

**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

CONOCOPHILLIPS ALASKA, INC., et al.,

Intervenor-Defendants-Appellees.

Case No. 23-35226

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs-Appellants,

v.

BUREAU OF LAND MANAGEMENT, et
al.,

Defendants-Appellees,

and

CONOCOPHILLIPS ALASKA, INC., et al.,

Intervenor-Defendants-Appellees.

Case No. 23-35227

**ARCTIC SLOPE REGIONAL CORPORATION'S
OPPOSITION TO APPELLANTS' MOTIONS FOR
PRELIMINARY INJUNCTION**

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INTRODUCTION

As the district court properly found when ruling on their motions for preliminary injunctive relief, Plaintiff-Appellants (collectively, “Plaintiffs”)¹ have failed to make three essential showings for injunctive relief: that irreparable harm would result from ConocoPhillips Alaska, Inc.’s (ConocoPhillips) limited winter construction; that their harms outweigh the significant economic and subsistence benefits of the Willow Project (Project); or that an injunction is in the public interest, despite compelling evidence and a resolution by the Alaska legislature that proceeding with the Project best serves the interests of Alaska and the Nation.²

¹ Two groups of plaintiffs have moved for an injunction pending appeal: Sovereign Iñupiat for a Living Arctic, Alaska Wilderness League, Environment America, Northern Alaska Environmental Center, Sierra Club, and The Wilderness Society, Mot. for Inj. Pending Appeal, ECF No. 5 (No. 23-35226) (SILA Mot.); and Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, Greenpeace, Inc., and Natural Resources Defense Council, Mot. for Inj. Pending Appeal, ECF No. 5 (No. 23-35227) (CBD Mot.).

² See also H. J. Res. No. 6 in the Thirty-Third Leg. of the State of Alaska at 4 (Alaska 2023), <https://legiscan.com/AK/bill/HJR6/2023>. The Joint Resolution noted that “further delay in approval or construction of the Willow Project undermines the values and benefits of the project to the state and its residents and the nation, and is not in the public interest.” *Id.* The Alaska legislature also recognized that the Iñupiat Community of the Arctic Slope, the North Slope Borough, the Alaska Federation of

The Supreme Court has instructed that courts must “pay particular regard [to] the public consequences in employing the extraordinary remedy of injunction,” and the district court faithfully did so here. *Winter v. Nat. Res. Def. Counsel*, 555 U.S. 7, 24 (2008) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)); see also *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). Intervenor-Defendant-Appellee Arctic Slope Regional Corporation (ASRC), as it did below, focuses on the public interest prong of the applicable, four-factor test for injunctive relief and the harmful impacts any injunction would have on the Company and its shareholders.³ ASRC is uniquely qualified to address these impacts. The Alaska Native Claims Settlement Act of 1971

Natives, the Alaska Native Village Corporation Association, the ANCSA Regional Association, the City of Utqiagvik, the City of Wainwright, the City of Atkasuk, and the Kuukpik Corporation are united in support of the Project. *Id.* at 2–3.

³ To obtain the “extraordinary remedy” of an injunction pending appeal, Plaintiffs must clearly establish the same four elements: (1) they are “likely to succeed on the merits,” (2) they are “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the balance of equities tips in their favor,” and (4) “an injunction is in the public interest.” See *Winter*, 555 U.S. at 20 (describing factors in the context of preliminary injunction); *Humane Soc. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (injunction pending appeal). For purposes of the appeal, Plaintiffs’ likelihood of success on the merits depends on whether they can show that the district court abused its discretion by denying the preliminary injunction motion. See *supra* p. 6.

(ANCSA)⁴ created ASRC (and other Alaska Native Corporations) to serve the economic and social needs of its shareholders, including their ability to maintain a subsistence lifestyle.⁵ The district court conscientiously and thoughtfully examined the social and economic impacts and reached the correct result—that such relief is not in the public interest. *See* Order on Mot. for TRO and Prelim. Inj. (“Order”) at 34–40, No. 3:23-cv-00058. The court’s conclusions were not an abuse of discretion, and Plaintiffs’ motions should be denied.

⁴ 43 U.S.C. §§ 1601–1629h.

⁵ 43 U.S.C. § 1606(r) (authorizing Alaska Native Corporations “to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed”); Decl. of Rex A. Rock, Sr. (Rock Decl.) ¶ 7, No. 3:23-cv-00058, ECF No. 16 (Alaska Native Corporations help to permit shareholders to maintain subsistence lifestyles) [all ECF cites, except as otherwise indicated, are to the SILA case, No. 3:23-cv-00058, because identical pleadings were filed in both cases] (copy attached); *see generally* ASRC’s Mem. in Supp. of Mots. to Intervene, ECF No. 15. In addition, ANCSA assigns Alaska Native Corporations like ASRC an important role helping to channel the benefits of oil and gas resources to Alaska Natives. Final Supplemental Environmental Impact Statement (FSEIS) at 302, ECF No. 43-2 (“The desire to develop oil and gas resources on the North Slope was a major factor in passage of the ANCSA and creation of ANCSA Native corporations, including regional corporations (e.g., ASRC) and village corporations (e.g., Kuukpik) in each community as well as the creation of local municipalities. These corporations control money and land from the settlement agreement and were established with the intent to provide Alaska Natives with opportunities for self-control and self-determination.”).

The relief Plaintiffs seek ignores Alaska Natives' unified support of the Project's responsible development plan. *See* Rock Decl. ¶¶ 62–63 & Ex. A (ASRC comments on Willow Master Development Plan). Many of the Iñupiat people of the North Slope continue to lead subsistence lifestyles and face the stark realities of their homeland's remote location. Rock Decl. ¶¶ 12–13. At a minimum, a preliminary injunction would negatively impact ASRC's approximately 13,900 shareholders, nearly half of whom reside across the North Slope, *id.* ¶¶ 11, 13, by delaying the Project's many benefits, including job opportunities, workforce development and training programs, tax revenues, grant-making capabilities for needed community projects and services, and additional dividend income the Project will bring. *See id.* ¶¶ 24–25. The loss of the Project's benefits would come at a time when ASRC's shareholders have experienced significant social and economic hardship.⁶ Worse still, delay caused by an injunction pending appeal could permanently jeopardize shareholders'

⁶ *See* Rock Decl. ¶¶ 53 (State's lengthy recession has had significant negative impacts on Alaska Natives), 57–58 (economic opportunities for ASRC's shareholders are particularly important now on heels of pandemic impacts).

access to these benefits.⁷ Because the effects of injunctive relief are not in the public interest, and because Plaintiffs otherwise fell far short of meeting the high burden required to justify injunctive relief, the district court did not abuse its discretion when it declined to grant an injunction and Plaintiffs' motion for an injunction pending appeal should be denied.

LEGAL STANDARD

In weighing whether to grant Plaintiffs the “extraordinary relief” of an injunction pending appeal, this Court’s review of the first factor focuses on a “strong showing that [the movant] is likely to succeed on the merits of its appeal.” *Flores v. Barr*, 977 F.3d 742, 746 (9th Cir. 2020). When a plaintiff appeals a district court’s denial of a preliminary injunction, this Court reviews the appeal on the merits for abuse of discretion by the district court. *The Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc), *overruled in part on other grounds by Winter*,

⁷ The harms from injunctive relief include not only the loss of what remains of this winter’s construction season, but the very real likelihood that the project will not be built. Although the district court discounted ConocoPhillips’ arguments that an injunction could place the entire project at risk, Order at n.144, it did not address unrefuted record evidence in the Declaration of ConocoPhillips’ Vice President of Willow and Exploration Stephen Bross that if the Project is preliminarily enjoined, “Willow will not be constructed.” ECF No. 48-10, ¶ 23.

555 U.S. 7. Plaintiffs therefore must show not just that they have a likelihood of success on the merits of their underlying cases, but rather that the district court abused its discretion by declining to preliminarily enjoin the Project.

This Court reviews the district court’s denial of a preliminary injunction for abuse of discretion—a “limited and deferential” standard. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). “The assignment of weight to particular harms is a matter for district courts to decide.” *Id.* at 475. Thus, “as 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.” *Id.* at 468 (citing *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006)).

ARGUMENT

Plaintiffs are unlikely to succeed on the merits of their appeal because the district court did not abuse its discretion by denying their motions for preliminary injunctive relief. An injunction of the Project would deny Alaskans—specifically the North Slope Iñupiat whose lands are truly concerned—already scarce economic opportunities that directly benefit their quality of life and serve the public interest, at a time when

those harms would be especially acute given the dire economic conditions on the North Slope. That result would be inconsistent with *Winter* and harmful to the public interest. As explained by ASRC’s President and Chief Executive Officer, Rex A. Rock, Sr., “[s]upplementing household incomes, which have seen marked declines in the wake of the pandemic, would advance the public interest. Enjoining the project would postpone or eliminate a needed spur to the economy and disserve the public interest.” Rock Decl. ¶ 60. It is not in the public interest to stall projects, like Willow, that could provide an economic lifeline to at-risk local economies.⁸

⁸ *The Lands Council*, 537 F.3d at 1005 (upholding denial of a preliminary injunction motion against project that “further[s] the public’s interest in aiding the struggling local economy and preventing job loss”); *Or. Nat. Desert Ass’n v. Bushue*, 594 F. Supp. 3d 1259, 1271 (D. Or. 2022) (denying as against public interest preliminary injunction that “could impose significant financial harm, threatening jobs and livelihoods”); *Earth Island Inst. v. Gould*, No. 1:14-CV-01140, 2014 WL 4082021, at *8 (E.D. Cal. Aug. 19, 2014) (denying preliminary injunction where “[t]he potential economic losses include the potential loss of jobs in the locality”); *Protect Our Communities Found. v. U.S. Dep’t of Agric.*, No. 11CV00093, 2011 WL 13356151, at *12 (S.D. Cal. Sept. 15, 2011) (“Maintaining jobs is in the public interest.”).

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING DELAY OF THE PROJECT'S BENEFITS AS ONE OF MANY HARMS AN INJUNCTION WOULD CAUSE.

The district court properly found that preliminarily enjoining the Project would result in the immediate, concrete loss of jobs related to ConocoPhillips' planned 2023 winter season, as well as immediate harms to area residents who plan to use the gravel road and boat ramps for subsistence activities. Order at 34–40 (citing “immediate economic impact on Nuiqsut”). These harms alone are sufficient to demonstrate that the district court did not abuse its discretion in balancing the equities.

Plaintiffs acknowledge that the relief they seek would cause jobs to be lost, but discount this harm as “temporary” because they assume the jobs will be available next year if and when construction resumes. SILA Mot. at 36–37; CBD Mot. at 30–31, 35. But a one-year delay in income is not trivial to many residents of the North Slope, where unemployment and poverty rates are high. Indeed, one Nuiqsut resident, whose testimony the district court quoted, explained that he needs the income from work at the Willow mine site this winter to pay for his daughter's braces and to buy ammunition and fuel for subsistence hunting. *See* Order at 34–35. Similarly, the district court found immediate harms to subsistence

use if it granted the preliminary injunction. *Id.* at 35–40 (discussing foregone opportunities for subsistence use of roads and ramps “this winter.”).

Plaintiffs argue that because the district court also considered harms that would result more generally from the loss of the whole Project, the court abused its discretion. Plaintiffs cite *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*, in which the Court of Appeals reversed an order denying a preliminary injunction for a logging project in a national forest that would “lead to the logging of thousands of mature trees.” 752 F.3d 755, 764 (9th Cir. 2014). SILA Mot. at 36–37; CBD Mot. at 29. But this Court did not hold in *Connaughton* that a court’s consideration of the public interest may never include benefits of the project as built that accrue only (or largely) after the injunction period ends. The balancing of equities that courts must perform requires a context-specific exercise, making “[t]he assignment of weight to particular harms . . . a matter for district courts to decide.” *Carlton*, 626 F.3d at 475. Thus, although it might have been a matter of little consequence in *Connaughton* whether jobs were available one year versus another, the record before the district court here shows that on the North Slope, where residents continue to face recession-based setbacks and

staggering unemployment, the difference between a paycheck now and one next year *is* meaningful. Indeed, many courts have relied on the public interest in a completed project to deny injunctive relief.⁹

A contrary holding would mean that for a broad category of major-infrastructure projects that take more than one season to complete, courts could never consider the project's economic, social, and cultural benefits in deciding whether to grant an injunction motion. That result would defy reason and is not required by *Connaughton*. As the Tenth Circuit explained in rejecting an argument that the court could not consider the public interest in delivering water to rural area because it would take ten years to complete the project: “Although [appellant] contends that

⁹ See *Earth Island Inst. v. Muldoon*, No. 122CV00710, 2022 WL 4388197, at *10 (E.D. Cal. Sept. 22, 2022) (denying motion to enjoin multi-year project where injunction “would necessarily delay the completion of the necessary fire mitigation.”); *Protect Our Communities Found.*, 2011 WL 13356151, at *12 (denying preliminary injunction where 117-mile transmission line would “generate over \$115 million per year in net benefits to consumers in the form of reduced energy costs”); *Friends of the Wild Swan v. Weber*, 955 F. Supp. 2d 1191, 1195 (D. Mont. 2013) (“[D]elay of the project would result in a likely loss of funding, increased fire danger, and economic impacts to local sawmill operators.”), *aff’d on other grounds*, 767 F.3d 936 (9th Cir. 2014); *W. Watersheds Project v. Salazar*, No. CV 11-00492, 2011 WL 13124018, at *20 (C.D. Cal. Aug. 10, 2011) (denying injunction based on “substantial socioeconomic impact upon hundreds of workers and state revenues” over project’s 30-year life).

the Project’s ten-year timeline renders any injunction-created delays inconsequential, we disagree: given the real need for potable drinking water in eastern New Mexico, the fact that the Project will take years to build *is all the more reason to keep its construction on pace.*” *Vill. of Logan v. U.S. Dep’t of the Interior*, 577 F. App’x 760, 768 (10th Cir. 2014) (emphasis added); *see id.* (“[T]he fact that the Project likely cannot fill that need for years to come . . . counsels *against* delaying the Project any further at this point.”).

II. THE PROJECT WILL INCREASE JOB OPPORTUNITIES FOR ASRC SHAREHOLDERS WHO RESIDE ON THE NORTH SLOPE.

The district court properly recognized and did not abuse its discretion in weighing the challenging economic conditions faced by North Slope residents. Order at 34. According to a North Slope Borough 2019 Census Report, before the pandemic more than a quarter of Iñupiat households in the North Slope Borough were below the poverty level, and the unemployment rate was as high as 32%. Rock Decl. ¶ 56. During the pandemic, Alaska Natives suffered from “unprecedented job losses, plummeting tax bases, and urgent public health needs.” *Id.* ¶ 57. The State’s economy is still recovering. *Id.*; FSEIS at 295, ECF No. 55-1. “The Project

would help ameliorate conditions for North Slope residents, including ASRC's shareholders, by providing dividends that augment household incomes, job opportunities, and access to critical social services and programs that depend on government revenues." Rock Decl. ¶ 59.

The Project will provide opportunities for ASRC and its subsidiaries to contract with ConocoPhillips. *Id.* ¶ 23. ASRC Energy Services (AES), as one of the largest Alaska-based subsidiaries of the largest Alaskan-owned company, provides important employment opportunities for shareholders. *Id.* ¶¶ 16, 17. AES's emphasis and preference when hiring is to employ shareholders. *Id.* ¶ 24. AES currently employs 109 shareholders across the North Slope, the majority of whom support ConocoPhillips' work at existing fields. *Id.* ¶ 18. ASRC has worked collaboratively with ConocoPhillips on responsible oil and gas development for more than two decades. *Id.* ¶ 20. If the Project moves forward as scheduled, AES and its subsidiaries expect to employ approximately 775 people to support it. *Id.* ¶ 24. This increase in job opportunities is particularly important given the challenging economic conditions on the North Slope.

III. THE PROJECT WILL BRING BUSINESS OPPORTUNITIES FOR ASRC THAT WILL INCREASE DIVIDENDS PAID TO SHAREHOLDERS.

The district court did not abuse its discretion by considering dividend income the Project would bring to ASRC shareholders. Order at 35. Dividends from ANCSA corporations “make up a substantial portion of household income in the [North Slope Borough].” FSEIS at 302, ECF No. 43-2. Revenue to AES and other ASRC subsidiaries from contracting opportunities related to the Project will increase the quarterly dividends that ASRC shareholders receive. Rock Decl. ¶¶ 24–25. “Supplementing household incomes, which have seen marked declines in the wake of the pandemic, would advance the public interest,” whereas an injunction “would postpone or eliminate a needed spur to the economy and disserve the public interest.” *Id.* ¶ 60.

The likely additional revenues for ASRC and its subsidiaries also increase the Company’s ability to fund community and economic development projects on the North Slope. *Id.* ¶ 25. As just one example, for the past few years, ASRC has partnered with the Arctic Slope Native Association and North Slope Borough to provide medical and travel funds to shareholders. *Id.* The grant funding provided by ASRC is made possible

through projects like Willow. Order at 35 (recognizing loss of grant-making as effect of injunction).¹⁰

IV. THE BUREAU OF LAND MANAGEMENT’S RECORD OF DECISION INCLUDES MITIGATION MEASURES THAT PROTECT SUBSISTENCE RIGHTS FOR ASRC SHAREHOLDERS WHO LIVE ON THE NORTH SLOPE.

An injunction would also diminish or negate the value of significant efforts by ASRC to shape the contours of the Project—specifically, its mitigation measures. ASRC invested significant time in the administrative process for the Project, participating in public meetings; filing comments; and consulting with federal agency officials to ensure that the Project “incorporates local knowledge and protects the Iñupiat way of life, including subsistence.” Rock Decl. ¶ 33. ASRC and AES, either alone or in concert with other North Slope interests, submitted public comments to BLM at least five different times throughout the process. *See id.* ¶¶ 35–

¹⁰ In addition to jobs and dividend income, as set forth more fully in pleadings filed below by the North Slope Borough and the State of Alaska, the Project will provide other economic benefits in the form of tax revenue that supports schools and health clinics on the North Slope, as well as royalties that fund grants made under the National Petroleum Reserve in Alaska (NPR-A) Impact Mitigation Grant Program to serve communities impacted by oil and gas development. *See generally* North Slope Borough’s Resp. in Opp’n to Mots. for Prelim. Inj. at 19–20, ECF No. 47; State of Alaska’s Mot. to Intervene at 4–8, ECF No. 41-1; Rock Decl. ¶¶ 29–30.

37, 39, 42–43 & attached exhibits. ASRC and AES also wrote at least six letters to public officials in support of the Project. *See id.* ¶¶ 38, 40–41, 44, 51–52, 61 & attached exhibits. ASRC’s diligent efforts helped to define the Project and Record of Decision.

During the environmental review process, ConocoPhillips responded to input from ASRC and other members of the North Slope community by “incorporating several mitigation measures to reduce environmental and subsistence impacts, including the postponement of several drill sites and associated roads and pipelines; reduction of some road widths; reduced speed limits; and the use of an onshore module transfer route” that eliminates the need to construct an offshore gravel island. *Id.* ¶ 46. As compensatory mitigation for the Project, ASRC also obtained commitments that will “protect a large area of valuable coastal wetlands for subsistence use.” *Id.* ¶ 47. Because ASRC’s involvement in the administrative process fulfills the National Environmental Policy Act’s (NEPA)¹¹ aims of harnessing stakeholder input to inform and improve

¹¹ 42 U.S.C. §§ 4321–4347.

projects subject to federal approvals, enjoining it would not be in the public's interest.¹²

V. THE PROJECT WILL PROVIDE OR FACILITATE CONSTRUCTION OF NEEDED SUBSISTENCE AND OTHER INFRASTRUCTURE.

The Project will increase road connectivity to the Village of Nuiqsut, which many residents view as a significant benefit. Rock Decl. ¶ 48. This improved connectivity—some of which will take effect immediately, Order at 37–39—will provide greater access for subsistence activities and increase safety. Rock Decl. ¶¶ 47–48. Also important for the Village—which lacks year-round road access to the Dalton Highway and other state roads—is the Project's proposed airstrip, which can be used by Nuiqsut residents for emergency medical evacuation, particularly when the other nearby airstrips are unavailable. *Id.* ¶ 49. Gravel sources opened to build roads for the Project will also be available for community development uses; without industry involvement, such access would be “cost prohibitive.” *Id.* ¶ 39 & Ex. E. at 9. These infrastructure improvements enhance the quality of life for ASRC shareholders who face serious

¹² See *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 575 (9th Cir. 1998) (purpose of NEPA is to foster “informed decision-making and informed public participation”) (cleaned up).

economic challenges, including the high costs of basic amenities and limited access to health care. *Id.* ¶ 13.

Project support facilities for Willow would include several road pullouts with subsistence access ramps, as well as boat ramps for subsistence use at Fish Creek, Tinmiaqsigvik, and Judy Creek, providing Nuiqsut residents with enhanced year-round access for subsistence activities.¹³ As part of the environmental review process for the Project, ConocoPhillips proposed a number of mitigation projects, such as improvement of the Nuiqsut ATV trail used for subsistence access; an east-west drainage project that will improve drainage through the middle of the community; assistance with a boat ramp project at the end of the newly constructed Native Village of Nuiqsut Colville River Access Road; and approximately five miles of ATV trails near Anaktuvuk Pass that will be improved for community subsistence access. *Id.* ¶ 45. These projects will bring recreational, cultural and subsistence opportunities to the community, and further serve the public interest.

¹³ See, e.g., FSEIS §§ 2.5.3.2 and 2.5.13, ECF No. 43–3.

CONCLUSION

The Project, which represents an opportunity for local subsistence communities to rebound from pandemic-induced economic hardship, overwhelmingly serves the public interest. The many public benefits the Project will bring, highlighted above, demonstrate that the public's interest is for it to be implemented, not for this Court to enjoin it. Because Plaintiffs cannot demonstrate that enjoining this critical Project is in the public interest or that the district court otherwise abused its discretion, their motions for injunction pending appeal should be denied.

Dated: April 13, 2023

Respectfully submitted,

s/ Stacey Bosshardt

Stacey Bosshardt
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite
800
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211
SBosshardt@perkinscoie.com

Eric B. Fjelstad
PERKINS COIE LLP
1029 West Third Avenue, Suite
300
Anchorage, AK 99501-1981
Telephone: 907.279.8561
EFjelstad@perkinscoie.com

*Attorneys for Intervenor-Defend-
ant-Appellee Arctic Slope Regional
Corporation*

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 13, 2023

s/ Stacey Bosshardt
Stacey Bosshardt
PERKINS COIE LLP