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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

INTERVENOR-DEFENDANT KUUKPIK CORPORATION'S JOINT OPPOSITION TO PLAINTIFFS' MOTIONS FOR INJUNCTION PENDING APPEAL

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I. INTRODUCTION

Plaintiffs are appealing this Court's decision upholding the federal government's Record of Decision that allowed a heavily modified and reduced version of the Willow Project to proceed. Plaintiffs request an injunction pending the outcome of that appeal. If granted, the injunction would unnecessarily suspend a project that is supported by nearly every interest group on the North Slope. The equities weigh against injunctive relief, and an injunction is not in the public interest. Nor have Plaintiffs raised even a meaningful question regarding the merits of this Court's decision or shown irreparable harm. The motions should be denied.

II. BACKGROUND

Kuukpik Corporation ("Kuukpik") has intervened to protect its interests and those of its Alaska Native shareholders. Kuukpik was formed pursuant to the Alaska Native Claims Settlement Act ("ANCSA") as the Alaska Native village corporation for Nuiqsut, the village closest to the area where Willow will be constructed.[1] In that capacity, Kuukpik's twin goals are protecting the subsistence lifestyle and culture of the Native residents of Nuiqsut while also providing for the long-term economic needs of its shareholders.[2] To that end, Kuukpik has historically supported only balanced and responsible oil and gas development.[3] The version of Willow that was approved in March

[1] BLM_3512_AR821012 (Ex. A).

[2] Decl. Joe Nukapigak, (Ex. B) ¶¶ 12-15, Mar. 24, 2023.

[3] *Id.* at ¶ 11.

2023 achieves that. It is therefore supported by many community members that had not previously supported Willow, including Kuukpik and its Board of Directors—a diverse group of young shareholders, elders, subsistence hunters, whaling captains, and community leaders.[4] That is why Kuukpik—speaking as a landowner and as a cultural and economic guardian of its shareholders—is confident that it is in the public interest to allow Willow to proceed.

III. INJUNCTION PENDING APPEAL STANDARD

Before Plaintiffs can seek an injunction pending appeal with the Ninth Circuit, they are required to request such relief from this Court, which is more familiar with the record and therefore better positioned to analyze the request in the first instance. The standard for evaluating an injunction pending appeal is similar to that which applies to a request for a preliminary injunction.[5] A plaintiff must establish (1) a likelihood of success on the merits, (2) irreparable harm absent preliminary relief, (3) the balance of equities favors relief, and (4) an injunction serves the public interest.[6] An injunction should not be granted upon a showing of only one, two, or even three of the *Winter* factors, but only where totality of the factors merit this "extraordinary and drastic remedy."[7]

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[4] *Id.* at ¶ 19.

[5] *Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 367 (9th Cir. 2016) (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) and *Southeast Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006)).

[6] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

[7] *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Winter*, 555 U.S. at 20.

IV. ARGUMENT

Because no other party is as well-suited to address the local issues in this case, Kuukpik's opposition focuses primarily on the relative harms, equities, and the public interest that would be affected by an injunction.

A. Plaintiffs have not even raised a question going to the merits of this Court's decision.

Despite the heavy burden Plaintiffs bear at this stage to show a strong likelihood of success on the merits, neither Plaintiff has mustered a serious critique of this Court's decision. CBD simply "stand[s] by the arguments in their summary judgment briefing,"[8] and asserts that the difficulty of the questions before this Court is, *ipso facto*, "sufficient to satisfy the requirement of likelihood of success on the merits."[9] SILA likewise merely restates its arguments (though not even on every issue it previously raised), describing them as "serious questions…[that] warrant an injunction."[10]

These arguments treat the first *Winter* factor as though it can be satisfied merely because the stakes are high or the issues thorny. However, the Ninth Circuit has rejected that position, repeatedly emphasizing that a petitioner must show a substantial case on the

[8] CBD Rule 62(d) Mot. for Inj. Pending Appeal at 4, 3:23-cv-00061-SLG, ECF No. 190 ("CBD Br." hereafter); *see All. for the Wild Rockies v. Kruger*, 35 F. Supp. 3d 1259, 1270 (D. Mont. 2014) ("This is merely a restatement of Plaintiffs' summary judgment argument, which the Court rejected, and is insufficient to raise serious questions regarding the merits of their claims.").

[9] CBD Br. at 5.

[10] SILA Mot. for Inj. Pending Appeal at 16, 3:23-cv-00058-SLG, ECF No. 169 ("SILA Br." hereafter).

merits.[11] The "serious questions" standard is not truly a lesser standard, but, in essence, part of a sliding *Winter* scale.[12] Where a case is close, and the harms certain, an injunction may be appropriate, but Plaintiffs still must demonstrate specifically why there is reason to question the Court's conclusion. They cannot simply rest on the rejected arguments, especially where the court had ample time to analyze those arguments.[13] Plaintiffs' failure to cast any doubt on the Court's reasoning is, by itself, reason to deny the motions.[14]

B. Plaintiffs have not demonstrated irreparable harm supporting injunctive relief.

There is no presumption of irreparable injury in environmental cases.[15] The

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[11] *Leiva-Perez v. Holder*, 640 F.3d 962, 967–68 (9th Cir. 2011) (concluding that the "many ways to articulate the minimum quantum of likely success necessary to justify a stay… are essentially interchangeable… Regardless of how one expresses the requirement, the idea is that in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits.").

[12] *Id.* at 967; *Heckler*, 713 F.2d at 1435.

[13] *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 497 (9th Cir. 2023) (cautioning that the "serious questions" standard "does not erase the Supreme Court's admonition that an injunction 'may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'").

[14] *Bank of Nova Scotia v. Pemberton*, 964 F. Supp. 189, 191 (D.V.I. 1997) (ruling against party who did not raise new arguments when requesting an injunction because "Those arguments possess no more merit now than they did previously. Defendant has failed to make a strong showing that he will succeed on appeal.").

[15] *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Plaintiffs' NEPA cases regarding the irreparability of environmental harm and the public interest analysis are off base. Most involve cursory Environmental Assessments or the failure to prepare an Environmental Impact Statement at all or which was clearly deficient. *See S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) ("no consideration of the environmental impact" of transporting 5 million tons of dusty mercury-containing ore); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (lack of any meaningful environmental review); *Save Our*

movant, "*by a clear showing*, carries the burden of persuasion."[16] Plaintiffs must "substantiate the claim that irreparable injury is likely to occur. Bare allegations of what is likely to occur are insufficient because the court must decide whether the harm will in fact occur."[17] The "'possibility' standard is too lenient."[18] Irreparable injury "must be both certain and great; it must be actual and not theoretical. Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time[.]"[19] Plaintiffs have not met this standard.

1. ConocoPhillips' Planned 2023-24 Construction Activities

As an initial matter, this Court (which is most familiar with the facts and record) must determine what activities are at issue in the motions. That factual determination

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Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1122 (9th Cir. 2005) (concluding that the EIS was completely deficient in scope); *Nat'l Parks Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 725 (9th Cir. 2001) (granting a preliminary injunction because the challenged "Parks Service [action was] put it into effect without preparing an [EIS]").

[16] *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (emphasis in original) (*quoting Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997); Order Re Mot. for TRO and Prelim. Inj. at 18, 3:23-cv-00058-SLG, ECF No. 74 and 3:23-cv-00061-SLG, ECF No.82 ("PI Order" hereafter).

[17] *Western Watersheds Project v. Bernhardt*, 468 F. Supp. 3d 29, 47 (D.D.C. 2020) (internal quotation marks and citation omitted).

[18] *Winter*, 555 U.S. at 22.

[19] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985):

> [T]he movant [must] substantiate the claim that irreparable injury is "likely" to occur. Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.") (citations omitted) (emphasis added).

defines the equities and public interest analysis, and the scope of an injunction should the Plaintiffs prevail.

SILA acknowledges that "the proper scope to evaluate the balance of equities and public interest is the timeframe that the injunction will be in place, *i.e.*, while the Ninth Circuit decides the appeal."[20] SILA then repeatedly refers to "ConocoPhillips' planned 2023-24 winter activities."[21] SILA does do not argue that the Court should consider any other activities or impacts. CBD vaguely alludes to impacts that would not occur until 2024-25,[22] but does not articulate or provide evidence that more than one year of construction should be at issue.[23] Kuukpik agrees with SILA that the proper scope is the next year of construction activities.

The relevant "Planned 2023-24 Activities" in the areas discussed by the parties and the declarants consist of gravel mining and the construction of:

(i) approximately seven total miles of gravel road between GMT2 and the Willow site;
(ii) approximately 1,130 vertical support members ("VSM") and horizontal support members ("HSM") on which to hang small pipelines (along the

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[20] SILA Br. at 16; *see also* CBD Br. at 13 ("In evaluating Defendants' harms, this Court considers 'only the portion of the harm that would occur while the [] injunction is in place'—*i.e.*, harm from postponing construction pending appeal—and not harm that would result if the entire Project were never built.") (citing *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014)).

[21] SILA Br. at 3 (citing Decl. of Connor Dunn ¶¶ 7, 9, Aug. 29, 2023, 3:23-cv-00058-SLG, ECF No. 141-2), 5 (multiple references), 16 (referencing "winter construction"), and 17 (referencing "winter construction" jobs).

[22] CBD Br. at 6-7.

[23] Briefing before the Ninth Circuit is currently scheduled to be completed by the end of February 2024. Time Schedule Order at 2, 3:23-cv-00061-SLG, ECF No. 194.

same basic route);
(iii) approximately 4.6 miles of small pipelines on those VSMs and HSMs;
(iv) a road spur and pad for access to Lake L9911;
(v) the Willow Operations Center gravel pad (only);
(vi) the Willow Central Facility gravel pad (only);
(vii) a one-mile gravel road connecting the Operations Center pad and the Central Facility pad;
(viii) the airstrip access road and airstrip apron;
(ix) the Willow 2 bridge on the Willow access road; and
(x) Completing the Tiŋmiaqsiuġvik River subsistence boat ramp.[24]

Both Plaintiffs discuss additional activities that are not at issue, and to which their declarants do not ascribe imminent harm. CBD, for example, asserts there are "140 miles of ice roads," "around 10 miles of gravel roads," a drill site, bridges, on-pad facilities, the Willow Operations Center, and the installation of over 3,000 [VSMs].[25] These descriptions are misleading. Some of these activities are based on a general (and already outdated) construction schedule that was included in the EIS,[26] rather than more specific, up to date information recently provided by Conoco.[27] Other items—like a doctor describing symptoms individually instead of just calling it "the flu"—are just components

[24] Decl. James Brodie ¶ 6, Nov. 27, 2023 (Ex. to ConocoPhillips' Opp'n.); Decl. Dunn ¶ 9, Aug. 29, 2023. SILA includes additional activities in its description as well; namely, eight additional miles of pipeline work and several hundred associated VSMs and HSMs. SILA Br. at 6, n.17. Those activities on the east side of the Colville River are depicted in Decl. Brodie, Ex. A at 2, Nov. 27, 2023. None of Plaintiffs' declarants discuss impacts associated with construction in these areas or claim that impacts in those long-developed areas some thirty miles east of the Willow Project area would impact them.

[25] CBD Br. at 6-7.

[26] BLM_3512_AR822029 (Ex. A) ("The schedule presented in the EIS is an estimated schedule that would be dependent on subsequent detailed Project planning and a variety of contingencies.")

[27] *See* Decl. Brodie ¶ 6, Nov. 27, 2023; Decl. Dunn ¶ 9, Aug. 29, 2023.

of the same thing (*e.g.*, VSMs and pipelines are different parts of the same infrastructure). Still others will not be constructed in the next year[28] or would not be affected by an injunction (*e.g.*, seismic exploration). Finally, some of these activities will occur in long-developed areas in the Kuparuk River and other oil and gas Units far away from the future Willow location.[29] This work is shown on Exhibit 2 of the Brodie Declaration. No plaintiff has claimed this work will cause them any specific harm. Therefore, if this activity is relevant at all, it is only because suspending it would delay the project without alleviating *any* identified harm.

The "Planned 2023-24 Activities" identified above, which are expected to occur in the next year and are within the areas discussed by the Plaintiffs, are therefore the relevant activities for purposes of this motion.

2. Plaintiffs have not clearly shown that the Planned 2023-24 Activities will cause irreparable harm to them or their members.

To obtain an injunction, Plaintiffs must demonstrate that the Planned 2023-24 Activities will result in irreparable harm before the Ninth Circuit rules on the merits.[30] Plaintiffs' long-term concerns regarding the potential environmental effects of many years

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[28] The first drill site, on-pad facilities, and the Willow Operations Center will not be constructed until next year at least. Decl. Dunn ¶ 10, Aug. 29, 2023. BLM_3512_AR822105, Tbl. D.4.20 (Ex. A) shows the original estimated schedule, which has already been delayed and changed in various respects.

[29] For example, 1,480 of the VSMs and eight (8) miles of the referenced pipelines are east of the Alpine Central Facilities, and are therefore at least 15-30 miles away from GMT2 and Willow. Decl. Brodie ¶ 6, Nov. 27, 2023. No Plaintiff has claimed they will experience any impacts as a result of these VSMs and pipelines.

[30] PI Order at 18-19; *Winter*, 555 U.S. at 22.

of Willow activity are not relevant to the present motion. Only injuries that would be caused by the Planned 2023-24 Activities are relevant.

Many of Plaintiffs' positions have not changed since the court evaluated nearly identical declarations in March 2023. These arguments can therefore be summarily dispatched by applying this Court's earlier reasoning, as follows:

1. To the extent Plaintiffs assert harms associated with global climate change, these concerns are not relevant to the current motions because the Planned 2023-24 Activities do not include extraction of any oil and gas.[31] Nor is there any evidence that enjoining the Planned 2023-24 Activities would alleviate harms associated with global climate change.
2. Any harms Plaintiffs expect to experience as a result of blasting activity at the gravel mine do not constitute an irreparable injury. Plaintiffs do not argue that the impacts associated with mining this coming winter will be different from the impacts that were expected (and experienced) last winter. Therefore, the same logic applies now: the impact associated with blasting "is short-lived; it is not permanent."[32]
3. No other asserted harms associated with the gravel mine constitute irreparable injury. Again, plaintiffs' evidence on this point has not changed since March. Accordingly, the analysis is the same: despite some declarants' "concerns" and

[31] PI Order at 19.

[32] PI Order at 20, nn.80-82; Decl. George Seilak, (Ex. D) ¶¶ 6-9, Nov. 28, 2023.

fears" regarding impacts associated with the mine, BLM's evidence shows that these fears are, at best, questionable.[33]

4. Outside Declarants who are interested in the aesthetics of the North Slope do not clearly demonstrate they will suffer irreparable harm absent an injunction. None of the claimed harms are specific to the location of the Planned 2023-24 Activities.[34] Rather, Plaintiffs treat an impact anywhere in the NPR-A as though it affects the entire Petroleum Reserve (or anyone located within or near it). [35] This Court has correctly rejected those false equivalencies already.[36] Other asserted harms are

[33] PI Order at 20-22.

[34] Declarant Ritzman, for example, describes previous experiences floating rivers many miles away from where the Planned 2023-24 Activities will occur and describes plans to float the Colville River in "Summer of 2024", and to "return to Utqiaġvik in 2024 and to do another trip down the Colville River to Nuiqsut in 2025 or 2026." Decl. Daniel Ritzman ¶ 34, Nov. 10, 2023, 3:23-cv-00058-SLG, ECF No. 169-5. The Planned 2023-24 Activities will not be ongoing by the time Mr. Ritzman visits these areas, if he ever does so (he "cancelled" the trip described in his earlier declaration; *id.*), which are between 30 and 150 miles away from the Planned 2023-24 Activities in any event. The approximately five foot tall gravel roads and pads, a bridge, and a pipeline rack will not be visible from the Colville (30 miles away) or from Utqiaġvik (150 miles away).

[35] PI Order at 24 ("Construction Activities will cause surface disruption on only a very small fraction of the NPR-A…."). Declarants who assert injuries related to polar bears are particularly befuddling. These individuals discuss bears near Kaktovik, some 175 miles away from the Planned 2023-24 Activities. BLM also concluded that construction activities would have minimal impacts on polar bears. EIS Ch. 3.13, BLM_3512_820970-1001.

[36] PI Order at 18 ("Clearly, the planned Winter 2023 Construction Activities are substantially narrower in scope than the Willow Project as a whole.") and 24; *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

speculative, vague, or based on Plaintiffs' own "fear," not facts.[37]

3. The Planned 2023-24 Activities will not irreparably harm subsistence users.

Plaintiffs also argue that certain subsistence users will suffer irreparable harm if construction is not enjoined during this appeal.[38] If the Planned 2023-24 Activities were likely to materially and negatively impact Nuiqsut residents' subsistence activities or decrease community harvests—whether Mr. Kunaknana, Ms. Ahtuangaruak, or others—Kuukpik would be on the other side of this motion.[39] However, the methodological evidence and consensus traditional knowledge does not support that conclusion.[40]

Plaintiffs' declarants primarily identify impacts they believe will be caused by the

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[37] *See, e.g.,* Decl. Ritzman ¶¶ 35, 36, Nov. 10, 2023; PI Order at 22, n.93 (citing *Caribbean,* 844 F.2d at 675-76). BLM's EIS refutes Mr. Ritzman and the other Aesthetic Plaintiffs' position that construction activities will, by definition, "negatively impact wildlife, future generations' ability to experience this landscape, and reduce opportunities for residents of the region to continue to practice their traditional subsistence lifestyle." *See generally* FEIS App. E.16 at BLM_3512_AR824196 (Ex. A) and PI Order at 22, n. 92.

[38] SILA Br. at 7.

[39] *See* Decl. J. Nukapigak, (Ex. B) ¶¶ 11, 14, 15, and 17.

[40] *See, e.g*., PI Order at 24 ("Moreover, BLM suggests that habitat loss and alteration from gravel mining specifically will have a minimal effect on caribou '[b]ecause the habitats lost are not unique and occur throughout the analysis area . . . [so] caribou would likely move to similar habitats nearby.'"). While Kuukpik does not categorically agree with the implicit premise that impacts to subsistence should be considered "minimal" unless the location is "unique", many Nuiqsut residents have indicated that short-term impacts at the gravel mine site will, in fact, be minimal. Decl. Seilak, (Ex. D) ¶ 9, Nov. 28, 2023; Decl. Bryan Nukapigak ¶ 10, Nov. 20, 2023 (Ex. to ConocoPhillips' Opp'n.); Decl. Curtis Ahvakana ¶ 12, Oct. 24, 2023 (Ex. to ConocoPhillips' Opp'n.); Decl. Thomas Napageak, Jr. ¶¶ 15, 16, Nov. 20, 2023 (Ex. to ConocoPhillips' Opp'n.). Thus, the Court's conclusion is supported by both Western science and local traditional knowledge. PI Order at 22, 27, and 37.

entire Willow Project, not the more limited activities that are expected to occur this year.[41] Mr. Kunaknana, for example, describes problems that he believes will occur "once Willow is complete…"[42] Mr. Kunaknana only refers to potential impacts *during this appeal* once: "I believe that if the court allows the Willow project to proceed in general and during this appeal process, it will make it even harder for me to continue my subsistence way of life. There are serious cumulative impacts to us from all these projects moving forward, including Willow."[43] This vague "belief" regarding Willow and "all these projects" do not demonstrate a likelihood of irreparable harm that would support injunctive relief this winter.[44]

Similarly, Kuukpik rejects Fairbanks resident Siqiniq Maupin's opinion that the Willow Project (notably, *not* the Planned 2023-24 Activities) will threaten people's ability to practice subsistence.[45] Again, if this were true, Kuukpik would be fighting tooth and nail to prevent construction from proceeding. But that is simply not reality. The many Nuiqsut residents who have provided testimony in this case disagree with Maupin's

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[41] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018) ("There must be a sufficient causal connection between the alleged irreparable harm and the activity to be enjoined, and showing that the requested injunction would forestall the irreparable harm qualifies as such a connection.") (internal citations omitted).

[42] Decl. Sam Kunaknana ¶ 17, Nov. 14, 2023, 3:23-cv-00058-SLG, ECF No. 169-8.

[43] *Id.* ¶ 35 (emphasis added).

[44] *Id.* ¶ 18.

[45] Decl. Siqiñiq Maupin ¶¶ 5, 23-24, Nov. 13, 2023, 3:23-cv-00058-SLG, ECF No. 169-9; *contra* Decl. Heather Napageak ¶ 9, Nov. 1, 2023 (Ex. to ConocoPhillips' Opp'n.).

assertion.[46] As does BLM's analysis.[47]

Plaintiffs also have not identified significant injuries that subsistence users are likely to experience where the Planned 2023-24 Activities will occur. CBD cites the EIS to prove that Nuiqsut hunters use "the Willow Area."[48] But they fail to note that "the Willow Area" as defined in the EIS spans approximately fifty miles, extending from Alpine to Willow.[49] So while it is undoubtedly true that many Nuiqsut hunters use "the Willow Area" as that term is defined in the EIS, the more specific evidence (in the EIS and from each side's declarants) shows that very little of this activity historically or currently occurs in the areas beyond GMT2 that will be most impacted by the Planned 2023-24 Activities.[50]

SILA attempts to be more specific, again citing Mr. Kunaknana for the proposition that subsistence users' ability to hunt and fish "in the vicinity of Willow" will be "irreparably harmed" by converting "areas that are important to him for hunting and fishing into industrial zones where he can no longer hunt and fish."[51] It is not clear what

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[46] *See* Decl. Nellie Kaigelak, (Ex. C) ¶¶ 9-10, Nov. 29, 2023; Decl. H. Napageak ¶ 5, Nov. 1, 2023; Decl. B. Nukapigak ¶ 4, Nov. 20, 2023; Decl. Ahvakana ¶ 7, Oct. 24, 2023; Decl. T. Napageak Jr. ¶ 24, Nov. 20, 2023.

[47] BLM_3512_AR821021 (Ex. A).

[48] CBD Br. at 9.

[49] BLM_3512_AR820697 (Ex. A).

[50] FEIS Figure 3.16.25 depicts the Willow Area as a "Low" use area for caribou subsistence use from 2008-2019, whereas the area between Nuiqsut and GMT-1 and around the Colville River as "High" use. BLM_3512_AR821352 (Ex. A); s*ee also* Figure 3.16.42, BLM_3512_821369 (Ex. A).

[51] SILA Br. at 7.

"vicinity" is being referred to here, but it is unlikely to be the areas where construction is occurring this year since Mr. Kunaknana does not claim to hunt there and these areas are currently all but unreachable anyway.[52] Nor will there be any "industrial zone" where hunting and fishing are not allowed. When the Planned 2023-24 Activities are complete, there will be a single gravel road, a partial pipeline along that road, and several gravel pads at the very end of the road. This is hardly an "industrial zone" where Mr. Kunaknana (or anyone else) can no longer hunt and fish. Quite the opposite: Kuukpik shareholders and Nuiqsut residents (including Mr. Kunaknana and Ms. Ahtuangaruak, who already enjoys using the road[53]) will be able to use these roads to access countless areas that are currently inaccessible. That is one of the project's main benefits for subsistence users.

Ms. Ahtuangaruak attempts to overcome the fact that few, if any, people currently use the area where the Planned 2023-24 Activities will occur by stating that unnamed family members have traveled on the tundra for up to 50 miles past GMT2 on their off-road vehicles.[54] These journeys must have occurred in winter because it would be virtually impossible to travel that far on unfrozen tundra.[55] A typical *summer* off road trip is less than 3 miles.[56] Given that, it is unlikely these individuals' hunting will be negatively impacted since there are few hunters and few caribou in the GMT2 and

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[52] *See generally*, Decl. Kunaknana ¶ 17, Nov. 14, 2023; *but see* Decl. Kaigelak, (Ex. C) ¶ 9, Nov. 29, 2023.

[53] Decl. Ahtuangaruak ¶ 23, Nov. 15, 2023, 3:23-cv-00061-SLG, ECF No. 190-2.

[54] *Id.* ¶¶ 16-17.

[55] Decl. Kaigelak, (Ex. C) ¶ 9, Nov. 29, 2023.

[56] *Id.*

Willow areas during winter.[57]

To the extent those individuals choose to avoid these areas during summer construction activities, there is no evidence that that decision would substantially, immediately, and irreparably prevent them from obtaining caribou for subsistence use.[58] Their avoidance of the road and the area would also likely be temporary because it is now well-documented that even subsistence hunters who avoid an area during certain construction (or other disruptive) periods are likely to return after construction is complete.[59] These individuals will have far better and safer access to the area beyond GMT2 at that point than they ever have before.[60]

Far from demonstrating irreparable harm, Plaintiffs' position underscores the benefits of proceeding with construction. Nuiqsut hunters were able to use the short road extension beyond GMT2 that Conoco constructed in 2023.[61] They would do so again next year if the road is extended all the way out to the Willow site.[62] The road is an undeniable benefit to these hunters. Moreover, Conoco will complete the much-desired Tiŋmiaqsiuġvik River boat ramp this year.[63] Completing that boat ramp will unlock the

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[57] *See* BLM_3512_AR821048 (Ex. A) and PI Order at 24.

[58] PI Order at 26-27, n.109.

[59] *See generally* EIS Ch. 3.12; BLM_3512_AR820959 (Ex. A).

[60] BLM_3512_AR821055 (Ex. A); Decl. Kaigelak, (Ex. C) ¶ 10, Nov. 29, 2023.

[61] Decl. Kaigelak, (Ex. C) ¶ 10, Nov. 29, 2023; Decl. Ahvakana ¶¶ 10-11, Oct. 24, 2023.

[62] Decl. Kaigelak, (Ex. C) ¶ 10, Nov. 29, 2023; Decl. Ahvakana ¶ 12, Oct. 24, 2023.

[63] Decl. Brodie ¶ 6, Nov. 27, 2023; Decl. Ahvakana ¶ 12, Oct. 24, 2023.

benefits the court identified in connection with the Plaintiffs' earlier request for an injunction.[64] Plaintiffs continue to ignore all these benefits by focusing exclusively on an extremely limited area that may be less desirable for subsistence *during* construction, rather than the thousands of acres that will be *more* accessible and widely used after the road is complete.

Plaintiffs' position that "even the loss of even a single opportunity to practice subsistence activities can inflict permanent harm" therefore rings hollow in this context.[65] Kuukpik has long defended residents' right to practice subsistence when and where they please.[66] But Plaintiffs cannot have it both ways. If the loss of a single opportunity to practice subsistence is irreparable harm, as Plaintiffs assert, then *granting* an injunction will cause far more irreparable harms because all the individuals who would use the Willow Road to practice subsistence will be deprived of those opportunities.[67]

Plaintiffs have not demonstrated that significant irreparable injury is "likely" to occur absent an injunction. The fears and worries Plaintiffs' declarants describe are not

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[64] PI Order at 39-40; Decl. Kaigelak, (Ex. C) ¶ 11, Nov. 29, 2023.

[65] CBD Br. at 10.

[66] *See, e,g.,* Decl. J. Nukapigak, (Ex. B) ¶ 15, Mar. 24, 2023, where Mr. Nukapigak describes how "Kuukpik said no" when Conoco wanted to build a bridge across the Niqliq Channel in a location "where too many people fished." After several years, some lengthy administrative processes, and a few lawsuits, the bridge was eventually moved to a more satisfactory location, and the projects moved forward.

[67] Decl. Kaigelak, (Ex. C) ¶¶ 9-10, Nov. 29, 2023; Decl. H. Napageak ¶ 5, Nov. 1, 2023; Decl. B. Nukapigak ¶ 4, Nov. 20, 2023; Decl. Ahvakana ¶ 7, Oct. 24, 2023; Decl. T. Napageak Jr. ¶ 24, Nov. 20, 2023.

injuries recognized by federal courts,[68] nor would they be avoided by an injunction. Plaintiffs have not carried their burden on this *Winter* factor either.

C. Granting the motions will harm Kuukpik's Alaska Native shareholders and Nuiqsut residents, weighing heavily against an injunction.

Plaintiffs' motions require the Court to balance the environmental harms that would occur if the Planned 2023-24 Activities proceed against the countervailing harms that would occur if those construction activities are prohibited during Plaintiffs' appeal.[69] This Court previously relied upon *Earth Island v. Carlton* to guide this balancing effort. There, the court first noted the wide latitude afforded to the district court to weigh each of the *Winter* factors in combination with the others. For example, the court is entitled to give more weight to economic or other impacts that an injunction would cause if a plaintiff only makes a minimal showing of potential success on the merits.[70] The Ninth Circuit therefore upheld the district court's decision to heavily weight the economic consequences

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[68] PI Order at 22, n.93. *Cf.* Decl. Ahtuangaruak ¶¶ 61, 63-67, Nov. 15, 2023, *with Garland v. Orlans, PC*, 999 F.3d 432, 438 (6th Cir. 2021), where the Sixth Circuit analyzed whether "anxiety" could qualify as an "injury in fact" to confer standing, which is a lower bar than establishing irreparable harm to support an injunction; *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 438 (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."). Having many cumulative worries does not change their character nor make injury "likely."

[69] *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (*en banc*) ("Our law does not, however, allow us to abandon a balance of harms analysis just because a potential environmental injury is at issue… Accordingly, we decline to adopt a rule that *any* potential environmental injury *automatically* merits an injunction, particularly where, as in this case, we have determined that the plaintiffs are not likely to succeed on the merits of their claims.").

[70] *Earth Island Inst. v. Carlton*, 626 F.3d 462, 474 (9th Cir. 2010).

of delaying a project, including the government's interest in the revenues the project would generate and the project's importance to the long-term local economy.

Many of the same considerations apply here. Plaintiffs have barely articulated a rationale for how they might succeed on the merits of their appeals. Their asserted harms are attenuated and uncertain. On the other hand, the negative consequences of an injunction to Nuiqsut's cash and subsistence economies are definite and significant. This is not about Conoco; Kuukpik frankly has little interest in the profits Willow will generate for Conoco. What Kuukpik cares about are the significant impacts that needlessly delaying this project will cause in Nuiqsut and the North Slope.

1. The loss of local jobs and individual household income weighs heavily against injunctive relief.

Plaintiffs wrongly assume an injunction will cause no harm other than delayed profits to Conoco and delayed income for affected residents.[71] Issuing an injunction will cause immediate harm to Kuukpik, its shareholders, and Nuiqsut subsistence users.

Allowing Willow construction to begin will facilitate important economic activity in Nuiqsut. An estimated 39% of Iñupiat households in Nuiqsut live below the poverty level.[72] The extraordinarily high cost of living exacerbates the negative impacts this economic situation can have on local people.[73] But development around the community—including Willow—has brought good job opportunities for residents. Wage earners help

[71] SILA Br. at 17-18; CBD Br. at 13-14.

[72] BLM_3512_AR821013 (Ex. A). The unemployment rate remains stubbornly high as well, between 13% and 26%. *Id*.

[73] *See generally* BLM_3512_AR821012-821014

fund their extended family's subsistence efforts.[74]

Enjoining Willow during this appeal would negatively affect Nuiqsut's modest cash economy more than suspending construction last winter would have done. Twenty-eight local subsistence representatives and ice road monitors are scheduled to be employed by Kuukpik this year to monitor Conoco activities between Alpine and Willow, significantly more than were hired last winter.[75] About twelve of those positions would be eliminated if Willow construction is enjoined.[76] These positions "pay a very good wage" and "are some of the best jobs in Nuiqsut for local residents" in part because they "keep locals connected to the land even while industry is operating there."[77]

Similarly, Kuukpik's wholly owned subsidiary, Nanuq, Inc., expects to employ around twenty-five additional Nuiqsut residents this winter. Each resident could earn approximately $42,000 doing that work.[78] Nanuq will not hire these residents if the project is enjoined.

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[74] Decl. Joe Frank Sovalik ¶ 4, Nov. 15, 2023 (Ex. to ConocoPhillips' Opp'n.) ("It is common for people in Nuiqsut to do seasonal work[,]" which provides cash income while enabling residents to "still subsistence hunt during the caribou season of fall and summer."); BLM_3512_AR821013 (Ex. A) ("Participation in subsistence also involved cash expenses for supplies, vehicles, and fuel used in harvests. Nuiqsut subsistence participants reported that they spent an average of $7,109 on subsistence activities in 2019.") (internal citation omitted).

[75] BLM_3512_AR821042 (Ex. A); BLM_3512_AR821083 (Ex. A); Decl. Kaigelak, (Ex. C) ¶ 16, Nov. 29, 2023.

[76] *Id.* ¶ 16.

[77] *Id.* ¶ 15.

[78] Decl. Chris Ledgerwood, (Ex. E) ¶ 5, Nov. 22, 2023.

Kuukpik would also lose out on revenue if the project is enjoined. Kuukpik is scheduled to perform some of the gravel work this winter,[79] but would not do so if the Court halts construction. That lost work would result in less revenue to Kuukpik to fund dividend payments to shareholders that are essential to Nuiqsut.[80]

These consequences far outweigh the harms asserted by plaintiffs' declarants, particularly in light of Plaintiffs' failure to articulate a plausible path to success on the merits and their questionable showings of irreparable harm.[81] Subsistence representative and Nanuq jobs *alone* could employ about ten percent (10%) of Nuiqsut's population this winter (and a significantly higher percentage of its working age population).[82]

Furthermore, even if "economic harm is not normally considered irreparable" such harm *is* irreparable when the injured party will not be able to recover monetary damages.[83] The people who would be most harmed by an injunction are individual community members whose jobs will be lost. Loss of jobs in a community like Nuiqsut is more

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[79] BLM_3512_AR821085 ("Kuukpik Corporation generates revenues from its subsidiaries involved in ice road construction, gravel mining and hauling, civil construction, drilling, seismic exploration, camp support (catering and security), and lodging services in Nuiqsut.").

[80] BLM_3512_AR821013 (Ex. A) ("Nuiqsut Iñupiat households receive 57% of their income from dividend payments (e.g., Kuukpik, ASRC)….").

[81] *Earth Island Inst.*, 626 F.3d at 474.

[82] Decl. Kaigelak, (Ex. C) ¶ 16, Nov. 29, 2023; Decl. Ledgerwood, (Ex. E) ¶ 5, Nov. 22, 2023; BLM_3512_821012. *See Earth Island Inst.*, 626 F.3d at 475 (holding that the district court did not clearly err by heavily weighting the "the public's interest in aiding the struggling local economy and preventing job loss" over potential environmental injuries).

[83] *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018).

disruptive and irreparable because economic opportunities are limited, and large family networks rely on a few wage earners to help support the entire network. Most people in Nuiqsut do not enjoy the privilege of having sufficient savings to cover long-term unemployment.[84] Moreover, without adequate cash, these earners and their family networks will be limited in the resources they are able to allocate to subsistence. Plaintiffs' *laissez faire* attitude regarding a year(s)-long delay in local job opportunities is callous and ignores real needs in Nuiqsut.

2. An injunction would cause less effective, less safe, and more expensive subsistence opportunities.

The Planned 2023-24 Activities would facilitate many of the same benefits this Court considered last winter: the boat ramp and gravel road would improve subsistence opportunities, safety, and mitigate tundra damage. The Willow Road to be constructed this year is about six miles longer than the road extension the Court considered in connection with Plaintiff's earlier injunction motion.[85] This road will provide many of the same benefits that Kuukpik and the Court noted then, just on a larger scale: safe[86] and relatively

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[84] The record does not provide data for Nuiqsut household savings, but given the community's poverty and unemployment rates (BLM_3512_AR821013 (Ex. A)), it is unlikely that household savings surpass the precarious nation-wide savings rate.

[85] Decl. Dunn ¶¶ 3, 9, Aug. 29, 2023; Decl. Brodie ¶¶ 5-6, Nov. 27, 2023.

[86] Decl. Kaigelak, (Ex. C) ¶ 4, Nov. 29, 2023. Nellie Kaigelak, who has hunted and fished around Nuiqsut her entire life, explains that open-tundra hunting, even with a four-wheeler, is risky and sometimes requires rescue. Kaigelak observes that gravel roads make hunting safer and *less* damaging to sensitive vegetative matt:

> I remember hunting before there was a road connecting Nuiqsut to the industry roads between Alpine CD2 and CD5. It was much harder to hunt before the road because you had to drive 4 wheelers out on to the tundra,

easy access to areas that are currently not very usable for subsistence.[87]

Likewise, the boat ramp ConocoPhillips began constructing this past winter should be completed this year. Two more are expected to follow. The ramp to be completed this year will immediately facilitate safer, more economic access to many areas that are valuable for caribou, fishing, and other subsistence activities, such as "really good white fishing" opportunities on the Ublutuoch:

> [Y]ou have to drive your boat down the Colville to the delta or the ocean, go west along the shore, and then back upstream into the rivers. That takes probably a few hours on a boat, which isn't terrible but it's not that easy or safe either, especially if you try to cut through the Colville bog, which is very shallow. You can definitely wreck a boat trying to do that. So it would be better to be able to trailer a boat to those rivers on the gravel road.[88]

The benefits from the road and the boat ramps would occur even if plaintiffs ultimately prevail and Willow is delayed or shelved. A six mile "road to nowhere" would be considerably longer than last year's two-mile road extension. So, there would be more impacts associated with such a road, but the subsistence access that it would facilitate would be remarkable. Under that hypothetical scenario, even the empty gravel pads at the end of the road could become useful subsistence areas because caribou would likely use

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> which is very wet and marshy. It was easy to get stuck and there was more damage to the tundra because of the 4 wheelers that everyone used to go hunting. It also took more time, and you couldn't go as far to find caribou. It was not as safe or comfortable as hunting can be now.

[87] *Id*. ¶¶ 4, 6, 7, 8; Decl. J. Nukapigak, (Ex. B) ¶¶ 14, 16, Mar. 24, 2023.

[88] Decl. Kaigelak, (Ex. C) ¶ 11, Nov. 29, 2023.

them to congregate during insect relief season in particular.[89]

In short, an injunction would negatively impact Nuiqsut by reducing revenue to residents that would help them practice subsistence and by *preventing* expansion of subsistence access that residents want.

D. Furthering congressional goals of Native self-determination and financial independence is in the public interest.

Evaluating whether the public interest is better served by issuing or denying the injunction is a "way of inquiring whether there are policy considerations that bear on whether the order should issue."[90] "In order to merit injunctive relief, the public interests in granting the injunction must 'outweigh other public interests that cut in favor of not issuing the injunction.'"[91] Further, in order to support the "serious legal questions" standard Plaintiffs petition for, the balance of hardships, which is merged with the public interest, must weigh *sharply* in favor of Plaintiffs.[92]

Here, the policy considerations are no different than they were last winter.[93] These

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[89] *Id.* ¶ 9; BLM_3512_AR820961 (Ex. A); BLM_3512_AR820963, Table 3.12.3 Note a (Ex. A).

[90] Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.4 (2d ed. 1994).

[91] *Greater Hells Canyon Council v. Stein*, 2018 WL 7254696, at *6 (D. Or. 2018) (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011)) (preliminary injunction contrary to public interest where "Intervenor-defendant presents evidence of economic benefits to the county that even a delay in logging could impair").

[92] *Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983); *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014).

[93] *See* Kuukpik's Opp'n. to Pls.' Mot. For TRO and Prelim. Inj. at 26-30, 3:23-cv-00061-SLG, ECF No. 58; PI Order at 40-44; *id.* at 43:

policy considerations "tip sharply against" injunctive relief.[94]

As noted at the outset and described in detail by Kuukpik President Joe Nukapigak,[95] Kuukpik has been making decisions about how to balance oil development and subsistence on its own lands and those around it for decades. Kuukpik only supported Conoco's use of Kuukpik land to advance Willow after much deliberation and consideration of the interests of Nuiqsut, Kuukpik's shareholders, and the residents across the North Slope and the State of Alaska, all of whom will benefit from Kuukpik and Nuiqsut shouldering some of the burdens and impacts of this project.[96] Kuukpik's support for the project as approved in the ROD and its opposition to this injunction reflect a careful evaluation that proceeding with the project now is in the best interest of Kuukpik's shareholders and the community. Under ANCSA, and with due regard to the rights of self-determination and sovereignty that have been promised to Alaska Natives, that determination is entitled to great weight.[97]

> In sum, the Court has weighed the environmental harm posed by the proposed Winter 2023 Construction Activities against the economic damages, benefits to most subsistence users, and the state and federal legislative pronouncements of the public interest that would be impacted by a preliminary injunction prohibiting these construction activities at this time, and concludes that the balance of the equities and the public interest tip sharply against preliminary injunctive relief.

[94] *Id.*

[95] *See generally* Decl. J. Nukapigak, (Ex. B) ¶¶ 9-15, 20-21, Mar. 24, 2023.

[96] *Id.* ¶ 20.

[97] 43 U.S.C.A. § 1601 (Alaska Native land claims should be accomplished "in conformity with the real economic and social needs of Natives" and "with maximum participation by Natives in decisions affecting their rights and property….").

So too are the determinations by regional entities such as the Arctic Slope Regional Corporation and the North Slope Borough, and the State of Alaska, all which have joined this litigation to defend a project that each has independently determined is in the best interest of the constituencies it represents. In light of this nearly unanimous legislative and regional support, it is hard to imagine how a court would reach the *opposite* conclusion by finding that the public interest and equities tilted sharply *against* allowing Willow to proceed. [98] Such a determination is not supported by the evidence, the law, or this Court's prior reasoning.

V. CONCLUSION

For these reasons, Kuukpik respectfully requests the court deny the Plaintiffs motions.

Dated: November 29, 2023.

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[98] *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1126–27 (9th Cir. 2008) ("Finally, our consideration of the public interest is constrained in this case, for the responsible public officials…have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal. The San Francisco Board of Supervisors passed it unanimously, and the mayor signed it. We are not sure on what basis a court could conclude that the public interest is not served by an ordinance adopted in such a fashion.") (emphasis added).

By: /s/ Kody P. George
Kody P. George
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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2023, a copy of foregoing INTERVENOR-DEFENDANT KUUKPIK CORPORATION'S JOINT OPPOSITION TO PLAINTIFFS' MOTIONS FOR INJUNCTION PENDING APPEAL, with attachments, was served electronically on all counsel of record through the Court's CM/ECF system.

Dated: November 29, 2023.

By: /s/ Kody P. George
Kody P. George

TABLE OF EXHIBITS

Exhibit No.	Description
A	Bureau of Land Management (BLM), Willow Master Development Plan, Supplemental Environmental Impact Statement (Jan. 2023) (excerpts)
B	Declaration of Joe Nukapigak (March 3, 2023)
C	Declaration of Nellie Kaigelak (November 29, 2023)
D	Declaration of George Seilak (November 28, 2023)
E	Declaration of Chris Ledgerwood (November 22, 2023)