IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA WILDERNESS LEAGUE, *et al.,* Plaintiffs, v. SALLY JEWELL, *et al.,* Defendants, and ALASKA OIL AND GAS ASSOCIATION, Intervenor-Defendant.	Case No. 3:15-cv-00067-SLG

ORDER DENYING MOTION FOR INJUNCTION PENDING APPEAL

I. *Introduction and Background*

Before the Court at Docket 63 is Plaintiffs' Rule 62 (c) Motion for Injunction Pending Appeal. Federal Defendants and the Intervenor-Defendant each filed oppositions to the motion, to which Plaintiffs replied.[1] For the reasons set forth herein, the motion will be denied.

The Court entered an Order re Cross-Motions for Summary Judgment in this case on July 2, 2015, which denied Plaintiffs' Motion for Summary Judgment.[2] Plaintiffs had sought a declaration that the Federal Defendants had violated the Marine Mammal

[1] Dockets 72, 72, and 75.

[2] Docket 59.

Protection Act,[3] the National Environmental Policy Act,[4] and the Administrative Procedure Act.[5] Plaintiffs had also sought an order setting aside the Incidental Take Regulation (ITR) that was promulgated for the Chukchi Sea on June 12, 2013.[6] On July 7, 2015, Plaintiffs filed a Notice of Appeal of the Court's decision with the Ninth Circuit Court of Appeals, which is currently pending.[7] The underlying facts and legal issues are set out in the Court's Order re Cross-Motions for Summary Judgment at Docket 59.

II. *Legal Standard*

"Once a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed."[8] But this principle of exclusive appellate jurisdiction is not absolute. "The district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo."[9] Federal Rule of Civil Procedure 62(c) codifies this exception by allowing a district court to "suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." But as the Ninth Circuit has explained, "[t]his Rule grants the district court no broader power than it has always

[3] 16 U.S.C. §§ 1361-1423, (MMPA).

[4] 42 U.S.C. §§ 4321-4370f, (NEPA).

[5] 5 U.S.C. §§ 702-706, (APA).

[6] 78 Fed. Reg. 35,364 (June 12, 2013) (codified at 50 C.F.R. §§ 18.111-18.119). *See* Docket 1 (Complaint) at 29.

[7] *See* Docket 60 (Notice of Appeal).

[8] *Natural Resources Defense Council, Inc. v. Southwest Marine Inc*., 242 F.3d 1163, 1166 (9th Cir. 2001) (citation omitted).

[9] *Id.* (citations omitted).

inherently possessed to preserve the status quo during the pendency of an appeal; it does not restore jurisdiction to the district court to adjudicate anew the merits of the case."[10] Accordingly, the Circuit has stressed that "any action taken pursuant to Rule 62(c) may not materially alter the status of the case on appeal."[11]

In deciding whether to grant an injunction pending appeal, a court applies the same standard as when considering a motion for preliminary injunction or a temporary restraining order.[12] Generally, a party seeking an injunction must demonstrate (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm absent the issuance of an injunction; (3) that the balance of hardships tips in that party's favor; and (4) that the issuance of the injunction is in the public interest.[13] However, an injunction may be warranted without a demonstrated likelihood of success where the moving party raises "serious questions going to the merits," if that party also demonstrates "a likelihood of irreparable injury and that the injunction is in the public interest" as well as a showing that the "balance of hardships tips sharply" in its favor.[14] Thus, as Plaintiffs correctly observe, an injunction pending appeal may still be entered in favor of a party against whom the Court ruled on the merits, so long as the party raises serious legal questions

[10] *Id.* (citations and quotation omitted).

[11] *Id.* (citation and quotation omitted).

[12] *Se. Alaska Conservation Council v. U.S. Army Corp of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006), *abrogated on other grounds by Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008).

[13] *Winter*, 555 U.S. at 20.

[14] *Alliance for the Wild Rockies v. Cottrell*, 632 D.3d 1127, 1135 (9th Cir. 2011).

and demonstrates each of the other requisite factors, including the heightened showing that "the balance of hardships tips sharply" in that party's favor.[15]

III. *Discussion*

Plaintiffs seek an injunction that would stay the effectiveness of the Incidental Take Regulation (ITR) and the subsequent Letter of Authorization (LOA) that was issued to Shell pursuant to the ITR, while Plaintiffs pursue their appeal. Alternatively, Plaintiffs seek a temporary order that would stay the effectiveness of the ITR and the LOA until the Ninth Circuit Court of Appeals has the opportunity to decide whether to issue an injunction pending appeal.

Plaintiffs assert that according injunctive relief to them at this time would maintain the status quo because Shell has not yet begun any exploratory drilling, so the injunction would maintain that state of affairs. Intervenor-Defendant Alaska Oil and Gas Association (AOGA) responds that the injunctive relief that Plaintiffs seek would upset the status quo because the ITR has been in place since 2013 and enjoining its validity at this time would constitute a change in that status quo. AOGA also asserts that extending any injunctive relief to the LOA accorded to Shell is particularly unwarranted because "the lawfulness of the LOA was not decided in the original disposition of the case."[16]

Whether according injunctive relief would alter the status quo depends on how the term status quo is defined. If, as Plaintiffs argue, the status quo is a state of affairs in

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[15] *See* Docket 63 (Mot.) at 3 (citing *Schrader v. Idaho Department of Health & Welfare*, 590 F. Supp. 554, 560 (D. Idaho 1984), *rev'd on other grounds by* 768 F.2d 1107 (1985).

[16] Docket 73 (Int. Def. Opp.) at 11 (quoting *McClatchy Newspapers v. Cent. Valley Typographical Union*, 686 F.2d 731, 734 (9th Cir. 1982).

which Shell is not actively drilling for oil in the Chukchi Sea, then according injunctive relief to Plaintiffs would perpetuate that status quo. And if, as AOGA argues, the status quo is defined as the legal state of affairs in which the ITR and associated LOA are of continuing validity, then the entry of the injunctive relief that Plaintiffs seek would undoubtedly change that legal state of affairs quite dramatically for the short term. But the Court finds that as defined by the Ninth Circuit, according injunctive relief at this time would not alter the status quo because it would not change the underlying ruling of the trial court upholding the validity of the ITR or otherwise materially alter the status of the case on appeal.

Intervenor-Defendant cites to *McClatchy Newspapers* in support of its position. There, the Ninth Circuit held that the district court was without jurisdiction while an appeal was pending before the Circuit to enter an amended judgment that ordered an employer to reinstate certain employees. The Circuit Court held that the trial court's action exceeded its jurisdiction because the order "materially affect[ed] substantial rights of the parties not decided in its original disposition of the case" and as such, did not preserve the status quo.[17] Here, Plaintiffs respond that *McClatchy* is inapposite because the trial court's order in *McClatchy* required the employer "to take affirmative actions that would extend beyond the time on appeal" whereas here Plaintiffs seek only short term injunctive relief. Rather, Plaintiffs maintain that their requested relief falls squarely within the language of Rule 62(c).

[17] 686 F.2d at 734.

The Ninth Circuit discussed its holding in *McClatchy* in *Britton v. Co-op Banking Group,* observing that "[i]n *McClatchy* the modified order reflected a change in the result of the very issue on appeal; if allowed to stand, the appeals court would be dealing with a moving target if it ruled on the revised order, or alternatively, its ruling would be obsolete if it ruled on the 'old' order."[18] In this case, the Court finds that the appeals court would not be dealing with a moving target if the short term injunctive relief that Plaintiffs seek were accorded to them, and hence, the requested relief does not exceed the district court's jurisdiction, at least as to the ITR. But the Court finds considerable merit to AOGA's argument that the invalidation of the LOA that Plaintiffs also seek at this time exceeds the scope of the administrative appeal that was argued by the parties and considered by this Court. This proceeding was focused only on the validity of the ITR. Accordingly, the Court declines to accord injunctive relief pending appeal with respect to the LOA for this reason.

Turning to the four-part test to assess the merits of the motion with respect to the ITR, the Court finds that Plaintiffs have raised serious legal questions with respect to the ITR's validity. Specifically, although the Court upheld the application of adaptive management with respect to further regulation in the Hanna Shoal, the ITR is silent as to the substantive criteria that would be used to determine when and what additional mitigation is warranted in the Hanna Shoal. And, as noted in the Court's summary judgment decision, there is only limited public participation in the subsequent LOA process. And yet, the Court concluded, for the reasons set forth in that Order, that the

[18] *Britton*, 916 F.2d 1405, 1411-12 (9th Cir. 1990).

ITR met the requirements of the MMPA, NEPA and APA. The Court remains firmly of the view that its determination upholding the regulation is correct, but the Court does find that Plaintiffs have raised serious legal questions with respect to the regulation's validity.

However, the Court finds that Plaintiffs have not demonstrated that the balance of equities tips sharply in their favor. For as the other parties correctly note, the ITR has been in place for over two years – since June 2013. Plaintiffs focus their concerns on Shell's upcoming planned activities. But Shell reasonably proceeded with its preparations and sizeable economic investment for the 2015 exploration program in reliance upon this 2013 regulation. And in balancing the equities, this Court has accorded some weight to Plaintiffs' decision to wait until late 2014 to file this lawsuit.[19] The Court acknowledges that "environment 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."[20] And yet when assessing the balance of hardships as between Plaintiffs and Shell, an AOGA member, during the limited time frame in which Plaintiffs may seek injunctive relief from the Circuit Court, the Court determines that the balance of hardships does not tip in favor of the Plaintiffs, and certainly not sharply in their favor.

Each of the four components of the standard for injunctive relief must be met in order for a Court to enter an injunction pending appeal. Because the Court has determined that the balance of hardships does not tip sharply in favor of the Plaintiffs,

[19] *See W. Watershed Project v. Salazar*, 692 F. 3d 921, 923 (9th Cir. 2012).

[20] *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987), *abrogated in part on other grounds by Winter*, 555 U.S. at 20.

even though the Court acknowledges that Plaintiffs have demonstrated serious legal questions on the merits, Plaintiffs' Rule 62(c) Motion for Injunction Pending Appeal at Docket 63 is DENIED. [21]

DATED this 23rd day of July, 2015 at Anchorage, Alaska.

/s/ Sharon L. Gleason
UNITED STATES DISTRICT JUDGE

[21] Plaintiffs' Motions for Judicial Notice at Dockets 64 and 66 are both GRANTED.