Bridget Psarianos (AK Bar No. 1705025)
Suzanne Bostrom (AK Bar No. 1011068)
Brook Brisson (AK Bar No. 0905013)
Brian Litmans (AK Bar No. 0111068)
TRUSTEES FOR ALASKA
1026 W. Fourth Avenue, Suite 201
Anchorage, AK 99501
Phone: (907) 276-4244
Fax: (907) 276-7110
bpsarianos@trustees.org
sbostrom@trustees.org
bbrisson@trustees.org
blitmans@trustees.org

Attorneys for Plaintiffs

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SOVEREIGN IÑUPIAT FOR A LIVING ARCTIC, *et al.*, Plaintiffs, v. BUREAU OF LAND MANAGEMENT, *et al.*, Defendants, and CONOCOPHILLIPS ALASKA, INC., Intervenor-Defendant.	Case No. 3:20-cv-00290-SLG

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION (Fed. R. Civ. P. 65)
[EXPEDITED RULING REQUESTED BY FEBRUARY 1, 2021]

TABLE OF CONTENTS

INTRODUCTION

Plaintiffs, Sovereign Iñupiat for a Living Arctic *et al.* (collectively, Plaintiffs) request a limited temporary restraining order and preliminary injunction (TRO/PI) to preclude construction activities for the Willow Master Development Plan (Willow) from occurring while the case is resolved on the merits.

The Willow project is in the National Petroleum Reserve-Alaska (Reserve). The Reserve is the largest and one of the wildest expanses of America's public lands. Stretching across the Western Arctic, from the Chukchi and Beaufort Seas to the foothills of the Brooks Range, it provides important habitat for wildlife, including fish, grizzly and polar bears, wolves, birds, and caribou.

Construction activities by ConocoPhillips Alaska, Inc. (ConocoPhillips) for Willow, including gravel mining and road construction, will irreparably harm wetlands, tundra, wildlife, and the community of Nuiqsut.

The Bureau of Land Management (BLM) rushed its environmental impact statement (EIS) review and approved Willow despite a lack of baseline data and information about the project design. The U.S. Fish and Wildlife Service (FWS) issued a flawed Biological Opinion (BiOp) in support of the final EIS and BLM's record of decision (ROD). Relying on its Willow ROD, BLM is poised to issue a 30-year right-of-

way grant and permits to drill, approving ConocoPhillips to begin gravel mining and road construction.[1] ConocoPhillips will begin activities on February 2, 2021.[2]

The TRO/PI are necessary to prevent irreparable harm to the resources of the Reserve, as well as Plaintiffs' and member's interests, before the Court has an opportunity to issue a decision on the merits.

BACKGROUND

At approximately 22.8 million acres, the Reserve is the nation's largest single public land unit. It provides rich habitat for wildlife, and is home to the Western Arctic and Teshekpuk Lake Caribou Herds, key subsistence resources for communities across northwest Alaska.

The Reserve is a mosaic of tundra wetlands, "covered with lakes, ponds, and generally slow-moving streams."[3] The Ublutuoch River and Fish Creek, which will be impacted by Willow, are two of the most significant coastal rivers and are important for subsistence use.[4] The Colville River "is the largest river draining the Alaskan Arctic and its size and unique land features set it apart from other rivers."[5] These rivers, lakes, wetlands, and floodplains provide many essential functions including regulating runoff

[1] Ex. 28.
[2] ECF No. 14.
[3] Ex. 29 at 4.
[4] *Id*. at 4–5.
[5] *Id*. at 3.

cont…

and retaining or distributing nutrients, sediments, and toxins.[6] Because of the importance of rivers and floodplains to wildlife, subsistence, and aquatic resources, BLM established "setbacks" prohibiting permanent oil and gas facilities and certain activities along many lakes and rivers.[7] Relevant to Willow are the 0.5-mile setback on the Ublutuoch River and Judy Creek, and the 3-mile setback on Fish Creek.[8]

The Reserve also provides denning habitat for polar bears, protected by the Marine Mammal Protection Act (MMPA) and a threatened species under the Endangered Species Act (ESA).[9] The Southern Beaufort Sea (SBS) polar bear stock occurs in the vicinity of Willow's onshore and offshore activities and is among the most imperiled stocks in the world.[10] Climate change has reduced polar bear populations to a precarious state, which is worsening as Arctic warming accelerates.[11] Noise and visual disturbance from human activity and equipment operation, especially aircraft and vehicle traffic, disturbs polar bears.[12] Disturbance of maternal females during denning can cause premature den abandonment, adversely affecting polar bear cub survival.[13]

---

[6] *Id*. at 2.

[7] *Id*. at 1 (explaining setbacks protect waterfowl, fish, caribou, riparian values, and subsistence).

[8] Ex. 24 at 11.

[9] 73 Fed. Reg. 28212 (May 15, 2008); 75 Fed. Reg. 76086 (Dec. 7, 2010).

[10] Ex. 26 at 4–6; Ex. 30 at 4, 7.

[11] 75 Fed. Reg. 76086.

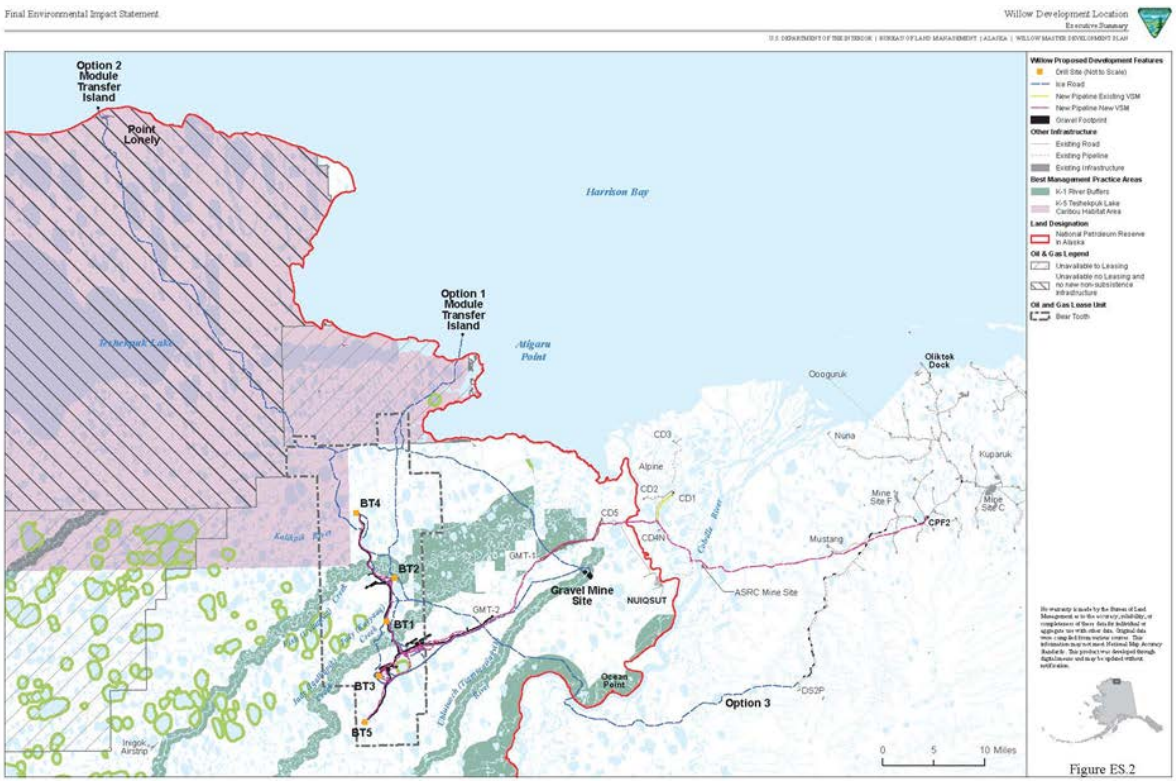
[12] Ex. 26 at 7–8.

[13] *Id*. at 7.

cont…

BLM began the National Environmental Policy Act (NEPA) process for Willow in 2018 with scoping. It released a draft EIS in August 2019 and a supplemental draft EIS in March 2020.[14] As shown on the map below,[15] Willow includes an extensive oil and gas production facility and infrastructure network that would result in the direct, permanent loss of wetlands from fill and excavation, with even greater impacts extending well beyond that footprint.[16] It would include a spiderweb of new gravel roads connecting to ConocoPhillips' Alpine field and roads, a new central processing facility and infrastructure pad, up to five satellite drill pads with up to seventy wells each, an airstrip, 300+ miles of pipelines, an ice bridge over the Colville River, and bridges over Fish and Judy Creeks.[17] It also includes two gravel mine sites within the Ublutuoch River setback.[18] Willow requires a variety of approvals from BLM, including rights-of-way, permits to drill, and contracts for gravel mining to obtain fill material. As such, BLM was the lead agency for the NEPA process.

[14] Ex. 23 at 1.
[15] Ex. 24 at 39.
[16] Fennessy Dec. at 4, 12–13, 15.
[17] Ex. 24 at 3–8.
[18] *Id.* at 5.



Another key permit related to the project is the Clean Water Act (CWA) Section 404 permit from the U.S. Army Corps of Engineers (Corps) for the discharge of fill into wetlands. The Corps was a cooperating agency on the EIS, which purported to fulfill the Corps' NEPA obligations.[19] However, ConocoPhillips did not submit its CWA permit application until after the completion of the draft EIS.[20]

Plaintiffs questioned what BLM and the Corps were permitting at this stage because ConocoPhillips had not applied for any rights-of-way, permits to drill, or CWA

[19] Ex. 22 at 1.

[20] Ex. 27 (Corps Public Notice dated Mar. 26, 2020).

cont…

permits, and the agencies were missing key information about the project.[21] Plaintiffs identified the EIS's inadequate baseline information, impacts analysis, information about the project design, and mitigation measures.[22]

On March 26, 2020, the Corps published its notice of the CWA permit.[23] Four days later, BLM released a supplemental draft EIS analyzing a number of changes to the project design — in particular, ConocoPhillips added a proposed ice bridge crossing the Colville River that BLM had previously rejected.[24] The supplemental draft EIS was limited in its scope, considering only three project changes; it did not evaluate the newly submitted CWA permit and the full set of project changes.[25] Similar to the draft EIS, the supplement did not provide an adequate analysis of impacts and potential mitigation or address prior deficiencies in the agency's analysis.

After the release of the final EIS, BLM adopted its ROD in late October, approving ConocoPhillips' proposed action.[26] The ROD stated that it "completes the required [final] EIS process and NEPA requirements for the subsequent issuance of BLM approvals, grants, and other authorizations necessary for development of all aspects of the

[21] Ex. 24 at 22–28.
[22] *Id.* at 12, 14–19, 22–28.
[23] Ex. 27 at 1.
[24] Ex. 23 at 4–7; Ex. 22 at 7 (draft EIS explaining option was technically infeasible).
[25] Ex. 23 at 1, 3.
[26] Ex. 25 at 1–2.

cont…

Willow [project]."[27] BLM issued its ROD before ConocoPhillips had applied for key permits, including the right-of-way and permits to drill, or requested the sale of materials for the gravel mine.

Following formal consultation, FWS issued a BiOp on the effects of Willow to polar bears and their critical habitat.[28] The BiOp estimated Willow might seriously injure or kill two or more polar bear cubs over the life of the project.[29] Nonetheless, the BiOp determined that Willow was not likely to jeopardize polar bears nor destroy or adversely modify critical habitat.[30] FWS based these findings largely on its assumption that future MMPA permitting would mitigate impacts to polar bears.[31]

On December 2, 2020, BLM posted online that it intended to prepare a Determination of NEPA Adequacy (DNA) approving ConocoPhillips' newly submitted applications for a 30-year right-of-way and one permit to drill by January 20, 2021.[32] BLM stated that the ROD completed the required NEPA analysis for Willow and approved "subsequent issuance of BLM approvals, grants, and other authorizations necessary for development of all aspects" of Willow.[33] ConocoPhillips' activities in early

---

[27] *Id.*
[28] Ex. 26 at 1.
[29] *Id*. at 7–8.
[30] *Id*. at 11–13.
[31] *Id.*
[32] Ex 28 at 1–2.
[33] *Id*. at 1.

cont…

2021 include "opening the Willow Gravel Mine and constructing the access road [between Willow and Alpine], up to Mile 2.8."[34] BLM will complete its review and approve ConocoPhillips' requested right-of-way, three permits to drill, and gravel mining activities imminently.[35]

On December 18, 2020, the Corps issued its CWA permit for Willow.[36]

LEGAL STANDARDS

Plaintiffs seeking a TRO/PI must establish: (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest.[37] A plaintiff can obtain an injunction by showing "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other factors are met.[38] Serious questions are "substantial, difficult, and doubtful" such that they need "more deliberative investigation."[39] This showing is a lower bar than

[34] *Id.*

[35] *Id*. at 5; ECF No. 14-1 at 5 (noting BLM planned to complete approvals between Dec. 14–18).

[36] Ex 32.

[37] *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (analysis for TRO is "substantially identical" to PI).

[38] *All. for the Wild Rockies v. Cottrell* (*Alliance*), 632 F.3d 1127, 1131–32 (9th Cir. 2011).

[39] *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

cont…

demonstrating likely success on the merits.[40] "When considering an injunction under the ESA, [the Court] presume[s] that remedies at law are inadequate, that the balance of interests weighs in favor of protecting endangered species, and that the public interest would not be disserved by an injunction."[41]

Courts "hold unlawful and set aside agency action, findings, and conclusions" if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if adopted "without observance of procedure required by law."[42] Courts undertake a "thorough, probing, in-depth review" to ensure that the agency made a "rational connection between the facts found and the conclusions made."[43]

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.[44]

A. The BiOp Unlawfully Relied on Mitigation Measures that Are Not Reasonably Certain to Occur.

ESA Section 7 requires that a federal agency consult with FWS to ensure that its action is not likely to jeopardize threatened or endangered species, or destroy or

---

[40] *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 413 F. Supp. 3d 973, 979 (D. AK 2019).

[41] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018).

[42] 5 U.S.C. § 706(2)(A), (D).

[43] *Native Ecosystems Council v. United States*, 418 F.3d 953, 960 (9th Cir. 2005).

[44] Plaintiffs present a limited subset of claims in this motion. Plaintiffs do not waive any claims or allegations in their complaint, and reserve those for summary judgment.

cont…

adversely modify critical habitat.[45] In analyzing the action, FWS may rely on mitigation measures to reach a no-jeopardy conclusion only where they involve "specific and binding plans" and "a clear, definite commitment of resources for future improvements."[46] Such mitigation measures "'must be reasonably specific, certain to occur, and capable of implementation; . . . subject to deadlines or otherwise-enforceable obligations; and most important . . . address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.'"[47] As the Ninth Circuit just held, under circumstances analogous to this case, a BiOp is arbitrary and capricious where it relies on future MMPA compliance in lieu of specific, binding, and certain mitigation measures to reach a no-jeopardy conclusion.[48]

Polar bears are protected from unauthorized incidental take under both the ESA[49] and the MMPA. The MMPA establishes a general moratorium on the incidental take of marine mammals, except where FWS makes a finding that such take will have only a negligible impact on the species or stock.[50] While both statutes address take, they have

---

[45] 16 U.S.C. § 1536(a)(2).

[46] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008).

[47] *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1001 (D. Ariz. 2011) (internal citations omitted).

[48] *Ctr. for Biological Diversity v. Bernhardt* (*CBD*), No. 18-73400, 2020 WL 7135484, at *14–17 (9th Cir. Dec. 7, 2020).

[49] 16 U.S.C. § 1538(a)(1)(B), (G); *see also id.* at § 1532(19) (defining take).

[50] 16 U.S.C. § 1371(a), (a)(5)(A); *see also id.* § 1362(13) (defining take).

cont…

distinct legal requirements. Compliance with one cannot substitute for compliance with the other: MMPA compliance "does not preclude or preempt FWS's responsibility to include the mitigation measures that it relies upon in a [BiOp] under . . . the ESA. The agency cannot refer to future, unstated authorizations under the MMPA to fulfill its obligations under [the ESA]."[51]

The BiOp acknowledges that Willow has the potential to harm polar bears. Specifically, it finds that Willow could affect polar bears by "obstructing or altering movements" of pregnant females searching for dens, "disturbing females at den sites before cubs are born," or "causing premature den or den site abandonment after cubs are born, which could cause the immediate death of cubs or reduced probability of survival over time . . . ."[52] FWS estimated that Willow may seriously injure or kill a mean of 2.2 cubs over the life of the project.[53] But FWS improperly relied on future, yet-to-be-determined project- or site-specific permitting under the MMPA to determine that Willow would not jeopardize polar bears nor adversely modify critical habitat under the ESA.

The mitigation measures in the BiOp are not sufficiently specific, binding, or certain to occur, just as in *CBD*.[54] For example, the BiOp relies on future MMPA

---

[51] *CBD*, 2020 WL 7135484, at *14.
[52] Ex. 26 at 7.
[53] *Id*. at 7–8 (explaining a roughly 16% probability of two or more takes occurring).
[54] *See* 2020 WL 7135484, at *12 ("Binding mitigation measures cannot refer only to cont…

compliance and states that past MMPA permitting for oil and gas activities has ensured impacts to marine mammals have been negligible, but does not identify the specific measures that will be applied and enforced for Willow.[55] The BiOp briefly summarizes the kinds of mitigation measures that "would be applied on a case-by-case basis" under the MMPA.[56] It lists eight non-specific "examples," such as requiring "den detection surveys, which can be infrared imagery surveys (either aerial or handheld) or scent-trained dog surveys."[57] But the BiOp does not specify which den detection techniques to use. It does not cite any studies on the effectiveness of these surveys. It does not explain how such surveys will mitigate Willow's impacts to mothers and cubs.

There is no indication that FWS specifically analyzed the MMPA mitigation measures it relied on to reach its no jeopardy and no adverse modification conclusions in the BiOp. It merely points to future permits under the MMPA that did not yet exist.[58] Future MMPA compliance "does not preclude or preempt FWS's responsibility to

---

generalized contingencies or gesture at hopeful plans; they must describe, in detail, the action agency's plan to offset the environmental damage caused by the project.").

[55] Ex. 26 at 2, 9–10. The future MMPA authorizations FWS relies upon are for 5-year periods, which is inappropriate for the 30-year project. *CBD*, 2020 WL 7135484, at *14.

[56] Ex. 26 at 2. *See CBD*, 2020 WL 7135484, at *15 (explaining future mitigation measures required on "case-by-case basis," and mitigation strategy's eventual MMPA approval are not sufficiently specific under ESA).

[57] Ex. 26 at 2–3.

[58] *Id*. at 14. On Dec. 21, 2020, FWS issued the required MMPA authorization. Ex. 31.

cont…

include the mitigation measures that it relies upon in a [BiOp] under . . . the ESA. The agency cannot refer to future, unstated authorizations under the MMPA to fulfill its obligations under [the ESA]."[59]

But FWS did just that here. The BiOp's no jeopardy determination concludes "the Proposed Action also contains protective measures that provide significant minimization of impacts to polar bears, most importantly BLM's commitment to ensure compliance with the MMPA."[60] The BiOp also expressly relies on MMPA compliance to ensure against destruction and adverse modification of critical habitat.[61] Because FWS relies heavily on potential future mitigation measures, actual measures remain unknown and are not binding or reasonably certain to occur.[62]

In sum, FWS's reliance on future unspecified MMPA mitigation measures that are not reasonably certain to occur to reach its no jeopardy or adverse modification conclusions violates the ESA.[63]

---

[59] *CBD*, 2020 WL 7135484, at *14.
[60] Ex. 26 at 11.
[61] *Id*. at 12–13.
[62] *CBD*, 2020 WL 7135484, at *15.
[63] *See supra* Legal Standards.

cont…

B. BLM Failed to Take Hard Look at Willow and Its Impacts, in Violation of NEPA.

NEPA is "our basic national charter for protection of the environment."[64] NEPA's analysis and disclosure goals are meant to ensure informed agency decisions and public involvement.[65] To fulfill these goals, an agency must take a "hard look" at the direct, indirect, and cumulative impacts of a proposed action.[66] This "hard look" requires a "full and fair discussion of significant environmental impacts."[67] NEPA also requires agencies to evaluate the site-specific impacts of an action prior to making an irretrievable commitment of resources.[68] If the agency makes an irretrievable commitment of resources, it cannot defer analysis of foreseeable impacts by asserting that the consequences are unclear or that the agency will analyze the impacts at a later point in time.[69]

BLM failed to take a hard look at Willow's site-specific impacts because BLM lacked critical information about the project proposal and design. Regarding Willow's

---

[64] 40 C.F.R. § 1500.1(a) (1978). The Council for Environmental Quality (CEQ) recently issued new NEPA regulations, effective September 14, 2020. 85 Fed. Reg. 43,304 (July 16, 2020). CEQ's prior regulations govern this case.

[65] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

[66] *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1211 (9th Cir. 1998).

[67] 40 C.F.R. § 1502.1.

[68] *California v. Block*, 690 F.2d 753, 761, 763 (9th Cir. 1982).

[69] *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002).

cont…

proposed water crossings, Judy Creek, Fish Creek, Willow Creek 4, and Kalikpik River would all require massive bridges with piers located in the riverbeds.[70] The draft and final EIS did not adequately describe how these would be constructed or provide design information, including bridge sizes.[71] The details of these crossings are essential to evaluating impacts.[72] Nonetheless, BLM stated that ConocoPhillips would "provide annual surveillance" of such crossings "due to the lack of a basis of design for structures proposed."[73] BLM also stated that the public would have an opportunity to comment on direct, indirect, and cumulative impacts to hydrological resources as part of the Corps' permitting process.[74] This ignores BLM's own NEPA obligation to take a "hard look" at the impacts of its own permitting approvals, including aquatic impacts.[75] BLM's deferral of this analysis is even more inappropriate given this EIS provides the NEPA analysis for the Corps' permit.

The EIS also contained little to no information on the length or location of the proposed infield roads, the amount of gravel needed for each road, or the site-specific

---

[70] Ex. 22 at 5–6.

[71] *Id*.; Ex. 24 at 2, 20 (final EIS noting bridges would range from 40-420 feet and listing total number).

[72] Fennessy Dec. at 9, 11.

[73] Ex. 24 at 13.

[74] *Id*. at 28.

[75] *See Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1102–04 (9th Cir. 2016); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1378–80 (9th Cir. 1998).

cont…

impacts from infrastructure placement.[76] The EIS only provided a wide range of the number of wells per pad, ignoring that the number of wells informs the size, infrastructure needs, and impacts of each pad.[77] BLM stated that it may do additional NEPA later, after project specifics are more clearly established[78] — but that analysis needed to occur now.

The supplemental draft EIS — prepared in response to ConocoPhillips' project changes — does not save BLM's deficient analysis. That document acknowledged that ConocoPhillips had and was continuing to make project changes throughout the NEPA process.[79] But the supplemental draft EIS did not analyze many changed project features and lacked requisite baseline data regarding a number of resources, including hydrology and wetlands. For example, there was key, missing information about the proposed Colville River crossing. The Environmental Protection Agency (EPA) stated that there was a continued lack of site-specific analysis of impacts to aquatic resources, including no flow data for the Colville River crossing.[80] In response to comments about the lack of analysis for aquatic resources and wetlands, the final EIS merely states "[b]ecause wetlands are abundant on the North Slope and the wetlands that would be impacted by

---

[76] Ex. 22 at 3, 5; Ex. 24 at 4; *see also* Ex. 24 at 40 (Kuukpik Corp. comments noting BLM's "abbreviated" analysis merely equates anticipated gravel footprint with impacts).

[77] Ex. 22 at 4; Ex. 24 at 1 (estimating "40 to 70" wells per pad).

[78] Ex. 24 at 23.

[79] Ex. 23 at 3 (listing project changes not analyzed in supplemental draft EIS).

[80] Ex. 24 at 21; *see also* Fennessy Dec. at 5–6.

cont…

the Project are not unique, the indirect effects to fish would likely not be measurable."[81] Such conclusory statements are not a hard look. The final EIS suffered from the same lack of detailed project information and analysis; BLM did not cure these deficiencies.[82]

BLM must base its analysis on actual project information — not hypothetical, rough estimates of infrastructure — for the agency to take an adequate hard look. Lacking these critical details, the EIS could not and did not take a hard look at Willow's site-specific direct, indirect, and cumulative impacts. Despite this, BLM approved construction and operation of Willow and issuance of future rights-of-way and other permits in the ROD — an irretrievable commitment of resources.[83] This violates NEPA.

The problems with this process are demonstrated by BLM's cursory, post-ROD issuance of a 30-year right-of-way and applications for permits to drill on three pads — all subject to approval without any further NEPA analysis.[84] This clarifies that BLM made an irretrievable commitment of resources in the ROD. But, BLM lacked sufficient information to conduct the required site-specific review of the project in its EIS. In sum, BLM failed to conduct the required site-specific analysis of Willow's impacts in its EIS and failed to take the hard look required by NEPA.

---

[81] Ex. 24 at 26.
[82] *Supra* notes 71–74, 76–81.
[83] Ex. 25 at 1–2.
[84] Ex. 28 at 1, 5.

cont…

Plaintiffs have shown a likelihood of success on the merits, or at least raised serious questions going to the merits.[85]

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

"Environmental injury, by its nature, . . . is often permanent or at least of long duration, *i.e.*, irreparable."[86] In cases brought under the ESA, harm to individual members of a species "is irreparable because once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult."[87] The Reserve, specifically its aquatic resources and polar bears, and Plaintiffs' and their members' interests in the Reserve, will be irreparably harmed by road building and gravel mining. [88]

ConocoPhillips proposes to excavate and directly fill wetlands with over 5 million cubic yards of gravel, with mining and road construction beginning shortly after February

---

[85] *See supra*, Legal Standards.

[86] *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987) abrogated in part on other grounds by *Winter*, 555 U.S. 7; *see also N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007).

[87] *Nat'l Wildlife Fed'n*, 886 F.3d at 818 (quotation, citation, and alteration omitted); *see also Cottonwood Envtl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015) (explaining in ESA cases, "establishing irreparable injury should not be an onerous task for plaintiffs").

[88] *See* Ex. 28 (describing proposed winter activities). Because of these harms from BLM and FWS's actions, Plaintiffs have standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000) (standing test); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 341–45 (1977) (same).

cont…

2, 2021.[89] The EPA and Corps' regulations recognize the "severe environmental impacts" of filling wetlands, creating a presumption of irreparable harm.[90] Courts recognize such harm as irreparable harm.[91] The attached declaration from Siobhan Fennessy, PhD explains that Willow would lead to the direct loss of hundreds of acres of wetlands, and the indirectly impact thousands more, significantly degrading and permanently harming the aquatic environment, including wetlands, streams and rivers, floodplains, and the diversity of functions and species they support.[92] In particular, Dr. Fennessy notes that gravel mining in floodplains as proposed this winter is "one of the most aggressive human actions" to cause floodplain and channel alterations.[93] Gravel mining and road construction will irreparably harm the Reserve's aquatic resources. Plaintiffs' interests in hunting, gathering, commercial and subsistence fishing, recreation, research, wildlife

[89] ECF No. 14; Ex. 32 at 1.

[90] 40 C.F.R. § 230.1(d).

[91] *See, e.g., U.S. v Akers*, 785 F.2d 814 (9th Cir. 1986) (affirming preliminary injunction of wetland alteration); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 995 (8th Cir. 2011) (finding irreparable harm from the filling of wetlands necessarily meant harm to the plaintiffs' environmental interests); *Utahns For Better Transp. v. U.S. Dep't of Transp*., No. 01-4216, 2001 WL 1739458, at *2 (10th Cir. Nov. 16, 2001) (granting preliminary injunction to prevent irreparable harm to wetlands);*see also S. Fork Band Council of W. Shoshone of Nev. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) ("The likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high.").

[92] Fennessy Dec. at 3–7, 9–15, 19.

[93] *Id*. at 11.

cont…

viewing, and aesthetic enjoyment will also be harmed by these activities.[94] An injunction is necessary to preserve the status quo and prevent irreparable harm from road construction and gravel mining while the court decides this case.

An injunction is also necessary to prevent harm to polar bears. The BiOp determined that Willow would neither jeopardize polar bears nor adversely modify critical habitat based on uncertain mitigation measures.[95] As a result, harm to polar bears and critical habitat in the Reserve could exceed what was analyzed in the BiOp; there is no assurance that jeopardy or adverse modification would not result from Willow, or that take would not exceed what was analyzed in the BiOp.[96] Because the population is already depleted, any additional take could cause irreparable harm to polar bears.[97] The loss of these bears would result in irreparable harm to Plaintiffs and their members, who

---

[94] Ahtuangaruak Dec. at 6–8; Baraff Dec. at 13; Fair Dec. at 13; Krause Dec. at 17, 19–20, 22; Kunaknana Dec. at 3–6, 8; Maupin Dec. at 9–10, 12; Wald Dec. at 9–12. *Alliance*, 632 F.3d at 1135 (finding harms to use of an area are "actual and irreparable injury" showing "likelihood of irreparable injury").

[95] *See supra* Argument.I.A.

[96] *Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1035 (9th Cir. 2005) ("It is not the responsibility of the plaintiffs to prove, nor the function of the courts to judge, the effect of a proposed action on an endangered species when proper procedures have not been followed." (quoting *Thomas v. Peterson*, 753 F.2d 754, 765 (9th Cir. 1985))).

[97] *See Yurok Tribe v. United States Bureau of Reclamation*, 231 F. Supp. 3d 450, 483 (N.D. Cal. 2017), order clarified sub nom. *Tribe v. United States Bureau of Reclamation*, 319 F. Supp. 3d 1168 (N.D. Cal. 2018) (explaining Plaintiffs do not need to show challenged activities are solely responsible for harm to species).

cont…

seek opportunities to view polar bears in the wild.[98] This threat to individual polar bears — and Plaintiffs' interest in them — is sufficient to establish irreparable harm.[99]

In sum, mining and construction activities are highly likely to irreparably harm the Reserve's aquatic resources, polar bears, and Plaintiffs' and their members' uses and interests.[100]

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST STRONGLY FAVOR AN INJUNCTION.

In cases against the government, the balance of equities and public interest factors merge.[101] Where environmental injury is "sufficiently likely, the balance of harms will usually favor the issuance of an injunction. . . ."[102] Under the ESA, the balance of hardships and public interest factors always tip heavily in favor of protecting the listed species.[103]

---

[98] Baraff Dec. at 11, 13–15; Fair Dec. at 7–8; Kolton Dec. at 7, 11; Krause Dec. at 20; Ritzman Dec. at 13–15; Whittington-Evans Dec. at 10–13, 16–17.

[99] *See Nat'l Wildlife Fed'n*, 886 F.3d at 822 (holding plaintiffs established "irreparable harm to their own interests stemming from the irreparable harm to the listed species").

[100] *See supra*, Legal Standards.

[101] *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

[102] *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1125 (9th Cir. 2004) (internal quotations omitted).

[103] *Nat. Wildlife Fed'n v. Burlington Northern R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994).

cont…

There is a "well-established public interest in preserving nature and avoiding irreparable environmental injury."[104] Gravel mining and road construction will irreparably harm the Reserve's sensitive ecosystems.[105] Polar bears, caribou, and wildlife of the northeastern Reserve, Teshekpuk Lake, and Colville River Delta are a resource used and enjoyed by Alaskans, citizens across the United States, and Plaintiffs.[106] The wetlands, and floodplains that will be mined and filled provide vital habitat for fish and wildlife, including important subsistence resources.[107] These wetlands and waterways provide valuable functions and would be permanently altered.[108] There is a significant public interest in protecting the Reserve and preserving the status quo while this case is decided.

ConocoPhillips and BLM may assert economic interests in this project; those do not overcome the equities in favor of an injunction. Where plaintiffs are likely to succeed on the merits, "the public interest in preserving nature and avoiding irreparable

---

[104] *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc), *overruled on other grounds by Winter*, 555 U.S. 7; *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

[105] Fennessy Dec. at 4, 8–11, 19.

[106] Ahtuangaruak Dec. at 3–15; Baraff Dec. at 8, 11–15; Fair Dec. at 2–12, 14–15; Kolton Dec. at 6–7, 10–12; Krause Dec. at 12–17, 19–20; Kunaknana Dec. at 2–11, 13–14; Maupin Dec. at 7–11; Ritzman Dec. at 8–16; Wald Dec. at 4–6, 9–12; Whittington-Evans Dec. at 4–6, 8–14, 16–17.

[107] Ex. 29 at 4–5.

[108] Fennessy Dec. at 6–11.

cont…

environmental injury outweighs economic concerns."[109] Where irreparable environmental harm is likely, "[m]ore than pecuniary harm must be demonstrated" to avoid a preliminary injunction.[110] Any economic benefits to the government or permittees based on violations of law are outweighed by environmental concerns.[111] Regardless, the economic interests will not be lost, only delayed pending resolution of the case: "[o]nly the portion of the [economic] harm that would occur while the preliminary injunction is in place" should be weighed, and the "balance of equities tips toward the . . . plaintiffs, because the harms they face are permanent."[112]

Plaintiffs also seek to compel compliance with environmental laws. Preventing a project from moving forward until the required environmental analysis occurs "comports with the public interest."[113] Indeed, agency compliance with the law "invokes a public interest of the highest order: the interest in having government officials act in accordance

[109] *Lands Council*, 537 F.3d at 1005; *see Nat'l Parks Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (holding loss of revenues "does not outweigh the potential irreparable damage to the environment").

[110] *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986).

[111] *See Alliance*, 632 F.3d at 1138–39 (holding temporary jobs do not outweigh the public interest in avoiding environmental injury); *Or. Natural Res. Council v. Goodman*, 505 F.3d 884, 889–90 (9th Cir. 2007) ("[T]he risk of permanent ecological harm outweighs the temporary economic harm that [the permittee] may suffer.").

[112] *League of Wilderness Defs./Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d at 755, 765 (9th Cir. 2014).

[113] *S. Fork Band Council of W. Shoshone of Nev.*, 588 F3d at 728.

cont…

with law."[114] Accordingly, these factors — balance of equities and public interest — are satisfied.[115]

IV. THE COURT SHOULD WAIVE ANY BOND REQUIREMENT.

While courts must consider whether a bond is necessary to indemnify wrongfully enjoined parties, there is a well-established "public interest" exception, and courts can decline to impose bonds to avoid frustrating public interest litigation.[116]

Plaintiffs seek to further the strong public interest in preventing irreparable harm caused by the destruction of the Reserve's irreplaceable wetlands and harm to polar bears, and ensuring compliance with important laws. Plaintiffs are non-profit, public interest organizations.[117] To safeguard the important public rights at issue in this case and because the Plaintiffs meet the criteria for bond waiver, the Court should exercise its discretion and waive the bond requirement or, at most, require only a nominal bond.[118]

---

[114] *Seattle Audubon Soc'y*, 771 F. Supp. at 1096.

[115] *See supra*, Legal Standards.

[116] *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325–26 (9th Cir. 1985); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999).

[117] Baraff Dec. at 16–17; Isherwood Dec. at 2–6; Kolton Dec. at 12; Krause Dec. at 23; Maupin Dec. at 13; Whittington-Evans Dec. at 17–19.

[118] *See Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009) (stating that a district court retains discretion "as to the amount of security required, *if any*") (internal quotation marks and citations omitted) (emphasis in original); *see, e.g.*, *Western Watersheds Project v. Schneider*, 417 F. Supp. 3d 1319, 1335 (D. Idaho 2019) ("Because plaintiffs are non-profit environmental groups seeking to advance the public interest in this litigation, the Court will waive the injunction bond requirement under Rule 65(c).").

CONCLUSION

For the reasons stated above, the Court should grant Plaintiffs' motion for a TRO/PI and waive the bond requirement.

Respectfully submitted this 23rd day of December, 2020.

s/ Bridget Psarianos
Bridget Psarianos (AK Bar No. 1705025)
Suzanne Bostrom (AK Bar No. 1011068)
Brook Brisson (AK Bar No. 0905013)
Brian Litmans (AK Bar No. 0111068)
TRUSTEES FOR ALASKA

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.4(a)(3), I certify that this memorandum complied with the type-volume limitation of 7.4(a)(1) because it contains 5,676 words, excluding the parts exempted by Local Civil Rule 7.4(a)(4).

–

s/ Bridget Psarianos
Bridget Psarianos