Case No. 23-35226

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

CONOCOPHILLIPS ALASKA, INC., et al.,
Intervenor-Defendants-Appellees.

On Appeal from the United States District Court
for the District of Alaska

Case No: 3:23-cv-00058-SLG

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3(a)

(RELIEF REQUESTED AS SOON AS POSSIBLE)

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INTRODUCTION

Appellants Sovereign Iñupiat for a Living Arctic, et al. (collectively SILA) demonstrated that immediate injunctive relief is necessary to avoid the additional, irreparable destruction of Arctic wetlands and tundra, and harms to wildlife and people, caused by ConocoPhillips Alaska, Inc.'s (ConocoPhillips) construction of the Willow Master Development Project (Willow) in the National Petroleum Reserve–Alaska (Reserve). Em. Mot. Under Circuit Rule 27-3(a), ECF No. 5-1 [hereinafter SILA]. ConocoPhillips has begun — but not completed — its planned gravel mining and road construction activities for the current winter season. In the interest of expediting a decision on this motion to preclude further irreparable harm, SILA submits this reply early, and respectfully requests the Court issue a decision as soon as possible.

ARGUMENT

I. SILA Demonstrated Its Members Will Suffer Irreparable Harm From This Winter's Activities; the District Court's Contrary Finding Misapplied the Law.

SILA explained this winter's construction activities and resulting permanent infrastructure will cause irreparable harm to its members, and demonstrated how the District Court abused its discretion in reaching a contrary conclusion. SILA at 6–11. Defendant-Intervenors-Appellees' ("Intervenors") arguments that SILA cannot be granted meaningful injunctive relief because gravel mining began on

April 4, 2023, obfuscate that further construction activities are ongoing. ConocoPhillips Alaska, Inc.'s Opp. to Em. Mots. at 9–10, ECF 18-1 [hereinafter CPAI]; North Slope Borough Opp. to Em. Mots. at 12–13, ECF 17 [hereinafter NSB]; Kuukpik Corp Opp. to Em. Mots. at 8–9, ECF 20 [hereinafter Kuukpik]. ConocoPhillips commenced construction activities to prepare the mine site for gravel extraction, but its winter construction activities are not complete. CPAI Ex. 1 at 3–4, ECF 18-3. ConocoPhillips' activities this winter include further excavating gravel, gravel hauling, and constructing up to 3.1 miles of permanent roads, and the company acknowledges work could extend beyond April 25, 2023. *Id*. at 5; SILA Ex. 22 at 11, ECF 5-23. ConocoPhillips so far has only mined a fraction of a percent — 0.6% — of the total gravel they plan to mine this winter. CPAI Ex. 1 at 5, ECF 18-3 (800 cubic yards mined); CPAI Ex. 13 at 6, ECF 18-15 (130,000 cubic yards planned). ConocoPhillips relies on cases that are factually inapposite or inapplicable because this Court can grant injunctive relief to prevent further gravel extraction and road construction, order interim reclamation of the mine site to begin immediately, or otherwise tailor the relief to minimize impacts to prevent further irreparable harm.[1] "Ongoing harm to the environment constitutes

[1] *See* CPAI at 9–10; *see, e.g.*, *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1288 (9th Cir. 2013) (dicta regarding forward-looking injunctive relief irrelevant where Court assessed past harms to determine whether defendants were

irreparable harm warranting an injunction." *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006) (upholding injunction pending appeal halting ongoing construction).

The ongoing gravel extraction and road construction is irreparably harming SILA's members, namely Sam Kunaknana, whose harm is not limited to blasting at the mine site. Mr. Kunaknana explains that his ability to hunt caribou will be harmed by road building and infrastructure in his traditional hunting and fishing areas. SILA Ex. 14 at 8–10, ECF 5-15 (explaining Willow's roads would be difficult to cross, impeding subsistence access); *see also* SILA at 7–8 (discussing Bureau of Land Management (BLM) findings that roads would harm subsistence). Arguments that SILA's motion should be denied because no relief can be granted are plainly false.[2]

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correct party to enjoin); *Schrier v. Univ. Of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (terminated employee denied injunctive relief where he failed to show permanent harm from being out of position during pendency of lawsuit and monetary damages were otherwise adequate); *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir. 1988) (finding it could not grant relief because mines were complete, work had ceased, and reclamation efforts were unavailable, so any order would have "no effect"). Here, the mine sites are required to be reclaimed, and interim reclamation would occur seasonally. Fed. Defs. Opp'n to Pls. Mot. for Inj. Pending Appeal [hereinafter BLM], Exs. at 1-GovEx-197-198, ECF 14-3 (describing incremental reclamation for mines wherein removed overburden would be stockpiled before replacing onto excavated area). An order requiring immediate interim reclamation would grant SILA relief.

[2] To the extent ConocoPhillips plans but has not disclosed summer

Arguments that the District Court properly found that there would not be harm to subsistence caribou hunters overlook that this finding was based on the wrong legal standard. *See, e.g.*, BLM at 37–38; NSB at 13; CPAI at 15 n.10. The proper standard is that SILA must show that its members will experience harm — not that there would be harm to subsistence caribou hunters universally. SILA at 8; *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) (explaining plaintiff must establish "he is likely to suffer irreparable harm"); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018) ("Plaintiffs seeking injunctive relief must show that they themselves are likely to suffer irreparable harm absent an injunction."). The District Court's application of the incorrect standard was, therefore, legal error. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

When the correct legal standard is applied, SILA meets it. SILA at 6–10. Mr. Kunaknana explained in detail how this winter's activities and the permanent infrastructure being constructed this winter would harm him now and far into the future. SILA at 9–10.[3] And BLM acknowledged that subsistence users may

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construction activities, SILA does not waive their right to seek injunctive relief at a future time. *Cf.* BLM at 13 n.1, ECF 14-1.

[3] ConocoPhillips characterizes Mr. Kunaknana's harm as "aesthetic" and "trifling," CPAI at 15, 17, ignoring his explanations of the subsistence and cultural importance of hunting and the significant impacts from this winter's activities and the infrastructure being built. SILA at 9–10.

experience the exact types of harm Mr. Kunaknana detailed. SILA at 7–8. This Court also recognized that subsistence harms like those described by Mr. Kunaknana are irreparable harm. SILA at 7 & n.2, 9 & n.3.

Contrary to ConocoPhillips' assertions, the District Court improperly relied on the number of acres impacted to determine whether SILA demonstrated harm, committing legal error. CPAI at 14–15 & nn.9–10; SILA Ex. 22 at 29; *see also* BLM at 38 (acknowledging that Court relied on impact to "tiny fraction" of caribou habitat to conclude no harm).

II. THE DISTRICT COURT ERRED IN FINDING THE BALANCE OF EQUITIES AND PUBLIC INTEREST DISFAVOR AN INJUNCTION.

SILA explained that the District Court's findings on the balance of equities and public interest factors were incorrect based on the law and the facts. SILA at 19–25. Importantly, because the District Court failed to reach the merits and committed legal error to find that there would not be harm to SILA, the Court misapplied case law to improperly weigh the economic benefits of Willow. SILA at 19–20 & n.6.

Most of the arguments advanced by Intervenors relate to the economic benefits that would come from Willow's full development and operations over the 30-year life of the project. NSB at 10–11; Arctic Slope Regional Corp. Opp'n to Mot. for Prelim. Inj. at 7, 11–13, ECF 16-1 [hereinafter ASRC]; Kuukpik at 16–17;

State of Alaska Opp'n to Pls. Mot. for Inj. Pending Appeal at 4, 7, ECF 21 [hereinafter SOA]; CPAI at 17–18.[4] They also assert that if the Court stops this winter's work, the project will not be built. CPAI at 19–20; ASRC at 5 n.7; NSB at 11. There are two errors with these arguments.

First, as a matter of law, the District Court should not have considered the full economic harms that fall outside of the timeframe when the injunction would be in place. SILA at 19–20. ASRC misunderstands this Court's holding in *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Connaughton* (*Connaughton*), 752 F.3d 755 (9th Cir. 2014), in arguing the District Court properly considered all the economic harms that would result if Willow was not developed. ASRC at 9–11. In *Connaughton*, the Court explained that "we must consider only the portion of the harm that would occur while the preliminary injunction is in place, and proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place." *Connaughton*, 752 F.3d at 765. The Court recognized that, if the project proceeds following an injunction, the economic harms would be mitigated and the "marginal harm" considered for an injunction is "the value of moving those jobs and tax dollars to a future year, rather

[4] ConocoPhillips asserts that the District Court did not look at the economic impacts beyond the winter construction season, CPAI at 16, but then argues the Court properly looked at long-term job opportunities and training programs, tax revenues, grant-making revenues, and dividends of the full project. CPAI at 17–18.

than the present." *Id.* at 765–66. Here, the District Court improperly considered the potential economic impacts of permanently stopping the project. This fails to account for the proportional and "marginal harm" from a year-long delay. SILA at 19–20.

Second, ConocoPhillips has not yet made a final investment decision to develop Willow. SILA Ex 18 at 1; SILA Ex. 19 at 48. Because the company has yet to commit to development, the vast majority of the economic harms that Intervenor-Defendants raise are speculative. *See Goldies Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1994) (explaining harm must be more than speculative). The District Court failed to consider this fact when balancing the equities.[5] Because the District Court applied the incorrect legal standard and relied, at least in part, on the speculative benefits of full-project development to reach its conclusion on the equities, SILA Ex. 22 at 35–36, it committed legal and factual error. SILA at 20–22; *Am. Trucking Ass'ns, Inc.*, 559 F.3d at 1052.[6]

ConocoPhillips now asserts that an injunction would lead to health and

[5] The District Court properly rejected ConocoPhillips' contention that an injunction would threaten its leases. SILA Ex. 22 at 36 n.144.

[6] Regarding subsistence use of roads and boat ramps, the District Court found that there would be a benefit to some from that infrastructure, not that there would be harm this year without them. SILA Ex. 22 at 38; *contra* ASRC at 8–9; NSB 8.

safety risks. CPAI at 18; *see also* Kuukpik Corp. at 24. It offers purely conclusory statements in support, failing to explain the safety risks of leaving culverts or insulation in place that could be properly marked or otherwise addressed. ConocoPhillips also claims there would be environmental and safety harms from stopping the building of the berm around the mine, but that component will be completed today. CPAI Ex. 1 at ¶ 11. Regardless, this Court can tailor an injunction to allow BLM and ConocoPhillips to take the necessary actions to secure the sites while enjoining further mining and road construction.

The District Court also erred by giving considerable weight to the positions of various governments and elected officials. SILA at 23–24. BLM and Intervenors fail to address, let alone try to reconcile, the District Court's misapplication of caselaw to reach its conclusion on this point. *See, e.g.*, BLM at 41; CPAI at 21.[7]

Lastly, contrary to assertions that SILA did not rebut the District Court's finding that Congress intended oil and gas development in the Reserve, and, therefore, the public interest disfavors an injunction, CPAI at 21, SILA explained how the District Court failed to account for protective statutory mandates, which are not overridden by oil and gas development. SILA at 24–25.

[7] SILA is not challenging the NSB's permit or approval, and, therefore, it is not determinative of the public interest. SILA at 23–24; *contra* NSB at 9–10.

III. SILA IS LIKELY TO SUCCEED ON THE MERITS OF ITS LEGAL CLAIMS.

SILA is likely to succeed and raised serious questions on the merits. In failing to reach the merits, the District Court improperly skewed its analysis of the balance of equities and public interest. *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) ("[A]voiding environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim."); SILA at 20 & n.6.

BLM violated the National Environmental Policy Act (NEPA) and the Naval Petroleum Reserves Production Act (NPRPA) by improperly limiting its alternatives analysis. SILA at 11–15. BLM's arguments do not refute the fact that it developed its alternatives and approved Willow under the same unlawful interpretation of its authority and improper view of ConocoPhillips' lease rights the District Court rejected. *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.* (*SILA I*), 555 F. Supp. 3d 739, 770 (D. Alaska 2021); BLM at 20–22. BLM's and Intervenors' focus on the consideration of additional alternative components and modifications to Alternative E misses the point: BLM improperly eliminated alternatives from consideration based on the limiting threshold screening criteria that it could not strand an "economically viable quantity of recoverable oil." SILA Ex. 2 at 36–37, 47; Ex. 3 at 6; SILA at 13; *but see* BLM 20–22; NSB at 16–17; CPAI at 25–26. By tying its hands in this way, BLM

unlawfully constrained its analysis and ruled out alternatives that could have further addressed Willow's serious impacts, consistent with its mandates under the NPRPA to mitigate adverse effects on surface resources and provide maximum protection for Special Areas. 42 U.S.C. § 6504(a); SILA at 14–15; *SILA I*, 555 F. Supp. 3d at 769 (stating framework for rejecting alternatives was "inconsistent with its own statutory responsibility to mitigate adverse effects on the surface resources").

Arguments that SILA just wanted consideration of a middle-ground alternative should be rejected. The cases BLM cites are inapposite because SILA suggested reasonable alternatives consistent with the project's purpose and the NPRPA's requirements to mitigate impacts to surface resources. BLM at 28; *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1004–05 (9th Cir. 2013) (finding no NEPA violation from rejecting additional middle-ground alternative where Plaintiff did not explain why another alternative would foster informed decision-making); *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 871–72 (9th Cir. 2004) (stating agency not required to consider additional middle-ground alternatives that would not meet project purpose). ConocoPhillips' reliance on *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006), is misplaced because that case involved the question of

whether BLM considered an adequate range of leasing alternatives at the Reserve's management plan stage and noted BLM could not entirely forbid all oil and gas activities. CPAI at 24–25. That holding is irrelevant to the present issue: that BLM improperly limited its consideration of alternatives to only those that would not strand an economically viable quantity of oil. SILA at 13–14.

BLM also violated the Alaska National Interest Lands Conservation Act (ANILCA) by failing to adequately consider alternatives and measures to reduce impacts to subsistence. SILA at 15–18. Contrary to ConocoPhillips' assertions, BLM's obligation to analyze alternatives to reduce the use of lands needed for subsistence uses is not per se satisfied because the agency finds there may be significant restrictions to subsistence for the alternatives it considered. CPAI at 28–29. Here, BLM improperly limited the scope of its alternatives by relying on the erroneous assumption that it could not strand economically viable quantities of oil. SILA Ex. 2 at 36, 37; *Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990) (rejecting argument that contractual obligations should limit alternatives or the substantive requirement to minimize subsistence impacts). This Court should reject BLM's arguments that Alternative E fixed this problem because, even to the extent BLM incorporated additional changes into Alternative E, BLM still found there would be significant impacts to subsistence. Those impacts were not

meaningfully reduced by any alternatives. SILA at 15–17; BLM at 33–34. Had BLM not improperly constrained its analysis, it could have considered additional measures to minimize the use of lands needed for subsistence and further minimized adverse impacts from the start. Because BLM improperly constrained its analysis of alternatives, its findings under Tier 2 of ANILCA were also arbitrary. SILA at 17–18; 16 U.S.C. § 3120(a)(3)(B).

CONCLUSION

SILA respectfully requests this Court grant its emergency motion as soon as possible.

Respectfully submitted this 14th day of April 2023.

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CERTIFICATE OF COMPLIANCE

I certify that:

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Signature: *s/Bridget Psarianos* Date: April 14, 2023

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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