IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

SHELL GULF OF MEXICO, INC, et al., Plaintiffs, vs. CENTER FOR BIOLOGICAL DIVERSITY, INC., et al., Defendants.	Case No. 3:12-cv-0048-RRB **ORDER DENYING MOTION TO DISMISS**

I. INTRODUCTION

Before the Court are Defendants Center For Biological Diversity, Inc.; Redoil, Inc.; Alaska Wilderness League; Natural Resources Defense Council, Inc.; Northern Alaska Environmental Center; Pacific Environment and Resources Center; Sierra Club; The Wilderness Society; Ocean Conservancy, Inc.; Oceana, Inc.; Defenders of Wildlife; Greenpeace, Inc.; and National Audubon Society, Inc. (collectively the "Organizations") with a Motion to Dismiss at Docket 44. The Organizations contend that this Court lacks jurisdiction and that the Amended Complaint fails to state a valid claim because: (1) the Amended Complaint does not present a case or controversy; (2) no cause of action exists that permits a

private party to sue another private party to affirm agency action; (3) the Noerr-Pennington doctrine prohibits bringing suit based on a party's exercise of its First Amendment right to petition the government; and (4) the Court should decline to exercise its discretionary authority under the Declaratory Judgment Act ("DJA").[1] Based on the lack of jurisdiction and of a valid claim, the Organizations request that the Court dismiss the present litigation.

Plaintiffs Shell Gulf of Mexico, Inc. and Shell Offshore, Inc. (collectively "Shell") oppose at Docket 51 and argue that: (1) Shell possesses a protectable legal interest in the Department of Interior's Bureau of Safety and Environmental Enforcement ("BSEE") approvals of the Chukchi and Beaufort Seas Oil Spill Response Plans ("OSRP"), such interest is adverse to that of the Organizations, and there exists between Shell and the Organizations an immediate and concrete dispute; (2) Shell can proceed under the DJA instead of the Administrative Procedure Act ("APA"); (3) the Noerr-Pennington doctrine is inapplicable; and (4) the Court should exercise its discretionary authority under the DJA in the interest of judicial economy.[2]

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[1] Docket 45 at 8.

[2] Docket 51 at 7-8.

Inasmuch as the Court concludes that: (1) it posses subject-matter jurisdiction over the present litigation; (2) a justiciable dispute exists between the parties; (3) it is appropriate for Shell to proceed under the DJA, as opposed to the APA; and (4) the Noerr-Pennington doctrine is not applicable in the instant matter, Shell's request for declaratory judgment will not be summarily dismissed. Additionally, the Court concludes that because the parties have submitted memoranda thoroughly discussing the law and evidence in support of their positions, oral argument is neither necessary nor warranted with regard to the instant matter.[3]

II. FACTS

The United States Government previously awarded Shell leases to drill for oil in the Chukchi and Beaufort Seas of the Arctic Ocean.[4] Shell hopes to begin drilling in those areas this summer.[5] To drill exploratory wells, Shell must obtain permits and authorizations.[6] One such authorization is federal agency approval

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[3] See Mahon v. Credit Bureau of Placer County Inc., 171 F.3d 1197, 1200 (9th Cir. 1999)(explaining that if the parties provided the district court with complete memoranda of the law and evidence in support of their positions, ordinarily, oral argument would not be required).

[4] Docket 45 at 10.

[5] Id.

[6] Docket 42 at 3.

of Shell's plans to respond to potential oil spills caused by the exploratory drilling.[7] BSEE is the agency responsible for reviewing and approving the Chukchi and Beaufort spill plans.[8] Shell's plans must comply with the Outer Continental Shelf Lands Act ("OCALA") and the Oil Pollution Act ("OPA").[9]

In March and April 2010, BSEE's predecessor agency approved Shell's spill plans for Chukchi and Beaufort drilling activities.[10] Shortly thereafter, Shell was required to revise its spill plans to include new calculations for a worst-case discharge scenario.[11] BSEE made the Beaufort spill plan publicly available on July 5, 2011, and the Chukchi spill plan available on November 16, 2011.[12] The Organizations submitted comments on both plans within the twenty-one-day comment periods.[13] After the comment periods were closed, BSEE asked Shell to revise both spill plans again.[14]

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[7] Id. at 7.

[8] Docket 45 at 10.

[9] Docket 42 at 7.

[10] Id. at 9, 11.

[11] Id. at 10, 12.

[12] Docket 45 at 10.

[13] Docket 42 at 11, 12.

[14] Docket 45 at 10.

Shell submitted a significantly revised Chukchi spill plan on February 3, 2012.[15] Within two weeks, BSEE approved the Chukchi spill plan, and on March 28, 2012, BSEE approved Shell's significantly revised Beaufort spill plan.[16] Shell initiated the current suit against the Organizations seeking relief declaring that the BSEE complied with the APA in approving the OSRPs and that the BSEE's conclusions regarding the OSRPs are not arbitrary, capricious, or an abuse of discretion.[17]

III. STANDARD OF REVIEW

Under Federal Rules of Civil Procedure ("FRCP"), Rule 12(b)(1), a defendant may raise a facial or factual challenge to the court's subject-matter jurisdiction.[18] If the challenge to jurisdiction is a facial attack, i.e., the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards applicable

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[15] Id.

[16] Docket 42 at 13-14.

[17] Docket 45 at 11; Docket 42 at 28.

[18] 2 James W. Moore, Moore's Federal Practice, § 12.30(4) at 12-38 (3d ed. 1977).

when a Rule 12(b)(6) motion is made.[19] "A complaint will be dismissed for lack of subject matter jurisdiction . . . if the cause does not 'arise under' any federal law or the United States Constitution[,]"[20] or if there does not exist complete diversity between the parties.[21]

A motion under FRCP, Rule 12(b)(6) may be granted "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations."[22] In deciding a motion, not only must a court accept all material allegations in the complaint as true, but the complaint must be construed, and all doubts resolved, in the light most favorable to the plaintiff.[23] Yet, such tenet does not apply to legal conclusions.[24] "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."[25]

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[19] See 2A J. Moore, J. Lucas & G. Grotheer, Moore's Federal Practice, 12.07(2.-1]), at 12-46 to 12-47 (2d ed. 1987).

[20] Baker v. Carr, 369 U.S. 186, 198 (1962).

[21] 28 U.S.C. § 1332 (2011).

[22] Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

[23] Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992) (citing Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987)).

[24] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[25] Id. at 663 (internal citations omitted).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[26]

Specifically, a complaint must "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[27] Plausibility is required so "that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation: The complaint should give fair notice and enable the opposing party to defend itself effectively.[28] "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[29] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[30] "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a

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[26] Id. at 679 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[27] Id. at 678 (quoting 550 U.S. at 570).

[28] Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

[29] 556 U.S. 662, 679 (internal citations omitted).

[30] Id. at 663 (citing 550 U.S. at 556).

defendant has acted unlawfully."[31] "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'"[32]

In short, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'"[33] In other words, the "dismissal for failure to state a claim is 'proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory.'"[34] A court should not look to "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[35]

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[31] Id. at 678 (quoting 550 U.S. at 557).

[32] Id.

[33] Id. at 679 (quoting Fed. R. Civ. P. 8(a)(2) (2009)).

[34] Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010).

[35] Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997).

IV. DISCUSSION

A. The Court Possesses Subject Matter Jurisdiction.

The Organizations dispute this Court's subject-matter jurisdiction.[36] However, the Court does possess jurisdiction.

> "When a declaratory judgment plaintiff asserts a claim that is in the nature of a defense to a *threatened* or pending action, the character of the threatened or pending action determines whether federal question jurisdiction exists with regard to the declaratory judgment action."[37] Here, it is alleged that the Organizations have implicitly and expressly threatened to challenge the BSEE's approval of Shell's two OSRPs under the APA.[38] Such a suit would involve an agency action "generally reviewable under federal question jurisdiction pursuant to 28 U.S.C. § 1331."[39] Therefore, because this Court would have jurisdiction over the threatened action, it possesses jurisdiction over the current suit.[40]

B. This Case Presents a Justiciable Dispute.

The Organizations argue that "Shell's suit is, at its core, an attempt to obtain an advisory opinion about the outcome of hyphothetical litigation between" the Organizations and the BSEE

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[36] Docket 45 at 13.

[37] Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1315 (9th Cir. 1986) (emphasis added) (citing Pub. Serv. Com'n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 248 (1952)).

[38] Docket 42 at 19-26; Docket 51 at 14-16.

[39] Spencer Enters., Inc. v. United States, 345 F.3d 683, 687 (9th Cir. 2003).

[40] The Court finds no need to analyze potential diversity jurisdiction under 28 U.S.C. § 1332, as jurisdiction is valid under 28 U.S.C. § 1331.

and "does not present a case or controversey."[41] The Court disagrees.

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'"[42] Of all the doctrines that inform a court's case-or-controversy or justiciability review - standing, mootness, ripeness, political questions, and advisory opinions – three are germane to the current inquiry: standing, ripeness, and advisory opinions.[43]

1. Shell Has Standing to Bring the Present Action.

Standing is, in essence, comprised of two questions: (1) "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues";[44] and (2) whether the litigant "'has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination . . . .'"[45] Moreover, "[t]he fundamental

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[41] Docket 45 at 13.

[42] Allen v. Wright, 468 U.S. 737, 750 (1984).

[43] Id. (quoting Vander Jagt v. O'Neill, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983)).

[44] 468 U.S. at 750-52.

[45] Flast v. Cohen, 392 U.S. 83, 99-100 (1968) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."[46]

The "constitutional minimum of standing contains three elements": (1) an "injury-in-fact" to "[t]he party invoking jurisdiction";[47] (2) "a causal connection between the injury and the conduct complained of"; and (3) the likeliness "that the injury will be 'redressed by a favorable decision.'"[48] It falls to the party asserting jurisdiction to establish these elements.[49] Yet, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice."[50]

First, the injury-in-fact must be "an invasion of a *legally protected interest* which is" both concrete and particularized and "'actual or *imminent*, not conjectural or hypothetical.'"[51] Second,

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[46] Id.

[47] Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (quoting Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972)).

[48] 504 U.S. at 560-61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

[49] Id. at 561.

[50] Id. (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)).

[51] Id. at 560-61 (emphases added) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.[52] Third, the certainty that the injury will be redressible by a favorable decision must be likely, as opposed to merely speculative.[53]

Here, Shell has standing to bring the current suit. The Organizations have threatened to file suit against the BSEE challenging both the Chukchi and Beaufort OSRPs under the APA. Such threatened action, if successful, would constitute an injury-in-fact to Shell. "Economic injury is clearly a sufficient basis for standing."[54] Shell's OSRPs are integral to its oil and gas leases in the Arctic. By threatening to attack such leases through challenging the OSRPs, the Organizations would be assailing Shell's protectable property interests conveyed by such leases.[55]

It is clear from the pleadings that the threats of litigation are not hypothetical. The Organizations' statements, show that the

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[52] 468 U.S. at 564 (internal quotation marks omitted)(quoting 426 U.S. at 41-42).

[53] Id. at 561 (internal quotation marks omitted) (quoting 426 U.S. at 43).

[54] San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126-33 (9th Cir. 1996) (quoting Cent. Ariz. Water Conservation Dist. v. EPA, 990 F.2d 1531, 1537 (9th Cir.)).

[55] Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 747 (9th Cir. 1975).

Organizations intend to challenge the OSRPs in court, as the Organizations consistently have in the past.[56] Also, it is highly likely that such threatened suit is imminent. Not only do the myriad of alleged statements from the Organizations point to a potential lawsuit, but the statements imply that an action would be filed soon.[57] Also, the OSRP approvals are subject to the APA's six-year statute of limitations, which ends immediately prior to July 2012.[58] If the Organizations are going to challenge the validity of the OSRPs, therefore, it has to be this month, June 2012.

Shell has also shown a causal connection between the harm to its property interests and the Organizations' impending suit to challenge the OSRPs. At this stage of the approval process, where the BSEE has - through final agency action - approved the OSRPs in question, the only way to challenge the OSRPs is through a suit under the APA. Indeed, the only harm that could come to Shell's leases, through the OSRPs, would be by the type of suit that the Organizations have threatened. Consequently, potential harm to Shell's property interests stemming from OSRP challenges would be traceable to the Organizations through their possible APA suit.

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[56] Docket 48-41 at 1 (Defendants' prior challenges to Shell's Arctic oil and gas activities).

[57] Docket 42 at 19-26; Docket 51 at 14-16.

[58] Docket 51 at 12.

Moreover, because an APA challenge is the only way to invalidate the OSRPs at this time, a declaratory decision by this Court in favor of Shell would entirely redress any harm to Shell's property interests effectuated by such a challenge.

Therefore, because there exists "a logical nexus between" Shell's asserted status and Shell's claims, the Court holds that Shell possesses standing to bring the instant litigation.[59]

2. The Current Controversy Is Ripe.

Another issue of justiciability is ripeness. A court "must determine whether . . . claims demonstrate sufficient ripeness to establish a concrete case or controversy."[60] Ripeness is a "'question of timing'"[61] that seeks to prevent "'the courts, through premature adjudication, from entangling themselves in abstract disagreements.'"[62] In addition to requiring a concrete case or controversy, the ripeness doctrine demands that courts analyze prudential factors: the fitness of the issues for judicial decision

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[59] 392 U.S. at 101-02.

[60] Thomas v. Union Carbide Agr. Prods. Co., 473 U.S. 568, 579 (1985) (citing Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 138-139 (1974)).

[61] Id. (quoting 419 U.S. at 140).

[62] Id. (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967)).

and the hardship to the parties of withholding court consideration.[63]

First, "[i]n 'measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.'"[64] But, the concreteness element does not force a party "'to await the consummation of threatened injury to obtain preventive relief. If the injury is *certainly impending*, that is enough.'"[65] The plaintiff must simply show that he "face[s] 'a realistic danger of sustaining a direct injury as a result of'" a threatened lawsuit.[66] The threat must be genuine.[67] The genuineness of a threat of suit can be shown by a threat's specificity and a history of similar suits between the parties.[68] Additionally, "a federal court normally ought not resolve issues 'involv[ing]

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[63] 473 U.S. at 581 (quoting 387 U.S. at 149).

[64] Thomas v. Anchorage Equal Rights Com'n, 220 F.3d 1134, 1138-39 (9th Cir. 2000) (quoting Gene R. Nichol, Jr., Ripeness and the Constitution, 54 U. Chi. L. Rev. 153, 172 (1987)).

[65] 473 U.S. at 581-82 (emphasis added) (quoting 419 U.S. at 143).

[66] See 220 F.3d at 1138-39 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

[67] See id. (quoting 98 F.3d at 1126).

[68] See id. (citing 98 F.3d at 1126-27).

contingent future events that may not occur as anticipated, or indeed may not occur at all.'"[69]

Second, pure legal questions that require little, if any, factual development are more likely to be fit for judicial decision.[70] Specifically, "a claim involving the action of an administrative agency is fit for review only when the agency action is final."[71] Ripeness exists to prevent courts "from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[72] Third, a dispute is ripe when "[n]othing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution of" such dispute.[73]

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[69] Clinton v. Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996) (quoting 473 U.S. at 580-81).

[70] 98 F.3d at 1132 (citing Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1434-35 (9th Cir. 1996)).

[71] 2 James W. Moore, Moore's Federal Practice, § 101.76(1)(c) (3d ed. 2002).

[72] Rapid Transit Advocates, Inc. v. S. Cal. Rapid Transit Dist., 752 F.2d 373, 378 (9th Cir. 1985).

[73] 473 U.S. at 581-82 (citing Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 82 (1978)).

Here, many of the factors that establish Shell's standing also establish the ripeness of the underlying contention between the parties. Particularly, this action is fit for judicial decision because no factual development needs to take place; the underlying questions are purely matters of law. Moreover, the Organizations' threat of legal action is not contingent on anything apart from the threat itself.

Nothing could be gained by postponing the inevitable challenge to the OSRPs for a couple of weeks. The Organizations argue that by hearing this case now, the Court would not be giving a potential challenger sufficient time to review both the OSRPs and the agency record and to determine what legal challenges to make.[74] Such argument rings hollow considering that a potential challenger has had since March 28, 2012, to prepare any possible challenges to the OSRPs in question. Furthermore, any specific deficiency a potential challenger could find with the BSEE's approvals would certainly be fleshed out in the current DJA action, thereby providing the court with the exact legal issues upon which it must focus.[75] Thus, adjudicating the present contention between the parties now would

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[74] See Docket 45 at 20.

[75] Additionally, Shell has already submitted a Freedom of Information Act request for the underlying administrative record involving the OSRP approvals, so as to provide the Court with a sufficient background of the case. Docket 51 at 28 n. 11.

not be a hardship to the Organizations, but waiting, even a short while, would be a burden to Shell given the limited time period available for exploration and the considerable money Shell has already expended in preparation for this season. Additionally, any costs that the Organizations would expend now to defend this action would be offset by the absence of litigations costs expended to bring an APA challenge in the near future and thus such present costs would not present a hardship to the Organizations. Also, considering the number of individuals and jobs that would be affected by this case, a speedy resolution of the matter serves the public interest. Therefore, the Court holds that the current dispute between Shell and the Organizations is ripe for adjudication.

3. Declaratory Relief Would Not Constitute an Advisory Opinion.

The Organizations claim that Shell is seeking an advisory opinion on BSEE's potential liability.[76] This Court disagrees. Shell is seeking to protect its property interests from potential invalidation through one of the few, if not the only, avenues available to Shell.

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[76] Docket 45 at 16.

The Supreme Court has stated that a federal court does not have "the power to render advisory opinions."[77] A court cannot render an "advisory decree upon a hypothetical state of facts."[78] Shell has alleged facts showing that the underlying questions in this case affect both its rights and the rights of the Organizations. Further, the factors supporting standing and ripeness sufficiently allege an actual dispute between Shell and the Organizations that would be definitively resolved by a possible decision in favor of Shell. Thus, any potential declaratory relief granted by this Court would not constitute an advisory opinion.

Therefore, the Court holds that the current action presents a "case or controversy" as is required by Article III of the Constitution.

C. Shell May Proceed under the DJA.

The Organizations maintain that "[f]ederal law contains no mechanism for Shell to obtain the relief it seeks."[79] The Organizations argue that the DJA does not create a cause of action and that "Shell is attempting to use the DJA to obtain agency

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[77] Preiser v. Newkirk, 422 U.S. 395, 401-02 (1975) (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

[78] Imperial Irr. Dist. v. Nevada-California Elec. Corp., 111 F.2d 319, 321 (9th Cir. 1940) (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 325 (1936)).

[79] Docket 45 at 7.

review of an agency action outside the boundaries of the APA."[80] The Court disagrees.

Under 28 U.S.C. § 2201(a), "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." However, the creation of the DJA was only an expansion of "the scope of the federal courts' *remedial* powers, it did nothing to alter . . . the general conditions necessary for federal adjudication (e.g., a federal question or diversity of citizenship)."[81] The DJA merely "vests a district court with discretion to hear an action which is already within its jurisdiction."[82] "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the

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[80] Id.

[81] Countrywide Home Loans, Inc., v. Mortgage Guar. Ins. Corp., 642 F.3d 849, 852-53 (9th Cir. 2011) (emphasis added) (citing Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950)).

[82] Plum Creek Timber Co., Inc. v. Trout Unlimited, 255 F.Supp.2d 1159, 1164-65 (D. Idaho 2003).

issuance of a declaratory judgment."[83] Specifically, "in its limitation to cases of actual controversy, [the DJA] manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense."[84]

When reviewing an action under the DJA, a court must resolve two issues: (1) "whether there is a case of actual controversy";[85] and (2) whether the court should exercise its discretion "'to declare the rights of litigants.'"[86]

1. The Matter at Bar Presents an Actual Controversy.

The DJA "offers a means by which rights and obligations may be adjudicated . . . in cases where a party who could sue for coercive relief has not yet done so."[87] Moreover, a primary purpose of the DJA "is to give litigants an early opportunity to resolve federal

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[83] MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007) (quoting Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273 (1941)).

[84] Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 239-40 (1937).

[85] Am. States Ins. Co. v. Kearns, 15 F.3d 142, 143-44 (9th Cir. 1994)(citing Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 893 (9th Cir. 1986)).

[86] 549 U.S. at 136 (quoting Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995)).

[87] 80 F.3d at 1405.

issues to avoid 'the threat of impending litigation[,]'"[88] especially if such threats "cause the plaintiff to have a 'real and reasonable apprehension that'" litigation will occur.[89] Declaratory relief is also appropriate for a plaintiff who is "uncertain of his rights . . . ."[90] In sum, a DJA action "'is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with . . . an early adjudication without waiting until his adversary should see fit to begin an action after the damage has accrued . . . .'"[91]

The Court has already found that an actual case or controversy exists between Shell and the Organizations. Thus, because the Article III justiciability analysis and the actual controversy element of the DJA authority coincide, the Court holds that this action presents an actual case or controversy under the DJA.

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[88] Biodiversity Legal Found. v. Badley, 309 F.3d 1166, 1172-73 (9th Cir. 2002) (quoting Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996)).

[89] Spokane Indian Tribe v. United States, 972 F.2d 1090, 1091-92 (9th Cir. 1992) (quoting Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1555-56 (9th Cir. 1990)).

[90] 799 F.2d at 1315.

[91] 255 F.Supp.2d at 1164 (quoting United Food & Commercial Workers Local Union Nos. 137, 324, 770, 899, 905, 1167, 1222, 1428, and 1442 v. Food Employers Council, Inc., 827 F.2d 519, 524 (9th Cir. 1987)).

Additionally, this case is appropriately resolved under the DJA because it touches upon the intertwined legal relations of Shell, as an oil and gas company, and of the Organizations, as entities that seek to discourage oil and gas exploration in the Arctic. Also, the timing of the present controversy is conducive to resolution under the DJA because the Organizations could sue the BSEE to challenge its approvals of the OSRPs, but has not yet done so. Thus, the DJA provides Shell with an early opportunity to avoid the impending litigation threatened by the Organizations and have this Court clarify the uncertain validity of Shell's property interests in its Arctic leases.

By waiting to hear the Organizations' likely challenges to the BSEE approvals until the Organizations decide to bring such a suit in the near future, Shell would continue to needlessly operate under a real apprehension of suit and to accrue potentially avoidable monetary losses. Such waiting would be markedly burdensome if the Organizations were to wait until the 11th hour to file a challenge to the approvals with the aim of employing the litigation to delay Shell until the current exploratory season expires.

2. The Court Will Exercise its Discretion.

The Supreme Court has held that although a court possesses jurisdiction to hear a justiciable DJA action, "it [i]s under no

compulsion to exercise that jurisdiction."[92] "If the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate."[93] A "district court 'must balance concerns of judicial administration, comity, and fairness to the litigants.'"[94] In making this determination, a court should consider the following factors: "1) the district court should avoid needless determination of state law issues; 2) it should discourage litigants from filing declaratory actions as a means of forum shopping; 3) and it should avoid duplicative litigation."[95] Additional factors to consider include:

> whether the declaratory action will settle all aspects of the controversy; whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage; or whether the use of a declaratory action will result in entanglement between the federal and state court systems.[96]

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[92] 515 U.S. at 282.

[93] Gov't Emps. Ins. Co. v. Dizol, 133 F.3d 1220, 1222-24 (9th Cir. 1998).

[94] 15 F.3d at 143-44 (quoting Chamberlain v. Allstate Ins. Co., 931 F.2d 1361, 1367 (9th Cir. 1991)).

[95] 255 F.Supp.2d at 1166 (citing 133 F.3d at 1225).

[96] Id. (internal citations omitted) (quoting 15 F.3d at 145 (Garth, J., concurring)).

The alleged facts of the current case cut in favor of employing this Court's discretionary authority under the DJA. Permitting the instant action to go forward would allow the court to hear any potential deficiencies in the BSEE approvals now instead of in a short time from now, thereby, promoting economic judicial administration and avoiding duplicative actions. Also, allowing the current action would be both fair and courteous to the parties, as it would allow Shell to determine its legal relations vis-à-vis its property interests in order to avoid the threat of impending suit, and it gives the Organizations a full opportunity to express their challenges before the very court that would hear such challenges if the Organizations were to bring their own suit.

Additionally, the case does not involve any state law, and there is no evidence of forum shopping, procedural fencing, or seeking a res judicata advantage. Establishing the validity or invalidity of the OSRPs now instead of later would further clarify the legal relations of the parties and allow them to timelier move forward with their respective pursuits. Moreover, deciding the underlying issues in the context of a DJA action would not open the floodgates to agency-action-validation suits as the Organizations claim, but would permit only those cases that present the same

exceptional circumstances that exist here.[97] Therefore, the Court chooses to exercise its discretionary authority under the DJA to hear the current action.

On a separate, but related matter, the Court finds that Shell could not have brought a suit under the APA to establish the validity of the BSEE approvals. In order to bring an action under the APA, a party must show that it has suffered a legal wrong.[98] Furthermore, Article III of the Constitution requires there to be an actual controversy between parties possessed of adverse legal interests. Shell is not seeking to invalidate agency action; it is seeking its validation. Shell could not bring a suit against the BSEE because their legal interests regarding the OSRPs are not adverse nor would there be any controversy over the approvals. A suit between Shell and the BSEE based on the approvals could not be fit for adjudication; there would be no cause of action.

The only avenue open to Shell to validate the approvals, therefore, is the DJA, which the Court finds to be an appropriate vehicle by which to seek such non-statutory review. It stands to reason that if the Organizations could sue to invalidate the approvals, Shell should have the ability to seek the approvals'

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[97] Docket 53 at 11.

[98] 497 U.S. at 882-83 (quoting 5 U.S.C. § 702 (1976)).

validation. Thus, it is fitting that Shell did not pursue this action under the APA, and it is appropriate that the Court analyze this action as arising under the DJA and not the APA.

D. The Noerr-Pennington Doctrine Is Not Applicable.

The Organizations claim that the Noerr-Pennington doctrine prohibits the Court from interpreting the DJA in a way that allows Shell to sue the Organizations based entirely on the their First Amendment petitioning activities.[99] However, the Court finds that the Noerr-Pennington doctrine does not apply to the instant matter.

The Noerr-Pennington doctrine applies in all contexts to immunize from statutory *liability* those individuals "who petition any department of the government for redress . . . ."[100] In other words, "a party may not be subjected to *liability* for conduct intimately related to its petitioning activities."[101] Such protected right to petition includes the right of access to federal courts,[102] including where no litigation is pending.[103] Yet, Ninth Circuit

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[99] Docket 45 at 23.

[100] Theme Promotions, Inc. v. News Am. Mkg. FSI, 546 F.3d 991, 1006-07 (9th Cir. 2008) (citing Sosa v. DIRECTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)).

[101] 437 F.3d at 934 (emphasis added).

[102] Id. at 929.

[103] Id. at 937.

courts "have taken a narrower view of Noerr-Pennington protections where petitions to adjudicatory bodies are at issue . . . ."[104]

In order to determine whether an action violates the Noerr-Pennington doctrine and thus infringes on a party's petitioning rights, the Ninth Circuit has employed a three-step analysis: (1) establish whether there is a threat to a party's petitioning rights; (2) determine whether the potential petitioning activity invokes the protection of the Petition Clause; and (3) decide whether a particular statute could be construed to not affect such rights.[105] In applying the Noerr-Pennington doctrine, a court "must give adequate 'breathing space' to the right of petition."[106]

Here, the Organizations' petitioning rights are not infringed, and the Noerr-Pennington doctrine is not invoked. The type of relief sought by Shell is a declaration that the approvals do not violate the APA and other statutes. Such relief does not hinder the Organizations' right to petition this Court for redress. The Organizations' right to challenge the approvals will be fully exercised during this suit, and the mere fact that such exercise of

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[104] Or. Natural Res. Council v. Mohala, 944 F.2d 531, 534 n. 2 (9th Cir. 1991)(citing Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886 (9th Cir. 1988)).

[105] See id. at 930.

[106] Id. at 931-32 (quoting BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 531 (2002)).

the Organizations' petitioning rights would happen now instead of in a couple of weeks from now does not threaten such rights nor invoke the Petition Clause. Additionally, Shell's action does not seek to impose any kind of liability on the Organizations.

The Organizations cite Westlands Water District Distribution District v. Natural Resources Defense Council, Inc., 276 F. Supp. 2d 1046 (E. D. Cal. 2003), to support their theory that the Noerr-Pennington doctrine immunizes it from the current DJA action. In Westlands, a water distribution district brought suit against an environmental group seeking a declaratory judgment that certain terms in the district's proposed long-term water service contract with the United States did not run afoul of federal law.[107] The court in Westlands held that the suit was barred by the Noerr-Pennington doctrine because the suit was based on the district's disagreement with the views expressed in a public comment letter written by the environmental group, which the court found was protected petitioning activity.[108] Not only is Westlands not precedential, but the case is distinguishable from the present suit.

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[107] 276 F. Supp. 2d at 1048.

[108] Id. at 1053.

In Westlands, the requested declaratory relief was based on the opinions expressed by an environmental group, not like here, where Shell is seeking relief based on agency approval. The plaintiff in Westlands was seeking to constrain the comment process by suing over views expressed in a comment letter prior to a final agency action. Here, the suit is based on a final agency action approving the OSRPs; the comment period is over; and the BSEE has acted. The only way to affect the agency action now is through a lawsuit. Thus, because the approvals constitute final agency action and because the Organizations can fully express any challenges to such approvals through the instant litigation, there is no chilling affect on any perceived petitioning activities.

Furthermore, the court in Westlands expressed concern that a DJA action could be brought solely to impose litigation costs on a party with which a plaintiff disagreed. Although that could be a valid concern, there is no evidence of that here. The court also failed to cite any cases restricting the Noerr-Pennington doctrine to immunizing a party from liability and not from an entire claim, which is a restriction set forth in Ninth Circuit precedent.[109]

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[109] E.g., 546 F.3d at 1006-07.

The gravamen of this action is not the curbing of the Organizations' right to challenge the OSRPs, but the validation of the approvals. It is important to keep in mind that by allowing Shell to proceed with its DJA action, this Court is not deciding the case in Shell's favor. Shell must fully prove its case before any relief is given. Therefore, the Court holds that because the Organizations' petitioning rights are not infringed by Shell's suit, the Noerr-Pennington doctrine does not apply.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion To Dismiss for lack of subject-matter jurisdiction and for failure to state a claim at **Docket 44** is hereby **DENIED**. Additionally, the Motion for Oral Argument at **Docket 54** and the Motion for Status Conference at **Docket 55** are hereby **DENIED**.

ORDERED this 26th day of June, 2012.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE