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## Dept. of Interior Held In Contempt over Drilling Moratorium

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Last year's drilling moratorium, issued in the wake of the *Deepwater Horizon* oil spill, has been the subject of ongoing litigation between the Department of Interior (DOI) and various owners and operators of offshore drilling support services (collectively Hornbeck Offshore Services). In the latest development, Hornbeck Offshore Services brought a civil contempt action against the DOI.<sup>2</sup> Hornbeck Offshore Services argued that the DOI violated an earlier court order, and therefore, Hornbeck was entitled to an award of attorney fees. In February, a Louisiana federal district court agreed with Hornbeck Offshore Services and ordered DOI to pay Hornbeck's attorney's fees.

### Background

After the April 2010 explosion on BP's *Deepwater Horizon* rig and the resulting oil spill, President Obama ordered the DOI to conduct a review of the incident. On May 27, 2010, the DOI released a review which suggested that all blowout preventer equipment and emergency systems be recertified, new design and testing procedures be implemented, and increased safety measures be required on all rigs.<sup>3</sup> Although the review was said to have been peer reviewed by a team of scientists, some of these identified scientists later denied participating in the review.<sup>4</sup> On May 28th, the DOI, exercising its authority under the Outer Continental Shelf Lands Act (OCSLA), placed a moratorium on all drilling operations in the Gulf of Mexico which were drilling at depths greater than 500 feet for the purpose of implementing improved safety measures. The OCSLA gives the DOI power to issue a moratorium if "there is a threat of serious, irreparable, or immediate harm or damage to life, to property, to any mineral deposits, or to the marine, coastal, or human environment."<sup>5</sup>

Hornbeck Offshore Services and others challenged the moratorium in court, and sought an injunction to prevent possible negative effects on individual business, local economies, and the economy at large.<sup>6</sup> On June 22, 2010, the court granted the injunction finding the DOI's decision arbitrary and capricious. According to the court, the moratorium of May 28, 2010 made no reference to any "irreparable harm," did not contain any predictions as to the length of time necessary to introduce proposed safety measures, and suggested that operations conducted at depths greater than 1,000 ft., not 500 ft., carried more complex risks than shallower operations.<sup>7</sup>

During the two weeks following the lifting of the moratorium, the DOI repeatedly announced that a new moratorium would be issued soon and therefore no new drilling commenced. On July 12th, the DOI rescinded the first moratorium and immediately enacted a second which eliminated the "drilling at 500 ft. standard" and imposed a ban on rigs which used "subsea blowout preventers or surface blowout preventers on a floating facility."<sup>8</sup> According to the court, this new moratorium, although textually different, was essentially identical to the first as all of the rigs drilling at 500 ft. used the blowout preventers at issue. The second moratorium also upheld the same expiration date of November 30, 2010. The new moratorium was lifted on October 12, 2010, and in November it was revealed that a White House official had made adjustments to the Safety Report before it was released which had created the misleading appearance of the Report being scientifically peer reviewed.<sup>9</sup> The plaintiffs then initiated a suit against the DOI under a civil contempt and bad faith claim in hopes of recovering their attorney fees.

### Civil Contempt

Hornbeck Offshore Services chose to make a civil contempt claim because it wanted compensation of attorney's fees, and a contempt claim can offer monetary compensation to parties who have suffered "unnecessary injuries or costs because of contemptuous conduct."<sup>10</sup> To prove a civil contempt claim, the aggrieved party must show "by clear and convincing evidence: 1) that a court order was in effect, 2) that the order required certain conduct by the [government], and 3) that the [government] failed to comply with the court's order."<sup>11</sup> The party must also show that the evidence in relation to the contempt charge is "so clear, direct and weighty, and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case."<sup>12</sup>

In this case, the court found that the first two requirements were clearly met. It became Hornbeck Offshore Services' burden to prove the third element (that the government failed to comply with the court's order) by producing evidence meeting the clear and convincing standard. Hornbeck Offshore Services argued that the DOI "showcased its defiance" of the first injunction by failing to seek a remand, continually expressing an intention of resolving and reapplying the moratorium, and notifying the operators that a new moratorium would soon be issued. On February 2, 2011, the court ruled in favor of Hornbeck Offshore Services stating that the "showcase of defiance" elements along with the issuance of a second essentially identical moratorium so soon after the first injunction constituted enough clear and convincing evidence to establish that the DOI was in fact in contempt of court.<sup>13</sup>

### Conclusion

Although the DOI was ordered to pay Hornbeck Offshore Services' attorney's fees, no dollar amount has been set. The case was handed over to another magistrate judge to decide how much compensation is warranted. The DOI has currently appealed the case to the U.S. Fifth Circuit Court of Appeals (New Orleans), and a hearing has been slated for the week of June 6th, to be presided over by a panel of three federal judges.<sup>14</sup>

In a related matter, the same court, on February 17, 2011, issued an order requiring the DOI to respond to seven drilling permit applications within thirty days of the ruling.<sup>15</sup> However, the DOI was relieved of this obligation when the Fifth Circuit, responding to the DOI's appeal, stayed the lower court's order until the outcome of the DOI's appeal is determined. Currently there have been only two new deepwater (OCS) drilling permits issued since the lifting of the second moratorium.

### Endnotes

1. 2012 J.D. Candidate, University of Mississippi School of Law.
2. Hornbeck Offshore Services, LLC v. Salazar, No. 10-1663, 2011 WL 454802 (E.D.La. Feb. 2, 2011).
3. Dept. of Interior, Increased Safety Measures for Energy Development on the Outer Continental Shelf, May 27, 2010, <http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598>.
4. *Hornbeck Offshore Services*, 2011 WL 454802, at \*1.
5. 43 U.S.C. § 1334(a)(1).
6. Hornbeck Offshore Services, L.L.C. v. Salazar, 696 F.Supp.2d 627, 631 (E.D.La. 2010).
7. *Id.* at 632.
8. *Hornbeck Offshore Services*, 2011 WL 454802, at \*1.
9. *Id.* at 2.
10. *Id.*
11. *Id.* (citing *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir.2000)).
12. *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 582 (5th Cir.2005).
13. *Hornbeck Offshore Services*, 2011 WL 454802, at \*3.
14. Laurel Brubaker Calkins & Allen Johnson Jr., *Appeals Court to Hear Arguments on Gulf Drilling Permit Delay*, Bloomberg, April 8, 2011, <http://www.bloomberg.com/news/2011-04-08/oil-industry-s-gulf-drill-ban-appeal-to-get-june-hearing-in-new-orleans.html>.
15. *Appeals Court Issues a Stay on Drilling Ruling*, Associated Press, March 15, 2011, available at [http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/03/appeals\\_court\\_issues\\_a\\_stay\\_on.html](http://www.nola.com/news/gulf-oil-spill/index.ssf/2011/03/appeals_court_issues_a_stay_on.html).

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