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## ALASKA



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### I. Introduction

The following is an update on Alaska legislative activity and case law relating to oil, gas, and mineral law from August 1, 2022, to July 31, 2023.

### II. Legislative and Regulatory Developments

The following is a discussion of notable legislation:

#### A. Senate Bill 48

Senate Bill 48 (“SB 48”) — Relating to the powers and duties of the Alaska Oil and Gas Conservation Commission; authorizing the Department of Natural Resources to lease land for carbon management purposes; establishing a carbon offset program for state land; authorizing the sale of carbon offset credits; authorizing the use of land and water within the Haines State Forest Resource Management Area for a carbon offset project; authorizing the undertaking of carbon offset projects on land in legislatively designated state forests; relating to oil and gas lease expenditures; and providing for an effective date.<sup>1</sup>

Section 3 of SB 48 amends AS 37.05.146(c) by adding the following subsection: “(85) revenue from the carbon offset program under AS 38.95.400 - 38.95.499.”<sup>2</sup> The provision directs that any funds received from carbon offset leasing be accounted for separately, and not made from the unrestricted general fund.<sup>3</sup>

Section 5 of SB 48 amends AS 38.05 by adding a new section: “Sec. 38.05.081. Leases of state land for carbon management purposes.”<sup>4</sup> Sec. 38.05.081(a) empowers the Alaska commissioner of natural resources<sup>5</sup> (“Commissioner”) to lease state land for carbon management purposes.<sup>6</sup> Sec. 38.05.081(b) establishes that a carbon management lease application must include: “(1) the specific location, description, and amount of land the applicant wants to lease; (2) a detailed summary of the proposed purpose the land will be used for; and (3) additional information and requirements established by the department in regulation, including any application fees.”<sup>7</sup> Sec. 38.05.081(d) directs that, if multiple applications are submitted to lease

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1. 2023 Alaska Sess. Laws ch. 2 (S.B. No. 48).

2. *Id.*, sec. 3, ALASKA STAT. ANN. § 37.05.146(c)(85) (West 2023).

3. *See* ALASKA STAT. ANN. § 37.05.146(b).

4. 2023 Sess. Laws ch. 2, sec. 5, ALASKA STAT. ANN. § 38.05.081.

5. *See* ALASKA STAT. ANN. § 38.05.965 (defining “commissioner”).

6. 2023 Sess. Laws ch. 2, sec. 5, ALASKA STAT. ANN. § 38.05.081(a).

7. *Id.*, § 38.05.081(b).

the same state land, the Commissioner must consider “reasonable factors.” These include, among others: potential revenue to the state, the applicant’s qualifications and experience, and the anticipated lease term.<sup>8</sup> Sec. 38.05.081(e) places restrictions on carbon management leases, which cannot exceed 55 years and must contain terms and conditions that include benchmarks.<sup>9</sup> The Commissioner is directed to terminate any lease if the lessee is not using the land for carbon management purposes, or otherwise fails to comply with the lease requirements.<sup>10</sup> Sec. 38.05.081(j) and (k) specify that land subject to carbon offset leasing must remain open to mineral exploration and development as well as hunting, fishing, and other generally allowed uses.<sup>11</sup> Finally, Sec. 38.05.081(l) directs the Commissioner to prepare a comprehensive annual report describing both new and ongoing carbon management lease agreements on state land.<sup>12</sup>

Section 8 of SB 48 amends AS 38.95 by adding new sections, 38.95.400–499, which create a state carbon offset program.<sup>13</sup> Sec. 38.95.400(b) directs the Commissioner to adopt regulations to implement the program.<sup>14</sup>

Section 17 of SB 48 allowed the law to take effect immediately on May 24, 2023.<sup>15</sup>

### III. Judicial Developments

#### A. Supreme Court Cases

None reported.

#### B. Appellate Activity

##### 1. *ConocoPhillips Alaska, Inc. v. Alaska Oil and Gas Conser. Comm’n*<sup>16</sup>

##### a) *Background*

The Alaska Oil and Gas Conservation Commission (“Commission”) is a quasi-judicial agency that oversees oil and gas operations in Alaska.<sup>17</sup>

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8. *Id.*, § 38.05.081(d).

9. *Id.* § 38.05.081(e).

10. *Id.*

11. *Id.* § 38.05.081(j)–(k)

12. *Id.* § 38.05.081(l).

13. 2023 Sess. Laws ch. 2, sec. 8, ALASKA STAT. ANN. § 38.95.400–499.

14. *Id.* § 38.95.400(b).

15. 2023 Sess. Laws ch. 2, sec. 17; *See also* ALASKA STAT. ANN. § 01.10.070(c).

16. *ConocoPhillips Alaska, Inc. v. Alaska Oil and Gas Conserv. Comm’n*, No. 3:22-CV-00121-SLG, 2023 WL 2403720 (D. Alaska Mar. 8, 2023).

17. *Id.* at \*3

ConocoPhillips Alaska, Inc. (CPAI) sued the Commission, challenging Alaska's state disclosure laws and seeking declaratory relief and a permanent injunction.<sup>18</sup> CPAI argued that Alaska's shorter timetable for public disclosure of proprietary well data is preempted by federal laws providing for release of well data at the end of the operator's lease.<sup>19</sup>

*b) Standard of Review*

To survive a motion to dismiss, a complaint must state a claim that is plausible on its face and include well-pleaded facts.<sup>20</sup>

A motion for partial summary judgment may be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>21</sup>

*c) Discussion*

In *ConocoPhillips*, the Court reviewed two motions, one from each party.<sup>22</sup> The Alaska Oil and Gas Conservation Commission ("AOGCC") moved to dismiss for failure to state a claim. ConocoPhillips moved for partial summary judgment on the issue of declaratory relief, declaring that AOGCC's actions under the color of state law are pre-empted by federal law.<sup>23</sup>

The District Court denied AOGCC's motion to dismiss because ConocoPhillips would never have had any National Petroleum Reserve in Alaska ("NPR-A") exploration information but for the privileges of the Naval Petroleum Reserves Production Act ("NPRPA") and its incorporated provisions of the Outer Continental Shelf Lands Act ("OCSLA"), therefore the information is obtained under federal law.<sup>24</sup>

The District Court granted ConocoPhillips' motion for partial summary judgment because state disclosure laws that would permit public disclosure of information sooner than is permitted by federal law is an obstacle to the intention of the NPRPA and thus preempted.<sup>25</sup>

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18. *Id.* at \*4

19. *Id.*

20. *See, e.g.,* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *See also* Fed. R. Civ. P. 12(b)(6).

21. Fed. R. Civ. P. 56(a).

22. *ConocoPhillips Alaska, Inc.*, 2023 WL 2403720, at \*4.

23. *Id.*

24. *Id.* at \*12.

25. *Id.* at \*13.

The Court was presented a singular legal question: Does federal law preempt state law on public release of ConocoPhillips' information from the NPR-A?<sup>26</sup> The Court answered yes.<sup>27</sup>

In the early '80s, the United States Naval Petroleum Reserves was opened to private exploration.<sup>28</sup> Tied to the NPRPA rider passed in 1980, the amendments were codified including incorporated parts of the OCSLA—specifically, the OCSLA's "Oil and Gas Information Program."<sup>29</sup>

The language incorporated read as follows, "[a]ny lessee ... conducting any exploration for ... oil and gas pursuant to this subchapter," must provide the Secretary of the Interior with, "all data and information ... obtained from such activity and shall provide copies of such data and information as the Secretary may request."<sup>30</sup> Neighboring provisions of the OCSLA grant individuals subject to this section confidentiality for privileged or proprietary information, shielding such information until a time when the lease is expired.<sup>31</sup> In contrast, the Alaska statute provided for only 24 months of confidentiality, before requiring the AOGCC to file the data publicly.<sup>32</sup>

The Court held that the incorporated provisions of the OCSLA preempt the Alaskan statute.<sup>33</sup> The Court held that the NPRPA does not expressly preempt state law.<sup>34</sup> In both the original NPRPA and its rider, Congress could have explicitly stated preemption but did not and that Congress referenced sections of the OCSLA but not its preemption clause solidifies that it did not expressly preempt state law.<sup>35</sup>

The Court then held that the NPRPA is ambiguous as to whether Congress intended to preempt state law.<sup>36</sup> Then, in analyzing the legislative history, the Court found ample evidence that Congress was focused on incentivizing private exploration and investment, specifically fielding views that emphasized the competitive value of confidentiality.<sup>37</sup>

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26. *Id.* at \*4.

27. *Id.* at \*13.

28. *Id.* at \*8.

29. *See generally id.* at \*1–4 (providing background information).

30. *Id.* at \*2 (quoting 43 U.S.C. § 1352(a)(1)(A)).

31. *Id.* at \*2.

32. ALASKA STAT. ANN. § 31.05.035(c) (West 2023).

33. *ConocoPhillips Alaska, Inc.*, 2023 WL 2403720, at \*13.

34. *Id.* at \*6.

35. *Id.*

36. *Id.* at \*8.

37. *Id.* at \*9.

AOGCC did not dispute the intentions and mechanics of the federal law.<sup>38</sup> Rather, they assert that they avoid conflict with federal law because they obtain well information under color of state law, not through the processes provided in the NPRPA.<sup>39</sup> The Court noted that exploration companies “would not have any NPR-A exploration information to submit ... but for their leases authorized under the NPRPA.”<sup>40</sup> Therefore, “*any* such information—whether submitted directly to the federal government or directly to the state government—is obtained pursuant to the NPRPA and its incorporated provisions of the OCSLA.”<sup>41</sup>

The Court’s analysis fits within a kind of implied preemption known as obstacle preemption.<sup>42</sup> There is no hard and fast rule for obstacle preemption, but it is an informed judgment derived from a federal law’s intent and purpose.<sup>43</sup> The Court stated that to accept AOGCC’s argument would be to disincentivize exploration of the NPR-A, the exact opposite effect of the NPRPA rider.<sup>44</sup> The stated goal of the rider was to promote expeditious private exploration, and as the Court put it, “[i]t would make no sense for Congress to prohibit the federal government from publicly disclosing [data] for the duration of an NPR-A lease but permit a state to disclose such information prior to the end of the lease,”<sup>45</sup> and that, “allowing [AOGCC’s interpretation] would clearly impede Congress’s intent to expeditiously advance private oil and gas development on the NPR-A.”<sup>46</sup>

### C. Trial Activity

None reported.

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38. *Id.* at \*5.

39. *Id.*

40. *Id.* at \*12.

41. *Id.*

42. *Id.* at \*11.

43. *Id.*; see also *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

44. *ConocoPhillips Alaska, Inc.*, 2023 WL 2403720, at \*13.

45. *Id.*

46. *Id.*