# COURT ORDERS HALT TO DRILLING

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The U.S. Ninth Circuit Court of Appeals has ordered all offshore oil development and exploration stopped in two large areas of the outer continental shelf, one in the Bering Sea and the other in Norton Sound. The court found that the U.S. Secretary of the Interior did not evaluate the potential impacts of such activity on the subsistence resources of western Alaskan Eskimos prior to the Lease Sales, as is mandated by section 810 of the Alaska National Interest Land Conservation Act (ANILCA).

In its decision, the court said that the interests of aboriginal peoples dependent upon marine mammals and other resources for survival supercede those of the oil companies or the Reagan administration's search for new energy sources.

Until the suit, filed by the People of the Village of Stebbins, the People of the Village of Gamble, and Nunam Kitlutsisti (the Protectors of the Land), is tried, all activities in connection with Lease Sale 57 and Lease Sale 83 have been suspended.

Lease Sale 57 involves 2.4 million acres in the Norton Sound Basin 25 miles off Alaska's west coast. Lease Sale 83 involves some 37 million acres of the outer continental shelf (OCS) due west of St. Matthews Island, 250 miles from Alaska's mainland.

In his opinion, Judge Arthur Alarcon wrote, "the maintenance of this subsistence economy is requisite to the literal survival of these isolated Alaskan tribal villages. On St. Lawrence Island alone 80 percent of all food consumed annually comes from the sea and land. A substantial portion of their cash income comes from carved walrus ivory. Moreover, even if the community's physical survival is not placed in immediate jeopardy by disruptions from oil and gas exploration, the very social structure of the village is jeopardized.

"The byproducts of oil and gas exploration such as potential oil spills, leakage and noise pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of Native Alaskans," wrote Alarcon for the 2-1 majority.

The lower court, in a ruling by U.S. District Judge James von der Heydt earlier this year found that the villages had a strong case based on the merits, because U.S. Secretary of the Interior Donald Hodel had violated section 810 of ANILCA, but refused to block drilling, saying that, "delay may cause irreparable harm to this nation's quest for new oil resources and energy independence."

The courts used the so-called "traditional test" to determine whether or not an injunction should be granted. The test involves the asking of three questions:

1. Have the movants (in this case, the villages) established a strong likelihood of success on the merits (of the case)?
2. Does the balance of irreparable harm favor the movants?
3. Is the public interest served by the granting of injunctive relief?

Although Judge von der Heydt did find a strong likelihood of success on the merits, the lower court felt the villages did not present a persuasive argument that offshore activities might cause irreparable harm to the hunting and fishing resources of Alaska Natives. Similarly, Judge von der Heydt felt that the public's interest in finding new energy sources outweighed the importance of protecting the hunting and fishing lifestyle of Alaska Natives.

However, Judge Alarcon disagreed. In his opinion, Judge Alarcon did indeed find that the plaintiffs (villages) demonstrated a strong likelihood of success on the merits; but in the test for the "balance of irreparable harm" Alarcon implied that the lower court had, in effect, turned that aspect of the traditional test on its head.

"Irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action," wrote Judge Alarcon, adding that, "In fact, the Secretary's Lease Sale plan poses the type of danger to the subsistence culture of Alaskan Natives that moved Congress to enact section 810(a) of the (Alaska National Interest Lands) Conservation Act."

In his conclusion, Judge Alarcon wrote:

"The Secretary failed to evaluate the effect on subsistence uses and needs of the Alaskan Natives prior to Lease Sale 57 and Lease Sale 83 because of his belief that section 810(a) of the Conservation Act did not apply to the outer continental shelf...

"The district court erred as a matter of law in concluding that these facts presented rare or unusual circumstances justifying a failure to follow the rule that a preliminary injunction should issue where a federal agency has violated the procedural requirements of an environmental protection or conservation statute. Under these facts, the issuance of a preliminary injunction would not have resulted in a belated interruption of long term contracts or interfered with any plan to *preserve* subsistence uses or to *protect* the environment. Instead, the Secretary's plan involves exploitation of finite environmental resources and a potential threat to the subsistence culture of Alaska Natives."

It is unclear what remedy the lower court may seek to apply in the case. The appeals court gave no guidance as to whether an environmental impact statement after-the-fact might be satisfactory, or whether a permanent injunction is the only remedy. The sales themselves were not cancelled when the appeals court remanded the case back to Judge von der Heydt.

The lone dissenter, Judge Carolyn R. Dimmick, in her dissenting opinion, cited Supreme Court cases in which federal agencies violated environmental statue and injunctions were denied. Judge Dimmick writes, "the majority, in reversing the trial court's decision, advances a new rule: absent unusual circumstances, an injunction must be issued when an environmental statute has been violated."

Judge Dimmick also questioned the court's lack of guidance to the lower court in a remedy for the case, writing that, "this case will probably become a trilogy," referring to the probable appeal by the Interior Department and the eight oil companies involved, which include Arco, Amoco and Exxon.

Judge Dimmick also argued in her opinion that the eight oil companies would be "irreparably harmed" by the loss of some $60 million and that all the plaintiffs (villages) could show was the "speculative harm to the environment."

But Judge Alarcon in the majority opinion pointed out that, "any financial losses which may have been incurred by the oil companies were also incurred with full knowledge of the risks involved in expending money at a time when the validity of leases sold without compliance with the Conservation Act was pending before the court."

The judge was referring to *Gambell I*, in which the court established a new principle of law in construing section 810(a) of ANILCA as applicable to the outer continental shelf. This was one of the key factors in the majority decision to apply the decision retroactively to Lease Sale 83.

"The facts demonstrate unequivocally that the Secretary conducted Lease Sale 83 with knowledge that his right to do so without complying with the Conservation Act was in doubt, in light of the fact that an appeal was then pending on Lease Sale 57," wrote Judge Alarcon.

The fact that an appeal had been filed before the sale was held is also a key point in demonstrating why a similar approach may be unsuccessful in stopping offshore oil activities in other areas around the state. It is uncertain whether or not the courts would have issued an injunction had it meant an interruption in long term contracts. In fact, in a similar case before the same court in 1984, *Forelaws on Board v. Johnson*, the court refused to issue injunctive relief despite a violation of the Environmental Act because such relief would have interfered with the operation of 20-year contracts.

The two leases together sold for over $800 million. Only Amoco had not completed its activities for the year at the time the court's decison was made.