Case No. 12-70218

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA SURVIVAL, *et al.*,

Petitioners

v.

SURFACE TRANSPORTATION BOARD, *et al.*,

Respondents,

and

ALASKA RAILROAD CORPORATION, *et al.*,

Intervenor-Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE SURFACE TRANSPORTATION BOARD

INTERVENOR-RESPONDENTS ALASKA RAILROAD CORPORATION AND MATANUSKA-SUSITNA BOROUGH'S REPLY IN SUPPORT OF THEIR MOTION TO LIFT STAY

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INTRODUCTION

If the emergency stay issued by the motions panel remains in place until a written decision is issued in this case, it would have a cascading effect that would delay the Port MacKenzie Rail Extension project for a year, at a cost millions of dollars and over 100 jobs. The panel that heard oral arguments in this case—unlike the motions panel—has had the benefit of a full opportunity to consider the merits of Petitioners' claims, and is able to judge the propriety of a stay order on that basis. Should the panel conclude that Petitioners are unlikely to prevail on the merits, it has full authority to vacate the motions panel's stay and prevent the unnecessary harms that would attend a continued delay of the Port MacKenzie Rail Extension project. Intervenor-Respondents Alaska Railroad Corporation ("ARRC") and the Matanuska-Susitna Borough ("the Mat-Su Borough) are respectfully requesting that the Court exercise its power by lifting the emergency stay imposed by the motions panel.

ARGUMENT

Petitioners' first substantive argument against lifting the emergency stay imposed by the motions panel characterizes Intervenor-Respondents' motion as "an untimely motion for reconsideration."[1] Docket No. 53, Opposition to Intervenors'

[1] Counsel stated during oral argument that Intervenor-Respondents were asking the Court to lift the emergency stay. The parties' positions on this issue have been clear since before Petitioners' filed their emergency motion.

Motion to Lift the Stay Pending Appeal ("Opp.") at 2. In light of the changed circumstances described in their motion, Intervenor-Respondents have accurately framed the instant motion as a request to lift the emergency stay imposed by the motions panel in light of full merits briefing, rather than as a motion for reconsideration. Regardless, "[w]ith the benefit of full briefing and (as was the case here) oral argument, the panel to which the case falls for disposition on the merits may conclude that the motions decision was improvident and should be ***reconsidered***." *See United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986) (quoting *Equal Employment Opportunity Comm'n v. Neches Butane Prods. Co.*, 704 F.2d 144, 147 (5th Cir. 1983)) (emphasis added). Such "reconsideration" of a motions panel's rulings can extend to decisions on the propriety of a stay or injunction. *See Blue Mtns. BioDiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (revisiting the initial denial of an emergency injunction motion). Thus, Petitioners' characterization of the instant motion has no impact on this Court's power to grant the relief being requested.

The bulk of Petitioners' opposition brief is devoted to arguing that neither changed circumstances nor legal precedent justifies a departure from the motions panel's decision. *See* Opp. at 3-8. Although Petitioners do not invoke the doctrine by name, all of these arguments are asking the Court to adhere to the "law of the case" established by the motions panel. The term "law of the case," as this Court

has explained, refers to "the principle that in order to maintain consistency during the course of a single lawsuit, reconsideration of legal questions previously decided should be avoided." *Houser*, 804 F.2d at 567. At the same time, however, the Court explained that the law of the case doctrine does not prevent a merits panel from revisiting a motions panel's prior ruling.

It is true, of course, that the law of the case doctrine is "sometimes applied to a reconsideration of an earlier decision of a panel of an appellate court." *Id*. But the Court in *Houser* articulated two reasons that the Court in this case is not subject to the strictures of the law of the case when reviewing Intervenor-Respondents' request to lift the emergency stay ordered by the motions panel.[2]

First, the law of the case doctrine "is discretionary, not mandatory"—it "merely expresses the practice of courts generally to refuse to reopen what has been decided," and does not "limit their power." *Id*. at 567. Petitioners interpret the latter parts of this passage as setting a high bar for reconsideration, arguing that a motions panel's decision should "be overturned only for compelling reasons." Opp. at 8 (emphasis omitted). But that is not what *Houser* says. Speaking generally of circumstances in which it is proper "to reconsider a prior decision," the Court observed that the law of the case need not be enforced "if a showing is made

[2] A third reason that the law of the case was not applied in *Houser*—existence of a jurisdictional question (*id*. at 568-69)—is not relevant here.

which compels [the Court] to reconsider [its] decision." *Houser*, 804 F.2d at 568. The Court then went on to explain that when the prior decision was a "summary disposition," as the motions panel's stay ruling was in this case, the Court must "scrutinize the merits of the question we were asked to reconsider with greater care." *Id.*

The Court in *Houser* further pointed out that "the realities of the provisional disposition" of a motions panel means that the law of the case doctrine applies with even less force. *Id.* A motions panel's decision rarely proceeds through the normal process of review, primarily because (as was the case here) such review would not be completed "prior to the time that the case is presented to the merits panel." *Id.* Consequently, "while a merits panel does not lightly overturn a decision made by a motions panel during the course of the same appeal, [it] do[es] not apply the law of the case doctrine as strictly in that instance as . . . when a second merits panel is asked to reconsider a decision reached by the first merits panel on an earlier appeal." *Id.*

In addition to noting the practical difficulties of reviewing a motions panel's "provisional disposition," the Court in *Houser* emphasized that the motions panel rarely has "the benefit of full briefing and . . . oral argument." *Id.* (citation omitted). Consequently, the decision of a motions panel is inherently "tentative" and "based on an abbreviated record . . . ." *Stifel, Nicolaus & Co., Inc. v. Woolsley &*

Co., Inc., 81 F.3d 1540, 1544 (10th Cir. 1996). These weaknesses are further highlighted when, as here, a motions panel is responding to an "emergency" request.

Petitioners filed their emergency motion for a stay on Friday afternoon, September 21. *See* Docket No. 38. Opposition briefs were submitted on September 25 (*see* Docket Nos. 39, 40, 41) and a reply brief was filed on September 26 (*see* Docket No. 43). The motions panel's decision was rendered on October 1, just ten days after the motion was filed, and only five days after briefing was complete. *See* Docket No. 44. This "provisional disposition" (*Houser*, 804 F.2d at 568), unquestionably made "on a scanty record," is simply "not entitled to the weight of a decision made after plenary submission." *Stifel*, 81 F.3d at 1544.

Finally, even if the Court were to accept Petitioners' contention that the motions panel's decision cannot be revisited absent "compelling reasons" to do so, such reasons are plainly present in this case. Because of the short construction season in Alaska and the need to comply with the extensive mitigation measures imposed by the Surface Transportation Board, ARRC, the Mat-Su Borough and the State of Alaska face a year's delay and millions of dollars in economic damages if the stay remains in place—damages that will not be remedied even if Respondents ultimately prevail on the merits. *See* Docket No. 52, Motion to Lift Stay at 8. Worse, the more than one hundred construction jobs that would be created if the rail extension project moves forward are on hold until the stay is lifted. *See id*. at

9. These harms readily qualify as the kind of "showing" that "compels" review of a motions panel's decision, especially when that decision is "summary" in nature (*Houser*, 804 F.2d at 568). In addition, despite a request from ARRC and the Mat-Su Borough, Petitioners were not required to pay a bond that might have mitigated the damage that inevitably accrues when a stay is imposed against the party ultimately prevails on the merits. *See* Fed. R. App. P. 18(b). As a result, the only way that harm to Intervenor-Respondents can be remedied is if the stay is lifted pending a written decision.

CONCLUSION

For all the reasons stated above, and in their initial motion, ARRC and the Mat-Su Borough respectfully request that the emergency stay imposed by the motions panel be immediately lifted pending issuance of an opinion and final judgment in this matter.

Dated: November 21, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. To the best of my knowledge, all counsel of record are registered CM/ECF users.

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