Nos. 07-71457, 07-71989, 07-72183

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE, *et al.*,
RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS, *et al.*, and
NORTH SLOPE BOROUGH, *et al.*,

Petitioners,

v.

DIRK KEMPTHORNE, Secretary of the Interior, *et al.*,

Repondents,

and

SHELL OFFSHORE, INC.,

Respondent-Intervenor.

On Petition for Review of a Decision of the Department of the Interior

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MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Proposed *Amici Curiae*, Mountain States Legal Foundation ("MSLF"), National Association of Manufacturers ("NAM"), and Chamber of Commerce of the United States of America ("Chamber") certifies that MSLF, NAM, and the Chamber are non-profit corporations that have no parent companies and have never issued any stock.

DATED this 17th day of February 2009.

Respectfully submitted by:

/s/ Ronald W. Opsahl

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COME NOW Mountain States Legal Foundation, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America and hereby move, pursuant to Federal Rule of Appellate Procedure 29(b), for leave to participate as *amici curiae*. The grounds for this Motion are as follows:

1. Mountain States Legal Foundation ("MSLF") is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF has more than 9,000 members throughout the United States, many of whom use public lands, as permitted by federal laws, in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington; these uses include recreational activities and economic endeavors, such as mining, logging, oil and gas development, and livestock grazing.

2. The National Association of Manufacturers ("NAM"), with more than 11,000 corporate members, is the Nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States's economic growth and to increase understanding among policymakers, the media,

and the general public about the vital role of manufacturing to America's economic future and living standards.

3. The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of business companies and associations, representing an underlying membership of more than three million business and professional organizations of every size and in every industrial sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

4. MSLF, NAM, and the Chamber believe that the overly strict interpretation of the National Environmental Policy Act requirement imposed by the majority opinion in this case has implications far beyond the Minerals Management Service and the Beaufort Sea projects. Indeed, the majority opinion's erroneous interpretation could make all federal projects, not just those seeking energy exploration and development in the Beaufort Sea, vastly more expensive or even financially prohibitive. In light of the serious impact such decisions have on the Nation's ability to bear the current economic stress and develop energy and other benefits in the future, it is important that this Court, which has jurisdiction over many of the Nation's most important national resources, delineate an analysis

that fairly recognizes the proper degree of scrutiny that should be applied to these projects.

5. Further, MSLF, NAM, and the Chamber believe that their members' interest in the outcome of this case, as well as their knowledge regarding various natural resources and environmental statutes, are such that its *amici curiae* brief will assist this Court.

6. Kimberly Philips, in-house counsel for Shell Offshore, Inc. was consulted regarding this Motion. Ms. Phillips stated that Shell Offshore, Inc. had no opposition to the granting of this Motion.

7. David Shilton, counsel for Respondents, Dirk Kempthorne, *et al.*, was consulted regarding this Motion. Mr. Shilton stated that Respondents had no opposition to the granting of this Motion.

8. Eric Jorgensen, counsel for the Alaska Wilderness League, Natural Resources Defense Council, Inc., Pacific Environment and Resources Center, Resisting Environmental Destruction on Indigenous Lands, Center for Biological Diversity, and the Sierra Club was consulted regarding this Motion. Mr. Jorgensen stated that his clients had no opposition to the granting of this Motion.

9. Christopher Winter, counsel for the North Slope Borough and Alaska Eskimo Whaling Commission was consulted regarding this Motion. Mr. Winter stated that his clients intend to oppose this Motion.

WHEREFORE, MSLF, NAM, and the Chamber respectfully move for leave to participate as *amici curiae* in support of Respondent-Intervenor, Shell Offshore Inc.'s Petition for Rehearing and Suggestion for Rehearing En Banc and requests that this Court allow it to file the *Amici Curiae* brief lodged herewith.

DATED this 17th day of February 2009.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that on February 17, 2009, I mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three calendar days, to the following:

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AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT-INTERVENOR'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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DATED this 17th day of February 2009.

Respectfully submitted by:

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IDENTITY AND INTEREST OF *AMICI CURIAE*

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The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of business companies and associations, representing

an underlying membership of more than three million business and professional organizations of every size and in every industrial sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.[1]

INTRODUCTION

In April 2002, the Minerals Management Service ("MMS") issued a five-year plan establishing a lease sale schedule for, *inter alia*, the Outer Continental Shelf of Alaska. The plan envisioned offering three separate lease sales in the Beaufort Sea. In February 2003, MMS prepared a detailed environmental impact statement ("Multi-Sale EIS") to evaluate the overall impacts of the activities projected to occur pursuant to these lease sales. The Multi-Sale EIS analyzed the potential effects of oil exploration and production on the region's wildlife, environment, and subsistence activities. The Multi-Sale EIS assumed that drilling would begin in 2007 and evaluated mitigation measures that were developed through the cooperation of federal agencies, the State of Alaska, and Native Alaskans. These measures included an extensive bowhead whale monitoring

[1] Pursuant to Federal Rule of Appellate Procedure 29, a Motion for Leave to File this *Amici Curiae* Brief is filed concurrently herewith.

program and a conflict avoidance process designed to protect subsistence activities. The Multi-Sale EIS further noted: "'Any proposed exploration or development plans that may result for any of the three OCS [outer continental shelf] sales evaluated in this EIS, would require additional NEPA environmental analysis using site specific information.'" *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 818 (9th Cir. 2008) (quoting Multi-Sale EIS).

In July 2004 and August 2006, MMS held two lease sales, preparing a supplemental environmental assessment ("EA") for each one. *Id.* Both of these EAs were "tiered" to the Multi-Sale EIS. *Id.* The leases at issue in this case were purchased by Shell Offshore, Inc. ("Shell") in July 2004. *Id.*

The Outer Continental Shelf Lands Act ("OCSLA") requires that a lessee obtain approval of an exploration plan before beginning exploratory drilling. 30 C.F.R. § 250.201. The exploration plan must include a project-specific environmental impact analysis assessing the potential effects of the proposed exploration activities. *Id.* § 250.227. MMS conducts its environmental review pursuant to the National Environmental Policy Act ("NEPA"), *id.* § 250.232(c), and, within thirty days, issues a decision approving, disapproving, or requiring modifications to the exploration plan. *Id.* § 250.233.

Shell's proposed drilling activities are the first to be considered for the Beaufort Sea in conjunction with these lease sales. *Alaska Wilderness League*,

548 F.3d at 818. In November 2006, Shell submitted its Exploration Plan for the Beaufort Sea region. *Id.* Shell's Exploration Plan details its plan to drill up to twelve exploratory wells on twelve lease tracts in the Beaufort Sea over the next three years. *Id.* In the first year of the plan, Shell aims to drill four wells; in the following two years, "Shell proposes to drill an undetermined number of wells on additional prospects . . . depending on the [initial] drilling results." *Id.* Throughout this project, Shell plans to use two drilling vessels, two icebreaking ships, various other supply boats, and up to six aircraft. *Id.* All exploratory activities would occur between June and mid-November as the Beaufort Sea is frozen over for half of the year. *Id.* at 818–819.

After receiving Shell's completed Exploration Plan, the MMS issued an 87-page Environmental Assessment and a Finding of No Significant Impact ("EA/FONSI") on February 15, 2007. *Id.* at 819. The EA/FONSI "tiers" to the prior environmental studies, pursuant to 40 C.F.R. § 1502.20. *Id.* The EA/FONSI provides: "'The level and types of activities proposed in the Shell [exploration plan] are within the range of the activities described and evaluated in the Beaufort Sea multiple-sale EIS . . . and updated in EA's [sic] for Sales 195 and 202.'" *Id.* (quoting EA/FONSI). The agency concluded that the proposed activities "would not significantly affect the quality of the human environment" or "cause undue or serious harm or damage to the human, marine, or coastal environment," in

accordance with 40 C.F.R. § 1508.27. *Id.* (internal quotation omitted). As a result of this finding, the MMS did not prepare an EIS specific to Shell's project. *Id.*

On April 13, 2007, a group of Petitioners consisting of the Alaska Wilderness League, the National Resources Defense Council, and the Pacific Environment and Resources Center filed a Petition for Review in this Court. No. 07-71457 (9th Cir.). Simultaneously, Petitioners representing the North Slope Borough and the Alaska Eskimo Whaling Commission filed an optional administrative appeal from the agency's decision with the Interior Board of Land Appeals ("IBLA"). On May 4, 2007, the IBLA declined to exercise its jurisdiction and stayed the administrative proceedings pending the outcome of the Alaska Wilderness League Petitioner's Petition for Review. *Alaska Wilderness League*, 548 F.3d at 819.

Shell filed a Motion to Intervene on May 14, 2007. *Id.* On May 15, 2007, the North Slope Borough Petitioners filed an independent Petition for Review. No. 07-72183 (9th Cir.). On May 22, 2007, Resisting Environmental Destruction on Indigenous Lands, an organization representing a network of Native Alaskans, filed its Petition for Review and a Motion to Consolidate. No. 07-71989 (9th Cir.). The Ninth Circuit consolidated the matter on July 2, 2007. *Alaska Wilderness League*, 548 F.3d at 820. On August 14, 2007, the Court granted Petitioners'

motion to stay, ordering the agency's decision inoperative until this matter could be considered on the merits. *Id.*

On November 19, 2008, this Court issued its opinion in these consolidated cases. 548 F.3d 815. A majority of the panel held the MMS's approval of Shell's exploration plan unlawful, vacated the approval decision, and remanded so that the MMS could conduct the "hard look" analysis required by NEPA. *Id.* at 835. The dissenting judge, Judge Bea, would have upheld the MMS's approval of Shell's exploration plan. *Id.* at 847 (Bea, J., dissenting).

On December 18, 2008, Shell filed a motion for an extension of time in which to file a petition for rehearing *en banc* until February 4, 2009. On December 23, 2008, the court granted the motions for extension of time. Doc. No. 123. On February 4, 2009, Shell filed the instant Petition for Rehearing *En Banc*. Doc. No. 126.

ARGUMENT

The majority opinion in this case represents a significant departure from the NEPA review standards set forth by this Court's recent *en banc* decision in *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008). As the dissent in this case noted, the majority opinion effectively overrules *Lands Council*. *Alaska Wilderness League*, 548 F.3d at 843 (Bea, J., dissenting). Thus, this Court should grant the instant Petition for Rehearing *En Banc* in order to rectify this intra-Circuit split.

Review of a federal agency's action is generally governed by the Administrative Procedure Act's arbitrary and capricious standards. 5 U.S.C. § 706(2)(A). In *Lands Council*, this Court held that a reviewing court must satisfy itself that the agency's analysis "'provide[s] a full and fair discussion of the environmental impacts' so as to 'inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.'" *Lands Council*, 537 F.3d at 1001 (citing 40 C.F.R. § 1502.1). If an agency has provided a full and fair discussion of environmental impacts, then it has satisfied NEPA's "hard look" requirement, and the reviewing court's role is completed. *Id.*

Despite the recent *en banc* decision of this Court in *Lands Council*, the majority opinion in the instant case completely ignored that binding precedent. As the dissent noted, the majority opinion changes the *Lands Council* "full and fair discussion" standard against which to judge the NEPA "hard look" requirement to a heightened standard of review, which would "require[] the agency to address every possible post-hoc consideration or eventuality." *Alaska Wilderness League*, 548 F.3d at 844 (Bea, J., dissenting). In *Lands Council*, this Court expressly rejected this review standard:

> Thus, we hold that to the extent our case law suggests that a NEPA violation occurs every time the [agency] does not affirmatively address an uncertainty in an [environmental analysis], we have erred. After all, to require the [agency] to affirmatively present every

> uncertainty in its [environmental analysis] would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the [agency] from acting due to the burden it would impose.

Lands Council, 537 F.3d at 1001 (internal citations omitted). Indeed, if the majority applied the *Lands Council* standard properly in this case, it could only have found that the MMS satisfied NEPA. *Alaska Wilderness League*, 548 F.3d at 844 (Bea, J., dissenting). Application of the heightened standard of review articulated by the majority, however, leads to a very different result. *Id.* Accordingly, *en banc* review is warranted to resolve the conflict created by the majority opinion in this case.

The majority opinion identified the "major shortcoming" of the MMS's environmental analysis of Shell's Exploration Plan as its failure to assess the impacts on the bowhead whale population of two drill ships and two icebreakers operating simultaneously in the specific migration corridor in the Beaufort Sea. *Id.* at 826. In identifying this purported "shortcoming," the majority recognized that no study of these precise circumstances existed. *Id.* However, as was proper under this Court's guidance in *Lands Council*, the MMS relied on existing studies in reviewing Shell's Exploration Plan. *Id.* In fact, the studies relied upon by the MMS considered the specific drill ships contained in the Exploration Plan and the effects of noise from icebreakers on the bowhead whale in the Beaufort Sea. *Id.* In fact, as the dissent described, the EA/FONSI provided:

> [D]etailed information regarding the specific types of drilling and ice-management vessels Shell plans to use and how it intends to use them . . . . The EA discussed icebreaker noise, the effect on bowheads of noise from drilling and ice management, and the National Marine Fisheries Service's conclusion that exploratory drilling and associated activities would not jeopardize the bowhead whale, which it based in turn on the analysis of icebreaker and ice-management noise in addition to drilling noise. In fact, the EA conducted a noise analysis specific to the particular drilling vessels . . . and the particular icebreakers . . . . Shell plans to use.

Id. at 843 (Bea, J., dissenting).

Despite the expert analysis of the MMS, the majority substituted its own opinion and decided that the MMS's reliance on these very studies was insufficient. *Id.* at 843–844 (Bea, J., dissenting). Indeed, the majority opinion simply dismissed the studies as too "generalized." *Id.* at 826. Instead, the majority opinion would require the MMS to define with specificity the impact of the noise from the icebreakers to be used by Shell in the precise locations proposed in the Exploration Plan. *Id.* at 826–827. The majority opinion therefore erroneously substituted its judgment on the scientific merit of the studies for that of the MMS. *Id.* at 843–847 (Bea, J., dissenting). Moreover, in contradiction of this Court's direction in *Lands Council*, the majority insisted that the MMS conduct additional studies before it could approve Shell's Exploration Plan. *Id.* at 835. As noted in *Lands Council*, NEPA does not require a court to "decide whether an EIS is based on the best scientific methodology available. And, [a reviewing court should] not

find a NEPA violation based on [the agency's] use of an assumption." *Lands Council*, 537 F.3d at 1003 (internal bracket, quotation, and citations omitted).

Further, the majority's rejection of the MMS's use of existing environmental studies conflicts with NEPA. By requiring the MMS to produce or analyze data reflecting the operation of two drilling vessels and icebreakers in a specific location, the majority obligated the MMS to "affirmatively address every uncertainty" in its NEPA review. This Court has expressly rejected this requirement in *Lands Council*. *Id.* at 1001. Moreover, by second guessing the MMS's conclusion that existing studies would adequately predict the noise impacts from two drill ships and icebreakers in the Beaufort Sea, the majority has overstepped the judicial boundary articulated in *Lands Council* and has substituted its own opinion as to what constitutes the "best" science available. *See Lands Council*, 537 F.3d at 1003.

Further, the majority was required to consider the decades-long history of oil and gas development in the Beaufort Sea. *Winter v. Natural Resources Defense Center*, ___ U.S. ___, 129 S.Ct. 365 (2008). In *Winter*, the United States Supreme Court stated that the fact that an activity is one that has been performed in the past, and has been the subject of many environmental studies, is an important factor to be considered during the NEPA review process. *Id.* at ___, 129 S.Ct. at 376. In this case, there is ample information about the potential environmental impacts of

exploratory work in the Beaufort Sea. *Alaska Wilderness League*, 548 F.3d at 843–847 (Bea, J., dissenting). Despite the plethora of existing information, the majority ignores that leases have been sold, and wells drilled, in the Beaufort Sea for more than two decades and that the population of bowhead whale has increased during that time. *Id.* Moreover, the majority opinion disregards the many studies that have found no long-term or serious impacts to the whales and subsistence hunts due to oil and gas exploration activities. *Id.* While the majority may not have agreed with the existing studies, a reviewing court may not substitute its preference for the expertise and experience of the action agency. *Lands Council*, 537 F.3d at 1001–1003.

Thus, the majority opinion in this case undermines a consistent application of the APA and the principle of uniform standards against which to judge NEPA compliance. If allowed to stand, this decision would subject agencies to legal challenges based on the failure to consider every eventuality, increase the time for NEPA review, and inject unwarranted uncertainty into the agency review and approval process.

CONCLUSION

The overly strict interpretation of the NEPA requirement imposed by the majority opinion in this case has implications far beyond the MMS and the Beaufort Sea projects. Indeed, the majority opinion's erroneous interpretation

could make all federal projects, not just those seeking energy exploration and development in the Beaufort Sea, vastly more expensive or even financially prohibitive. In light of the serious impact such decisions have on the Nation's ability to bear the current economic stress and develop energy and other benefits in the future, it is important that this Court, which has jurisdiction over many of the Nation's most important national resources, delineate an analysis that fairly recognizes the proper degree of scrutiny that should be applied to these projects.

For the foregoing reasons, *Amici Curiae*, Mountain States Legal Foundation, the National Association of Manufacturers, and the Chamber of Commerce of the United States of America, respectfully urge this Court review this case *en banc* in order to clarify the apparent intra-Circuit split created by the Panel's majority opinion in this case.

DATED this 17th day of February 2009.

Respectfully submitted by:

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CERTIFICATE OF COMPLIANCE

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/s/ Ronald W. Opsahl
Ronald W. Opsahl, Esq.

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