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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA INDUSTRIAL DEVELOPMENT AND EXPORT AUTHORITY, et al, Plaintiffs, and STATE OF ALASKA, Intervenor-Plaintiff, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al., Defendants, and NATIVE VILLAGE OF VENETIE TRIBAL GOVERNMENT, et al. Intervenor-Defendants	Case No. 3:21-cv-00245-SLG **PLAINTIFFS' AND INTERVENOR-PLAINTIFF'S REPLY BRIEF REGARDING MOTION TO ALTER OR AMEND SUMMARY JUDGMENT ORDER AND JUDGMENT**

Plaintiffs file this reply brief in support of their Rule 59(e) Motion to Alter or Amend (Dkt. 76) the Court's August 7, 2023 Order granting summary judgment ("Order") and the related Judgment (Dkts. 72 and 73).

A Challenges to Lease Suspension Have Become Moot.[1]

Concurrently with this reply brief, Plaintiffs are filing a motion under Fed.R.Civ.P. 60(b) requesting relief from judgment and vacatur of the Order, because DOI's actions shortly after entry of the Court's judgment have rendered this litigation moot. This case about the Federal Defendants' temporary suspension and moratorium on the implementation of oil and gas leases in the ANWR Coastal Plain was litigated to judgment on the premise that Federal Defendants had only temporarily stayed AIDEA's leases. *See* Dkt. 72 at 16-20, 24, 45, and 65. On September 6th, 2023, 30 days after the Court entered its judgment, and one day after Plaintiffs filed their Motion to Alter or Amend based on that premise that the case involved a temporary suspension only, Federal Defendants issued an order cancelling AIDEA's Coastal Plain leases. *See* Dkt. 79 at 4, n. 2.[2] As Federal Defendants acknowledge in their opposition, their cancellation of AIDEA's leases prevents the award of meaningful relief to Plaintiffs: "Movants

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[1] Plaintiffs' discussion of mootness is limited to responding to Federal Defendants' assertion that the specific relief sought in the Motion to Alter or Amend can no longer be granted (Dkt. 79 at 4, n. 2). Broader arguments regarding mootness and the effect DOI's lease cancellation has on this litigation as a whole should be considered in the context of Plaintiffs' separate Rule 60 Motion, to which Federal Defendants and Defendant-Intervenors have the opportunity to respond. Plaintiffs encourage the Court to rule on this Motion after the briefing in the Rule 60 motion is completed so that all Parties have had the opportunity to fully brief the effects that cancelling AIDEA's lease agreements has on this litigation.

[2] The leaseholder, Plaintiff AIDEA, will shortly be filing a new lawsuit seeking to overturn this new unlawful final agency action (lease cancellation).

[Plaintiffs AIDEA et al.] could not undertake lease implementation actions regardless of whether they prevail on their Motion [to Alter or Amend], because the Department of Interior cancelled the corresponding leases on September 6, 2023." (Dkt. 79 at 4, n. 2).

Federal Defendants are correct that lease cancellation does overtake the present Motion. The Motion seeks relief from the Court's judgment upholding lease suspension while Federal Defendants consider measures to protect the environment. The relief sought by Plaintiffs was an order requiring Federal Defendants to allow Plaintiffs to undertake non-environment impacting lease implementation activities such as archeological surveys. Plaintiffs sought to take such steps while Federal Defendants continue to consider necessary measures to protect the environment with respect to other lease implementation activities that do impact the environment. Motion at 6. But now, there are no more leases to implement, either through environment impacting or non-environment impacting activities.

Plaintiffs' remedy at this point is to file a new lawsuit seeking judicial review of the new operative event and relief from this new situation and the materially changed circumstances, which is Federal Defendants' outright cancellation of their Congressionally-mandated leases. With respect to this existing lawsuit, Plaintiffs are filing shortly a Rule 60 motion requesting relief from judgment, based on Federal Defendants' cancellation of the leases mooting this litigation over the suspension and moratorium of activities under those leases.

B. Plaintiffs' Motion does Not Raise New Arguments or Relitigate Decided Issues.

In the event the Court finds that this litigation presents a continuing live controversy despite Federal Defendants' cancellation of the leases on September 6, 2023, Plaintiffs now briefly reply to the Oppositions filed by Federal Defendants and the two sets of Defendant-Intervenors to Plaintiffs' Motion to Alter or Amend. That Motion seeks relief from the August 7, 2023 judgment in the form of a judicial order overriding the lease suspensions issued in 2021 and directing Federal Defendants to allow Plaintiffs to undertake non-environment impacting activities implementing the leases that, as of the filing of the Motion, were merely suspended.

Federal Defendants and Defendant-Intervenors contend that Plaintiffs' Motion attempts to relitigate the outcome of issues already decided by the Court in its Order or, conversely, seeks to raise new issues that should have been raised before Judgment. Instead, the Motion is directed at implications of the Court's summary judgment order that could not reasonably have been anticipated and caselaw and evidence that was not discussed by the parties in their briefing, but was discussed by the Court in its decision.

1. The Court Raised Section 6 of the Now-Cancelled Leases *Sua Sponte*

Plaintiffs' discussion in its Motion to Alter or Amend regarding § 6 of AIDEA's leases was in response to the Court's *sua sponte* analysis of § 6 in its summary judgment order (Dkt. 72 at 39-40). In Plaintiffs' opening motion for summary judgment, Plaintiffs referred to a different provision of the lease agreements, which declared that the leases were subject to future regulations or orders from DOI only when those actions are "not

inconsistent with, or unduly burdensome on, lease rights granted or specific provisions of the lease." Dkt. 60, at 29. Federal Defendants and Defendant-Intervenors did not address any of the lease terms in their briefing, thus did not raise § 6, and therefore Plaintiffs did not discuss § 6 in their reply summary judgment briefs. The Court's summary judgment order does discuss § 6, and cites it for the proposition that Federal Defendants may suspend activities under the leases to protect the environment. Dkt. 72, at 39-40.

In its analysis, though, the Court mistakenly overlooked that § 6 of the Lease authorizes DOI to take actions "reasonably necessary" to minimize adverse impacts of operations to the environment. This means § 6 does not authorize the suspension of lease implementation activities that do not impact the environment, such as archeological surveys. Identifying this limitation on the scope of a lease provision *sua sponte* relied upon by the Court is not relitigating issues fully-litigated in the summary judgment pleadings or introducing new issues that should have been raised before.

2. Any Suspension Authority within the NPRPA is Limited to "Operations and Production" and Protection of the Environment.

Similar to the Court's analysis of § 6 of the Lease Agreement, the Court overbroadly concludes that 42 U.S.C. § 6506a(k)(2) authorizes a total moratorium of all Coastal Plain oil and gas program activities. The Court held that this NPRPA suspension authority provision applies to the ANWR Coastal Plain litigation through the Tax Act.

Plaintiffs addressed this provision of the NPRPA in a footnote within their opening brief, explaining that 1) the NPRPA does not apply to the Coastal Plain given the Tax Act's mandate for oil and gas development and 2) that even if the NPRPA provision

were to apply, the suspension authority would be limited to site-specific lease considerations, not authority to issue a general program-wide suspension.[3] Federal Defendants did not address this NPRPA provision in their responsive summary judgment brief. Defendant-Intervenors in their responsive summary judgment brief argued this NPRPA provision does directly apply to all matters set forth in the Tax Act's discussion of the Coastal Plain,[4] and Plaintiffs, in their reply, responded to Defendant-Intervenors' point that the NPRA applied to post-lease-issuance matters.[5]

In its Order, the Court concluded that the NPRPA rule applies conveying suspension authority over lease activities.[6] Plaintiffs do not seek to relitigate through this Motion the Court's ruling on the applicability of the NPRPA suspension provision. Plaintiffs' discussion of 42 U.S.C. § 6506a(k) in this Motion instead requests that the Court narrow the scope of its order upholding the Moratorium as a whole to reflect the limiting language within § 6506a(k)(2), the immediate surrounding clauses of the statute, and its implementing regulations. The analysis of that limiting language is closely parallel to that of § 6 of the lease discussed above – the NPRPA provision, like § 6 of the lease, is directed at environment-impacting activities, and so does not support a moratorium of those lease implementation activities that do not impact the environment. This is a natural follow-up issue that arose only after the Court rejected Plaintiffs'

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3 Dkt. 60 at 22.

4 Dkt. 64 at 14; Dkt. 65 at 11.

5 Dkt. 67 at 15-16.

6 Dkt. 72 at 21-25.

principal argument that 42 U.S.C. § 6506a(k)(2) cannot apply to Coastal Plain post-lease-issuance matters. Plaintiffs cannot be expected to anticipate every twist and turn that may follow from how the Court resolves an issue not raised by the Federal Defendants to defend their lease suspension.

3. The Court's *sua sponte* discussion of *Gen. Motors v. United States* was an important part of its opinion.

In reaching its key decision that the Tax Act's December 2021 deadline for implementing the first lease sale on the Coastal Plain did not impose any corresponding deadlines for DOI to grant easements and rights-of-way necessary to implement the program, the Court ruled that when Congress imposes an explicit deadline for one agency action in a statute, but not for another action, Congress acted intentionally in omitting a second deadline.[7] In reaching this conclusion, the Court relied upon a case not cited by the parties in their briefing, *Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990).

As discussed in greater detail in Plaintiffs' Motion to Alter or Amend, in *Gen. Motors* the Court interpreted statutory deadlines within the Clean Air Act for two distinct, equally significant, parallel agency tasks.[8] In contrast, the Tax Act sets forth a set deadline for one major, primary directive (the initial Coastal Plain lease sale) followed by a directive for DOI to complete necessary, smaller follow-up actions to implement and effectuate the sale. Defendant-Intervenors assert that Plaintiffs' discussion of *Gen. Motors* and the canons of statutory construction is an attempt to relitigate the Tax Act's

[7] Dkt. 72 at 19.

[8] *See* Dkt. 76 at 6-9.

deadlines by improperly raising a new argument for the first time in their Motion to Alter or Amend. But neither Defendants, nor Intervenor-Defendants raised *Gen. Motors* in their briefing or applied its statutory construction arguments in support of the Moratorium. Plaintiffs had no reason to distinguish and contest a rival, unarticulated canon of statutory interpretation or case law which Plaintiffs believe is distinct from the statutory language and Congressional mandates set forth within the Tax Act. The Court found and considered this precedent through its own research. It is thus proper, and the first opportunity, for Plaintiffs to respond to the Court's consideration of *Gen. Motors* through the Motion to Alter or Amend.

C. Permitting Non-Environmentally Impacting Activities is a Logical Lesser Remedy, Properly Brought in Response to the Court's Order.

Defendant-Intervenors argue that Plaintiffs' request for limited relief is an impermissible new argument because Plaintiffs did not expressly request such a lesser alternative when discussing appropriate remedies in the summary judgment pleadings. But full vacatur is the presumptive remedy for unlawful agency actions.[9] Furthermore, it is appropriate to request the Court to narrow its ruling (consequently providing some form of lesser relief to Plaintiffs) when the rationale relied upon in its Order as broad grounds establishing DOI's authority to implement the Moratorium does not apply to the subset of activities under the Coastal Plain oil and gas program which do not adversely affect the environment.

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[9] *350 Montana v. Haaland*, 50 F.4th 1254, 1259 (9th Cir. 2022).

Moreover, Plaintiffs' summary judgment pleadings identified preliminary non-environment impacting activities such as archaeological studies and the unlawfulness of the Moratorium's scope in also precluding these activities.[10] Plaintiffs also argued that even if the Court accepts Federal Defendants' position that additional analysis of alleged deficits is necessary, no reason nor justification exists for the suspension of activities that do not adversely affect the environment such as archeological surveys.[11]

Relatedly, the Court should not heed Federal Defendants' assertion that this requested relief is inherently flawed because all activities on the Coastal Plain are capable of adverse impacts through the disturbance of vegetation and disruption of wildlife.[12] Archaeological studies and cultural surveys do not involve construction of permanent structures or ground-disturbing activities. These are the initial activities designed to identify areas on the Coastal Plain which require additional protections. Affects, if any, from individuals traversing the landscape in order to survey or photograph these areas will be minimal and short-term in duration.[13] Moreover, Plaintiffs must still obtain DOI authorization for any such work, providing the agency with discretion to impose conditions or restrictions it finds necessary to protect the environment.

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[10] Dkt. 60 at 13; Dkt. 60-1 at 5-6.

[11] Dkt. 66 at 16-17.

[12] Dkt. 79 at 3.

[13] Federal Defendants' cites to the EIS indicate that disturbances from general exploration activities, not specific to archeological and cultural surveys, are largely short term in duration and site-specific.

Finally, Federal Defendant's argument that this lesser-relief is not warranted because DOI's Moratorium is based on deficiencies in the record, not environmental impacts,[14] is unpersuasive. The stated reasoning for DOI's Moratorium is the purported need to correct deficiencies in its implementation of the Coastal Plain oil and gas program. But the purported errors all relate to impacts the Program will have on the environment. More importantly, the sources of law the Court finds as establishing the agency's suspension authority, and thus authorizing the Moratorium, do require the prevention of environmental harm for the conveyance of suspension authority.[15]

C. Conclusion

If the Court decides that this matter is not moot, the Court should grant Plaintiffs' Motion to Alter or Amend.

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14 Dkt. 79 at 3.

15 Dkt. 76 at 3-6.

Respectfully submitted this 17th day of October, 2023.

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