Native Village of Point Hope v. Jewell: Analyzing the Environmental Impact of Uncertain Quantities of Oil Production

I. OVERVIEW

The Bureau of Ocean Energy Management (BOEM)[1] sold leases of federal land in the Chukchi Sea for offshore oil and gas development on February 6, 2008, for $2.6 billion.[2] A part of the Arctic Ocean, the Chukchi Sea separates northern Alaska from Russia.[3] The leases were offered as part of the United States Department of Interior's 2007-2012 Five Year Oil and Gas Leasing Program.[4] The Secretary of the Interior selected the lease plan from four alternatives outlined in a Final Environmental Impact Statement (FEIS) released by BOEM pursuant to the National Environmental Policy Act (NEPA).[5] In preparing the FEIS,

1. The agency has previously been known as the Minerals Management Service and the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). For simplicity, it will be referred to throughout this Note as BOEM. *OCS Lands Act History*, BUREAU OCEAN ENERGY MGMT., http://www.boem.gov/OCS-Lands-Act-History/ (last visited Oct. 12, 2014).

2. Native Village of Point Hope v. Jewell, 740 F.3d 489, 494 (9th Cir. 2014).

3. *See id.* at 492.

4. *Chukchi Planning Area: Final Supplemental Environmental Impact Statement*, BUREAU OCEAN ENERGY MGMT. 1 (Aug. 2011), http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Environment/Environmental_Analysis/2011-041v1.pdf.

5. *Point Hope*, 740 F.3d at 493-94.

BOEM relied on an estimate of oil production from the first oil field in the lease area, which it projected to be one billion barrels.[6]

Plaintiffs, a coalition of environmental advocacy organizations and local Alaskan communities, challenged the 2008 lease sale, "alleging seven deficiencies in the FEIS."[7] The United States District Court for the District of Alaska remanded the case to BOEM on July 21, 2010, instructing the agency to address three flaws in its analysis.[8] The district court concluded, however, that the FEIS's reliance on the one-billion-barrel estimate was proper under NEPA.[9]

In response to the remand order, BOEM issued a supplemental environmental impact statement (SEIS) addressing the district court's concerns, and the agency's motion for summary judgment was granted.[10] Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, arguing that BOEM abused its discretion in formulating the FEIS and SEIS by failing to include "essential" information required by 40 C.F.R. § 1502.22 and relying on "an unrealistically low estimate of the economically recoverable oil."[11] The Ninth Circuit *held* that BOEM did not improperly exclude essential information from the environmental impact statements but that its estimate of one billion barrels of recoverable oil was arbitrary and capricious. *Native Village of Point Hope v. Jewell*, 740 F.3d. 489, 489-90 (9th Cir. 2014).

II. BACKGROUND

A. Considering the Environment in the Offshore Oil and Gas Development Process

In the Outer Continental Shelf Lands Act (OCSLA), the United States Congress declared the Outer Continental Shelf (OCS) a "vital national resource reserve" that should be developed to maintain "competition and other national needs."[12] Originally enacted in 1953, OCSLA authorized federal leases of land at least three miles offshore for

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6. Alaska OCS Region, Minerals Mgmt. Serv., *Chukchi Planning Area: Final Supplemental Environmental Impact Statement*, BUREAU OCEAN ENERGY MGMT. ES-2 (May 2007), http://www.boem.gov/uploadedFiles/BOEM/About_BOEM/BOEM_Regions/Alaska_Region/Leasing_and_Plans/Leasing/Lease_Sales/Sale_193/LS-193-FEIS-Vol-I.pdf.

7. *Point Hope*, 740 F.3d at 489, 494.

8. *Chukchi Planning Area: Final Supplemental Environmental Impact Statement*, *supra* note 4, at 2.

9. *Point Hope*, 740 F.3d at 494.

10. *Id.* at 495.

11. *Id.* at 495-96.

12. 43 U.S.C. § 1332(3) (2012).

energy exploration.[13] In the decades since, multiple OCSLA amendments have been enacted and several other environmental laws have taken effect.[14] Many of these laws, including NEPA, impact the development of offshore energy resources.[15] Today, offshore developments governed by OCSLA comprise 24% of oil production and 7% of natural gas production in the United States.[16]

Under OCSLA, developing offshore energy resources entails four distinct stages: "(1) preparation of a leasing program, (2) lease sales . . . , (3) exploration by the lessees, and (4) development and production."[17] "An agency is required to comply with NEPA at various stages" of the process.[18] To conduct stage two lease sales, BOEM must conduct a NEPA analysis.[19] After securing leases, however, lessees must still submit and obtain approval for specific oil or gas exploration and production plans.[20] Before approving those plans and allowing lessees to move into the final stages of development, BOEM must conduct a separate site-specific NEPA analysis.[21]

A NEPA analysis requires federal agencies to consider the environmental consequences of their actions along with alternatives that may have a lesser impact.[22] Depending on the significance of those consequences, the agency may be required to detail its analysis in an environmental impact statement (EIS).[23] "Once an agency has an obligation to prepare an EIS, the scope of its analysis of environmental consequences in that EIS must be appropriate to the action in question."[24] "When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an [EIS] and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking."[25] Information "essential to a

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13. *OCS Lands Act History*, BUREAU OCEAN ENERGY MGMT., http://www.boem.gov/OCS-Lands-Act-History/ (last visited Oct. 12, 2014).
14. *Id.*
15. *See id.*
16. *Id.*
17. Sec'y of the Interior v. California, 464 U.S. 312, 313 (1984).
18. Native Village of Point Hope v. Jewell, 740 F.3d 489, 493 (9th Cir. 2014).
19. *See Sec'y of the Interior*, 464 U.S. at 338.
20. *See id.*
21. *See Point Hope*, 740 F.3d at 499.
22. *See National Environmental Policy Act*, EPA, http://www.epa.gov/compliance/nepa/ (last visited Oct. 12, 2014).
23. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 372 (1989).
24. Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062, 1072 (9th Cir. 2002).
25. 40 C.F.R. § 1502.22 (2013).

reasoned choice among alternatives" cannot be excluded from the EIS unless the information is too difficult or costly for the agency to obtain.[26]

To satisfy NEPA, different types of information must be analyzed at each of the different OCSLA stages.[27] When preparing for offshore oil and gas lease sales, NEPA does not require "a site-specific level of detail" in an agency's analysis.[28] Some incomplete or missing information may be more appropriately obtained when the agency reviews a lessee's site-specific plan.[29] For instance, because lease sales occur prior to exploration, agency predictions of how much oil will be produced are uncertain at that stage.[30] As a result, other parts of an agency analysis based on production levels "can never be more than speculative."[31] A lack of reliable information at the lease sale stage does not threaten the environment, however, because the leases themselves do not authorize environmentally risky activities.[32] Adjustments can still be made later in the process as more reliable information becomes available.[33]

B. Judicial Review of an Agency's Environmental Analysis

Pursuant to the Administrative Procedure Act (APA), courts review an agency's EIS according to the "arbitrary and capricious" standard.[34] The United States Supreme Court has described four indicators that an agency has failed to meet the standard:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[35]

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26. *Id.* § 1502.22(a)-(b).

27. *See* Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1191-92 (9th Cir. 1988); *see also* Sierra Club v. Morton, 510 F.2d 813, 828 (5th Cir. 1975); Sec'y of the Interior v. California, 464 U.S. 312 (1984).

28. Native Village of Point Hope v. Jewell, 740 F.3d 489, 493-94 (9th Cir. 2014) (citing N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975–77 (9th Cir. 2006)).

29. *See Akutan*, 869 F.2d at 1192.

30. *See id.*

31. *Id.*

32. *See id.*

33. *See id.*

34. 5 U.S.C. § 706(2)(a) (2012); N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006).

35. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983).

To satisfy judicial review under NEPA, an agency's EIS must at least constitute a "hard look" at relevant environmental considerations.[36] The Ninth Circuit employs a "rule of reason to determine whether [an EIS] contains a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'"[37] In conducting such a review, courts must be especially deferential to predictions made by an agency "within its area of special expertise, at the frontiers of science."[38]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit held that BOEM did not exclude essential information from the FEIS and SEIS analyzing the Chukchi Sea leases, but did abuse its discretion by conducting the analysis based on an unrealistic prediction of economically recoverable oil.[39] The court acknowledged that by finding that BOEM relied on an inadequate estimate of oil production, its decision could affect other portions of the FEIS.[40]

A. Essential Information in the FEIS

The court began its discussion by reviewing the regulatory requirements that govern an agency's treatment of incomplete or missing information in an EIS.[41] The court pointed to its precedent outlining the separate stages of development under OCSLA and the varying levels of NEPA analysis required at those stages.[42] Information not essential at one stage may become essential at another.[43] The court distinguished between EISs at the "programmatic" and "implementation" levels.[44]

At the programmatic level, site-specific development plans have not been formed, and an EIS must only outline amendable plans intended to guide decision making.[45] At the implementation level, site-specific plans are submitted, and NEPA requires a site-specific analysis.[46] The court

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36. Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373-74 (1989).
37. Edwardsen v. U.S. Dep't of the Interior, 268 F.3d 781, 784-85 (9th Cir. 2001) (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv. 137 F.3d 1372, 1376 (9th Cir. 1998)).
38. Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983).
39. Native Village of Point Hope v. Jewell, 740 F.3d. 489, 495-96 (9th Cir. 2014).
40. *Id.* at 499.
41. *Id.* at 496 (quoting 40 C.F.R. § 1502.22).
42. *Id.* at 497.
43. *Id.* at 499.
44. *Id.* at 497 (quoting Friends of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003)).
45. *Id.*
46. *See id.* at 497, 499.

considered OCSLA lease sales programmatic.[47] The court affirmed that at each stage it would "defer to the agency's judgment about the appropriate level of analysis so long as the EIS provides as much environmental analysis as is reasonably possible under the circumstances."[48] Accordingly, the court concluded that additional environmental analysis of the Chukchi Sea's development should be conducted after the lease sale stage, when missing or incomplete information becomes known to the agency or essential to the agency's decision making.[49]

Responding to the plaintiffs' argument that missing information specifically concerning animals was essential and therefore improperly excluded from the challenged EIS, the court pointed to additional statutory protections provided for animals at later stages of the development process.[50] Although BOEM consulted with the National Marine Fisheries Service and the United States Fish and Wildlife Service (FWS) while preparing the lease sale FEIS, the court noted that subsequent consultation with those agencies may be required when BOEM evaluates site-specific plans.[51] Through those consultations, the agency must insure its proposed actions are not detrimental to the survival of endangered or threatened species.[52]

B. Oil Production Estimate

The court next considered the plaintiffs' argument that BOEM based the FEIS on an arbitrary estimate of the amount of economically recoverable oil that would be produced from the lease area.[53] The record showed that BOEM employees decided to base their environmental analysis on estimates of production in only one of the oil fields being leased, due to concerns about the additional time required to estimate production for the entire area.[54] The agency then settled on an estimate of one billion barrels because it was the lowest amount of oil that would be economical to recover.[55] Draft estimates circulated among BOEM employees and distributed to other agencies, however, pegged the mean

47. *Id.* at 497.
48. *Id.* at 498.
49. *Id.* at 498-99.
50. *Id.* at 498.
51. *Id.*
52. *See id.*
53. *See id.* at 499.
54. *Id.*
55. *Id.* at 500-01.

amount of economically recoverable oil in the entire Chukchi Sea lease area at twelve billion barrels, with the potential to be far greater.[56]

The court agreed with the plaintiffs' argument and articulated three reasons underlying its decision.[57] First, the court criticized BOEM's "choice of the lowest possible amount of oil that was economical to produce as the basis for its analysis."[58] BOEM explained that it relied on that estimate because the risks and challenges associated with exploration in the lease area make any actual oil development improbable.[59] Therefore, the agency contended that it was "generous" to rely on an estimate of the lowest amount of oil that would be economically feasible to recover in the unlikely scenario that oil was recovered.[60]

In response, the court distinguished "the likelihood of oil and gas production [from] the likelihood of environmental effects if such production occurs."[61] According to the court, for the purposes of the agency's environmental analysis, the relevant consideration was not the probability that oil would be produced from the lease sale, but the amount of oil that would be produced if that probability were realized.[62] The court noted information exchanged between BOEM employees, making clear that if oil production occurred, the amount produced would likely be much greater than one billion barrels.[63] The court concluded that having determined production was at least "reasonably foreseeable," BOEM was bound to analyze the environmental consequences that could result from such production.[64]

Second, the court found that BOEM ignored the influence of changing oil prices in developing its estimate.[65] At higher prices, more oil becomes "economically recoverable."[66]

Third, the court found BOEM's explanation for basing its estimate on the production expected from only one oil field insufficient.[67] Although the FEIS cautioned that challenges inherit to the Chukchi Sea would prevent some oil production that would otherwise be economical, the FEIS did not support the contention that the development of one field

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56. *Id.*
57. *Id.* at 502.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 503.
62. *See id.*
63. *Id.* at 502.
64. *Id.* at 503 (quoting 40 C.F.R. § 1508.7).
65. *Id.*
66. *See id.*
67. *Id.*

would not be followed by development in other fields.[68] The court noted that the FEIS expressly predicted that one successful development in the lease area would likely spur more development.[69]

In conclusion, the court expressed an inability to determine "why BOEM chose to analyze the lowest amount of oil that could be produced in the Chukchi Sea from the smallest number of oil fields that could be developed."[70] It dismissed the agency's argument that the site-specific EISs required at subsequent stages would provide a sufficient opportunity to address problems arising from the estimate.[71] The court determined that the "appropriate time to estimate the total oil production from the lease sale is the time of the lease sale itself."[72] The court reasoned that the lease-sale stage provides the only opportunity for the agency to estimate the total production of the entire area and analyze the relating environmental consequences.[73]

C. Judge Rawlinson's Dissent

Judge Rawlinson agreed with the majority's conclusion that the FEIS and SEIS did not exclude essential information and that additional environmental analysis was not required at the lease sale stage.[74] However, he disagreed with the majority's conclusion that BOEM's one-billion-barrel estimate was arbitrary.[75]

Judge Rawlinson reiterated the limited nature of the court's review under the arbitrary and capricious standard.[76] He emphasized that the standard is "most deferential" when the court reviews the type of prediction BOEM used in preparing the challenged EIS.[77] After reviewing the potential grounds on which a court may find an agency acted arbitrarily, he concluded the majority's holding rested on the notion that the evidence available to BOEM contradicted the estimate the agency developed.[78] To refute that contention, he relied on the court's decision in *Tribal Village of Akutan v. Hodel* acknowledging the difficulty involved with making oil production estimates and dismissing

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68. *Id.*
69. *Id.*
70. *Id.* at 503-04.
71. *Id.* at 504.
72. *Id.*
73. *Id.*
74. *Id.* at 505 (Rawlinson, J., concurring in part and dissenting in part).
75. *Id.*
76. *Id.* (citing Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008)).
77. *Id.* (citing *Lands Council*, 537 F.3d at 993).
78. *See id.* at 506.

concerns about incomplete or missing information at the lease sale stage.[79]

While acknowledging that "[i]t is beyond dispute" that more than one billion barrels of oil rests under the Chukchi Sea, Judge Rawlinson maintained that the appropriate question was whether BOEM's estimate "was the product of agency expertise."[80] He reasoned that the lack of success previous explorations of the Chukchi Sea encountered when searching for economically viable oil developments supported BOEM's approach to developing its estimate.[81] He also noted that the agency's prediction fell within the range of previous estimates of oil production in the Chukchi Sea.[82] Despite scientific disagreement over BOEM's estimate, Judge Rawlinson concluded that the agency explained the estimate and the court was "uniquely unqualified to second-guess that selection."[83]

IV. ANALYSIS

The history of failed exploration in the Chukchi Sea demonstrates the inherent difficulty of developing energy resources in challenging environments. Nevertheless, OCSLA makes Congress's intent that such resources be developed unambiguously clear. Accordingly, courts have granted agencies that attempt to facilitate OCSLA development wide deference in conducting the type of NEPA analysis BOEM prepared in relation to the Chukchi Sea lease sale.[84] Similarly, the court in *Point Hope* deferred to BOEM's judgment that the challenged FEIS and SEIS did not exclude essential information.[85] Such deference respects the agency's unique expertise and acknowledges the careful interplay between OCSLA's development stages and the corresponding environmental analyses required by NEPA. Under that framework, the development of offshore energy resources progresses incrementally, providing multiple opportunities for environmental impact assessments. As development moves forward and more information becomes available, BOEM can perform increasingly sophisticated analyses and respond accordingly.

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79. *Id.* (citing Tribal Village of Akutan v. Hodel, 869 F.2d 1185, 1192 (9th Cir. 1989)).
80. *Id.*
81. *Id.*
82. *Id.* at 506-07.
83. *Id.* at 507.
84. *See* Sec'y of the Interior v. California, 464 U.S. 312 (1984); *see also Akutan*, 869 F.2d 1185; Village of False Pass v. Clark, 733 F.2d 605 (9th Cir. 1984).
85. *Point Hope*, 740 F.3d at 498 (citing Friends of Yosemite Valley v. Norton, 348 F.3d 789, 800 (9th Cir. 2003)).

In holding that BOEM's estimate of one billion barrels of oil was arbitrary and capricious; however, the court preempted this sequential process from unfolding in the Chukchi Sea. In *Akutan*, the court refused to conduct such an intricate evaluation of alleged methodological deficiencies in an oil spill risk analysis, insisting only that the methodology used should be reasonable.[86] The *Akutan* court observed, "Prior to exploration, it is difficult to make so much as an educated guess as to the volume of oil likely to be produced or the probable location of oil wells."[87] As a result, analysis based on that information "can never be more than speculative."[88]

The court attempts to distinguish *Point Hope* from *Akutan* on the basis that BOEM used its estimate here to inform a much broader environmental assessment, whereas the estimate in *Akutan* was only used in analyzing oil spill risk.[89] The difficulty of devising an accurate estimate of oil production at the lease-sale stage, however, is surely not diminished simply because a broader analysis relies on the estimate. While those additional considerations obviously make an informed prediction of oil production more desirable, they do not make such a prediction more attainable. The court's decision indicates somewhat inexplicably that the scope of deference given an agency in making such a difficult estimate should at least in part depend on the extent of the analysis relying on the estimate.

The court further departs from *Akutan* in emphasizing that the lease-sale stage provides the agency with the best opportunity to estimate total oil production.[90] The *Akutan* court observed that incomplete information at the lease-sale stage posed a minimal environmental risk because exploration and production only occur at later stages, when more accurate estimates are available and additional analysis is required.[91] However, the majority opinion asserted, "A later project or site-specific environmental analysis is an inadequate substitute for an estimate of total production from the lease sale as a whole."[92] The majority goes on to observe that if BOEM had not relied on its estimate of one billion barrels of production, the FWS may have found a protected species was jeopardized by the lease sale.[93] The majority's concern for such a

86. *Akutan*, 869 F.2d at 1191-92.
87. *Id.* at 1192.
88. *Id.*
89. *Point Hope*, 740 F.3d at 504 (citing *Akutan*, 869 F.2d at 1192).
90. *Id.*
91. *Akutan*, 869 F.2d at 1192.
92. *Point Hope*, 740 F.3d at 504.
93. *Id.*

possibility at the lease-sale stage is surprising in light of its earlier discussion of the extensive statutory protections provided for animals at later stages in the OCSLA process.

As Judge Rawlinson pointed out and the evidence demonstrated, experts disagreed over the method BOEM relied on to form its oil production estimate. Such disagreement, however, only highlights the obstacles involved in predicting the amount of oil that will be produced from underneath ocean areas that have not yet been explored, developed, or even leased. Judge Rawlinson keenly observed that courts "do not sit as a panel of super scientists to dissect the agency's analysis."[94] As the result of the majority's decision to step away from the *Akutan* precedent and restrict the level of deference given to BOEM in this case, Judge Rawlinson's words may no longer ring quite so loudly in the Ninth Circuit.

V. CONCLUSION

While the Ninth Circuit correctly deferred to BOEM's determinations regarding essential information and environmental analysis at the lease sale stage, it should have granted the same level of deference to the agency's oil production estimate. By not granting that deference, the court's holding departs from its precedent and places an even greater burden on agencies tasked with already considerable challenges. As a result, development under OCLSA will become an even more complicated undertaking.

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94. *Id.* at 506 (Rawlinson, J., concurring in part and dissenting in part).

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