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### Alabama

Walton Jackson

Ted Holt

Shannon Oldenburg

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# ALABAMA



By: Walton Jackson, Ted Holt, & Shannon Oldenburg†

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† About the Authors: Mr. Jackson is a shareholder in Maynard, Cooper & Gale, P.C.’s Mobile, Alabama office where he practices general litigation, including the defense of oil and gas interests in royalty owner class action and general liability claims, and representation of transportation interests. Mr. Jackson graduated from the University of Alabama School of Law (J.D.) and Auburn University (B.A.). Mr. Holt is also a shareholder in Maynard, Cooper & Gale, P.C.’s Birmingham, Alabama office where he practices commercial litigation, including representing oil and gas exploration production, and transportation companies. Mr. Holt graduated from the University of Alabama School of Law (J.D.), the University of Alabama at Birmingham (MBA), and Rollins College (B.A.) and is a frequent lecturer on oil and gas topics. Ms. Oldenburg practices land use, environmental, and natural resources law in Maynard, Cooper & Gale, P.C.’s Mobile, Alabama office where she has gained extensive experience with energy issues. Ms. Oldenburg received her law degree from the University of San Diego School of Law and her B.A. and M.E.S.M. in Environmental Science & Management from the University of California at Santa Barbara.

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I. SONS SEEK TO VOID CONVEYANCE OF DECEASED MOTHER'S  
ROYALTY INTEREST IN MINERAL ESTATE IN *ANDREWS V.*  
*CENTRAL PETROLEUM, INC.*

Two adult brothers, individually and as executors of their deceased mother's estate, filed suit against a Mississippi petroleum corporation requesting a declaratory judgment that a royalty deed conveying their mother's royalty interest in a mineral estate was void.<sup>1</sup> After a bench trial, the circuit court<sup>2</sup> entered judgment in favor of the corporation. The adult sons appealed.<sup>3</sup> On transfer from the Alabama Supreme Court, the court of civil appeals affirmed, holding that Central Petroleum, Inc. ("Central") was engaged in interstate commerce, rather than intrastate commerce, so the Commerce Clause of the United States Constitution (the "Commerce Clause") barred application of a state statute that would have rendered the royalty deed void.<sup>4</sup>

At issue in this case was the applicability of an Alabama statute, § 10-2B-15.02(a).<sup>5</sup> Section 10-2B-15.02(a) is part of a statutory scheme that requires foreign corporations to receive a certificate of authority to do business in the state prior to transacting business there.<sup>6</sup> A foreign corporation cannot enforce a contract entered into in the state if it fails to secure a certificate of authority.<sup>7</sup> However, if

1. *Andrews v. Cent. Petroleum, Inc.*, 63 So. 3d 650, 651 (Ala. Civ. App. 2010).

2. Monroe County, No. CV-07-144, (Dawn W. Hare, J.).

3. *Andrews*, 63 So. 3d at 650.

4. *Id.* at 656.

5. ALA. CODE § 10-2B-15.02(a) (1975) (current version at § 10A-2-15.02).

6. *Id.*; *Green Tree Acceptance Corp. v. Blalock*, 525 So. 2d 1366, 1370 (Ala. 1988).

7. *Green Tree*, 525 So. 2d at 1370.

the business conducted in the state is considered “interstate” in nature, it is protected by the Commerce Clause and is, therefore, immune from the effects of “door closing” statutes like § 10-2B-15.02(a).<sup>8</sup> Alabama courts determine whether a corporation is doing business in the state within the meaning of § 10-2B-15.02(a) on a case-by-case basis.<sup>9</sup>

The facts in this case were undisputed by the parties. Central, a Mississippi corporation, was engaged in the business of trading oil and gas leases and royalty interests and participated in the drilling of oil and gas wells.<sup>10</sup> Central was not qualified to do business in Alabama and did not have an office or any agents in Alabama.<sup>11</sup> In January 1998, Central mailed from Mississippi approximately forty-five to fifty solicitation letters to the owners of mineral royalty interests in Monroe County, Alabama.<sup>12</sup> In the letters, Central made an offer to buy the addressees’ mineral royalty interests and enclosed royalty deeds for the addressees to execute and return to Central if they accepted Central’s offer.<sup>13</sup> The letters also enclosed bank drafts in payment for the addressees’ mineral royalty interests, which were negotiable if they accepted Central’s offer.<sup>14</sup>

Willie Mae Andrews (“Willie Mae”) received one of these letters.<sup>15</sup> Willie Mae executed the royalty deed on January 22, 1998, in her attorney’s office in Monroe County, Alabama, and mailed it to Central.<sup>16</sup> Willie Mae presented Central’s draft in the amount of \$1,037 for payment at her bank in Alabama, and Central’s bank in Mississippi paid the draft.<sup>17</sup> After receiving the executed royalty deed from Willie Mae, Central mailed it to the office of the Probate Judge of Monroe County, Alabama, for recording.<sup>18</sup> Central similarly acquired the mineral royalty interests of approximately sixteen other persons in Monroe County in January and February 1998.<sup>19</sup>

Henry Andrews and Thomas Andrews, Willie Mae’s two adult sons (“Henry” and “Thomas,” respectively), argued that the trial court erred in determining that the royalty deed was not void because Central was engaged in intrastate commerce in the transaction with Willie Mae and, thus, § 10-2B-15.02(a) rendered the royalty deed void.<sup>20</sup>

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8. *Stewart Mach. & Eng’g Co. v. Checkers Drive in Rests. of N. Am., Inc.*, 575 So. 2d 1072, 1074 (Ala. 1991).

9. *Green Tree*, 525 So. 2d at 1370.

10. *Andrews v. Cent. Petroleum, Inc.*, 63 So. 3d 650, 652 (Ala. Civ. App. 2010).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Henry and Thomas also argued that Central's act of recording the executed royalty deed in Alabama constituted intrastate commerce because recording the deed was an action directly related to Central's corporate purpose of trading in mineral royalty interests.<sup>21</sup> Central countered that it was engaged wholly in interstate commerce in its transaction with Willie Mae and in recording the royalty deed; therefore, the Commerce Clause barred application of § 10-2B-15.02(a).<sup>22</sup>

In a prior case, *SGB Construction Services, Inc. v. Ray Sumlin Construction Co.*, the Alabama Supreme Court held that the active solicitation of business in Alabama and the shipping of equipment to Alabama pursuant to an equipment lease executed as a result of that solicitation do not constitute intrastate commerce for the purposes of determining whether the Commerce Clause bars application of § 10-2B-15.02(a).<sup>23</sup> Citing *SGB Construction Services, Inc.*, the court of civil appeals concluded that Central's solicitation of mineral royalty interests in Alabama and the execution of royalty deeds as a result of that solicitation were not intrastate commerce for purposes of determining whether the Commerce Clause bars application of § 10-2B-15.02(a).<sup>24</sup> The court was not persuaded by Henry and Thomas's argument that Central's mere recordation of the royalty deed changed what was otherwise interstate commerce into intrastate commerce.<sup>25</sup> The court decided that the transaction between Willie Mae and Central constituted interstate commerce; thus, the Commerce Clause did bar application of § 10-2B-15.02(a) to that transaction.<sup>26</sup> Therefore, the court concluded that royalty deed was not void and affirmed the judgment of the trial court.<sup>27</sup>

## II. CHEVRON GRANTED LEAVE TO INTERVENE IN *DEFENDERS OF WILDLIFE V. BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, & ENFORCEMENT*

*Defenders of Wildlife v. Bureau of Ocean Energy Management, Regulation, & Enforcement* involved Chevron U.S.A.'s ("Chevron") Motion for Leave to Intervene ("Motion") as a defendant in a suit filed by Defenders of Wildlife ("DOW") against the Bureau of Ocean Energy Management, Regulation, and Enforcement ("BOEMRE"), the United States Department of the Interior ("DOI"), and Secretary of the Interior Ken Salazar concerning their authorization of oil and gas leases and related drilling operations in the Gulf of Mexico after the

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21. *Id.* at 654.

22. *Id.* at 652.

23. *SGB Constr. Servs., Inc. v. Ray Sumlin Constr. Co.*, 644 So. 2d 892, 894 (Ala. 1994).

24. *Andrews*, 650 So. 3d at 655-56.

25. *Id.* at 656.

26. *Id.*

27. *Id.*

*Deepwater Horizon* blowout.<sup>28</sup> The court previously granted leave to intervene as defendants to the American Petroleum Institute, Independent Petroleum Association of America, U.S. Oil & Gas Association, and International Association of Drilling Contractors (collectively, the “Associations”), to which no party formally objected.<sup>29</sup>

In this case, Chevron sought leave to intervene pursuant to both the “intervention of right” and the “permissive intervention” prongs of Rule 24 of the Federal Rules of Civil Procedure.<sup>30</sup> Rule 24(a) permits intervention of right if a party shows that it has an interest in the subject matter of an action and that its interest may be impaired by disposition of the action, as long as the applicant’s interest is adequately represented by existing parties in the suit.<sup>31</sup> Under Rule 24(b), the court has discretion to permit a party to intervene if the applicant’s claim or defense has a question of law or fact in common with the main action.<sup>32</sup> Here, DOW opposed Chevron’s motion, on a single narrow ground, arguing that the Associations (Chevron being a member of one) already represented Chevron’s interests in the proceeding and that Chevron had failed to prove otherwise.<sup>33</sup>

The court agreed with the plaintiff’s assertion that Chevron bore the burden of showing inadequate representation by existing parties, but the court explained that a putative intervenor satisfies its “minimal” burden by showing merely that the current parties’ representation “may be inadequate.”<sup>34</sup> Chevron’s evidence in support of its motion showed that many members of the Associations had no or little interest in deepwater leases and technologies, in contrast to Chevron, which had major interests in deepwater drilling and exploration in the Gulf of Mexico.<sup>35</sup> The court found that Chevron’s interest in the controversy was “much more narrowly focused, direct and specific” than the broader and more general industry-wide concerns of the Associations.<sup>36</sup> The court agreed with Chevron that the Associations’ representation of Chevron’s interests *may* be inadequate, despite obvious overlapping interests.<sup>37</sup> On that basis, the court determined that Chevron’s showing met the modest “inadequate representation” element of the Rule 24(a) inquiry.<sup>38</sup> Because the court

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28. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation, & Enforcement*, No. 10-0254-WS-C, 2010 WL 5139101, at \*1 (S.D. Ala. Dec. 9, 2010).

29. *Id.*

30. *Id.* (citing FED. R. CIV. P. 24(a), (b)).

31. FED. R. CIV. P. 24(a).

32. FED. R. CIV. P. 24(b).

33. *Defenders of Wildlife*, 2010 WL 5139101, at \*2.

34. *Id.* at \*3 (quoting *Stone v. First Union Corp.*, 371 F.3d 1305, 1311 (11th Cir. 2004)).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

found that all other prerequisites for intervention of right were also present, it granted Chevron's motion to intervene as of right.<sup>39</sup>

III. ENVIRONMENTAL GROUPS CHALLENGE OFFSHORE OIL AND GAS LEASING PROCESS IN *DEFENDERS OF WILDLIFE V. BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION, & ENFORCEMENT*

A. *Introduction*

DOW sued BOEMRE, DOI, and Secretary of the Interior Ken Salazar (collectively, the "Federal Defendants"), challenging ongoing authorization of offshore oil and gas leasing and related drilling operations in the Gulf of Mexico.<sup>40</sup> DOW's position was that, in the wake of the *Deepwater Horizon* drilling rig explosion and oil spill in the Gulf of Mexico on April 20, 2010, the Federal Defendants had failed to modify their policies and practices concerning oil and gas leasing and operations in the Gulf as required by the National Environmental Policy Act of 1969 ("NEPA"), the Administrative Procedures Act ("APA"), and the Endangered Species Act ("ESA").<sup>41</sup> In this case, the court considered whether the lawsuit should proceed to trial or whether any or all three motions to dismiss should be granted.<sup>42</sup>

B. *Background*

In the spring of 2010, BOEMRE finalized over 200 deep-water oil and gas lease purchases, collectively known as Lease Sale 213, completing the sale after the *Deepwater Horizon* explosions and oil spill. Lease Sale 213 included individual offshore leases in Gulf waters. Lease purchasers received authority to explore and drill during the duration of the lease. Offshore oil and gas leasing is governed by the Outer Continental Shelf Lands Act ("OCSLA") which sets out a four-step process: (1) preparation of a leasing program by BOEMRE; (2) lease sales during which buyers bid at auctions for leases; (3) exploration; and (4) development and production.<sup>43</sup> The dispute concerned BOEMRE's actions during the lease sales phase.<sup>44</sup>

C. *Dow's Complaint*

DOW's operative Third Amended Complaint alleged four causes of action against the Federal Defendants.<sup>45</sup> In the first claim ("Claim

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39. *Id.*

40. *Defenders of Wildlife v. Bureau of Ocean Energy Mgmt., Regulation, & Enforcement*, 791 F. Supp. 2d 1158, 1161 (S.D. Ala. 2011).

41. *Id.*

42. *Id.* at 1160–61.

43. *Id.* at 1161 n.2.

44. *Id.* at 1161–62.

45. *Id.* at 1161.

One”), DOW asserted that BOEMRE violated NEPA and the APA by continuing to rely upon the conclusions of an April 2007 environmental impact statement (the “Multi-sale EIS”) for certain lease sales in the Gulf (including Lease Sale 213), even though key conclusions of the Multi-sale EIS were demonstrably invalid following the *Deepwater Horizon* incident.<sup>46</sup> DOW maintained that, pursuant to NEPA and the APA, BOEMRE is required to prepare a supplemental EIS and environmental assessments (“EAs”) for ongoing and future lease sales since April 20, 2010.<sup>47</sup> The second claim (“Claim Two”) alleged that BOEMRE violated the APA in Lease Sale 213 by accepting more than 200 bids for new oil and gas drilling leases after the *Deepwater Horizon* incident without first supplementing the Multi-sale EIS.<sup>48</sup> The third claim (“Claim Three”) alleged that BOEMRE violated the ESA and the APA by proceeding with lease sales in the Gulf after the *Deepwater Horizon* incident without reinitiating consultation with the U.S. Fish & Wildlife Service (“FWS”) and the National Maritime Fisheries Service (“NMFS”) in light of new information revealed by the *Deepwater Horizon* incident showing that deep-water drilling in that area may harm endangered or threatened species and critical habitats.<sup>49</sup> In the fourth claim (“Claim Four”), DOW alleged that BOEMRE violated the ESA and APA by failing to ensure that its actions with respect to offshore drilling in the Gulf following the *Deepwater Horizon* incident were not likely to jeopardize the continued existence of endangered or threatened species.<sup>50</sup>

Based on these four claims, DOW sought: (1) a declaration that the Federal Defendants were in violation of the specified statutes in the specified ways; (2) vacatur of BOEMRE’s acceptance of bids for new leases in Lease Sale 213 that occurred after the *Deepwater Horizon* incident; (3) vacatur and remand of the Multi-sale EIS; (4) an injunction to stop all future lease sales approved under BOEMRE’s 2007-2012 Lease Sale Program until a supplemental EIS was prepared; and (5) an order commanding the Federal Defendants to reinitiate consultation under the ESA to account for the new information presented by the *Deepwater Horizon* incident.<sup>51</sup>

BOEMRE moved to dismiss Claims One and Three, and a portion of Claim Four, arguing both mootness and ripeness issues.<sup>52</sup> Intervening defendants, the American Petroleum Institute, the U.S. Oil & Gas Association, and the International Association of Drilling Contractors (collectively, the “Association Intervenors”), also requested dismissal,

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46. *Id.* at 1161–62.

47. *Id.* at 1162.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1164–65.



arguing improper venue and that no NEPA or ESA violations transpired.<sup>53</sup> Intervening defendant Chevron U.S.A., Inc. (“Chevron”) also moved to dismiss, and included the additional arguments that Claim Four was not adequately pleaded and that DOW failed to provide adequate statutory notice of certain aspects of that claim.<sup>54</sup>

#### D. *Federal Defendants’ Motion to Dismiss*

##### 1. Claim One: Mootness Issue

The Federal Defendants sought dismissal of Claim One on grounds of mootness (in that BOEMRE was in fact preparing a supplemental Multi-sale EIS and would likewise supplement the EAs for Lease Sales 206 and 213), ripeness (in that DOW’s challenges to future lease sales in Claim One were not ripe for judicial review), and lack of final agency action.<sup>55</sup> DOW acknowledged BOEMRE’s formal announcement of its intent to prepare a supplemental EIS governing the remainder of the 2007-2012 Lease Sale Program; however, DOW contested the mootness argument on the theory that even though BOEMRE was working on a supplemental EIS, it was nonetheless violating NEPA because it was continuing to approve “drilling plans and lease sales” based on the old EIS.<sup>56</sup> The court determined that DOW’s argument—that Claim One was not moot because BOEMRE was approving “drilling plans” under the faulty EIS—failed because no “drilling plans” claims were presented in the Third Amended Complaint.<sup>57</sup> Furthermore, even if Claim One did assert violations based on the Federal Defendants’ approval of drilling plans, such claims would be properly dismissed because exclusive jurisdiction over them vests with the court of appeals.<sup>58</sup>

DOW also argued that Claim One was not moot because BOEMRE continued to tier its approval of lease sales to an admittedly inadequate EIS. BOEMRE countered that, other than Lease Sale 213, BOEMRE had not conducted and would not conduct any post-*Deepwater Horizon* lease sales under the Multi-sale EIS until the supplemental EIS was completed.<sup>59</sup> The court found issue with Lease Sale 213. Because Claim One had a Lease Sale 213 component that the Federal Defendants’ motion to dismiss did not address, the court found that the Federal Defendants had not shown that this portion of Claim One was moot or otherwise due to be dismissed. However, the court agreed with the Federal Defendants that the remainder of Claim

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53. *Id.* at 1162, 1173.

54. *Id.* at 1162, 1179–80.

55. *Id.* at 1163–64.

56. *Id.* at 1165.

57. *Id.*

58. *Id.*

59. *Id.* at 1166.

One was moot; DOW contended that BOEMRE must supplement the EIS, but BOEMRE was already doing so.<sup>60</sup>

DOW countered that the portions of Claim One found to be moot because the Federal Defendants had demonstrated commitment to supplementing the Multi-sale EIS should not have been dismissed due to the “voluntary cessation” exception to the mootness doctrine.<sup>61</sup> The “voluntary cessation” exception will render a claim moot only if there is no reasonable expectation that the accused litigant will resume the challenged conduct after the lawsuit is dismissed.<sup>62</sup> The court noted that government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur and found that there was no “voluntary cessation” problem in this case.<sup>63</sup>

## 2. Claim One: Ripeness Issue

DOW’s Claim One specifically mentioned future lease sales, and its Third Amended Complaint sought injunction of future lease sales pending preparation of a supplemental Multi-sale EIS.<sup>64</sup> The Federal Defendants interpreted that DOW was asking the court to find that future lease sales would violate NEPA unless the agency first completed a supplemental EIS.<sup>65</sup> The Federal Defendants argued that any actions related to future lease sales based on a future supplemental EIS were unknowable at that time. As such, the Federal Defendants argued that this aspect of Claim One was rooted in hypotheticals and speculation, and was therefore not ripe for judicial review.<sup>66</sup> In the NEPA context, the Eleventh Circuit has explained that “the issue is ripe at the time the agency fails to comply” with NEPA.<sup>67</sup> The Federal Defendants’ point was that BOEMRE could not have failed to comply with NEPA as to future lease sales that it had not yet approved or authorized.<sup>68</sup>

In response, DOW insisted that the Federal Defendants misunderstood the nature of the relief sought in Claim One. DOW stated that it was not challenging the adequacy of the future supplemental EIS or actions taken in reliance on it.<sup>69</sup> Rather, DOW’s Third Amended Complaint related to the existing environmental review process and sought to remedy instances of reliance on the existing faulty and now-outdated Multi-sale EIS, namely approval of bids for Lease Sale 213

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60. *Id.* at 1167.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1168.

65. *Id.*

66. *Id.*

67. *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1174 (11th Cir. 2006).

68. *Defenders of Wildlife*, 791 F. Supp. 2d at 1168.

69. *Id.*

that occurred after the *Deepwater Horizon* incident. The court found no ripeness problem with that claim.<sup>70</sup>

### 3. Claim Three: Failure to Reinitiate Consultation Under ESA

In Claim Three, DOW claimed that the Federal Defendants violated the ESA and the APA because they failed to reinitiate consultation with NMFS and FWS following the oil spill. In deciding the matter, the court emphasized that consultation is not a one-time obligation, but rather a continual process.<sup>71</sup> However, the court dismissed DOW's consultation claim as moot in light of letters produced by BOEMRE proving ongoing consultation efforts.<sup>72</sup>

### 4. Claim Four: Failure to Ensure No Jeopardy Under ESA

The Federal Defendants also moved for dismissal of part of DOW's Claim Four, in which DOW claimed that BOEMRE neglected its individual obligation to ensure that its actions were not likely to jeopardize the continued existence of any protected species, and thereby violated the ESA and APA.<sup>73</sup> Similar to the reasoning presented in opposition to Claim One, the Federal Defendants argued that Claim Four was not ripe for review to the extent that it purported to challenge future lease sales. The court, however, determined that Claim Four was aimed exclusively at past and current agency actions, and specifically at BOEMRE's reliance on faulty NMFS/FWS consultation opinions in proceeding with lease sales that had already occurred in the Gulf after the *Deepwater Horizon* incident.<sup>74</sup> Because DOW's challenge was directed only at past and present BOEMRE actions, not future lease sales, the court denied the motion to dismiss as it related to Claim Four.<sup>75</sup>

### E. Association Intervenors' Motion to Dismiss

The Association Intervenors argued that the case should be dismissed on three additional arguments not explored in the Federal Defendants' motion, contending that: (1) venue was improper because the case arose from administrative decisions that took place in Washington, D.C., and/or at BOEMRE offices in states other than Alabama; (2) Claims One and Two should have been dismissed because there were no major federal actions remaining with respect to Lease Sale 213 at the time of the *Deepwater Horizon* incident that would trigger NEPA review; and (3) Count Four should have been dismissed

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70. *Id.*

71. *Id.* at 1169.

72. *Id.* at 1169–70.

73. *Id.* at 1171.

74. *Id.* at 1172.

75. *Id.*

because BOEMRE complied with the ESA with respect to Lease Sale 213, as a matter of law.<sup>76</sup>

### 1. Improper Venue

In response, DOW challenged the Association Intervenors' right to raise a venue objection, arguing that venue is personal to the defendant in a civil suit and that intervening parties may not object to improper venue.<sup>77</sup> The court agreed with DOW and found that, because the Federal Defendants did not object to venue, intervenors were not entitled to assert that privilege on their behalf and had waived objection to venue by voluntarily interjecting themselves into litigation in that forum. Accordingly, the Association Intervenors' venue objection was denied.<sup>78</sup>

### 2. Claims One and Two: No Remaining Federal Actions to Trigger NEPA

With regard to Claims One and Two, the Association Intervenors argued that BOEMRE was under no obligation to prepare a supplemental EIS for Lease Sale 213 in light of the *Deepwater Horizon* incident because there was no major federal action remaining with respect to Lease Sale 213 that would trigger environmental review under NEPA.<sup>79</sup> The court disagreed, pointing to the fact that, at the time of the *Deepwater Horizon* incident, BOEMRE was still evaluating bids for hundreds of tracts involved in Lease Sale 213.<sup>80</sup> Deciding whether or not to accept those bids constituted a major federal activity because BOEMRE retained discretion to accept or reject the bids. Therefore, the court denied the Association Intervenors' motion to dismiss Claims One and Two.<sup>81</sup>

### 3. Claim Four: No Remaining Federal Actions to Require ESA Consultation

The Association Intervenors maintained that Claim Four should have been dismissed for two reasons. First, they argued that Lease Sale 213 had already occurred more than a month prior to the *Deepwater Horizon* oil spill and, therefore, no additional consultation was required pursuant to the ESA.<sup>82</sup> This argument was similar to the Association Intervenors' argument that no supplemental EIS was needed for Lease Sale 213 because there were no major federal actions re-

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76. *Id.* at 1173.

77. *Id.* (quoting *Trans World Airlines, Inc. v. C.A.B.*, 339 F.2d 56, 63–64 (2d Cir. 1964)).

78. *Id.* at 1175.

79. *Id.*

80. *Id.* at 1177.

81. *Id.* at 1177–78.

82. *Id.* at 1178.

maining. The court rejected this theory in the context of the ESA just as it did in the NEPA context.<sup>83</sup> BOEMRE continued to analyze and accept numerous bids concerning Lease Sale 213 after the *Deepwater Horizon* incident. In performing those discretionary, non-ministerial actions, BOEMRE had a continuing obligation under the ESA to ensure that the authorized conduct was not likely to jeopardize the continued existence of listed species. The court found that DOW was not barred from raising an ESA claim concerning Lease Sale 213 on that basis.<sup>84</sup>

The Association Intervenors' second argument against Claim Four was based on dicta in *North Slope Borough v. Andrus*, which reasoned that ESA consultation was unnecessary during the lease sale process because environmental review at subsequent stages of lease development would be sufficient to protect endangered and threatened species from harm.<sup>85</sup> This argument failed because the facts of the *North Slope Borough* case were not analogous to the facts in this case; thus, the court found that *North Slope Borough* did not support dismissal of DOW's ESA claims pertaining to Lease Sale 213.<sup>86</sup> The Association Intervenors' motion to dismiss was denied as to Claim Four.<sup>87</sup>

#### F. *Chevron's Motion to Dismiss*

Finally, the court considered those aspects of intervenor defendant Chevron's motion to dismiss that were not already adequately addressed in analyzing the other defendants' motions.<sup>88</sup> Particularly, Chevron raised new arguments that Claim Four was not adequately pleaded and that DOW failed to provide adequate statutory notice to the Federal Defendants of certain aspects of that claim.<sup>89</sup>

##### 1. Claim Four: Adequacy of Pleading

Chevron contended that Claim Four was inadequately pleaded, based on the legal requirement that only final agency action is subject to judicial review.<sup>90</sup> Chevron maintained that DOW raised only general ESA challenges and did not identify a single agency action that allegedly violated the ESA. The court disagreed with Chevron and recognized that Claim Four focused specifically on DOW's allegations that BOEMRE violated the ESA by relying on faulty opinions (by NMFS and FWS) in proceeding with lease sales in the Gulf after the *Deepwater Horizon* incident, thereby violating its independent duty

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83. *Id.*

84. *Id.*

85. *N. Slope Borough v. Andrus*, 642 F.2d 589, 608–09 (D.C. Cir. 1980).

86. *Defenders of Wildlife*, 791 F. Supp. 2d at 1179.

87. *Id.*

88. *Id.*

89. *Id.* at 1179–80.

90. *Id.* at 1180.

under the ESA to ensure that its actions were not likely to jeopardize the continued existence of any listed species.<sup>91</sup> The court found that DOW had identified in its Third Amended Complaint specific final agency actions that were inconsistent with the agency's duties under the ESA and, therefore, Chevron was not entitled to dismissal of Claim Four on that basis.<sup>92</sup>

## 2. Claim Four: Adequacy of Statutory Notice

Chevron's other new argument related to the sufficiency of DOW's pre-suit notice to BOEMRE.<sup>93</sup> The ESA requires that any plaintiff commencing an action under the ESA's citizen suit provision must give written notice to the Secretary of the Interior and any alleged violator at least sixty days prior to bringing suit. The sixty-day notice requirement is jurisdictional, so if DOW had not provided the requisite notice to BOEMRE of its ESA claim asserted in Claim Four, then the court lacked jurisdiction to hear it and the cause of action should have been dismissed. In support of its theory, Chevron submitted a copy of DOW's May 17, 2010 notice letter to the Federal Defendants. The court found that, under any reasonable reading of the letter, the Federal Defendants were put on notice of DOW's contention that BOEMRE's decision to proceed with lease sales after the *Deepwater Horizon* spill, without analyzing the new information brought to light by the incident, amounted to a violation of its ongoing obligation under the ESA to ensure against jeopardy for listed species.<sup>94</sup> The court found that the letter disclosed the very claim brought in DOW's Claim Four and, as such, was sufficient to place the Federal Defendants on notice.<sup>95</sup> Therefore, DOW had fulfilled its pre-suit notice obligations. Accordingly, Chevron's motion to dismiss Claim Four on a theory of inadequate notice was denied.<sup>96</sup>

## G. Conclusion

Based on the foregoing, the court held that:

1. DOW's claim alleging BOEMRE's failure to prepare a supplemental EIS was moot;
2. The voluntary cessation exception to mootness was inapplicable to DOW's supplemental EIS claim;
3. DOW's claim alleging BOEMRE's failure to prepare a supplemental EIS was ripe for review;
4. DOW's claim alleging BOEMRE's failure to reinstate consultation under the ESA was moot;

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91. *Id.*

92. *Id.* at 1180–81.

93. *Id.* at 1181.

94. *Id.*

95. *Id.* at 1181–82.

96. *Id.* at 1182.

5. DOW's claim alleging BOEMRE's failure under the ESA to ensure "no jeopardy" to listed species was ripe for review;
6. The third party intervenors lacked ability to challenge venue;
7. DOW's EIS-based claims alleged a "major federal action" under NEPA;
8. DOW was not barred from raising a "no jeopardy" claim under the ESA;
9. DOW's ESA-based claims alleged a "final agency action"; and
10. DOW provided adequate pre-suit notice to the Federal Defendants.<sup>97</sup>

Accordingly, the motions to dismiss brought by the Federal Defendants, the Association Intervenors, and Chevron were granted in part and denied in part, as follows:

1. Claim One was dismissed, except for the portion of the claim concerning BOEMRE's acceptance of bids for Lease Sale 213 after the *Deepwater Horizon* incident without completing a supplemental EIS and EA;
2. Claim Three was dismissed;
3. The court construed the Third Amended Complaint as bringing no claims based on BOEMRE's approval of drilling, exploration, or production plans, and held that any such claims would be improper because the OCSLA confers exclusive jurisdiction over them to the relevant court of appeals;
4. The court construed the Third Amended Complaint as bringing only challenges for agency actions that had already happened or were ongoing, not for agency actions that may or may not occur in the future, e.g., future lease sales; and
5. In all other respects, the motions to dismiss were denied.<sup>98</sup>

The court concluded that three claims should proceed to trial:

1. The portion of Claim One alleging that BOEMRE violated NEPA and the APA by continuing to rely upon the conclusions of the April 2007 "Multi-sale EIS" for Lease Sale 213 after the *Deepwater Horizon* incident without completing a supplemental EIS and EA;
2. Claim Two, alleging that BOEMRE violated the APA in Lease Sale 213 by accepting more than 200 bids for new oil and gas drilling leases after the *Deepwater Horizon* spill without first supplementing the Multi-sale EIS; and
3. Claim Four, alleging that BOEMRE violated the ESA and APA by failing to ensure that its actions with respect to offshore drilling in the Gulf following the *Deepwater Horizon* incident were

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97. *See id.*

98. *Id.*

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not likely to jeopardize the continued existence of endangered or threatened species.<sup>99</sup>

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99. *Id.* at 1164, 1178, 1179, 1182.