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

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

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

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

Attorneys for Plaintiff-Appellant Center for Biological Diversity

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

Attorneys for Plaintiff-Appellant Natural Resources Defense Council

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; FRIENDS OF THE EARTH; GREENPEACE, INC.; and NATURAL RESOURCES DEFENSE COUNCIL, INC., *Plaintiffs-Appellants,* v. BUREAU OF LAND MANAGEMENT; UNITED STATES FISH AND WILDLIFE SERVICE; NATIONAL MARINE FISHERIES SERVICE; UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF COMMERCE; DEB HAALAND, in her official capacity as Secretary of the Interior; TOMMY P. BEAUDREAU, in his official capacity as Deputy Secretary of the Interior; GINA M. RAIMONDO, in her official capacity as Secretary of Commerce; STEVEN COHN, in his official capacity as Alaska State Director of Bureau of Land Management; SARA BOARIO, in her official capacity as Regional Director of United States Fish and Wildlife Service; and JONATHAN KURLAND, in his official capacity as Regional Administrator of National Marine Fisheries Service, *Defendants-Appellees*, CONOCOPHILLIPS ALASKA, INC.; ARCTIC SLOPE REGIONAL CORPORATION; NORTH SLOPE BOROUGH; KUUKPIK CORPORATION; and STATE OF ALASKA, *Intervenor-Defendants-Appellees*.	**No. 23-35227** On Appeal from the United States District Court for the District of Alaska No. 3:23-cv-00061-SLG Hon. Sharon L. Gleason

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION PER CIRCUIT RULE 27-3 (RELIEF REQUESTED BY APRIL 7, 2023, OR AS SOON AS POSSIBLE THEREAFTER)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: http://www.ca9.uscourts.gov/forms/form16instructions.pdf

9th Cir. Case Number(s) 23-35227

Case Name Center for Biological Diversity v. Bureau of Land Management

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

Plaintiffs-Appellants request that the Court enjoin implementation of Defendants-Appellees' approval of ConocoPhillips Alaska, Inc.'s Willow Master Development Plan in the Western Arctic, including construction activities now ongoing and planned for this winter, pending resolution of this appeal.

Relief is needed no later than *(date)*: 4-7-2023, or as soon as possible thereafter

The following will happen if relief is not granted within the requested time:

ConocoPhillips began surface-disturbing construction related to gravel mining and road construction on April 4, 2023. It anticipates the winter construction season will end by April 25, 2023. Absent an injunction, these activities will irreparably harm Plaintiffs-Appellants.

I could not have filed this motion earlier because:

The district court denied Plaintiffs-Appellants' motion for preliminary injunction on April 3, 2023 (CR 82). It denied their motion for injunction pending appeal on April 5, 2023 (CR 87). Plaintiffs-Appellants filed as promptly as possible thereafter.

I requested this relief in the district court or other lower court: ◉ Yes ○ No

If not, why not:

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: ◉ Yes ○ No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: April 5, 2023

By *(method)*: Email

Position of other parties: Oppose

Name and best contact information for each counsel/party notified:

See attachment.

I declare under penalty of perjury that the foregoing is true.

Signature s/ Erik Grafe **Date** April 5, 2023

*(use "*s/[typed name]*" to sign electronically-filed documents)*

ATTACHMENT TO FORM 16, CIRCUIT RULE 27-3 CERTIFICATE

The names, office addresses, telephone numbers, and e-mail addresses of other counsel are as follows:

Counsel for Defendants-Appellees Bureau of Land Management *et al.*

Rickey Turner, Jr.
U.S. DEPARTMENT OF JUSTICE
Wildlife and Marine Resources Section
999 18th Street, South Terrace,
Suite 370
Denver, CO 80202
T: 303.844.1373
E: rickey.turner@usdoj.gov

Paul A. Turcke
U.S. DEPARTMENT OF JUSTICE
Natural Resources Section
c/o U.S. Attorney's Office
1290 West Myrtle Street, Suite 500
Boise, ID 83702
T: 202.532.5994
E: paul.turcke@usdoj.gov

Amy Elizabeth Collier
U.S. DEPARTMENT OF JUSTICE
Environment and Natural Resources
Division
P.O. Box 7415, Ben Franklin Station
Washington, DC 20044-7415
E: amy.collier@usdoj.gov

Counsel for Intervenor-Defendant-Appellee ConocoPhillips Alaska, Inc.

Ryan P. Steen
Jason T. Morgan
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
T: 206.624.0900
E: ryan.steen@stoel.com
E: jason.morgan@stoel.com

Whitney A. Brown
STOEL RIVES LLP
510 L Street, Suite 500
Anchorage, AK 99501
T: 907.277.1900
E: whitney.brown@stoel.com

Counsel for Intervenor-Defendant-Appellee Arctic Slope Regional Corporation

Stacey Bosshardt
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, DC 20005-3960
T: 202.654.6200
E: SBosshardt@perkinscoie.com

Eric B. Fjelstad
PERKINS COIE LLP
1029 West Third Avenue, Suite 300
Anchorage, AK 99501-1981
T: 907.279.8561
E: EFjelstad@perkinscoie.com

Counsel for Intervenor-Defendant-Appellee North Slope Borough

Tyson C. Kade
Jonathan D. Simon
Melinda L. Meade Meyers
VAN NESS FELDMAN, LLP
1050 Thomas Jefferson Street, NW
Washington, DC 20007
T: 202.298.1800
E: tck@vnf.com
E: jxs@vnf.com
E: mmm@vnf.com

Charlene Koski
VAN NESS FELDMAN, LLP
1191 Second Avenue, Suite 1800
Seattle, WA 98101
T: 206.623.9372
E: cbk@vnf.com

Counsel for Intervenor-Defendant-Appellee Kuukpik Corporation

Patrick W. Munson
Charles A. Cacciola
CHANDLER, FALCONER, MUNSON & CACCIOLA, LLP
911 W. 8th Avenue, Suite 302
Anchorage, AK 99501
T: 907.272.8401
E: pmunson@bcfaklaw.com
E: ccacciola@bcfaklaw.com

Counsel for Intervenor-Defendant-Appellee State of Alaska

Mary Hunter Gramling
STATE OF ALASKA, DEPARTMENT OF LAW
P.O. Box 110300
Juneau, AK 99811-0300
T: 907.465.3600
E: mary.gramling@alaska.gov

Counsel for *Amicus Curiae* United States Senator Lisa Murkowski *et al.*

Jon W. Katchen
William R. Crowther
HOLLAND & HART LLP
420 L Street, Suite 550
Anchorage, AK 99501
T: 907.865.2600
E: jwkatchen@hollandhart.com
E: wrcrowther@hollandhart.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Center for Biological Diversity, Defenders of Wildlife, Friends of the Earth, Greenpeace, Inc., and Natural Resources Defense Council hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

RULES

INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8(a) and Circuit Rule 27-3, Plaintiffs-Appellants (Plaintiffs) move to enjoin implementation of Defendants-Appellees' (BLM) approval of ConocoPhillips Alaska. Inc.'s (ConocoPhillips) Willow Master Development Plan ("Willow" or "Project"), an enormous oil and gas project in the National Petroleum Reserve-Alaska (Reserve), pending appeal of the district court's denial of Plaintiffs' motion for preliminary injunction. Plaintiffs request relief by April 7, or as soon as possible thereafter.

Plaintiffs satisfy the elements necessary to support an injunction. They are likely to succeed on the merits of their legal claims: BLM has again violated the National Environmental Policy Act (NEPA) in the same way it did previously, unlawfully constraining its consideration of alternatives so as to exclude any that would eliminate impacts to designated wildlife special areas in the Reserve or substantially reduce the Project's massive greenhouse gas emissions and resulting climate impacts. Absent relief, Plaintiffs and their members will suffer irreparable harm: ConocoPhillips has already begun mining and road building, which will disturb wildlife and affect subsistence hunting and other uses in an undeveloped area of the Reserve. Those serious and largely permanent harms outweigh temporary harms to Intervenors. Finally, ensuring BLM's compliance with NEPA *before* the Project moves forward is in the public interest.

Injunctive relief is therefore warranted. In its decision holding otherwise, the district court made several consequential legal and factual errors.

BACKGROUND

The Reserve is an extraordinary and ecologically important landscape and is home to numerous species, including polar bears, caribou, moose, and millions of migratory birds. This landscape and wildlife are central to the traditional practices of local Alaska Native peoples. Ex. 3 at 13-23; Ex. 21, ¶¶7-12; Ex. 1 at 246-47. Like other Arctic regions, the Reserve is suffering the effects of the climate crisis more rapidly than the rest of the Earth. Ex. 10 at 43-44.

Because of the Reserve's unique wildlife and subsistence values, the Naval Petroleum Reserves Production Act (Reserves Act) requires the Secretary of the Interior (Secretary) to protect its surface resources any time the Secretary authorizes oil and gas activity there. 42 U.S.C. §§ 6504(a), 6506a(b). Specifically, the Act requires the Secretary to impose "conditions, restrictions, and prohibitions" on such activities that "the Secretary deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects" to those resources. *Id.* § 6506a(b). Congress also designated certain areas, and authorized the Secretary to designate others, for "maximum protection" of "subsistence, recreational, fish and wildlife, or historical or scenic value[s]." *Id.* § 6504(a). Under this authority, the Secretary has designated areas around Teshekpuk Lake and the Colville River,

among others, as Special Areas meriting such protection. 42 Fed. Reg. 28,723 (June 3, 1977).

Industrial activity in the Reserve has largely been limited to the northeastern area closest to existing infrastructure on state lands. Ex. 1 at 6-7; Ex. 10 at 93. Willow would change that, expanding development activities into areas currently free of industrial infrastructure, including the Teshekpuk Lake and Colville River Special Areas. Ex. 10 at 93. The Project would include three drill sites, 25 miles of gravel road, a central processing facility, an operations center, an airstrip, and hundreds of miles of ice roads and pipelines. Ex. 12 at 13-14; Ex. 10 at 36-39. The Project would produce 576 million barrels of oil, resulting in about 239 million metric tons of indirect greenhouse gas emissions over 30 years. Ex. 12 at 22.

BLM approved the first iteration of the Project in October 2020. Ex. 6 at 3. Conservation and Alaska Native groups filed suit and sought a preliminary injunction to halt winter construction activities. *Sovereign Iñupiat for a Living Arctic v. BLM*, No. 3:20-cv-00290-SLG (Dec. 23, 2020) (*SILA*), Doc. 17; *Ctr. for Biological Diversity v. BLM*, No. 3:20-cv-00308-SLG (Dec. 24, 2020), Doc. 9. In February 2021, the court issued a temporary injunction pending the groups' motions for emergency relief in the Ninth Circuit, finding winter construction

likely to cause irreparable harm. *SILA*, Nos. 3:20-cv-00290-SLG, 3:20-cv-00308-SLG, 2021 WL 454280, at *2-3 (D. Alaska Feb. 6, 2021).

The Ninth Circuit affirmed, extending the district court's temporary injunction to the duration of the appeal. *SILA*, Nos. 21-35085, 21-35095, 2021 WL 4228689, at *2 (9th Cir. Feb. 13, 2021). The parties subsequently agreed that construction would not commence while merits litigation proceeded, *SILA*, No. 3:20-cv-00290-SLG (Feb. 26, 2021), Doc. 63, ¶1, and Plaintiffs dismissed their appeal, *id*., Doc. 69. In August 2021, the district court vacated and remanded BLM's approval of the Project and related environmental review documents, finding, among other deficiencies, that BLM violated NEPA by restricting the project alternatives it considered based on the mistaken view that ConocoPhillips had a right to extract all the oil and gas on its leases. *SILA*, 555 F. Supp. 3d 739, 767-78, 805 (D. Alaska 2021).

In February 2022, BLM began its revised environmental review. In July, BLM issued a draft supplemental environmental impact statement (SEIS) under NEPA. Public comments detailed serious flaws, including BLM's failure again to consider a reasonable range of alternatives. *See, e.g.*, Ex. 1 at 37, 42, 72-74; Ex. 17; Ex. 2 at 2-6; Ex. 10 at 979-99. In February 2023, BLM released a final SEIS that failed to correct these problems. On March 13, BLM signed a Record of Decision (ROD) approving the Project. Ex. 12 at 37.

Upon receiving that approval, ConocoPhillips began construction activities slated for this winter: developing a new gravel mine and constructing a permanent road from Greater Mooses Tooth-2 (GMT-2), an existing ConocoPhillips development, to Willow. CR 23, ¶2. The district court denied Plaintiffs' motion for preliminary injunction on April 3, Ex. 31, and denied Plaintiffs' motion for injunction pending appeal on April 5, Ex. 32. ConocoPhillips began ice road construction on March 13 and surface-disturbing construction on April 4. CR 23, ¶¶2, 7.

ARGUMENT

Plaintiffs meet the standard for an injunction pending appeal. As with a preliminary injunction, the moving party must show (1) a likelihood of success on the merits, (2) irreparable harm absent preliminary relief, (3) that the balance of equities favors relief, and (4) that an injunction is in the public interest. *See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Alternatively, the Ninth Circuit applies a "sliding scale" or "serious questions" test. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011).

I. Plaintiffs are likely to succeed on the merits.

A. Plaintiffs demonstrated a likelihood of success on their underlying claim that BLM violated NEPA by failing to consider reasonable alternatives.

Of the several flaws Plaintiffs will challenge in the litigation, they focus for purposes of this motion on one of BLM's legal errors: its failure to consider a reasonable range of alternatives.[1]

NEPA requires agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives" to a proposed action. *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1100 (9th Cir. 2010) (citation omitted). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Id*. (citation omitted). BLM here unlawfully eliminated reasonable alternatives that would minimize adverse impacts on the climate and special areas.

The district court previously held that BLM acted unlawfully when it first approved Willow by "develop[ing] its alternatives analysis based on the view that ConocoPhillips has the right to extract all possible oil and gas on its leases." *SILA*, 555 F. Supp. 3d at 770. The court concluded that this view contravenes BLM's responsibility under the Reserves Act "to mitigate adverse effects on [] surface resources." *Id.* at 769 (citing 42 U.S.C. § 6506a(b)). It also concluded that "[t]he leases do not grant the lessee the unfettered right to drill wherever it chooses or

[1] The district court did not reach the merits prong.

categorically preclude BLM from considering alternative development scenarios." *Id.* at 768. It similarly held that BLM wrongly eliminated an alternative that would prohibit or limit infrastructure in the Teshekpuk Lake Special Area, given its statutory obligation to give such areas "maximum protection." *Id.* at 769.

On remand, BLM has *again* restricted the alternatives considered, refusing to consider an alternative that would prohibit infrastructure in the Teshekpuk Lake and Colville River Special Areas, or one that would substantially reduce production and resultant greenhouse gas emissions. *See* Ex. 1 at 29, 42-47; Ex. 2 at 4; Ex. 20 at 3-4; Ex. 15 at 2, 4, 9-10.

Instead, the alternatives in the final SEIS are variants of the same project ConocoPhillips proposed, as in the prior EIS, Ex. 5 at 7-8, 22, 30-32, plus one new Alternative E that consolidates two well pads in the Teshekpuk Lake Special Area into one larger pad and defers approval of another pad to the south. Ex. 10 at 26-27, 31-33. But this one additional alternative fails to solve the problem. It, like the others, includes drill pads and other infrastructure within the Teshekpuk Lake Special Area and roads and pipelines crossing the Colville River Special Area. Ex. 10 at 25-27. And each alternative would result in similar and substantial oil production and greenhouse gas emissions, none less than 97 percent of ConocoPhillips' proposal. *Id.* at 46-63, 116-18; CR 69 at 7. The ROD adopts what BLM calls a "minor variation" of Alternative E: one that denies rather than

defers the southern pad but still places infrastructure in the Teshekpuk Lake and Colville River Special Areas and allows ConocoPhillips to access 92 percent as much oil as its own proposal. Ex. 12 at 12-14; *compare id.* at 22 (576 million barrels of oil for the approved Project), *with* Ex. 10 at 117 (628.9 million barrels of oil for ConocoPhillips' proposal).

As in its previous remanded decision, BLM cabined its analysis by adopting a limited view of its authority. BLM chose the alternatives in the draft SEIS based on screening criteria that referenced the district court's decision, but also included requirements that alternatives must allow ConocoPhillips to "fully develop" the field, so as not to "strand an economically viable quantity of oil." Ex. 8 at 7; *see also id.* at 3-4. Though BLM deleted a reference to the latter criteria in the similar portion of the final SEIS, Ex. 10 at 107a, elsewhere the final SEIS shows these criteria remained critical.

For example, in responding to comments, BLM maintained that ConocoPhillips must "fully develop" the oil under its leases, and therefore BLM must only consider alternatives allowing "full field development." *Id*. at 98. BLM thus explained it eliminated alternatives that would meaningfully reduce oil production and emissions or prohibit infrastructure in special areas because they "would strand an economically viable quantity of recoverable oil." *Id.* at 109-10, 112.

Below, Defendants did not dispute that BLM applied this constraint to its development of alternatives, CR 48 at 17 n.8; CR 54 at 18, but nevertheless defended the SEIS based on the improvements in its one new Alternative E. Their arguments, though, avoid the fundamental flaw created by this constraint.

BLM's position is unlawful for the same reason as before: it defies the agency's "statutory responsibility to mitigate adverse effects." *SILA*, 555 F. Supp. 3d at 769. There is no meaningful difference between "extract[ing] all possible oil," previously found unlawful, *id*. at 770, and not "strand[ing] an economically viable quantity of oil."

But even if there were, the current formulation is not justified. The Reserves Act requires BLM to protect the Reserve's "environmental, fish and wildlife, and historical or scenic values." 42 U.S.C. § 6503(b). Furthermore, BLM "shall include or provide for such conditions, restrictions, and prohibitions as [it] deems necessary or appropriate to mitigate reasonably foreseeable and significantly adverse effects on the surface resources of the [Reserve]." *Id.* § 6506a(b).

Under this authority, BLM can limit or reject a development proposal if impacts are too significant and cannot be mitigated. *See id.*; 43 C.F.R. § 2361.1(e)(1) (BLM "may limit, restrict, or prohibit use of and access to lands within the Reserve"); 43 C.F.R. § 3135.2(a)(1), (3) (BLM may suspend production to protect natural and surface resources); *N. Alaska Env't Ctr. v. Kempthorne*,

457 F.3d 969, 976 (9th Cir. 2006) (BLM "can condition permits for drilling [in the Reserve] on implementation of environmentally protective measures, and we assume it can deny a specific application altogether if a particularly sensitive area is sought to be developed and mitigation measures are not available."). BLM can no more decline to fulfill these protective responsibilities based on an assertion that doing so would strand some economically viable oil than it can because it would preclude development of all possible oil.

ConocoPhillips' lease rights do not undercut BLM's authority, *SILA*, 555 F. Supp. 3d at 768-69, or justify BLM's alternatives criteria. Rather, the lease terms specifically allow BLM to restrict development by "specify[ing] rates of development and production" and requiring measures to "minimize adverse impacts to the [environment], to cultural, . . . and other resources, and to other land uses or users." Ex. 7 at 99, ¶¶4, 6.

Finally, neither does the SEIS's statement of purpose—"to construct the infrastructure necessary to allow the production and transportation to market of federal oil and gas resources in the Willow reservoir," Ex. 10 at 29-30—justify BLM's alternatives constraint. An alternative that reduces total oil production and emissions or that prohibits infrastructure in the Teshekpuk Lake Special Area is entirely consistent with this purpose, as ConocoPhillips effectively acknowledged

in its briefing below admitting that the purpose would be satisfied by an alternative that "allow[s] for *some* development of oil." CR 54 at 19.

B. Plaintiffs are likely to succeed on the merits of their appeal of the denial of their preliminary injunction.

This Court reviews the denial "of a preliminary injunction for an abuse of discretion," "factual findings for clear error," and "the underlying legal conclusions de novo." *Washington v. U.S. Dep't of State*, 996 F.3d 552, 560 (9th Cir. 2021). Here, the district court denied Plaintiffs' motion because it determined Plaintiffs had not shown a likelihood of irreparable harm and the balance of equities did not support an injunction. As discussed in the sections below, the district court made several clear errors of fact and law in its decision.

II. Plaintiffs are likely to suffer irreparable harm without an injunction.

A. Plaintiffs' declarants fully documented irreparable harm from this winter's construction activities.

Plaintiffs provided detailed evidence of irreparable harm from Dr. Rosemary Ahtuangaruak, a member of Plaintiff Friends of the Earth and Mayor of Nuiqsut. Ex. 21, ¶¶3-4. Dr. Ahtuangaruak's testimony details the immediate effect that winter ground-disturbing activities from the mine and road would have on her and her family from both disruption during the construction season and the permanent presence of this new infrastructure in previously undeveloped areas. Specifically, she observed that the site of the planned gravel mine, along the Tiŋmiaqsiuġvik River, is a "beautiful" area that "has been a place of wellness for me," whose

qualities will be permanently destroyed by industrial development. Ex. 21, ¶¶51, 53, 54. She highlighted the use of the affected areas for central parts of her way of life, such as berry picking and subsistence hunting. She described that the mine location "is part of our traditional use areas," that she and her family "hunt caribou where the mine would be," and that she "worr[ies] that all the noises and activities from the mine will affect caribou migrations through that area." *Id.*, ¶54.[2]

These concerns are rooted in her long experience in the greater project area. She described that she and her family were forced to travel further to hunt caribou in undeveloped places, like the mine site, to maintain their subsistence practices due to the effects of oil infrastructure, traffic, and overflights on caribou migration patterns. *Id.*, ¶¶13-18, 23, 99-100. She described how the loss of even a single opportunity to practice subsistence activities can inflict permanent harm. *Id.*, ¶13-14; *see also id.*, ¶¶22 (similar example). Failed hunts threaten not only the food security of Dr. Ahtuangaruak and her family, but their physical and mental health as well. *Id.*, ¶¶13-15, 17-21, 42-44, 48-49, 51, 54, 83-84, 86, 92, 96-100, 108. She

[2] In its opposition to Plaintiffs' injunction motion, ConocoPhillips offered testimony suggesting that other hunters do not hunt in the area near the mine that Dr. Ahtuangaruak utilizes. But in the very declarations it offers, there is also direct evidence that the mine site is used for hunting. CR 54-6, ¶¶12-13 (acknowledging that there is a "current trail out that direction" used for hunting). Kuukpik also provides a declaration from a community member that corroborates use of the area for hunting. CR 58-3, ¶9.

also described that she experienced mining blasts that shook "houses, bodies, and minds," cracking windows and agitating elders. *Id.*, ¶53.

Dr. Ahtuangaruak's concerns are supported by BLM's own analysis. In the near-term, construction activities will occur within a high-use subsistence area, at a time when such use is at its "highest." Ex. 10 at 82, 95; *see also* Ex. 4 at 25 (depicting this winter's activities taking place within high-density caribou winter habitat); Ex. 3 at 28 (confirming that even a temporary disruption of harvest patterns would have negative effects on subsistence users). Mining for gravel requires blasting, which produces the loudest sound levels projected for the Project. Ex. 10 at 76; *id.* at 64-65 (describing blasting sound not dissipating to ambient levels for more than 100 miles). That noise would disturb and displace caribou from around the mine site. Ex. 10 at 76. Roads, along with associated traffic and human activity, deflect and delay caribou movement. *Id.* at 83. Caribou are least likely to cross a road when traffic exceeds 15 vehicles per hour, as would occur during construction for Willow. *Id.* at 75-77. Negative effects on caribou caused by wintertime disturbances could increase mortality or reduce calf productivity. Ex. 3 at 26.

Because the point of this winter's mine and road construction is to create long-lasting infrastructure, it will also result in permanent damage to areas Dr. Ahtuangaruak uses. For example, mine and gravel road construction "would result

in the removal or disturbance of habitat for resources such as fish . . ., waterfowl, and caribou." Ex. 10 at 81. The gravel road would cause changes in surrounding soil, affecting the tundra, and "would increase mechanisms for invasive species." *Id.* at 68. As BLM acknowledged, "except perhaps for a small proportion of the most tolerant females, maternal caribou do not habituate to road traffic during the calving period." *Id.* at 75; *see also id.* at 79 (noting that long-term changes in caribou distribution or migration may extend beyond the life of the Project). "[L]arge deflections of caribou away from the area west of Nuiqsut would have substantial impacts to subsistence users." *Id.* at 85.

In short, this winter's construction activities will cause Dr. Ahtuangaruak and her family immediate harm and have lasting consequences for their traditional way of life.[3]

This winter's construction activities will also adversely affect Plaintiffs' member, Daniel Ritzman, who intends to travel down the Colville River this summer, ending his trip in Nuiqsut, and plans to visit the Ublutuoch River, where the mine would be. Ex. 22, ¶27; Ex. 12 at 50 (showing the mine will be placed

[3] In their briefing below, ConocoPhillips provided testimony from some subsistence users describing benefits of roads to their own subsistence practices. CR 54-4, ¶4. That other subsistence users may find roads useful for *their* subsistence activities does not rebut Dr. Ahtuangaruak's testimony that the mine and road construction this winter would harm *her* subsistence activities.

within the river setback). The presence of a mine and road would harm his enjoyment of the landscape and could diminish his ability to view raptors, caribou, and other wildlife. Ex. 22, ¶¶11, 18, 20-21, 27-31.

ConocoPhillips' immediate construction activities would cause irreparable and long-term harm to Plaintiffs' members' ability to "view, experience, and utilize" the Project area in its "undisturbed state." *Cottrell*, 632 F.3d at 1135; *see also SILA*, 2021 WL 454280, at *3 (once blasting begins, the landscape will be "irreparably altered"); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.").

B. The district court erred in dismissing Plaintiffs' evidence of harm.

The district court committed legal error in holding Plaintiffs to an incorrect standard of harm. The district court faulted Plaintiffs for failing to show that Dr. Ahtuangaruak would not be able to harvest caribou in another location if unable to do so at the mine site. Ex. 31 at 27. But "[t]his argument proves too much."

Cottrell, 632 F.3d at 1135.[4] Were this the standard, "a plaintiff c[ould] never suffer irreparable injury resulting from environmental harm in a[n] … area as long as there are other areas … that are not harmed." *Id*. Thus, the focus of the inquiry is on harm to the plaintiffs' use of the area at issue, not on the availability of different areas to use. *See id*.

Also applying an incorrect standard, it found that Plaintiffs failed to demonstrate "a likelihood of irreparable harm to subsistence caribou hunters" *as a class*. Ex. 31 at 23 (citing "competing narratives from subsistence hunters"). But as described, *supra* pp. 11-14, Dr. Ahtuangaruak attested that this winter's activities will harm her specifically by impeding subsistence caribou hunting in the mine area. This evidence of individual harm suffices to support an injunction. *See Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008) (a plaintiff must establish "that *he* is likely to suffer irreparable harm" (emphasis added)).

Finally, the district court made a serious factual error when it dismissed Dr. Ahtuangaruak's evidence of harm on the basis that her testimony about her use of the mining area has changed from what she said in support of Plaintiffs' challenge

[4] The district court distinguishes *Cottrell* on the ground that it involved disruption of more acres than the mine, Ex. 31 at 29, but *Cottrell* turns on whether the disturbance irreparably affects plaintiffs' use of an area, not whether that area is large. *Cottrell*, 632 F.3d at 1135; *see also California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (noting irreparable harm "analysis focuses on irreparability, 'irrespective of the magnitude of the injury'").

to the first Willow approval. During that challenge, the court issued an injunction based in part on Dr. Ahtuangaruak's testimony demonstrating irreparable harm from the same proposed mining and road building at issue here. *SILA*, 2021 WL 454280, at *3. And this Court affirmed and extended that injunction. *See SILA*, 2021 WL 4228689, at *2.

In the present challenge, the district court again concluded that "'there is a strong likelihood of irreparable environmental consequences once blasting operations commence'" this winter and cited Dr. Ahtuangaruak's prior testimony that the mine would harm her ability to "'hunt caribou where the mine is going to be located.'" Ex. 31 at 26 (quoting *SILA*, 2021 WL 454280, at *3). But then the court concluded that her current testimony had changed, interpreting a separate statement about different harm relating to boat access to the Tiŋmiaqsiuġvik River where it meets the Colville River as evidence that she no longer uses the area for caribou hunting. *Id.* at 26-27. However, Dr. Ahtuangaruak's current declaration contains the very same evidence of use of the mining area as her prior declaration: "We hunt caribou where the mine is going to be located," the "area, like the whole Willow Project area, is part of our traditional use areas," and "I also worry about the impacts that gravel mine will have on caribou." Ex. 21, ¶54; *compare* Case

No. 3:20-cv-00308-JWS, Doc. 9-13, ¶36. This is evidence of irreparable harm, and the district court abused its discretion in concluding otherwise.[5]

III. The balance of equities and public interest tip in Plaintiffs' favor.

A. Plaintiffs have established immediate and permanent harm, while Intervenors have shown only temporary harm.

As detailed above, this winter's construction activities will cause both immediate and permanent harm to Plaintiffs' members, including Dr. Ahtuangaruak, and to the environment. In contrast, the harm to Intervenors from an injunction is largely temporary and economic. The balance thus tips sharply in Plaintiffs' favor.

Intervenors and Amici argued below that an injunction would cause them extensive economic and other harms, including lost tax revenues and weakened energy security. *See, e.g.*, CR 56 at 2; CR 55-1 at 8-11. But they failed to demonstrate that such harms "would occur while the preliminary injunction is in place." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 765 (9th Cir. 2014). Rather, those harms are likely to materialize only if the Project, as a whole, is never built. *See* CR 54 at 43

[5] The district court also erred in discounting evidence of caribou impacts from the SEIS based on the observation that overall caribou hunting is low in winter compared to other seasons, Ex. 31 at 24, because the court ignored that subsistence hunters "often travel to certain areas at specific times of the year" and "subsistence uses in [the mine] area are at their peak" in winter. Ex. 10 at 82. Hunters would be harmed if unable to harvest caribou there.

(indicating energy security benefits and majority of economic benefits are lost only in the event of Project failure). They are therefore irrelevant to Plaintiffs' motions for preliminary relief, which concern only this winter's construction activities.

Indeed, although ConocoPhillips asserted that delay might lead to lease cancellation to argue that a preliminary injunction risks viability of the entire Project, CR 54 at 3, 42-43, that argument fails. The statute it cited specifies that no lease "shall expire" where the lessee fails to produce oil "due to circumstances beyond the[ir] control." 42 U.S.C. § 6506a(i)(6). Where such circumstances exist, BLM can suspend the lease term. 43 C.F.R. § 3135.2. Here, a temporary injunction halting construction activities would create a delay beyond ConocoPhillips' control, allowing ConocoPhillips to seek a suspension and sparing it from lease expiration—and thus avoiding any harms pegged to completion of the entire Project.

What remains are limited impacts stemming from the postponement of this winter's construction activities. As to ConocoPhillips, any such impacts are purely financial and insufficient to tip the balance of equities in its favor, particularly since the company assumed that financial risk "with full awareness" of this potential litigation and "chose to gamble on the [S]EIS being adequate." *N. Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1557 (9th Cir. 1988); *see also* CR 54 at 41 & CR 54-11, ¶6 (describing already executed construction contracts). As to

certain Nuiqsut community members, the value to them from road construction this winter—both in the form of seasonal jobs and subsistence benefits—is real and significant. *See, e.g.*, CR 58 at 3-4, 16, 18-20; CR 54 at 39-41. But the harm they would face as the result of an injunction is temporary; once the litigation is resolved, then the Project may proceed and those benefits "will be realized." *Connaughton*, 752 F.3d at 765-66.

When properly stacked against each other, the immediate and long-lasting impacts that mining and road-building activities would have on the area, and on Plaintiffs' members and the wildlife who use it, "outweigh the temporary delay intervenors face in receiving a part of the economic benefits of the project." *Id.* at 766; *see also S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (per curiam) (reversing in part district court's denial of preliminary injunctive relief despite employment loss, which "may for the most part be temporary"); *Se. Alaska Conservation Council*, 472 F.3d at 1101 (denying motion to vacate injunction pending appeal stopping construction of dam and mine because injunction would not "reduce significantly any future economic benefit" from the mine's operation); *N. Alaska Env't Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (affirming preliminary injunction despite potential for "real financial hardship" to miners).

B. The district court skewed its balancing analysis by improperly minimizing Plaintiffs' harm and inflating Intervenors'.

The district court's flawed conclusion that Plaintiffs would not likely suffer irreparable harm tainted its balancing analysis. Specifically, because the court mistakenly concluded that Dr. Ahtuangaruak would not likely be harmed by construction of the mine, it did not account for and properly balance the likely permanent harm resulting from the mine against the temporary harms to Intervenors from a preliminary injunction. Instead, relying significantly on *Amoco*, the court reasoned that deferral of economic benefits to residents of Nuiqsut "may outweigh any potential harm to subsistence hunters that construction may cause." Ex. 31 at 37-38. But in *Amoco*, the Supreme Court held that the district court wrongly issued a preliminary injunction in part because injury to subsistence resources "was not at all probable." 480 U.S. at 545. Dr. Ahtuangaruak's declaration demonstrates that such harm here is very likely, and so this aspect of *Amoco* and similar cases does not apply.[6]

The district court also wrongly conflated Intervenors' temporary harms caused by a delay in this winter's construction activities with long-term harms that would occur only if the Project were never completed. It began by citing the

[6] This case is further unlike *Amoco* because, there, the oil company stood to lose $70 million, 480 U.S. at 545, whereas here, ConocoPhillips "did not provide any evidence as to what its economic loss would be for this year," Ex. 31 at 36 n.144.

correct legal standard—that it "must consider the effect on each party of the granting or withholding of the requested relief." Ex. 31 at 31 (quoting *Amoco*, 480 U.S. at 542). And it agreed with Plaintiffs and found ConocoPhillips' assertion that an injunction "would place the entire project at risk" unpersuasive. *Id.* at 36 n.144. But the court went on to apply the legal standard incorrectly, crediting certain allegations of harm that simply would not be an "effect" of the injunction.

For example, the district court accepted that a preliminary injunction would negatively affect workforce development and training programs, tax revenues, grant-making capabilities, and dividend income. *Id.* at 35-36. It also placed considerable weight on the Alaska legislature's and congressional delegation's support for the Project. *Id.* at 41-43. But those benefits and public officials' support are based overwhelmingly on the Project as a whole and are irrelevant to Plaintiffs' motions. *See, e.g.*, CR 55-3 at 3-4 (state legislature's resolution declaring that construction delay "undermines the values and benefits of the project," while naming royalty payments and enhanced energy security as such benefits); CR 55-1 at 10-11 (Amici's brief touting revenues that would accrue "*over the life of the Project*" (emphasis added)); *supra* pp. 18-20. Similarly, the district court noted that some subsistence hunters believe the road extension from GMT-2 to Willow would be beneficial for both hunting and search and rescue. Ex. 31 at 39. But those benefits would be only partly realized this winter if

construction were to proceed, and would be deferred, not denied, by an injunction. *See* CR 58-2, ¶¶9-10.

By including these harms in its analysis, the district court effectively inflated Defendants' and Intervenors' side of the balancing equation, *see* Ex. 31 at 34 (finding those economic interests to be "substantial"), and failed to "proportionally diminish total harms to reflect only the time when a preliminary injunction would be in place." *Connaughton*, 752 F.3d at 767.

C. An injunction pending appeal is in the public interest.

Ensuring federal agencies' faithful compliance with federal laws "comports with the public interest." *Cottrell*, 632 F.3d at 1138 (citation omitted). Indeed, "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward." *S. Fork Band Council*, 588 F.3d at 728 (holding that suspending a mining project until the agency revised its NEPA analysis served the public interest). Here, Plaintiffs have demonstrated a likelihood of success on the merits of their claim that BLM violated NEPA, and the public interest is best served by an injunction pending adjudication of BLM's compliance with the law.

In concluding instead that the public interest favored Defendants, the district court again placed substantial weight on public officials' support for Willow. As detailed above, however, much of that support is irrelevant because it is premised

on the Project's overall benefits that will accrue over a 30-year period. And while Amici also pointed to some more immediate economic benefits, such as construction jobs, *see* CR 55-1 at 10, they incorrectly claimed that such benefits will be "los[t]" or "kill[ed]" by the injunction, *id.* To the contrary, those benefits "will not be completely foregone," only temporarily delayed by the injunction. *Connaughton*, 752 F.3d at 767; *supra* pp. 18-20.

The district court further erred by concluding that its consideration of the public interest was "constrained" by the Alaska legislature's and congressional delegation's unanimous support of the Project. Ex. 31 at 41. But the cases it relied on, unlike here, involved locally enacted rules, orders, and ordinances that were the subject of the litigation. The federal statutes directly implicated by this case—NEPA and the Reserves Act—reflect Congress' intent that oil development be accompanied by careful analysis and protection of affected environmental resources. *Supra* pp. 2-3; *contra* Ex. 31 at 42-43 (focusing only on oil development aspect).

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court enjoin implementation of BLM's approval of ConocoPhillips' Project while appeal of the district court's denial of Plaintiffs' motion for preliminary injunction is pending.

Respectfully submitted this 5th day of April, 2023.

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

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

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

Attorneys for Plaintiff-Appellant Center for Biological Diversity

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

Attorneys for Plaintiff-Appellant Natural Resources Defense Council

STATEMENT OF RELATED CASES PURSUANT TO

CIRCUIT RULE 28-2.6 AND FORM 17

9th Cir. Case No. 23-35227

The undersigned attorney states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[x] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Sovereign Iñupiat for a Living Arctic et al. v. Bureau of Land Management et al., No. 23-35226 (9th Cir.). The case challenges the same action as this case.

Signature: *s/Erik Grafe* **Date:** April 5, 2023

CERTIFICATE OF COMPLIANCE

I certify that:

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

(ii) This document contains 5,587 words, excluding items exempted by Federal Rule of Appellate Procedure 32(f). When divided by 280, the word length of this document does not exceed 20 pages in compliance with Circuit Rules 27-1(1)(d) and 32-3(2).

Dated: April 5, 2023

s/ Erik Grafe
Erik Grafe

TABLE OF EXHIBITS[1]

Center for Biological Diversity et al. v. Bureau of Land Management et al., No. 23-35227

Exhibit No. (Dist. Court Doc. No.)	Description
1 (Doc. 24-1)	Alaska Soles Great Old Broads for Wilderness *et al.*, Comments on Willow Master Development Plan Draft Supplemental Environmental Impact Statement (Aug. 29, 2022)
2 (Doc. 24-2)	Alaska Wilderness League *et al.*, Comments on Willow Master Development Plan Supplemental Environmental Impact Statement (Feb. 2, 2022) (excerpt)
3 (Doc. 24-3)	Bureau of Land Management (BLM), National Petroleum Reserve-Alaska, Final Integrated Activity Plan/ Environmental Impact Statement (Nov. 2012) (excerpts)
4 (Doc. 24-4)	BLM, National Petroleum Reserve in Alaska, Final Integrated Activity Plan and Environmental Impact Statement (June 2020) (excerpts)
5 (Doc. 24-5)	BLM, Willow Master Development Plan, Final Environmental Impact Statement (Aug. 2020) (excerpts)
6 (Doc. 24-6)	BLM, Willow Master Development Plan, Record of Decision (Oct. 26, 2020) (excerpts)

[1] In addition to the district court's decisions, Exs. 31 & 32 (CR 82 & 87), Plaintiffs-Appellants have included exhibits to materials they cite in the Emergency Motion. To aid cross-referencing, they have retained the exhibit numbers designated in their preliminary injunction motion in the district court, CR 24.

7 (Doc. 24-7, 24-8)	BLM, Executed leases for the Willow Project area, as provided by BLM in *Center for Biological Diversity et al. v. BLM et al.,* Case No. 3:20-cv-00308-SLG, Docs. 118, 118-2, 118-3, and 118-4 (July 16, 2021)
8 (Doc. 24-9)	BLM, Willow Master Development Plan, Draft Supplemental Environmental Impact Statement (June 2022) (excerpts)
10 (Doc. 24-11, 24-12, 24-13)	BLM, Willow Master Development Plan, Final Supplemental Environmental Impact Statement (Jan. 2023) (excerpts)
12 (Doc. 24-15)	BLM, Willow Master Development Plan, Record of Decision (Mar. 13, 2023)
15 (Doc. 24-18)	R. Chu, Environmental Protection Agency, Letter to S. Rice, BLM (Aug. 29, 2022)
17 (Doc. 24-19)	Earthjustice, Comments on Willow Master Development Plan Draft Supplemental Environmental Impact Statement – BLM's Decision-Making Authority (Aug. 29, 2022)
20 (Doc. 24-22)	Alaska Wilderness League *et al.*, Comments on Willow Master Development Plan Draft Environmental Impact Statement (Oct. 29, 2019) (excerpt)
21 (Doc. 24-23)	Declaration of Rosemary Ahtuangaruak
22 (Doc. 24-24)	Declaration of Daniel Ritzman
31 (Doc. 82)	Order re Motions for Temporary Restraining Order and Preliminary Injunction (Apr. 3, 2023)
32 (Doc. 87)	Order Granting Motion to Expedite and Denying Plaintiffs' Motion for Injunction Pending Appeal (Apr. 5, 2023)