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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE,  
NATURAL RESOURCES DEFENSE  
COUNCIL, and PACIFIC  
ENVIRONMENT

Petitioners,

NORTH SLOPE BOROUGH, ALASKA  
ESKIMO WHALING COMMISSION,

Proposed Petitioners-  
Intervenors

v.

DIRK KEMPTHORNE, Secretary of the  
Interior, and MINERALS  
MANAGEMENT SERVICE,

Respondents.

No.: 07-71457

**THE NORTH SLOPE  
BOROUGH'S AND THE  
ALASKA ESKIMO WHALING  
COMMISSION'S REPLY TO  
OPPOSITIONS TO URGENT  
MOTION FOR A STAY  
PURSUANT TO CIRCUIT  
RULE 27-3(b)**

Shell's exploration activities pose a concrete, definite, and imminent threat to subsistence hunters on the North Slope. The level of activity planned for this summer is unprecedented, and scientific studies of the effects of lower levels of similar drilling activity in the same area establish that exploration will impede subsistence hunting, placing at risk the lives of Inupiat hunters and jeopardizing the health and mental well-being of communities across the Alaskan Arctic.

Unable to refute the North Slope Borough's ("NSB") and the Alaska Eskimo Whaling Commission's ("AEWC") (collectively "Inupiat") compelling evidence of harm, Proposed Respondent-Intervenor Shell Offshore Inc. ("Shell") and Federal Respondents (collectively "MMS") attempt to rely on a poorly conceived set of mitigation measures. MMS and Shell have not offered any expert evidence or other assessment of these mitigation measures to support their factual argument on harm. These facts alone do not outweigh the overwhelming evidence of harm submitted by Inupiat in their opening motion. The imminent threat of death or serious injury resulting from the deflection of the bowhead migration is likely, irreparable and cannot be ignored.

## **ARGUMENT**

### **I. Inupiat are Likely to Suffer Irreparable Injury in the Absence of a Stay.**

Inupiat have shown that injury from the proposed exploratory activities is both likely and irreparable in their opening motion. North Slope Borough's and

Alaska Eskimo Commission’s Urgent Motion for Stay (“Inupiats Mot.”) at 10-12. In their opposition briefs, MMS and Shell mischaracterize the applicable science without any supporting expert declarations and then rely on a poorly conceived set of mitigation measures. MMS and Shell have failed to present any evidence that outweighs the substantial showing of harm made by Inupiats.<sup>1</sup>

Shell relies principally on the multi-sale EIS and claims that “significant scientific data” establishes that drilling operations do not have an effect on migration patterns of bowhead whales. Shell Op. at 46. This assertion highly mischaracterizes the cited portions of the EIS, and Shell and MMS noticeably fail to provide any expert opinions to support this misleading statement. In fact, much of the discussion cited by Shell addresses the impacts of seismic testing, rather than exploration and drilling activity. AR 247-258. The EIS states that “no definitive conclusions can be drawn from [the studies] on whether or not the overall fall migration is displaced by seismic activity,” because “most of the studies did not involve actively migrating whales” and the whale sightings were “observational” and “opportunistic.” AR 252.

With respect to drilling operations, the EIS similarly explains that most observations are “based on opportunistic sightings of whales near ongoing oil-

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<sup>1</sup> Shell did not include in its brief any discussion of the harm to subsistence uses resulting from deflection of bowhead whales. See Shell Offshore Inc.’s Opposition to Motions for Stay (“Shell Opp.”) at 41-47.

industry operations, and it is not known whether more whales would have been present in the absence of those operations.” AR 262. The studies suggest that cumulative effects may cause the whales to completely abandon an area and that migrating whales “appear to avoid” offshore drilling operations. *Id.* The studies confirm the expert opinions of NSB Department of Wildlife scientists – bowhead whales are likely to completely avoid an area about 15 miles in radius around a single drill ship. Ex. 112 ¶¶ 6-11; Ex. 113 ¶¶ 9-10.<sup>2</sup>

In addition to mischaracterizing the applicable science, MMS and Shell rely upon the following mitigation measures: 1) a bowhead whale monitoring plan, 2) maintenance of a communications center, and 3) Shell’s “Adaptive Management Plan,” which includes the potential 10-day shut down period. Federal Respondents’ Response in Opposition to Urgent Motion for Stay Pending Review (“MMS Resp.”) at 40. As an initial matter, the court should look very skeptically at factual claims that these mitigation measures adequately protect subsistence uses. The National Marine Fisheries Service (“NMFS”) is the expert agency with primary jurisdiction over marine mammals and the protection of subsistence uses. NMFS has already made a preliminary determination that these so-called mitigation measures do not adequately protect subsistence uses of bowhead whales. 72 Fed. Reg. 17864, 17872 (April 10, 2007).

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<sup>2</sup> This area of deflection will likely be greater when two drill ships are operating simultaneously. AR 6061.

The bowhead whale monitoring plan does nothing to prevent potential impacts to bowhead whales or reduce the impacts from underwater noise. Simply identifying the potential deflection of whales from their normal migration routes does not prevent the resulting impacts to subsistence uses. Similarly, establishing a “communications center” does nothing to prevent the deflection of bowhead whales from their migration routes as a result of drilling and icebreaking activities. Neither Shell nor MMS have presented any evidence that these proposed measures prevent the well-documented threats to subsistence uses resulting from deflection caused by underwater noise.<sup>3</sup> Neither of these mitigation measures has any impact on the level of underwater noise.

Shell’s two-page “Adaptive Management Plan” similarly fails to provide adequate protections. Ex. 120 at 3-4. The court should note that MMS did not include the Adaptive Management Plan as a part of the decision. MMS first provided that plan to Inupiat on May 17, 2007. *Id.* at 1. The plan is undated and appears to be prepared after litigation commenced. MMS has not evaluated the plan as part of the NEPA process, and the court should provide little if any

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<sup>3</sup>Instead, MMS baldly states that Inupiat have not met their burden in showing that the mitigation measures will prevent irreparable harm. However, MMS fails to refute the pages of evidence put forth by Inupiat establishing that the exploration activities are likely to cause irreparable harm. Rather, the agency relies on mitigation measures that are speculative and undefined. The burden is on the applicant to demonstrate how its activities will not avoid conflicts with subsistence hunting, not the other way around. AR 75 (Stipulation 5).

evidentiary weight to these measures.<sup>4</sup>

MMS's failure to analyze the Adaptive Management Plan in the Environmental Assessment is particularly troubling because of the noticeable lack of detail and significant questions regarding the plan's components. The plan contains several optional measures that may or may not reduce impacts to subsistence uses. For instance, Shell plans to "minimize" refueling, "reduce" vessel noise, and "may" move vessels out of the whale migration path. These soft and undefined commitments provide no certainty that the plan will prevent impacts to subsistence uses, and they are left entirely within the company's discretion. Shell provides no specificity or commitment on levels of underwater noise resulting from its activities, despite the fact that noise levels are the single most important determining factor in bowhead deflection. Ex. 112 ¶¶ 5-20.

Furthermore, Shell's offer to delay drilling activities by 10 days starting September 10 similarly fails to prevent harm to subsistence uses. Although Shell can stop the drilling after a delay that is necessary to safely plug the hole, the icebreakers must continue to protect the drill rigs and generators must continue running to support the people living aboard the rigs. The noise from the

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<sup>4</sup> MMS must identify the mitigation measures and must evaluate their effectiveness. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733-36 (9<sup>th</sup> Cir. 2001) (holding that EIS must be prepared where monitoring and mitigation measures were uncertain). In addition, the measures must be supported by analytical data. *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1151 (9<sup>th</sup> Cir. 1998). "Mitigation must 'be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9<sup>th</sup> Cir. 1998).

icebreakers alone can cause serious deflection, even when drilling has ceased. AR 265.

In addition, even if Shell could somehow eliminate all noise from generators, re-supply vessels, aircraft, and icebreakers, a 10-day window is insufficient. The hunt at Cross Island typically lasts one month. Ex. 124 (Second Declaration of John C. “Craig” George) ¶ 4-6. In addition, almost one third of whales are caught before September 10. *Id.* The promise to “shut down” for 10 days starting on September 10 will not prevent irreparable harm to the hunters.<sup>5</sup>

Finally, Shell relies heavily upon Lease Stipulation No. 5, which provides for consultation between the operator and North Slope residents if Shell does not enter into a Conflict Avoidance Agreement (“CAA”). Shell notified MMS on April 20, 2007 that it had not reached agreement on a CAA. Ex. 120 at 1. MMS waited until May 17, 2007 to request a meeting with NSB and then provided MMS only one day to respond to the letter and provide input on potential proposals. *Id.*

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<sup>5</sup> MMS and Shell also make unsupported factual statements that operations will not require much in the way of ice management from icebreakers and that ice conditions will be “light.” MMS Op. at 41; Shell Op. at 46. Shell cites to AR 606 for the proposition that “light ice conditions will require less ice-breaking activities.” Shell Op. at 46 n. 162. AR 606 includes portions of MMS’s response to comments in the EIS and does not include any mention of ice conditions in Camden Bay.

These assertions also contradict Shell’s own statements made to the U.S. Coast Guard in conjunction with a request to establish “safety zones” around the drill rigs. In that letter, Shell stated that “constant” ice management may be required due to the ever-present the danger of polar ice. Ex. 123. As Shell acknowledges, “[i]ce conditions during 2006 were such that the areas of drilling interest were ice covered the majority of the period between July and October.” *Id.*

at 102. MMS responded with a letter dated June 1, 2007 questioning the timelines and asking for specific information on the exploration activities before participating in such a meeting. Ex. 123. MMS never responded in writing to NSB's request. The Stipulation No. 5 process therefore provides no support for MMS's for Shell's factual argument on irreparable harm to subsistence uses.

**II. The harm to the physical and mental health of Inupiat's far outweighs any monetary harm to MMS and Shell, and the public interest favors a stay.**

The balance of hardships and the public interest weigh heavily in favor of a stay. MMS and Shell fail to explain how Shell's investment will be "compromised." Shell Op. at 39. Presumably, the investment made by Shell will equally benefit activity planned for future years in the Beaufort Sea. Thus, there is no risk that these expenditures will be irreparably lost. Additionally, although the primary term of a lease is 10 years, the lease will not expire if the lessee is conducting operations on the lease. 30 CFR § 250.180. Finally, even if the company is unable to begin operations within ten years, MMS may extend the initial term of the leases. *Id.*; *see also* 30 CFR §§ 250.168-177. Shell provides no information on the economic loss from a one-year delay.<sup>6</sup>

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<sup>6</sup> In addition, it is inappropriate for Shell to include expenditures made for seismic activity, as this case does not seek a stay of that activity, which is permitted through a separate regulatory process not at issue in these motions.

While Shell can only point to questionable monetary losses, Inupiats face the immediate and irreparable threat of death or serious injury. The balance of hardships thus weighs heavily in favor of a temporary injunction.

### **III. Inupiats and Petitioners are Likely to Succeed on the Merits**

Inupiats and Petitioners have raised serious questions as to whether MMS adequately considered potential impacts to bowhead whales and the subsistence harvest. MMS bases its entire argument on mitigation on the supposed fact that the “relevant protective stipulations and conditions are a part of Shell’s underlying leases and the EP approval \* \* \*.” MMS Op. at 26. Shell’s Adaptive Management Plan, however, did not exist at the time the EA was completed, and MMS never analyzed the plan in the EA. Furthermore, the EA assumes that mitigation measures will take shape later, through an Incidental Harassment Authorization (“IHA”) and CAA and that the measures will be adequate. MMS does not provide any specificity on what measures will be included in the IHA or the CAA.

MMS’s reliance on *Envtl. Prot. Info. Ctr. v. United States Forest Serv.*, 451 F.3d 1005 (9<sup>th</sup> Cir. 2006) is therefore misplaced. In that case, mitigation measures were part of the project design. The court pointed to CEQ guidance that states:

Where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant.

451 F.3d at 1015 (*quoting* 46 Fed. Reg. 18026, 18037 (1981)). Here, mitigation measures have yet to be identified months after the project was proposed and approved. The hypothetical future mitigation measures in the CAA and IHA are not “detailed” or “specific” and, in fact, these mitigation measures do not actually exist still to this day. The only detail is contained in the Adaptive Management Plan, which was not included in the EA and is not a part of MMS’s decision. This case is therefore analogous to *National Parks & Conservation Assoc.*, 241 F.3d at 733-36 (discussing uncertainty that mitigation measures would be implemented and requiring preparation of EIS).

Inupiats are also likely to prevail on their claim that MMS failed to examine the potential impacts to other subsistence resources, including beluga whales and caribou.<sup>7</sup> Neither MMS nor Shell contest Inupiats’ assertion that the EA fails to analyze the potential impacts to the beluga whale and caribou hunts. MMS Op. at 29, 31; Shell Op. at 35-37. Instead, both MMS and Shell rely on the EIS and discussions about the biological impacts to the resources, but these sections do not contain any site-specific discussion of impacts to subsistence uses of beluga whales or caribou. MMS must analyze both the biological impacts to the resources and potential behavioral changes that could impact subsistence uses.

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<sup>7</sup> Inupiats concur with and join in Petitioners’ reply that Petitioners are likely to succeed on the merits. The agency’s failure to analyze impacts of noise on bowhead whales necessarily resulted in a complete failure to analyze potential impacts to the bowhead whale hunt.

Finally, MMS's conclusion that the proposed activities will not significantly affect the environment is arbitrary. Contrary to the assertion of MMS, the effects of Shell's proposed activities are highly uncertain and the EA undeniably acknowledges this fact. Inupiats' Mot. at 22-24. In addition, the impacts are controversial, and the agency's own experts expressed serious concern about significant impacts to subsistence uses that are likely to occur. Exs. 17, 31-32, 36.

Inupiats have raised serious questions as to whether an EIS is required for exploration activities involving two separate drilling rigs, icebreakers, support vessels, and support aircraft in the middle of Inupiats' traditional subsistence hunting grounds. Inupiats respectfully request a temporary stay to allow the court a full opportunity to review the merits before subsistence hunters face the irreparable risk of death or serious injury in the Arctic Ocean.

DATED this 15th day of June, 2007.

Respectfully submitted,

/s/ Christopher Winter

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## CERTIFICATE OF SERVICE

I, Christopher Winter, certify that on June 16, 2007, I served true and correct copies of **THE NORTH SLOPE BOROUGH'S AND THE ALASKA ESKIMO WHALING COMMISSION'S REPLY TO OPPOSITIONS TO MOTION FOR A STAY PURSUANT TO CIRCUIT RULE 27-3(b)** on the following parties by first class mail and electronic mail:

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DATED this 16th day of June, 2007.

/s/ Christopher Winter  
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