Tim DeChristopher (right) and his attorney, Ron Yengich. Photo: Keith Johnson, Deseret News

On Friday, the New York Times carried a story about Tim DeChristopher, the economics student in Utah who bid on federal oil and gas leases at an auction last December as a form of protest against global warming. DeChristopher was the winning bidder on 14 parcels, but admits that he never had either the intent or the ability to pay the $1.7 million he bid. He is now facing criminal charges of interfering with an auction and making false statements on a bidding form. DeChristopher's attorney has argued that he should be allowed to present a necessity defense to a jury. In a hearing last month, the judge was unpersuaded, but did give the defense time to submit a written brief in support of its claim.

As the Times reports, the necessity defense is a long shot in a case like this. A defendant claiming necessity must show that he or she acted to prevent an imminent harm greater than that caused by the protest, and that there was no other legal option.

DeChristopher is of course not the only environmental protester to appeal to the necessity defense. It's a time-honored, and typically unsuccessful, strategy for tree-sitters and other monkey-wrenchers seeking to halt logging or other environmentally destructive actions. As climate change protests have become more common and more aggressive (CoalSwarm lists 52 direct action protests against coal worldwide so far in 2009), necessity claims have become popular with climate protesters.

The partially painted tower at the Kingsnorth power station. Photo: BBC News

What the Times story failed to note is that there's been one notable successful use of the necessity defense. In October 2007, five Greenpeace activists climbed the chimney of the Kingsnorth power plant in England to protest a plan to build a new coal-fired unit at the plant. The plant was temporarily shut down, and the activists managed to paint the first word of a planned message to the prime minister. They, and an organizer who stayed on the ground, were arrested and charged with

causing £ 30,000 worth of damage. At their trial, the judge allowed the defense to call a series of witnesses, including high-profile NASA scientist James Hansen, to testify to the harms threatened by global warming. After being directed to consider whether the activists had a lawful excuse, the jury found them not guilty.

Activists cheered the Kingsnorth decision while others called it "a green light to anarchy." So far, it has not been repeated, in England or elsewhere. This summer, activists who (peacefully) hijacked a train carrying coal to a power station in Yorkshire were convicted after the judge refused to allow introduction of a necessity defense. The sentences imposed were light.

Back to DeChristopher, it seems unlikely that he can make out a necessity defense. The lease auction he interfered with is only the first step in a lengthy chain leading to actual drilling, and other legal means of opposing the auction were readily available. A coalition of environmental groups successfully challenged the auction in federal court, winning a preliminary injunction that temporarily halted implemenatation of 77 leases when a judge concluded that they had established a likelihood of success on their claims of inadequate environmental review. Interior Secretary Ken Salazar pulled the leases temporarily. Last week, BLM issued a report recommending that many of them be deferred pending further review.

What DeChristopher did was not necessary to stop the leases, but it did draw considerable media attention to them, and that in turn was part of what convinced the Interior Department to take a second look. While he can't make out a necessity defense, he also did not risk human life (as the Kingsnorth protesters did) or cause large-scale disruption. It would be pretty easy for Interior to avoid this kind of monkey-wrenching in the future, simply by imposing pre-qualification requirements for auction bidders (is anyone else surprised that any one off the street can apparently go into one of these auctions, bid millions, and be taken seriously?). And it turns out that the lease procedure was seriously flawed. Under the circumstances, some exercise of prosecutorial discretion seems called for. It's hard to imagine that justice would be served by convicting DeChristopher of serious felonies.