David Karl Gross, ABA #9611065
James Lister, ABA #1611111
Birch Horton Bittner & Cherot
510 L Street, Suite 700
Anchorage, Alaska 99501
dgross@bhb.com
jlister@bhb.com
Telephone 907.276.1550
Facsimile 907.276.3680

Attorneys for Plaintiffs Alaska Industrial Development and Export Authority, North Slope Borough, Arctic Slope Regional Corporation, and Kaktovik Inupiat Corporation

Treg Taylor
Attorney General
Ronald W. Opsahl, ABA #2108081
Assistant Attorney General
Department of Law
1031 W 4th Ave, Ste 200
Anchorage, AK 99501
ron.opsahl@alaska.gov
Telephone: (907) 269-5232
Facsimile: (907) 276-3697

Attorneys for Intervenor-Plaintiff State of Alaska

(see signature page for additional counsel)

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 vs. 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

REPLY IN SUPPORT OF MOTION FOR RELIEF FROM FINAL JUDGMENT

The decision by the U.S. Department of the Interior ("DOI") to cancel the Alaska Industrial Development and Export Authority's ("AIDEA") oil and gas leases on the Coastal Plain has rendered this controversy moot. While AIDEA has filed a new lawsuit challenging this separate subsequent agency action, the lease cancellation removed the Court's ability to provide Plaintiffs with any meaningful, effective relief in this litigation. Despite their attenuated characterization of Plaintiffs' claims and the hypothetical relief available in the event of success on appeal, Defendants and Defendant-Intervenors fail to rebut this inescapable conclusion.

I. Munsingwear Vacatur, in Whole or In Part, is Required Under These Circumstances.

Defendant and Defendant-Intervenors' Opposition memorandums suffer from a shared flaw: they conflate the standard applicable to a typical Rule 60(b)(5) motion for relief from a final judgment with that applicable to motions made pursuant to *United States v. Munsingwear.*[1] As Plaintiffs briefed in their opening Motion for Relief from Final Judgment,[2] little authority addresses which subsection of Rule 60(b) allows a party to move for relief under *Munsingwear*'s holding. In *American Games, Inc. v. Trade Prod., Inc.,*[3] the Ninth Circuit implied that section

[1] 340 U.S. 36 (1950).

[2] Dkt. 84 at 7, n. 16.

[3] 142 F.3d 1164 (9th Cir. 1998).

(b)(5) is applicable to requests for vacatur on mootness grounds where mootness resulted from the appellant's actions, rather than, as here, the actions of a party who prevailed in the lower court.[4]

It is puzzling that Defendants and Defendant-Intervenors argue the lease cancellation was not due to Defendants' unilateral actions and AIDEA should have anticipated the cancellation of its leases without opportunity for comment. It is black-letter law that federal courts, following *Munsingwear*, treat "automatic vacatur as the 'established practice,' applying whenever mootness prevents appellate review."[5] *Munsingwear* may be applied to require vacatur of either all of a judgment, or only those portions which have been rendered moot by subsequent actions.[6]

The Ninth Circuit recognizes a *limited exception* to this "established practice" where a case is mooted not due to happenstance, but "when the appellant has by his own act caused the dismissal of the appeal."[7] The Supreme Court upheld this rule in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* stating that the

---

[4] *Id.* at 1168.

[5] *Dilley v. Gunn,* 64 F.3d 1365, 1369 (9th Cir. 1995) (citing *In re Davenport,* 40 F.3d 298, 299 (9th Cir.1994); *Funbus Systems, Inc. v. California Pub. Utils. Comm'n*, 801 F.2d 1120, 1131 (9th Cir.1986); *DHL Corp. v. Civil Aeronautics Bd.,* 659 F.2d 941, 944 (9th Cir.1981); *Boggess v. Berry Corp.,* 233 F.2d 389, 393 (9th Cir.1956)).

[6] *See, e.g., Donovan v. Vance,* 70 F.4th 1167, 1172 (9th Cir. 2023) (vacating certain portions of trial court judgment pursuant to *Munsingwear* but declining to vacate portions which were clearly not moot).

[7] *Ringsby Truck Lines, Inc., v. Western Conf. of Teamsters,* 686 F.2d 720, 722 (9th Cir. 1982).

equitable principles of vacatur are not present "where the appellant by his own act prevents appellate review of the adverse judgment."[8] The Ninth Circuit recently repeated this point: "We decline to apply *Munsingwear* vacatur only when the party seeking appellate relief fails to protect itself or is the cause of subsequent mootness."[9] The basis for this rule is equity: in light of the equitable origins of vacatur, moot cases are to be disposed of in the manner " 'most consonant to justice' ... in view of the nature and character of the conditions which have caused the case to become moot."[10]

Defendants and Defendant-Intervenors fail to show that Plaintiffs did anything to prevent appellate review of the Court's summary judgment order. Instead, it is Defendants who saw fit to cancel AIDEA's leases and moot the controversy present throughout this case. Shortly after judgment in this case, Federal Defendants cancelled Plaintiff AIDEA's leases without providing an opportunity to defend against the cancellation, and before obtaining public comment on the draft NEPA document Federal Defendants prepared to evaluate whether their prior NEPA work was deficient.[11]. Indeed, Defendants and Defendant-Intervenors do not identify any specific action that Plaintiffs are alleged to have taken to rendered this case moot. From Plaintiffs' perspective, the timing

---

[8] 513 U.S. 18, 23 (1994).

[9] *Donovan*, 70 F.4th at 1173 (internal quotation omitted).

[10] *United States v. Hamburg–Amerikanische Packetfahrt–Actien Gesellschaft*, 239 U.S. 466, 477–478 (1916) (internal citations omitted).

[11] *See* Motion at 2 and n. 2; see also, Dkt. 85, Ex. A. ¶¶ 31-34, 41.

of the cancellation was either a tactical decision or happenstance — and either way, entirely outside of Plaintiffs' control. Such happenstance — by definition an exceptional circumstance — falls squarely within the scope of automatic *Munsingwear* vacatur. Plaintiffs respectfully request vacatur of the Court's final Order pursuant to Fed. R. Civ. P. 60(b)(5) and (6).

II. All Claims Pleaded by Plaintiff Have Been Rendered Moot.

A case is not moot only if the challenged action "is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties."[12] The adverse effect, however, must not be "so remote and speculative that there [is] no tangible prejudice to the existing interests of the parties."[13] Following the cancellation of AIDEA's leases, the Moratorium has no impact on the interests of the Plaintiffs and there is no "meaningful relief" that Plaintiffs can obtain.[14]

Plaintiffs' interests in this suit were two-fold: 1) specific relief lifting the suspension as to AIDEA's leases; and 2) the benefits arising from overall development of the Coastal Plain oil and gas program, which, given the termination

---

12 *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1974).

13 *Id.* at 123 (*discussing Oil Workers Unions v. Missouri*, 361 U.S. 363, 371 (1960)).

14 "Stated another way, the central question before us is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for ***meaningful*** relief." *Gator.com Corp., v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (*en banc*, emphasis added).

of all other leases, relied entirely upon work and development under AIDEA's lease agreements. Importantly, no party disputes that claims and arguments directly relating to the suspension of AIDEA's lease agreements are now moot. Instead, Defendants argue Plaintiffs' broader interests in development of the Coastal Plain remain live controversies because the Moratorium is still in effect.[15] But this argument fails to recognize that 1) development of the Coastal Plain is dependent upon the existence of lease agreements authorizing oil and gas operations; and 2) the apparent intent behind the Moratorium was to halt Coastal Plain oil and gas activities, which has been accomplished by Defendants' cancellation of the lease agreements. In finding the Moratorium to be a narrow agency adjudicative act focused on the leases, the Court stated:

> Although the Moratorium reverses Agency Defendants' prior determination — expressed through the NEPA review and their carrying out of the lease sale — that the Program comported with applicable federal laws, the Moratorium does not operate prospectively to affect the rights of unspecified individuals in the future. ***Rather, it directly and immediately affected the rights of the identified lessees*** on the Coastal Plain.[16]

Seeking to head off the conclusion that the case (and, indeed, the Moratorium more broadly) is moot, Defendants now contend that the Moratorium is broader than the leases and blocks Program activities that could theoretically be carried out, despite cancellation of the leases. Defendants assert Plaintiffs can

[15] Defendants Response in Opposition to Plaintiffs' Motion to Vacate, [Dkt. 89] at 3-5; Intervenor-Defendants' Joint Response in Opposition to Motion for Relief From Judgment, [Dkt. 90] at 5-10.

[16] Dkt. 72 at 44 (emphasis added).

still obtain an order compelling BLM to 1) process applications for necessary rights-of-ways and easements; or 2) issue permits for existing or new applications to perform non-lease operations on the Coastal Plain.[17]

But such an order cannot provide Plaintiffs with meaningful relief; it places the cart before the horse. No lease agreements authorizing oil and gas production are in effect. In their absence, it is impossible for Plaintiffs or BLM to identify the "necessary" rights-of-way or easements for development on the Coastal Plain. Filing for rights-of-way for transportation to and from unknown locations would be an exercise in futility, and such rights of way would presumably not be "necessary."[18] Similarly, applications for preliminary non-lease operations such as archeological surveys were done so to facilitate the development of AIDEA's existing lease-sites. The impetus behind those, or any future application, is tied entirely upon the corresponding opportunity to develop that land. But following lease cancellation, no such assurance exists. Plaintiffs cannot know what acres will be available in a future lease sale, if they will win the opportunity to enter a new lease, or what conditions on development may be attached to the lease. The effect of the lease cancellation is to turn any other work on the Coastal Plain, such as exploration, into a wholly speculative endeavor. Thus, an order compelling Federal Defendants to process those applications is a remedy in name only.

---

[17] Dkt. 89, p. 3; Dkt. 90, pp. 8-10.

[18] *See* Dkt. 72 at 25 (Tax Act § 20001(c)(2) only directs Federal Defendants to issue those rights of way that are "necessary").

Although the Moratorium remains in effect, its continued existence does not prevent mootness. Changes in circumstances since filing of the lawsuit must not have forestalled the court's ability to offer meaningful relief.[19] "A declaratory judgment may not be used to secure judicial determination of moot questions."[20] Similarly, claims for injunctive relief remain live controversies only so long as a plaintiff can reasonably be expected to benefit from such relief.[21] "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects."[22] Prior to lease cancellation, Plaintiffs could obtain relief from the Court in a variety of ways: a declaratory order that the Moratorium is unlawful, limited relief authorizing non-surface disturbing work while keeping the larger Moratorium in place, or issuing a date-certain deadline for BLM to complete their review to minimize delays. Following cancellation, those remedies no longer provide Plaintiffs with effective relief. If further litigation will result only in academic determinations as to the legality of the Moratorium, but cannot provide "meaningful relief" benefitting the Plaintiffs, then this lawsuit is moot.[23] Such is the case here.

---

[19] *Bayer* at 867.

[20] *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 816 (9th Cir. 1995).

[21] *Bayer* at 864.

[22] *Id.* (quoting *O'Neal v. City of Seattle*, 66 F.3d 1064, 1066 (9th Cir. 1995)).

[23] *Gator.com Corp.,* 398 F.3d at 1129.

Defendants also assert, somewhat naively, that a narrow subset of applications relating to permits for work on lands owned by Plaintiff Kaktovik Inupiat Corporation ("KIC") preclude mootness. As a threshold issue, the financial hardship that resulted from Defendants' suspension and then cancellation of AIDEA's leases has eviscerated KIC's financial ability to perform costly seismic work on its own behalf.[24] Even assuming *arguendo* that such permits remain relevant in the wake of AIDEA's lease cancellations, claims regarding KIC's permits are functionally moot. Seismic work on the Coastal Plain is limited to a short winter window each year, requiring advanced planning and notice.[25] It is certain that by the time the Court could issue a ruling compelling DOI to process these applications, and by the time DOI completes its review, it will be too late for KIC to actually conduct such seismic operations this year. If BLM sticks to its representations that a final SEIS will be issued in second quarter 2024, the Moratorium will be lifted prior to KIC's next opportunity to undergo such seismic

---

[24] *See,* e.g., Dkt. 62-2, Declaration of Charles Lampe, at ¶ 11 ("Defendants' halting of the Leasing Program is creating financial hardship to KIC. BLM has suspended AIDEA's leases in the Coastal Plain and halted the processing of any and all applications for necessary work as part of the moratorium."). Now that AIDEA's leases (and all other Program leases) are cancelled, KIC could not fulfil its goals of working with AIDEA in oil and gas development in ANWR even if KIC succeeded in getting the Moratorium lifted for the remaining seven months or so in which the Moratorium will be in effect. *See Gator.com Corp*., 398 F.3d at 1129 ("The Supreme Court has repeatedly held that the requisite case or controversy is absent where a plaintiff no longer wishes — or is no longer able — to engage in the activity concerning which it is seeking declaratory relief.")

[25] Dkt. 60-2, at 6.

operations in Winter 2024-2025. The Court cannot provide KIC with meaningful relief prior to the end of the Moratorium, therefore these claims too are moot.[26]

III. This Case Has Always Been, on a Practical Level, Primarily Concerned with the Development of AIDEA's Leases.

Throughout this litigation, all parties conceived of the gravamen of Plaintiffs' claims as arising from their shared inability to perform work in furtherance of the pursuit of oil and gas development on the lands leased to AIDEA. In their summary judgment motion, Dkt. 60, Plaintiffs styled the ongoing harm relating to the Moratorium by decrying that "AIDEA's leases remain suspended, and BLM continues to refuse to process any applications from AIDEA or its contractors for rights-of-way necessary to develop the leases."[27] Plaintiffs reiterated that, "[b]ecause the Agency Defendants have suspended AIDEA's leases and halted the processing of all applications, AIDEA has been unable to proceed with cultural resources inventories and seismic acquisition activities that are critical to development of its seven Coastal Plain leases."[28] While Defendants now assert that KIC has interests that diverge from the other Plaintiffs, this is not the case.

---

[26] This case is unlike *Donovan, supra*, in which only part of the judgment was vacated, due to a subsequent partially mooting event. 70 F.4th at 1172. KIC's claim is also moot, like the rest of this lawsuit centered about the now-cancelled leases. Any claims relating to KIC's interests in work permits relating to activities not on AIDEA's lease-owned lands is not truly separate from the lease and are moot.

[27] Dkt. 60 at 15-16.

[28] Dkt. 60 at 18.

To the contrary, Plaintiffs consistently asserted that KIC was harmed by the Moratorium because it "precluded Plaintiff KIC from performing archaeological work as a ***subcontractor for AIDEA***," [29] and from conducting seismic operations, thereby depriving KIC and its shareholders of substantial revenues, employment opportunities, and indirect data regarding oil and gas reserves on KIC's own land. KIC does not hold mineral rights, it is just a surface owner, and so it is and was dependent on working with AIDEA as the lessee of sub-surface mineral rights. The State perceived the issues in this case similarly, writing that it was harmed by its inability "to earn revenue from annual rentals and royalties that would otherwise flow from the leases."[30] The State emphasized that the Moratorium "prevent[ed] AIDEA from developing its leases and denies the state the revenue and economic stimulus which would flow from the Leasing Program."[31] Importantly, Defendants appeared to concede in their summary judgment briefing that the interests of KIC and other AIDEA subcontractors in the Moratorium were inextricably tied to AIDEA's leases.[32] Defendant-Intervenors even more broadly characterized the DOI action at issue in this case as the "suspen[sion of] leases until [DOI's

---

29 *Id.* (emphasis added).

30 Dkt. 59 at 14.

31 *Id.* at 19.

32 *See* Dkt. 63 at 17 ("Through contractors, AIDEA has sought approval to conduct certain lease-related activities. See AR 3370-76 (application for permit to conduct archeological investigations); AR 3397-98 (requests to schedule "pre application meeting" to discuss submittal of an application to conduct seismic exploration).").

supplemental analysis] is completed"[33] and as DOI's "suspen[sion of] the leases in an exercise of its inherent authority to correct legal errors."[34] Defendant-Intervenors nowhere characterized KIC or any other Plaintiff group as having interests distinct from AIDEA. It is only now that Defendants' and Defendant-Intervenors' attempt to split hairs and distinguish among the plaintiff groups in an effort to deny Plaintiffs the relief to which they have shown entitlement.

The Moratorium's operative language offers little support for Defendants' efforts. The Moratorium extended to "any aspect of the Program, including but not limited to, any leasing, exploration, development, production, or transportation."[35] All the activities in that list after "leasing" are follow-up actions dependent on the leases being in place. Indeed, the leases used the same list of activities in describing what the lessee could do as a result of holding a lease.[36] The purpose of the Moratorium was to halt leasing activities.

Even *arguendo* were KIC's interests distinct from those of other plaintiffs, it appears — as indicated above — that this is simply a question of timing. There is no situation where KIC would, acting alone, be able to obtain appellate relief before the new ROD issues. The matter is entirely moot — or, at minimum, moot for all practical purposes. Nor can the Court's summary judgment order, Dkt. 72,

---

[33] Dkt. 65 at 16.

[34] *Id.* at 18.

[35] AR3363.

[36] AR3320 (lessee entitled to "rights of way and easements necessary for the exploration, development, production, or transportation of oil and gas.").

reasonably be broken apart into component pieces that do, and do not, involve the now-moot issue of the suspension of AIDEA's leases. The Court, like all parties, characterized the impetus for this case as Federal Defendants' refusal "to authorize AIDEA or its contractors to proceed with any activities relating to the leases."[37] The Court expressly stated that it considered the "Moratorium" challenged by Plaintiffs "to encapsulate Agency Defendants' efforts to implement the directive in EO 13990 by temporarily suspending implementation of the Program and the leases issued pursuant thereto."[38] The Court characterized Plaintiffs' harm as Plaintiffs' inability "to proceed with the activities critical to developing AIDEA's leases, such as archaeological and seismic work, meaning that they cannot reap the revenue, employment opportunities, and information gathering that would result from commencing work on the leases."[39]

In ultimately upholding the validity of the Moratorium, a key factor in the Court's consideration was that "the Moratorium has a finite, even if inexact, endpoint, and it is limited to a suspension of lease operations."[40] The Court found there "is simply no language within the Tax Act that limits the President's authority to order — or DOI's authority to implement — a temporary suspension of the Program leases while the agency undertakes supplemental environmental

---

37 Dkt. 72 at 8.

38 *Id.* at 9.

39 *Id.* at 11.

40 *Id.* at 17.

review."[41] There is simply no portion of the Court's opinion which can be construed as rendering a decision on any aspect of the Moratorium unrelated to AIDEA's leases. Because it is impossible to separate the portions of the Court's final opinion addressing AIDEA's leases from those which address only KIC's potential activities on its own lands, the cancellation of AIDEA's leases rendered the whole order moot.

IV. Conclusion.

Plaintiffs' claims all directly arise from AIDEA's leases or require the continued existence of those agreements in order to obtain any "meaningful" relief. The parties' prior pleadings and the Court's order reflects this fact. DOI's actions cancelling the lease agreements make it impossible for Plaintiffs to receive effective relief, either from this Court or upon appeal, rendering this case moot. Therefore, in accordance with the principles established by *Munsingwear*, Plaintiffs and Intervenor-Plaintiffs respectfully request that the Court grant the Motion for Relief from Final Judgement.

[41] *Id.* at 22.

DATED this 21st day of November, 2023.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Plaintiffs Alaska Industrial Development and Export Authority, North Slope Borough, Arctic Slope Regional Corporation, and Kaktovik Inupiat Corporation

By: /s/ David Karl Gross
David Karl Gross, ABA #9611065
Zoe A. Eisberg, ABA #1911094
510 L Street, Suite 700
Anchorage, Alaska 99501
Telephone: 907.802.2998
Facsimile: 907.276.3680
dgross@bhb.com
zeisberg@bhb.com

By: /s/ James H. Lister
James H. Lister, ABA #1611111
Brian V. Gerd, ABA #1810097
1150 Connecticut Ave NW, Suite 350
Washington, DC 20036
Telephone: 202.862.8375
Facsimile: 202.659.1027
jlister@bhb.com
bgerd@bhb.com

TREG TAYLOR
ATTORNEY GENERAL
Attorneys for Intervenor-Plaintiff State of Alaska

By: /s/Ronald W. Opsahl ________________
Ronald W. Opsahl, ABA #2108081
Assistant Attorney General
Department of Law
1031 W 4th Ave, Ste 200
Anchorage, AK 99501
ron.opsahl@alaska.gov
Telephone: (907) 269-5232
Facsimile: (907) 276-3697

Kathleen C. Schroder (*pro hac vice)*
Gail L. Wurtzler
Mark E. Champoux
Nicholas R. Peppler
Davis Graham & Stubbs LLP
1550 Seventeenth St., Suite 500
Denver, CO 80202
Telephone: (303) 892-9400
Facsimile: (303) 893-1379
Email: katie.schroder@dgslaw.com
gail.wurtzler@dgslaw.com
mark.champoux@dgslaw.com
nick.peppler@dgslaw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of November, 2023, a true and correct copy of the foregoing was served on the following via the Court's CM/ECF electronic delivery system:

Attorneys for State of Alaska

Ronald Walter Opsahl
Alaska Department of Law
ron.opsahl@alaska.gov

Gail L Wurtzler (pro hac vice)
Kathleen C Schroder (pro hac vice)
Mark E Champoux (pro hac vice)
Nicholas R. Peppler (pro hac vice)
Davis Graham & Stubbs LLP
gail.wurtzler@dgslaw.com
katie.schroder@dgslaw.com
mark.champoux@dgslaw.com
nick.peppler@dgslaw.com

Attorneys for Joseph R. Biden Jr., United States Department of Interior, Deb Halland, Laura Daniel-Davis, Bureau of Land Management, Tracy Stone-Manning, & Thomas Heinlein

Paul A. Turcke
DOJ-Enrd
C/O U.S. Attorney's Office
paul.turcke@usdoj.gov

Attorneys for Native Village of Venetie Tribal Government, Venetie Village Council, & Arctic Village Council

Matthew Neil Newman
Megan Rachel Condon
Native American Rights Fund
mnewman@narf.org
mcondon@narf.org

Karen E. Schmidt
Peter H. Van Tuyn
Bessenyey & Van Tuyn, LLC
karen@bvt-law.com
peter@bvt-law.com

Attorneys for Gwich'in Steering Committee, Alaska Wilderness League, Alaska Wildlife Alliance, Canadian Parks & Wilderness Society-Yukon, Defenders of Wildlife, Environment America, Inc., Friends of Alaska National Wildlife Refuges, National Wildlife Federation, National

Wildlife Refuge Association, Northern Alaska Environmental Center, The Wilderness Society, & Wilderness Watch

Bridget Earley Psarianos
Brook Brisson
Suzanne Bostrom
Victoria Clark
Trustees for Alaska
bpsarianos@trustees.org
bbrisson@trustees.org
sbostrom@trustees.org
vclark@trustees.org

Attorneys for Sierra Club

Bridget Earley Psarianos
Brook Brisson
Suzanne Bostrom
Victoria Clark
Trustees for Alaska
bpsarianos@trustees.org
bbrisson@trustees.org
sbostrom@trustees.org
vclark@trustees.org

Karimah Schoenhut
Sierra Club Environmental Law Program
karimah.schoenhut@sierraclub.org

BIRCH HORTON BITTNER & CHEROT

By: /s/ Nathan S. Wood