Nos. 23-35226 & 23-35227

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al.,
Plaintiffs/Appellants,
v.
BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees,

and

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs/Appellants,
v.
BUREAU OF LAND MANAGEMENT, et al.,
Defendants/Appellees.

On Appeal from the United States District Court for the District of Alaska
Nos. 3:23-cv-058 & 3:23-cv-061
Hon. Sharon L. Gleason

Appellee Kuukpik Corporation's Opposition to Appellants' Motions for Injunction Pending Appeal

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I. BACKGROUND

A. Willow and Kuukpik Corporation

Two years ago, this Court decided a similar motion with similar parties for a similar oil project.[1] Similar, but not the same. Kuukpik did not support the version of Willow authorized in the 2021 Record of Decision, but it supports this one because the project is different.[2] Those differences matter.

Kuukpik was incorporated pursuant to the Alaska Native Claims Settlement Act as the Village Corporation for Nuiqsut, Alaska, charged with providing for the economic and social welfare of the Alaska Natives from the Colville River Delta.[3] Those lands, "always … a place of great subsistence,"[4] turned out to be surrounded by some of the largest oil deposits in North America. Long-time Kuukpik President Joe Nukapigak summarized the role and philosophy Kuukpik adopted during five subsequent decades of exploration and development in and around Kuukpik-owned ANCSA lands:

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[1] *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 21-35085, No. 21-35095, 2021 WL 4228689 (9th Cir., Feb. 13, 2021).

[2] Ex. B, ¶¶ 17, 20.

[3] 43 U.S.C. §1601(b) ("[T]the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property …"); Ex. B, ¶¶ 4-8.

[4] Ex. B, ¶ 2.

> After we knew there was oil around us, [elder Thomas Napageak] would always say that industry was coming, and we could either have a seat at the table or we would get run over. He was right. Industry came. Texaco, ARCO, Phillips, ConocoPhillips and whatnot. The elders saw the benefits and wanted them for the community. But they had to protect subsistence too. This is what Kuukpik has always done.
>
> We did not own the oil, but we owned the land. ANCSA gave Kuukpik rights. No one would come onto Kuukpik land unless Kuukpik agreed. So we had our seat at the table.
> . . .
> Willow is not on Kuukpik land. But Conoco will cross Kuukpik land to get to Willow. So we will use their roads and ice roads to Willow area too. Kuukpik and Conoco have agreed to that. They cannot stop shareholders and residents from using the roads, even if wanted to. But they will not. Conoco has been good about this mostly. It's not perfect but it's mostly good. There are benefits. There will be more jobs too. Not just for Nuiqsut.
>
> There will be impacts. We all know that. I worry about the caribou and the migration. Kuukpik did not support Willow for a long time because of that. It was too big, too many impacts to subsistence. So we did not support it. But there have been many changes.[5]

The "changes" Mr. Nukapigak alludes to are the reason Kuukpik has intervened in this litigation. The Willow project approved by the Biden administration in March 2023 reduces impacts in ways that Kuukpik has advocated for years, many of which were not included in the 2021 Project.[6] Yet the 2023 Project also allows Conoco to recover the vast majority of petroleum resources in the area, maximizing benefits to economic stakeholders like the State of Alaska,

[5] Ex. B, ¶¶ 11, 12, 16, 17 (paragraph numbering omitted).

[6] Ex, p. 14-15, 23-24; Ex. F, pp. 3, 10-11.

North Slope Borough, and the villages of the North Slope. In short, the approved project may come as close to minimizing impacts and maximizing benefits as is practically achievable.[7] That is why Kuukpik, after not supporting the 2021 Project, supports Willow as approved and wants to see this version of Willow go forward without delay.[8]

B. The 2023 Winter Construction Activities to be enjoined if the motion is granted.

Movants seek to enjoin the 2023 Winter Construction Activities, or at least what remains of them. The Winter 2023 Construction Activities are comprised of five components: "(1) ice road and pad construction, (2) opening a gravel mine site, (3) constructing a gravel road that will provide access to the Willow Project area, (4) constructing a subsistence boat ramp on the Tiŋmiaqsiuġvik River, and (5) gravel work in the Kuparuk River Unit."[9] This work can only occur during the remainder of this winter season, which ends when the State of Alaska orders ice roads to be closed prior to spring breakup.[10] The 2023 Winter Construction

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[7] Ex. F, p. 2 ("After years of discussion and changes to the Project, Kuukpik supports the Willow Project as described in Alternative E because it strikes an appropriate balance between the need to develop oil and gas resources and ensuring that Nuiqsut residents can continue to practice subsistence for generations to come.").

[8] Ex. B, ¶¶ 20-21.

[9] Docket 5-23, Case No. 23-35226, p. 9; Docket 5-17, Case No. 23-35227, p. 9.

[10] *See generally* 11 AAC 95.285-.335 (granting Alaska Department of Natural Resources authority over Winter Road construction and closure).

Activities are expected to conclude around April 25, 2023, depending on the weather.[11]

II. STANDARD FOR GRANTING AN INJUNCTION PENDING APPEAL

In deciding whether to grant a stay or injunction pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a *strong showing* that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[12]

"A stay [or injunction] is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."[13]

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[11] Docket 14-4, Case No. 23-35226, p. 189; Docket 16-4, Case No. 23-35227, p. 189.

[12] *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019) (*quoting Nken v. Holder*, 556 U.S. 418, 434 (2009).

[13] *Al Otro Lado v. Wolf*, 952 F. 3d 999, 1006 (9th Cir. 2020) (citation and quotation marks omitted).

III. ARGUMENT

The district court thoroughly considered movants' assertions of harm their members would suffer if injunctive relief were denied.[14] Equally important, the court carefully weighed the equities and the public interest:

> In sum, the [district court] weighed the environmental harm posed by the proposed Winter 2023 Construction Activities against the economic damages, benefits to most subsistence users, and the state and federal legislative pronouncements of the public interest that would be impacted by a preliminary injunction prohibiting these construction activities at this time, and concludes that *the balance of the equities and the public interest tip sharply against preliminary injunctive relief.*[15]

A preliminary injunction "should never be awarded as of right[,]"[16] or upon a showing on only one, two, or even three of the *Winter* factors,[17] but only where totality of the factors and facts merit this "extraordinary and drastic remedy."[18] The district court's conclusion set forth above is the gravamen of injunctive relief and the crux movants cannot overcome.

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[14] Docket 5-23, Case No. 23-35226, pp. 19-31; Docket 5-17, Case No. 23-35227, pp. 19-31.

[15] *Id*. at 43 (emphasis added).

[16] *Munaf v. Geren*, 553 US 674, 689-90 (2008).

[17] *See Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008).

[18] *Id*.

The district court considered that some of movants' members' subsistence activities may be affected absent a preliminary injunction,[19] acknowledged that the 2023 Winter Construction Activities might disturb those members,[20] and that another member's summer recreation might be affected,[21] but concluded that these possible injuries are sharply outweighed by facts that militate against a preliminary injunction. Movants do not make a "strong showing" that the district court's conclusion was an abuse of discretion. This Court should deny the motion for that reason.

Should this Court conclude that the movants' alleged injuries rise to the level of irreparable harm, the Court's ultimate determination should still accord with the district court's: the balance of the equities and the public interest "tip sharply against" preliminary injunctive relief. In fact, the equities and public interest now weigh more heavily against injunctive relief because the 2023 Winter Construction activities are nearly complete.[22] Stopping activity at this point would not avoid the injury alleged by movants; it would prevent ConocoPhillips from

[19] *E.g.*, Docket 5-23, Case No. 23-35226, pp. 22, 27; Docket 5-17, Case No. 23-35227, pp. 22, 27.

[20] *Id.* at 20.

[21] *Id.* at 28.

[22] *See* Docket 9, Case No. 23-35276, pp. 1-2; Docket 10, Case No. 23-35277, pp. 1-2.

bringing those activities to a safe close and eliminate subsistence benefits associated with the Activities.

A. Movants have not made a strong showing that they are likely to succeed on the merits because the district court did not abuse its discretion in denying their motions for a preliminary injunction.

"A district court's decision regarding preliminary injunctive relief is subject to 'limited and deferential' review."[23] "[A]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case."[24]

Movants predominantly argue that the facts should be viewed differently than the district court viewed them, particularly with respect to the irreparable harm movants allege their members will suffer absent a preliminary injunction. Movants' disagreement with certain fact statements in the district court's detailed decision does not rise to "a strong showing" that appellant-movants are likely to succeed on the merits of the appeal. Even if the reviewing court were to agree with appellants' view of certain facts when resolving the merits of the interlocutory appeal, an appellate court's disagreement with the district court's view of the facts is not grounds for reversal unless the district court applied the law incorrectly.

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[23] *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (overruled in part on other grounds by *Winter*, 555 U.S. 7).

[24] *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F. 3d 1281, 1286 (9th Cir. 2013).

Because the present motion is for emergency injunctive relief pending interlocutory appeal of a denial of a preliminary injunction, the remaining three *Winter* factors – irreparable harm, the equities, and the public interest[25]– are examined to determine the likelihood of success on the merits (applying an abuse of discretion standard) and whether they are sufficiently satisfied for emergency injunctive relief pending appeal (requiring that movants make a strong showing). Each of these *Winter* factors is addressed below, with the district court's determination and movants' showing lack of a strong showing with this motion discussed in tandem.

The district court got the law right and the facts support its conclusions. These emergency motions for injunctive relief present no reason "to decide justice on the fly" instead of through the traditional judicial review process.[26]

B. The requisite showing of irreparable harm absent injunction was not made to the district court and it is not made before this Court.

The district court's preliminary injunction would have enjoined all the 2023 Winter Construction Activities. Issuing an injunction *now* would affect approximately ten days of activities.[27] To the extent there was irreparable harm that

[25] *Winter*, 555 U.S. at 20.

[26] *Sierra Club*, 929 F.3d at 688 (*quoting Nken*, 556 U.S. at 427).

[27] Docket 14-4, Case No. 23-35226, p. 189; Docket 16-4, Case No. 23-35227, p. 189.

would have been prevented by the district court's preliminary injunction, virtually none would be prevented if this Court grants an injunction.

Movants argue that declarants Sam Kunaknana and Rosemary Ahtuangaruak will suffer irreparable harm if they cannot practice subsistence at the mine site.[28] If the 2023 Winter Construction Activities were likely to materially and negatively impact Nuiqsut residents' subsistence activities or decrease community harvests – whether Kunaknana's, Ahtuangaruak's, or others' – Kuukpik would be on the other side of this motion.[29] However, the methodological evidence and consensus traditional knowledge does not support that conclusion.[30] Movants fail to demonstrate that Kunaknana's or Ahtuangaruak's subsistence harvests will be

[28] Docket 5-1, Case No. 23-35226, p. 26-27; Docket 5-1, Case No. 23-35227, pp. 23-25.

[29] *See* Ex. B, ¶¶ 11, 14 15, 17.

[30] *E.g.*, Docket 5-23, Case No. 23-35226, p. 24; Docket 5-17, Case No. 23-35227, p. 24 ("Moreover, BLM suggests that habitat loss and alteration from gravel mining specifically will have a minimal effect on caribou '[b]ecause the habitats lost are not unique and occur throughout the analysis area . . . [so] caribou would likely move to similar habitats nearby.'"). While Kuukpik does not categorically agree with the implicit premise that impacts to subsistence should be considered "minimal" unless the location is "unique", many Nuiqsut resident declarants have indicated that short-term impacts at the gravel mine site will, in fact, be minimal. Ex. D, ¶ 9; Ex. J, ¶10; ¶; Ex. H, ¶12; Ex. I, ¶¶ 15, 16. Thus, the court's conclusion is supported by Western science and local traditional knowledge.

diminished by the 2023 Winter Construction Activities absent injunctive relief, as the district court found.[31]

Sovereign Inupiat for a Living Arctic ("SILA") movants assert that Kuukpik conceded that Sam Kunaknana's "ability to hunt caribou in an area he currently relies on would be irreparably harmed by gravel mining this winter and into the future."[32] This is incorrect. Kuukpik acknowledged (and still acknowledges) that if Kunaknana "includes himself among those disturbed" by the sounds associated with blasting at the new mine site that was opened last week, then "he plausibly identifies an injury."[33] Being "disturbed" by short, pre-announced blasting sounds occurring seven miles west of Nuiqsut, while unfortunate, does not rise to the level of irreparable harm.[34]

Center for Biological Diversity ("CBD") movants assert that the district court erred in its review of the declaration of Rosemary Ahtuangaruak regarding caribou hunting.[35] The district court's interpretation of Ahtuangaruak's declaration

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[31] Docket 5-23, Case No. 23-35226, pp. 22, 27, 37; Docket 5-17, Case No. 23-35227, pp. 22, 27, 37.

[32] Docket 5-1, Case No. 23-35226, pp. 25-26.

[33] Docket 5-21, Case No. 23-35226, p. 17 (also noting that Kunaknana "does not assert that he intends to hunt at the proposed mine site during the next three to five weeks, when blasting would occur.").

[34] Docket 5-23, Case No. 23-35226, p. 9; Docket 5-17, Case No. 23-35227, p. 9.

[35] Docket 5-1, Case No. 23-35227, p. 28 ("But then the court concluded that [Ahtuangaruak's] current testimony had changed, interpreting a separate statement

is not an abuse of discretion.[36] Even if the district court misunderstood a particular detail or two, it was harmless because the district court separately observed: "*And* she has not demonstrated that *if she were unable to hunt caribou at the proposed 10-acre mine site*, it would impact her ability to obtain caribou for subsistence use."[37]

Kunaknana and Ahtuangaruak have many worries and concerns with the North Slope oil industry generally,[38] fewer concerns for Willow's impacts over the life of the project,[39] and far fewer concerns regarding the 2023 Winter

about different harm relating to boat access to the Tiŋmiaqsiuġvik River where it meets the Colville River as evidence that she no longer uses the area for caribou hunting.").

[36] CBD does not, and cannot, dispute that the content of Ahtuangaruak's declaration differs what she provided in 2001. Rather, CBD argues the relevance of Ahtuangaruak's new statement that that "it is no longer possible" to take her boat up the Tiŋmiaqsiuġvik River "because of a piling that was placed where the river enters Colville." Docket 5-1, Case No. 23-35227, p. 28. But such weighing and interpretation of the evidence is where the trial court's discretion is at its zenith. That CBD would have this evidence interpreted differently is not an abuse of discretion.

[37] Docket 5-23, Case No. 23-35226, p. 27; Docket 5-17, Case No. 23-35227, p. 27 (emphasis added).

[38] Docket 5-15, Case. No. 23-35226, ¶¶ 9, 11-19, 30-35; Docket 5-15, Case No. 23-35227, ¶¶ 13-25, 39-53, 56-57, 63-95, 99-102, 104-133.

[39] Docket 5-15, Case. No. 23-35226, ¶¶ 17, 27-30, 35; Docket 5-15, Case No. 23-35227, 15, 28, 45, 48,49, 51, 53, 68, 73, 80, 91, 95-97, 103.

Construction Activities.[40] Neither identifies specific irreparable harm that will flow from the 2023 Winter Construction Activities, the relevant inquiry.

Movants fail to show the 2023 Winter Construction Activities will prevent any of their members from practicing subsistence. The district court ruled that they did not make such a showing.[41] No fair evaluation of the evidence before the district court suggests this finding was an abuse of discretion.

To overcome the lack of evidence of any reduction in subsistence harvest caused by the 2023 Winter Construction Activities, movants daisy chain their subsistence argument to non-subsistence environmental cases.[42] In so doing, they view subsistence through a Western sport hunting and fishing lens. Subsistence is

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[40] Docket 5-15, Case. No. 23-35226, ¶¶ 10-11, 16; Docket 5-15, Case No. 23-35227, ¶¶ 53-55.

[41] Docket 5-23, Case No. 23-35226, pp. 22, 27; Docket 5-17, Case No. 23-35227, pp. 22 ("The Court acknowledges Mr. Kunaknana's concern for the potential of irreparable harm to the fish he relies on for subsistence from the Winter 2023 Construction Activities. But his concern is not sufficient to establish that irreparable harm to the downriver fish resource is likely if Winter 2023 Construction Activities take place.") and pp. 27 (Ahtuangaruak "has not demonstrated that if she were unable to hunt caribou at the proposed 10-acre mine site, it would impact her ability to obtain caribou for subsistence use.").

[42] Docket 5-23, Case No. 23-35226, pp. 27-28; Docket 5-17, Case No. 23-35227, p. 27. In *Alliance for the Wild Rockies v. Cottrell*, relied upon by movants, the Ninth Circuit rejected the conclusion that the ability to "view, experience, and utilize" other areas in their undisturbed necessarily defeats a showing of irreparable harm, with the Court applying a slippery slope argument. 632 F.3d 1127, 1138 (9th Cir. 2011). In the context of subsistence, however, a much clearer line than is possible with hiking and similar forms of recreation presents itself: effect on subsistence yield.

not sport;[43] it's harvest.[44] Subsistence sustains the community.[45] Safe and effective yield of traditional resources should be the primary focus.

CBD movants assert that "the loss of even a single opportunity to practice subsistence activities can inflict permanent harm."[46] Although Kuukpik has spent decades emphasizing the importance of subsistence and the role of special places where subsistence traditionally occurs, CBD's assertion is not a workable standard for determining whether subsistence interests are irreparably harmed in this context. The district court did not believe it was. Should this Court disagree and instead hold that the loss of a single subsistence opportunity is irreparable harm, then movants may have shown irreparable harm. However, and as explained below, if the loss of a single opportunity to practice subsistence activities is irreparable harm, *a fortiori* Nellie Kaigelak, Bryan Nukapigak, Heather Napageak, Curtis Ahvakana, Thomas Napageak, and the community generally will suffer irreparable harm if an injunction is granted.[47]

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[43] *See, e.g.*, Ex. H, ¶ 6.

[44] Docket 5-15, Case. No. 23-35226, ¶7; Docket 5-15, Case No. 23-35227, ¶¶ 7-10 ("We work together in harvesting plants and animals and sharing the harvest."); Ex. G, ¶ 4; Ex. I, ¶ 4-7.

[45] According to 2016 data, subsistence contributes the equivalent of approximately $20,664 to $27,552 per household. Ex. A, p. 10-12.

[46] Docket 5-1, Case No. 23-35227, p. 23.

[47] Ex. C, ¶ 10-11; Ex. J, ¶ 8; Ex. G, ¶ 7; Ex. H, ¶ 9-10; Ex. I, ¶¶ 11, 14, 19.

C. The equities were against injunctive relief in the district court and are on appeal.

Granting an injunction at this juncture would cause harm disproportionately greater than any harm movants may suffer if 2023 Winter Construction Activities continue. There are local costs from development. There are also benefits. The 2023 Winter Construction Activities are a net benefit to Nuiqsut and to both prongs of its economy, cash and subsistence.

No party is more attuned to the delicate balance of Willow's costs and benefits to the local community, including from the 2023 Winter Construction Activities, than Kuukpik. Kuukpik intervened in this litigation because its Board of Directors overwhelmingly concluded that the 2023 Record of Decision and the 2023 Winter Construction Activities ultimately benefit the community despite the associated negative impacts.[48]

Preventing construction of up to 3.1 miles of gravel road in the next 1-2 weeks would deprive Nuiqsut of a valuable subsistence access option for the upcoming summer subsistence season.[49] Numerous Nuiqsut subsistence users find that industry gravel roads can make subsistence activities safer,[50] more efficient,[51]

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[48] Ex. B, ¶¶ 17-21.

[49] Ex. C, ¶ 10-11; Ex. J, ¶ 8; Ex. G, ¶ 7; Ex. H, ¶ 9; Ex. I, ¶¶ 11, 14, 19.

[50] Ex. C, ¶ 5; Ex. J, ¶ 9; Ex. H, ¶ 9; Ex. I, ¶ 9.

[51] Ex. C, ¶ 4; Ex. J, ¶ 4; Ex. H, ¶ 7; Ex. I, ¶¶ 7-8; Ex. K, ¶ 3.

and improve subsistence yields.[52] Those users state that they would use the road that is currently being constructed even if plaintiffs ultimately prevail on the merits of the underlying district court case and Willow is delayed or never built. As Kuukpik previously pointed out, that outcome would have its own benefits because Nuiqsut residents would get their own gravel road without many of the associated negative impacts.[53]

The subsistence boat ramp construction that is a component of the 2023 Winter Construction Activities will likewise improve access during the upcoming summer subsistence season.[54] Kuukpik proposed and has supported the three boat ramps included in the approved project because the ramps provide improved access to currently under-used subsistence areas to offset the anticipated negative impacts that the project as a whole (not just the 2023 Winter Construction Activities) will have elsewhere. The subsistence boat ramps, including one such ramp planned as part of the 2023 Winter Construction Activities, will benefit subsistence as soon as they are completed. Movants do not contend otherwise.

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[52] Ex. J, ¶ 5; Ex. H, ¶ 7; Ex. I, ¶ 19.

[53] Docket 5-23, Case No. 23-35226, p. 39; Docket 5-17, Case No. 23-35227, p. 39 ("Kuukpik Corporation maintains that the road construction 'would provide a benefit even if plaintiffs ultimately prevail' because subsistence users would 'get their own road on Conoco's dime.'").

[54] Ex. C, ¶ 11; Ex. H ¶ 10; Ex. I, ¶ 19.

In short, allowing the 2023 Winter Construction Activities to proceed is a net benefit to subsistence. Enjoining construction would deprive subsistence users of subsistence access options this summer and fall during prime caribou seasons (and permanently if appellants prevail on the merits of their complaint). Disturbing 10.4 acres of tundra for a gravel mine to build this road and associated subsistence boat ramps is a negative impact,[55] but one that Kuukpik strongly believes is outweighed by the subsistence benefits that gravel will ultimately provide.

Finally, cash is essential to subsistence and to Nuiqsut flourishing.[56] The 2023 Winter Construction Activities currently provide, and will continue to provide past April 25, 2023,[57] good jobs for Nuiqsut residents.[58] Movants assert that this loss of individual income is not an irreparable harm because the jobs will

[55] Docket 5-23, Case No. 23-35226, p. 10; Docket 5-17, Case No. 23-35227, p. 10.

[56] Ex. A, p. 11 ("Participation in subsistence also involved cash expenses for supplies, vehicles, and fuel used in harvests. Nuiqsut subsistence participants reported that they spent an average of $7,109 on subsistence activities in 2019.") (internal citation omitted).

[57] Ex. C, ¶ 16 ("Four [positions filled by local residents] were added since the Willow Project was approved last week in order to monitor activities at the ice road and the future mine site. As long as the project proceeds, those 4 people will keep working this spring and probably throughout the summer. Then next year, we would add another 8 total positions, for a total of about 28….").

[58] Ex. C, ¶ 15; Ex. E; ¶¶ 2, 5; *see generally*, Docket 5-23, Case No. 23-35226, pp. 34-35; Docket 5-17, Case No. 23-35227, pp. 34-35.

only be delayed a year.[59] The argument that delaying high-paying employment for a year does not cause irreparable harm is callous.[60] Not everyone enjoys the privilege of having savings sufficient to cover long-term unemployment.[61]

Movants argue that the district court erred by weighing benefits that would accrue over the life of the Willow project against harms to their members' interests that will arise only from the 2023 Winter Construction Activities.[62] This is not a fair reading of the district court's decision. Moreover, movants urge this Court to err in the opposite direction by considering harms to *their* interests that may occur if Willow is fully operational (and even from unrelated oil projects), while (correctly) restricting the weighing of the equities to harms that accrue from erroneously enjoining the 2023 Winter Construction Activities only.[63]

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[59] Docket 5-1, Case No. 23-35226, pp. 36-37; Docket 5-1, Case No. 23-35227, p. 35.

[60] *See, e.g.,* Ex. K, ¶ 5 ("I am relying on having a job this winter hauling gravel. I need this job to feed my family. I have a daughter that needs braces.").

[61] The record does not provide data for Nuiqsut household savings, only that the employment rate is between 13 and 26%, and that an estimated 39% of Nuiqsut Iñupiat households are below the poverty level. Ex. A, p. 11.

[62] Docket 5-1, Case No. 23-35226, pp. 36-38; Docket 5-1, Case No. 23-35227, pp. 32-34.

[63] Docket 5-1, Case No. 23-35227, p. 23-25 (*e.g., citing* Decl. Ahtuangaruak (Docket 5-15, Case No. 23-35227) for worries she has and harms she says she has experienced from other oil projects and a changing climate, and citing BLM conclusions such as "[L]arge deflections of caribou away from the area west of Nuiqsut would have substantial impacts to subsistence users" but without providing any evidence that the 2023 Winter Activities would cause such

Arguing that *their* injury is irreparable, the CBD movants assert that Ahtuangaruak "described how the loss of even a single opportunity to practice subsistence activities can inflict permanent harm."[64] CBD movants then turn around and make the opposite argument for other people's lost subsistence opportunities, asserting that those opportunities "would be deferred, not denied, by an injunction."[65] Movants cannot have it both ways. If the loss of even a single opportunity to practice subsistence activities inflicts permanent harm on movants' members, then the loss of subsistence opportunities caused by enjoining the 2023 Winter Construction Activities is also permanent harm.

Kuukpik's president, a long-term Nuiqsut resident and one of its original re-settlers,[66] summarized what is at issue on this appeal and with this motion: "We try to have a balance. We need development, and we need subsistence. They can

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deflection); Docket 5-1, Case No. 23-35226, pp. 24-26 (*e.g., citing* BLM conclusions for entire Willow project and citing Decl. Kunaknana for harms he fears will arise from "serious cumulative impacts to us from all these projects, including Willow" and his observation that "Willow is a really big project and it will connect back to the other oil facilities already surrounding my community."). Moreover, "worry and "concern" that something may occur are not injuries recognized by federal courts. *Garland v. Orlans, PC*, 999 F.3d 432, 438 (6th Cir. 2021); *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 438 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

[64] Docket 5-1, Case No. 23-35227, p. 23.

[65] *Id*. at 33-34.

[66] Ex. B, ¶¶ 1, 5.

happen together."[67] The district court did not abuse its discretion in reaching the same conclusion. This Court should similarly conclude that the equities tip sharply against preliminary injunctive relief.

D. An injunction would frustrate the public interest.

1. The district court's determination that the public interest tips sharply against preliminary injunctive relief is not an abuse of discretion.

The district court's denial of a preliminary injunction is independently valid based on the court's finding that "the public interest tip[s] sharply against injunctive relief."[68] Plaintiffs not only failed to persuade the district court that a preliminary injunction serves the public interest (as required to prevail under *Winter*), the court concluded the opposite: Enjoining the 2023 Winter Construction Activities is *against* in the public interest. That conclusion was not an abuse of discretion.

Winter's public interest analysis can be articulated in two ways. As the district court noted, the public interest inquiry "[a]ddresses impact on non-parties rather than parties."[69] In this case, however, so many entities, including state and municipal governments, have intervened to oppose preliminary injunctive relief

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[67] Ex. B, ¶ 15.

[68] Docket 5-23, Case No. 23-35226, p. 43; Docket 5-17, Case No. 23-35227, p. 43.

[69] *Id.,* at p. 41.

that "non-parties" are indirectly represented.[70] Therefore it is useful to articulate the public interest analysis as a "way of inquiring whether there are policy considerations that bear on whether the order should issue."[71] Regardless of the exact framing, the purpose is the same: the respective interests of individual parties do not exist in a vacuum, but against the backdrop of the overall public good. "In order to merit injunctive relief, the public interests in granting the injunction must 'outweigh other public interests that cut in favor of not issuing the injunction.'"[72]

The district court's conclusion that the public interest tipped "sharply against preliminary injunctive relief" is supported by the record. That conclusion was based primarily on detailed consideration of the evidence of "the environmental harm posed by the proposed Winter 2023 Construction Activities against the economic damages, benefits to most subsistence users, and the state and federal

[70] *Id.* at 40 ("The Court also gives considerable weight to the fact that Kuukpik, the North Slope Borough, and ASRC have all intervened to express their support for the Willow Project and Winter 2023 Construction Activities.").

[71] 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.4 (2d ed. 1994).

[72] *Greater Hells Canyon Council v. Stein*, 2018 WL 7254696, at *6 (D. Or. 2018) (quoting *All. for the Wild Rockies*, 632 F.3d at 1138) (preliminary injunction contrary to public interest where "resiliency thinning and group selection harvests are designed to improve forest health, reduce the accumulation of fuels, and improve forest stand health by reducing the risk of severe infestation, disease, and wildfire. Intervenor-defendant presents evidence of economic benefits to the county that even a delay in logging could impair.").

legislative pronouncements of the public interest that would be impacted by a preliminary injunction prohibiting these construction activities at this time…."[73]

The court's analysis highlighted significant differences between the evidence bearing on the public interest here as compared to the 2021 Willow litigation, including "the fact that Kuukpik, the North Slope Borough, and ASRC have all intervened to express their support for the Willow Project and Winter 2023 Construction Activities."[74] After *not* supporting the previously approved version of the project, Kuukpik would not have intervened if it had any doubt that the 2023 Winter Construction Activities are in the best interests of Kuukpik's nearly 600 shareholders and the community of Nuiqsut for which Kuukpik exercises its responsibilities as an ANCSA corporation, which the district court notes in its public interest analysis.[75]

As described in detail by Kuukpik President Joe Nukapigak,[76] Kuukpik has been making decisions about how to balance oil development and subsistence on its own lands and those around it for decades. A core tenant of ANCSA is to ensure

[73] Docket 5-23, Case No. 23-35226, p. 43; Docket 5-17, Case No. 23-35227, p. 43.

[74] *Id.* at 44.

[75] *Id.*

[76] *See generally* Ex. B.

that each Native village receive title to a portion of their traditional lands to use as they saw fit.[77]

The Native residents of Nuiqsut organized as Kuukpik Corporation to carry out that purpose.[78] On their behalf, Kuukpik has exercised the rights and responsibilities entrusted to it by Congress by supporting only balanced and responsible oil and gas development that offered sufficient benefits to Nuiqsut to offset the unavoidable negative impacts.[79] It has opposed development that did not meet that standard, including Conoco's original proposal to develop Willow and the alternative approved in the 2021 ROD that last appeared before this Court.[80]

Kuukpik only supported use of Kuukpik land to advance the Willow Project after much deliberation and consideration of the interests of Nuiqsut, Kuukpik's shareholders, and the residents across the North Slope and the State of Alaska, all of whom will benefit from Kuukpik and Nuiqsut shouldering some of the burdens and impacts of this Project.[81] It is not for any outside entity to substitute its judgment for that of Kuukpik's board of directors—comprised of elders, hunters,

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[77] 43 U.S.C. § 1603, 1611, 1613.

[78] 43 U.S.C. § 1607 ("The Native residents of each Native village entitled to receive lands and benefits under [ANCSA were required to] organize as a business for profit or nonprofit corporation under the laws of the State[.]").

[79] Ex. B, ¶ 11.

[80] Ex. B, ¶ 17.

[81] Ex. B, ¶ 20.

young leaders, and residents of Nuiqsut—regarding the interests of the shareholders Kuukpik was created to serve and the use of lands Congress entrusted to Kuukpik.[82]

As an ANCSA landowner and caretaker of Nuiqsut's subsistence lifestyle, Kuukpik understands the balance that must be struck between development on one hand, and Nuiqsut's subsistence culture on the other. Kuukpik has worked hard to achieve that balance with respect to Willow and elsewhere. Its support for Alternative E and its opposition to the injunction reflect a considered determination that project proceeding without delay is in the best interest of Kuukpik's shareholders and the community Kuukpik exists to serve.[83] The district court recognized this and correctly analyzed and gave weight to that determination. There was no basis for the district court, nor is there for this Court, to substitute its judgment for Kuukpik's evaluation of what is in the best use of its ANCSA lands.

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[82] Congress's declared purpose was that settlement of the Kuukpikmiut's aboriginal land claims be accomplished "in conformity with the real economic and social needs of Natives" and "*with maximum participation by Natives in decisions affecting their rights and property.*" 43 U.S.C.A. § 1601(b) (emphasis added). To assert that Kuukpik and its board of directors cannot decide for themselves how to use their own land, particularly when Kuukpik's track record over many decades is one of remarkable success, represents the return to centuries of paternalistic policies that ANCSA was expressly intended to avoid.

[83] Ex. B, ¶¶ 16-21.

2. At this juncture, the public interest tips more sharply against injunctive relief.

The mine has been opened.[84] Blasting has likely occurred.[85] Halting work now, but not allowing the gravel to be used for the roads and subsistence ramp would be the worst-case outcome: impacts are realized, benefits are not. Should an injunction issue at an inopportune time, leaving the gravel road in a half-constructed state or the mine not properly supported and prepared for summer, the order would create needless environmental and public safety risk.

Even if the Court believes the district court got everything wrong, enjoining the 2023 Winter Activities at this point presents no upside, only harm. Allowing the activities to be completed better serves the interest of the Nuiqsut public because residents will at least enjoy the benefits of the 3.1-mile gravel road to nowhere while litigation continues. Stopping construction activities now would defeat the public interest requiring Conoco to walk away without spending the last few days of the season correctly winding down the work for the summer season is unsafe.

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[84] Docket 9, Case No. 23-35276, pp. 1-2; Docket 10, Case No. 23-35277, pp. 1-2.

[85] *See D*ocket 14-4, Case No. 23-35226, p. 189; Docket 16-4, Case No. 23-35227, p. 189.

IV. CONCLUSION

In light of the limited work remaining, and the necessity of bringing that work to a close in an orderly and safe manner, and the benefits Nuiqsut residents will experience if the Project is allowed to proceed as scheduled, the motions should be denied.

Dated: April 13, 2023

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CERTIFICATE OF COMPLIANCE

1. This response to the appellants' motions for injunction pending appeal contains 3,935 words, in compliance with FRAP 27-1 and FRAP 27 (d)(2).

2. The document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of Rule 32(a)(6).

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