Nos. 07-1247, 07-1433

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent,

AMERICAN PETROLEUM INSTITUTE,
Intervenor.

NATIVE VILLAGE OF POINT HOPE, *et al.*,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondent,

AMERICAN PETROLEUM INSTITUTE,
Intervenor.

ON PETITIONS FOR REVIEW OF FINAL DECISION BY
THE UNITED STATES DEPARTMENT OF THE INTERIOR

PETITION FOR REHEARING AND/OR CLARIFICATION

ARTHUR E. GARY
Acting Solicitor

SUSAN H. CASON
U.S. Department of the Interior
1849 C Street NW
Washington DC 20240

JOHN C. CRUDEN
Acting Assistant Attorney General

SAMBHAV N. SANKAR
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-5442

CERTIFICATE AS TO PARTIES AND AMICI

Petitioners are: Native Village of Point Hope, Alaska Wilderness League, Pacific Environment, and Center for Biological Diversity. Respondent is the United States Department of the Interior.

This Court granted the American Petroleum Institute leave to intervene, and granted leave to participate as amici curiae to Oceana, Ocean Conservancy, The National Audubon Society, The Wilderness Society, Natural Resources Defense Council, W. Michael Hanemann and Charles Kolstad.

SAMBHAV N. SANKAR
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-5442

May 11, 2009

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

FEDERAL STATUTES:

RULES AND REGULATIONS:

INTRODUCTION

The Government petitions the panel for amendment and/or clarification of its April 17, 2009, opinion and order in the above-captioned case. This Court denied the petitions for review with respect to all claims except one advanced by the Native Village of Point Hope (NVPH) as lead petitioner. NVPH's petition for review asserted that the Department of the Interior's 2007-2012 Five-Year Program for offshore leasing caused NVPH injury "to the extent it affects the coast of Alaska." Its brief argued, in part, that Interior failed properly to analyze "the relative environmental sensitivity" of offshore areas pursuant to Section 18(a)(2)(G) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1344(a)(2)(G), and that this error erroneously "resulted in the placement of the Beaufort and Chukchi Seas at the bottom of the 'Relative Environmental Sensitivity ranking.'" Br. 38. This Court agreed that NVPH had identified legitimate concerns and ordered that the Program be "vacated and remanded for reconsideration."

Interior has already begun addressing the Court's remand instructions and is acting to preserve the environmental status quo in Alaskan waters during reconsideration. The Government submits, however, that vacating the entire 2007-2012 Program pending reconsideration will cause broader disruptions that would be both severe and unnecessary. In particular, vacatur might require interruption of exploration and production activity in the Gulf of Mexico and could call into question

the validity of 487 leases already issued in the Chukchi Sea and 1,854 more issued in the Gulf of Mexico. NVPH has not identified any injury arising from the mere existence of these leases, nor from further exploration and development activity on the Gulf of Mexico leases. The Government therefore asks the Court to clarify the intended scope of its order and/or to amend the order to remand the Program without vacating it. Alternatively, Interior asks this Court to stay its mandate pending Interior's Section 18(a)(2)(G) and 18(a)(3) reconsideration.

ARGUMENT

A. The Court's Order Could Require Cancellation of Previously Issued Leases And Interrupt Exploration And Production In The Gulf Of Mexico.

As presently formulated, the Court's judgment creates significant uncertainties for Interior and for the oil and gas industry. Petitioners have stated that the Court's remedy prevents further leasing in Alaska. *See* Attachment A. But the Court did not explicitly limit its remedy to Alaska, let alone to the specific areas that NVPH discussed in its briefing. Further, the opinion does not explicitly address the status of leases already issued under the challenged Five-Year Program. Absent further clarification, these uncertainties could have serious disruptive consequences as discussed further below.

1. Potential Disruption Of Leases Already Issued In The Chukchi Sea and Gulf of Mexico

The 2007-2012 Five-Year Program scheduled 21 lease sales in eight areas. JA 1956. In its merits brief, filed on August 29, 2008, the Government explained that Interior had by then already conducted four of those lease sales—three in the Gulf of Mexico (Sale #204, #205, and #206) and one in Alaska's Chukchi Sea (#193). *See* Br. at 14 n.3. In the time between briefing and the Court's decision, Interior conducted two more scheduled sales in the Gulf of Mexico (#207, #208).

As detailed in the declaration of Chris Oynes, Minerals Management Service Associate Director for Offshore Energy and Minerals Management, Interior has already issued 1,854 leases in the Gulf of Mexico and 487 leases in the Chukchi Sea pursuant to the lease sales described above. Oynes Decl. ¶¶ 5 (Attachment B). The Court's remedy could be interpreted to call all 2,341 of these leases into question. In other contexts, this Court has said that to vacate "means 'to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (citations omitted). Section 18(d)(3) of the OCSLA, meanwhile, states in part that "no lease shall be issued unless it is for an area included in the approved leasing program." 43 U.S.C. § 1344(d)(3).

Although Interior does not interpret the Court's order to require retroactive

invalidation of prior leases,[1] one of the amici in this case has already highlighted the uncertainty Interior faces by claiming publicly that under the Court's order, all 2,341 leases previously issued pursuant to the 2007-2012 Five-Year Program "are void." *See* Attachment C (reporting public statements by amicus Oceana). It would be profoundly disruptive if this Court's order were interpreted in that way or in any way that would require restoration of the status quo prior to Sale #193 in the Chukchi Sea and Sales #204-208 in the Gulf of Mexico. Interior collected $9.94 billion in bonus payments alone during those lease sales. Oynes Decl. ¶¶ 11. After collecting those payments, Interior paid approximately $9.3 million to coastal States pursuant to OCSLA Section 8(g), 43 U.S.C. § 1337(g), and transferred the remainder to the general Treasury. Oynes Decl. ¶¶ 12. Attempting to restore the status quo ante would therefore be extraordinarily difficult. It would also be unnecessary; Petitioner NVPH cannot identify any harm arising from the mere existence of leases. Owning an OCSLA lease confers no "immediate or absolute right" to explore or develop it; a lease amounts "primarily to an opportunity to try to obtain exploration and development rights" in accordance with the OCSLA. *Sec'y of the Interior v. Calif.*, 464 U.S. 312, 317 (1984); *Mobil Oil Expl. v. United States*, 530 U.S. 604, 620 (2000).

---

[1] The limitation on lease issuance in 43 U.S.C. § 1344(d)(3) refers to the status of the leasing program at the time a lease is issued. The limitation does not authorize invalidation of leases already issued under a challenged program.

2. Potential Disruption Of Ongoing Activities On Gulf Of Mexico Leases

Even if the Court's order were not interpreted to invalidate the lease sales described above, Interior would face substantial uncertainty about permissible activities on the relevant leases. The Court's opinion does not expressly resolve (1) the validity of prior agency actions authorizing exploration, development, and production activities, or (2) the permissibility of issuing further authorizations and approvals necessary to facilitate activity that has already begun. Ironically, this uncertainty primarily affects Gulf of Mexico areas, not areas of interest to NVPH.

NVPH's petition for review, standing affidavits, and merits briefing all focused on the potential impacts that offshore oil production might have on OCS areas in Alaska. For example, NVPH expressed concern that the 2007-2012 Five-Year Program "opens the door to oil and gas activities in the OCS off Alaska," and argued that Interior selected "the timing and leasing of location in the Beaufort, Chukchi and Bering Seas" without properly applying OCSLA Section 18(a)(2)(G) and 18(a)(3). Br. 3, 24. To date, however, Interior has only conducted one relevant lease sale in Alaska: Chukchi Sea Sale #193. And while Interior has issued leases pursuant to that sale, it has not yet received any exploration or development plan proposals for those leases, let alone approved such plans. Accordingly, Chukchi lessees at present have no "immediate or absolute right to explore for, develop, or produce oil." *Sec'y of the Interior v. Calif.*, 464 U.S. at 317.

By contrast, many of Interior's Gulf of Mexico lessees have reached later phases of the OCSLA process. Before this Court issued its opinion, Interior had already approved exploration plans for 92 leases issued from Sales #204-207 in the Gulf of Mexico. Oynes Decl. ¶ 6. Similarly, Interior had approved development plans for 20 Gulf leases and issued 197 permits for platform and pipeline construction and well drilling. *Id.* ¶ 7. Relying on these approvals and permits, lessees have already drilled 47 wells, laid 589,623 feet of pipeline, and built 18 oil platforms on Gulf leases issued from Sales #204-207, all at a cost of $764 million. *Id.* ¶ 8. They have also planned an estimated $345 million in further work for the near future; at present, Interior has pending before it three development plans, 15 exploration plans, and 33 applications for permits to drill or install platforms or pipelines in Gulf areas. *Id.* ¶¶ 6-7. Given the nature of offshore oil work, it would be extraordinarily disruptive if the Court's opinion were interpreted to prohibit ongoing and planned OCS work on Gulf of Mexico leases unrelated to NVPH's asserted injuries.

3. Potential Disruption Of Future Leasing Activity

Last, the Court's Order leaves Interior uncertain as to (1) what OCSLA procedures it must follow on remand and (2) which scheduled lease sales, if any, it may conduct during the remand period.

The Court's opinion states that Interior must conduct a more complete environmental sensitivity analysis under Section 18(a)(2)(G), then consider whether

this analysis warrants exclusion of any areas included in the 2007-2012 Five-Year Program. Interior must then reassess the timing and location of lease sales under Section 18(a)(3). Slip Op. at 35-36. At present, however, the Court's opinion does not explicitly resolve whether its vacatur requires Interior to develop and approve an entirely new Five-Year Program following OCSLA procedures. It typically takes Interior from 24 to 30 months to develop a new Program, of which approximately 11 months are statutorily-mandated periods for state, congressional, and public review. 43 U.S.C. § 1344(c,d). Interior estimates that if it followed these procedures, the Secretary could not approve a new Five-Year Program until at least 2011. Oynes Decl. ¶ 24. Interior could complete its Section 18(a)(2)(G) and (a)(3) reconsideration, obtain public comment, and approve a new leasing schedule on a more expedited basis, as the Court permitted in 1982. *See* discussion pp. 13-14 and n.5, below.

The Court's opinion also does not specify whether Interior may conduct any lease sales scheduled in the 2007-2012 Five-Year Program during remand proceedings. The legislative history of the OCSLA shows that Congress intended "no delay or interruptions in lease sales" to arise from Five-Year Program challenges, H.R. Rep. 95-590 at 151, and the *Watt I* court suggested that the statute requires that leasing be allowed to continue so long as any given Program is under judicial or administrative review—a period that encompasses "the remand as well as the pre-approval period of administrative decisionmaking." *California v. Watt*, 668 F.2d

1290, 1326 n.176 (D.C. Cir. 1981). At the same time, *Watt I* also suggests that vacating a Five-Year Program could prevent new leasing. *Id. at* 1326 ("we do not vacate the program, thereby allowing the proposed lease sales scheduled thereon to proceed").

While delaying or canceling planned lease sales is less immediately problematic than halting activity on existing leases or canceling them, it presents the same potential for long-term disruption. Pursuant to the OCSLA, Interior's Five-Year Program scheduled leasing necessary to "best meet national energy needs for the five-year period." 43 U.S.C. § 1344(a). Suspending all future lease sales scheduled under the 2007-2012 Five Year Program, including the six scheduled in the Gulf of Mexico, may reduce domestic OCS production.

B. Correcting The Analytical Errors The Court Identified Does Not Require Vacatur And Its Potentially Disruptive Consequences.

The Government respectfully submits that Interior can address the OCSLA violations that this Court identified in a manner that does not require immediate invalidation of leases already issued pursuant to the 2007-2012 Five-Year Plan, interruption of activity on those leases, or suspension of future lease sales.

The Court has identified two defects in Interior's Section 18 analysis: a misapplication of OCSLA Section 18(a)(2)(G) and a consequently incomplete Section 18(a)(3) balancing analysis. Again, in arguing its Section 18(a)(2)(G) claim, NVPH

argued primarily that Interior's focus on shoreline sensitivity resulted in erroneously low sensitivity rankings for the Beaufort and Chukchi Sea areas. *See* Br. 3; *see also* JA 2044 (sensitivity rankings).[2] The Court's opinion appears in many respects to mirror this concern. *See* Slip Op. 9 (referring to "the disputed Alaskan sea areas"); *id.* at 35 (discussing Interior's "failure properly to consider the environmental sensitivity of different areas of the OCS—areas *beyond* the Alaskan coastline" and contemplating further analysis of the "Beaufort, Bering and Chukchi Seas").[3]

The Program currently ranks the Beaufort and Chukchi Seas lowest in environmental sensitivity as compared to other regions. JA 2044-2055. As a result, Interior could only assign them the same or higher relative sensitivity rankings on reconsideration. Higher relative sensitivity rankings could lead Interior to conclude that it should schedule less leasing (or none) in the Beaufort and Chukchi Seas. But because the OCSLA specifies that Five-Year Programs should schedule leasing to "best meet national energy needs," 43 U.S.C. § 1344(a), Interior may conclude that

---

[2] While Petitioner Center for Biological Diversity stated that it joined all of NVPH's claims, Br. 55, it did not present any Section 18(a)(2)(G) arguments.

[3] The Court's mention of the Bering Sea reflects the fact that the challenged Program schedules leasing in the North Aleutian Basin, which includes the Bering Sea. JA 1956. NVPH has mentioned isolated concerns about Interior's Bering Sea sensitivity analysis, Reply Br. 9, but Interior notes that the Program assigned that area a high sensitivity ranking, listed only a single lease sale there, and that Interior has since scheduled it for November 2011. Interior expects to complete its reconsideration before that date, but the Secretary will delay the sale beyond November 2011 if necessary to allow Interior to complete its reconsideration.

Beaufort and Chukchi leasing reductions should be offset by additional lease sales in *other* areas. Additionally, without prejudging the issue, Interior believes that its Section 18(a)(2)(G) and 18(a)(3) reconsideration is unlikely to lead to major reductions in the number of scheduled Gulf of Mexico lease sales, especially given the limited number of OCS areas available to meet energy needs, the fact that Interior properly evaluated seven of the Section 18(a)(2) factors in the Program, and that its 18(a)(3) evaluation reflected consideration of environmental factors beyond the shoreline.

Interior plans to re-evaluate the environmental sensitivity of all leasing areas listed in the 2007-2012 Program, not just the Bering, Beaufort and Chukchi Seas. But in light of the facts described above, the Government submits that it is unnecessary for the Court immediately to suspend any OCS activity or to cancel any lease sales. Doing so would appear to conflict with Congress' desire for expeditious and orderly development of OCS resources and for leasing to continue "during any administrative review occasioned by a remand." *Watt I*, 668 F.2d at 1326 n.176. Moreover, the Secretary recognizes the importance of the Alaska Seas in this litigation. Accordingly he plans to preserve the environmental status quo on Chukchi Sale #193 leases during remand proceedings.[4]

---

[4] Interior has not conducted any Beaufort or Bering Sea lease sales under the challenged Program. The first Beaufort Sea sale is scheduled for February, 2010.

Specifically, until Interior completes its Section 18(a)(2)(G) and 18(a)(3) reconsideration, it will not authorize any activities under exploration plans on Chukchi Sea Sale #193 leases, thereby halting all but certain data gathering and other "ancillary" activities on those leases. *See* 30 C.F.R. §§ 250.207 to 250.210. Oynes Decl. ¶ 23(e). The Secretary will also delay the February 2010 Beaufort Sea Sale #209 as necessary. After reconsideration, Interior could conclude that it should exclude the Chukchi or Beaufort Seas from leasing altogether. *See* Slip Op. at 35. However, Interior could also conclude that the 2007-2012 Five-Year Program scheduled too many lease sales in those areas, or that it scheduled an appropriate number of lease sales. No matter the result, Interior will promptly take actions necessary to implement its conclusions.

C. The Court Should Remand The 2007-2012 Five-Year Program Without Vacating It.

As described above, the Court's Order could be interpreted to have severely disruptive consequences that would neither advance NVPH's environmental goals nor facilitate reconsideration proceedings. Accordingly, the Government respectfully requests that the Court remand the 2007-2012 Five-Year Program without vacating it. The decision to vacate an administrative action depends on the seriousness of the action's deficiencies and the disruptive consequences of vacatur pending their

---

The first North Aleutian Basin (Bering Sea) sale is scheduled for November, 2011.

correction. *See Allied-Signal Inc. v. U.S. Nuclear Reg. Comm'n,* 988 F.2d 146, 150-151 (D.C. Cir. 1993). Both factors support a remand-only disposition here. Part A, above, explains that vacating the 2007-2012 Five-Year Program could be interpreted to have severely disruptive consequences; as in *Sugar Cane Growers v. Veneman*, "the egg has been scrambled and there is no apparent way to restore the status quo ante." 289 F.3d 89, 97 (D.C. Cir. 2002). And Part B, above, explains that Interior's reconsideration is unlikely to require it to "unscramble" current and future activity in the Gulf of Mexico, and that the Secretary is acting to preserve the environmental status quo in the Chukchi Sea and defer leasing in the Beaufort Sea. The Government accordingly requests that this Court modify its Opinion and Order to remand the 2007-2012 Five-Year Program without vacating it.

The OCSLA and this Court's case law provide precedent and authority for a remand-only disposition in this case. Section 23(c)(6) of the OCSLA, 43 U.S.C. § 1349(c)(6), explicitly contemplates remand without vacatur: it states that the Court may "affirm, vacate, or modify any order or decision *or* may remand the proceedings to the Secretary for such further action as it may direct." (emphasis added). And in *Watt I*, where the Court issued relief pursuant to this provision, it remanded without vacating. The *Watt I* court concluded that in developing the 1980-1985 Five-Year Program, Interior inadequately considered *two* of the Section 18(a)(2) factors: factor (B) ("equitable sharing of developmental benefits and environmental risks among the

various regions), and factor (G) ("relative environmental sensitivity"). 668 F.2d at 1307-1313. And, like the panel here, the *Watt I* court concluded that Interior's Section 18(a)(2) errors precluded proper balancing under Section 18(a)(3). 668 F.2d at 1318. Nevertheless, the Court let the program stand during remand, "thereby allowing the proposed lease sales scheduled thereon to proceed." *Id.* at 1326. The Court retained jurisdiction pending remand proceedings and, notably, issued a separate order allowing Interior to approve a revised Five-Year Program on an expedited schedule. *See* Order of Jan. 19, 1982 (Attachment D).[5]

The Government recognizes that some D.C. Circuit opinions suggest that vacating unlawful agency action "should always be the preferred course," and that unwarranted disruption can be prevented through stays of mandates as necessary. *Contrast Honeywell Intern. Inc. v. EPA*, 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph, J., concurring); *with NRDC v. EPA*, 489 F.3d 1250, 1264-1265 (D.C. Cir. 2007) (Rogers, J., concurring in part and dissenting in part). Here, however, an order vacating the 2007-2012 Five-Year Program threatens severe and unnecessary disruption even before the mandate issues. Offshore lessees are understandably

---

[5] The Order approved preparation of a revised Draft Final Program with a 30-day comment period for Governors, Congress and the public, rather than repeating the Draft Proposed Program and Proposed Program planning stages. The Secretary proposes to use the same process in this remand. Oynes Decl. ¶ 23. A streamlined process is appropriate because only one Section 18(a)(2) factor will change in this analysis.

reluctant to commit resources to exploring and developing existing leases if those leases may be invalidated through future vacatur. Oynes Decl. ¶¶ 15-16.

The Court need not be concerned that a remand-only disposition would be tantamount to "an indefinite stay of the effectiveness of the court's decision." *NRDC v. EPA*, 489 F.3d at 1264. As described above, the Secretary plans to delay new lease sales in Alaskan areas and suspend activities under exploration plans for Sale #193 leases until Interior completes its Section 18(a)(2)(G) and 18(a)(3) reconsideration. Oynes Decl. ¶ 23(e). Interior will therefore have substantial incentives to complete its reconsideration promptly. To address any remaining concerns about a remand-only disposition, the Government invites the Court to retain jurisdiction over this matter, preserving the adversarial posture of the parties and allowing Petitioners to seek later vacatur if necessary.

D. The Court Should Alternatively Stay The Mandate Pending Interior's Section 18(a)(2)(G) And 18(a)(3) Reconsideration.

If this Court believes that a vacatur order remains appropriate in spite of its potentially disruptive consequences, the Government alternatively requests a stay of the mandate pending completion of the Secretary's reconsideration. On completion of those proceedings, Interior would submit the results of its Section 18(a)(2)(G) and 18(a)(3) reconsideration to the Court for legal review. If the Court concludes that Interior's renewed analysis satisfies the OCSLA, it could then craft relief in light of

Interior's conclusions. For example, if Interior concludes on reconsideration that the leasing schedule proposed in the 2007-2012 Five-Year Program was correct, then the Court could dismiss the petitions for review. If, on the other hand, Interior concludes on reconsideration that the 2007-2012 Program must be modified, Interior would advance specific remedial proposals for the Court's consideration.

Interior recognizes that this Court disfavors open-ended mandate stays. *See, e.g.*, D.C. Cir. R. 41(a)(2). However, Interior notes again that the Secretary's planned actions to preserve the environmental status quo in Alaskan waters greatly reduce the risk that the stay would continue for a prolonged period. Interior also offers to submit regular status reports to Petitioners and the Court regarding its progress on remand; the Court can affirmatively dissolve its stay if it deems the progress insufficient.

CONCLUSION

For the foregoing reasons, the Government requests that the panel clarify its order and/or modify the order to specify remand without vacatur.

Respectfully submitted,

SAMBHAV N. SANKAR
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026

May 11, 2009

CERTIFICATE OF SERVICE

I hereby certify that on Monday, May 11, 2009, I caused two copies of the foregoing Petition for Rehearing to be sent by overnight delivery to:

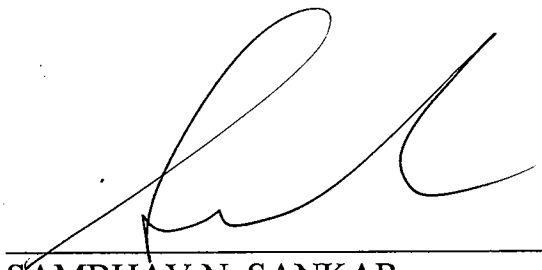
William J. Snape, III
Center for Biological Diversity
5268 Watson Street, NW
Washington, DC 20016

C. Miyoko Sakashita
Brendan R. Cummings
Center for Biological Diversity
1095 Market Street, Suite 511
San Francisco, CA 94103

Steven Rosenbaum
Covington & Burling LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Peter Van Tuyn
Bessenyey & Van Tuyn
310 K Street, #200
Anchorage, AK 99501

James B. Dougherty
709 Third St., N.W.
Washington, D.C. 20024



SAMBHAV N. SANKAR
U.S. Department of Justice
Environment & Natural Res. Div.
P.O. Box 23795 (L'Enfant Station)
Washington, DC 20026
(202) 514-5442