁴ The Aklavik Hunters and Trappers Committee, Aklavik Community Corporation, The Wildlife Management Advisory Council (NWT), The Fisheries Joint Management Committee and the Joint Secretariat. (2016). *Aklavik Community Conservation Plan, Akaqviki miut Nunamikini Nunutailivikautinich: A plan to provide guidance regarding the conservation and management of renewable resources and lands within the Inuvialuit Settlement Region in the vicinity of Aklavik, Northwest Territories*. Joint Secretariat, Inuvik, NT. 195 pp.

The Inuvik Hunters and Trappers Committee, Inuvik Community Corporation, The Wildlife Management Advisory Council (NWT), The Fisheries Joint Management Committee and the Joint Secretariat. (2016). *Inuvik Community Conservation Plan, Inuuvium Angalatchivingit Niryutinik: A plan to provide guidance regarding the conservation and management of renewable resources and lands within the Inuvialuit Settlement Region in the vicinity of Inuvik, Northwest Territories*. Joint Secretariat, Inuvik, NT. 192 pp.

The Inuvik Hunters and Trappers Committee, Inuvik Community Corporation, The Wildlife Management Advisory Council (NWT), The Fisheries Joint Management Committee and the Joint Secretariat. (2016). *Tuktoyaktuk Community Conservation Plan, Tuktuuyaqtuum Angalatchivingit Niryutinik: A plan for the conservation and management of renewable resources and lands within the Inuvialuit Settlement Region in the vicinity of Tuktoyaktuk, Northwest Territories*. Joint Secretariat, Inuvik, NT. 227 pp.

⁵ Wildlife Management Advisory Council (North Slope). (1996, 2003). *Yukon North Slope Wildlife Management and Conservation Plan: The Land and the Legacy - Taimanga Nunapta Pitqusia: Volume I and II*. Wildlife Management Advisory Council (North Slope), Whitehorse, YT. 44 pp. and vi 74 pp.

By signing these agreements, all parties – including the United States Government – recognized the significance of these populations and agreed to uphold the goals and values described within them. For the Inuvialuit, these transboundary populations and the agreements that conserve them are critically important for the protection of their subsistence rights in Canada. They provide food security for isolated communities and harvesting practices continue the important ongoing connection of Inuvialuit to the land that has sustained them for generations.

The Porcupine Caribou herd is particularly important to the Inuvialuit for subsistence and cultural practices. The *Porcupine Caribou Management Agreement* (“PCMA”) is part of the Inuvialuit Final Agreement and identifies goals and principles of herd conservation and management in Canada. Canada’s commitment to protecting critical habitat and sustainable herd management of the Porcupine Caribou herd is established in the IFA through the creation of Ivvavik National Park (IFA 12.(5)), the withdrawal of all lands on the Yukon North Slope east of the Babbage River from development (IFA 12.(4)) and, through the PCMA, the establishment of the Porcupine Caribou Management Board.

The PCMA also provides the rationale for agreements with other “jurisdictions where lands support the herds and the caribou are harvested for subsistence.” The 1002 area of the Coastal Plain includes the US portion of the Porcupine Caribou calving grounds, which are critical to the sustainability of the herd. The PCMA provided the foundation for the *International Porcupine Caribou Agreement* between Canada and the United States.

Since the late 1970s, debate around development of the 1002 area and its impact on the sustainability of the Porcupine Caribou herd has been a conversation shared by both signatories to the *International Porcupine Caribou Agreement*. The 1002 lands contain approximately 78% of the core calving area and supports significant post-calving aggregations. The United States Fish and Wildlife Service asserts that the annual variability in where the herd calves indicates that the Porcupine Caribou require access to the entirety of the area used for calving to select the best habitat for the conditions in a given year⁶.

The 1002 area is also critical to the long-term wellbeing of snow geese as it contains preferred staging habitat used by over 100,000 birds per year. In addition, there are 57 recorded species of migratory birds that use the coastal plain and barrier islands on a regular basis. These are shared populations that are important species to both Inuvialuit and all Canadians, as recognized by the *Convention for the Protection of Migratory Birds in the United States and Canada*.

The 1002 area is also habitat for the Southern Beaufort population of polar bears. The 1988 *Inuvialuit-Inupiat Polar Bear Agreement* recognizes the shared subsistence and cultural interests of the Inuvialuit and the Inupiat in this transboundary population and its population and harvest management. Polar bears are highly valued in Inuvialuit mythology, spirituality, storytelling, art, song and other forms of cultural expression, and the well-being of this population is extremely important because of the ongoing relationship Inuvialuit have with these animals⁷.

⁶ U.S. Fish and Wildlife Service. (2015). *Arctic National Wildlife Refuge revised comprehensive conservation plan, vol. 1*. <https://www.fws.gov/home/arctic-ccp/>

⁷ Joint Secretariat. (2015). *Inuvialuit and Nanuq: A Polar Bear Traditional Knowledge Study*. Joint Secretariat, Inuvialuit Settlement Region. xx + 304 pp.

If the coastal plain lands are developed, it is likely that associated transportation and coastal development will impact marine resources. Five species of whitefish including Arctic Cisco migrate along the Alaska/Canada coast and are important subsistence food resources in both countries. These coastal zones are important summering areas for all Dolly Varden char populations that are resident to the streams and rivers of the Alaska/Canada North Slope and the west side of the Mackenzie Delta. Dolly Varden is a valued subsistence and sport fishing species for residents and visitors to these areas. Shared marine mammal populations also use these coastal waters including ringed seal, bearded seal, beluga whale and bowhead whale. Beluga whale are recognized as an importance shared subsistence species for the Inuvialuit and Inupiat and are jointly managed through the *Inuvialuit-Inupiat Beaufort Sea Beluga Whale Agreement*.

There are many other species that are important to the Inuvialuit that move freely across the Arctic North Slope, including grizzly bears (further details provided in Appendix 1). Since the establishment of the Arctic National Wildlife Refuge, these transboundary populations have had the benefit of many international treaties and conservation initiatives to ensure their ongoing sustainability. These agreements and the land-based conservation initiatives taken by countries on both sides of the border show the value that Inuvialuit and the Canadian government place on its uniqueness and ensuring the ongoing biological diversity and productivity of the North Slope.

Part 3: United States Domestic Law

This submission relies on a Memorandum (July 1, 1997) of the Council of Environmental Quality of the Executive Office of the President, which provides the Council's Guidance to Heads of Agencies on NEPA analysis for Transboundary Impacts.⁸ This Memorandum continues to be listed as current on the NEPA.GOV website.⁹ This Guidance makes it abundantly clear that NEPA does not "define agencies' obligations to analyze effects of actions by administrative boundaries." Instead, "the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, *regardless of where those impacts might occur.*" (emphasis added) In light of this, the CEQ concluded that federal agencies "must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States."

The CEQ Guidance goes on to note that agencies should use the scoping process (40.CFR s.1501.7) to identify those actions that may have adverse environmental effects. The CEQ cautions that agencies "should be particularly alert to actions that may affect migratory species, air quality, watersheds, and other components of the natural ecosystem that cross borders, as well as to interrelated social and economic effects. Should such potential impacts be identified, agencies may rely on available professional sources of information and should contact agencies in the affected country with relevant expertise."

⁸ <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/memorandum-transboundary-impacts-070197.pdf>

⁹ <https://ceq.doe.gov/guidance/guidance.html>

In sum, the BLM is bound to include within the scope of the EIA the effect of activities in the 1002 lands which may have implications for shared migratory species, the shared ecosystem of the North Slope and interrelated social and economic effects on indigenous communities dependent on these resources and the shared ecosystem.

Part 4: International Law

This part examines the obligations of the United States under relevant bilateral agreements between the United States and Canada, multilateral agreements such as the Agreement on the Conservation of Polar Bears, and under customary international law. It concludes with a discussion of the relevance of international human rights law.

Before turning to the treaties however it is important at the outset to note that the CEQ itself recognizes the relevance of customary international law at both procedurally and substantively. Thus, the CEQ acknowledges that:

It has been customary law since the 1905 Trail Smelter Arbitration that no nation may undertake acts on its territory that will harm the territory of another state²¹. This rule of customary law has been recognized as binding in Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development. This concept, along with the duty to give notice to others to avoid or avert such harm, is incorporated into numerous treaty obligations undertaken by the United States. Analysis of transboundary impacts of federal agency actions that occur in the United States is an appropriate step towards implementing those principles.

Relevant Bilateral Agreements

Agreement between the Government of Canada and the Government of the United States on the Conservation of the Porcupine Caribou Herd (1987)¹⁰

The Preamble to this Agreement recognizes that the Porcupine Caribou Herd (PCH) is a shared migratory resources and “a unique and irreplaceable natural resource of great value which each generation should maintain and make use of so as to conserve them for future generations”. The substantive provisions of the Agreement include Article 3 on Conservation the entirety of which is relevant to this proposed leasing activity. Article 3 includes the following requirements:

Conservation

- *The Parties will take appropriate action to conserve the Porcupine Caribou Herd and its habitat.*
- *The Parties will ensure that the Porcupine Caribou Herd, its habitat and the interests of users of Porcupine Caribou are given effective consideration in evaluating proposed activities within the range of the Herd.*

¹⁰ <http://www.treaty-accord.gc.ca/text-texte.aspx?id=100687>

- *Activities requiring a Party's approval having a potential impact on the conservation of the Porcupine Caribou Herd or its habitat will be subject to impact assessment and review consistent with domestic laws, regulations and processes.*
- *Where an activity in one country is determined to be likely to cause significant long-term adverse impact on the Porcupine Caribou Herd or its habitat, the other Party will be notified and given an opportunity to consult prior to final decision.*
- *Activities requiring a Party's approval having a potential significant impact on the conservation or use of the Porcupine Caribou Herd or its habitat may require mitigation.*
- *The Parties should avoid or minimize activities that would significantly disrupt migration or other important behavior patterns of the Porcupine Caribou Herd or that would otherwise lessen the ability of users of Porcupine Caribou to use the Herd.*
- *When evaluating the environmental consequences of a proposed activity, the Parties will consider and analyze potential impacts, including cumulative impacts, to the Porcupine Caribou Herd, its habitat and affected users of Porcupine Caribou.*
- *The Parties will prohibit the commercial sale of meat from the Porcupine Caribou Herd.*

Migratory Birds Convention and Protocol¹¹

The Preamble to the Protocol (which amends the original Convention of 1916) notes that the Parties are committed

... to the long-term conservation of shared species of migratory birds for their nutritional, social, cultural, spiritual, ecological, economic, and aesthetic values through a more comprehensive international framework that involves working together to cooperatively manage their populations, regulate their take, protect the lands and waters on which they depend, and share research and survey information; (emphasis added)

In addition, the amended Article IV provides that:

Each High Contracting Power shall use its authority to take appropriate measures to preserve and enhance the environment of migratory birds. In particular, it shall, within its constitutional authority:

- (a) seek means to prevent damage to such birds and their environments, including damage resulting from pollution;*
- (b) endeavour to take such measures as may be necessary to control the importation of live animals and plants which it determines to be hazardous to the preservation of such birds;*
- (c) endeavour to take such measures as may be necessary to control the introduction of live animals and plants which could disturb the ecological balance of unique island environments;*
- and*
- (d) pursue cooperative arrangements to conserve habitats essential to migratory bird populations.*

While there is no express mention of a duty to conduct an environmental assessment of activities that may affect migratory birds as defined by the Convention and Protocol, this instrument clearly recognizes that both Parties have a shared interest in the health of these populations. Furthermore, and using the logic of the CEQ, it is relatively easy to *imply* a duty to conduct an EIA. After all, if there is a duty to prevent damage to the environment of migratory birds, there

¹¹ <http://laws-lois.justice.gc.ca/eng/acts/m-7.01/page-11.html#h-16>

must be a corresponding obligation to understand the impacts of proposed activities on those environments, otherwise it will not be possible to operationalize the duty to prevent damage.

Memorandum of Understanding between Environment Canada and the United States Department of the Interior for the Conservation and Management of Shared Polar Bear Populations (2008)

The MOU expressly states that it is not legally binding but it clearly recognizes that both Canada and the United States have a shared interest in the health of the Southern Beaufort Sea (SBS) population of bears which utilizes both the coastal plain and the adjacent offshore areas.

Inuvialuit - Inupiat Polar Bear Management Agreement in the Southern Beaufort Sea¹²

This is an agreement between the two user groups of the SBS population of polar bears. The agreement is principally concerned to ensure that harvest of bears remains within sustainable limits, but the agreement also acknowledges more generally that the continued availability of bears “is essential to maintain the dietary, cultural, and economic base” of both communities .

Inuvialuit-Inupiat Beaufort Sea Beluga Whale Agreement

This is an agreement between the two user groups of the Beaufort Sea populations of Beluga whales. The agreement recognizes the management plans established by each group and establishes a Commission to ensure the exchange of information and the establishment of joint research and management programs to ensure the sustainability of the shared stocks.

Multilateral Agreements¹³

Agreement on the Conservation of Polar Bears (1973)¹⁴

Article II of this Agreement contains an important commitment to protect the habitat of polar bear as well as the ecosystem of which polar bears are a part.

Each Contracting Party shall take appropriate action to protect the ecosystems of which polar bears are a part, with special attention to habitat components such as denning and feeding sites and migration patterns, and shall manage polar bear populations in accordance with sound conservation practices based on the best available scientific data.

Once again, there is no specific reference to the need to conduct an EIA for projects that may affect sole or shared populations of polar bear, but such an obligation can be implied.

The recently adopted Circumpolar Action Plan¹⁵ provides that Parties should “Consider the cumulative effects of climate change and human activities on polar bear subpopulations and habitats when making management decisions using tools such as predictive modeling” and

¹² <http://pbsg.npolar.no/en/agreements/USA-Canada.html>

¹³ In addition to the ACPB and Ramsar Convention, Canada is also a party to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context and the Convention on Biological Diversity. The US is not a party to either agreement and thus they are not considered further here.

¹⁴ <http://pbsg.npolar.no/en/agreements/agreement1973.html>

¹⁵ http://naalakkersuisut.gl/~media/Nanoq/Files/Attached%20Files/Fiskeri_Fangst_Landbrug/Polarbear%202015/CAP/CAP%20Book.pdf

should “Identify essential polar bear habitat and redefine it as changes occur over time.” Specifically with respect to planning and EIAs the Action Plan suggests that Parties should:¹⁶ Use regional land-use planning processes, regional strategic environmental assessments and project environmental assessments to mitigate the effects of mineral and energy development activities on polar bears.

Ramsar Wetlands Convention, 1971¹⁷

Ninety nine percent of the 1002 area is classified as wetland. Both the United States and Canada are party to the Convention on Wetlands of International Importance especially as Waterfowl Habitat. The Preamble to the Convention contains the following recitals:

CONSIDERING the fundamental ecological functions of wetlands as regulators of water regimes and as habitats supporting a characteristic flora and fauna, especially waterfowl;

BEING CONVINCED that wetlands constitute a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable;

DESIRING to stem the progressive encroachment on and loss of wetlands now and in the future;

RECOGNIZING that waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource;

While most of the obligations under the Convention apply only to listed wetlands there are some more general obligations such as the obligation under Article 3(1) to “formulate and implement their planning so as to promote ... as far as possible the wise use of wetlands in their territory.”

The term “wise use” is a term of art under the Ramsar Convention. The Parties have elaborated on its meaning in a number of ways including through the adoption of Recommendation 6.2 (1996) on Environmental Impact Assessment. This Recommendation calls on the Contracting Parties “to integrate environmental considerations in relation to wetlands into planning decisions in a clear and publicly transparent manner.”¹⁸

Customary International Law

As noted above, the CEQ had already recognized by 1997 that customary international law required a State to conduct an EIA where an activity in State A might have implications for State B. Developments and judicial statements since then have simply reinforced this conclusion. For example, in the *Pulp Mills Case*¹⁹ the International Court of Justice reasoned as follows:

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to

¹⁶ Id at 59.

¹⁷ http://archive.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0

¹⁸ Brisbane, https://www.ramsar.org/sites/default/files/documents/library/key_rec_6.02e.pdf

¹⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* <http://www.icj-cij.org/en/case/135/judgments>
See also Principle 17 of the Rio Declaration, Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

International Human Rights Law

The analysis above has principally focused on international environmental law and the law of shared resources but international human rights also supports the analysis and confirms that any assessment should pay particular attention to the effects of any development of the 1002 lands that impair the subsistence harvesting interests of indigenous communities on both sides of the international boundary.

Both Canada and the United States are party to the International Covenant on Civil and Political Rights (ICCPR).²⁰ Article 1(2) of that Convention provides that “In no case may a people be deprived of its own means of subsistence.” In addition, Article 27 provides that

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Human Rights Committee has interpreted the right to culture in Article 27 in broad terms in its General Comment No. 23.²¹ Paragraph 7 of that Comment notes that:

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

Both Canada and the United States have also endorsed the United Nations Declaration on the Rights of Indigenous Peoples.²² Article 25 of that Declaration provides that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

In addition, Article 29(1) provides (in part) that:

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.

²⁰ <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

²¹ General Comment No. 23: The rights of minorities (Art. 27) : . 08/04/94. CCPR/C/21/Rev.1/Add.5
<http://indianlaw.org/sites/default/files/resources/UN%20OHCHR%20Comments%20on%20Article%2027.pdf>

²² http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

While there is no specific reference to an EIA in this instrument, these provisions establish at a minimum that States have a due diligence duty to assess whether the activities that they authorize will have an impact on the rights of indigenous communities.

Part 5. Concluding Statement & Signatures

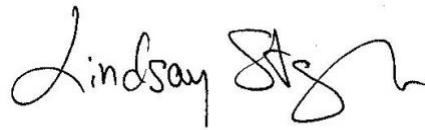
The Coastal Plain discussed in this submission is a critically important region to the Inuvialuit of Canada. As described above, the Inuvialuit have long and ongoing relationships with this region and with species that rely upon this habitat, which are rich with history and meaning. The transboundary Arctic Coastal Plain has been part of an international conservation regime for decades, demonstrating the Inuvialuit, Canadian, and United States' interest in and commitment to the conservation of these species and the habitat they depend upon. It is within the collective interests and legal obligations of Canada and the U.S. to ensure the ongoing conservation of fish and wildlife populations dependent upon the Coastal Plain and the maintenance of Inuvialuit subsistence rights, which are critical to the economic and cultural sustainability of the Inuvialuit people.

We thank you for your consideration of our interests as presented above and will continue to engage in the Environmental Impact Statement process.

Sincerely,



John Lucas Jr
Chair
Inuvialuit Game Council



Lindsay Staples
Chair
Wildlife Management Advisory Council
(North Slope)



Larry Carpenter
Chair
Wildlife Management Advisory Council
(Northwest Territories)



David V. Gillman
Chair
Fisheries Joint Management Committee

APPENDIX 1

Inuvialuit, Yukon, Northwest Territories and Canadian Interests Potentially Affected by the Coastal Plain Oil and Gas Leasing Program, Alaska

Major categories of interest-based issues affecting the Inuvialuit Settlement Region, and other regions of Yukon, Northwest Territories and Canada, and associated questions for the EIS to address.

1. Biophysical, ecological and socio-ecological systems and traditional activities

1.1 How will the leasing program, including the requirement to hold no fewer than two lease sales area-wide, leasing alternatives, post-lease activities, including seismic and drilling exploration, development, additional road and air access, and transportation of oil and gas in and from the Coastal Plain (hereafter referred to the *leasing program and related activities*) affect population dynamics, behaviour, distribution and health of shared wildlife populations and the quantity, quality, availability and connectivity of their habitats (critical habitat and habitat effectiveness), with special attention to each of the following:

- Porcupine Caribou barren ground caribou herd
 - including core Porcupine Caribou calving areas, sensitive habitats and summer/winter range
- migratory birds
- grizzly bears, wolverine, muskox
- polar bear, including critical denning areas
- beluga whale
- bowhead whale
- ringed seal
- Shared fish stocks including Arctic char, Dolly Varden char and Cisco
- listed U.S. and Canadian species-at-risk including: buff-breasted sandpiper, rusty blackbird; short-eared owl, dolly Varden char, red knot, polar bear, peregrine falcon, olive-sided flycatcher, ivory gull, grey whale, bowhead whale, barn swallow, bank swallow
- cited candidate species for listing under either U.S. or Canada's species-at-risk acts (grizzly bear, wolverine, barren-ground caribou, red-necked phalarope)

For each species listed above, consider the impacts on the capacity of these resources to meet present and future needs of Inuvialuit and other Canadian subsistence users as per their subsistence rights, as well as subsistence user communities in Alaska, based on the documents listed in Appendix A1.

1.2 How will the *leasing program and related activities* affect Canadian subsistence use areas and Inuvialuit subsistence activities dependent on shared wildlife populations? Are subsistence use areas and subsistence activities likely to be generally in better or worse condition after the project is over? What are the potential impacts to food security, health and well-being for Inuvialuit, including an assessment of economic impacts?

Canadian subsistence use areas and Inuvialuit subsistence activities are described in the documents listed in Appendix A1.

1.3 How will the *leasing program and related activities* affect present and future terrestrial and marine conservation measures in Canada, including:

- species-specific measures and plans in Canada for polar bears, grizzly bears, Porcupine caribou, muskoxen
- protected areas, conservation areas and special use areas, including Ivvavik National Park, Herschel Island Territorial Park, the eastern Yukon North Slope (under withdrawal for conservation purposes), Vuntut National Park, Old Crow Special Management Area, Tarium Niriyutait Marine Protected Area

See Appendix A1 for a list of existing management and conservation plans for wildlife and habitat in Canada to consider in this assessment.

1.4 How will the *leasing program and related activities* contribute to or detract from measures in the Yukon, Northwest Territories and Canada-wide to reduce greenhouse gas emissions?

See Appendix A1 for a list of existing management and conservation plans for wildlife and habitat in Canada to consider in this assessment.

1.5 How may continuing climate change affect, and interact with (including cumulative effects) the *leasing program and related activities* and their effects on the ecology of the program area and their implications for 1.1 – 1.7?

1.6 How may other environmental conditions affect the *leasing program and related activities* and program effects on the ecology of the program area for 1.1 – 1.4?

1.7 How might these prospects (consider each of 1.1 – 1.6) be different with selected leasing alternatives?

2.0 Trade-offs

2.1 Have the proposed trade-offs been discussed and/or accepted through any open and participative processes?

3.0 Alternatives

3.1 What are the overall long term advantages and disadvantages for the program area, larger region, United States, and Canada of proceeding now with the proposed leasing program option versus delaying the program, or proceeding with other possible timing, scale, pace and/or components?

Appendix A1: Reference Documents

Park/Regional Management Plans:

Yukon Government. (2006). *Herschel Island Qikiqtaruk Territorial Park Management Plan*. Yukon Government, Whitehorse, YT. iv + 54 pp. http://www.env.gov.yk.ca/publications-maps/documents/herschel_management_plan.pdf

Parks Canada. (2007). *Ivvavik National Park of Canada: Management Plan*. Parks Canada, Gatineau, QC. vii + 73 pp. <https://www.pc.gc.ca/en/agence-agency/bib-lib/~media/77C45C06474B405C8AF2C38F625EDA6C.ashx>

DFO. (2010). *Monitoring indicators for the Tarium Nirvutait Marine Protected Area (TNMPA)*. DFO Can. Sci. Advis. Sec. Sci. Advis. Rep. 2010/059. http://www.dfo-mpo.gc.ca/csas-sccs/publications/sar-as/2010/2010_059-eng.html

Wildlife Management Advisory Council (North Slope). (1996, 2003). *Yukon North Slope Wildlife Management and Conservation Plan: The Land and the Legacy - Taimanga Nunapta Pitqusia: Volume I and II*. Wildlife Management Advisory Council (North Slope), Whitehorse, YT. 44 pp. and vi 74 pp.

Species-Specific Management Plans:

Wildlife Management Advisory Council (North Slope). (2018). *Framework for the Management of Yukon North Slope Muskox*. The Wildlife Management Advisory Council (North Slope), Whitehorse, YT. iii + 24 pp. https://wmacns.ca/documents/328/WMACNS_-_Framework_for_the_Management_of_North_Slope_muskox.pdf

Joint Secretariat. (2017). *Inuvialuit Settlement Region Polar Bear Joint Management Plan*. Joint Secretariat, Inuvialuit Settlement Region. vii + 66 pp. http://www.nwtspeciesatrisk.ca/sites/default/files/isr_polar_bear_joint_management_plan_2017_final.pdf

First Nation of NaCho Nyäk Dun, Gwich'in Tribal Council, Inuvialuit Game Council, Tr'ondëk Hwëch'in, Vuntut Gwitchin Government, Government of the Northwest Territories, Government of Yukon, and Government of Canada. (2010). *Harvest Management Plan for the Porcupine Caribou Herd in Canada*. Porcupine Caribou Management Board, Whitehorse, YT. 45 pp. <http://www.pcmb.ca/documents/Harvest%20Management%20Plan%202010.pdf>

Environment and Climate Change Canada. (2017). *Management Plan for the Peregrine Falcon anatum/tundrius (Falco peregrinus anatum/tundrius) in Canada*. Species at Risk Act Management Plan Series. Environment and Climate Change Canada, Ottawa. iv + 28 pp. https://www.registrelep-sararegistry.gc.ca/document/default_e.cfm?documentID=2741

Nagy, J. A., & Branigan, M. (1998). *Co-management plan for grizzly bears in the Inuvialuit Settlement Region, Yukon Territory and Northwest Territories*. Government of the Northwest Territories, Department of Resources, Wildlife, and Economic Development, Inuvik, NT.
<https://wmacns.ca/resources/co-management-plan-grizzly-bears/>

Inuvialuit Traditional Use & Knowledge:

Wildlife Management Advisory Council (North Slope) and Aklavik Hunters and Trappers Committee. (2018). *Yukon North Slope Inuvialuit Traditional Use Study*. Wildlife Management Advisory Council (North Slope), Whitehorse, Yukon. 124 + xvi pp.
<https://wmacns.ca/resources/?id=77>

Joint Secretariat. (2015). *Inuvialuit and Nanuq: A Polar Bear Traditional Knowledge Study*. Joint Secretariat, Inuvialuit Settlement Region. xx + 304 pp.
<https://wmacns.ca/resources/inuvialuit-and-nanuq-polar-bear-traditional-knowledge-study/>

Wildlife Management Advisory Council (North Slope) and the Aklavik Hunters and Trappers Committee. (2008). *Aklavik local and traditional knowledge about grizzly bears of the Yukon North Slope: Final Report*. Whitehorse, Yukon: Wildlife Management Advisory Council (North Slope). https://wmacns.ca/documents/82/272_WMAC09136rpt_griz_knwldg_web3.pdf

Wildlife Management Advisory Council (North Slope) and Aklavik Hunters and Trappers Committee. (2018). *Inuvialuit Traditional Knowledge of Wildlife Habitat, Yukon North Slope*. Wildlife Management Advisory Council (North Slope), Whitehorse, Yukon. vi + 74 pp.
https://wmacns.ca/documents/326/habitat_YNS.pdf

Climate Change Documents:

Government of the Northwest Territories. (2017). *2030 NWT Climate Change Strategic Framework*. <http://www.enr.gov.nt.ca/en/services/climate-change/2030-nwt-climate-change-strategic-framework>

Yukon Government. (2009). *Yukon Government Climate Change Action Plan*. Yukon Government, Whitehorse, YT. 45 pp. http://www.env.gov.yk.ca/publications-maps/documents/YG_Climate_Change_Action_Plan.pdf