Case No. 12-70218

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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ALASKA SURVIVAL, *et al.*,

Petitioners

v.

SURFACE TRANSPORTATION BOARD, *et al.*,

Respondents,

and

ALASKA RAILROAD CORPORATION, *et al.*,

Intervenor-Respondents.

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ON PETITION FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

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# INTERVENOR-RESPONDENTS ALASKA RAILROAD CORPORATION AND MATANUSKA-SUSITNA BOROUGH'S MOTION TO LIFT STAY

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## INTRODUCTION

Approximately seven weeks ago, on the heels of the U.S. Army Corps of Engineers' decision to issue a Clean Water Act Section 404 permit for the Port MacKenzie Rail Extension project, Petitioners filed an emergency motion for a stay of the Surface Transportation Board order at issue in this proceeding. Because Petitioners' characterized their motion as an "emergency," the clerk's office ordered an exceptionally short briefing schedule. A motions panel of this Court granted Petitioners' motion on October 1, 2011, over a strongly worded dissent. The panel further ordered the expedition of oral argument on the merits of the Petition for review of the Board's order.

Three significant things have changed since the Order issuing the emergency stay in this case. First and most significant, oral argument on the merits of Petitioners' claims was held on November 8, 2012, and the case was submitted for decision. Second, on November 6, 2012, the voters of the State of Alaska approved a bond issue that provides additional funding for the Port MacKenzie Rail Extension. Third, on October 5, 2012, the same three entities who are Petitioners in this case filed a lawsuit in the United States District Court for the District of Alaska directly challenging the Corps of Engineers permit that originally prompted their emergency motion in this Court. As discussed in detail below, each of these changes argues against the continuance of the emergency stay.

If the stay is not lifted in light of these changed circumstances, it will cause significant harm the project proponents in this case, Alaska Railroad Corporation ("ARRC") and Matanuska-Susitna Borough (the "Mat-Su Borough"), and to the public. ARRC is an instrumentality of the state of Alaska, and is tasked with facilitating economic growth in the state. The Borough is a municipality whose interests similarly lie in promotion of the employment and economic well-being of its residents. The stay obtained by Petitioners is already delaying investments that will bring new construction jobs to the region, and, if it is left in place, could cause significant delays in the construction of the project itself. These delays are expected to add a significant incremental cost to this publicly funded project.

For all of these reasons, the requisite balancing of interests in this case calls for an immediate lifting of the emergency stay that was ordered by the motions panel prior to oral argument.

## BACKGROUND

The background of the Port MacKenzie Rail Extension project, and the Surface Transportation Board's order approving the construction and operation of that rail line extension, is thoroughly discussed in ARRC and the Borough's merits sum. *See* Docket No. 24, Brief of Intervenor-Respondents Alaska Railroad Corporation and Matanuska-Susitna Borough ("ARRC-Borough Br.") at 4-10. As the Court is aware, ARRC is planning to construct a thirty-five mile rail line extension

from its main line near Willow, Alaska to the large bi-modal bulk materials facility at Port MacKenzie. *Id*. at 7. The Surface Transportation Board spent approximately four years conducting an extensive, public review of the potential environmental impacts of ARRC's project, and ultimately voted to approve ARRC's project. *Id*. at 8-10.

Despite the Board's approval, ARRC's ability to proceed with staged construction was constrained for many months by the fact that it had not yet acquired a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers (the "Corps"). On September 10, 2012, however, the Corps issued its permit, which authorized the discharge of fill material into wetlands and other jurisdictional waters of the U.S. in connection with the project. Docket 41-2, Second Declaration of Brian Lindamood ("Lindamood Decl.") ¶ 3 & Ex. A. Petitioners cited the issuance of the Corps permit as the primary reason that they sought an emergency stay when they did. *See* Docket 38, Mot. for Emerg. Stay at 3-4.

As ARRC explained to the motions panel, it plans to proceed with construction of the Port MacKenzie Rail Extension in eight stages, or "segments." Lindamood Decl. ¶ 4 & Ex. B. The actual work will be performed by construction contractors, with each segment being the subject of a separate public contracting process. *Id*. ¶ 5. So far, only one of the eight contracts has been awarded, the contract for construction of Segment 1. *Id*. ¶ 6. When the Corps issued its Clean Wa-

ter Act permit, ARRC authorized its Segment 1 contractor to proceed with all permitted activities. *Id.* ¶ 8. The most recent schedule that ARRC received from its contractor indicated that the majority of filling activities authorized by the Corps permit in Segment 1 would commence in February 2013. *Id.* ¶ 9. Some preliminary work, such as grade preparation and bridge construction, was expected to occur before the end of the year. *Id.* ¶ 10.

Two other segments, Segment 3 and Segment 6, had been set to go through the public bidding process in September 2012. *Id.* ¶ 11. Work on these segments was expected to begin in the spring of 2013, with Segment 3 being completed by the end of 2013 and Segment 6 being completed in 2014. *Id.* ¶ 12. In light of the passage of the bond measure by Alaska voters this week, ARRC further plans to bid out Segment 4 in January 2013. *Id.* ¶ 13. The remaining project Segments (2, 5, 7 and 8) are anticipated to be under contract in fall 2013. *Id.* ¶ 15. Track construction (Segment 8) is not anticipated to be complete before the end of 2016. *Id.* ¶ 18. Obviously, rail operations will not take place until track construction is complete. *Id.* ¶ 19.

## ARGUMENT

As the U.S. Supreme Court explained in *Nken v. Holder*, 556 U.S. 418, 427 (2009), the issuance of a stay pending review is an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of

right, even if irreparable injury might otherwise result to the appellant." (Internal quotation marks and citations omitted.) Rather, courts have discretion to grant a stay based on their evaluation of four factors: (1) whether the moving party "has made a strong showing that he is likely to succeed on the merits"; (2) whether the moving party "will be irreparably injured" absent the requested relief; (3) whether other parties involved in the case will be "substantially injure[d]"; and (4) "where the public interest lies." *Id*. at 434. This Court has explained that consideration of a request for a stay demands a "flexible approach" that involves a "balancing" of these four factors. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

Where the "circumstances and balance of hardships" that supported issuance of a stay "have changed," a party may ask that the stay be lifted. *Log Cabin Republicans v. United States*, Nos. 10-56813 & 10-56634, 2011 WL 2637191, at *1 (9th Cir. July 6, 2011), reversed in part, 2011 WL 2982102 (9th Cir. July 15, 2011). Faced with such a request, a Court will re-evaluate the stay factors to determine whether continuance of the stay is justified. *See id*. (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

## I. Since the case has been submitted, Petitioners' likelihood of success on the merits should be considered in light of full briefing and argument.

"The first showing a stay petitioner must make is 'a ***strong showing*** that he is ***likely*** to succeed on the merits.'" *Leiva-Perez*, 630 F.3d at 966 (quoting *Nken*,

556 U.S. at 434) (emphasis added). That does not mean that it must be "more likely than not" the moving party will prevail on the merits, but it does require "more than a mere possibility" of success. *Id*. at 967 (internal quotation marks omitted). By a 2-to-1 margin, the motions panel ruled that Petitioners had raised a "serious question" on the merits, and accordingly granted their request for a stay. Docket No. 44, Order at 1. But circumstances have now changed.

This Court heard oral arguments in this case on November 8. *See* Docket No. 51. Afterwards, the case was submitted for decision, and is now before the merits panel that heard arguments. *Id*. The Court can therefore base its stay determination on the merits briefing and oral argument, rather than making a "tentative" decision "based on an abbreviated record . . . without the benefit of full briefing and oral argument" (*Stifel, Nicolaus & Co., Inc. v. Woolsley & Co., Inc.*, 81 F.3d 1540, 1544 (10th Cir. 1996)), as the motions panel was required to do. Indeed, "[d]ecisions made by motions panels are summary in character, made often on a scanty record, and not entitled to the weight of a decision made after plenary submission." *Id*. (internal quotations marks and citations omitted). "With the benefit of full briefing and (as was the case here) oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be reconsidered." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (quoting *Equal Employment Opportunity Comm'n v.*

*Neches Butane Prods. Co.*, 704 F.2d 144, 147 (5th Cir. 1983)); *cf. Blue Mtns. Bio-Diversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (explaining that the Court had initially denied an emergency injunction motion, but later imposed an injunction "after hearing oral arguments" on the merits); *Clarett v. National Football League*, 369 F.3d 124, 129-130 (2d Cir. 2004) (noting that the Court had granted a stay motion after oral argument, citing the "likelihood of success" of the party that ultimately prevailed on the merits).

As this Court has previously explained, "even certainty of irreparable harm has never ***entitled*** one to a stay." *Leiva-Perez*, 640 F.3d at 965 (citing *Nken*, 556 U.S. at 433). Rather, because a stay is an "intrusion into the ordinary processes of administration and judicial review," the movant must also make "a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 427, 434. Intervenor-Respondents submit that, when the full merits briefing and arguments are taken into account, Petitioners cannot show that they have raised the type of "serious question" on the merits of this case necessary to sustain the emergency stay imposed by the motions panel. Thus, regardless of the injuries that Petitioners allege, they are not entitled to a stay pending issuance of a written decision.

## II. A continuance of the stay would severely harm ARRC, the Mat-Su Borough and the public.

There has never been any question that ARRC and the Mat-Su Borough face significant hardships if ARRC is not permitted to move forward with the construc-

tion activities authorized by Board. Now those hardships are complicated by the fact that the voters of Alaska have approved a state bond issue, part of which was intended to pay for construction activities that are on hold as a result of the stay in this case.

The three construction contracts that ARRC had planned to award in 2012 (Lindamood Decl. ¶ 23) have already been delayed, and could be cancelled if the stay remains in place through the end of November, 2012. Furthermore, if the stay is not lifted before construction is planned to resume (in Feburary 2013), ARRC will be forced to delay or cancel the already-awarded contract for Segment 1, at a cost of approximately $1.5 million. *Id*. ¶ 22. And ARRC cannot reasonably initiate the procurement process (which takes an estimated 90-120 days) for construction work planned to occur in 2013 until the stay is lifted. Thus, if the stay remains in place until a decision issues in this case, it could cause ARRC to lose out on the spring and summer 2013 construction season in Alaska, which would effectively delay the entire project by a year. *Id*. ¶ 21. The costs of such a delay—including inflation, regulatory reporting costs and administrative fees—are estimated to be over $10 million. *Id*. ¶ 24. Combined with the costs of delaying or canceling the Segment 1 contract, ARRC faces over ***$12 million*** in direct costs from a continuance of the stay, to say nothing of the incalculable indirect costs from lost revenue opportunities. *Id*. ¶¶ 25-26.

In addition, the maintenance of the stay in this case puts on hold the more than 100 construction jobs that the Port MacKenzie Rail Extension construction was anticipated to generate in the coming months. *See id*. ¶ 27. Especially in the present difficult economic times, this Court has been careful to consider the employment benefits of a project like the rail extension. *See, e.g.*, *Western Watersheds Project v. Salazar*, 692 F.3d 921, 922 (9th Cir. 2012) (concluding that the district court properly denied an injunction after weighing "environmental harm" against, among other things, "possible damage to project funding" and "jobs"); *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (affirming the denial of an injunction based in part on the "boost to the local economy by creating jobs"); *Western Watersheds Project v. Bureau of Land Mgmt*., 774 F. Supp. 2d 1089, 1103 (D. Nev.), *aff'd*, 443 Fed. Appx. 278 (9th Cir. 2011) (denying an injunction based in part on the benefits of 225 construction jobs to the state's "economic recovery"). The Port MacKenzie Rail Extension project will boost the Mat-Su Borough's economy, most immediately by providing over 100 residents with high-paying construction jobs. Docket No. 41-5, Declaration of John Moosey ¶ 3. Those high-paying jobs will lead to more spending, which will benefit the public, including numerous Borough residents. *Id*. ¶¶ 4-5. That is precisely why the public on November 6 voted to approve a state bond issue that will help fund continued work on the project.

## III. Petitioners' new lawsuit against the Corps in the District of Alaska abrogates the need for an emergency stay of the Board's order in this case.

As noted above, Petitioners have always been clear that the catalyst for their seeking an emergency stay in this case was the Corps' issuance of a Clean Water Act permit. At the time they filed their emergency motion in this Court, however, Petitioners had not challenged the legality of the Corps permit. Now, they have. On October 5—just days after the motions panel's order in this case—Petitioners filed a new civil action in the District of Alaska claiming, among other things, that the Corps' permitting decision violated the National Environmental Policy Act ("NEPA") and the Clean Water Act. *See Cook Inletkeeper, et al. v. United States Army Corps of Engr's, et al.*, Case No. 3:12-cv-00205-JWS (D. Alaska). To the extent that Petitioners believe the Corps' permit authorizes activity that would justify preliminary injunctive relief, they can seek that relief from the district court. There is no longer any reason to hold the Board's order hostage based on the Petitioners' opposition to the activities authorized by the Corps permit.

## CONCLUSION

For all the reasons stated above, ARRC and the Mat-Su Borough respectfully request that the emergency stay imposed by the motions panel be immediately lifted pending issuance of an opinion and final judgment in this matter.

Dated: November 9, 2012

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. To the best of my knowledge, all counsel of record are registered CM/ECF users.

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