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IN THE SUPERIOR COURT OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

NINILCHIK TRADITIONAL COUNCIL,
ALASKA CENTER FOR THE ENVIRONMENT,
GREENPEACE, TRUSTEES FOR ALASKA,
KENAI PENINSULA FISHERMEN'S ASSOCIATION,
UNITED COOK INLET DRIFT ASSOCIATION,

Appellants.

v.

HARRY NOAH, Commissioner,
State of Alaska Department of Natural
Resources, JAMES EASON, Director,
Division of Oil and Gas, State of Alaska
Department of Natural Resources and STATE
OF ALASKA, DEPARTMENT OF NATURAL RESOURCES,

Appellees.

Case No. 3KN-93-1174 CI

ORDER ON MOTION TO STAY

Appellants, Ninilchik Traditional Council, Alaska Center For the Environment, Greenpeace, Trustees For Alaska, Kenai Peninsula Fishermen's Association, and United Cook Inlet Drift Association (hereinafter "NTC") are appealing the Department of Natural Resources' (DNR) finding that lease sale 78 is in the State's "best interests" and the finding that the lease sale is "consistent" with the Alaska Coastal Management Plan (ACMP). NTC argues that the appellee's (hereinafter "Noah") have not met the legal requirements of the "best interests" finding or the ACMP. Specifically, NTC asserts that Noah has impermissibly deferred consideration of important issues such as: 1) conflicts between the oil and gas industry and commercial fishing, 2) subsistence use, and 3)

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environmental degradation, until after the lease sale. Further, sale 78 is not consistent with the ACMP which gives preference to water dependant and water related uses, such as fishing.

As background, in order for the state to dispose of State lands, under AS 38.05.035(e), there must be a finding that the lease sale is in the "best interests" of the State. Further, under the ACMP, the lease sale must be consistent with the ACMP. NTC has moved this Court to stay oil and gas lease sale 78 until the merits of this appeal are decided. The sale is planned to go forward on January 25, 1994.

In reviewing Noah's "best interest determination the Court is reviewing a policy decision involving complex issues beyond this Court's ability to decide." Hammond v. North Slope Borough, 645 P.2d 750, 758 (AK 1952). Accordingly, this Court must decide whether Noah had a reasonable basis for his decision on each issue. Trustees for Alaska et al. v. State of Alaska, Department of Natural Resources, et al., Alaska Supreme Court, Slip Op. 4039. (December 23, 1993) the Court said:

"... this Court must ensure that DNR has taken a "hard look" at the salient problems and has genuinely engaged in reasoned decision making . . . A decision will be regarded as arbitrary "where an agency fails to consider an important factor in making its decision." (Citing Trustees for Alaska v. State, DNR, 795 P.2d 805 (Alaska 1990), Slip op. at 5).

NTC has moved this Court for a stay of lease sale 78 until the merits of this appeal are decided. The two alternate tests for determining whether a stay should be granted are: 1) "a clear

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showing of probable success" on the merits, State v. Kluti Kaah Native Village, 831 P.2d 1270, 1272 (Alaska 1992), or 2) a "balance of the hardships." Id. The Court must limit its scope of review under either theory by the reasonable basis test. The first test, probable success on the merits, is invoked "where the party asking for relief does not stand to suffer irreparable harm, or where the party against whom the injunction is sought will suffer injury if the injunction is issued." Id. at 1272. If, on the other hand, the non-moving party can be protected from injury, and "the party seeking the injunction stands to suffer irreparable harm," the "balance of the hardships" test is appropriate. Id. The "balance of the hardships" test is divided into three parts: "(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'" Messeri v. Department of Natural Resources, 768 P.2d 1112, 1122 (Alaska 1989) (citing and quoting Alaska Public Utilities Comm'n v. Greater Anchorage Area Borough, 534 P.2d 549, 554 (Alaska 1975)).

In determining which test to apply, this court must consider the harm to each of the parties. The delay of the lease sale, according to Noah, will result in the loss of potential lessees as well as having to put the lease sale back in the five year

schedule.¹ Thus, the State will lose money by not being able to go forward with the lease sale as planned. NTC contends that irreparable harm will result if the lease sale is allowed to go forward because the proposed sale will directly conflict with and harm fishing activities in the region and will harm subsistence use in the area. If plaintiffs will not suffer irreparable harm, the balance of hardship test is inappropriate.

The United States Supreme Court has noted that "the actual opening of the bids does not involve a commitment of any kind" since all bids can be rejected and "even after the bids are accepted . . . [the court could have the] power to declare the leases invalid if the court determined that the Government entered into a lease without compliance with the requirements of the [law]." New York Natural Resources Defense Council, Inc. v. Kleppe, 429 U.S. 1307 (1976), Hammond v. North Slope Borough, supra. Under the lease terms, the State has the authority to cancel a lease at any time, if for example, information came to light which compelled it to withdraw a tract from exploration or drilling. On the other hand, the State cannot deprive a lessee of the reasonable use of the leasehold interest. See Finding at 126, Appendix D, Sample Lease at para. 9(f); 11 AAC 83.158. The revocation of a lease or the deprivation of the reasonable use of a lessee's property, would result in the State having to pay just

¹ The court should also note that under AS 38.05.180(c), a lease sale can be held up to ninety days "after the last day of the calendar quarter for which it was scheduled . . ." Id.

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compensation to the lessee. Therefore, once it issues the lease, the State is under tremendous pressure to let the lessee go forward with its exploration and extraction.

Nevertheless, this analysis of the lease sale process does not mask the fact that precedent compels this court to find that NTC has not shown it will suffer irreparable harm, since the State may buy back an offending lease. However, under the "probable success on the merits" test, a showing of irreparable harm is not necessary. The court will apply the "probable success" test.

NTC alleges that Noah has deferred consideration of environmental concerns and has put off imposing environmental protection on oil and gas exploration and development activities until the oil industry lessee has presented a specific plan of operations to DNR. According to NTC, this consideration must take place after the lease sale. NTC cites evidence of direct conflicts between oil and gas activities and existing uses of the sale area. Further, under the ACPF, Noah has failed to evaluate the impacts by oil and gas exploration and development in relation to the standards imposed by the ACPF which are listed in 6 AAC 80.130(b) and (c).

Lease sale tracts between Kasilof and Anchor Point are particularly contested by NTC because of the heavy commercial, sport and subsistence fishing in that area. Hundreds of setnetters and driftnet fishers fish in this corridor from June through August. See Appellant's Exhs. 5, 24. In his findings, Noah

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identifies the extent of the fisheries within the lease sale area and even recognizes that "exploration and development of the sale area could adversely affect human uses of the area and its resources if access to hunting, fishing, or trapping areas is restricted or if industry operations occur at the same place and time as harvest activities." See Findings at 36. Further, Noah states that "[i]nterference with subsistence and commercial fishing could present a conflict of interest in the sale area." However, Noah believes its mitigation measures will "assure that potential conflicts are avoided to the fullest extent possible." *Id.*

NTC points out that the problem with considering problems or conflicts at the plan of operations stage, is that it "mask[s] appreciation [of] cumulative environmental threat[s]." Trustees for Alaska v. State, DNR, 851 P.2d 1340 (Alaska 1993).

This court finds that based on the limited amount of briefing and after reading the final Findings by Noah, as to the "best interest" issue, NTC has failed to show probability of success on the merits. Noah has identified the potential for conflicts between fishing interests and the oil and gas industry in some of tracts located in the lease sale and has detailed either how the lease sale terms apply to the conflicts (findings page 32) or relies on mitigating measures. At this time, in terms of the reasonable basis test, the Court cannot find that it is probable that Noah failed to consider an important fact in making the "best interest" determination or that he failed to take a hard look at

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the salient problems. While plaintiffs may disagree with Noah's conclusion that some problems must await further study as to individual tracts, that conclusion does not imply that Noah's best interest finding is arbitrary. Accordingly the Court denies the motion to stay lease sale 78 on the basis of Noah's non-compliance with AS 35.05.035(e).

AS 46.40.010 - 210 provides for the establishment of an Alaska Coastal Management Program,

"... which is partly designed to ensure that the development of industrial and commercial enterprise is consistent with environmental and cultural interests in the State. AS 46.40.020."

Hammond v. North Slope Borough, 545 P.2d 750, 761 (Alaska 1982).

Pursuant to statutory authority, the Alaska Coastal Policy Council has established regulations for the administration and enforcement of the Alaska Coastal Management Program, 6 AAC 80.010 - 900.

6 AAC 80.010(b) provides in part:

"Uses and activities conducted by state agencies in the coastal area must be consistent with the applicable district program and the standards contained in this chapter. In authorizing uses or activities in the coastal area under its statutory authority each state agency shall grant authorization if in addition to finding that the use or activity complies with the agency's statutes and regulations, the agency finds that the use or activity is consistent with the applicable district program and the standard contained in this chapter."

Among the standards of the chapter are those contained at 6 AAC 80.040(a):

"In planning for and approving development in coastal areas, districts and state agencies shall give in the following order; priority to:

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- (1) water-dependent uses and activities;
- (2) water-related uses and activities; and
- (3) uses and activities which are neither water-dependent nor water-related for which there is no feasible and prudent inland alternative to meet the public need for the use or activity.

In addition 6 AAC 80.130(d) provides:

"Uses and activities in the coastal area which will not conform to the standards contained in (b) and (c) of this section may be allowed by the district or appropriate state agency if the following are established:

- (1) there is a significant public need for the proposed use or activity;
- (2) there is no feasible prudent alternative to meet the public need for the proposed use or activity which would conform to the standards contained in (b) and (c) of this section; and
- (3) all feasible and prudent steps to maximize conformance with the standard contained in (b) and (c) of this section will be taken."

On September 9, 1993 the Division of Oil and Gas issued a conclusive consistency determination for proposed Sale 78. The determination stated that "as the coordinating agency for this review process, the Division of Oil and Gas now conclusively determines that proposed Sale 78 is consistent with the ACMP". The memorandum constituted final agency action under AS 44.19.145(a)(11). Apparently because the September 9, 1993 memorandum was final agency action the Director does not address the consistency represented in his final finding dated October 19, 1993.

In Hammond v. North Slope Borough, supra, plaintiffs challenged the decision of the Department of Natural Resources to issue oil and gas leases in the Beaufort Sea. Among other things

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plaintiffs contested the AOMP consistency determination. The Supreme Court found the consistency determination insufficient. It said:

The Commissioner concluded the lease sale is consistent with both the State standards in the AOM and the proposed North Slope Borough coastal management program. However, since the Commissioner's consistency determination with regard to the State standards is stated in a conclusory manner, it is unclear which of the methods stated in the preceding paragraph the Commissioner used in making the consistency determination.

Id., 645 P.2d at 762.

The two methods by which the commissioner may find consistency are either finding that all specific environmental protections have been met, or if there will be conflicting uses, finding that the provisions of 6 AAC 80.30(d) have been satisfied. In this case, since there are conflicting uses, the commissioner must find and explain compliance with that regulation. The Department has failed to do this.

Footnote 7 to the opinion in Hammond, *supra*, at 762 discusses the scope of the required findings. The Court notes the hesitancy to require findings in informal agency decisions absent an express statutory requirement. But the Supreme Court states:

"If the reviewing Court cannot divine the basis for the decision from a bulky record, this language clearly leaves the door open for the requiring of findings under common law or a basis for reviewability."

Id. (Citing Mobile Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92, 97 n.11 (Alaska 1974)).

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In this case the Court cannot divine the basis for the consistency determination. First, there is no discussion of the priority required in 6 AAC 80.040. Has the Commissioner considered both offshore oil and gas development and a fishery as water dependant and activities? Or, is oil and gas a water related activity? The Court cannot determine whether the sale is consistent with either standard absent a finding.

There is no discussion of a significant public need for the lease sale, 6 AAC 80.140(d), except that at page 35 of the findings Noah states that:

"Sale 78 is likely to make out modest additions to State revenues given the low to moderate potential for oil and gas discoveries in the sale area".

6 AAC 80.130(d) requires a finding of no feasible prudent alternative to meet the public need for the proposed use and a finding that all feasible and prudent steps to maximize conformance with the standards will be taken.

Satisfaction of the latter two requirements of 6 AAC 80.130(d) may raise an issue as to the Commissioner's reliance on possible mitigating factors. In short, while the reliance upon mitigating factors devised after formation of the plan of operations may not imperil the "best interest" finding, the failure to address and resolve specific conflicts as to the proposed use may imperil the consistency finding. For example, in Kuitsarak Corporation, et al. v. Red Swope, et al., Slip Op. 4042 Alaska Supreme Court, (January 14, 1994) footnote 10, the Court said:

The primary danger associated with lease determinations made on a case-by-case basis is that the cumulative environmental threat posed by mining is not adequately considered.

Slip Op. at 21:

The reasoning of the Court in Kuitsarak applies by analogy with equal logic to an oil and gas lease sale.

Since the plaintiffs have demonstrated a probability of success on the merits of its claim that Noah's ACMP consistency finding is deficient, the Court may appropriately order a stay of oil and gas lease sale number 78.²

The last issue to be considered is whether NTC qualifies as a public interest litigant thereby waiving any bond requirement which might be imposed to cover the State's estimated losses.³ NTC cites to the Ninth Circuit which has repeatedly held that when requiring a bond would "effectively deny access to judicial review"

² Noah argues that NTC has waived its right to appeal the consistency determination because the determination was a final agency action and an appeal was not filed by NTC within the allotted thirty days. NTC argues that the consistency determination is part and parcel of the "best interests" finding and thus, it was only appropriate that the two be appealed together. Noah responds that the two determinations are separate and distinct statutory requirements and separate final agency decisions.

Since, as the Court found in Trustees for Alaska v. State, 851 P.2d 1340 (Alaska 1993), the "consistency determination is one section of its finding," this court finds it was proper to appeal the consistency determination along with the "best interests" finding. *Id.* at 1342 n.2.

³ This decision also impacts another pending motion. NTC is asking this court to waive the cost of preparing the record. Noah maintains that filing the record in this case will cost \$10,000. NTC, as a public interest litigant, believes it is entitled to have the costs waived. The ruling on this issue is dispositive of the Motion to Waive Costs and will be considered as such.

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no bond, or only a nominal bond will be imposed. People ex rel. Van de Kamo v. Tahoe Regional Planning Agency, 766 F.2d 1319 (9th Cir. 1985). There are four factors used in identifying a public interest litigant:

- (1) Is the case designed to effectuate strong public policies?
- (2) If the plaintiff succeeds will numerous people receive benefits from the lawsuit?
- (3) Can only a private party have been expected to bring suit?
- (4) Would the purported public interest litigant have sufficient economic interest to file suit even if the action involved only narrow issues lacking general importance?

Anchorage Daily News v. Anchorage School District, 803 P.2d 402, 404 (Alaska 1990). NTC asserts it satisfies all these requirements. First, this appeal has been filed to effectuate public policies embodied in the Alaska Constitution, Art. VII, sec. 1 which encourages settlement of state land and development of resources "consistent with the public interest." Moreover, this appeal is to ensure the compliance with AS 38.05.035(e) which requires that disposal of state land be within the State's best interests. Second, the beneficiaries of this appeal are those who use the resources of Cook Inlet such as traditional subsistence users, environmental and recreational users, and commercial and sport fishers. Third, since the appellees include DNR, a state agency, only a private party could be expected to bring this action. See Southeast Alaska Conservation Council v. State, 665 P.2d at 544, 554 (Alaska 1983). Lastly, no claim for monetary damages has been made in this appeal and no monetary gain will

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result from a successful appeal. While it is true that the appellant's include fishing organizations, which the State alleges have an obvious economic interest in bringing this appeal, NTC argues that it is public rights that are at stake here.

The fact that an organization may have an economic interest in whether or not tracts of land are sold to oil companies, does not obscure the fact that it is a public right being litigated.

IT IS HEREBY ORDERED that Appellants Motion to Stay is GRANTED.

Dated at Kenai, Alaska this 24th day of January, 1994.

CHARLES K. CRANSTON
SUPER. COURT JUDGE

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