

# PUBLICATION

---

## Department of Interior Choreographs a Creative and Strategic Ballet through the Moratorium

December 13, 2012

***Hornbeck Offshore Services, L.L.C., et al. v. Kenneth Salazar, Secretary, Department of Interior, et al.*, No. 11-30936, 2012 WL5910842 (5th Cir. 2012).** Whether in or out of the inner circle of the oil and gas industry, most are likely familiar with the 2010 Deepwater Horizon oil spill. It proved to be the largest accidental marine oil spill in the history of the petroleum industry and had far reaching implications. There has been a great deal of commentary on investigations, accusations and litigation resulting from the spill. Perhaps not as widely known is the action filed by Hornbeck Offshore Services, L.L.C., and approximately forty other companies involved in the oil and gas drilling, exploration, and production industry, seeking declaratory and injunctive relief regarding the six month moratorium by the U.S. Department of the Interior, which prohibited all new and existing oil and gas drilling operations on the Outer Continental Shelf (the "May Directive"). Hornbeck argued that the May Directive and the notices that the Department of Interior sent to thirty-three operators of permitted wells were inadequately explained and justified and violated the Administrative Procedures Act ("APA"). Hornbeck also complained that the Secretary of Interior had exceeded his authority under the Outer Continental Shelf Lands Act. The U.S. District Court for the Eastern District of Louisiana held in favor of Hornbeck on its claims under the APA and preliminarily enjoined enforcement of the moratorium. The Department of Interior immediately appealed the injunction to the U.S. Court of Appeals for the Fifth Circuit and sought a stay of its enforcement.

While the appeal was pending, the U.S. Department of the Interior rescinded the May Directive and issued its "July Directive" ostensibly to address the deficiencies noted in the ruling that led to the injunction and to effectively make moot the issues pending on appeal. The sole remaining question addressed in this opinion by the Fifth Circuit was whether the actions of the U.S. Department of the Interior following the injunction violated the specific provisions of that injunction and rose to the level of contempt. The public actions and procedural maneuvering of the U.S. Department of the Interior are well tracked in the split opinion of the Fifth Circuit. The majority disagreed with the lower court and held that the U.S. Department of the Interior did not commit civil contempt. What the majority characterizes as a successful "end-run" by the Secretary of the Interior, the dissent finds to be more akin to a "wink-and-a-nod" approach which seriously threatens the inherent contempt powers of the courts. (See *id.* at \*13, Elrod, J., dissenting).

The Secretary of Interior lifted the July Directive on October 12, 2010, just weeks before the anticipated six month moratorium was set to expire. Nevertheless, its actions in issuing and rescinding directives and filing and mooting appeals evidences its very successful and "calculated plan to interfere with enforcement of a remedy.. and to insulate the moratorium decision from judicial review." (See *id.* at \*11). The Fifth Circuit did not feel that the words expressed or actions taken by the Secretary of Interior when taken all together rose to the level of a violation of a clear provision of the district court's order. The ultimate findings of the Fifth Circuit seem driven largely by the premise that the "controversial policy decisions" behind the May and July Directives "were made at the highest level of government" and perhaps at Presidential direction. (See *id.* at \*7). No civil contempt, however, occurred because there was no clear and convincing evidence that the Secretary of Interior's actions following the issuance of the injunction violated the clear terms of the injunction as drafted. The lower court's finding of contempt and award of attorney's fees was reversed.

