Ryan P. Steen (Bar No. 0912084)
ryan.steen@stoel.com
Jason T. Morgan (Bar No. 1602010)
jason.morgan@stoel.com
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: 206.624.0900
Facsimile: 206.386.7500

Whitney A. Brown (Bar No. 1906063)
whitney.brown@stoel.com
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, AK 99501
Telephone: 907.277.1900
Facsimile: 907.277.1920

Attorneys for Intervenor-Defendant-Appellee ConocoPhillips Alaska, Inc.

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.	**No. 23-35226** On Appeal from the United States District Court for the District of Alaska No. 3:23-cv-00058-SLG Hon. Sharon L. Gleason
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.	**No. 23-35227** On Appeal from the United States District Court for the District of Alaska No. 3:23-cv-00061-SLG Hon. Sharon L. Gleason

CONOCOPHILLIPS ALASKA, INC.'S OPPOSITION TO MOTIONS FOR INJUNCTION PENDING APPEAL

CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant-Appellee ConocoPhillips Alaska, Inc. is a wholly owned subsidiary of ConocoPhillips Company. ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips, which is a publicly traded corporation. ConocoPhillips has no parent corporation and, based on Schedule 13G filings with the Securities and Exchange Commission, no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Statutes

Rules and Regulations

Other Authorities

I. INTRODUCTION

Willow is an oil and gas development project in the National Petroleum Reserve in Alaska ("Petroleum Reserve" or "NPR-A"). Willow's approved design is the culmination of more than five years of planning and engagement with federal, State, municipal, and Tribal authorities, and careful vetting by two presidential administrations. The Bureau of Land Management ("BLM") approved the project last month in a record of decision ("ROD") supported by a Final Supplemental Environmental Impact Statement ("FSEIS"). The ROD rejected the design proposed by ConocoPhillips Alaska, Inc. ("ConocoPhillips"), and instead approved a compromise alternative that eliminates two of the five proposed drilling pads and subjects the project to 261 environmental protection measures.

In 2021, the district court judge whose order is now on appeal concluded that BLM's 2020 approval of a different version of Willow violated the National Environmental Policy Act ("NEPA"), and remanded to BLM to address specific errors. That remand involved public comment on the scope of potential new alternatives, public comment on a draft supplemental EIS, and an expanded multi-agency analysis that addressed the deficiencies the district court identified. As revised, the Project earned strong support from Kuukpik Corporation, the local Alaska Native village corporation. As Kuukpik put it: "we doubt there is any other

resource development project that has changed so dramatically in response to local concerns while still maintaining economic viability." Ex. 17 at 64.

Willow's public benefits are undeniable: billions in public revenues (including for nearby communities), thousands of jobs, and a stable domestic energy supply delivered through the existing Trans-Alaska Pipeline System. Those public benefits are why BLM approved the project and the Alaska Legislature unanimously adopted a resolution stating that "a further delay in … 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." Ex. 16 at 5 (emphasis added). Local and Tribal governments agree that a "delay is … harmful and contrary to the interests of the Alaska Native people who call the North Slope home." Ex. 17 at 24.

Willow's public benefits extend beyond Alaska. Americans will consume roughly the same amount of oil, regardless of whether Willow is built. *See* FSEIS Table 3.2.3 at 45-46.[1] But the FSEIS confirms that if Willow is *not* built, over 50% of the oil that would have been produced by Willow will be produced by foreign

[1] The FSEIS and appendices are exhibits to the Federal Defendants' opposition.

sources. *Id*. And reducing dependence on foreign oil is precisely why Congress established the Petroleum Reserve in the first place.[2]

Not everyone agrees with Congress's policy choice to foster development in the Petroleum Reserve. Plaintiffs here oppose *any* such development and again challenge BLM's ROD in an effort to halt construction activities that are already well underway. But the district court appropriately denied their requests for a preliminary injunction. The court, based on its review of hundreds of pages of declarations (including numerous declarations from local Native subsistence hunters supporting Willow) and other evidence, concluded that Plaintiffs failed to show likely irreparable harm absent an injunction, and that the balance of equities and public interest "tip sharply against" a preliminary injunction. Ex. 2 at 43.

Those conclusions—which are reviewed deferentially on appeal—are even more true now. Plaintiffs' motions seek to halt construction *before* ground-disturbing activities take place at a 10.4-acre gravel mine this winter. But ConocoPhillips has since completed surface excavation at the gravel site, and is currently in the process of extracting gravel, building a safety berm, and constructing a road.[3] An order halting that work now cannot provide Plaintiffs any

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[2] George Gryc, *The National Petroleum Reserve in Alaska*, U.S. Dep't of Interior (1985), https://pubs.usgs.gov/pp/1240c/report.pdf.

[3] The Second Declaration of James I. Brodie (Ex. 1) provides an update on the status of construction.

relief and instead would create environmental and public safety hazards. Equity is not served by such a result.

Plaintiffs' motions for an injunction pending appeal should be denied.

II. BACKGROUND

A. The Petroleum Reserve and Integrated Activity Plans.

In 1980, Congress amended the Naval Petroleum Reserves Production Act ("NPRPA"), directing the Secretary of the Interior to "conduct an expeditious program of competitive leasing of oil and gas" in the 23-million-acre Petroleum Reserve. 42 U.S.C. §6506a. Pursuant to that authority, BLM has produced integrated activity plans ("IAPs") governing leasing and environmental protection in the Petroleum Reserve. Ex. 18 at 2. In 2013, BLM issued an IAP that closed roughly half the Petroleum Reserve (11 million acres) to leasing and development, subjected millions more acres to stipulations prohibiting surface construction, and opened the remaining portion (9.3 million acres) to leasing and new oil and gas infrastructure, subject to terms and conditions for the protection of surface resources. *Id.*; Ex. 19 at 9. The 2013 IAP was uniformly received as balanced. Even some of the Plaintiffs here praised it as "provid[ing] effective and reliable conservation measures to protect fish, wildlife and their habitats to ensure balanced management of the NPR-A, consistent with federal law." Ex. 20 at 15.

In 2022, BLM issued a new IAP affirming the 2013 land allocations, finding that they "strike[] a balance" among development, the "importance of surface resources," and the need to mitigate impacts on subsistence uses. Ex. 19 at 14. The 2022 IAP includes dozens of protective measures. Ex. 21 at 23.

B. The Willow Project.

Because of the permafrost-underlain topography, construction in the Petroleum Reserve is very different from construction elsewhere. *See* Ex. 13 ¶¶4, 6; Ex. 17 at 50. Construction of most infrastructure in the Petroleum Reserve occurs only during the winter when ice roads can be built and used to transport equipment and supplies. The ice road season lasts about 90 days, typically ending (weather dependent) around April 25. Ex. 13 ¶¶4, 18. As a result, project construction is not continuous and spans many years.

Willow is located in an area open to oil and gas leasing and surface development under both the 2013 and 2022 IAPs. Its purpose is to tap into an oil reservoir underneath 195,709 acres of Petroleum Reserve land leased to ConocoPhillips and organized as a unit called the Bear Tooth Unit. ConocoPhillips began acquiring those leases in 1999. A full project history is in Exhibit 18 and a graphical representation is in Exhibit 24 at 4.

BLM first approved Willow in 2020 in a form that would have allowed ConocoPhillips to extract most, though not all, of the available oil. Plaintiffs filed

two lawsuits challenging that approval. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.* ("*SILA*"), 555 F. Supp. 3d 739, 750-51, 753 (D. Alaska 2021). The district court largely rejected Plaintiffs' claims, but identified two errors in the original EIS: (1) it did not properly account for emissions from foreign consumption of oil, and (2) its alternatives analysis was inadequate "to the extent that BLM [i] failed to consider the statutory directive that 'maximum protection' be given to surface values within" the Teshekpuk Lake Special Area ("TLSA") and "[ii] developed its alternatives . . . based on the view that ConocoPhillips has the right to extract *all* possible oil and gas on its leases." *Id.* at 767, 770 (emphasis added).

On remand, BLM, in cooperation with State, federal, municipal, and Tribal agencies, screened 19 revised drill-pad configurations and other project components to address the district court's ruling on alternatives. FSEIS Appendix D.1, Table D.3.5 at 32-34. Based on that evaluation, BLM developed a new alternative (Alternative E), which significantly changed ConocoPhillips' original proposal. Ex. 24 at 6. These changes included eliminating one drill site (BT4), deferring approval of another drill site (BT5), and reducing Willow's footprint in TLSA by 40%. Ex. 24 at 6, 24; Ex. 25 at 7-8.

On March 12, 2023, BLM issued its ROD approving Alternative E with one change: the BT5 drill site was permanently rejected to minimize potential impacts

to caribou and subsistence hunting. Ex. 21 at 10, 15. As approved, Willow's total gravel footprint is only about 385 acres (out of the 23.5-million-acre Petroleum Reserve). Four days after the ROD issued, ConocoPhillips relinquished all or portions of 13 leases comprising 68,085.50 acres that would have been accessible from BT4 and BT5. Ex. 12 ¶17, Ex. B.

C. This Winter's Construction.

ConocoPhillips began winter construction for Willow on March 13, 2023. Ex. 13 ¶12. The full scope of work this winter, expected to be completed before the ice road season ends, includes (a) opening a new mine and beginning gravel extraction (about 10.4 acres of surface disturbance); (b) extending the road from the existing Greater Mooses Tooth 2 ("GMT2") pad west towards Willow by a distance of up to 3.1 miles; and (c) starting construction of a subsistence boat ramp to the Tiŋmiaqsiuġvik (Ublutuoch) River from the existing GMT2 road. *Id.* ¶¶5, 11, 13-14, 17. After April 25, work may continue if weather permits. *Id.* ¶18.

D. This Litigation.

Plaintiffs filed two lawsuits challenging BLM's ROD, along with motions for a preliminary injunction. Ex. 2 at 2, 12. To facilitate district court review of those motions, ConocoPhillips stipulated that it would "not commence surface-disturbing construction activities at the mine until April 4, 2023 (unless the Court issues a decision denying Plaintiffs' motions before that date)." Ex. 23 ¶7.

On April 3, 2023, the district court denied both motions in a 44-page order. To ensure that all or a substantial portion of this year's planned scope of work can be completed, ConocoPhillips broke ground on the mine site the same day and work is continuing. Ex. 1 ¶7. The district court denied Plaintiffs' requests for an injunction pending appeal. Ex. 3 at 2, 4.

III. STANDARD OF REVIEW

"The standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 367 (9th Cir. 2016). Plaintiffs must show: (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.'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citation omitted). In the context of an injunction pending appeal, the first factor focuses on whether there is 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).

Here, the merits of the appeal are whether the district court abused its discretion by denying a preliminary injunction. *See The Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (*en banc*); *Nat'l Urban League v. Ross*, 977 F.3d

770, 776 (9th Cir. 2020). Denial of a preliminary injunction "is subject to 'limited and deferential' review." *Lands Council*, 537 F.3d at 986 (citation omitted).

IV. ARGUMENT

A. Plaintiffs Are Unlikely to Succeed on the Merits of Their Appeal.

The district court denied Plaintiffs' motions because (i) Plaintiffs failed to show likely irreparable harm absent an injunction and (ii) the balance of the equities and public interest sharply favored denying an injunction. *Both* findings are well-supported by the extensive record and *either* is sufficient to support the court's ruling. Neither finding is an abuse of discretion.

1. The District Court Did Not Abuse Its Discretion by Concluding Plaintiffs Failed to Show Irreparable Harm.

Plaintiffs' motions are intended to prevent construction based on their declarants' claims that they will be harmed by the development of the mine site.[4] However, the mine site has been completely cleared and excavated, and gravel extraction is underway. Ex. 1 ¶¶7-10, Ex. A. An injunction's purpose is to prevent future harm, not to remedy past injury. *See Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1288 (9th Cir. 2013); *Sierra Club v. Penfold*, 857 F.2d 1307,

[4] As to the remaining work this winter, Plaintiffs assert no injury related to the subsistence boat ramp and produced no declaration before the district court showing irreparable injury related to use of the area where the road extension will occur. *See* Ex. 2 at 28 (failing to show connection to "gravel road extension site"); *id*. at 23 (generic concerns about road impacts on caribou undermined by contrary testimony).

1317-18 (9th Cir. 1988) ("no adequate remedy exists" where defendants "had already taken measures to proceed with mining operations"); *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) ("The purpose of a preliminary injunction is not to remedy past harm."). For this reason alone, Plaintiffs' motions should be denied. Nonetheless, as described below, the district court's findings on irreparable injury are fully supported by the evidentiary record.

The district court found that Plaintiffs failed to demonstrate likely irreparable injury from this winter's construction activities, which "are substantially narrower in scope than the Willow Project as a whole." Ex. 2 at 18; *see Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1998).[5] The court explained that generalized concerns about the extraction of oil and gas over Willow's lifetime "are not relevant" to Plaintiffs' injunction requests because oil and gas extraction is still years away. Ex. 2 at 19. The court also found that: (i) any noise from this winter's construction will be "short lived" and "not permanent," *id.* at 19-20; (ii) BLM's own analysis demonstrates that any impacts to downstream fishing will be "minimal," *id.* at 21; (iii) caribou hunters are not likely to suffer irreparable harm, *id.* at 22-23; and (iv) Plaintiffs' vague

[5] Construction of Willow will take approximately six years. The district court can address the merits before next winter's construction season begins, as it did in prior litigation. *See SILA*, 555 F. Supp. 3d at 755.

declarations do not establish "'substantial and immediate'" irreparable harm, *id.* at 26-30 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

Plaintiffs' briefs take creative liberties with their own declarations in an effort to make them sound more specific than they actually are. But, as the district court recognized, *none* of Plaintiffs' members unequivocally stated that they intend to use the mine site for hunting, fishing, or recreation this winter. Instead, they express nebulous fears and concerns without a clear nexus to the area at issue. For example, SILA's declarant, Mr. Kunaknana, merely states he is "worried" about how the mine will affect "the health of the fish downstream." *SILA* ECF No. 5-15 ¶10; *see id.* (worrying that area upstream from where he fishes "will never be the same"). "[W]orrying that something may happen … does not rise to the level of irreparable harm." *Ness v. Law Enf't Support Agency*, No. C10-5111 KLS, 2012 WL 13176243, at *4 (W.D. Wash. Aug. 9, 2012); *accord Berg v. Obama*, 586 F.3d 234, 239 (3d Cir. 2009) ("[W]orry" is "not an injury cognizable in a federal court."); *Caribbean Marine Servs. Co.*, 844 F.2d at 675-76 ("Subjective apprehensions and unsupported predictions . . . are not sufficient to satisfy a plaintiff's burden of demonstrating an immediate threat of irreparable harm."). And as the district court recognized, BLM's own conclusions specifically foreclose Mr. Kunaknana's concern. *See* Ex. 2 at 21.

Similarly, as the district court explained, CBD's declarant, Dr. Ahtuangaruak, no longer travels by boat to the area near the mine site (a primary method for hunting caribou). Ex. 2 at 26-27. She offers only the vague and generic statement that "*[w]e* hunt caribou where the mine is going to be located." *CBD* ECF No. 5-15 ¶54 (emphasis added). But she does not say "we" intend to hunt caribou in that location *this winter* or specify whether she is referring to the northern mine (under construction this winter) or the southern mine (to be built at a later date). Moreover, Dr. Ahtuangaruak's use of "we" rather than "I" fails to establish that she *herself* has been to the mine site or has plans to go there, this winter or otherwise.[6] And her use of "we" to suggest others hunt there is rebutted by multiple hunters from Nuiqsut who testify that the northern mine site is difficult to access, that they do not hunt there, and that there are no caribou there. Ex. 6 ¶7 ("I have never seen a tuttu [caribou] in that area, or anyone hunting for tuttus there."); *see also* Ex. 7 ¶13; Ex. 8 ¶¶13-14. The district court acted well within its

[6] CBD does not and cannot provide authority for its suggestion that the district court was compelled to come to the same conclusion on irreparable harm as it did in 2021. *See generally Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001). Regardless, the district court's decision is fully supported by the current record, which includes declarations from Nuiqsut hunters that severely undermine any allegation of harm to subsistence from this winter's activities as well as Dr. Ahtuangaruak's *new* testimony about lack of boat travel that undermines her allegation about hunting at the mine site. *See* Ex. 5 ¶¶8, 10; Ex. 6 ¶¶6-7; Ex. 7 ¶¶11-13; Ex. 8 ¶¶13-17.

discretion by finding such vague allegations from Dr. Ahtuangaruak insufficient to establish irreparable injury.[7]

Likewise, the district court was appropriately unpersuaded by testimony from Dr. Ahtuangaruak that the "area near the gravel site is beautiful" and it is "an area where I go walking and berry-picking." *CBD* ECF No. 5-15 ¶53. The descriptor "near" is both subjective and ambiguous, as the district court explained. Ex. 2 at 27. Dr. Ahtuangaruak does not say whether any of her walks are "near" the northern mine that is at issue this winter, rather than the southern mine, which is not.[8] The northern mine is "several miles from the nearest road" and "[i]t is difficult to walk across the tundra" to get there. Ex. 7 ¶¶7, 13. Mr. Kunaknana's declaration also does not help Plaintiffs. He expresses concern that blasting will disturb caribou but stops short of stating that he hunts for caribou where the mine

[7] *See* Suzanne Downing, *Mayor of Nuiqsut Tells a Whopper to Congressional Committee – and Gets Caught*, Must Read Alaska (Sept. 21, 2022), https://mustreadalaska.com/mayor-of-nuiqsut-tells-a-whopper-to-congressional-committee-and-gets-caught/.

[8] The same flaw befalls Mr. Kunaknana's contention that he will be injured because the mine site is "upstream" from where he hunts and fishes. *SILA* ECF No. 5-15 ¶10. The term "upstream," like "near," is relative and ambiguous, not to mention attenuated. Daniel Ritzman's claim that the mine and road extension will affect his wildlife viewing opportunities while rafting the Colville River, which is far from this winter's work locations, fails for the same reason, as the district court recognized. Ex. 2 at 28; *SILA* ECF No. 5-11 ¶32.

is located. *SILA* ECF No. 5-15 ¶16.[9] Plaintiffs thus fail to demonstrate that their declarants use the affected area rather than another area in the general vicinity. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565-66 (1992).

Plaintiffs' comparison to *Alliance for the Wild Rockies v. Cottrell* is inapposite. 632 F.3d 1127, 1135 (9th Cir. 2011). In *Cottrell*, the government tried to minimize harm from logging 1,652 acres of forest with a clever argument that the plaintiffs' members could simply use and enjoy another area of forest. The court said the "argument proves too much." *Id*. The situation here is entirely different. The district court found that Dr. Ahtuangaruak's alleged use and enjoyment of "an unspecified area 'near' the gravel site" was not enough to establish likely irreparable injury. Ex. 2 at 27. As the district court explained, "Dr. Ahtuangaruak has not shown how these environmental impacts" from mine construction "would cause 'substantial and immediate' irreparable harm to her," and she does not even "specify how near to the proposed gravel site she traveled." *Id.* at 26-27. This is not a clever argument that proves too much, as in *Cottrell*, but a situation where Plaintiffs' declarations prove too little. *Caribbean Marine Servs.*

[9] As the district court observed, any noise from blasting this winter will be "short-lived" and "not permanent." Ex. 2 at 20. And claims of likely disturbance to caribou from mining activities are refuted by other subsistence hunters. *See* Ex. 5 ¶10; Ex. 6 ¶7; Ex. 7 ¶¶11-12; Ex. 8 ¶¶14-16.

Co., 844 F.2d at 676 ("Injunctions should not issue to restrain an act the injurious consequences of which are merely trifling." (internal quotation marks and citation omitted)).

Finally, Plaintiffs point to statements in the FSEIS suggesting that Willow will harm the environment and subsistence. But those statements discuss the *possible* environmental impacts of the Willow project *as a whole* (rather than the *likely* impacts of *this winter's work*). *See, e.g.*, *SILA* ECF No. 5-3 at 11 (noting that certain effects "can" or "could" happen), 13-14, 16 (discussing effects over "the life of the Project (approximately 30 years)"). SILA insists that BLM's conclusions "were not limited to full-project development," but cannot identify which (if any) of BLM's conclusions relate only to this winter's work. BLM's conclusions about the impacts of the project as a whole do not bear on the likelihood of imminent harm *to the Plaintiffs*. *See Nat'l Wildlife Fed'n*, 886 F.3d at 822 ("Plaintiffs seeking injunctive relief must show that *they themselves* are likely to suffer irreparable harm absent an injunction." (emphasis added)).[10]

[10] SILA also asserts that the district court "erred by focusing on the number of acres impacted relative to the overall average of the Reserve." SILA Mot. at 11. That is not accurate. The Court denied SILA's motion because SILA's declarant (Mr. Kunaknana) expressed "concerns" about fish and "concerns" about hunting that were contradicted by other hunters, and because controlling Ninth Circuit authority provides that such concerns do not establish likely irreparable harm. Ex. 2 at 22-23 (citing *Caribbean Marine Servs. Co.*, 844 F.2d at 675-76).

2. The District Court Did Not Abuse Its Discretion by Concluding That the Equities and Public Interest Do Not Favor an Injunction.

Under *Winter*, Plaintiffs must prove that the balance of hardships tips in their favor. *See, e.g.*, *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)).[11] The district court concluded that the balance of the equities and the public interest tip "sharply" *against* an injunction. Ex. 2 at 43. That conclusion—based on hundreds of pages of declarations and evidence—is certainly no abuse of discretion.

a. The Benefits to Local Communities of This Winter's Work Outweigh Any Harm to Plaintiffs' Interests.

Plaintiffs attempt to manufacture an error by arguing that the district court improperly considered the harms that would occur to the Intervenor-Defendants and the public if the project as a whole were enjoined. But the district court did no such thing. The district court correctly observed that its task was "to balance the environmental harms that would be caused if the Winter 2023 Construction Activities were allowed to proceed against the economic and other harms that would occur if those activities were precluded while the merits in this case are determined." *Id.* at 32.

[11] ConocoPhillips submits that any "sliding scale" approach to the preliminary-injunction factors is inconsistent with the Supreme Court's decision in *Winter*, but recognizes that the Ninth Circuit has adopted a modified sliding-scale standard post-*Winter*, *see Cottrell*, 632 F.3d at 1134.

Based on that narrow scope, the district court appropriately identified the many harms associated with enjoining this winter's construction, including "an immediate economic impact on Nuiqsut," such as the loss of seasonal jobs for people like Joe Sovalik and Jonas Sikvayugak, who are counting on the mine and road work this winter to support themselves and their families. *Id.* at 34-35; *see* Ex. 10 ¶¶5-6 ("It is seasonal work … [b]ut the money is important to me. It is how I support myself throughout the year, and how I help support my family."); Ex. 9 ¶5 ("I am relying on having a job this winter hauling gravel" to "feed my family, and pay my bills"). Plaintiffs deride these impacts as "temporary," but in an area with 13% unemployment, those who would immediately be put out of work know that an injunction would be "terrible" for them and their families. Ex. 2 at 34; Ex. 9 ¶5. These hard-hitting, concrete injuries more than outweigh the aesthetic injuries (if any) to Dr. Ahtuangaruak, Mr. Ritzman, and Mr. Kunaknana.

The district court also found that the economic harms from delaying construction "extend beyond Nuiqsut." Ex. 2 at 35. Based on evidence presented by the Arctic Slope Regional Corporation ("ASRC"), the North Slope Borough, and the State of Alaska, the court recognized that delaying the project by preventing this season's work would "delay[] 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 at a time when local subsistence communities are struggling to rebound from pandemic-induced economic hardship." *Id.* at 35-36 (quotation marks omitted). Plaintiffs present no evidence to counter these harms.[12]

Moreover, the harms from an injunction would be even more significant now than when the district court denied Plaintiffs' motions on April 3. The mine has already been excavated, and ConocoPhillips must complete a perimeter berm necessary "to keep mining sediments contained within the footprint of the mine area" and to ensure public safety by providing a "physical barrier around the mine site." Ex. 1 ¶8. Additionally, road construction has already begun with the installation of 11 culverts and associated insulation, and the road work must be completed to ensure safety and environmental integrity during spring break-up and the summer season. *Id*. ¶¶12, 14-16. An injunction halting this work would therefore "create serious public safety and environmental concerns" and prevent ConocoPhillips from finishing the site to ensure it is "safe and stable." *Id*. ¶16.

[12] Plaintiffs cite *Lands Council*, 537 F.3d at 1003-05, arguing that the district court improperly relied on economic factors. SILA Mot. at 20 n.6. But "[e]conomic harm may indeed be a factor in considering the balance of equitable interests." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). Moreover, *Lands Council* was a pre-*Winter* case in which this Court applied a different, less stringent preliminary injunction standard. *Compare* 537 F.3d at 987 *with Winter*, 555 U.S. at 22.

The district court also found that the harms from enjoining this winter's work "outweigh any potential harm to subsistence hunters that construction may cause." Ex. 2 at 38. The court's conclusion was bolstered by its recognition of the *benefits* of this winter's construction to hunters, including easier access to subsistence resources via the new gravel road and a boat ramp. Ex. 2 at 38-40; *see* Ex. 8 ¶¶7, 11, 19 (describing the planned road extension as "an immediate benefit to our community as it will increase subsistence access for myself and … other hunters"); *id.* ¶11 ("The more access we have, the better we can feed our community. If gravel goes down this winter, I will be using that gravel this summer."); Ex. 7 ¶9 ("[J]ust extending the GMT 2 road a mile or two would give us more and better access to subsistence resources"); Ex. 5 ¶¶11, 13 ("In fifty or a hundred years, when the oil companies are gone, the caribou will still be there, and so will the roads that provide us access to the caribou. The roads will help sustain our way of life.").

Finally, although the district court declined to give weight to the risk that Willow will not be constructed if an injunction issues, ConocoPhillips presented unrebutted testimony explaining why a preliminary injunction preventing this winter's work would have the likely consequence that "Willow would not be

constructed." *See* Ex. 12 ¶¶19-23.[13] That would cause the loss of billions of dollars to the State and local communities, thousands of jobs, and national energy security—dwarfing any injury Plaintiffs allege. *See* Ex. 14 ¶¶6-8. This risk of project derailment provides an additional and independent ground for affirming the district court's order.

Regardless, even without the risk of project failure, the district court found that "the balance of the equities and the public interest tip sharply *against* preliminary injunctive relief." Ex. 2 at 43 (emphasis added). Plaintiffs are unlikely to prevail in showing that the denial of their motions for a preliminary injunction was an abuse of discretion.

b. An Injunction Is Not in the Public Interest.

The district court detailed the overwhelming support for Willow and this winter's construction activities from Kuukpik Corporation, North Slope Borough, ASRC, the State of Alaska, and Alaska's Congressional delegation. *Id.* at 40-43. Its conclusion that the public interest in allowing Willow to proceed overshadows the interests of the few dissenting voices is manifestly correct and not an abuse of discretion.

[13] ConocoPhillips believes that the risk of lease expiration based on the statutory text is far greater than credited by the district court.

Plaintiffs disparage the Alaska Legislature's unanimous resolution that "*a further delay* in approval or construction of the Willow project … is not in the public interest." *Id.* at 41 (emphasis added); Ex. 16 at 5. But the resolution was enacted through a public legislative process, including a public hearing. *See SILA* ECF No. 5-16 ¶17. SILA objected to the resolution at the public hearing, but the Alaska Legislature unanimously disagreed with SILA's position. *Id*. The district court did not abuse its discretion by giving weight to this powerful expression of public interest. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1140 (9th Cir. 2009) (courts "should give due weight to the serious consideration of the public interest in this case that has already been undertaken by the responsible state officials … who unanimously passed" the measure).

Moreover, Plaintiffs have no response to Congress's expression of its intent with respect to the NPRPA: to "conduct an expeditious program of competitive leasing" in the Petroleum Reserve. 42 U.S.C. §6506a(a); *see ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm'n*, No. 3:22-cv-00121-SLG, 2023 WL 2403720, at *8 (D. Alaska Mar. 8, 2023) ("Congress intended to open the NPR-A to private leasing and exploration and production in order to increase domestic oil supply as expeditiously as possible."); *Nat. Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 127 (D.D.C. 2007) ("The development of domestic energy resources is of paramount public interest."). Three different

presidential administrations—Obama, Trump, and Biden—have produced IAPs confirming that all areas encompassed by Willow are open to oil development. *See* Ex. 19 at 6-7. Delaying Willow delays the benefits of the project, thereby undermining both Congressional and executive intent. *Cf. Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) ("The public interest in this case favored continued oil exploration, given OCSLA's stated policy.").

In sum, the serious public and private harms that would result from a preliminary injunction far outweigh the comparatively small harm (if any) that would result from allowing completion of this winter's construction. Plaintiffs are unlikely to prevail in their appeals of the district court's order, and the public interest warrants denial of their motions.

B. Plaintiffs Are Also Unlikely to Prevail on the Underlying Merits.

As discussed above, because Plaintiffs cannot demonstrate that the district court abused its discretion by denying a preliminary injunction, that ends the matter. Regardless, Plaintiffs are also unlikely to succeed on the merits of their underlying claims.

Plaintiffs collectively advance two claims under the Administrative Procedure Act ("APA").[14] Under the APA, agency action is presumed valid and will be upheld unless a plaintiff demonstrates the action "is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Westlands Water Dist. v. Dep't of the Interior*, 376 F.3d 853, 865 (9th Cir. 2004) (quoting 5 U.S.C. §706(2)(A)). Plaintiffs are unlikely to succeed on the merits of their claims or even show serious questions.

1. Plaintiffs' NEPA Arguments Have No Merit.

Plaintiffs argue that the FSEIS did not consider a "reasonable range of alternatives" and that the new FSEIS ignored the prior remand order by giving too much emphasis to lease rights. These arguments ignore the purpose of the Willow development, overlook BLM's detailed alternatives analysis and its statutory obligations, and misconstrue the role of alternatives in the NEPA process.

An agency complies with NEPA if it "considers an appropriate range of alternatives, even if it does not consider every available alternative." *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) (internal quotation marks and citation omitted). "An agency need not, therefore, discuss alternatives similar to alternatives actually considered, or alternatives which are infeasible,

[14] In the district court proceedings, CBD argued a third APA claim but has forgone that claim in its motion. *See* CBD Mot. for Preliminary Injunction in No. 3:23-cv-00061-SLG, Dkt. 24 at 16-20 (Mar. 16, 2023).

ineffective, or inconsistent with the basic policy objectives for the management of the area." *Id.* (internal quotation marks and citation omitted). The purpose of a full evaluation of alternatives is simply to "ensure[] that the most intelligent, optimally beneficial decision will ultimately be made." *Id.* (internal quotation marks and citation omitted).

Kempthorne involved BLM's EIS for an earlier version of the IAP for the Petroleum Reserve. That EIS included five alternatives. The plaintiffs argued that BLM should have also considered their preferred "Audubon Alternative," which provided more protections for wildlife. *Id.* The court rejected that argument, noting that BLM had both explained why the "Audubon Alternative … was inconsistent with the [IAP] project and statutory mandates" for the Petroleum Reserve and agreed to "incorporate several [protective] recommendations" into the alternative it selected. *Id.* at 978-79.

BLM did essentially the same here. It considered a range of alternatives and explained why it screened out others based on Willow's purpose and BLM's statutory obligations. Ex. 28 at 16-45.[15] The alternatives BLM considered,

[15] *See also* FSEIS Appendix D.1 at 36, 44 (eliminating a concept that rerouted an access road to avoid crossing the Coville River Special Area because it "[w]ould result in more impacts to yellow-billed loons" and eliminating a pad concept based on relocating BT2 south of Fish Creek that already was incorporated into Alternatives B, C, and D).

moreover, included those Plaintiffs claim were *not* analyzed.[16] And while Plaintiffs' preferred alternatives were not carried forward for detailed analysis, many recommendations Plaintiffs urged (fewer well sites, less access to oil, fewer greenhouse gas emissions, less infrastructure in TLSA, less impact on subsistence resources, fewer gravel roads) were incorporated in Alternative E—a "middle ground" alternative. *Kempthorne*, 457 F.3d at 978; Ex. 28 at 48-50. Nothing more was required under NEPA. *See Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013) (an EIS need only "briefly discuss the reasons for eliminating any alternatives from detailed study").

The range of alternatives BLM considered here allowed it to make the "optimally beneficial decision"—which, again, is the purpose of considering alternatives. *Kempthorne*, 457 F.3d at 978. BLM had the information it needed to evaluate the proposed project, and it approved a version that was more restrictive of lease rights, and more protective of surface resources, than either ConocoPhillips' proposal or BLM's preferred Alternative E.[17] The final decision eliminates both BT4 and BT5, reducing total oil recovery by 52.9 million barrels

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[16] *Compare* SILA Mot. at 14-15 *and* CBD Mot. at 7-8 *with* FSEIS Appendix D.1 at 32-48.

[17] *Cf.* Ex. 28 at 46-47 (figures showing that well reaches of Alternatives B, C, D, and E do *not* constitute "full development" and maximum oil production available to ConocoPhillips in the Willow reservoir, contrary to Plaintiffs' unsupported assertions to the contrary).

and reducing indirect CO_2 emissions by 21,750,000 metric tons. Ex. 21 at 18. The area subject to lease is also reduced—permanently—as a result of ConocoPhillips' relinquishment of over 68,000 acres of its leases in the Petroleum Reserve, including 57,995 acres in the TLSA, in response to BLM's elimination of BT4 and BT5. *See id.* at 24; Ex. 12 ¶17, Ex. B.

Plaintiffs fail to explain which additional alternative should have been given more detailed consideration in the FSEIS, much less satisfy their "duty to show that th[at] alternative is viable." *Alaska Survival*, 705 F.3d at 1087. They merely suggest in conclusory fashion that alternatives that would reduce or prohibit infrastructure in TLSA are consistent with the project's purpose. SILA Mot. at 14; *see* CBD Mot. at 10. But again, Alternative E *does* reduce oil production and infrastructure in the TLSA. And BLM considered moving all infrastructure out of the TLSA but decided not to give such an alternative detailed analysis because, it explained, "[t]his alternative concept would not meet the Project's purpose and need and would strand an economically viable quantity of recoverable oil." FSEIS Appendix D.1 at 37-38. This is entirely reasonable, particularly given that "infrastructure is allowed, and indeed anticipated, within the TLSA." *SILA*, 555 F. Supp. 3d at 769.

Plaintiffs claim the FSEIS's discussion of "economically viable quantities of recoverable oil" and "fully develop[ing]" oil resources constituted a self-imposed

mandate that limited alternatives. SILA Mot. at 13-14; CBD Mot. at 8. BLM did no such thing. BLM considered recovery of oil as *one factor* among many factors in balancing ConocoPhillips' development rights against the goal of "reduc[ing] infrastructure and impacts within the TLSA," which is entirely consistent with the NPRPA. *See, e.g.*, FSEIS at 8; FSEIS Appendix D.1 at 27; Ex. 22 at 14-18. The project's purpose, in other words, is to provide "maximum protection to significant surface resources" *and also* "to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources in the Willow reservoir." FSEIS at 2-3. This reflects the statutory scheme: "[m]aximum protection of designated special areas does *not* imply prohibition of exploration or other activities," but instead means "steps to minimize adverse impacts." 42 Fed. Reg. 28,723 (June 2, 1977) (emphasis added); *see* 42 U.S.C. §6504(a) ("[E]xploration within the[] . . . area[] … shall be conducted in a manner which will assure the maximum protection of such surface values *to the extent consistent with the requirements of th[e] [NPRPA].*" (emphasis added)). In sum, the FSEIS aligns squarely with the Interior Secretary's duty under the NPRPA to "conduct an expeditious program of competitive leasing" in the Petroleum Reserve while protecting surface values. 42 U.S.C. §§6504(a), 6506a(a), (b). Plaintiffs are unlikely to prevail on their NEPA claims.

2. BLM Complied with ANILCA Section 810.

SILA contends that BLM violated ANILCA Section 810 by not considering enough alternatives. This argument is divorced from the record and unlikely to succeed on the merits.

ANILCA requires federal agencies to evaluate subsistence uses and needs before "withdraw[ing], reserv[ing], leas[ing], or otherwise permit[ting] the use, occupancy, or disposition of public lands." 16 U.S.C. §3120(a). An ANILCA analysis proceeds in two tiers. At tier I, the agency must consider "(1) the effect of leases on subsistence uses and needs; (2) the availability of other lands for oil and gas leasing; and (3) other alternatives which would reduce or eliminate the amount of land taken away from subsistence uses." *Kunaknana v. Clark*, 742 F.2d 1145, 1150-51 (9th Cir. 1984). If the agency determines that the contemplated action "may significantly restrict subsistence use," it proceeds to tier II. *Id*. at 1151. There, the agency must "give notice to the communities affected, hold public hearings, and make specified findings about the propriety of the proposed action and the measures that will be taken to mitigate adverse impacts on subsistence uses and resources." *Hanlon v. Barton*, 740 F. Supp. 1446, 1448 (D. Alaska 1988); *see* 16 U.S.C. §3120(a)(1)-(3).

Here, BLM determined at tier I that Willow "may significantly restrict subsistence use." FSEIS Appendix G at 35. SILA perplexingly targets that finding,

arguing that BLM had to consider even more alternatives.[18] But BLM considered the requisite alternatives at tier I. Appendix G to the FSEIS presents 66 pages of tier I analysis and findings. BLM analyzed four action alternatives and three module delivery options, in addition to a no-action alternative. *Id.* at 1; *see id.* at 3-66. BLM worked with ConocoPhillips and the local community to repeatedly refine the project and change its configuration to address subsistence impacts. Ex. 17 at 62-80. To illustrate, Kuukpik Corporation—"caretaker of Nuiqsut's birthright and subsistence lifestyle," participant in the ANILCA 810 process, and former Willow critic, *see id.* at 65—informed BLM that Alternative E "contains enough measures intended to minimize adverse impacts to subsistence that BLM can safely make the required determinations under ANILCA 810." *Id.* at 92. BLM's analysis manifestly satisfied ANILCA Section 810.[19]

Moreover, ANILCA, like NEPA, "must be read in light of [the NPRPA,] which requires the agency to grant some oil and gas leases in the NPR-A."

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[18] SILA Mot. at 17. The Agency's obligation to consider alternatives occurs at tier I. *See Kunaknana*, 742 F.2d at 1150-51. Given that BLM made an affirmative tier I determination, it is unclear what other outcome SILA seeks by insisting that BLM was obligated to consider additional alternatives at tier I.

[19] *Tenakee Springs v. Clough*, 915 F.2d 1308 (9th Cir. 1990), is inapposite. There, this Court disapproved of the agency's "failure seriously to consider *any* alternative to the rigid application of its own interpretation of the contract requirements." *Id.* at 1312 (emphasis added). Here, by contrast, BLM engaged in a fulsome review of multiple alternative courses of action before selecting Alternative E.

Kunaknana, 742 F.2d at 1151 (citing 42 U.S.C. §6508). As it did in its NEPA analysis, BLM appropriately balanced the demands of ANILCA and the NPRPA, and concluded that Alternative E best effectuates the mandates and goals of each. *See* Section IV.B.1 (alternatives section); *see also Amoco Prod. Co.,* 480 U.S. at 544 ("Section 810 does not prohibit all federal land use actions which would adversely affect subsistence resources."). SILA is unlikely to prevail on this claim.

V. CONCLUSION

Plaintiffs' motions for an injunction pending appeal should be denied.

DATED: April 13, 2023.

STOEL RIVES LLP

By: */s/ Jason T. Morgan*
Ryan P. Steen (Bar No. 0912084)
Jason T. Morgan (Bar No. 1602010)
Whitney A. Brown (Bar No. 1906063)

Attorneys for ConocoPhillips Alaska, Inc.

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