Jeremy C. Lieb
Erik Grafe
Ian S. Dooley
Carole A. Holley
EARTHJUSTICE
441 W 5th Avenue, Suite 301
Anchorage, AK 99501
T: 907.277.2500
E: jlieb@earthjustice.org
E: egrafe@earthjustice.org
E: idooley@earthjustice.org
E: cholley@earthjustice.org

Eric P. Jorgensen
EARTHJUSTICE
325 Fourth Street
Juneau, AK 99801
T: 907.586.2751
E: ejorgensen@earthjustice.org

Attorneys for Plaintiffs-Appellants Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, and Greenpeace, Inc.

Kristen Monsell
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, St. #800
Oakland, CA 94612
T: 510.844.7100
E: kmonsell@biologicaldiversity.org

Attorneys for Plaintiff-Appellant Center for Biological Diversity

Cecilia Segal
Ann Alexander
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter St., 21st floor
San Francisco, CA 94104
T: 415.875.6100
T: 415.875.6190
E: csegal@nrdc.org
E: aalexander@nrdc.org

Attorneys for Plaintiff-Appellant Natural Resources Defense Council

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY *et al.*, *Plaintiffs-Appellants,* v. BUREAU OF LAND MANAGEMENT *et al.*, *Defendants-Appellees*, and CONOCOPHILLIPS ALASKA, INC.; ARCTIC SLOPE REGIONAL CORPORATION; NORTH SLOPE BOROUGH; KUUKPIK CORPORATION; and STATE OF ALASKA, *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

PLAINTIFFS-APPELLANTS' CENTER FOR BIOLOGICAL DIVERSITY *ET AL.*'S REPLY IN SUPPORT OF EMERGENCY MOTION PER CIRCUIT RULE 27-3 (RELIEF REQUESTED AS SOON AS POSSIBLE)

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PLAINTIFFS ARE LIKELY TO SUFFER IRREPARABLE HARM WITHOUT AN INJUNCTION

I. An injunction would prevent irreparable harm because the lion's share of ConocoPhillips' planned construction this winter has yet to occur.

ConocoPhillips misleadingly suggests that "no adequate remedy exists" to avoid irreparable harm to Plaintiffs because it has commenced activities during the pendency of this motion. Dkt. 20-1 at 9-10. Not so. An injunction before the end of the winter construction season would prevent irreparable harm to Plaintiffs. Over 99 percent of the gravel mining ConocoPhillips plans to conduct this winter has yet to occur. *Compare* Dkt. 20-15, ¶8 (ConocoPhillips plans to mine up to 130,000 cubic yards of gravel this winter), *with* Dkt. 20-3, ¶11 (ConocoPhillips has mined 800 cubic yards of gravel so far). ConocoPhillips anticipates that "[b]lasting to access additional gravel will begin on April 14." Dkt. 20-3, ¶11. Blasting produces the loudest sounds of the entire Project and would disturb and displace caribou from the mine site, making them unavailable for harvest in the area and potentially increasing mortality or resulting in reduced calving. Dkt. 5-1 at 13. ConocoPhillips also has yet to undertake any substantial road construction. Dkt. 20-3, ¶11 (describing completion of "an initial leveling course on the first part of the road extension"). Road construction this winter, and the presence of a road in perpetuity, would negatively affect caribou and their availability for harvest. As described in their motion, Dkt. 5-1 at 12-15, Plaintiffs' member Dr. Ahtuangaruak

would be irreparably harmed by these activities this winter and beyond, both in her home and in her and her family's caribou hunting, *see* Dkt. 5-15, ¶¶51, 53, 54; *id.* at 94, 98, 109; *infra* pp. 2-4. An injunction stopping these activities pending this Court's adjudication of Plaintiffs' appeal would provide meaningful relief from irreparable harm.

II. ConocoPhillips' attempt to undermine Plaintiffs' evidence of harm is unsuccessful.

ConocoPhillips' challenge to Dr. Ahtuangaruak's evidence of harm from this winter's activities is ineffective and mischaracterizes her testimony. First, ConocoPhillips doubles down on the same clear error the district court made, misusing her statement that she can no longer access the Tiŋmiaqsiuġvik River by boat to suggest it prevents her family's use of the mine site. Dkt. 20-1 at 12-13. The argument fails to address her direct testimony of future harm from effects on hunting where "the mine is going to be located." Dkt. 5-15, ¶54. Further, Dr. Ahtuangaruak's use of the area is corroborated by other Intervenor declarants' testimony. *See* Dkt. 20-10, ¶12 (stating residents use existing overland trail to hunt for caribou where the mine is located); Dkt. 21-5, ¶9 ("There is a trail out that way towards the new mine that people use for hunting.").

ConocoPhillips' challenge to Dr. Ahtuangaruak's use of the word "we" to attest to harm caused by the company's activities, Dkt. 20-1 at 12, suggesting that she does not use the affected areas and is not personally harmed, fundamentally

misrepresents her testimony. And it reflects an indifference to the importance of sharing food and resources to Dr. Ahtuangaruak's family and community as an integral part of their culture. *See* Dkt. 5-15, ¶¶7-8 (discussing sharing traditions), ¶10 ("Sharing is vital to obtaining the variety of foods we need."), ¶12 ("My family and I hunt, fish, and gather across the North Slope . . . . We travel with family and friends to hunt and harvest in all these places. My family shares all types of foods with me as I share foods with them."), ¶34 (discussing hunting with family).

ConocoPhillips also seeks to undercut Dr. Ahtuangaruak's testimony that she and her family hunt, pick berries, fish, and enjoy other traditional and spiritual benefits in the area of the mine site, focusing on Dr. Ahtuangaruak's use of the word "near." Dkt. 20-1 at 13 (citing Dkt. 5-15, ¶53). But her testimony is that her use of the area is near enough to the mine site to be injured. Dkt. 5-15, ¶¶53-55.[1]

Also ineffective is ConocoPhillips' suggestion that evidence from the SEIS about caribou impacts only results from the whole Project, not just the near-term activities. Dkt. 20-1 at 15. To the contrary, the SEIS shows the ongoing activities are occurring in the heart of a high-use subsistence area, in high-density caribou

[1] Contrary to ConocoPhillips' effort to introduce confusion, Dkt. 20-1 at 12, there is no ambiguity that Dr. Ahtuangaruak's testimony is about the mine site that will be active this winter.

habitat, and during the peak hunting season in this particular area. Dkt. 5-1 at 13-14, 18 n.5; CR 69 at 16. And the SEIS describes how caribou will be disturbed and displaced not just once the Project as a whole is built, but "during all periods of human activity." Dkt. 5-10 at 76; *see also id.* at 75-76, 82 (the presence of ongoing human activity results in even higher rates of displacement of maternal caribou).

THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR THE INJUNCTION

ConocoPhillips incorrectly asserts that the balance of harms tips against an injunction because not completing certain Project components would harm public safety and the environment. *See* Dkt. 20-1 at 3-4, 18. Specifically, ConocoPhillips argues that it needs to complete a perimeter berm and vaguely asserts that it needs to complete certain "road work." *Id.* at 18 (citing declaration).

The purported need to complete these Project components does not justify continued blasting and gravel mining or road construction. Indeed, ConocoPhillips' declaration shows not only that more mining and road construction will occur this winter, but that these activities are entirely distinct from installing the berm. *Compare* Dkt. 20-3, ¶11 (describing "[b]lasting to access additional gravel" and additional road construction still to occur), *with id.*, ¶16 (references to leaving an open mine site). And ConocoPhillips provides no support

for its self-serving assertion that it must complete road work to protect public safety and the environment. *See* Dkt. 20-1 at 18; Dkt. 20-3, ¶16.

Moreover, ConocoPhillips stated that it expects to complete the berm today, *id*., ¶10—*i.e.*, before this Court would rule on Plaintiffs' motion. And even assuming certain activities remain necessary for public safety or environmental protection—Defendants did not raise this issue in their brief—this Court can issue a tailored injunction allowing BLM to permit just those activities to proceed while still barring gravel mining and related road construction. *See, e.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822-24 (9th Cir. 2018) (upholding injunction that was narrowly tailored to avoid irreparable harm).

ConocoPhillips also fails to rebut Plaintiffs' argument that the serious and largely permanent harms Plaintiffs' members will suffer outweigh temporary harms to Intervenors. *See* Dkt. 5-1 at 18-20. Instead, ConocoPhillips mischaracterizes Plaintiffs' members' harm to argue that these "aesthetic" harms cannot outweigh economic harms to local residents. *See* Dkt. 20-1 at 17. But Plaintiffs' members' harms are not only "aesthetic." Rather, this winter's construction activity will also cause permanent harm to their cultural, subsistence, and recreational interests. *See, e.g.*, *supra* pp. 1-4; Dkt. 5-1 at 11-13. And this Court has regularly recognized that these types of harms outweigh temporary economic harm, even if such temporary harm is real and significant. *See, e.g.*,

League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton, 752 F.3d 755, 766 (9th Cir. 2014) (holding that "plaintiffs' irreparable environmental injuries outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project"); *see also* Dkt. 5-1 at 20 (collecting cases).

Intervenors attempt to bolster their temporary harms by pointing to harms from the delay of long-term benefits of the Project as a whole, including tax revenues and grants. Dkt. 17-1 at 11-14; Dkt. 18 at 9-11; Dkt. 20-1 at 17-18; Dkt. 21-1 at 21-23; Dkt. 24 at 3. But as Arctic Slope Regional Corporation (ASRC) apparently concedes, these are "benefits of the project as built that accrue only (or largely) after the injunction period ends." Dkt. 17-1 at 9. They are therefore irrelevant to Plaintiffs' present motion. *See* Dkt. 16-1 at 16-17 (relevant timeframe for Court's review is harm experienced during pendency of Plaintiffs' appeal from district court's preliminary injunction denial); *cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.").

ASRC insists these benefits should nonetheless be considered, Dkt. 17-1 at 9-11, but the cases on which it relies are unavailing. *Earth Island Institute v. Muldoon* and *Friends of the Wild Swan v. Weber* involved tree logging projects; as

soon as project implementation began, the benefits—fire mitigation—began to accrue. *See Muldoon*, No. 22-cv-710, 2022 WL 4388197, at *1 & n.1, *7-10 (E.D. Cal. Sept. 22, 2022), *appeal docketed*, No. 22-16483 (9th Cir. Sept. 27, 2022); *Weber*, 955 F. Supp. 2d 1191, 1192, 1195-96 (D. Mont. 2013). In contrast here, most of the benefits Intervenors cite will not be realized until Willow becomes operational. In *Weber*, delay also risked a loss of project funding. 955 F. Supp. 2d at 1195. So too in *Western Watersheds Project v. Salazar*, No. 11-cv-492, 2011 WL 13124018, at *19 (C.D. Cal. Aug. 10, 2011). That is not the case here.[2]

ConocoPhillips resurrects an argument it did not prevail on below—that any delay in construction risks the viability of the whole Project because of possible lease expiration—and suggests its argument is unrebutted. Dkt. 20-1 at 19-20. But as Plaintiffs argued in their motion and their briefing below, the Reserves Act and its implementing regulations authorize BLM to suspend lease terms due to circumstances beyond the lessee's control. Dkt. 5-1 at 19; CR 69 at 20-21. ConocoPhillips does not deny that these suspension provisions apply; it merely

[2] To the extent ASRC's remaining cases support the premise that the benefits from a project's completion are relevant to the public interest prong of the preliminary injunction test, they are contrary to this Court's precedent. *See Connaughton*, 752 F.3d at 765 (when balancing the equities, courts "must consider only the portion of the harm that would occur while the preliminary injunction is in place"); *S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (per curiam) ("[T]he public interest requires careful consideration of environmental impacts before major federal projects may go forward.").

asserts, without explanation, that the "risk of lease expiration" is nonetheless "great[]." Dkt. 20-1 at 20 n.13. Plaintiffs also observed that ConocoPhillips' viability argument conflicts with BLM's view of possible project timelines and is further undermined by the fact that the company has yet to make a final investment decision for the Project. CR 69 at 21-22. ConocoPhillips ignores these rebuttals. *See* Dkt. 20-1 at 18-20.

Intervenors' reliance on select legislative pronouncements and intent also misses the mark. Contrary to ConocoPhillips' suggestion that Plaintiffs have no response to the purposes of the Reserves Act, Dkt. 20-1 at 21, Plaintiffs' motion explained how Congress contemplated oil and gas development in the Reserve while *also* requiring, through the Reserves Act and NEPA, that any such development be accompanied by careful environmental analysis and protective measures. Dkt. 5-1 at 2-3, 24. Furthermore, support for Willow among Alaska Native people is not "unified." Dkt. 17-1 at 4. Rather, the Tribal and City governments of Nuiqsut have expressed deep concerns about the Project, including from the construction activities occurring this winter. CR 69 at 24-25. Finally, since delay caused by a preliminary injunction will not kill the Project, *supra* pp. 7-8, the Alaska legislature's concern about delay is unpersuasive; neither the legislature nor Intervenors have demonstrated how the loss of a few weeks of construction would substantially affect the timing of the Project's ultimate benefits,

given that construction will last for years before any oil would flow. *See* Dkt. 20-18 at 4 (legislature simply assuming delay will have this effect); Dkt. 17-1 at 4 (same for ASRC); Dkt. 18 at 9 & Ex. 1, ¶21 (same for North Slope Borough); Dkt. 23 at 5-6 (same for State of Alaska); Dkt. 24 at 3 (same for Amici); *see also* Dkt. 20-1 at 21.

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR ALTERNATIVES CLAIM

Defendants and ConocoPhillips continue to defend the SEIS's alternatives analysis on the ground that Alternative E differs from the alternatives considered in the first EIS. Dkt. 16-1 at 22-25; Dkt. 20-1 at 24-26. But, this argument fails to rebut the heart of Plaintiffs' argument—other reasonable, important alternatives with greater environmental benefits were excluded because of the constraint BLM applied to its alternatives development. As in their briefing before the district court, neither disputes that BLM concluded that it cannot strand economically viable oil under leases, and, indeed, both essentially defend the point. *See* Dkt. 16-1 at 27 n.4 (stating that ConocoPhillips "does possess development rights in its leases" that prevent BLM from precluding drilling altogether); Dkt. 20-1 at 26-27 (defending the constraint as consistent with the Reserves Act). As Plaintiffs describe in their motion, Dkt. 5-1 at 9-11, this conclusion is flawed, and it renders arbitrary BLM's rejection of alternatives based on this limit.

Instead, Defendants and ConocoPhillips attempt to downplay the significance of this constraint. But as Plaintiffs showed, the flawed economically viable limit was a central basis for screening all alternatives, Dkt. 5-1 at 8-9, and not, as ConocoPhillips argues, "*one factor* among many factors," Dkt. 20-1 at 27, or, as Defendants suggest, that it was just one of "multiple reasons" for rejecting other alternatives, Dkt. 16-1 at 26. BLM assessed several factors in developing alternatives, of course, but no alternative was considered in detail in the SEIS if it did not pass this test. And, regardless, as the district court concluded previously on this point, *Sovereign Iñupiat for a Living Arctic v. BLM*, 555 F. Supp. 3d 739, 769 (D. Alaska 2021), reliance on an arbitrary factor, even if there are other factors, renders the decision unlawful. *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 807 (9th Cir. 2005) ("The role of harmless error in the context of agency review is constrained" and "may be employed only when a mistake . . . *clearly* had *no bearing* on the procedure used or the substance of decision reached." (quoting *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004))).

Defendants' description of how BLM rejected "alternative component No. 44," an alternative that would eliminate infrastructure in the Teshekpuk Lake Special Area, further demonstrates the centrality of the economically viable limit. Dkt. 16-1 at 26. Three of the five reasons BLM cites for rejecting further

consideration of the alternative are predicated on the limit: (i) the alternative's complete elimination of oil resources in several Willow leases, (ii) its reduction of access to oil in additional leases, and (iii) limits in drilling technology to reach all leases in the special area from a pad outside of it. Moreover, because the (iv) purpose and need statement does not preclude alternatives that reduce production, Dkt. 5-1 at 10-11, BLM's citation of it justifies rejecting the alternative only if it is also predicated on the economically viable limit. BLM's final reason, (v) that removing infrastructure from the Teshekpuk Lake Special Area places it too close to other well sites, is a non sequitur, because the concept is to design an alternative with "no new Project infrastructure . . . within the" Special Area. Dkt. 16-4 at 297 (Pad Concept 3.5.5.9).

BLM's failure to analyze alternatives that significantly reduced oil production is a consequential error. Contrary to ConocoPhillips' suggestion, Dkt. 20-1 at 2-3, the SEIS concluded that approving Willow would result in a substantial global increase of greenhouse gas emissions, to the tune of over 130 million metric tons compared to leaving the oil in the ground, considering market factors. Dkt. 16-3 at 227 (Table 3.2.8 showing net emissions, last column, last row). BLM's flawed limit prevented it from assessing alternatives that could reduce these emissions and the harms they will create.

Respectfully submitted this 14th day of April, 2023.

s/ Erik Grafe
Erik Grafe (Alaska Bar No. 0804010)
Jeremy C. Lieb (Alaska Bar No. 1810088)
Ian S. Dooley (Alaska Bar No. 2006059)
Carole A. Holley (Alaska Bar No. 0611076)
Eric P. Jorgensen (Alaska Bar No. 8904010)
EARTHJUSTICE

Attorneys for Plaintiffs-Appellants Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, and Greenpeace, Inc.

s/ Kristen Monsell
Kristen Monsell (California Bar No. 304793)
CENTER FOR BIOLOGICAL DIVERSITY

Attorneys for Plaintiff-Appellant Center for Biological Diversity

s/ Cecilia Segal
Cecilia Segal (California Bar No. 310935)
Ann Alexander (California Bar No. 321751)
NATURAL RESOURCES DEFENSE COUNCIL

Attorneys for Plaintiff-Appellant Natural Resources Defense Council

CERTIFICATE OF COMPLIANCE

I certify that:

(i) This document uses proportionally spaced, 14-point, roman style font and therefore complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6); and

(ii) This document contains 2,678 words, excluding items exempted by Federal Rule of Appellate Procedure 32(f). When divided by 280, the word length of this document does not exceed 20 pages in compliance with Circuit Rules 27-1(1)(d) and 32-3(2).

Dated: April 14, 2023

s/ Erik Grafe
Erik Grafe