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Patrick Galvin

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ALASKA



By: Patrick Galvin

This Article focuses on the interpretations of changes relating to oil and gas law in Alaska from September 1, 2010, to August 31, 2011. During this period there were no significant statutory or regulatory changes, nor any relevant decisions from the Alaska Supreme Court. This Article will focus on a significant decision from the Alaska Superior Court that is currently on appeal to the Alaska Supreme Court.

REDOIL v. State of Alaska, Department of Natural Resources concerns the State of Alaska's decision-making process for issuing oil and gas leases and for permitting exploration and development activities on those lands.¹ Since the State is the most significant oil and gas resource owner in Alaska, this decision has far-reaching implications for oil and gas activities in both emerging and mature basins in Alaska.

The case concerns the decision by the Department of Natural Resources ("DNR") to offer hundreds of tracts for lease within the Beaufort Sea Lease Sale Area, a two million acre area of state-owned tide and submerged land located off the North Slope of Alaska between Point Barrow and the Canadian Border.² In November 2009, DNR issued a Final Finding of the Director for the Lease Sale concluding that it was in the best interest of the State to offer the oil and gas leases for bid. DNR limited the finding to consideration of the impact associated with the lease sale itself and did not address many of the implications associated with potential oil and gas activities.³

1. *Resisting Envtl. Destruction of Indigenous Lands v. Irwin (REDOIL)*, No. 3AN-10-4217CI, slip op., at 2 (Alaska Sup. Ct. Feb. 22, 2011) (mem.).

2. *Id.*

3. *Id.* at 2, 5-6.

DNR determined that state law allowed for a phased approach to the decision making on oil and gas leasing and subsequent activities.⁴

The REDOIL group requested the Commissioner of DNR to reconsider the decision on a number of grounds—particularly that DNR’s phasing approach violated the Alaska Constitution.⁵ The Commissioner denied the request for reconsideration, and REDOIL appealed the Commissioner’s decision to the Alaska Superior Court.⁶ On February 11, 2011, Superior Court Judge Peter Ashman reversed the Commissioner’s decision and remanded the decision back to DNR to “revise the decision to conform to this court’s ruling to require a written best interest finding at each phase of the subject project.”⁷

Article VIII of the Alaska Constitution grants the legislature with the authority to provide for the leasing of, and the issuance of permits for exploration of, the public domain⁸ “to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”⁹

Alaska statutes grant the director of DNR with the power to dispose of state interests and establish requirements for the disposal process, including the requirement for a best interest finding.¹⁰ The statutes further authorize the director to limit the scope of an administrative review and finding for a proposed disposal to those facts and issues pertinent to that discrete phase of a project.¹¹ Also, the same statute states, “in approving a contract under this subsection, the director need only prepare a single written finding.”¹²

The judge in REDOIL held that, as it relates to a phased project approval, DNR is required to make a best interest finding at each phase of the project.¹³ To the extent that Alaska Statute section 38.05.035(e) limits DNR to only one best interest finding, the statute is unconstitutional.¹⁴ This ruling will require a significant change in the current practices at DNR for approving subsequent phases, such as exploration or development activities. Currently, a best interest finding is an extensive document whose preparation is very time consuming. It is so time consuming that even though oil and gas lease sales are typically held annually, the statutes only require one best interest finding every ten years.¹⁵ Exploration and development activ-

4. *Id.* at 6.

5. *Id.* at 7.

6. *Id.* at 7–8.

7. *Id.* at 24.

8. ALASKA CONST. art. VIII, § 8.

9. *Id.* § 1.

10. ALASKA STAT. § 38.05.035(e) (2010).

11. *Id.* § 38.05.035(e)(1)(C).

12. *Id.* § 38.05.035(e).

13. REDOIL, No. 3AN-10-4217CI, slip op., at 23 (Alaska Sup. Ct. Feb. 22, 2011) (mem.).

14. *Id.*

15. § 38.05.035(e)(6)(F).

ities are currently reviewed and approved through a public review of an applicant's plan of operations. It is unclear what additional review will be required under the REDOIL decision; however, it is sure to be substantially more extensive and time consuming than the current process. The REDOIL decision is currently being briefed before the Alaska Supreme Court.¹⁶

16. *REDOIL*, No. 3AN-10-4217CI, *appeal docketed sub nom* Sullivan v. Resisting Evtl. Destruction of Indigenous Lands, No. S 14216 (Alaska Mar. 9, 2011).