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IN THE 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

DEFENDANTS' COMBINED MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR INJUNCTION PENDING APPEAL

INTRODUCTION

These related cases challenge the Bureau of Land Management ("BLM") March 2023 approval of the Willow Master Development Plan, which authorizes oil and gas production on leases held by ConocoPhillips Alaska, Inc. in the National Petroleum Reserve – Alaska. BLM's approval did not occur on a blank slate, but followed a Supplemental Environmental Impact Statement designed in significant part to address this Court's 2021 ruling finding certain aspects of BLM's October 2020 approval of a prior version of the Plan to be unlawful. This Court, and the Ninth Circuit, denied

Plaintiffs' efforts to preliminarily enjoin initial April 2023 work on the Willow Project. The Court has now ruled on the merits, upheld BLM's revised analysis, dismissed Plaintiffs' claims with prejudice, and entered judgment for Defendants.

Plaintiffs have appealed, and in each case seek an injunction pending appeal. Plaintiffs have identified no valid basis for the Court to revisit its recent and thorough analysis. And, consistent with this Court's findings in denying Plaintiffs' motions for preliminary injunction, the equitable factors and public interest weigh against the grant of any injunctive relief here. The Court should deny the motions.[1]

LEGAL STANDARD

A court has discretion to "suspend, modify, restore or grant an injunction on terms for bond or other terms that secure the opposing party's rights" during an appeal. Fed. R. Civ. Pro. 62(d). An injunction pending appeal is "an extraordinary remedy that should be granted sparingly." *Ariz. Contractors Ass'n v. Candelaria*, No. CV07-2496-PHX-NVW, 2008 WL 486002, at *1 (D. Ariz. Feb. 19, 2008) (collecting cases). In deciding "an injunction pending appeal," courts apply "the test for preliminary injunctions." *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1176 (9th Cir. 2021); *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). This test requires one to show: "(1) it is likely to succeed on the merits; (2) it is

[1] Plaintiffs in each case have filed a Motion for Injunction Pending Appeal, ECF No. 169 in Case No. 3:23-cv-00058-SLG ("SILA Motion"), and ECF No. 190 in Case No. 3:23-cv-00061-SLG ("CBD Motion"). The Court's analysis of the merits was presented in the November 9 Decision & Order, ECF No. 166 in Case No. 3:23-cv-00058-SLG, and ECF No. 184 in Case No. 3:23-cv-00061-SLG ("Decision").

likely to suffer irreparable harm if the preliminary injunction is not granted; (3) the balance of equities tips in its favor; and (4) an injunction is in the public's interest." *Conserv. Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1054 (9th Cir. 2013) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 22 (2008)). Alternatively, the Ninth Circuit has stated that "'serious questions going to the merits' [rather than a likelihood of success on the merits] and a hardship balance that tips sharply toward the plaintiff can support issuance of a preliminary injunction, assuming the other two elements of the *Winter* test are also met." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011).[2] Under either test, the movant must "establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction[,]" *id.* at 1131, and a deficiency in any one of the required elements precludes extraordinary relief. *Winter*, 555 U.S. at 24; *see also Dep't of Fish & Game v. Fed. Subsistence Bd.*, No. 3:20-cv-00195-SLG, 2020 WL 6786899, at *4 (D. Alaska Nov. 18, 2020). Finally, when the United States is a party, the balancing of equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citation omitted).

ARGUMENT

Plaintiffs neither demonstrate error in the Decision nor demonstrate why they are entitled to the extraordinary remedy of an injunction pending appeal. For all the reasons stated below and in Defendants' Memorandum in Opposition to Plaintiffs' Motions for

[2] Defendants do not concede the validity of *Cottrell*'s reasoning that the Ninth Circuit's historical "sliding scale" test for issuing a preliminary injunction survives *Winter*.

Summary Judgment or Judgment Under Local Rule 16.3, ECF No. 137 in Case No. 3:23-cv-00058-SLG, and ECF No. 149 in Case No. 3:23-cv-00061-SLG, Defendants request that the Court deny Plaintiffs' Motions for Injunction Pending Appeal.

Plaintiffs do not show they are likely to succeed on the merits. Purporting to address this requirement, SILA's Motion merely summarizes just one of its prior arguments, i.e., that BLM failed to consider a reasonable range of alternatives under the Naval Petroleum Reserves Production Act ("NPRPA") and National Environmental Policy Act ("NEPA"). *See* SILA Motion at 9-15. And CBD Plaintiffs forego outright any substantive argument on the merits, stating only that they "stand by the arguments in their summary judgment briefing and believe they are likely to succeed on the merits of their claims that BLM violated [NEPA] by failing to consider a reasonable range of alternatives and by failing to consider Willow's reasonably foreseeable climate impacts." CBD Motion at 4. But the Decision addresses these arguments (and others) in significant detail, and rejects them. Plaintiffs identify no error in the Decision, and provide no basis for the Court to rethink how it addressed these arguments.[3] Plaintiffs have thus failed to

[3] Similarly, the Motions find no support in *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.,* Nos. 3:20-cv-00290-SLG and -00308-SLG, 2021 WL 454280 (D. Alaska Feb. 6, 2021), where this Court granted a limited injunction pending appeal in different circumstances and on a different record. There, the Court had denied motions for preliminary injunction based solely on the determination that the NPRPA judicial review provision foreclosed review of Plaintiffs' claims. *Id*. at *2. But the Court acknowledged this interpretation was a matter of first impression. *Id*. The Court further stated that, had they not been time barred, Plaintiffs' NEPA claims were likely to succeed and that the 2021 record before the Court established a likelihood of irreparable injury for "at least one of Plaintiffs' members." *Id*. at *2-3. Here, the Decision soundly rejects all of Plaintiffs' claims under established principles of administrative law, and leaves no basis to find that Plaintiffs even raise serious questions on the merits.

show a likelihood of success on the merits, and this alone precludes entry of an injunction pending appeal. *See Winter*, 555 U.S. at 24.

Plaintiffs similarly fail to show that they are likely to suffer irreparable harm as a result of project-related activities that are planned for 2023-2024. This Court rejected similar arguments when it denied Plaintiffs' motions for preliminary injunction in April 2023, *see* Order Re Motions for Temporary Restraining Order and Preliminary Injunction, ECF No. 74 in Case No. 3:23-cv-00058-SLG, and ECF No. 82 in Case No. 3:23-cv-00061-SLG ("PI Order"), and the reasoning underlying that decision is equally compelling here. As the PI Order noted, "there is no presumption of irreparable harm, even in cases involving environmental impact." *Id*. at 17 (citing *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544-55 (1987)). "Furthermore, 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." PI Order at 17-18 (internal quotation marks and citations omitted). Plaintiffs fall short of this requirement because they once again present generalized assertions of injury, or fail to connect more specific allegations of harm to the specific actions that might occur while this case is on appeal.

At the outset, Plaintiffs' restated concerns "about the negative impacts from the extraction of oil and gas over the lifetime of the Willow Project, and in particular its impact on global climate change[,]" provide no basis for granting the Motions; such

concerns "are not relevant to the Court's consideration of the current motions because the planned [2023-2024] Construction Activities do not include the extraction of any oil and gas." *Id*. at 19; *see e.g*., Declaration of Siqiñiq Maupin ¶ 25, ECF No. 169-9 in Case No. 3:23-00058-SLG (alleging Willow is "at odds with the urgent need to address climate change"); Declaration of Rosemary Ahtuangaruak ¶¶ 82-89, ECF No. 190-2 in Case No. 3:23-00061-SLG (alleging that oil and gas activities throughout the Arctic are adversely affecting the environment and contributing to climate change).

Plaintiffs' limited attempts to connect alleged irreparable injury to the upcoming construction activities fall short of their burden. SILA Plaintiffs seemingly acknowledge the need to make this showing, and identify the work planned for the coming season. *See* SILA Motion at 6 (citing Declaration of Connor A. Dunn ¶ 9, ECF No. 141-2). And SILA Plaintiffs assert the need for an injunction is now greater than when this Court issued the Order, because the "planned 2023-24 winter activities are significantly broader in scope and will be far more impactful than the limited construction that occurred last winter." SILA Motion at 6.[4] But instead of providing specific examples of how these activities may impact their interests, Plaintiffs assert generalized long-term impacts to "subsistence hunting, gathering, and fishing; recreation; research; wildlife viewing and protection; and aesthetic enjoyment of the area's natural setting[.]" *Id*. For example, Plaintiffs point to Robert Thompson's testimony that "Willow's infrastructure,

[4] The 2023-2024 planned construction work largely focuses on basic infrastructure such as installing certain pipelines and laying gravel for the access road, airstrip, and pads for the Willow Operations Center ("WOC") and Willow Central Facilities, which will be located at the eastern edge of the Bear Tooth Unit. *See* Dunn Decl. ¶ 9.

disturbance, and greenhouse gas emissions will harm polar bears," which in turn will cause him recreational and aesthetic injury and affect his business of conducting polar bear viewing trips. *Id*. at 8. But Mr. Thompson lives in Kaktovik and his guiding activities occur, pursuant to permit, in the Arctic National Wildlife Refuge. *See* Declaration of Robert James Thompson ¶¶ 2-3, ECF No. 169-7 in Case No. 3:23-cv-00058-SLG. His asserted injury is therefore not connected to 2023-2024 (or any) particularized Willow construction activity, but rather to the belief that "[t]he Willow project will harm the animals, including threatened species, that call the Arctic home and contribute to climate change," since "[t]he Arctic is all connected." *Id*. ¶¶ 7-8. This is precisely the formulation of injury that this Court rejected in concluding that Plaintiffs failed to demonstrate a likelihood of irreparable injury that was causally connected to planned construction activities. *See* PI Order at 18-19; *see also Powder River Basin Res. Council v. U.S. Dept of Interior*, No. 22-CV-2696 (TSC), 2023 WL 7298815, at *14 (D.D.C. Nov. 6, 2023) (plaintiffs failed to show likelihood of irreparable injury through averments that failed to connect "loss of recreational opportunities, scarcity of wildlife, noise pollution, air pollution, and so forth" to specific aspects of the challenged decision(s) and "failed to allege, with any specificity, when these alleged irreparable harms will occur").

The CBD Plaintiffs' submissions are similarly insufficient to establish the necessary causal connection between their asserted injuries and the 2023-2024 planned work activities. CBD Plaintiffs put great emphasis on the proffered testimony of three "decorated caribou experts with decades of experience." CBD Motion at 7-8 (describing

and citing to the Declaration of Likely Impacts to Caribou and Caribou Subsistence from the Construction Phase of the Willow Project, National Petroleum Reserve in Alaska, ECF No. 190-1 in Case No. 3:23-cv-00061-SLG). But this "declaration" is not properly before the Court because it is not executed. *See Steel Bros., Inc. v. Dong Sung Heavy Indus.*, No. 3:09-CV-00235-RRB, 2013 WL 11309602, at *2 (D. Alaska Jan. 8, 2013) (citing *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) ("[A]n unsworn declaration *subscribed* as true under penalty of perjury satisfies the requirement for an affidavit [but a]n unsworn declaration that is not signed by the declarant does not comply with this requirement."). It is also significant that the information the CBD Plaintiffs have waited to proffer in this context could have been (but was not) submitted for BLM's consideration during the NEPA process.

Even putting these defects aside, the so called declaration does not aid Plaintiffs. It presents "two overarching conclusions" that Willow "construction activities in the next two years are more likely than not" to (a) alter the Teshekpuk Lake caribou herd distribution and movements; and (b) negatively affect "the caribou subsistence system in the community of Nuiqsut[.]" Declaration at 3. But BLM generally reached the same conclusions, which were fully disclosed and analyzed under applicable procedural requirements. *See* AR820958-61 (addressing caribou disturbance/displacement and injury/mortality); AR820962-63 (Table 3.12.3 comparing effects to caribou across alternatives); AR824300-75 (Alaska National Interest Lands Conservation Act Section 810 subsistence analysis). And BLM's selected alternative was designed to protect caribou movement and migration and reduce the effects of development on the traditional

subsistence way of life of the community of Nuiqsut. AR820953 (detailing Teshekpuk Lake Caribou Habitat Area lease stipulations); AR824999.

CBD Plaintiffs also rely on a signed declaration by Josh Oboler, describing a planned 2024 birding trip to Teshekpuk Lake and the heartbreak that he and his child will experience "see[ing] oilfield equipment and infrastructure tearing apart the precious habitat of our beloved birds." Declaration of Josh Oboler ¶ 11, ECF No. 190-4 in Case No. 3:23-cv-00061-SLG. But Teshekpuk Lake is not near the 2023-2024 planned work activity, and the planned work activity is not occurring in habitat for the migratory waterfowl and shorebirds the Obolers seek to observe. *See* AR820716 (map depicting Teshekpuk Lake and area of Willow Project infrastructure); AR820914-15 (discussing Arctic Coastal Plain bird habitats); *see also* Oboler Decl. ¶ 11 (acknowledging they may not "hear or see the noise from our campsite" but may see signs of North Slope development on the flight to camp from Nuiqsut). Lacking a causal connection between the proposed work and interests in maintaining waterfowl and shorebird habitat, Mr. Oboler's concerns devolve into generalized frustration about North Slope oil and gas development. *Id*. (emphasizing climate change).

Plaintiffs' remaining declarations are not meaningfully different from those submitted during preliminary injunction proceedings. *See* CBD Motion at 8, 11-12 (citing four declarations considered by the Court in denying the preliminary injunction).[5]

[5] Considerable portions of Dr. Ahtuangaruak's most recent 147-paragraph declaration repeat her earlier testimony and are irrelevant to the 2023-2024 planned work activities, or even to the Willow project. *See* Ahtuangaruak Decl. ¶¶ 120-145 (presenting generalized concerns about proceeding with development throughout "the Arctic" in

Nothing about the repurposing of this testimony for the instant Motions changes the Court's explanation why these submissions do not provide a basis for injunctive relief. *See* PI Order at 19-30 (analyzing declarations submitted by Sam Kunaknana, Daniel Ritzman, and Dr. Ahtuangaruak).

Finally, the Court should find that the balance of equities and public interest continue to weigh against injunctive relief. *See id*. at 31-44. Since Plaintiffs fail the necessary showing on the first two elements the Court "need not dwell on the final two factors" and, "when considered alongside the [movants'] failure to show irreparable harm, the final two factors do not weigh in favor of a stay." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778-79 (9th Cir. 2018). But to the extent those factors are relevant, the testimony previously considered by this Court shows that construction of gravel roads in an area otherwise lacking them is more likely to benefit subsistence hunters. *See* PI Order at 37-40. And the Court appropriately recognized the numerous benefits of the project, even during its initial construction, to the local community as expressed by Kuukpik, the North Slope Borough, Arctic Slope Regional Corporation, and to statewide interests as expressed by the State of Alaska and its Congressional delegation. *See id*. at 40-43. These conclusions reflect particularized factual findings that are uniquely the province of this Court to make. *See Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d 511, 521 (9th Cir. 1984) (reviewing district court's equitable balancing under abuse of discretion standard).

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separate actions involving seismic exploration, Peregrine, or the Arctic Refuge, and concerns about oil leaks/spills such as have occurred at Repsol or Deepwater Horizon).

For all these reasons, the Court should deny Plaintiffs' Motions for Injunction Pending Appeal.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2023, a copy of the foregoing was served by electronic means on all counsel of record by the Court's CM/ECF system.

/s/ Paul A. Turcke
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