ARE DOJ AND DOI MAKING A COMPETENT LEGAL EFFORT ON GULF MORATORIUM?

Exactly one week ago, in a post entitled *Judicial Ethics in the Gulf: Judge Feldman's Conflicts and DOJ Malpractice*, I related the patently obvious, and disqualifying, statutory ethical conflicts on the part of the Federal judge in the Eastern District of Louisiana, Martin Feldman, who made the curious and shocking decision to stay enforcement of the Obama Administration's six month deepwater moratorium. As I pointed out, it legally was somewhat astounding the government did not raise Feldman's conflict at any opportunity:

> With this knowledge in the public sphere at least substantially by the night after Feldman's decision, the government nevertheless did not even mention it as a ground in their attempt to stay Feldman's ruling at the district court level when they filed their motion to stay at the district court level late the following day. That motion was in front of Feldman himself, so maybe you could rationalize the government not raising it at that point (although I would have posed the motion to stay to the chief judge for the district and included the conflict as grounds for relief were it me).
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> Having predictably received no relief in their lame request for stay from Feldman, the judge who had just hammered them (not surprising), the government put their tails between their legs and made preparations to seek a stay from the 5th Circuit. Surely the government would forcefully argue the glaringly obvious egregious appearance of both

> conflict and lack of impartiality once they were free of Feldman and in the Fifth Circuit, right? No, no they didn't.
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> When the government filed their motion for stay in the 5th Circuit mid to late day Friday June 25, a full three days after getting hammered by oiled up Judge Feldman, and after Feldman's most recent 2009 financial disclosure had even started being released to the general public (as evidenced by the literally damning piece on it Rachel Maddow did Friday night), the government STILL did not avail themselves of the glaringly obvious argument of conflict by Feldman. Nary a peep from the fine lawyers at the DOJ on one of the most stunningly obvious arguments of judicial bias in recent memory.

Another week later, and there STILL is no peep from the government on an issue that would be critical to reinstating their moratorium if they really wanted to. But while the government lawyers refuse to zealously litigate the position they claim to support, intervenors represented a by law school clinic professor and two lawyers for environmental groups have done the work the government should have done. On Friday June 2, Defendant-Intervenors filed a Motion to Disqualify Feldman in the district trial court and properly noticed the record at the 5th Circuit.

From the D-I Motion to Disqualify:

> Pursuant to 28 U.S.C. § 455, Defendant-Intervenors Defenders of Wildlife, Sierra Club, Florida Wildlife Federation, Center for Biological Diversity, and Natural Resources Defense Council (collectively "Defenders") respectfully move this Court to disqualify itself from proceedings in this case.

> As detailed more fully in Defenders' memorandum in support of this motion, the Court must recuse itself for two distinct and independent reasons. First, the Court's financial holdings in various companies involved in oil and gas drilling raise in an objective mind a reasonable question concerning the Court's impartiality in these proceedings, triggering the obligation under 28 U.S.C. § 455(a) for the court to disqualify itself. This obligation is not mitigated by the Court's sale of some of this stock prior to the issuance of the preliminary injunction on June 22, 2010 since, prior to that time the Court must have formed substantive opinions about the case from both the briefs filed by the parties and the hearing on June 21. The Court owns and/or recently has owned an interest in several companies that comprise part of the network that supports the Gulf's oil and gas industry. To rule that the moratorium would injure irreparably a network in which the Court was financially invested creates an impermissible appearance of partiality in the mind of a reasonable observer, which is enough to trigger the duty to recuse under § 455(a).

So, hats off to attorney Catherine Wannamaker and her clients the Center for Biological Diversity and Defenders of Wildlife, David Guest of Earthjustice for Florida Wildlife Federation and the Sierra Club and Professor Adam Babich of Tulane Law School's Environmental Law Center also for the Sierra Club. These intrepid intervenors are doing the job the government lawyers should be doing, but curiously refuse to do.

But this is not the only instance of highly suspect lawyering by the DOJ and DOI attorneys handling the *Hornbeck* litigation on the six

month moratorium. There is also the government's failure to meaningfully address the critical case Feldman used to craft his contorted ruling. As I said a week ago:

> Furthermore, the legal eagles at the DOJ and DOI failed to effectively address and contradict Judge Feldman's reliance on the case of Motor Vehicle Manufacturers Association V. State Farm Insurance, 463 U. S. 29 (1983), which Feldman contorted and misapplied to wrongfully reach his result.

Here is Feldman's opinion/order staying the Administration's six month moratorium. Here is the decision in *Motor Vehicle Manufacturers Association v. State Farm* that Feldman used to contort the playing field in the direction he wanted. A reading of Feldman's decision coupled with a close reading of *State Farm* reveals the clear distinction and contrast between the two situations and why the *State Farm* decision does not operate in the fashion Feldman claims.

State Farm is remarkably ill applied by Feldman. First off, and most obviously, *State Farm* reaffirms the proper standard of review, namely that any competent evidence in the agency record mandates upholding the agency determination (in this case the moratorium). Feldman, of course, did a complete end run of this standard. The government, in their respective motions for stay at the district and 5th Circuit, did at least make a halfhearted argument on Feldman violating the standard of review, although they completely fail to use his own linchpin *State Farm* case against him as would have been appropriate under the circumstances.

Beyond that though, and much more significantly, *State Farm* delves into a situation where the agency in question there (NHTSA) completely rescinded a rule deemed by the court to be in the interest of protecting the public, and did so without an arguable basis for completely removing the protection to the public. Put more

plainly, the government agency in the *State Farm* situation was harming the public with no viable explanation for the action.

The Court in *State Farm* found such action – harming the public sector the agency was tasked with protecting instead of helping it – to be directly contrary to the mission and task of the that agency. That logic and framing certainly does NOT apply in the least to the Interior Department's action in the instant case to impose a six month moratorium where it is crystal clear that the regulatory structure and practices of the oil and gas extraction industry are incapable of protecting the public and environmental welfare. Not to mention that the Department has asserted that their entire array of resources is being consumed entirely by the BP Macondo leak and it is an emergency scenario they are operating under.

In the instant case, Interior was acting exactly within their mission and task to protect the public in relation to mineral exploration and removal, and was not rescinding a rule to protect the public, it enacting a rule – a temporary delay – in order to immediately protect the environment and public, and determine how to better protect the public in the future. There is simply no way to read *State Farm* as being consistent with the way Feldman applied it to the instant case; in fact a proper scrutiny of *State Farm* demonstrates that it quite arguable actually *supports* the government's agency decision on the moratorium.

But if you review the subsequent motions by the government by and through their attorneys at the DOJ and DOI linked above (and here and here for convenience), they barely address the *State Farm* decision Feldman used to leverage his entire decision. It is almost beyond belief that a competent lawyer truly zealously and appropriately fighting to restore the moratorium would fail to attack Feldman's use and abuse of *State Farm*.

So, if the Obama Administration and Interior

Department Secretary Ken Salazar truly believe in the propriety of their six month moratorium, and are dedicated to fighting through appeal for it, why are their lawyers not acting like it? Are they really not trying because they really don’t care, or are they just sloppy and incompetent? It is one or the other.

Oh, and the 5th Circuit is moving things right along. The 5th Circuit told the Hornbeck and related moratorium challengers to file briefs on the stay issue by Friday July 2. Hornbeck filed a brief, as did, quite astoundingly, Senator Mary Landrieu against the government and in favor of oil companies. The government must reply by July 6, if it wishes. The Court set a one-hour hearing for the afternoon of July 8, in New Orleans and said no delays will be granted.