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THE STATE OF ALASKA and
SEAN PARNELL, GOVERNOR OF ALASKA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

THE STATE OF ALASKA; SEAN PARNELL, GOVERNOR OF ALASKA *Plaintiffs*, v. KEN SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; UNITED STATES DEPARTMENT OF THE INTERIOR; MICHAEL BROMWICH, IN HIS OFFICIAL CAPACITY AS DIRECTOR, BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION ANDENFORCEMENT; and BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT *Defendants*.	Case No. 3:10-cv-00205-RRB **MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

MOTION FOR PARTIAL SUMMARY JUDGMENT

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Plaintiffs State of Alaska and Governor Parnell hereby move the Court for partial summary judgment on the First Cause of Action to Plaintiffs' complaint on the ground that there is no genuine issue as to any material fact and that Plaintiffs are entitled to judgment as a matter of law. This Motion and the First Cause of Action seek a writ of mandamus to compel Defendants to vacate a deferral of OCS exploration and development for the Alaska region and provide Plaintiffs with notice and an opportunity to participate before imposing any future "moratorium," "pause," "postponement," or any other type of deferral. Plaintiffs are eligible for this relief because (1) Defendants owe Plaintiffs a nondiscretionary duty of notice and opportunity to participate under the Outer Continental Shelf Lands Act; (2) Defendants breached that duty by not giving Plaintiffs notice or an opportunity to participate before imposing a deferral of OCS exploration and development in the Alaska region; and (3) Plaintiffs have no alterative remedy.

This motion is based on this Motion, the following Memorandum of Points and Authorities, the Request for Judicial Notice in Support of Motion for Partial Summary Judgment, the Declaration of Sean Parnell in Support of Motion for Partial Summary Judgment, the Declaration of Tara Fradley in Support of Motion for Partial Summary Judgment, the Declaration of Kim Shafer in Support of Motion for Partial Summary Judgment, the Declaration of Alan Bailey, the pleadings and papers on file in this action, and upon such other matters as may be presented to the Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Secretary Salazar has repeatedly and unequivocally proclaimed that the Department of Interior ("DOI") and Bureau of Ocean Energy Management, Regulation, and Enforcement

("BOEMRE"),[1] and by extension BOEMRE Director Bromwich and Secretary Salazar, are deferring Outer Continental Shelf ("OCS") exploration and development in the Alaska region. Secretary Salazar has called this action a "moratorium," a "pause," and a "postponement." But regardless of the label, it is evident from Secretary Salazar's statements that Defendants are not entertaining Exploration Plans or permit applications for the Alaska region — indefinitely.

By imposing this "deferral/moratorium" on OCS exploration and development, Defendants have taken an agency action affecting OCS development; and when any federal agency takes an action affecting OCS Development, Secretary Salazar has a duty under the Outer Continental Shelf Lands Act ("OCSLA") to notify the governor of an affected state — here, the State of Alaska and Governor Parnell. Defendants have a further duty to allow feedback from the Governor and to otherwise allow the State an opportunity to participate in the decision-making process. Defendants have failed to provide notice or allow the State or Governor Parnell to participate in the process.

These procedural errors are not mere technicalities. The OCSLA notice and opportunity to participate provisions ensure that federal agency decisions affecting the OCS will be open and explicit. Here, the State of Alaska and Governor Parnell — and indeed, the public at large — know of Defendants' moratorium/deferral action only because of Secretary Salazar's bald public statements that there is a "moratorium." Defendants have offered no explanation for the moratorium/deferral, have not defined its scope, and have suggested no end date. This is in sharp contrast to the moratorium Defendants issued for the Gulf of Mexico and Pacific regions, which is spelled out in a 29-page decision, explaining the reasons for a moratorium and giving a November 30, 2010 end date.

Since Defendants have already imposed the Alaska region moratorium/deferral, the only avenue to correct Defendants' failure to provide notice and an opportunity to participate is

[1] BOEMRE was formerly known as the Minerals Management Service ("MMS"). For simplicity, Plaintiffs will refer to the agency as BOEMRE in this motion, regardless of the agency's name at a given time.

to invalidate the moratorium/deferral decision and start over, following all OCSLA procedures. Plaintiffs' only means to that end is a writ of mandamus from this Court, compelling Defendants to abide by their statutory duties to Governor Parnell and the State.

As set forth below, there is no dispute of fact as to Defendants' actions — they have unequivocally proclaimed there to be a moratorium/deferral, but have not provided Governor Parnell or the State notice or an opportunity to participate in that moratorium/deferral decision. As a matter of law, these actions breach Defendants' duty under the OCSLA to provide Plaintiffs' with notice and an opportunity to participate. And as a matter of law, Plaintiffs have no alternative remedy to enforce this duty. Accordingly, the Court may exercise its discretion to issue a writ of mandamus, instructing Defendants to vacate the moratorium/deferral and follow the notice and opportunity to participate provisions before imposing any future moratorium/deferral. More importantly, the Court *should* issue this writ. Without it, the State's voice will be silenced in a process that directly affects Alaska's environment and the lifeblood of its economy and job market.

INDISPUTABLE FACTS

On May 27, 2010, Defendants issued a press release announcing a six-month moratorium on deepwater drilling in the wake of the BP Deepwater Horizon oil spill in the Gulf of Mexico. (Request for Judicial Notice in Support of Motion of Partial Summary Judgment ("RJN"), Ex. A.) This press release also stated that:

> Secretary Salazar said the Administration will continue to take a cautious approach in the Arctic and, in light of the need for additional information about spill risks and spill response capabilities, ***will postpone consideration*** of Shell's proposal to drill up to five exploration wells in the Arctic this summer.

(*Id.* at 1 (emphasis added).) At the time of this press release, BOEMRE had previously approved two Exploration Plans for Shell to drill shallow water exploration wells in the Alaska region in the summer of 2010, and the Ninth Circuit had denied review of those Exploration Plans on

appeal. (RJN, Ex. C, D.) *Native Village of Point Hope v. Salazar*, Nos. 09-73942, 09-73944, 10-70166, 10-70368, 2010 WL 1917085 (9th Cir. May 13, 2010). With the Exploration Plans approved, Shell would have needed BOEMRE's approval for an Application for Permit to Drill ("APD") to proceed with its exploratory wells. 30 C.F.R. § 250.1617 ("Before drilling a well under an approved Exploration Plan . . . you must file Form MMS-123, APD, with the District Manager for approval.").

Secretary Salazar testified before the Senate Appropriations Committee on Interior, Environment, and Related Agencies on June 23, 2010. In that hearing, Senator Lisa Murkowski asked Secretary Salazar "whether or not the Alaska leases are technically under this same moratoria that relate to deep water or are they subject to a special delay of their own." (Ex. B at 3.) Secretary Salazar responded that:

> Our view is that there are a number of different issues that are important in addressing oil and gas development in Arctic – the science, number one, and number two, specifically with respect to the exploration wells that you refer to, is a question of whether or not there is the oil spill response capability that would be sufficient in the event that you would have some kind of an unexpected disaster, the way that we have had with the Deepwater Horizon.
>
> ***So the pause button gives us an opportunity to take a look at the whole set of issues in the OCS, and that will be one that we will be looking at.***

(*Id.* (emphasis added).) Senator Murkowski then asked for further clarification:

> But how – how are we defining that pause? Because if it is a moratoria, a moratoria that is brought about because of a decision made by the administration as a result of the Deepwater Horizon disaster, then there are funds that have been made available by B.P. to assist those displaced workers who would be subject to this moratoria.
>
> We've got about 600 people in the state of Alaska that had planned on going to work right now. And those people are no longer needed in the sense of being able to do the supplying, do the training, be physically out there. But we don't know what our status is. All we know is that we have been put on hold. . . .

> And so to suggest that, well, it's just a pause, what does that pause really mean to us in Alaska?

(*Id.* at 3-4.) Secretary Salazar responded:

> Senator Murkowski, you raise a very fair question. Let me just respond with two points.
>
> First, we are in a very dynamic situation, in the midst of a crisis that no one in this Senate and no one in the executive branch ever anticipated we would be dealing with right now. We're trying to bring this crisis under control.
>
> And the most important thing I think that we can do is to do that and fix a problem and then to learn the lessons from that problem. And that's what the president has directed me to do; that's what we've directed our people in Interior to do, and we will do that.
>
> Secondly, with respect to the exploratory wells that you speak about for Shell, frankly, there is an issue which I think is apparent to everybody, and that is that the oil spill response capability is something that has to be taken a look at.
>
> And right now, as you know, part of the reason, why the Gulf of Mexico, in our mind made the most sense in terms of moving forward with oil and gas production, is that is where you have, essentially, the focal point of the infrastructure, the support of state governments. But, in addition to that, that's where you had the massive oil spill response capability that had been amassed there over time.
>
> We don't have that same oil spill response capability through the Coast Guard or anybody else in the Arctic. And so ***it is my view that the pause button is very appropriate for these wells.***

(*Id.* at 4 (emphasis added).) Senator Murkowski again asked for clarification:

> . . . What I'm asking today is for a greater certainty as to that Alaska status. Are we in a moratoria? Is it is a special delay of its own?
>
> If that is the case, and as I understood your comments at the time that this moratoria was put in place was Alaska was not under a moratoria, it was being viewed differently. . . .

(*Id.* at 4.) Secretary Salazar responded:

> Certainly, happy to respond to it very quickly. And that is, you know, ***the moratorium that is in place does, in fact, apply to the Alaska wells and to the exploration wells that Shell had proposed to put into place***.

> And that's because we need to have a greater level of certainty that the kind of tragedy that is unfolding in the Gulf doesn't occur up there. And we will be working at it in the weeks and months ahead, and we'll be working with you as well to make sure we're doing the right thing for the environment in Alaska as well as for the interests that you and others advocate.

(*Id.* at 5 (emphasis added).)

Secretary Salazar held a press conference in Anchorage, Alaska on September 3, 2010. At that press conference, Secretary Salazar was asked, "Does the moratorium on the Gulf drilling apply to Alaska?" (RJN, ¶ 5; Declaration of Kimberly Schafer in Support of Motion for Partial Summary Judgment ("Schafer Decl."), Ex. A at 1.) Secretary Salazar responded that:

> ***The moratorium does in fact apply to Alaska*** because we are not going to allow the drilling activities that would have to happen in the OCS without us having to make some kind of affirmative decision. Let me just be very specific, if the drilling activity in the Outer Continental Shelf, now, is essentially the exploration wells which Shell had proposed to drill in the Chukchi and the Beaufort, ***I put those exploration plans on hold this year*** until we learn more from the experience that we've had dealing with the Macondo well in the Gulf of Mexico. So, in effect, until we are confident that drilling can be conducted in the Chukchi and the Beaufort Sea ***we will not be allowing that program to move forward.***

(Schafer Decl., Ex. A at 1-2 (emphasis added).)

> [W]ith respect to the moratorium itself, the way we prepared the moratorium, it applies to the Gulf of Mexico because it's a moratorium that applies to deep waters. We recognize the issues that apply to the Chukchi and the Beaufort, that it is not in the deep water. ***But because some of those same issues that we are dealing with such as the adequacy of blowout preventers and the adequacy of oil spill response plans are very much on my mind as Secretary of the Interior, that is why we did not allow the exploration wells to be drilled this summer.***

(*Id.* at 6-7 (emphasis added).) Secretary Salazar was then asked, "the Notice to Lessees that had been published by DOI called the drilling moratorium did not specifically mention the Arctic, but you've said the moratorium still applied to the Arctic. Could you explain the discrepancy?" Secretary Salazar responded:

> Well, let me. ***The moratorium on the Arctic essentially is imposed in a different way.*** That's because in order for Shell to move forward with the drilling of the exploration wells which it planned, they needed my authorization. I withheld that authorization because of the fact that some of the same questions that I am looking at in the Gulf of Mexico are central to the question of whether we allow an exploration well. . . . And so because those questions are very much a part of what we've been dealing with, it also seemed necessary for us to say ***until we have answers to some of those central questions, we aren't going to allow the drilling and the exploration wells.***

(*Id.* at 7 (emphasis added).) Secretary Salazar then invited Deputy Secretary David Hayes to comment. Mr. Hayes stated:

> I would just like to clarify because this can be confusing. The notice to lessees applied to anyone who is drilling offshore whether you're in shallow water or deepwater. Now separately the Secretary entered a moratorium on deepwater drilling and the report the Secretary referred to is coming together on the deepwater drilling. And then in another action as to the Arctic the Secretary said ***we're not going forward this year with drilling offshore in the Beaufort or Chukchi.*** Now that's shallow water ***so there's essentially a moratorium at the current time on the Arctic as well.*** But formally the moratorium is for deepwater, okay?

(*Id.* at 7-8 (emphasis added).)

Governor Parnell did not receive advance notice of this "moratorium," "pause," or "postponement" of OCS development on leased areas of the Alaska region. (Declaration of Sean Parnell in Support of Motion for Partial Summary Judgment ("Parnell Decl.") ¶ 4; Declaration of Tara Fradley in Support of Motion for Partial Summary Judgment ("Fradley Decl.") ¶¶ 4-6.) Nor did the State have an opportunity to participate in the decision to impose this moratorium/deferral (Parnell Decl. ¶ 5.)

ARGUMENT

The State is entitled to partial summary judgment on the First Cause of Action because there is no genuine dispute of fact and the State is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2), (d). As the party with the burden of persuasion at trial, the State has the

initial burden to produce affirmative evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). Because the State has met this burden and shown a right to judgment as a matter of law, the burden of production shifts to Defendants. *Id.* "A factual dispute is genuine only if a reasonable trier of fact could find in favor of the nonmoving party." *Galen v. County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). Defendants will not be able to meet this burden. As set forth below, there is no dispute of fact and the State is entitled to judgment on the First Cause of Action as a matter of law. *See Celotex Corp.*, 477 U.S. at 330.

I. AS A MATTER OF LAW, THE COURT MAY ISSUE A WRIT OF MANDAMUS FOR DEFENDANTS TO PROVIDE NOTICE AND AN OPPORTUNITY TO PARTICIPATE BEFORE TAKING AGENCY ACTION THAT AFFECTS DEVELOPMENT OF THE ALASKA REGION OCS.

A writ of mandamus is the appropriate remedy to compel Defendants to perform their nondiscretionary duty to provide notice to the Governor before taking an agency action that affects OCS development and to provide an opportunity for the State to participate in the decision making process. The Federal Mandamus and Venue Act of 1962 gives this Court jurisdiction to grant "mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.[2] The Administrative Procedures Act also specifies that a court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

A court may issue a writ of mandamus if "(1) the plaintiff's claim is clear and certain; (2) the duty is 'ministerial and so plainly prescribed as to be free from doubt'; and (3) no other adequate remedy is available." *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). Here, the OCSLA sets forth a specific, nondiscretionary duty for the Secretary of Interior — and to the extent the Secretary delegates that duty to other Defendants, those Defendants — to notify

[2] Federal Rule of Civil Procedure 81(b) abolished the writ of mandamus as a procedure, but preserved mandamus relief when sought by "action or motion" under the Federal Rules. Fed. R. Civ. P. 81(b) ("The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.").

Governor Parnell of any federal agency action that will affect OCS development in the Alaska region. The OCSLA also imposes a duty to allow States an opportunity to participate in decisions affecting OCS development. Defendants breached that duty by imposing an indefinite moratorium/deferral on any oil and gas activity in the Alaska region without either notifying the Governor or allowing the State a chance to provide input on that decision. For these procedural violations, the State and Governor Parnell have no other means of recourse than a writ of mandamus. This Court may thus exercise its discretion to compel Defendants to go back and follow these notice and opportunity to participate procedures before enforcing any moratorium/deferral on oil and gas development in the Arctic.

A. Defendants Have a Duty to Notify the Governor of Agency Action Affecting OCS Development and to Give the State an Opportunity to Participate in the Decision-Making Process.

Secretary Salazar has a nondiscretionary duty to notify a governor of federal agency actions that directly and significantly affect OCS development. The OCSLA expressly requires that:

> The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and *the Secretary shall thereafter notify the Governor of any affected State* and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

43 U.S.C. § 1334(h). By using the word "shall," Congress made the Secretary's duty to notify non-discretionary.

Also implicit in Section 1334(h) is a duty to accept input from an affected State. The Secretary's duty is to first notify a governor and then to recommend appropriate changes to the agency action. 43 U.S.C. § 1334(h). The fact that the recommendation must come *after* notification to a governor indicates that a governor is to be given the opportunity to offer input on the State's position to inform the Secretary's recommendations for any changes to the agency action. A duty to allow participation under Section 1334(h) is in keeping with Congress's policy

declaration that under the OCSLA, coastal and other affected states "are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf." 43 U.S.C. § 1332(4)(C). The language of this statute is mandatory as well, stating that affected states are "entitled" to an opportunity to participate. Congress also imposed specific duties on Defendants to consult with affected States on leasing and development decisions. 43 U.S.C. § 1345.[3] The same duty is evident in Section 1334(h) for other agency actions affecting OCS development.

These duties to provide notice and an opportunity to participate in decision making are the type of nondiscretionary, ministerial duties that courts have found to warrant mandamus relief. For example, in *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D. S.D. 1995), the court invalidated a hiring freeze and reduction-in-force for failure to consult with a Native American tribe, and issued a writ of mandamus to compel meaningful prior consultation before issuing any further hiring freezes or reductions-in-force. *Id.* at 402. The court found a clear, nondiscretionary duty in internal policies and a presidential memorandum that the agency "must consult" and "shall consult" with tribal governments before taking action that will affect tribal resources. *Id.* at 398-401. *See also Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. 157, 167 (D. S.D. 1996) (issuing writ of mandamus to invalidate hiring freeze and reduction-in-force

[3] The legislative history of this section, adopted at the same time as Section 1334(h), demonstrates an overall intent for States to play a role in OCS decision making. *See*, *e.g.*, S. Rep. No. 95-284, at 78 (1977) ("The intention of this section is to insure that Governors of affected States have a leading role in decisions as to potential lease sales and production and development plans. . . . The intent of the committee is to insure that the Secretary give[s] thorough consideration to the voices of responsible regional and local State officials in planning OCS leasing and development. . . . The committee fully expects . . . that the advice of the Governor, be given full and careful consideration and be incorporated into the ultimate decision of the Secretary, insofar as they are not inconsistent with the balanced approach to OCS leasing set out in this act."); H. Rep. No. 95-590, at 152 (1977) ("This section is intended to insure that Governors of affected State, and local government executives within such States, have a leading role in OCS decisions and particularly as to potential lease sales and development and production plans.").

and compelling meaningful, prior consultation with tribe before issuing any further hiring freeze or reduction-in-force).

Similarly in *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. 1457 (N.D. Ala. 1997), the court found notice and hearing requirements to be mandatory, and thus a moratorium on processing rezoning applications that was adopted without notice or a hearing was invalid. *Id.* at 1464-65. The court issued a writ of mandamus to invalidate the moratorium and compel the county to consider applications. *See also Medics, Inc. v. Sullivan*, 766 F. Supp. 47 (D. P.R. 1991) (issuing writ of mandamus requiring Secretary of Health and Human Services to provide a notice and comment period before issuing a final rule).

And in *Commonwealth of Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), overruled on other grounds, 659 F.2d 306 (3rd Cir. 1981), a state sought mandamus relief against the Secretary of Housing and Urban Development for failure to publicize the availability of flood insurance under the National Flood Insurance Act. The court found a clear, ministerial duty to publicize in the statute's language that the Secretary "shall" take necessary actions to publicize this insurance. *Id.* at 26. The means of publicizing were discretionary, but the duty to do so was not. *Id.*

Like the government entities in these cases, Defendants have nondiscretionary duties with respect to notice and opportunity to participate — Secretary Salazar "shall" give notice to governors of affected states, and affected states are "entitled" to an opportunity to participate in the decision making process. 43 U.S.C. §§ 1332(4)(C), 1334(h).

Defendants certainly have discretion to *take* action affecting OCS development. But when any federal agency wants to take such an action, Defendants have no discretion as to whether to provide the notice and opportunity to participate required by the OCSLA. This lack of discretion is similar to cases where courts have found that an agency lacked discretion to make a decision on an application, even though the agency had discretion as to the decision's outcome. For example, in *Marathon Oil Co. v. Lujan*, 937 F.2d 498 (10th Cir. 1991), the district court had

invalidated a DOI moratorium on processing applications for oil shale mining claims and issued a writ of mandamus compelling the agency to act on pending applications within 30 days. *See Marathon Oil Co. v. Lujan*, 751 F. Supp. 1454, 1463-64 (D. Colo. 1990). The Tenth Circuit affirmed this ruling, observing that "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *Marathon Oil Co.*, 937 F.2d at 500. The court rejected the agency's efforts to extend the moratorium until additional regulations concerning oil shale mining could be passed. *Id.* at 501.

Similarly, in *Patel v. Reno*, 134 F.3d 929 (9th Cir. 1997), plaintiffs filed a request for mandamus relief to compel the United States Consulate to issue a decision on pending visa applications. The Ninth Circuit observed that the Consulate's decision to approve or deny the applications was discretionary, but its duty to make that decision and take action on the applications was not. *Id.* at 931-32. Because the Consulate was required by law to act on visa applications but had failed to do so, the Ninth Circuit held that that district court should have issued a writ of mandamus to compel a decision. *Id.* at 932-33. Other courts have held the same. *In re American Rivers and Idaho Rivers* United, 372 F.3d 413, 418-20 (D.C. Cir. 2004) (granting writ of mandamus to compel FERC to formally act on petitions after unreasonable delay); *National Wildlife Federation v. Cosgriffe*, 21 F. Supp. 2d 1211, 1219-20 (D. Or. 1998) (plaintiffs were entitled to an injunction under mandamus standards to compel the Secretary of Interior and BLM to prepare a river plan and environmental impact statement that the agency was required by statute to prepare).

The Court here should find Defendants' duty to provide notice and an opportunity to participate in the decision-making process similarly mandatory. Like the statutes, regulations, and policies in the cases discussed above, the OCSLA includes mandatory language requiring notice to the governor and an opportunity to participate for the state. Defendants have discretion to take action affecting OCS development, but they do not have discretion to shut affected states and their governors out of the process.

And for agency actions affecting OCS development in the Alaska region, there should be no question that Defendants owe these duties to Alaska and its governor, as the "affected state." The OCSLA defines an "affected State" as, *inter alia*, any state that will "receive, oil for . . . transshipment which was extracted from the outer Continental Shelf" or "in which there will be significant changes in the social, governmental, or economic infrastructure, resulting from the exploration, development, and production of oil and gas anywhere on the outer Continental Shelf." 43 U.S.C. § 1331(f). Alaska is the only state adjacent to BOEMRE's "Alaska region" of the OCS. (RJN, Ex. E at 1, Fig. 1.) Thus, it is Alaska whose lands and communities would be affected by development and production in the Alaska region, and Alaska through which any oil and gas would be transported.

Accordingly, Defendants owed Governor Parnell a duty to notify him of federal agency actions affecting OCS development in the Alaska region, and owed the State and Governor Parnell an opportunity to participate in the decision-making process affecting this region.

B. Defendants Took Action Affecting OCS Development Without Notifying the Governor or Allowing the State to Participate in the Decision-Making Process.

Defendants' duties of notification and opportunity to participate arise whenever any federal department or agency "takes any action which has a direct and significant effect on the outer Continental Shelf or its development." 43 U.S.C. § 1334(h). Here, Secretary Salazar has repeatedly made official, public statements demonstrating an agency action affecting the OCS: an indefinite moratorium/deferral on exploration and development in the Alaska region.

Secretary Salazar proclaimed this moratorium/deferral in an official press release, in testimony before a Senate committee, and in an official press conference, often following questions asking Secretary Salazar to explain whether there was "moratorium" or similar type of deferral:

- "[T]he ***moratorium does in fact apply to Alaska*** because we are not going to allow the drilling activities that would have to happen in the OCS without us having to

make some kind of affirmative decision." (Schafer Decl., Ex. A at 1 (emphasis added).)

- "[T]he ***moratorium that is in place does, in fact, apply to the Alaska wells and to the exploration wells*** that Shell had proposed to put into place. (RJN, Ex. B at 5 (emphasis added).)
- "***The moratorium on the Arctic*** essentially is imposed in a different way." (Schafer Decl., Ex. A at 7 (emphasis added).)
- "[T]he ***pause button*** gives us an opportunity to take a look at the whole set of issues in the OCS . . . . [I]t is my view that the ***pause button*** is very appropriate for these wells." (RJN, Ex. B at 3, 4. (emphasis added).)
- "[T]he Administration . . . ***will postpone*** consideration of Shell's proposal to drill up to five exploration wells in the Arctic this summer." (RJN, Ex. A at 1 (emphasis added).)
- "[U]ntil we are confident that drilling can be conducted in the Chukchi and Beaufort Sea ***we will not be allowing that program to move forward.*** (Schafer Decl., Ex. A at 2 (emphasis added).)
- "[U]ntil we have answers to some of those central questions, ***we aren't going to allow the drilling and the exploration wells***. (Schafer Decl., Ex. A at 7 (emphasis added).)

These are not mere ambiguities or slips of the tongue. In his Senate Committee testimony and at the September 3, 2010 press conference, Secretary Salazar was asked repeatedly to clarify whether there was a moratorium on the Alaska region, and again and again he answered, unequivocally that there was. (RJN, Ex. B at 2-5; Shafer Decl., Ex. A at 1-2, 6-8.) Whether it is labeled a "moratorium," a "pause," or "postponement" is of no consequence. What Secretary Salazar's official statements pronounce and describe is a deferral of OCS decision making for the Alaska region by DOI and BOEMRE.

This moratorium/deferral of OCS exploration and development on leased areas within the Alaska region is an action by an agency — DOI and its bureau, BOEMRE — that has a direct and significant effect on the OCS and its development — *i.e.*, not allowing development to occur. Accordingly, the moratorium/deferral triggers Defendants' duty to notify the governor of an affected state and to allow the state an opportunity to participate in the decision-making process. 43 U.S.C. §§ 1332(4)(C), 1334(h). Defendants did not give Governor Parnell, governor of the state affected by Alaska region OCS decisions, notice. (Parnell Decl. ¶ 4; Fradley Decl. ¶¶ 4-6.) Nor did Defendants give Governor Parnell or the State of Alaska an opportunity to participate in the decision to impose this moratorium/deferral. (Parnell Decl. ¶ 5.)

A moratorium/deferral imposed without following the proper procedure is invalid and a writ of mandamus is appropriate to enforce such procedures. *See, e.g.*, *Marathon Oil Co. v. Lujan*, 937 F.2d at 500-01 (affirming writ of mandamus invalidating moratorium for lack of justification and compelling agency to take action on applications); *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. at 1464-65 (issuing writ of mandamus to invalidate moratorium for failure to follow notice and hearing procedures and compelling county to take action on applications). By failing to give advance notice and opportunity to participate, Defendants violated their duties to Plaintiffs under the OCSLA and the moratorium/deferral should be invalidated until Defendants follow these mandatory procedures.

C. A Writ of Mandamus is the Only Adequate Remedy.

The State and Governor Parnell have no means to enforce the OCSLA notice and opportunity to participate provisions without an order from this Court compelling Defendants to comply with these provisions. Because what Plaintiffs are seeking is an order compelling federal agency officials to perform statutory duties, what Plaintiffs are seeking is a writ of mandamus. 28 U.S.C. § 1361. That is the relief multiple courts have found appropriate to remedy a failure to follow mandatory procedures in agency decision making. *See, e.g.*, *Marathon Oil Co. v. Lujan*, 937 F.2d at 500-01 (affirming writ of mandamus invalidating moratorium for lack of justification

and compelling agency to take action on applications); *Sprint Spectrum L.P. v. Jefferson County*, 968 F. Supp. at 1464-65 (issuing writ of mandamus to invalidate moratorium imposed without public notice or hearing); *Winnebago Tribe of Nebraska v. Babbitt*, 915 F. Supp. at 167 (issuing writ of mandamus to invalidate agency action taken without prior consultation with tribe); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. at 398-401 (same); *cf. Medics, Inc. v. Sullivan*, 766 F. Supp. 47 (D. P.R. 1991) (issuing writ of mandamus for requiring Secretary of Health and Human Services to provide a notice and comment period before issuing final rule). That is the only relief Plaintiffs can seek to remedy the procedural violations here.

II. THE COURT SHOULD EXERCISE ITS DISCRETION AND GRANT MANDAMUS RELIEF.

Because Plaintiffs are owed a statutory duty of notice and opportunity to participate before an agency implements an action affecting OCS development, because Defendants breached that duty by imposing a moratorium/deferral on OCS exploration and development decision making for the Alaska region, and because Plaintiffs have no other remedy to correct these procedural errors, a writ of mandamus is appropriate. This Court should exercise its discretion and grant that relief.

The benefits of the OCSLA notice and opportunity to participate provisions are two-fold. First, the State of Alaska and Governor Parnell have superior knowledge of how OCS exploration and development — or lack thereof — will affect Alaska. As the State and as a property owner of much of the adjacent offshore and onshore land, the State can provide information about the neighboring ecosystems and how exploratory drilling and production will affect the environment. The State and Governor Parnell can also provide information about nearby communities and how exploratory drilling and production, or the absence of such activities due to a moratorium/deferral, will affect local economies and job markets. The State and Governor Parnell can provide information about the State's revenues as well, and how exploratory drilling and production impacts the State as a whole. Environmental effects and

local and statewide economic effects are eminently relevant to a decision whether to defer OCS exploration and development. By failing to give Governor Parnell notice of the moratorium/deferral, however, Defendants made that decision without such information — in contravention of Congress's stated policy that the states affected by OCS development should be a part of the process. 43 U.S.C. § 1332(4).

Second, government decision making should be open and explicit, not brokered behind closed-doors and revealed only in general terms in various public statements. *See, e.g.*, 5 U.S.C. § 551 *et seq*. For the deepwater drilling moratorium that Defendants imposed on the Gulf of Mexico and Pacific regions, Defendants issued a 29-page decision explaining the reasons for imposing a moratorium and its scope — what activities were enjoined, where, by whom, and for how long. (RJN, Ex. F.) In sharp contrast, Defendants provided the State, the public, and lessees with nothing for the Alaska region moratorium/deferral but a sentence in a press release and Secretary Salazar's repeated statements that such a moratorium/deferral is in fact in place. Defendants have offered no end date for the Alaska region moratorium/deferral — unlike the Gulf moratorium that will expire November 30, 2010. They have offered no limitation by activity — unlike the Gulf moratorium, which is specific to certain deepwater drilling technology. And the only justification Defendants have offered is that the agency needs to think about the BP Gulf of Mexico spill — a spill that occurred half away across the world, using different technology, in a vastly different scenario (deepwater drilling at a depth of 5000+ feet, versus the shallow water drilling of approximately 150 feet in the Arctic). If Defendants had given Governor Parnell notice and the State an opportunity to participate in the Alaska region moratorium/deferral decision, however, Defendants would have revealed the scope of the moratorium/deferral and their reasons for implementing it. Such transparency is fundamental to open governmental decision making.

Defendants made their deepwater drilling moratorium decision in the light of day. The State of Alaska, its Governor, and all Alaskans deserve the same.

CONCLUSION

It is beyond factual dispute that Defendants have imposed a moratorium/deferral on OCS exploration and development in the Alaska region — what Secretary Salazar has variously called a "moratorium," a "pause," and a "postponement." It is also beyond dispute that Defendants did not notify Governor Parnell or give the State an opportunity to participate before making the decision to impose this moratorium/deferral. Secretary Salazar has proclaimed this moratorium/deferral in official, public statements, repeatedly and unequivocally, in response to questions specifically pressing him on whether there was such a moratorium/deferral for the Alaska region. As a matter of law, Defendants' failure to give notice and an opportunity to participate breaches their duty to the State and Governor Parnell under the OCSLA, leaving Plaintiffs with no remedy other than a writ of mandamus. This Court can and should issue a writ of mandamus to invalidate the moratorium/deferral and compel Defendants to provide Plaintiffs with notice and an opportunity to participate before imposing any future moratorium/deferral on OCS exploration and development in the Alaska region.

Dated this 12th day of October, 2010, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 12, 2010, a copy of the foregoing was served by U.S. Mail on the parties listed below.

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