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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants, and CONOCOPHILLIPS ALASKA, INC., et al., Intervenor-Defendants.	Case No.: 3:23-cv-00058-SLG
CENTER FOR BIOLOGICAL DIVERSITY, et al., Plaintiffs, v. BUREAU OF LAND MANAGEMENT, et al., Defendants, and CONOCOPHILLIPS ALASKA, INC., et al., Intervenor-Defendants.	Case No. 3:23-cv-00061-SLG

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

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1
II. BACKGROUND 3
A. The Court Denied Plaintiffs' Requests for a Preliminary Injunction in April 2023. 3
B. Willow Construction Is Ongoing, Is Already Providing Benefits, and Will Provide Greater Benefits This Year. 5
III. STANDARD FOR AN INJUNCTION PENDING APPEAL 9
IV. ARGUMENT 12
A. Plaintiffs Are Unlikely to Prevail on Appeal. 12
B. Plaintiffs Fail to Demonstrate Likely Irreparable Harm. 16
C. The Balance of the Equities and Public Interest Tip Sharply Against an Injunction. 30
1. The Immediate Benefits of This Winter's Work to Local Communities Continue to Outweigh Any Harms to Plaintiffs' Interests. 32
2. An Injunction Pending Appeal Would Cause Substantial Financial Harm and Likely Result in Project Failure. 35
3. The Public Interest Continues to Weigh Sharply Against an Injunction. 39
D. CBD Plaintiffs' Alternative Request for a Short-Term Injunction Should Be Denied. 41
V. CONCLUSION 43

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TABLE OF AUTHORIES

Page

Cases

Abbassi v. I.N.S.,
143 F.3d 513 (9th Cir. 1998) 16

All. for Wild Rockies v. Ashe,
No. CV 13-92-M-DWM, 2015 WL 13309317 (D. Mont. Jan. 20, 2015) 13

All. for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 1, 11, 17

All. for the Wild Rockies v. Kruger,
35 F. Supp. 3d 1259 (D. Mont. 2014) 10, 13

Am. Beverage Ass'n v. City & County of San Francisco,
No. 15-cv-03415-EMC, 2016 WL 9184999 (N.D. Cal. June 7, 2016) 14

Amoco Prod. Co. v. Vill. of Gambell, AK,
480 U.S. 531 (1987) ..... passim

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678 F.3d 1314 (Fed. Cir. 2012) 16

Bartell Ranch LLC v. McCullough,
No. 3:21-CV-00080-MMD-CLB, 2023 WL 2226849, slip op. (D. Nev. Feb. 24, 2023) 10

Caribbean Marine Servs. Co. v. Baldrige,
844 F.2d 668 (9th Cir. 1988) 16

Chao v. Westside Drywall, Inc.,
709 F. Supp. 2d 1037, 1052 (D. Or. 2010) 26

Chevron v. Donziger,
37 F. Supp. 3d 650 (S.D.N.Y. 2014) 10

City of Oakland v. Holder,
961 F. Supp. 2d 1005 (N.D. Cal. 2013) 14, 15

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 20

ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm'n,
No. 3:22-CV-00121-SLG, 2023 WL 2403720 (D. Alaska Mar. 8, 2023) 38

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TABLE OF AUTHORITIES
(continued)

Page

Conservation Congress v. U.S. Forest Service,
803 F. Supp. 2d 1126 (E.D. Cal. 2011) 41

Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n,
260 U.S. 212 (1922) 10

Dawson v. Asher,
447 F. Supp. 3d 1047 (W.D. Wash. 2020) 41

Dayton Christian Schs. v. Ohio C.R. Comm'n,
604 F. Supp. 101 (S.D. Ohio 1984) 12

Doe v. San Diego Unified Sch. Dist.,
19 F.4th 1173 (9th Cir. 2021) 11

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 29

Earth Island Inst. v. Carlton,
626 F.3d 462 (9th Cir. 2010) 30, 37

Feldman v. Ariz. Sec'y of State's Off.,
843 F.3d 366 (9th Cir. 2016) 5, 12

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66 F.3d 1489 (9th Cir. 1995) 30

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530 F.2d 982 (D.C. Cir. 1975) 28

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No. CV-15-27-BU-BMM, 2018 WL 1796216 (D. Mont. Apr. 16, 2018) 14, 15

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936 F.2d 417 (9th Cir. 1991) 15

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739 F.2d 466 (9th Cir. 1984) 16

Hernandez v. City of Phoenix,
432 F. Supp. 3d 1049 (D. Ariz. 2020) 24

Page

L.A. Mem'l Coliseum Comm'n v. Nat'l Football League,
634 F.2d 1197 (9th Cir. 1980) 16

Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) 17, 30

Lands Council v. Packard,
391 F. Supp. 2d 869 (D. Idaho 2005) 13

Lopez v. Brewer,
680 F.3d 1068 (9th Cir. 2012) 17

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 24

Lydo Enters., Inc. v. City of Las Vegas,
745 F.2d 1211 (9th Cir. 1984) 41

Maldonado v. Morales,
556 F.3d 1037 (9th Cir. 2009) 14

Mazurek v. Armstrong,
520 U.S. 968 (1997) 17, 43

Medcursor Inc. v. Shenzen KLM Internet Trading Co.,
543 F. Supp. 3d 866 (C.D. Cal. 2021) 16

Millennium Pipeline Co., LLC v. Certain Permanent & Temp. Easements in (No Number) Thayer Rd.,
812 F. Supp. 2d 273 (W.D.N.Y. 2011) 12

Monsanto Co. v. Geertson Seed Farms,
561 U.S. 139 (2010) 43

N. Alaska Env't Ctr. v. Kempthorne,
457 F.3d 969 (9th Cir. 2006) 15

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330 F. Supp. 3d 14 (D.D.C. 2018) 29

Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,
886 F.3d 803 (9th Cir. 2018) 17, 19, 22, 24

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Page

Ness v. L. Enf't Support Agency,
No. C10-5111 KLS, 2012 WL 13176243 (W.D. Wash. Aug. 9, 2012) 20

Nken v. Holder,
556 U.S. 418 (2009) 15

Oakland Trib., Inc. v. Chron. Publ'g Co.,
762 F.2d 1374 (9th Cir. 1985) 14

Perfect 10, Inc. v. Google, Inc.,
653 F.3d 976 (9th Cir. 2011) 17

S. Utah Wilderness All. v. Bernhardt,
512 F. Supp. 3d 13 (D.D.C. 2021) 29

S. Utah Wilderness All. v. Thompson,
811 F. Supp. 635 (D. Utah 1993) 29

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No. 23-cv-01057-AMO, 2023 WL 5496802 (N.D. Cal. Aug. 24, 2023) 15

Sierra Club v. U.S. Army Corps of Eng'rs,
990 F. Supp. 2d 9 (D.D.C. 2013) 28

Sierra Forest Legacy v. Rey,
577 F.3d 1015 (9th Cir. 2009) 11, 12, 13, 17

SILA v. BLM,
No. 3:20-cv-00308-SLG, 2021 WL 454280 (D. Alaska Feb. 6, 2021) 41

Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.,
516 F. Supp. 3d 943 (D. Alaska 2021) 19

Tandon v. Newsom,
992 F.3d 916, 917 (9th Cir. 2021) 12

United States v. El-O-Pathic Pharmacy,
192 F.2d 62 (9th Cir. 1951) 10

United States v. Hansell,
109 F.2d 613 (2d Cir. 1940) 10, 16

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TABLE OF AUTHORITIES
(continued)

Page

Vonsclobohm v. Cnty. of Los Angeles,
No. 2:18-CV-04527-JFW (ADS), 2019 WL 4879180 (C.D. Cal. Oct. 3, 2019) 26

W. Watersheds Project v. Bureau of Land Mgmt,
No. 3:21-CV-00103-MMD-CLB, 2021 WL 3779147 (D. Nev. July 23, 2021) 29

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692 F.3d 921 (9th Cir. 2012) 30

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No. CV 11-00492 DMG (Ex), 2011 WL 13124018 (C.D. Cal. Aug. 10, 2011) 39

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No. CV-22-08015-PCT-DJH, 2022 WL 6181882 (D. Ariz. Oct. 7, 2022) 10

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32 F.4th 852 (9th Cir. 2022) 11, 13, 15

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555 U.S. 7 (2008) ..... passim

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758 F.2d 669 (D.C. Cir.1985) 28

Statutes

28 U.S.C. § 1746 ..... 25, 26

5 U.S.C. §§ 551-559 15

42 U.S.C. §§ 4321 et seq. 13

Rules

Fed. R. App. P. 8 9

Fed. R. App. P. 8, Advisory Committee Notes, 1967 Adoption, Subdivision (a) 10

Fed. R. App. P. 8(a)(1) 16

Page

Fed. R. App. P. 8(a)(1)(C) 10

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126 Cong. Rec. 31,196 (1980) (statement of Sen. Stevens) 38

11 Charles Alan Wright et al., Federal Practice and Procedure § 2904 (3d ed. 2015) 12

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Environmental Quality, *Guidance for Federal Departments and Agencies on Indigenous Knowledge* 11 (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf 27

H.R.J. Res. No. 6 (Alaska 2023) 39

Rutter Group Prac. Guide Fed. Ninth Cir. Civ. App. Prac. Ch. 6-C (6:272) 12

Tara Sweeney, False Narrative Dangerously Misleading, ICT (May 14, 2021), https://ictnews.org/opinion/false-narrative-dangerously-misleading 21

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I. INTRODUCTION

Plaintiffs in these cases, Center for Biological Diversity, et al., and Sovereign Iñupiat for a Living Arctic, et al. (collectively, "Plaintiffs"), have had three requests for emergency injunctions denied (two by this Court and one by the Ninth Circuit), voluntarily dismissed their own appeals of this Court's denial of their preliminary injunction motion, and, most recently, had every claim they raised on the merits dismissed with prejudice by this Court in a 109-page opinion.[1] Plaintiffs now return to this Court with their fourth request for emergency injunctive relief.

But the extraordinary relief again sought by Plaintiffs is even less appropriate now than it was in April 2023. Having lost on the merits, Plaintiffs must show not only likely and significant irreparable injury but also that "the balance of hardships tips ***sharply*** in [their] favor[,] and that the public interest favors a preliminary injunction."[2] And they must do so against the backdrop of this Court's conclusions, in April 2023, that Plaintiffs failed to show *any* irreparable injury and "the balance of the equities and public interest tip ***sharply against*** preliminary injunctive relief."[3]

Since April 2023, the facts demonstrate that the balance of equities and public interest tip even more sharply against an injunction. New evidence confirms that the first

[1] Dkt. 166, No. 3:23-cv-00058-SLG (SILA); Dkt. 184, No. 3:23-cv-00061-SLG (CBD) ("SJ Order").

[2] *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added).

[3] SILA Dkt. 74; CBD Dkt. 82 ("PI Order") at 43 (emphasis added).

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season of Willow construction provided the anticipated benefits to Nuiqsut residents in the form of increased subsistence opportunities and jobs, while having no discernable negative effect on subsistence activities or wildlife. The second season of construction is underway and will have even greater benefits in terms of jobs and access to subsistence resources.

There are presently hundreds of workers on the North Slope actively employed on the Willow project. More workers are starting each week, and there will ultimately be up to 1,800 people participating in Willow construction and support activities on the North Slope this season. Most of those workers will lose their jobs if an injunction pending appeal is granted. Additionally, ConocoPhillips plans to complete construction of eight miles of new gravel roads, the subsistence boat ramp on the Tiŋmiaqsiuġvik River, and two subsistence access ramps—all of which will be subject to the most stringent environmental protections, while providing substantial benefits to Alaska Native communities. None of those benefits will be realized if an injunction pending appeal is granted. ConocoPhillips will also invest between $1 billion and $1.5 billion in the Willow project in calendar year 2024 alone, but that economic infusion into local and state economies will not be realized if an injunction is granted. Most alarmingly, because this winter season is absolutely essential to the Willow project timeline, the derailment of this season will almost certainly result in project failure—to the great detriment of the people, governments, and communities who stand to benefit from Willow's significant present and future benefits.

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In short, Plaintiffs cannot overcome their burden. ConocoPhillips respectfully requests that the Court deny their motions for an injunction pending appeal.

II. BACKGROUND

A. The Court Denied Plaintiffs' Requests for a Preliminary Injunction in April 2023.

On April 3, 2023, this Court denied Plaintiffs' motions for a preliminary injunction to halt ConocoPhillips' planned winter 2023 construction activities.[4] This Court applied the *Winter* factors[5] but did not reach whether Plaintiffs were likely to succeed on the merits because Plaintiffs failed to satisfy the other factors, which the Court fully analyzed.[6]

The Court first found that "Plaintiffs have not made the requisite showing that they would likely be irreparably harmed if the planned Winter 2023 Construction Activities proceed."[7] Specifically, the Court concluded that (a) Plaintiffs' concerns about noise from the mine site would be "short lived" and "not permanent,"[8] (b) Plaintiffs' "concern" about impacts to fish were "not sufficient to establish irreparable harm,"[9] and (c) potential impacts to subsistence were contradicted by (i) "competing narratives from subsistence hunters" and (ii) the fact that Willow construction (last winter) "will cause

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[4] PI Order at 44.

[5] *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); PI Order at 14.

[6] PI Order at 43-44.

[7] *Id.* at 31.

[8] *Id.* at 20.

[9] *Id.* at 22.

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surface disruption on only a very small fraction of the [National Petroleum Reserve in Alaska ("NPR-A")]—0.00015 percent."[10] The Court also determined that the construction would not cause substantial and immediate irreparable harm to Plaintiffs' claimed enjoyment of lands "near" the construction sites.[11]

As to the balancing of the equities and the public interest, the Court "weighed the environmental harm posed by the Winter 2023 Construction Activities against the economic damages, benefits to most subsistence users, and the state and federal legislative pronouncements of the public interest," and "conclude[d] that the balance of the equities and public interest tip sharply against preliminary injunctive relief."[12] These factors included testimony from numerous Nuiqsut hunters about the benefits of the new road and from local residents about the benefits of Willow's seasonal jobs.[13]

On April 4, 2023, Plaintiffs appealed the order denying their motions for preliminary injunction.[14] On that same day, the Court denied Plaintiffs' request for an injunction pending appeal. On April 5, 2023, Plaintiffs filed motions for injunction

[10] *Id.* at 24.

[11] *Id.* at 26-30.

[12] *Id.* at 43.

[13] *Id.* at 34-35, 38-39.

[14] SILA Dkt. 75; CBD Dkt. 83.

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pending appeal with the Ninth Circuit. On April 19, 2023, the Ninth Circuit summarily denied Plaintiffs' motions for injunction pending appeal.[15]

B. Willow Construction Is Ongoing, Is Already Providing Benefits, and Will Provide Greater Benefits This Year.

Surface-disturbing construction on the Willow project began on April 3, 2023.[16] Between April 3, 2023 and May 3, 2023, ConocoPhillips opened a new gravel mine, built two miles of gravel road from the Greater Mooses Tooth-2 ("GMT2") pad west towards Willow, and started construction of a subsistence boat ramp for the local community that would provide access to the Tiŋmiaqsiuġvik (Ublutuoch) River from the GMT2 road.[17] Work on the gravel road continued throughout the summer with compacting and grooming activities, and the road extension was formally opened for local community use in October 2023.[18]

Willow construction is already providing benefits to the local community. For example, Nuiqsut resident Jonas Sikvayugak "worked on the ice roads to support construction for the Willow project" in April 2023 and on compacting gravel over the summer on the new road.[19] He explains that "[t]his work on the Willow project has been

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[15] *See* No. 23-35226, Dkt. 27 at 2 (SILA) (citing *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 367 (9th Cir. 2016)).

[16] Exhibit 11, Second Declaration of Connor Dunn ¶3.

[17] *Id.*

[18] Exhibit 4, Second Declaration of Curtis Ahvakana ¶10; Exhibit 13, Second Declaration of Lisa Pekich ¶13.

[19] Exhibit 6, Second Declaration of Jonas Sikvayugak ¶5.

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good for me and my family," "helped put food on the table," "helped me buy fuel and ammunition for subsistence hunting," and "helped me buy braces for my daughter."[20] As another example, Chester Hopson—a Nuiqsut resident and subsistence representative for Kuukpik Corporation—goes on the new section of road "pretty much every day" and has "seen a lot of people harvesting caribou on that road."[21] So have many others.[22]

At the same time, Plaintiffs' fears about impacts to subsistence resources or noise from mining never materialized. According to Nuiqsut hunters and subsistence representatives who were out in the field observing wildlife, the caribou either had "no visible reaction of any kind" to Willow construction activities [23] or the reactions were "temporary and minimal."[24] In Nuiqsut itself, the noise from the mine was, in most cases, imperceptible.[25]

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[20] *Id.*

[21] Exhibit 8, Declaration of Chester Hopson ¶7.

[22] Exhibit 2, Second Declaration of T. Napageak ¶10 (discussing successful hunt off the end of new road); Exhibit 3, Second Declaration of Bryan Nukapigak ¶8 (same); Exhibit 9, Declaration of Faleasha Bodfish ¶6 (observing Nukapigak and his cousin "butchering caribou on that new section of road."); Ex.4 (Ahvakana) ¶10 ("the new road" is "being heavily used every day by people from the village").

[23] Ex.4 (Ahvakana) ¶¶13-14 ("I observed no impact as to the availability of caribou last winter"); Ex.2 (T. Napageak) ¶19 ("Willow construction last year did not alter the migration").

[24] Ex.8 (Hopson) ¶10; *see also* Ex.13 (Pekich) ¶¶6-7; Exhibit 14, Second Declaration of Robyn McGhee ¶¶11-14.

[25] Ex.2 (T. Napageak) ¶13 ("I did not hear anything in Nuiqsut"); Ex.8 (Hopson) ¶10 ("From the Spur road outside of Nuiqsut, you could see the mine blasts in the distance, but you could not hear them. And I did not hear any blasts at all in Nuiqsut."); Ex.9 (Bodfish) ¶8 ("Most times from the village, you could not hear or feel the blasts at all.

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This winter, construction will include another eight miles of gravel road (all of which will be open to subsistence hunters) and completion of the subsistence boat ramp.[26] As Heather Napageak explained: "The road construction that occurred last winter was a good start, but the real access benefits will occur with road construction starting this winter, which will provide many more miles of access for subsistence hunting."[27] Mr. Hopson agrees, explaining that the two-mile extension is a "good start" as "[i]t gets us closer to some of our other hunting grounds."[28] But "[a] bigger benefit will come with the construction this winter of the road to the Willow project site."[29] He says that "[t]hese new roads will give us better access to year round caribou locations, and to caribou migration routes."[30] Likewise, Curtis Ahvakana explains that the "little sliver of new road gives us a taste of the additional benefits that Willow construction will have this season and next."[31] The roads planned for this winter and next "will open many more miles of important hunting access" and "will help to continue to sustain the subsistence way of life

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There were a few times when I felt a slight vibration, but it was minor."); Ex.13 (Pekich) ¶10.

[26] Ex.11 (Dunn) ¶9.

[27] Exhibit 5, Second Declaration of Heather Napageak ¶6.

[28] Ex.8 (Hopson) ¶8.

[29] *Id.*

[30] *Id.*

[31] Ex.4 (Ahvakana) ¶11.

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for many years to come."[32] And completion of the boat ramp this winter will provide new and safer subsistence access for many Nuiqsut residents.[33]

Willow construction has been ongoing since April 2023.[34] Given the harsh and remote climate, much of the fabrication of pipelines and facilities takes place offsite.[35] For example, construction on the Willow Operations Center began in April 2023 in Texas.[36] Pipe fabrication is occurring in Anchorage and Fairbanks.[37] In addition, ConocoPhillips made road improvements in the Kuparuk River Unit in summer 2023 to accommodate the future transport of the Willow Operations Center modules.[38]

Winter construction this year is already underway with staking of ice routes and prepacking of snow in preparation for ice road construction.[39] Nanuq Inc. expects to hire up to 550 workers this winter.[40] Many of those employees, like Mr. Sikvayugak, have already been hired and are already working.[41] Thomas Bourdon, President of I.C.E. Services, has already hired 52 people this winter (and expects to ramp up to 164 people

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[32] *Id.*
[33] Ex.5 (H. Napageak) ¶7; Ex.2 (T. Napageak) ¶22.
[34] Ex.11 (Dunn) ¶3.
[35] *Id.* ¶4.
[36] *Id.*
[37] *Id.* ¶5.
[38] *Id.* ¶6.
[39] *Id.* ¶¶7-8.
[40] Exhibit 12, Second Declaration of James Brodie ¶8.
[41] Ex.6 (Sikvayugak) ¶6.

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through November) just to provide food and lodging services to workers engaged in Willow construction activities this winter.[42] Altogether, Willow construction this winter will involve up to 1,800 contractor personnel working in the field on the North Slope and an additional 600 contractors supporting Willow with engineering, planning, and other office work.[43]

The immense mobilization for this winter's work reflects a significant and ongoing daily investment by ConocoPhillips in the Willow project at a rate of approximately $4 million ***per day***.[44] Indeed, this investment and mobilization is essential to the future success of the Willow project. The construction planned for this winter is absolutely critical to completion of the Willow project, which depends on a "highly integrated series of construction milestones from 2023 through 2029."[45] "[T]here are no opportunities to further compress the construction schedule that would not create major execution risk."[46]

III. STANDARD FOR AN INJUNCTION PENDING APPEAL

Before a party can seek an injunction pending appeal with the Ninth Circuit, Federal Rule of Appellate Procedure 8 requires the party to move the district court for

[42] Exhibit 10, Third Declaration of Thomas Bourdon ¶6.
[43] Ex.11 (Dunn) ¶11.
[44] *Id.* ¶13.
[45] *Id.* ¶16.
[46] *Id.*

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such relief.[47] This is not a mere formality. It is a requirement rooted in the long-held and logical recognition that the district court is "the one which has considered the case on the merits, and therefore is familiar with the record," and is in a better position to balance the equities.[48] The district court "necessarily knows more of the case than the circuit court of appeals[,]" and its "ruling will help [the circuit court] greatly, particularly if [the district court] states why [it] does not think the appeal raises 'any substantial question which should be reviewed.'"[49] Furthermore, a robust opinion from the district court prevents the court of appeals from "be[ing] left in a welter of assertion and counter-assertion in affidavits from which [it has] no adequate means of emerging."[50] Accordingly, district courts commonly address all factors underlying an injunction decision, even where one factor (*e.g.*, likelihood of success on the merits) may be sufficient to deny a request.[51]

Motions in the district court for an injunction pending appeal are governed by Federal Rule of Civil Procedure 62(d). To determine whether to grant an injunction

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[47] Fed. R. App. P. 8(a)(1)(C).

[48] *Cumberland Tel. & Tel. Co. v. La. Pub. Serv. Comm'n*, 260 U.S. 212, 219 (1922); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir. 1951); *United States v. Hansell*, 109 F.2d 613 (2d Cir. 1940) (*per curiam*) (Hand, J., Chase, J., and Clark, C.J. sitting); *see also* Fed. R. App. P. 8, Advisory Committee Notes, 1967 Adoption, Subdivision (a); *Chevron v. Donziger*, 37 F. Supp. 3d 650, 651 (S.D.N.Y. 2014).

[49] *Hansell*, 109 F.2d at 614 (cited by Advisory Committee); *Donziger*, 37 F. Supp. 3d at 651.

[50] *Hansell*, 109 F.2d at 614.

[51] *See, e.g.*, *Bartell Ranch LLC v. McCullough*, No. 3:21-CV-00080-MMD-CLB, 2023 WL 2226849, slip op. at *2 (D. Nev. Feb. 24, 2023); *Ward v. Thompson*, No. CV-22-08015-PCT-DJH, 2022 WL 6181882 (D. Ariz. Oct. 7, 2022); *All. for the Wild Rockies v. Kruger*, 35 F. Supp. 3d 1259, 1268-71 (D. Mont. 2014).

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pending appeal, courts generally apply the same test for a preliminary injunction, requiring plaintiffs to show:[52] (1) a likelihood of success on the merits, (2) that they are likely to suffer irreparable harm before a decision on the merits can be rendered, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest.[53] Under the Ninth Circuit's sliding scale approach, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another."[54] A preliminary injunction can issue where the likelihood of success is such that "serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor."[55] "But none of these legal standards allows the district court to enter an injunction on a merely plausible claim."[56]

Importantly, Plaintiffs have a heavier burden for an injunction pending appeal after losing on the merits. "Although trial and appellate courts apply the same four-factor test . . . the 'strong showing' of likelihood of success on the merits that the movant must make to secure relief pending appeal is more demanding than the showing of likelihood

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[52] *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176 (9th Cir. 2021) (citation omitted), *reconsideration en banc denied*, 22 F.4th 1099 (9th Cir. 2022).

[53] *Id.* at 1176-77 (citing *Winter*, 555 U.S. at 20); *see also Sierra Forest Legacy*, 691 F. Supp. 2d at 1209.

[54] *Cottrell*, 632 F.3d at 1131.

[55] *Id.* (citation omitted).

[56] *Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 863 (9th Cir. 2022) (reversing preliminary injunction because "[n]o injunction can issue based on only a plausible claim").

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of success on the merits required to secure a preliminary injunction."[57] Because Plaintiffs are, in essence, requesting that the Court grant the relief, pending appeal, that the Court just decided they were not entitled to receive at all, "the burden of meeting the standard is a heavy one."[58] An injunction pending appeal is therefore an extraordinary remedy "never awarded as of right"[59] "that should be granted sparingly."[60] "The standard to obtain such relief is accordingly stringent."[61]

IV. ARGUMENT

A. Plaintiffs Are Unlikely to Prevail on Appeal.

Plaintiffs are not entitled to an injunction pending appeal because, as this Court properly concluded, their arguments fail on the merits. The Court's 109-page analysis was thorough, detailed, and well-reasoned. Plaintiffs' motions offer little of substance

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[57] Rutter Group Prac. Guide Fed. Ninth Cir. Civ. App. Prac. Ch. 6-C (6:272).

[58] 11 Charles Alan Wright et al., Federal Practice and Procedure § 2904 (3d ed. 2015); *see Millennium Pipeline Co., LLC v. Certain Permanent & Temp. Easements in (No Number) Thayer Rd.*, 812 F. Supp. 2d 273, 275 (W.D.N.Y. 2011) ("[L]ogic dictates that a court will seldom [issue an order or judgment and] then turn around and grant [a stay] pending appeal, finding, in part, that the party seeking [the stay] is likely to prevail on appeal, i.e., that it is likely that the court erred in [issuing the underlying order or judgment]." (quoting *Dayton Christian Schs. v. Ohio C.R. Comm'n*, 604 F. Supp. 101, 103 (S.D. Ohio 1984) (alteration in *Millennium Pipeline*)).

[59] *Winter*, 555 U.S. at 24 (citation omitted).

[60] *Sierra Forest Legacy*, 691 F. Supp. 2d at 1207 (citation omitted); *see also Tandon v. Newsom*, 992 F.3d 916, 917 (9th Cir. 2021), *disapproved in later proceedings*, 209 L. Ed. 2d 355, 141 S. Ct. 1294 (2021).

[61] *Feldman*, 843 F.3d at 375 (on appeal from denial of injunction pending appeal) (citing *Winter*, 555 U.S. at 20).

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and ultimately just ask the Court to "revisit its findings on summary judgment."[62] Courts routinely decline such invitations, and this Court should do the same.[63]

Both sets of Plaintiffs assert that they are likely to prevail on appeal in arguing that the Bureau of Land Management ("BLM") failed to consider a reasonable range of alternatives under the National Environmental Policy Act.[64] They are not. The Court previously remanded the alternatives analysis to address specific errors, and the Court's summary judgment order explains that BLM cured those errors and that its approach on remand was reasonable and consistent with the statute and the record.[65] Plaintiffs' burden is to show a "likelihood of success" or at least "serious questions" on the merits. Plaintiffs do not even raise plausible arguments about alternatives on appeal, and even if they could, "none of these legal standards allows the district court to enter an injunction on a merely plausible claim."[66]

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[62] *Sierra Forest Legacy*, 691 F. Supp. 2d at 1208.

[63] *See id.*; *see also, e.g.*, *Lands Council v. Packard*, 391 F. Supp. 2d 869, 871 (D. Idaho 2005) ("Plaintiffs have failed to assert any new arguments in support of their claims."); *All. for Wild Rockies v. Ashe*, No. CV 13-92-M-DWM, 2015 WL 13309317, at *1 (D. Mont. Jan. 20, 2015) (plaintiffs "merely rehash[] [their] summary judgment arguments, which were previously considered and rejected. Such reasoning is insufficient for demonstrating serious questions going to the merits." (citation omitted)); *Kruger*, 35 F. Supp. 3d at 1270 (same).

[64] SILA Br. at 9-10; CBD Br. at 3-4.

[65] SJ Order at 15-32.

[66] *Where Do We Go Berkeley*, 32 F.4th at 863.

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Plaintiffs' other grounds for appeal are equally anemic. CBD Plaintiffs, in passing, claim error in the BLM's indirect-effects analysis, but provide no explanation.[67] SILA Plaintiffs make an implausible argument that the Court erroneously interpreted the Naval Petroleum Reserves Production Act of 1976 ("NPRPA") in a way that *mandates* development in the Teshekpuk Lake Special Area ("TLSA"),[68] while ignoring the Court's holding that BLM had the discretion "to prohibit all infrastructure in the TLSA at the Integrated Activity Plan ('IAP') development stage or at the lease sale stage," and that BLM correctly applied "maximum protection" to mitigate impacts from Willow development activities.[69]

Serious questions could exist "where a party moving for an injunction received an adverse ruling *based on uncertainties in the law*."[70] But no such uncertainties exist here. This Court applied well-settled law to conclude that BLM considered a reasonable range

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[67] This Court could properly treat the argument as waived. *See Maldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009) ("Arguments made in passing and inadequately briefed are waived." (citation omitted)).

[68] SILA Br. at 11.

[69] SJ Order at 21.

[70] *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. CV-15-27-BU-BMM, 2018 WL 1796216, at *3 (D. Mont. Apr. 16, 2018) (emphasis added); *see City of Oakland v. Holder*, 961 F. Supp. 2d 1005, 1012 (N.D. Cal. 2013) ("novel legal questions" support issuance of a stay); *Am. Beverage Ass'n v. City & County of San Francisco*, No. 15-cv-03415-EMC, 2016 WL 9184999, at *2 (N.D. Cal. June 7, 2016) (injunction pending appeal may be appropriate "where the trial court is charting a new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review" (internal quotation marks and citation omitted)).

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of alternatives based on Willow's purpose and need.[71] Plaintiffs prefer a different result, but they have not identified a "close call" that could support injunctive relief.[72] Nor have they established that their claims otherwise "involve a fair chance of success on the merits."[73]

CBD grasps at straws, claiming that an injunction is appropriate because "an injunction pending appeal [] allows the Ninth Circuit to 'provide guidance' on how its precedent applies to Plaintiffs' claims before Plaintiffs suffer irreparable harm."[74] But the case they cite involved "serious legal questions" including, specifically, "novel legal questions about the interplay between the [Administrative Procedure Act] and the civil forfeiture statutory scheme."[75] CBD concedes that this case, by contrast, involves "applying well-established Ninth Circuit law."[76] Moreover, Plaintiffs had their chance to seek "guidance" from the Ninth Circuit in April 2023, and instead elected to withdraw

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[71] *See* SJ Order at 18-32 (citing *N. Alaska Env't Ctr. v. Kempthorne*, 457 F.3d 969, 973 (9th Cir. 2006), among other authorities); *see Sanai v. Kruger*, No. 23-cv-01057-AMO, 2023 WL 5496802, at *7 (N.D. Cal. Aug. 24, 2023) (likelihood of success on the merits weighs against granting injunction pending appeal where "[t]he Ninth Circuit has rejected similar challenges" (citation omitted)).

[72] *See Gallatin*, 2018 WL 1796216, at *4.

[73] *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (internal quotation marks and citation omitted).

[74] CBD Br. at 5.

[75] *Holder*, 961 F. Supp. 2d at 1012.

[76] CBD Br. at 4.

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their appeal in favor of a merits ruling from this Court.[77] There is no "guidance" exception to the *Winter* test.[78] Indeed, Plaintiffs' guidance arguments are entirely backwards, as a core purpose of Fed. R. App. P. 8(a)(1) is to allow a *district court* to provide guidance to the appellate court as to "why [it] does not think the appeal raises any 'substantial question which should be reviewed.'"[79] For these reasons, Plaintiffs have not established serious questions, much less that they are likely to succeed, on the merits of their claims.

B. Plaintiffs Fail to Demonstrate Likely Irreparable Harm.

A plaintiff must demonstrate that, in the absence of an injunction pending appeal, "'the [plaintiff] is likely to suffer irreparable harm before a decision on the merits can be rendered.'"[80] "A likelihood of irreparable harm means 'a likelihood of substantial and immediate irreparable injury.'"[81] The Supreme Court has emphasized that "simply showing some 'possibility of irreparable injury'" is insufficient.[82] "Speculative injury

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[77] *Oakland Trib., Inc. v. Chron. Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." (citation omitted)).

[78] *Where Do We Go Berkeley*, 32 F.4th at 863.

[79] *Hansell*, 109 F.2d at 614 (cited by Advisory Committee).

[80] *Winter*, 555 U.S. at 22 (quoting 11A Charles Allen Wright & Arthur Miller, Federal Practice and Procedure § 2948.1, p. 139 (2d ed.1995)).

[81] *Medcursor Inc. v. Shenzen KLM Internet Trading Co.*, 543 F. Supp. 3d 866, 877 (C.D. Cal. 2021) (quoting *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1325 (Fed. Cir. 2012)).

[82] *Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (quoting *Abbassi v. I.N.S.*, 143 F.3d 513, 514 (9th Cir. 1998)).

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does not constitute irreparable injury . . . . [A] plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief."[83] And while environmental damage can be irreparable, "this does not mean that 'any potential environmental injury' warrants an injunction."[84] Additionally, "[a]ssertions of harm cannot be generic: they must be precise and detailed enough to enable the Court to evaluate the 'harms pertaining to injunctive relief in the context' of the scope of the injunction sought."[85] "There must be a 'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined," such as a "showing that 'the requested injunction would forestall' the irreparable harm."[86] "[T]he movant, *by a clear showing*, carries the burden of persuasion."[87] For the reasons explained below, Plaintiffs again fail to meet their burden.

Initially, Plaintiffs urge the Court—without addressing the basis of the Court's irreparable harm findings in April 2023—to reach a different result this time because the

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[83] *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (emphasis omitted) (citing *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) and *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980)).

[84] *All. for the Wild Rockies*, 632 F.3d at 1135 (quoting *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008)); *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 544-55 (1987) (no presumption of irreparable damage in environmental cases).

[85] *Sierra Forest Legacy*, 691 F. Supp. 2d at 1209 (quoting *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1022 (9th Cir. 2009)).

[86] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018) (quoting *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 981-82 (9th Cir. 2011)).

[87] *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis in original) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

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scope of construction is larger this winter. This is a red herring. A significant portion of the Willow construction and related activity this year involves pipeline upgrades *outside* the NPR-A in areas where Plaintiffs have not asserted any specific interests.[88] Construction this winter within the NPR-A is expected to result in a total cumulative surface disturbance footprint of about 204.1 acres, or 0.000897% of the 23,229,653-acre NPR-A.[89] This includes zero acres of development in 3,264,377-acre TLSA, and 7.6 acres of development in the Colville River Special Area ("CRSA") (0.00031% of the 2,441,224-acre CRSA).[90] Once fully completed in 2029, Willow will have a total footprint of about 499.5 acres (0.00215% of the NPR-A), including only 61.2 acres of ground disturbance in the TLSA (0.0019% of the TLSA).[91] So, while more construction is planned this season, it remains an objectively small footprint within a massive geographic area, and even that small footprint is subject to hundreds of mitigation measures to further protect surface resources and wildlife, including "'a groundbreaking mitigation measure' for protection of 'the caribou herd that is most important to Nuiqsut subsistence users.'"[92]

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[88] *See* Ex.12 (Brodie) ¶6, Ex.A at 2.

[89] *Id.* ¶13.

[90] *Id.* ¶14. Construction in the TLSA is not expected before January 2025. Activity in the TLSA this winter is limited to exploration activities and geotechnical surveys. *Id.*

[91] *Id.* ¶¶13-14.

[92] *See* SJ Order at 44, 53-54.

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In any event, Plaintiffs' focus on the scope of construction this winter versus last winter misses the point. As the Court previously explained, "Plaintiffs' declarations at a minimum must show that at least one or more *of their members* will be irreparably harmed" if construction proceeds.[93] Plaintiffs again fail to make this showing, as their declarations are largely unchanged from the declarations they filed in March 2023. SILA continues to rely on concerns about future climate change,[94] but as the Court already explained, these concerns "are not relevant" because construction this winter (and the next several winters) does not involve the extraction of oil and gas.[95] SILA and CBD continue to raise concerns about blasting noise from the mine,[96] but those concerns were

[93] PI Order at 26 (emphasis added); *see Nat'l Wildlife Fed'n*, 886 F.3d at 817.

[94] SILA Br. at 8, 15.

[95] PI Order at 19. *See also* SILA Dkt. 141-003 (Declaration of Anne Smith) (confirming that lifetime impact of downstream Willow emissions on sea ice is immeasurably small). SILA cites concerns about harms to polar bears, but that, too, is unavailing. To the extent the concerns relate to lost future sea ice from downstream emissions, those injuries are not imminent (production does not start until 2029), and not likely in any event. *See id.* To the extent SILA suggests Willow construction will cause harm to polar bears this winter, those claims are not probable, as established in the Biological Opinion (estimating zero incidental takes) (FWS_76_AR032540), Ex.14 (McGhee) ¶¶17-19, and this Court's 2021 order rejecting similar arguments. *See Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 516 F. Supp. 3d 943, 957 (D. Alaska 2021) ("[T]he Court finds that SILA Plaintiffs have not demonstrated that 'irreparable injury [to SBS polar bears] is *likely* in the absence of an injunction' enjoining the Winter 2021 Construction Activities." (second set of brackets in original)), *appeal dismissed*, No. 21-35085, 2021 WL 3371588 (9th Cir. Mar. 9, 2021).

[96] SILA Dkt. 169-009 ¶¶22, 28; CBD Dkt. 190-002 ¶¶24-25.

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unconvincing in March 2023,[97] and have proven to be unfounded.[98] Concerns that construction at the mine or road-building will disturb caribou were also insufficient last time and have proven to be unfounded.[99]

As to Plaintiffs' specific declarants, SILA submits a revised declaration for Sam Kunaknana, but it just raises the same "concerns" Mr. Kunaknana raised in his prior declaration, claiming that the new mine will impact downriver fish resources and that the mine and new roads will drive away caribou and make subsistence hunting harder.[100] These concerns were insufficient to show likely irreparable harm last winter[101] and they are even less convincing now that direct observations from last winter have revealed no such impacts.[102]

Mr. Kunaknana's general concerns about the impacts of roads on subsistence hunting also continue to be contradicted by specific evidence from other subsistence

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[97] PI Order at 23-24.

[98] Ex.2 (T. Napageak) ¶13; Ex.8 (Hopson) ¶10; Ex.9 (Bodfish) ¶8; Ex.13 (Pekich) ¶10.

[99] Ex.2 (T. Napageak) ¶19; Ex.3 (Nukapigak) ¶15; Ex.4 (Ahvakana) ¶¶13-14; Ex.8 (Hopson) ¶10; Ex.13 (Pekich) ¶¶6-7; Ex.14 (McGhee) ¶¶12-14.

[100] SILA Dkt. 169-008 ¶¶9-17.

[101] PI Order at 22, n.93 (citing *Ness v. L. Enf't Support Agency*, No. C10-5111 KLS, 2012 WL 13176243, at *4 (W.D. Wash. Aug. 9, 2012) ("While worrying that something may happen can be difficult, it does not rise to the level of irreparable harm."), and *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.")).

[102] Ex.2 (T. Napageak) ¶19; Ex.3 (Nukapigak) ¶15; Ex.4 (Ahvakana) ¶¶13-14; Ex.8 Hopson ¶10.

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hunters. This includes testimony from Thomas Napageak—one of Nuiqsut's most accomplished hunters—that these same roads, in fact, "are a blessing for access to subsistence resources," and that the construction activities planned for this winter are expected to have "no negative impact at all on subsistence hunting."[103] Mr. Ahvakana states that the roads built this winter and next will "help to continue to sustain the subsistence way of life for many years to come."[104] Bryan Nukapigak explains, "I am expecting the roads that will be built this winter further out west for the Willow project for the next two years will have even more benefits."[105]

Next, both SILA and CBD provide revised declarations from New Mexico resident Daniel Ritzman, but those revisions do not cure any of the flaws that the Court found in his prior declarations.[106] Mr. Ritzman does not aver that he ever has been to, or plans to go to, the locations where the Willow project will actually be built this winter or

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[103] Ex.2 (T. Napageak) ¶¶7, 16-17. SILA declarant Siqiniq Maupin claims harms to subsistence and purports to represent the "youth" of Nuiqsut. SILA Dkt. 169-9 ¶24. But young hunter Heather Napageak says that "makes me mad" because Ms. Maupin is "not even from Nuiqsut," "does not live here," and "I have never seen her in Nuiqsut, and I don't know anyone who has." Ex.5 (H. Napageak) ¶9. She explains: "We see Willow as an opportunity to build roads for subsistence, and an opportunity for jobs for the future so that we can continue living in our community." *Id.* ¶10. Ms. Napageak is not alone in her criticism of Ms. Maupin. *See* Tara Sweeney, False Narrative Dangerously Misleading, ICT (May 14, 2021), https://ictnews.org/opinion/false-narrative-dangerously-misleading.

[104] Ex.4 (Ahvakana) ¶11.

[105] Ex.3 (Nukapigak) ¶9.

[106] PI Order at 28 ("Mr. Ritzman … does not clearly demonstrate that he will suffer irreparable harm absent an injunction of the Winter 2023 Construction Activities because his future travel plans in Alaska would not take him to the gravel mine site or the gravel road extensions site.").

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next. He says he has been to the "northern shore of Teshekpuk Lake," but that is an area closed to leasing and surface development, and the 2024 construction footprint is, at its closest point, 34.7 miles from the *southern-most* part of Teshekpuk Lake.[107] Mr. Ritzman vaguely alludes to a "trip to observe birds in the Teshekpuk Lake Special Area" and says he would "very likely see signs of Willow's construction and operation."[108] But this is improbable speculation, as he does not identify when this trip is planned (if at all) or where in the 3,264,377-acre TLSA he plans to go.

Mr. Ritzman does vaguely assert that, in some future visit to Nuiqsut (which he cancelled last year), he "plan[s] to explore the surrounding areas, including the Ublutuoch [Tiŋmiaqsiuġvik] River in the area near the Willow Development."[109] But to the extent he is trying to claim some injury related to the mine near the Ublutuoch River, that mine has already been opened.[110] Besides, this nebulous statement does nothing to address the Court's prior criticism that "it is not at all clear that he would be able to see the mine from the river as the mine would be over 500 feet away" and "Mr. Ritzman will travel

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[107] SILA Dkt. 169-005 ¶32; *see* Ex.12 (Brodie) ¶14. General construction noise that may occur in the summer (when Ritzman visits) dissipates at about 4 miles. BLM_3512_AR820825. Once the project is complete, the northern most point of Willow (BT2) will still be 25.5 miles from the closest point to Teshekpuk Lake. Ex.12 (Brodie) ¶14.

[108] SILA Dkt. 169-005 ¶36. Ritzman also says that sometimes he hikes "up to five miles off- [the Colville] river," *id.* ¶34, but he does not say he plans to hike to any Willow infrastructure areas, and five miles from the Colville would not get him to any such areas.

[109] *Id.* ¶34.

[110] *Nat'l Wildlife Fed'n*, 886 F.3d at 819 (injunction must "'forestall' the irreparable harm" (citation omitted)).

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only in the summer and the mining will occur only in the winter."[111] Courts have made clear that "[a] 'possibility' of irreparable harm" like this one "cannot support an injunction."[112]

CBD provides a new declaration from Josh Oboler, who has homes in D.C. and Florida, and has "travelled to every continent except Antarctica," but has never been to the Arctic.[113] CBD claims that Mr. Oboler "plans to camp with his family next summer ***near*** the construction area, and his experience will be dramatically reduced by the extensive human activity."[114] This is misleading. Mr. Oboler's itinerary shows that his trip will only explore a "tiny piece" of the NPR-A, starting to the north at Teshekpuk Lake (at least 34.7 miles from Willow construction), and going only as far south as Pik Sand Dunes (at least 24.9 miles from Willow construction).[115] Willow summer

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[111] PI Order at 28.

[112] *Nat'l Wildlife Fed'n*, 886 F.3d at 818. Ritzman's declaration also mentions a concern about the crossing at Ocean Point, but construction of that crossing is several years away. Ex.12 (Brodie) ¶17.

[113] CBD Dkt. 190-004.

[114] CBD Br. at 11 (emphasis added).

[115] CBD Dkt. 190-004 at 5; Ex.13 (Pekich) ¶23. In a similar vein, CBD argues that Jeffrey Fair will suffer irreparable injury to his loon-viewing interests on some future trip to the Chipp River area. CBD Br. at 11-12 (citing Dkt. 115-3 ¶17). But this is entirely speculative as the Chipp River is (at its closest point) 70 miles from Willow (Ex.14 (McGhee) ¶23), and Willow was designed to avoid and minimize loon habitat impacts as per Required Operating Procedure E-11. BLM_3512_AR820822.

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construction cannot be seen or heard from this distance.[116] This is not even sufficient to confer standing, let alone the higher burden of irreparable injury.[117]

CBD also provides a slightly revised, lengthy declaration from Rosemary Ahtuangaruak,[118] but this declaration contains familiar fatal flaws. Rather than address her own interests in using the lands or areas where the Willow project will be built, Ms. Ahtuangaruak relies on the interests of unnamed "nephews" who allegedly travel west of GMT2 to go hunting.[119] Assuming the veracity of her statements about her nephews' hunting plans (and putting aside obvious evidentiary objections such as hearsay and lack of personal knowledge), Ms. Ahtuangaruak does not allege that her nephews are actually *members* of any plaintiff organization. Irreparable injury must be to Plaintiffs' members, not unidentified third parties.[120] This is the same flaw the Court already identified: "Dr. Ahtuangaruak has not shown how these environmental impacts would

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[116] BLM_3512_AR820825 (general construction noise dissipates to ambient levels at four miles).

[117] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565-66 (1992) ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly in the vicinity of it." (internal quotation marks and citation omitted)).

[118] Ms. Ahtuangaruak is no longer the Mayor of Nuiqsut. Ex.4 (Ahvakhana) ¶15.

[119] CBD Dkt. 192-002 ¶¶16-18.

[120] *Winter*, 555 U.S. at 22 (citing 11A Charles Allen Wright et al., Federal Practice and Procedure § 2948.1, p. 139 (2d ed.1995)); *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 . . . ." (emphasis added)); *Hernandez v. City of Phoenix*, 432 F. Supp. 3d 1049, 1068 (D. Ariz. 2020) ("The irreparable harm analysis focuses on the harm to the party seeking injunctive relief, not on potential harm to third parties." (citing *Winter*, 555 U.S. at 20)).

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cause 'substantial and immediate' irreparable harm ***to her***."[121] Besides, while Ms. Ahtuangaruak's unidentified nephews may see the new roads as a detriment (even though they currently use the ConocoPhillips road to GMT2 for subsistence access), multiple identified Nuiqsut hunters, including one of Nuiqsut's most accomplished hunters, have provided sworn testimony that the new roads will be a major *benefit* to subsistence hunting.[122]

Nor can Ms. Ahtuangaruak credibly claim an irreparable injury to her recreational interests based on new road construction, given her admission that she uses *and enjoys* the existing roads built by ConocoPhillips. Indeed, Ms. Ahtuangaruak states that she "likes to travel along the GMT-2 road, from Nuiqsut to the end, not to hunt but to get out and enjoy nature and try to relax," and that "as [she] go[es] farther out" towards GMT2, it becomes "more peaceful, and easier to relax."[123] The new roads to Willow will extend the end of the road eight miles farther, allowing Ms. Ahtuangaruak to go even "farther out" as she desires to do. There is no irreparable injury here.[124]

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[121] PI Order at 26 (emphasis added).

[122] Ex.2 (T. Napageak) ¶17 ("the Willow project will 100% benefit subsistence hunting access"); Ex.5 (H. Napageak) ¶6; Ex.3 (Nukapigak) ¶¶13-16; Ex.4 (Ahvakana) ¶ 11.

[123] CBD Dkt. 192-002 ¶23.

[124] Ms. Ahtuangaruk worries that "access will be blocked" to roads and that ConocoPhillips is "breaking their promises" because "I went out there and people there told me I couldn't be out there." CBD Dkt. 192-002 ¶18. This is, at best, misleading. Last winter, Ms. Ahtuangaruk went to the mine site, claiming "she was inspecting for cultural resources as the Mayor of Nuiqsut." Ex.4 (Ahvakana) ¶15. "She ignored warning signs and verbal warnings and entered an active mine site," and "Security had to be called to remove her for safety reasons." *Id.*; *see also* Ex.13 (Pekich) ¶¶11-12.

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Lastly, unable to find a subsistence hunter who agrees with its views, CBD turns to a Wyoming Institute and three academics who provide a self-titled "declaration" with their opinions about the impact of Willow construction for the next two years on caribou and subsistence hunting (the "Kofinas Declaration"). But this is not a declaration at all, as it is not signed by anyone, let alone signed under penalty of perjury as required by 28 U.S.C. § 1746. Nor has CBD made any attempt to authenticate this unpublished document, which appears to be generated solely for this litigation. Accordingly, the Court should give it little or no evidentiary weight.[125]

Moreover, the opinions of the Kofinas Declaration are directly contradicted by testimony from subsistence hunters, such as Thomas Napageak, Brian Nukapigak, Curtis Ahvakana, and others who have first-hand observational experience with caribou responses to oil and gas infrastructure, including Willow construction last winter.[126] Although the Kofinas Declaration pays lip service to considering "Indigenous

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[125] *Vonsclobohm v. Cnty. of Los Angeles*, No. 2:18-CV-04527-JFW (ADS), 2019 WL 4879180, at *7 (C.D. Cal. Oct. 3, 2019) (unsigned declarations in support of motions for injunction are "not competent or reliable evidence"); *Chao v. Westside Drywall, Inc.*, 709 F. Supp. 2d 1037, 1052 (D. Or. 2010) (unsworn declarations that do not carry a declaration that the statement is true under penalty of perjury are not admissible under 28 U.S.C. § 1746).

[126] Ex.2 (T. Napageak) ¶19 ("I do not believe that Willow construction will alter the migration of the caribou. GMT1 and GMT2 and Willow construction last year did not alter the migration, and I do not think Willow construction moving forward will either."); Ex.3 (Nukapigak) ¶15 ("Even during construction time, I don't see any impact to caribou. They are always right by the road, and the roads have not really impacted caribou migration in any meaningful way."); Ex.4 (Ahvakana) ¶¶17-19.

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Knowledge,"[127] the authors apparently never interviewed any Nuiqsut hunters or subsistence representatives with first-hand knowledge of Willow's potential impact.[128] As Mr. Napageak states: "They did not ask me about their predictions. . . . If they had asked me, I would have told them they are crazy. They don't understand our culture, or how subsistence hunting works."[129] Rather than use Indigenous Knowledge or actually make a field visit, Kofinas instead offers "simulation modelling . . . for scaling up from individual behavioral responses to the herdscale," which is both unintelligible and unpersuasive.[130] Common observations on the North Slope, such as those depicted below, show caribou are habituated to gravel roads and oil and gas traffic:[131]

[127] Recent White House Guidance encourages the use of Indigenous Knowledge in decision-making, but warns that the academic community must "also recognize and abide by the principal that consent is required before Indigenous Knowledge can be included in any research." Executive Office of the President, Council on Environmental Quality, *Guidance for Federal Departments and Agencies on Indigenous Knowledge* 11 (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.

[128] Ex.2 (T. Napageak) ¶19; Ex.3 (Nukapigak) ¶15; Ex.13 (Pekich) ¶8.

[129] Ex.2 (T. Napageak) ¶19.

[130] CBD Dkt. 190-001 at 9.

[131] *See* Ex.14 (McGhee) ¶¶12-14, Exhibits B-F.

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Simulation modeling aside, practical experience shows that "[c]aribou migrate as they have been doing for thousands of years,"[132] and caribou "quickly get used to" new roads, and "actually use the roads to help avoid predators like wolves and wolverines."[133] CBD's attempt to manufacture irreparable injury with uninformed academic opinion lacks credibility.

In any event, the Kofinas Declaration is ultimately irrelevant. The question before the Court is whether construction this winter will cause *irreparable* injury to one of CBD's members before the appeal can be resolved. The Kofinas Declaration contains no such allegations and fails to address the potential impact to Ms. Ahtuangaruak—the only Nuiqsut resident put forward by CBD. Instead, the report concludes only that "the evidence strongly suggests that Willow Project construction in the next two years is more

[132] Ex. 2 (T. Napegeak) ¶17.

[133] Ex.3 (Nukapigak) ¶15.

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likely than not to negatively affect caribou ecology and traditional caribou subsistence."[134] But construction disturbances to caribou (if they even occur) are temporary, and the Kofinas Declaration does not say that these impacts would be "certain and great" or otherwise cause a lasting or irreparable impact to the health of the caribou herd.[135] Temporary losses to "a reasonably abundant game species," like caribou, are not irreparable injury.[136] The only supposed lasting impact identified in the Kofinas Declaration is the potential for new roads to deflect caribou (an assertion with which many Nuiqsut subsistence hunters disagree), but the authors do not argue that deflection has an irreparable impact on subsistence hunting, and effectively admit deflection could be remediated by later road removal.[137] Harm that can be remediated is not irreparable.[138]

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[134] CBD Dkt. 190-001 at 3.

[135] "The party seeking injunctive relief must demonstrate that the claimed injury is 'both certain and great' and that the alleged harm is 'actual and not theoretical.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 38-39 (D.D.C. 2013) (quoting *Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir.1985)).

[136] *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) ("To equate the death of a small percentage of a reasonably abundant game species with irreparable injury without any attempt to show that the well-being of that species may be jeopardized is to ignore the plain meaning of the word."); *S. Utah Wilderness All. v. Thompson*, 811 F. Supp. 635, 642 (D. Utah 1993) (plaintiffs failed to establish that they would suffer irreparable injury since "the coyote population [would] remain viable").

[137] CBD Dkt. 190-001 at 10 ("the road infrastructure will cause impacts for as long as the road is in use"); *see also* Ex.13 (Pekich) ¶¶7-8; Ex.14 (McGhee) ¶¶12-14.

[138] *W. Watersheds Project v. Bureau of Land Mgmt*, No. 3:21-CV-00103-MMD-CLB, 2021 WL 3779147, at *5 (D. Nev. July 23, 2021) (finding no irreparable harm where environmental changes were subject to remediation measures); *S. Utah Wilderness All. v. Bernhardt*, 512 F. Supp. 3d 13, 22 (D.D.C. 2021) ("Plaintiffs must demonstrate they would suffer irreparable harm absent the requested relief that is 'beyond remediation.'" (quoting *Nat'l Fair Housing All. v. Carson*, 330 F. Supp. 3d 14, 62 (D.D.C. 2018))).

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In sum, Plaintiffs have once again failed to show that any member is likely to suffer irreparable injury. Their motions for an injunction pending appeal fail on this prong as well.

C. The Balance of the Equities and Public Interest Tip Sharply *Against* an Injunction.

Finally, Plaintiffs fail to establish that the equities or the public interest weigh in favor of granting an injunction, much less weigh "sharply" in favor.[139] Balancing "competing claims of injury" requires a court to "consider the effect on each party of the granting or withholding of the requested relief."[140] A court may not "abandon a balance of harms analysis just because a potential environmental injury is at issue,"[141] and "[e]conomic harm may indeed be a factor in considering the balance of equitable interests."[142]

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[139] *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (when the government is a party, the balance of the equities and public interest factors merge).

[140] *Amoco Prod. Co.*, 480 U.S. at 542.

[141] *Lands Council*, 537 F.3d at 1005 (citing *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995)); *see W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) ("In balancing the equities, the district court properly weighed the environmental harm posed by [a solar energy] project against the possible damage to project funding, jobs, and the state and national renewable energy goals that would result from an injunction halting project construction, and concluded that the balance favored" denial of preliminary injunction that would have halted project construction).

[142] *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (first citing *Amoco Prod. Co.*, 480 U.S. at 545; and then citing *Lands Council*, 537 F.3d at 1005 (holding district court did not clearly err in concluding that the balance of harms did not tip in environmental organization's favor where a Forest Service project would "further the public's interest in aiding the struggling local economy and preventing job loss")).

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When it rejected Plaintiffs' motions for a preliminary injunction last April, the Court underscored the "substantial economic interests at issue in this case," including the loss of seasonal jobs and income for Nuiqsut residents, development and training programs, tax revenues, dividend income for shareholders of Arctic Slope Regional Corporation, and loss of investment to ConocoPhillips.[143] The Court concluded that these economic harms outweighed any potential harm that last winter's construction might cause.[144] The Court also gave "considerable weight to the fact that Kuukpik, the North Slope Borough, and ASRC have all intervened to express their support for the Willow Project,"[145] and that the Alaska House and Senate and Alaska's Congressional delegation had unanimously endorsed Willow.[146] Accordingly, the Court concluded that the balance of the equities and the public interest "tip sharply *against* preliminary injunctive relief."[147]

Plaintiffs fail to demonstrate, as they must, that now, seven months later, the balance has completely flipped in their favor. In fact, as addressed below and in all the arguments and declarations submitted by the Intervenor-Defendants, the equities have tipped even more sharply *against* the entry of injunctive relief.[148]

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[143] PI Order at 34-40.

[144] *Id.* at 38.

[145] *Id.* at 40.

[146] *Id.* at 40-43.

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

[148] Plaintiffs incorrectly claim an injunction will preserve the "status quo." *See* SILA Br. at 3. Plaintiffs forfeited their right to preserve the "status quo" when they withdrew their

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1. The Immediate Benefits of This Winter's Work to Local Communities Continue to Outweigh Any Harms to Plaintiffs' Interests.

As the Court observed in April, many (if not the vast majority of) hunters in Nuiqsut believe that "'[t]he gravel roads are a blessing for access to subsistence resources'" because "'[t]hey provide year-round access'" to caribou hunting grounds.[149] New declarations submitted with this response demonstrate that these views proved correct with respect to construction last winter, and resonate with even greater force for the Willow construction planned this season.

For example, Mr. Ahvakana explains that "[c]onstruction this winter and next will open many more miles of important hunting access, including access to Fish Creek and Judy Creek for camping and fishing" and will "help to continue to sustain the subsistence way of life for many years to come."[150] Nuiqsut resident Faleasha Bodfish believes that "the roads that they plan to build this winter will be a benefit to the community as it opens up new areas for subsistence," including for those who do not have a snowmachine and "the elderly who still want to hunt or go see the animals from the road, but are no longer able to handle the pounding that comes with using a snowmachine or four

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appeals of the denial of the preliminary injunction. The status quo now is that Willow has been approved, construction has been ongoing since April 2023 and will continue through 2024, and this Court has upheld the project's approval against every claim asserted by Plaintiffs.

[149] PI Order at 23 (quoting Declaration of Thomas Napageak Jr. (Dkt. 48-6) ¶¶7, 9).

[150] Ex.4 (Ahvakana) ¶11.

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wheeler."[151] Nuiqsut hunter Heather Napageak explains that "[t]he road to Willow would open that [area] up year round, giving us much broader access," and "would be a big benefit to the community for subsistence hunting."[152] Likewise, Nuiqsut hunter Chester Hopson states that "[t]hese new roads will give us better access to year round caribou locations, and caribou migration routes," and "[t]hese are really good hunting grounds."[153]

An injunction this winter would also prevent completion of the subsistence boat ramp on the Tiŋmiaqsiuġvik River. The boat ramp will have "important benefits to the community starting next summer," as it will "save time, improve safety and reduce fuel costs which are very high in Nuiqsut."[154] Nuiqsut resident Joe Frank Sovalik explains that he "plan[s] to use the new subsistence boat ramp . . . once construction is completed this winter" and that the "new boat ramp is a definite benefit because it will save hours of travel time and be much safer."[155] An injunction would prevent completion of that subsistence boat ramp this winter.

Plaintiffs' requested injunction would also damage local communities by immediately putting local residents out of work. Unemployment in Nuiqsut is 13%.[156] As

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[151] Ex.9 (Bodfish) ¶¶4, 6.

[152] Ex.5 (H. Napageak) ¶6; *id*. ¶11 ("I expect to be hunting from many decades to come, the roads and access they provide, will be a great benefit.").

[153] Ex.8 (Hopson) ¶8.

[154] Ex.4 (Ahvakana) ¶12; Ex.2 (T. Napageak) ¶22.

[155] Exhibit 7, Declaration of Jo Frank Sovalik ¶8.

[156] PI Order at 34.

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Mr. Sovalik explains, "It is common for people in Nuiqsut to do seasonal work [as a way] to support our families."[157] As Faleasha Bodfish explains, "[J]obs are scarce here," especially for young people in the community, and "[t]he Willow project will provide those important jobs and experience for our community."[158] Indeed, there are many hundreds more people employed by Willow this winter than last winter, including 30-40 Nuiqsut residents hired as subsistence representatives to monitor Willow.[159] Mr. Sikvayugak, who is currently working on Willow, is expecting to "work on the Willow project all winter," and explains that if an injunction issues "I would lose my job" and "that would be a terrible hardship" because "I need this job to feed my family and pay my bills."[160] Mr. Sovalik is again working on Willow this winter, is hoping to get his two nephews hired as well, and is dependent on this job to pay his bills and support his family.[161] Thomas Bourdon, President of I.C.E. Services, explains that, if an injunction issues, at his small company alone, "52 workers will lose their jobs" and "112 workers will either not be hired, or if hired by that point, will be terminated."[162]

Although Plaintiffs brush aside the loss of jobs as a supposedly "temporary" harm, the effects to the people who will lose those jobs are hardly temporary. And the benefits

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[157] Ex.7 (Sovalik) ¶4.

[158] Ex.9 (Bodfish) ¶9.

[159] Ex.2 (T. Napageak) ¶25.

[160] Ex.6 (Sikvayugak) ¶6.

[161] Ex.7 (Sovalik) ¶ 6-7 ("This winter I need to make as much money as I can because my Silverado truck has a blown engine that needs to be fixed.").

[162] Ex.10 (Bourdon) ¶6.

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of those jobs are tangible and lasting, as was demonstrated last summer. These immediate benefits of Willow construction this winter to the local communities, and the harm caused to workers who would lose their jobs if an injunction issues, far outweigh the speculative harms claimed by Plaintiffs' members.

2. An Injunction Pending Appeal Would Cause Substantial Financial Harm and Likely Result in Project Failure.

An injunction pending appeal would also cause substantial financial injury. ConocoPhillips has invested $1.1 billion into the Willow project through November 2023. The company expects a going forward investment in excess of $7 billion to bring the project to first oil. There are two alternative ways to express the likely financial injury from an injunction pending appeal.

First, as set forth in the Second Connor Dunn Declaration, the most likely outcome of an injunction pending appeal is total project failure.[163] That is so because the project is on a very tight timeline and must reach first oil by September 2029 to avoid the risk of lease expiration.[164] It is impossible to meet this timeline if the 2024 winter construction season is prevented. Accordingly, a court injunction that causes ConocoPhillips to miss all or even a portion of this winter's construction season will squarely present the risk of lease expiration because ConocoPhillips will be unable to reach first oil by September 2029.

[163] Ex.11 (Dunn) ¶16.

[164] *Id.* ¶14.

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ConocoPhillips appreciates and respects the Court's discussion of the lease expiration language in footnote 144 of its Order Denying Preliminary Injunction. However, as explained in the Second Dunn Declaration, the Court's interpretation in the context of a preliminary injunction is not a binding interpretation of the statute and does not eliminate the very real risk that the government (or Plaintiffs) would assert a contrary position in the future.[165] And, respectfully, that risk is one that ConocoPhillips cannot ignore when making business decisions that involve the investment of billions of dollars. As explained in the Second Dunn Declaration, because of that serious risk, ConocoPhillips has determined that the "most likely consequence of an injunction preventing all or part of the 2023-2024 Willow construction work is that ConocoPhillips will terminate the project."[166]

The financial ramifications of this "most likely" consequence of an injunction pending appeal scenario are severe. It would cause ConocoPhillips to lose its entire $1.4 billion investment in Willow, which includes the cost of winding the project down.[167] The State of Alaska would lose the economic and social benefits of ConocoPhillips' planned multi-billion-dollar investment in developing Willow. Nuiqsut residents would lose "important jobs and experience for community"[168] and the needed "jobs for many

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[165] *Id.* ¶¶14, 17.

[166] *Id.* ¶20.

[167] *Id.*

[168] Ex.9 (Bodfish) ¶9.

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years" that Willow would provide.[169] They would also lose the opportunity for new gravel roads and the improved access to subsistence hunting. The North Slope Borough would lose the estimated $1.25 billion in property tax revenue that it would use to support essential government services.[170] The State of Alaska would lose an estimated $1.258 billion to $5.211 billion in production tax revenues.[171] Local communities would lose out on an estimated $2.27 billion to $3.56 billion from the NPR-A Impact Mitigation Grant Program.[172]

Second, even assuming that an injunction pending appeal would not result directly in project failure, it still would cause substantial financial injury to ConocoPhillips and to the thousands of people, governments, and businesses counting on ConocoPhillips' investment in Willow for 2024. As explained in the Second Dunn Declaration, the estimated cost of an injunction halting construction would be non-recoupable costs of at least $100 million. This includes losses associated with the termination of hundreds of existing contracts for the 1,800 workers engaged for this winter and related delivery contracts from materials and infrastructure, including substantial cancellation fees. And this does not include a multi-million-dollar increase in project cost resulting from the

[169] Ex.6 (Sikvaygak) ¶6.
[170] Ex.11 (Dunn) ¶20.
[171] *Id.*
[172] *Id.*

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delay or a multi-million-dollar erosion in the present net value of the project by deferring project revenue at least a year.[173]

Plaintiffs deride these harms as a mere a business risk. But, as the Court previously explained, the Ninth Circuit's decision in *Earth Island v. Carlton* holds that economic harm is a relevant consideration, as does the Supreme Court's decision in *Amoco Production Company v. Village of Gambell*.[174] Indeed, the business risk undertaken by ConocoPhillips to develop its leases in the NPR-A is precisely what Congress envisioned when it mandated the expeditious program of private-sector leasing and development in the NPRPA in 1980.[175] There is no legal or equitable basis for discounting the enormous investments made by ConocoPhillips to develop leases it purchased as a direct result of Congress's decision to expeditiously explore and develop the NPR-A *through the solicitation of private industry investment*.[176] That ConocoPhillips has invested over a billion dollars in response to Congress's statutory

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[173] *Id*. ¶¶ 18-20.

[174] PI Order at 32-34 (citing and discussing *Earth Island*, 626 F.3d at 475); *id.* (citing and discussing *Amoco Production Company*, 480 U.S. at 545-46).

[175] Congress passed the 1980 amendments to the NPRPA to "advance *private* oil and gas development on the NPR-A." *ConocoPhillips Alaska, Inc. v. Alaska Oil & Gas Conservation Comm'n*, No. 3:22-CV-00121-SLG, 2023 WL 2403720, at *13 (D. Alaska Mar. 8, 2023) (emphasis added); *see* 126 Cong. Rec. 31,196 (1980) (statement of Sen. Stevens) ("The conferees have agreed to include language to expedite *private* leasing and exploration of the entire National Petroleum Reserve in Alaska." (emphasis added)).

[176] *ConocoPhillips Alaska, Inc.*, 2023 WL 2403720, at *8 ("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.").

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invitation is absolutely relevant to the equities.[177] Moreover, numerous third-party contractors and 1,800 individual workers are relying upon that investment in 2024, and certainly are not *de minimis* human collateral to be shrugged off as "business risk."

3. The Public Interest Continues to Weigh Sharply Against an Injunction.

The other public interest factors discussed in the Court's April 2023 order also continue to weigh against an injunction. The Court previously gave "considerable weight to the Alaska House and Senate's unanimous conclusion"[178] that "a further delay in approval or construction of the Willow project . . . is not in the public interest."[179] That remains true today. Tellingly, both SILA and CBD ignore the Court's prior analysis of the legislatively declared public interest or the public interest in expeditious development reflected in the NPRPA.

Instead, Plaintiffs offer generic arguments that there is a "public interest in complying with the law" and that halting the project to "ensur[e] that BLM carefully

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[177] *See Amoco Prod. Co.*, 480 U.S. at 545 (affirming denial of injunction where company "committed approximately $70 million to exploration" and "the public interest in this case favored continued oil exploration, given OCSLA's stated policy"); *W. Watersheds Project v. Salazar*, No. CV 11-00492 DMG (Ex), 2011 WL 13124018, at *17, 20 (C.D. Cal. Aug. 10, 2011) (denying injunction for project that would result in "the loss of thousands of acres of desert habitat" because the project applicant had "expended more than $712 million constructing the project to date" and the "project is expected to contribute to state and federal goals for the increased use of renewable energy"), *aff'd*, 692 F.3d 921 (9th Cir. 2012).

[178] PI Order at 41-42.

[179] H.R.J. Res. No. 6 (Alaska 2023).

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considers Willow's environmental impacts . . . comports with the public interest."[180] But this Court found that BLM *did* comply with the law, and this case has already been decided on the merits. Moreover, there is no credible dispute that the Willow project is narrowly designed to minimize its environmental footprint, subject to hundreds of mitigation measures, and the product of thousands of pages of rigorous analytical review. In this context, the public interest—framed by the NPRPA's mandate for expeditious development—plainly favors the construction of Willow.

In sum, the equities tip even more sharply against an injunction now than they did in April. Although the scope of construction this winter is larger, so are the benefits to subsistence users and to the 1,800 people who will benefit from construction and construction support jobs. Moreover, ConocoPhillips' economic investment in Willow has continued through the summer, and the reliance interests of countless other individuals and entities—most notably the North Slope residents who reasonably expect to be employed on the project this winter—are even more substantial than they were last spring.[181] Accordingly, the balance of the equities and public interest continue to tip sharply *against* injunctive relief.

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[180] SILA Br. at 16; CBD Br. at 13. In making these arguments, Plaintiffs purport to seek what they view as adequate environmental review. But that is not their endgame. Their goal, as it has always been, is to prevent Willow from ever being constructed. *See* SILA Dkt. 48 at 10 (Plaintiffs' attorneys stating that they "don't see any acceptable version of the project" and hope "that Willow dies a death by a thousand cuts").

[181] Ex.11 (Dunn) ¶20.

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D. CBD Plaintiffs' Alternative Request for a Short-Term Injunction Should Be Denied.

CBD (but not SILA) alternatively requests a "short-term injunction to preserve current conditions on the ground while Plaintiffs seek an emergency injunction from the Ninth Circuit Court of Appeals."[182] This request is unsupported and without merit for multiple reasons.

Principally, an injunction of any length, even a TRO, is an "extraordinary remedy"[183] and CBD has shown no equitable basis for a short-term injunction. Surface-disturbing activities will recommence no sooner than December 21, 2023. The Court has indicated that it will provide a decision on CBD's motion for an injunction pending appeal no later than December 4, 2023. That leaves CBD 17 days, at least, to seek an injunction pending appeal from the Ninth Circuit, which is ample time to resolve any such motion. To the extent that CBD wanted more time for the Ninth Circuit to contemplate its motion, it should not have delayed eight days in filing its motion for an injunction pending appeal or forfeited its prior appeal of this Court's order denying a preliminary injunction. "[B]y sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . . ."[184]

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[182] CBD Dkt. 190 at 1.

[183] *Dawson v. Asher*, 447 F. Supp. 3d 1047, 1049 (W.D. Wash. 2020) ("A TRO is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" (quoting *Winter*, 555 U.S. at 24)).

[184] *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (citation omitted).

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For the same reasons, the cases cited by CBD, including *SILA v. BLM*[185] and *Conservation Congress v. U.S. Forest Service*,[186] are distinguishable. Both cases involved a situation where irreparable harm would occur immediately, *before* the Ninth Circuit could reasonably hear a motion for an injunction pending appeal. In both cases, the courts issued very short injunctions (14 days and 10 days, respectively). Here, the Court has already given CBD 17 days to seek relief from the Ninth Circuit, and CBD has made no showing (or even offered any explanation) as to why that amount of time is insufficient.

Additionally, CBD fails to show irreparable injury to support a short-term injunction. CBD identifies no currently occurring irreparable injury associated with Willow construction. Even assuming that weather permits recommencement of surface-disturbing activities on December 21, and the Ninth Circuit has not addressed Plaintiffs' motions by that date (which is itself speculative), Plaintiffs will still suffer no irreparable injury. ConocoPhillips will first recommence mining activities, then will extend the gravel road past GMT2.[187] These are the same activities for which Plaintiffs failed to demonstrate irreparable injury in April 2023, and for which they again (as set forth above) fail to show irreparable injury this winter. No injunction may issue without a clear demonstration of likely irreparable injury.[188] Moreover, as discussed above, the equities

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[185] No. 3:20-cv-00308-SLG et al., 2021 WL 454280, at *4 (D. Alaska Feb. 6, 2021).

[186] 803 F. Supp. 2d 1126, 1134 (E.D. Cal. 2011).

[187] Ex.12 (Brodie) ¶12.

[188] *Winter*, 555 U.S. at 22 ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an

and public interest weigh sharply *against* an injunction of any length.[189] CBD Plaintiffs' alternative request for a "short-term" injunction should be denied.

V. CONCLUSION

Plaintiffs cannot satisfy any—much less all—of *Winter*'s four requirements. Accordingly, Plaintiffs' requests for an injunction pending appeal should be denied.

DATED: November 28, 2023.

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extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." (citing *Mazurek*, 520 U.S. at 972)).

[189] Although this Court previously granted a short-term injunction without finding all four factors to be satisfied, ConocoPhillips respectfully submits "[a]n injunction should issue only if the traditional four-factor test is satisfied." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010).

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2023, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court of Alaska by using the CM/ECF system. Participants in Case No. 3:23-cv-00058-SLG and 3:23-cv-00061 SLG who are registered CM/ECF users will be served by the CM/ECF system.

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