Managing Alaska's Coastal Development: State Review of Federal Oil and Gas Lease Sales

Outside of a thin three-mile strip of Alaska's coast, all offshore oil and gas production occurs on federal lands. Given the potential for environmental harm and the economic change that development of these resources would entail, Alaska has a clear interest in controlling this development to the fullest extent possible. This note argues that federal law provides the means by which the state can ensure that production on federal lands will not circumvent whatever safeguards Alaska feels are necessary. The note concludes by offering a means by which Alaska can get involved in the offshore development process as early as possible and thereby can guarantee that its concerns will not be pushed aside by the federal government.

I. INTRODUCTION

On October 1, 1945, the United States Congress announced that it "regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."[1] This announcement, known as the Truman Proclamation, came as a surprise to the coastal states and territories, which traditionally believed that they controlled the continental shelf.[2] The Truman Proclamation was codified as part of the Outer Continental Shelf Lands Act,[3] establishing a zone of state control three miles seaward of the low water mark along state coastlines. Everything seaward of this line was deemed to be federal territory.[4]

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1. Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945).

2. Robert B. Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf: Sources, Problems, and the Opportunity for Change*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 75, 80 (1992).

3. 43 U.S.C. §§ 1331-56 (Supp. V 1993).

4. *Id.* § 1311 (1988).

Despite the fact that the technology to exploit Outer Continental Shelf ("OCS") natural resources was unavailable in 1953, the states were aware of the potential for development of the regions off their shorelines, and they fought hard to keep those regions under state control. State challenges to federal ownership of the OCS were made both before and after the passage of the the Outer Continental Shelf Lands Act.[5] The states were correct in assessing the value of offshore resources—over 20,000 oil and gas wells have been drilled in the OCS, and the United States government has made more than eighty-seven billion dollars through lease sales and royalty payments.[6] Only recently has the federal government begun to share revenues generated beyond the three-mile line with coastal states. However, those states receive only twenty-seven percent of the royalties earned from resource extraction in the zone three to six miles off their coasts.[7]

Although they have lost the battle for OCS ownership, coastal states continue to have reasons for attempting to affect its development. One important reason is environmental protection. In January 1969, a well blow-out spilled 70,000 barrels of oil into the Santa Barbara Channel, inundating the media with images of dying, oil-soaked birds.[8] These pictures provoked such a hostile public response that California was able to force Congress to impose a moratorium on offshore leasing and development off its coast.[9] Since then, the specter of oil spills has haunted both the oil industry and the states whose environments are threatened.

Concern about oil spills in Alaska intensified in 1989 as a result of the Exxon *Valdez* tragedy that spilled eleven million barrels of oil into Prince William Sound.[10] The *Valdez* disaster

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5. *See, e.g.,* United States v. Maine, 469 U.S. 504 (1985); United States v. Florida, 363 U.S. 121 (1960); United States v. Louisiana, 339 U.S. 699 (1950).

6. Wiygul, *supra* note 2, at 81.

7. 43 U.S.C. § 1337(g)(2) (Supp. V 1993).

8. John K. Van de Kamp & John A. Saurenman, *Outer Continental Shelf Oil and Gas Leasing: What Role for the States?*, 14 HARV. ENVTL. L. REV. 73, 73 n.2 (1990).

9. Wiygul, *supra* note 2, at 82. Congressional moratoria are generally the result of political pressure against petroleum production on the east and west coasts. Today, Congress allows OCS development to proceed only in Alaska, Louisiana, Mississippi and Alabama. *Id.* Of course, all states are free to allow production to continue within their three-mile zone.

10. David P. Lewis, Note, *The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?*, 10 ALASKA L. REV. 87, 87 (1993).

caused a legislative response on both local and national levels, and it led directly to the passage of the Oil Pollution Act of 1990.[11] Alaska's concern about oil spills clearly extends to federal oil and gas activities on the OCS as well as those on state lands.

Preventing oil spills, however, is not the only reason Alaska has an interest in regulating OCS development. Resource production off the Alaska coast will put significant pressure on the state's infrastructure as remote areas such as the North Slope Borough develop. Additionally, drilling and oil transportation could pose other environmental problems. For example, construction of undersea pipelines may disturb the migratory patterns of endangered bowhead whales, while increased traffic near land-based facilities could alter the migration of other animals such as caribou. Either of these possibilities would further disturb the subsistence lifestyles of many Native Alaskan communities. Finally, oil drilling on the OCS would interfere with the productivity of other offshore resources. For example, the fishing industry could be affected by hazards resulting from sustained drilling activity, such as gear loss[12] and seabed degradation.

The Alaska state government is better able to address these state-related issues than the federal government. The state legislature is likely to be better informed about the multitude of local issues that will inevitably arise, and is better equipped to protect the rights of Alaskans against intrusions by the federal government. Congress recognized as much with its inclusion of the state consistency doctrine in the Coastal Zone Management Act.[13]

This note will examine the means by which Alaska can achieve some level of control over resource development on the OCS off its coast. Part II reviews the governing structure of federal lease sales. Part III analyzes consistency determinations in some detail, as these appear to be the primary means for Alaska to influence OCS development. Part IV emphasizes the importance of the state utilizing its power at the lease sale stage rather than later in the process. Finally, this note concludes by making concrete recom-

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11. 33 U.S.C. §§ 2701-2761 (Supp. II 1990).

12. Gear loss occurs when devices such as trawl nets become entangled with offshore petroleum facilities.

13. 16 U.S.C. §§ 1451-64 (1988). Under the consistency doctrine, all federal OCS activities must be consistent with state coastal management programs. *See infra* text accompanying note 37.

mendations as to how the state can exert greater control over the OCS.

II. LAWS AFFECTING OFFSHORE OIL PRODUCTION IN ALASKA

A. The Outer Continental Shelf Lands Act

Federal activities of almost any sort outside of the three-mile zone of state control on the OCS are governed by the Outer Continental Shelf Lands Act ("OCSLA").[14] Congress passed the OCSLA with the explicit purpose of providing for the development of the nation's submerged natural resources, with particular emphasis on lessening American dependency on foreign energy sources.[15] However, Congress was clearly concerned with the secondary effects of coastal development. Therefore, the OCSLA enumerates several other considerations that must be balanced against national energy goals during the development of the OCS, including: (1) fair returns on oil and gas resources; (2) preservation of competition; (3) protection of human, marine and coastal environments; and (4) local and state governments' rights to be involved in a process that will affect their jurisdictions.[16]

The OCSLA arranges the development of offshore resources on federal lands by dividing the process into four distinct stages: pre-leasing, lease sale, exploration and development.[17] At each stage, the Secretary of the Interior must review increasingly detailed environmental information, and he or she retains the power to halt the process at any time if such action would be necessary to protect the environment.[18] Courts have used this pyramidal structure to justify exceedingly lenient review of actions by the Secretary at early stages of the process.[19]

Lease sales are governed by 43 U.S.C. § 1337, which allows the Secretary of the Interior to grant leases of submerged lands to the highest bidder.[20] Prior to the issuance of any lease, the Secretary

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14. 43 U.S.C. §§ 1331-56 (Supp. II 1990).

15. *Id.* § 1801.

16. *Id.* § 1802.

17. *Id.* §§ 1337, 1340, 1344, 1351.

18. *Id.* § 1334(a)(2)(A)(i).

19. *See, e.g.,* California *ex rel.* Brown v. Watt, 668 F.2d 1290, 1317 (D.C. Cir. 1981).

20. 43 U.S.C. § 1337(a)(1) (1988). This section provides for several other details of the lease, including the length of the lease, royalties, cancellation and

must prepare an environmental impact statement and determine that the lease is consistent with the coastal management program of the affected state.[21] The lessee must provide further environmental reports explaining any planned exploration or development activities once the lease is sold.[22] These reports must consider such issues as the adequacy of clean-up facilities, the impact of onshore support facilities, possible pollution caused by any operation and "the direct affects on the offshore and onshore environments."[23]

The OCSLA provides for a limited amount of state involvement during the OCS development process, even at the pre-lease sale stage. The governors of affected states may submit recommendations to the Secretary of the Interior concerning the timing or size and location of the lands in a proposed lease sale.[24] The Secretary is required to accept the recommendations of a governor upon determining that they "provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State."[25] The Secretary may also enter into cooperative agreements with affected states for any purpose consistent with the OCSLA.[26] Finally, the Secretary is required to make information regarding the lease available to affected states in order to

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suspension of the lease, and the entitlement of the lessee to conduct exploration and production, subject to the Secretary's approval of the planned activities. *Id.*

21. *See* Village of False Pass v. Watt, 565 F. Supp. 1123 (D. Alaska 1983). The authority for the state consistency determination comes from the Coastal Zone Management Act. *See infra* text accompanying notes 36-53. The consistency determination can take place only if the affected state has enacted a federally approved coastal management program. Alaska's coastal management program is based upon the Alaska Coastal Management Act of 1977, ALASKA STAT. §§ 46.40.010-210, and received federal approval in 1979. See ALASKA ADMIN. CODE tit. 6, §§ 50, 80 for regulations concerning the ACMP.

22. 43 U.S.C. §§ 1340, 1351 (Supp. II 1990).

23. 30 C.F.R. § 250.34(3)(a)(1) (1992).

24. 43 U.S.C. § 1345(a) (1988).

25. *Id.* § 1345(c). While there is no clear statement of what constitutes a "reasonable balance," one court has said that a recommendation must allow "oil and gas to be 'developed in a manner which takes into consideration the Nation's energy needs and also assures adequate protection to the renewable resources of the OCS.'" Massachusetts v. Clark, 594 F. Supp. 1373, 1384 (D. Mass. 1984) (quoting 43 U.S.C. § 1801(14) (1982)).

26. 43 U.S.C. § 1345(e) (1988). Alaska has entered into such an agreement under the authority provided for in this section and under the CZMA. Memorandum of Understanding Between Division of Policy Development and Planning and U.S. Geological Survey (1980) (on file with the *Alaska Law Review*).

assist them in planning for the onshore impact of OCS activities.[27] This level of state involvement provides Alaska with the opportunity to influence the development of resources off its coast.[28]

However, the influence of the states over lease sales under the OCSLA must not be overstated. The weak position of the states was illustrated in a Ninth Circuit decision. In *California v. Watt*,[29] California challenged a rejection of Governor Brown's recommendation that a number of tracts in the Santa Maria basin be deleted from a proposed sale. The appellate court affirmed the dismissal of the state's challenge, holding that although the Secretary perhaps had not adequately balanced the interests of the residents of California against those of the federal government, reversal was not warranted under the "arbitrary and capricious" standard of review.[30]

Similarly, in *Tribal Village of Akutan v. Hodel*,[31] Alaskan tribal villages and environmental groups attempted to enjoin a lease sale off the northern coast of the Aleutian Islands. The Ninth Circuit upheld Secretary Hodel's rejection of Governor Sheffield's recommendations,[32] citing the high level of deference accorded the Secretary's decisions under the OCSLA. The court refused to reevaluate the data used by the Secretary and noted that even if the governor's proposals were found to be reasonable, it would not imply that the Secretary's rejection of them was arbitrary and capricious.[33] One author has pointed out that "[t]he general lesson to draw from these cases is that Section 19 [of the OCSLA][34] has some utility as a means of making the concerns of the states known to Interior, but gives them no real power to enforce

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27. 43 U.S.C. § 1352(b)(2) (1988).

28. *See* Village of False Pass v. Watt, 565 F.Supp. 1123 (D. Alaska 1983). In that case, Governor Sheffield used the comment power to recommend that certain stipulations be entered in to the lease sale agreement regarding spill response and pipelines. The Secretary made "substantial accommodations" to the concerns of the Governor and included the requested stipulations.

29. 683 F.2d 1253 (9th Cir. 1982), *rev'd on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

30. *Id.* at 1268-69.

31. 869 F.2d 1185 (9th Cir. 1988).

32. Governor Sheffield recommended that (1) the lease sale be delayed for eight years and (2) all tracts within twenty-five miles of the Alaska peninsula be deleted from the deal. *Id.* at 1188.

33. *Id.* at 1190.

34. 43 U.S.C. § 1345 (1988) (gubernatorial comment power).

these concerns."[35] Therefore, Alaska must look beyond the OCSLA for authority if it wishes to assert substantial control over OCS development.

B. The Coastal Zone Management Act

In 1972, Congress sought to implement a more rational program of OCS development by coordinating agencies and different levels of government on projects affecting the three-mile coastal zone. This concern resulted in the passage of the Coastal Zone Management Act ("CZMA").[36]

The CZMA marked the beginning of a new era of shared control of the OCS between the federal and state governments. Section 307(c)(1) of the Act requires that

> [e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.[37]

It has been said that "nowhere has more authority been delegated to the states than under the [CZMA's] federal consistency doctrine."[38] The state has the power to make an independent review of any federal activity to determine whether the activity is consistent with the state's coastal management program.[39] This consistency determination is the basis of almost all of the state's power to affect OCS development.[40] However, to utilize this power most effectively, the state must devise a detailed coastal management plan, thereby providing a sounder basis for showing a subsequent decision by Interior to be arbitrary and capricious.

The first case to address consistency review at the lease sale stage under the CZMA was *Secretary of the Interior v. California*.[41] There, California challenged a lease sale off Santa Barbara, claiming that it was an activity "directly affecting" the coastal zone

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35. Wiygul, *supra* note 2, at 75 (footnote added).
36. 16 U.S.C. §§ 1451-64 (1988).
37. *Id.* § 1456(c)(1)(A) (Supp. V 1993).
38. Timothy Eichenburg, *Federalism and Federal Consistency: The State Perspective*, 1 COASTAL ZONE 542 (1987).
39. 16 U.S.C. § 1456(c)(3) (1988).
40. See part III.B., *infra*, for a detailed discussion of state consistency review.
41. 464 U.S. 312 (1984).

and therefore subject to consistency review.[42] The Supreme Court held that lease sales did not directly affect the coastal zone and that the states had no power under the consistency review power to affect OCS development at the lease sale stage.[43] The Court made its decision despite legislative history and agency interpretations that clearly indicated that Congress had intended consistency review to occur at the lease sale stage.[44]

In 1990, Congress acted to remedy this situation by enacting the 1990 amendments to the CZMA.[45] The revised version of CZMA § 307(c)(1)[46] leaves no doubt that lease sales are subject to consistency review.[47] However, the statutory change did not invalidate all of the prior case law in this area. For example, in *California v. Watt*,[48] the Ninth Circuit held that a determination by the Secretary of the Interior that a lease sale was consistent with a state's coastal management program was reviewable subject to the presumption of regularity afforded to agency decisions.[49] After the 1990 Amendments, a federal district court in Louisiana also deferred to the agency's decision.[50] Although one court has

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42. *Id.* The original version of CZMA § 307(c)(1) read: "Each Federal agency conducting or supporting activities *directly affecting* the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (1972) (emphasis added) (amended 1990). Thus, the state had to claim that lease sales were such an activity in order to challenge the federal action. This requirement was deleted by the 1990 CZMA Amendments.

43. *Secretary of the Interior*, 464 U.S. at 330.

44. The Department of Justice had already issued an opinion that lease sale activities were subject to state consistency review. 44 Fed. Reg. 37,142 (1979).

45. For an extended review of how the legislative history of the 1990 CZMA Amendments indicates a congressional intent to overrule *Secretary of the Interior*, see Jack H. Archer, *Evolution of Major 1990 CZMA Amendments: Restoring Federal Consistency and Protecting Coastal Water Quality*, 1 TERR. SEA J. 191 (1991).

46. See *supra* text accompanying note 37.

47. The National Oceanic and Atmospheric Administration noted as much, stating that the 1990 amendments "overturn[ed] the Supreme Court's 1984 decision in *Secretary of the Interior v. California*, in which the Court held that OCS oil and gas lease sales were not subject to Federal consistency." 57 Fed. Reg. 31,106 (1992).

48. 683 F.2d 1253 (9th Cir. 1982), *rev'd on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984).

49. *Id.* at 1264.

50. Louisiana v. Lujan, 777 F. Supp. 486 (E.D. La. 1991). This was the first court challenge to a lease sale under the 1990 CZMA. Louisiana sought to enjoin

held that the federal agency bears the burden of proving that an OCS activity complies with the local coastal management program,[51] it appears that a challenge to a federal consistency determination of a lease sale would likely fail because of the high level of deference to the Secretary of Interior. One author has said:

> In the case of federal activity such as a leasing decision, the courts have generally held, in effect, that the federal agency ultimately decides whether the activity is consistent "to the maximum extent practicable" with the state coastal zone program. This means that once the Department of the Interior decides that a lease sale is consistent, the burden is on the coastal state to show that the Interior's decision is wrong. Thus, in a judicial challenge, the federal agency's decision will be protected by the federal Administrative Procedure Act's (APA) deferential review standards. As a practical matter, this means that it will be very difficult for the adjacent state to challenge the federal agency's determination that its action is consistent.[52]

In order to avoid having their challenges to federal consistency determinations defeated by the APA's "arbitrary and capricious" standard, states that wish to exercise control over the OCS must clarify their interests to the Secretary of the Interior in their coastal management programs. If a state concern is addressed by a federally approved coastal management program, the Secretary will have no choice but to follow that state's wishes unless "the Secretary finds . . . that each activity . . . is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security."[53] Should the Secretary make such a determination, the state will have no power to control the proposed activity. However, the Secretary will not always be able to make a credible determination of that sort. As a result, states can best affect federal OCS activities by enacting detailed coastal management programs to form the basis for consistency review.

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the lease sale on the basis that the Secretary's determination of consistency with Louisiana's coastal management plan was invalid. After losing its motion for a preliminary injunction, Louisiana withdrew the suit.

51. Conservation Law Foundation v. Watt, 560 F. Supp. 561, 576 (D. Mass.), *aff'd*, 716 F.2d 946 (1st Cir. 1983).

52. Wiygul, *supra* note 2, at 160.

53. 16 U.S.C. § 1456(c)(3)(B)(iii) (1988).

C. The Alaska Coastal Management Program

The Alaska Coastal Management Act of 1977[54] created the Alaska Coastal Management Plan ("ACMP"). The objective of the ACMP is to encourage the development of Alaska's coastal resources while protecting "significant historic, cultural, natural and aesthetic values . . . within the coastal area."[55] The Coastal Management Act also established the Alaska Coastal Policy Council for the purpose of reviewing and updating the ACMP.[56] The Alaska Coastal Policy Council must develop statewide policies consistent with the objectives of the Act and promulgate procedural regulations governing interaction with federal agencies.[57] Furthermore, local governments and certain specially organized coastal resource service areas are required to develop district coastal management programs for state approval and integration into the ACMP.[58] The combination of local coastal management plans with statewide policies is designed to ensure that issues unique to local areas may be incorporated into the state interests as a whole.

The Alaska Supreme Court has held that "[t]he regulations . . . provide that a state agency may authorize uses or activities in the coastal area under its statutory authority only if 'the agency *finds* that the use or activity is consistent with the applicable district program and the standards contained in this chapter.'"[59] Thus, Alaska has the opportunity to influence offshore activities by means of its ACMP regulations.

The ACMP currently includes regulations implementing the specific standards applicable to coastal activities, several of which are relevant to OCS hydrocarbon production.[60] For example, agencies must identify both known and potential geophysical hazard areas.[61] Development may not take place in these areas until certain loss-prevention measures have been taken.[62] Agencies are also required to identify areas suitable for the location of

54. 1977 Alaska Sess. Laws ch. 84.

55. ALASKA STAT. § 46.40.020(5) (1991).

56. *Id.* § 46.40.010.

57. *Id.* § 46.40.040.

58. *Id.* §§ 46.40.030, 46.40.120.

59. Hammond v. North Slope Borough, 645 P.2d 750, 761 (Alaska 1982) (quoting ALASKA ADMIN. CODE tit. 6, § 80.010(b) (Jan. 1993)).

60. *See generally* ALASKA ADMIN. CODE tit. 6, § 80 (Jan. 1993).

61. *Id.* § 80.050.

62. *Id.*

"energy facilities," subject to a number of specific considerations.[63] Possible transportation routes,[64] the impact on subsistence usage of coastal areas and resources,[65] and preservation of habitats[66] must also be considered under the ACMP. Air, land and water quality standards are also adopted by reference into the ACMP.[67] Finally, agencies and districts must identify archaeological sites important to the study of the area's history.[68]

In *Trustees for Alaska v. State Department of Natural Resources (Trustees II)*,[69] the Alaska Supreme Court established standards for applying some of these regulations within the context of a state lease sale. The case involved a challenge to the state's findings that a proposed lease sale in Camden Bay ("Sale 50") was consistent with the ACMP and that it was in the state's best interest.[70] The Trustees contended that Sale 50 failed to comply with ACMP standards regarding geophysical hazards, archaeological resources and transportation.[71] Citing *Trustees I*,[72] the Court held that the

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63. *Id.* § 80.070. The term "major energy facility" is defined by § 80.900(22) to include almost anything having to do with energy production, including rigs, pipelines, oil terminals and port developments. The considerations include minimalization of risk to biologically productive or vulnerable habitats, allowance for the free passage of wildlife and location of facilities in areas of least biological activity. *Id.* § 80.070(11)-(13).

64. *Id.* § 80.080.

65. *Id.* § 80.120.

66. *Id.* § 80.130(d). "Offshore areas" are included generally in "habitats" for the purposes of this regulation. *Id.* § 80.130(a)(1). Activities that do not maintain or enhance natural habitats may be allowed only if there is "significant public need," no "feasible prudent alternative" exists to meet the need and "all feasible and prudent steps to maximize conformance" with this standard are taken. *Id.* § 80.130(d).

In a recent decision, a Superior court held, among other things, that there is a general significant public need for oil and gas production, that feasible alternatives to such production do not exist outside of the coastal zone, and that lease terms and stipulations may be sufficient to maximize conformance with the ACMP. *Ninilchik v. Noah*, No. 3KN-93-1174 Civil, slip op. at 14-19 (Alaska Super. Ct., Oct. 17, 1994). To the extent that this ruling is upheld on appeal, the viability of the habitats standard may be completely undermined.

67. ALASKA ADMIN. CODE tit. 6, § 80.140 (Supp. July 1994).

68. *Id.* § 80.150 (Jan. 1993).

69. 851 P.2d 1340 (Alaska 1993).

70. *Trustees II* dealt only with the issue of ACMP consistency. The court did not review the best-interest determination on substantive grounds as it had done in *Trustees I*.

71. *Trustees II*, 851 P.2d at 1342-43.

Department of Natural Resources "had the duty to determine whether the sale of oil and gas leases was consistent with the ACMP."[73]

With respect to the geophysical hazard standard, the Department of Natural Resources contended that its identification of the entire Sale 50 area as a geophysical hazard area was sufficient to comply with section 80.050 of title 6 of the Alaska Administrative Code, so long as development would not be approved until loss-prevention measures had been provided for.[74] However, the court held that because detailed knowledge of the area was available, "indiscriminate and conclusory identification of an entire sale area as a geophysical hazard area does not suffice . . . ."[75] The court further noted that consideration of geophysical hazards at the development stage would entail examination on a lease-site-by-lease-site basis, which could lead to a failure to appreciate the cumulative effect of several operations in a given area.[76] The court determined that a segmented approach to review would increase the risk that activities permitted in the early phases of development might attain an inertia that would compel the Department of Natural Resources to permit unsound activities in the future.[77] The court also emphasized the need for the review of cumulative environmental impacts as early in the development process as possible.[78]

The Trustees also prevailed on their contention that the Department of Natural Resources failed to apply the archaeological standard properly. The Department of Natural Resources argued that it had justifiably delegated its duty to identify archaeological sites to the Sale 50 lessees on the bases that (1) the existence of such sites was highly unlikely in the Sale 50 area, (2) the Sale 50 leases stipulated that the lessees would report any discoveries, and

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72. Trustees for Alaska v. State Dep't of Natural Resources, 795 P.2d 805 (Alaska 1990). There, the court held that the sale was subject to consistency review, but remanded the decision for a new review by the Office of Management and Budget rather than by the Department of Natural Resources. *Id.* at 812. Because of this procedural remand, the court did not examine the substance of whether the sale was consistent with the ACMP.

73. *Trustees II*, 851 P.2d at 1344.

74. *Id.* at 1343.

75. *Id.* at 1344.

76. *Id.*

77. *Id.* (citing Trustees for Alaska v. Gorsuch, 835 P.2d 1239 (Alaska 1992)).

78. *Id.* at 1344 n.8.

(3) development of the lease sites would be subject to an independent determination.[79] The court disagreed, holding that the ACMP requires the identification of known archaeological sites at the lease sale stage.[80] The court reiterated the fact that individual lease site review could have the effect of undervaluing the cumulative importance of an area, and that the lessees would be operating under a conflict of interest concerning the reporting of sites which they discovered.[81]

Despite the court's rulings that geophysical hazards and archeological sites must be examined at the lease sale stage, it also held that the Department of Natural Resources' failure to examine the possible effects of transporting oil from the Sale 50 site did not violate the ACMP transportation standard.[82] The regulation provides:

> (a) Transportation and utility routes and facilities in the coastal area must be sited, designed and constructed so as to be compatible with district programs.
> (b) Transportation and utility routes and facilities must be sited inland from beaches and shorelines unless the route or facility is water-dependent or no feasible and prudent inland alternative exists to meet the public need for the route or facility.[83]

The court reasoned that "[u]ntil exploration is proposed and, in all likelihood, until and unless a commercially exploitable discovery is made, there will be no occasion for siting, designing or constructing transportation and utility routes."[84] Thus, the standard had not been violated because there was no proposed exploration.

The court's willingness to allow postponed review of potential transportation routes is arbitrary given the court's holding that examination of geophysical hazards and archaeological sites must take place upon review of the lease sale. Just as there could be archaeological sites so valuable as to make a given lease sale inherently inconsistent with the ACMP, there could also be a site to which no reasonable transportation route consistent with the ACMP could be envisioned. Furthermore, the court's cursory review of the transportation issue is anomalous when compared to the emphasis placed on transportation in *Trustees I*. Despite these

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79. *Id.* at 1345.
80. *Id.* at 1346.
81. *Id.*
82. *Id.*
83. ALASKA ADMIN. CODE tit. 6, § 80.080 (Jan. 1993).
84. *Trustees II*, 851 P.2d at 1346.

apparent inconsistencies it remains, under *Trustees II*, that the ACMP transportation standard cannot be violated at the lease sale stage.

Recently, the Alaska legislature amended the ACMP by codifying the "phasing" of consistency determinations.[85] This amendment allows an agency charged with deciding whether a given activity is consistent with the ACMP (in the case of oil and gas leasing, the Department of Natural Resources) to review only the current phase of the activity if

> (1) at the time the proposed use or activity is initiated, there is insufficient information to evaluate and render a consistency determination for the entirety of the proposed use or activity;
> (2) the proposed use or activity is capable of proceeding in discrete phases based upon developing information obtained in the course of a phase; and
> (3) each subsequent phase of the proposed use or activity is subject to discretion to implement alternative decisions based upon the developing information.[86]

Furthermore, the agency must ensure that subsequent phases will be subject to independent consistency determinations "based on applicable statutes and regulations, the facts that are material and known to the state . . . and the reasonably foreseeable, significant effects of the use or activity for which the consistency determination is sought."[87] Because no cases have been decided under this procedure, it is unclear whether the legislature has changed existing law or merely codified a process which was in use prior to enactment. However, by postponing review, this statute lends support to the Alaska Supreme Court's treatment of the transportation standard in *Trustees II*, and may even undermine the court's holding with respect to its decision to apply the geophysical and archeological standards to the lease sale stage.

D. Other Laws Affecting OCS Lease Sales

Several other laws are applicable to OCS lease sales. Three of these, the National Environmental Policy Act,[88] the Endangered Species Act[89] and the Marine Mammal Protection Act,[90] give the

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85. Act of May 9, 1994, ch. 38, 1994 Alaska Sess. Laws 308 § 8 (to be codified at ALASKA STAT. § 46.40.094).

86. *Id.*

87. Letter from Bruce M. Bothelo, Attorney General, to Walter J. Hickel, Governor of Alaska 3 (May 8, 1994) (on file with the *Alaska Law Review*).

88. 42 U.S.C. §§ 4321-61 (1988).

89. 16 U.S.C. §§ 1531-44 (Supp. V 1993).

states little influence over OCS activities. The National Environmental Policy Act generally provides that actions such as an OCS lease sale must be accompanied by an environmental impact statement, which at the very least should have the effect of providing valuable information to the affected states.[91] However, courts have chosen to excuse the Department of the Interior from having to produce detailed analyses at the lease-sale stage, largely because of the availability of further review at the later stages of the OCS development process.[92] Under the Endangered Species Act, states have only a comment power,[93] and they have no role at all under the Marine Mammal Protection Act. Similarly, none of the remaining statutes that could in some way affect OCS activities seem to grant any power to the states at the lease sale stage.[94]

III. CONSISTENCY DETERMINATION IN ALASKA

A. Federal Consistency Determination

Before a given tract of the OCS is offered for leasing, the federal government undergoes a planning procedure known as the Area Evaluation and Decision Process.[95] Under the current five-year plan,[96] there are three steps which the Minerals Management Service ("MMS") must take before a lease sale. The first step is the Information Gathering and Evaluation Process, during which the MMS reviews the area for potential OCS development.[97] The

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90. *Id.* §§ 1361-1407 (1988).

91. 42 U.S.C. § 4332(2)(c) (1988).

92. *See, e.g,* North Slope Borough v. Andrus, 642 F.2d 589 (D.C. Cir. 1980); Tribal Village of Akutan v. Hodel, 869 F.2d 1185 (9th Cir. 1988), *cert. den.*, 493 U.S. 873 (1989). For a summary of how the courts have greatly weakened the requirements of the National Environmental Policy Act with respect to OCS activities, see Van de Kamp & Saurenman, *supra* note 8, at 93-98.

93. 16 U.S.C. § 1533(b)(5)(A)(ii) (1988).

94. For a complete listing of the applicable laws, see Elizabeth J. Kerttula & Gabrielle E. LaRoche, ALASKA OUTER CONTINENTAL SHELF OIL AND GAS LEASE SALE REVIEW AND COASTAL ZONE MANAGEMENT: REPORT TO COASTAL POLICY COUNCIL App. J (June 1993) [hereinafter OCS LEASE SALE REVIEW].

95. *Id.* at 28-31.

96. The Department of the Interior coordinates lease sales under five-year plans. 43 U.S.C. § 1344(a) (1988). The current operative plan runs from 1992-1997.

97. OCS LEASE SALE REVIEW, *supra* note 94, at 29.

states have no power over the activity at this stage. After an area has been evaluated and a decision has been made to proceed, the MMS begins the Planning and Consultation Process.[98] During this stage, the MMS interacts with state and local governments, largely for the purpose of creating a "consensus" on whether to proceed with development. The states, however, have no real power to affect a decision made by the MMS at this stage, except perhaps through less formal means such as political pressure.

The states' first real opportunity to interact with the MMS comes during the Analysis of Decision Options Process. At the beginning of the lease sale process, the MMS sends the affected states a proposed notice of sale, alerting state and local governments to the exact location and size of the planned lease.[99] At this stage, the MMS also must prepare an environmental impact statement pursuant to the National Environmental Policy Act,[100] consult with the governors of affected states as required by the OCSLA,[101] and consult other agencies under the Endangered Species Act.[102] Most importantly, though, the MMS must prepare and submit a determination of the lease sale's consistency with the affected state's coastal management program.[103]

This complex process is best illustrated by reference to a specific lease sale. On November 16, 1990, Alaska received a proposed notice of sale from the MMS for Beaufort Sea Lease Sale 124 ("Sale 124").[104] The Sale 124 area was composed of large portions of the continental shelf in the northeastern Chukchi Sea and the Beaufort Sea that contained an estimated 900 million barrels of hydrocarbon resources.[105] The MMS also requested the governor's comments pursuant to the OCSLA, which he submitted prior to the state consistency determination. The MMS published its consistency determination on February 8, 1991, after finding the

98. *Id.*

99. *Id.*

100. 42 U.S.C. § 4332(2)(c) (1988).

101. 43 U.S.C. § 1352(b)(2) (1988).

102. 16 U.S.C. §§ 1536(a)(2) (1988).

103. 15 C.F.R. § 930.40 (1992).

104. This was the first OCS lease sale to be conducted after the enactment of the 1990 Amendments to the CZMA, which had taken effect only eleven days earlier.

105. MMS CONSISTENCY DETERMINATION FOR BEAUFORT SEA OCS LEASE SALE 124, 3 (Feb. 8, 1991) (on file with the *Alaska Law Review*) [hereinafter MMS CONSISTENCY DETERMINATION].

lease sale to be consistent with the ACMP.[106] The state issued its final consistency determination on April 30, agreeing with the MMS's finding that Sale 124 complied with the requirements of the ACMP.[107] Finally, on June 26 the MMS conducted the lease sale.[108]

The MMS consistency determination is worth reviewing in detail. The MMS noted that while the lease sale was composed of seemingly innocuous activities such as submission and evaluation of bids, if a lease were made, the lessee would acquire certain rights, including the right to conduct "preliminary activities."[109] Furthermore, the MMS noted that "[p]release decisions are based on an evaluation of events that could follow the lease sale."[110] Therefore, the federal consistency determination would be based upon much of the same material used in preparing the environmental impact statement required by the National Environmental Policy Act, which included estimates of exploitable resources, exploration and development plans and environmental impact.

Based on previous drilling in the Beaufort Sea, the MMS assumed that exploratory drilling would last five years (1992-1996) with production running from 2000-2018. Furthermore, assuming that oil would be both discovered and produced, the agency calculated a sixty-eight percent chance that one or more spills of at least one thousand barrels of oil would occur during the productive life of the lease sale area.[111] Finally, the MMS estimated that the oil would be transported approximately 600 miles by pipeline, connecting the productive wells with the Trans-Alaska Pipeline. Onshore support for the OCS activities would be centered in Prudhoe Bay.[112]

In assessing the likely impact of offshore activities, the MMS made further assumptions concerning the exact nature of the activities. For instance, in concluding that the community of Nuiqsut would suffer a high level of disturbance, the MMS assumed that the landfall of the pipeline would occur at Point Thompson.

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106. *Id.*

107. Office of the Governor, CONCLUSIVE CONSISTENCY DETERMINATION: OCS BEAUFORT SEA LEASE SALE 124, April 30, 1991.

108. MMS CONSISTENCY DETERMINATION, *supra* note 105, at 17.

109. *Id.* at 2.

110. *Id.*

111. *Id.* at 3.

112. *Id.*

This location is in the immediate vicinity of Flaxman Island, the primary site for Nuiqsut subsistence whaling activities. Construction in that area would probably drive away bowhead whales for the duration of the construction period. Such a result would be a serious blow to the Nuiqsut, particularly if the whales were driven to areas beyond the range of their hunters. Onshore pipeline construction activity was also found to have a probable moderate disruptive effect on caribou migration patterns.[113]

Having made these assumptions, the MMS then proceeded to analyze the ACMP and the North Slope Borough Coastal Management Plan in light of the anticipated activities during the term of the lease.[114] Wherever possible, the MMS assumed compliance with state and local standards.[115] For instance, because the North Slope Borough Coastal Management Plan limits support facilities for tankers,[116] the MMS assumed the use of pipelines for transportation and pointed out that lease stipulations require pipelines under most circumstances.[117] Furthermore, offshore pipelines were assumed to continue inland immediately after crossing the beach in order to comply with section 80.080 of title 6 of the Alaska Administrative Code, which requires that transportation facilities be situated inland from shorelines and beaches.[118]

In order to determine that Sale 124 was consistent with the ACMP and North Slope Borough Coastal Management Plan subsistence standards, the MMS was forced to assume that certain stipulations would be incorporated into the lease. Of particular force was the agency's conclusion that construction activities near Flaxman Island would disrupt subsistence bowhead whaling. Stipulation 6 of Sale 124 (Substinence Whaling and Other Sub-

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113. *Id.* at 4.

114. *Id.* at 8-21.

115. Because these and other MMS assumptions deal primarily with the anticipated effects of production rather than of the lease sale itself, they probably do not fall within the scope of a phased consistency determination concerning a lease sale under the new ALASKA STAT. § 46.40.094(c). *See supra* text accompanying notes 85-87. As a result, such a forward looking assessment of consequences may no longer be required during a consistency determination.

116. § 2.4.5.1[g].

117. MMS CONSISTENCY DETERMINATION, *supra* note 105, at 12.

118. *Id.* The MMS was even able to project the location and length of the pipeline—about 275 miles offshore and 325 miles inland were estimated to be necessary to move oil from the production platforms to the Trans-Alaska pipeline. *Id.* at 3.

stinence Activities) requires that the lessee contact affected native communities as well as the Alaska Eskimo Whaling Commission and make reasonable efforts to ensure that OCS activity does not conflict with subsistence activities.[119] The MMS decided that this stipulation was sufficient to ensure that Sale 124 was "consistent with subsistence policies to the maximum extent practicable."[120] The MMS chose not to assume a seasonal drilling restriction to protect the whales during the hunting season. This was done for several reasons, including the fact that Alaska did not request such a restriction and that the Department of Commerce had found previously that any advantages accruing to subsistence communities and/or endangered species through seasonal restrictions would be outweighed by the substantial cost the lessee would bear.[121] Ultimately, the MMS concluded that Sale 124 was consistent with the ACMP.

B. State Consistency Determination Review

As noted above, following the enactment of the 1990 Amendments to the CZMA, OCS lease sales have required state consistency review. This review is the first real opportunity for coastal states to attack a federal decision to proceed with unwanted development of the OCS off their shorelines. It is critical that a state wishing to exercise control over OCS development enact a detailed coastal management plan in order to be able to challenge a federal consistency determination at this stage.

State consistency review begins when it receives the MMS's consistency determination. Under Alaska regulations governing the review process, there is an initial twenty-five day period from the time when the state agency receives the MMS determination, during which it may request additional information from the person seeking to engage in OCS activity.[122] The Department of Governmental Coordination can hold up the review process until such information is received.[123] The state may then issue a conclusive determination based on the received comments within forty-five days. However, the federal action proponent, state resource

119. *Id.* app. A at 6.
120. *Id.* at 14.
121. *Id.* at 15.
122. ALASKA ADMIN. CODE tit. 6, § 50.070(g) (Jan. 1993).
123. *See generally id.* § 50; OCS LEASE SALE REVIEW, *supra* note 94, at 11.

agencies or any affected coastal district may "elevate"[124] a proposed decision for further review by state resource agency directors.[125] State regulations provide for a total of three levels of review, and because each level of review must be completed within fifteen days, the entire process may be completed within the ninety days provided in the CZMA.[126] Alaska also provides for appeal by coastal districts or coastal citizens to the Alaska Coastal Policy Council.[127] However, due to practical considerations, such a review would probably not be available within the federally imposed time frame.

State rejection of a federal consistency determination must be accompanied by reasons explaining the disagreement.[128] If the parties cannot resolve their differences, they may go through a mediation process.[129] The availability of mediation does not exclude other remedies, nor is it a prerequisite for judicial action.[130] If the state cannot settle its dispute through mediation, and chooses to go through the court system, it will run up against the "arbitrary and capricious" standard established in *Citizens to Preserve Overton Park v. Volpe*.[131] Perhaps states might do better in mediation, but it seems likely that the same high standard would stand in their way. Therefore, regardless of whether the state anticipates mediation, it is imperative that states make sure that their positions are properly supported by legislation and regulations when they disagree with a federal consistency determination. The existence of detailed, supporting legislation and regulations

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124. "Elevated" effectively means "appealed" during the consistency review process.

125. ALASKA ADMIN. CODE tit. 6, § 50.070(j) (Jan. 1993).

126. The CZMA actually only provides a 60 day window for state consistency review during the 90 day period between the issuance of its consistency determination and the time at which it can take action. 15 C.F.R. §§ 930.39-.40. There remains some debate over whether Alaska would be able to utilize the full 90 days or whether the MMS could limit the state to 60 days (thus eliminating two potential review levels). However, because the three-level review process is part of the federally approved ACMP, it appears that the federal government has implicitly guaranteed Alaska the use of the full 90 days.

127. ALASKA STAT. § 46.40.100 (1991).

128. 15 C.F.R. § 930.42.

129. *Id.* § 930.43.

130. *Id.* § 930.116.

131. 401 U.S. 402 (1971). Courts have utilized that standard to uphold decisions made by the Secretary of the Interior in *California v. Watt*, 683 F.2d 1253 (9th Cir. 1982) and *Louisiana v. Lujan* 777 F. Supp. 486 (E.D. La. 1991).

increases the chances that the Secretary of the Interior's rejection of the state's consistency findings will be found arbitrary and capricious.

IV. ALASKA'S ABILITY TO INFLUENCE THE OCS DEVELOPMENT PROCESS

A. Significance of the Lease Sale Stage

If Alaska wishes to exert any real influence over the OCS development process, it should do so as early as possible, preferably at the lease sale stage. However, courts have attempted to weaken the role of the states at this early stage, relying on five main propositions to achieve this goal:

> (1) No physical impacts of importance can follow the sale without first being approved by the Secretary of the Interior;
> (2) The successful lessees do not acquire any right to proceed to exploration and development but only a priority for submitting plans of exploration and development and production plans;
> (3) At the exploration, development, and production stages, all environmental statutes apply, including [the National Environmental Policy Act];
> (4) At the exploration, development, and production stages, the Secretary retains the authority to suspend or cancel leases if the environmental impacts of development are too great; and
> (5) At exploration and development stages, the consistency provisions of the Coastal Zone Management Act allow states a substantial voice in what activities will occur.[132]

However, the logic of the various courts that have attempted to minimize the importance of the lease sale stage is fundamentally flawed. The lease sale stage is absolutely critical to OCS development. In *Trustees II,* the Alaska Supreme Court noted the importance of the lease sale:

> [E]nvironmentally protective purposes require that at the time [the Department of Natural Resources] reviews any . . . permit application it consider the probable cumulative impact of all anticipated activities which will be a part of [the project in question], whether or not the activities are part of the permit under review. If [the Department of Natural Resources] determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved.[133]

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132. Van de Kamp & Saurenman, *supra* note 8, at 99 (footnotes omitted).

133. 851 P.2d 1340, 1344 n.8 (Alaska 1993) (quoting *Trustees for Alaska v. Gorsuch*, 835 P.2d 1239, 1246 (Alaska 1992)).

Moreover, the states are no longer powerless to have an early effect on the process. When the 1990 Amendments to the CZMA were passed, the states' power at the lease sale stage increased substantially because it became clear that the lease sales are subject to state consistency review.

The paramount importance of the lease sale stage emanates from the fact that it is the only opportunity to review the entire lease sale area as a whole. Review at the exploration or development stages is limited to those individual lease sites within the lease area which are part of the current exploration or development plan. Deferring consideration of environmental issues until only individual lease sites are reviewed "may tend to mask appreciation of any cumulative environmental threat that would otherwise be apparent if [the Department of Natural Resources] began with a detailed and comprehensive identification of those hazards."[134] Thus, individualized site review cannot effectively protect the Alaskan coastal region as a whole.

Furthermore, the Secretary of Interior's power to suspend or cancel a lease does not provide any real safeguards to the state's interests. Once an OCS area has been leased, a certain amount of inertia tends to drive the area toward development. First, the Department of the Interior has a financial interest in not cancelling a lease—the OCSLA provides that in the event of a cancellation, a lessee is entitled to compensation equal to the lesser of anticipated profits or the difference between the lessee's revenues to date and his expenditures.[135] More importantly the Department of the Interior has never cancelled any lease for any reason. As one commentator points out, "for Interior the benefits associated with protecting the environment have never been valuable enough to justify incurring the high cost of cancelling a lease agreement."[136]

Overall, the courts' reliance on the later stages of review is unwarranted. In addition to the fact that issues such as cumulative effects cannot be adequately addressed beyond the lease sale stage, the regulations applicable to the post-lease sale phases of OCS development only address the question of what form exploration and production should take, as opposed to whether they should occur at all.[137] Also, state consistency review at later stages is

134. *Id.* at 1344.
135. 43 U.S.C. § 1334(a)(2)(C) (1988).
136. Van de Kamp & Saurenman, *supra* note 8, at 104.
137. *Id.* at 105.

severely limited by the Department of the Interior's position that environmental impact statements are not required for exploration plans.[138] This has the effect of denying the state the chance to examine all possible environmental effects. Finally, state denials of exploration or development plans will not be upheld unless the state provides to the lessee a "reasonable alternative."[139] This prevents a state from completely blocking undesirable exploration or development. Therefore, if a state wishes to exercise any real control over the OCS development process, it must do so at the lease sale stage.

B. A Case Study: Alaska's Oil and Gas Transportation Standard

The importance of the lease sale stage to Alaska is exemplified by the single issue of oil transportation from OCS facilities to inland points. Under *Trustees II*, Alaska may not include a review of the method of oil transportation at the lease sale consistency review.[140] Therefore, Alaska's transportation standard cannot serve to determine which lease sales are consistent with the ACMP and which are not. Still, the very existence of the transportation standard is evidence that the state believes it to be an integral part of the ACMP. Its inapplicability at the lease sale stage is an issue that should be addressed by the state so as to ensure that federal lease sales are conducted in a manner consistent with Alaska's requirements for oil transportation.

The hazards accompanying oil transportation methods pose cumulative risks that might go unnoticed if each lease site were allowed to determine its transportation plan separately. For instance, a lease site generating a low level of tanker activity might be allowed to begin production under the ACMP. But, if tanker activity for other sites in the same leasing area are not taken into account, factors such as the cumulative probability of collision and the total oil tonnage being transported might not be fully appreciated.

One example of the extremely harmful effects of cumulative risks can be seen in Louisiana. Most of the 20,000 OCS wells drilled since the beginning of offshore oil production are in the western Gulf of Mexico. A large number of these wells are off the

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138. *Id.* at 108-09.

139. *Id.* at 110. The right to appeal to the Secretary of Commerce is established by 16 U.S.C. § 1456(c)(3)(B) (Supp. V 1993).

140. *See supra* text accompanying notes 82-84.

shores of Louisiana, which depends so heavily on the oil industry that it has been reluctant to attack OCS development until recently. Today, Louisiana suffers from an astounding rate of coastal erosion—it loses an area approximately equal to that of the District of Columbia (fifty square miles) each year.[141] Although no single pipeline could possibly have caused this level of damage, the cumulative effect of all the pipelines is an environmental disaster. Perhaps Alaska's coastlines are not as susceptible to erosion as Louisiana's marsh, but there is no guarantee that local problems unique to Alaska would not arise on a similar scale.

Alaska must prevent such a possibility by amending its transportation standard so that it applies at all stages of the OCS process. One way to do this would be to amend section 80.080 of title 6 of the Alaska Administrative Code to specifically require that transportation analysis be conducted on the basis of whatever information and reasonable projections are available at the time of the consistency determination.[142] There has been some concern that there is not enough information to make a determination about transportation routes until actual drill sites have been established.[143] However, as a matter of course, the MMS makes reasonable assumptions about transportation routes when producing both their environmental impact statement and their consistency determination.[144] If there is a genuine lack of information, the Department of Natural Resources could simply adopt the projections of the MMS for the purpose of making its own consistency determination.

Concern about whether the state would be "locked in" to a determination under the transportation standard is also unfounded. Determination under other ACMP standards does not preclude a later determination that reverses the first one. For instance, if an OCS lessee made an important archaeological find that warranted

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141. Wiygul, *supra* note 2, at 140, n. 292.

142. Along these same lines, Alaska could adopt a general amendment to section 80 of title 6 of the Alaska Administrative Code which requires all ACMP reviews to supplement factual information with reasonable projections about factual data. The ACMP could at the same time reserve the right to alter initial determinations which were based on projections as actual data becomes available.

143. Indeed, this very concern appears to have driven the ruling in *Trustees II*, where the court stated that "until and unless a commercially exploitable discovery is made, there will be no occasion for siting, designing or constructing transportation and utility routes." *Trustees II*, 851 P.2d at 1346.

144. *See supra* text accompanying notes 111-21.

an end to OCS activity in that area, no one could reasonably claim that the Department of Natural Resources' previous determination to allow development would prevent review of the same area. Similarly, if data revealing unforeseen hazards (or simply more serious hazards than originally anticipated) relating to transportation became available after an initial consistency determination, there is no reason to believe that it would be allowed to continue. Alaska should explicitly reserve the right to reevaluate the consistency of an activity in light of any new data or interpretations of data that could reasonably be expected to reveal a violation of the ACMP.

Alaska should also try to be more specific about what the ACMP requires from its transportation standard. Other state coastal management programs address transportation much more specifically. For example, California explicitly prefers pipelines over tankering.[145] Section 80.080 of title 6 of the Alaska Administrative Code does contain specific references to the siting of onshore facilities and compliance with district programs. However, it could easily be amended to state a preferred method of transportation. It could also be used to address issues that are uniquely Alaskan. For example, the state might wish to limit or eliminate tankering in broken-ice conditions. Such specificity is desirable because it would give the state much firmer ground on which to stand in either a challenge to its consistency determination or in a court battle with the Secretary of the Interior. Today, even if the state were to feel that tankering was a possibility for a given lease area, and wished to limit it to non-broken-ice conditions, the Secretary could simply decide that such activity is not a violation of the ACMP and then hide behind the "arbitrary and capricious" standard. But, if the ACMP expressly forbade tankering in those conditions, such action by the Secretary might actually appear either arbitrary or capricious.

V. CONCLUSION

The availability of consistency review provides Alaska with a unique opportunity to exercise real influence over the development of the natural resources off its shoreline. Although the state can never fully control these resources, it can ensure that oil and gas production on the OCS does not run afoul of the standards which

145. CAL. PUB. RES. § 30265(b) (1990).

it has set for other offshore activities by revising the ACMP. State control in this area is especially important to Alaska because of the scope of potential problems and opportunities that could arise as a result of OCS petroleum development. Only the states can fully understand the implications of offshore activities to local environments and economies. Alaska, with its unique environment and natural wealth, is in a position to steer OCS development toward a controlled growth that can help meet the energy needs of the nation as a whole without undue risk to one of the nation's treasures—the Alaskan landscape.

Alaska can accomplish this by taking a few necessary steps. First and foremost, it must revise the ACMP to ensure that it applies to all stages of OCS development, particularly the lease sale stage. An ACMP that does not apply at the critical early stages is ineffective in light of considerations such as the inertia behind taking a leased area through to production. If any given standard within the ACMP does not apply to the lease sale stage (such as transportation), it must be revised so that it does. Furthermore, the phasing system[146] should be revised in order to make it clear that it is not intended to allow phases of OCS activities to proceed without examining the consequences of the activity as a whole. Phasing should grant flexibility to an agency by allowing it to focus on a smaller time frame, not hamstring it by forcing it to look only at presently available facts. This could easily be accomplished by amending the ACMP regulatory definitions to include MMS projections and other possible outcomes of the activity among the "reasonably foreseeable, significant effects" under Alaska Statutes section 46.40.094(b)(2)(C). A detailed ACMP that applies to the early phases of offshore development can be used either to challenge a federal consistency determination directly or as a negotiating tool, as was the case with the review of Sale 124. The ACMP must become the primary means for Alaska to exert power over OCS development.

Alaska should also continue to use some of the less reliable means of influencing the process, such as the gubernatorial comment power under the OCSLA and its power to issue consistency determinations. As previously discussed, these methods should not be relied upon to produce desired results, as the Secretary of the Interior's determinations are subject to a very high

146. *See supra* text accompanying notes 85-87.

level of deference. However, these methods have been successful in the past as a means of incorporating limited concerns into a given lease, and they should continue to be used as a kind of testing ground for future ACMP regulations.

There is enormous wealth off Alaska's coast. This wealth includes not only petroleum, but also resources such as fish, tourism and natural beauty. The development of any offshore resource also has substantial effects on the land. Regardless of whether these effects are negative (such as oil spills or interference with subsistence lifestyles) or positive (such as more jobs and increased wealth), Alaska should have a say in whether these effects will be allowed. It does. Consistency review under the CZMA gives the state the means to play a role in regulating federal activities off its shore. Alaska must grasp this opportunity to the greatest degree possible. Using the ACMP through CZMA consistency review is Alaska's key to shaping its own future.

M. David Kurtz