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## Can We Drill Now?: The Ninth Circuit's View on Filing Environmental Impact Statements. *Alaska Wilderness League v. Kempthorne*

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# Can We Drill Now?: The Ninth Circuit's View on Filing Environmental Impact Statements

*Alaska Wilderness League v. Kempthorne*<sup>1</sup>

## I. INTRODUCTION

From the 1960s to the 1980s, there was a flood of interest in environmental policy in the United States. In 1970, the National Environmental Policy Act (hereinafter “NEPA”) was passed by Congress in response to the growing public demand for cleaner water, air, and land, as well as to enhance the public’s views of environmental policy.<sup>2</sup> Later that year, a joint effort by Congress and President Nixon produced the Environmental Protection Agency (hereinafter “EPA”).<sup>3</sup> Since the passing of the NEPA and the creation of the EPA, Congress has passed even more environmentally specific provisions to ensure the protection of our country’s wildlife, water, air, and land.<sup>4</sup> With issues such as global warming and alternative energy sources making headlines, environmental concerns continue to be at the forefront of American politics and policy.<sup>5</sup> With the 2008 vice presidential nomination of Alaska Governor Sarah Palin and the Republican Party slogan of “Drill Baby Drill,” the issue of oil and gas exploration off the coast of Alaska has been topping headlines and public polls.<sup>6</sup>

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<sup>1</sup> 548 F.3d 815 (9th Cir. 2008)

<sup>2</sup> 42 U.S.C. § 4321 (2006).

<sup>3</sup> Environmental Protection Agency, About EPA, <http://www.epa.gov/epahome/aboutepa.htm> (last visited Sept. 28, 2009) (follow “Our History” hyperlink).

<sup>4</sup> See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531-1543 (2006); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006); Clean Air Act, 42 U.S.C. §§ 7401-7671q.

<sup>5</sup> Kent Garber, *McCain and Obama Take on Environmental Concerns*, US NEWS & WORLD REP., July 10, 2008, <http://www.usnews.com/articles/news/campaign-2008/2008/07/10/mccain-and-obama-take-on-environmental-concerns.html>.

<sup>6</sup> See generally Mary Lu Carnevale, *Steele Gives GOP Delegates New Cheer: “Drill, Baby, Drill!”*, WALL ST. J., Sept. 3, 2008; Juliann Vachon, *Sarah Palin, Republican Vice Presidential Nominee*, L.A. TIMES, Nov. 1, 2008.

## CAN WE DRILL NOW?

Traditionally, the Ninth Circuit has been a leader in advocating and recognizing rules and regulations protecting environmental interests. In its recent decision, *Alaska Wilderness League v. Kempthorne*, the Ninth Circuit revisited holdings of its past decisions to interpret the duty of a federal agency when accepting or rejecting environmental assessments submitted by private companies wishing to conduct projects that could have a significant impact on the environment.<sup>7</sup> The court's decision in *Alaska Wilderness League* was a shift from an opinion issued by the Ninth Circuit just a few months before.<sup>8</sup> This note analyzes the Ninth Circuit's considerations in interpreting the provisions of the NEPA and the Outer Continental Shelf Lands Act (hereinafter "OCSLA")<sup>9</sup> to determine what constitutes a "hard look" at the exploration plan as defined by these Acts. This note emphasizes the need for detailed guidelines on the procedure as well as the ability to retain flexibility so that the precise guidelines may be applied in all situations without the need for judicial interpretation in every case.

### II. FACTS AND HOLDING

In 2002, the Minerals Management Service (hereinafter "MMS") determined a lease sale schedule for the Outer Continental Shelf off the Gulf of Mexico and Alaska.<sup>10</sup> The plan included three different lease sales in the Beaufort Sea.<sup>11</sup> At issue in this case is Lease Sale 195, which was purchased in July 2004 by Shell Offshore (hereinafter "Shell") and located in the Beaufort Sea.<sup>12</sup> Shell's proposed drilling is the first drilling activity considered in the Beaufort Sea in relation to the new lease sales developed by MMS.<sup>13</sup>

The Beaufort Sea is part of the Arctic Ocean and borders the northern shore of Alaska.<sup>14</sup> The Beaufort Sea is home to the Western Arctic stock

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<sup>7</sup> *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 824-25 (9th Cir. 2008).

<sup>8</sup> *Id.* at 842 (Bea, J., dissenting).

<sup>9</sup> 43 U.S.C. §§ 1331-1356 (2006).

<sup>10</sup> *Id.* at 817.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 818.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 820.

of bowhead whales, which are deemed an endangered species under the Endangered Species Act.<sup>15</sup> Researchers have found that the whales are particularly susceptible to noise in their environment.<sup>16</sup> Increased intensities of underwater noise can cause problems such as temporary or permanent hearing damage, or even go as far as affecting the whale's behaviors and displacing their migratory routes.<sup>17</sup>

Furthermore, Shell's exploratory drilling could adversely affect more than just marine mammals. For example, the Inupiat Eskimos are also residents of Alaska's northern coast and have long relied on the Beaufort Sea for subsistence.<sup>18</sup> In particular, the Inupiats depend on the bowhead whale as an important source of food.<sup>19</sup> Shell's proposed exploratory drilling is set to take place within or adjacent to the Inupiats' whale hunting waters, which could wreak havoc on the whale's behavioral patterns and, therefore, interrupt the Inupiats' whaling endeavors.<sup>20</sup>

The OCSLA requires that a lessee obtain approval of an exploration plan before beginning any exploratory drilling.<sup>21</sup> The exploration plan must include a project-specific environmental impact statement (hereinafter "EIS") assessing the potential effects of the proposed exploration activities.<sup>22</sup> The exploration plan is then submitted to MMS to evaluate the plan's accuracy and determine whether it fulfills the OCSLA requirements.<sup>23</sup> Next, MMS conducts an environmental review pursuant to the NEPA<sup>24</sup> and issues a decision to notify the lessee whether the exploration plan is approved, disapproved, or will require modifications.<sup>25</sup>

Shell submitted the first version of its exploration plan for drilling operations on Lease Sale 195 in the Beaufort Sea in November 2006, and

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<sup>15</sup> *Id.* (citing 50 C.F.R. § 17.11(h) (2008)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Alaska Wilderness*, 548 F.3d at 818 (citing 30 C.F.R. § 250.201 (2008)).

<sup>22</sup> *Id.* (citing 30 C.F.R. § 250.227).

<sup>23</sup> *Id.* (citing 30 C.F.R. § 250.231(a)).

<sup>24</sup> 42 U.S.C. §§ 4321-4347 (2006).

<sup>25</sup> *Alaska Wilderness*, 548 F.3d at 818 (citing 30 C.F.R. §§ 250.232(c), 250.233).

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MMS issued its conclusions on the plan one month later.<sup>26</sup> MMS indicated that it needed more information from Shell before it could allow Shell to start its intended exploratory drilling, and it asked Shell to determine specific locations for which it was seeking approval to drill.<sup>27</sup> Additionally, MMS requested more information on the potential impact of underwater noise, “conflict avoidance mechanisms,” and other procedures that could alleviate the potential harmful effects of the exploratory drilling.<sup>28</sup> In response, Shell filed a revised exploration plan on January 12, 2007, which included its environmental report and an oil spill contingency plan; however, no further information was given regarding the information MMS had requested, particularly the specific locations of Shell’s exploratory drilling.<sup>29</sup> Regardless, MMS determined that Shell’s exploration plan was satisfactory and complete, and thus, began the thirty-day approval process on January 17, 2007.<sup>30</sup>

Throughout the thirty-day approval period, several environmental experts expressed concern about the effects the drilling would have on the bowhead whale and polar bear populations as well as on the local Inupiat’s subsistence harvest.<sup>31</sup> Despite these concerns, on February 15, 2007, MMS concluded there would be “no significant impact” on local populations and issued an exploration approval.<sup>32</sup> Because MMS found that the exploratory drilling would not “cause undue or serious harm or damage to the human, marine, or coastal environment,” a more detailed EIS was not ordered to specify Shell’s intended activity in the Beaufort Sea.<sup>33</sup>

On April 13, 2007, the Alaska Wilderness League, the National Resources Defense Council, and the Pacific Environment filed a Petition for Review with the Ninth Circuit.<sup>34</sup> Soon thereafter, the North Slope Borough and the Alaska Eskimo Whaling Commission filed an

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<sup>26</sup> *Id.* at 818-19.

<sup>27</sup> *Id.* at 819.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

administrative appeal with the Interior Board of Land Appeals from MMS's approval of Shell's exploration plan.<sup>35</sup> However, the Interior Board issued a stay on the administrative proceedings pending the outcome of the Alaska Wilderness League's Petition for Review.<sup>36</sup> Shell then filed a Motion to Intervene on the Alaska Wilderness League's Petition for Review on May 14, 2007.<sup>37</sup> The next day, the North Slope Borough and the Alaska Eskimo Whaling Commission filed an independent Petition for Review with this court.<sup>38</sup> Finally, Resisting Environmental Destruction on Indigenous Lands filed a Petition for Review and Motion to Consolidate on May 22, 2007.<sup>39</sup> The Ninth Circuit consolidated all of the Petitions for Review on July 2, 2007, and granted Alaska Wilderness League's Motion to Stay on August 14, 2007, which ordered MMS's decision on Shell's exploration plan on Lease Sale 195 inoperative until the court could consider the matter on its merits.<sup>40</sup>

The Ninth Circuit, in a split 2-1 decision, vacated MMS's approval of the exploration plan and remanded the case.<sup>41</sup> The court required MMS to prepare a revised environmental assessment or an EIS and to take a "hard look" as mandated by the NEPA.<sup>42</sup> The court also held that detailed locations and information about the wells was essential to MMS's capacity to investigate the project's potential environmental effects.<sup>43</sup> By consenting to the three-year project without contemplating the specific locations of all present and future wells, MMS violated provisions of both the NEPA and OCSLA.<sup>44</sup>

On March 6, 2009, the Ninth Circuit vacated and withdrew its opinion in *Alaska Wilderness League v. Kempthorne*.<sup>45</sup> On June 30, 2009, the Ninth Circuit released a revised opinion, with a newly-styled caption to

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 819-20.

<sup>40</sup> *Id.* at 820.

<sup>41</sup> *Id.* at 835.

<sup>42</sup> *Id.* at 833-34.

<sup>43</sup> *Id.* at 835.

<sup>44</sup> *Id.*

<sup>45</sup> 559 F.3d 916 (9th Cir. 2009).

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show the succession of the new administration, in *Alaska Wilderness League v. Salazar*.<sup>46</sup> The Court held that because Shell withdrew its exploration plan on May 5, 2009, the litigation regarding such exploration plan was considered moot.<sup>47</sup> When Shell withdrew its exploration plan, MMS rescinded its previous approval of the exploration and declared the plan “null and void.”<sup>48</sup>

### III. LEGAL BACKGROUND

#### A. *The National Environmental Policy Act (“NEPA”)*<sup>49</sup>

The NEPA was enacted by Congress in 1970 with the goals of “declar[ing] a national policy which will encourage . . . harmony between man and his environment” and “promot[ing] efforts [to] prevent or eliminate damage to environment . . . and stimulate the health and welfare of man.”<sup>50</sup> The NEPA requires that all federal agencies prepare an EIS when considering activities that have the possibility of “significantly affecting the quality of the human environment.”<sup>51</sup> However, prior to preparing an EIS, a federal agency may complete a less exhaustive environmental assessment to determine how severe of an impact, if any, the project will have on the local environment.<sup>52</sup> An environmental assessment is a public document used to determine whether to prepare an EIS or a finding of no significant impact (hereinafter “FONSI”).<sup>53</sup> “[A]n [EIS] *must* be prepared if substantial questions are raised as to whether a project . . . may”<sup>54</sup> significantly affect the human environment.<sup>55</sup> If an

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<sup>46</sup> 571 F.3d 859 (9th Cir. 2009).

<sup>47</sup> *Id.* at 859.

<sup>48</sup> *Id.*

<sup>49</sup> 42 U.S.C. §§ 4321-4347 (2006).

<sup>50</sup> *Id.* § 4321.

<sup>51</sup> *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 824 (quoting 42 U.S.C. § 4332).

<sup>52</sup> *Id.* (citing 40 C.F.R. § 1508.9 (2008); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001)).

<sup>53</sup> *Id.* (quoting 40 C.F.R. § 1508.9(a)).

<sup>54</sup> *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)).

agency states that there will be “no significant impact” on the human environment, issues a FONSI, and, therefore, does not file an EIS, the agency must provide a statement of reasons to explain its decision.<sup>56</sup> If it is determined that a project will not likely have a significant impact on the environment, the agency must cite specific evidence in support of its conclusion and not rely on “conclusory assertions.”<sup>57</sup> The federal agency must state that it took the required “hard look” at the potential environmental impacts of a project to justify its action of not completing an EIS.<sup>58</sup>

The Council on Environmental Quality has written regulations to establish that an agency must look to the context and intensity of a project when concluding whether the effects will be “significant.”<sup>59</sup> When considering the context of the project, the agency should review “the location and interests that would be affected by the proposed action.”<sup>60</sup> When looking to the intensity of the project, the agency should review “the severity of the impact” and the included specific factors that should be addressed during the review.<sup>61</sup>

### B. *The Outer Continental Shelf Lands Act (“OCSLA”)*<sup>62</sup>

One of the many purposes of OCSLA is “to permit an expedient resolution of preliminary matters in the development of oil lands while preserving administrative and judicial review for future times when

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<sup>55</sup> *Id.* (alteration in original) (quoting *Idaho Sporting Cong.*, 137 F.3d at 1149).

<sup>56</sup> *Id.* (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); 40 C.F.R. §§ 1501.4(e), 1508.13).

<sup>57</sup> *Id.* (quoting *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005)).

<sup>58</sup> *Id.* (citing *Blue Mountains Biodiversity Project*, 161 F.3d at 1212).

<sup>59</sup> *Id.* at 825 (citing 40 C.F.R. § 1508.27).

<sup>60</sup> *Id.* (citing 40 C.F.R. § 1508.27(a)).

<sup>61</sup> *Id.* (quoting 40 C.F.R. § 1508.27(b)). The factors the Council on Environmental Quality listed includes: “the effect on public health and safety; the unique characteristics of the geographic area; the degree to which the effects on the quality of the human environment are likely to be highly controversial; the degree to which the possible effects are highly uncertain or involve unknown risks; and the possible impacts on an endangered or threatened species.” *Id.* (citing 40 C.F.R. § 1508.27(b)(2)-(5), (7)).

<sup>62</sup> 43 U.S.C. §§ 1331-1356a (2006).



potential threats to the environment are readily visualized and evaluated.”<sup>63</sup> When Congress passed OSCLA, it stipulated that the Act did not change a federal agency’s obligations under the NEPA.<sup>64</sup> The regulations interpreting the Act specifically state that “the [agency] will evaluate the environmental impacts of the activities described in [the] proposed [exploration plan] and prepare environmental documentation under [the NEPA].”<sup>65</sup>

OCSLA sets out a four-step review process for oil and gas development.<sup>66</sup> The four steps are: preparation of a lease-sale schedule, lease sales, exploration of the lease-sale area, and development and production.<sup>67</sup> This process allows an agency to modify its investigation to ensure all activities are conducted in an environmentally safe manner.<sup>68</sup> Courts have previously determined that there is NEPA and individual regulatory review at each stage of the OSCLA process.<sup>69</sup> There are also statutory measures set up to ensure agencies’ compliance through each step of the OCSLA procedure.<sup>70</sup> Specifically, during the exploration phase, the lessee must submit an exploration plan for review to the controlling federal agency.<sup>71</sup> That agency then has thirty days to review and either approve or disapprove the exploration plan.<sup>72</sup> The agency must deny the plan if the agency determines that the exploration would result in “serious harm or damage” to the marine, coastal, or human environment.<sup>73</sup>

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<sup>63</sup> *Alaska Wilderness*, 548 F.3d at 828 (quoting *Vill. of False Pass v. Watt*, 565 F. Supp. 1123, 1135 (D. Alaska 1983)).

<sup>64</sup> *Id.* at 834 (citing 43 U.S.C. § 1866(a)).

<sup>65</sup> 30 C.F.R. § 250.232(c) (2008).

<sup>66</sup> *Alaska Wilderness*, 548 F.3d at 823 (citing *Sec’y of the Interior v. California*, 464 U.S. 312, 337 (1984)).

<sup>67</sup> *Id.* (citing *Sec’y of the Interior*, 464 U.S. at 337).

<sup>68</sup> *Id.*

<sup>69</sup> *See, e.g., Sec’y of the Interior*, 464 U.S. 312.

<sup>70</sup> *See Alaska Wilderness*, 548 F.3d at 824.

<sup>71</sup> *Id.* at 823-24 (citing 43 U.S.C. § 1340(c) (2006)).

<sup>72</sup> *Id.* at 824 (citing 43 U.S.C. § 1340(c)(1)).

<sup>73</sup> *Id.* (quoting 43 U.S.C. § 1334(a)(2)(A)(i)).

C. Lands Council<sup>74</sup> and the Ninth Circuit

In *Lands Council*, the Ninth Circuit held that it is not the judiciary's proper role to "make fine-grained judgments" about the weight of specific studies on which an environmental agency relies.<sup>75</sup> Rather, "[the judiciary] should be 'most deferential' when the agency is 'making predictions, within its area of special expertise, at the frontiers of science.'"<sup>76</sup> The court also held that an agency does not have to explain all possibilities resulting from an uncertainty in an environmental assessment or EIS, as long as the statement identifies these areas of uncertainty and no scientific research can determine the outcome to these uncertainties.<sup>77</sup> However, the court stated that if the area of uncertainty is significant, the agency has a duty to address such uncertainties, as this has been the view of the Ninth Circuit and the United States Supreme Court in the past.<sup>78</sup> The court specifically set out three roles of the judiciary in reviewing an environmental agency's judgments on an exploration plan.<sup>79</sup> These roles involve making sure the agency stays within the parameters that Congress intended, does not forget to think about an essential issue in the proposed plan, and offers solutions that are consistent with the evidence and expertise provided by the agency.<sup>80</sup> The *Lands Council* decision signified a major shift in the Ninth Circuit's environmental law position.<sup>81</sup> This shift embraced a new willingness to allow executive agencies to have more leniency compared to the older strict restraints imposed on environment assessments and EIS.<sup>82</sup>

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<sup>74</sup> *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008).

<sup>75</sup> *Id.* at 993 (internal quotation marks omitted) (citing with disapproval *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1077 (9th Cir. 2005)).

<sup>76</sup> *Id.* (quoting *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1099 (9th Cir. 2003)).

<sup>77</sup> *Id.* at 1001-02.

<sup>78</sup> *Id.* at 1001.

<sup>79</sup> *See id.* at 993.

<sup>80</sup> *Id.*

<sup>81</sup> *See id.* at 988.

<sup>82</sup> Dan Levine, *Alaska Drilling Case May Test 9<sup>th</sup> Circuit's Envio Cred*, RECORDER, Nov. 24, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202426221578>.

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### D. Change in Administration

This lawsuit was filed against Dirk Kempthorne, who became the Secretary of the Department of Interior under the Bush Administration in 2006.<sup>83</sup> Secretary Kempthorne was formerly a republican governor and senator from Idaho and is known for his conservative beliefs.<sup>84</sup> Kempthorne's time at the helm of Department of the Interior was plagued by controversy and criticism.<sup>85</sup> He was especially criticized by environmental groups who accused him of watching out for corporate interests at the expense of the environment, endangered species, and the human race.<sup>86</sup> In fact, the Center for Biological Diversity filed suit against Secretary Kempthorne for mismanagement of the Department of the Interior in late 2008, the closing days of the Bush Administration.<sup>87</sup>

Kempthorne's Department of the Interior was especially scrutinized when MMS officials, overseen by the Department of Interior, were discovered abusing power and trading favors with oil and gas industry representatives.<sup>88</sup> The investigation uncovered that MMS officials had accepted various gifts from energy companies, conduct which is banned under government ethic rules.<sup>89</sup> These gifts included golf and ski trips, meals, cocktails, and tickets to concerts, football games, and baseball games.<sup>90</sup> There were also reports of heavy alcohol consumption, illegal drug use, and sexual relationships between MMS officials and energy company representatives.<sup>91</sup>

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<sup>83</sup> Michael Janofsky, *Idaho Governor Dirk Kempthorne Selected to Lead Interior Dept*, N.Y. TIMES, Mar. 17, 2006, at A16, available at <http://www.nytimes.com/2006/03/17/politics/17interior.html>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *Ctr. for Biological Diversity v. Kempthorne*, No. C 08-1339 CW, 2008 WL 4951027 (N.D. Cal. Nov. 18, 2008).

<sup>88</sup> Charlie Savage, *Sex, Drug Use and Graft Cited in Interior Department*, N.Y. TIMES, Sept. 10, 2008, at A1, available at <http://www.nytimes.com/2008/09/11/washington/11royalty.html>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

When the presidential administration changed in 2009, so did the head of the Department of the Interior. Under the Obama administration, Ken Salazar has taken the reigns as the new Secretary of the Department of the Interior.<sup>92</sup> Secretary Salazar, a democrat, is a former senator from Colorado.<sup>93</sup> Little is known about Secretary Salazar's specific policies, as of yet, regarding oil and mineral leases located in the outer continental shelf. Environmental groups' opinion of Salazar's appointment has been mixed. Specifically, Salazar has been criticized by environmental groups for his close ties to the coal and mining industries. Under Salazar's reign as Secretary, the Department of the Interior could vastly change its policies to tighten regulations that had become lax under past administrations, or it could fulfill critics' concerns by continuing to keep regulations loose and watching out for big business' interests. Unfortunately, only time will tell what the Obama administration holds for the Department and for future environmental policy.

## VI. INSTANT DECISION

### A. *The Majority Opinion*

The Ninth Circuit first addressed the assertion that MMS's approval of Shell's exploration plan in the Beaufort Sea did not comply with the NEPA's provisions concerning taking a "hard look" at the project's impact on the environment.<sup>94</sup> In determining whether MMS had complied with the NEPA's "hard look" standard, the court first looked to the project's impact on the bowhead whale population.<sup>95</sup> The court held that the environmental analysis which discussed the consequences of underwater noise on the bowhead whales was inadequate.<sup>96</sup> The court stated that the party submitting the assessment has the burden of proof with respect to showing that the project would not have a significant impact on bowhead

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<sup>92</sup> U.S. Department of the Interior, Secretary of the Interior: Ken Salazar, <http://www.doi.gov/welcome.html> (last visited Sept. 30, 2009).

<sup>93</sup> *Id.*

<sup>94</sup> *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825 (9th Cir. 2008).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

whales. The court reasoned this was especially true in this case after the environmental assessment stated that the project, specifically the underwater noise, could cause significant biological effects.<sup>97</sup> The court also rejected MMS's proposed mitigation measure of monitoring the whales to determine how the whales would be affected by the project once it actually begins.<sup>98</sup> Mitigation is defined "as a way to avoid, minimize, rectify, or compensate for the impact of a potentially harmful action."<sup>99</sup> The court reasoned that the monitoring of the whales' response to the project could only detect negative impacts after the fact, and would not be able to prevent such negative effects.<sup>100</sup> Finally, the court held MMS failed to satisfy the "hard look" standard set forth by the NEPA because the environment assessment did not provide a comprehensive inspection of definite effects to the bowhead whales.<sup>101</sup>

The court next discussed the impact of the proposed project on the subsistence activities of the Inupiat population.<sup>102</sup> Under the NEPA, the MMS should have considered how the proposed project could affect the health and safety of the human population as well as the degree of uncertainty regarding its impact.<sup>103</sup> The court applied the same analysis it used in determining the "hard look" issue.<sup>104</sup> The MMS provided only conclusory assertions that the impact on the Inupiat community would not be significant and failed to present any evidence to support that conclusion.<sup>105</sup> The agency failed to consider the vagueness of the exploration plan which resulted in uncertainties and an inadequate analysis of the impact of the Inupiat, who rely on bowhead whales for survival.<sup>106</sup> In addition, the court stated that the exploration plan took only a "cursory

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<sup>97</sup> *Id.* at 826.

<sup>98</sup> *Id.* at 828.

<sup>99</sup> *Id.* at 827 (citing 40 C.F.R. § 1508.20(a)-(e) (2008)).

<sup>100</sup> *Id.* at 828.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 829.

<sup>103</sup> *Id.* (citing 40 C.F.R. § 1508.27(b)(2), (4)-(5)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (citing *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-66 (9th Cir. 2005)).

<sup>106</sup> *Id.*

glance” at the potential impact of Shell’s project on other subsistence activities of the Inupiat community.<sup>107</sup>

The court determined that despite these and other shortages, the agency’s environmental assessment satisfactorily describes the effects of a possible oil spill in the proposed drilling area.<sup>108</sup> MMS satisfied the NEPA requirements by assessing the likelihood of the risk of a crude oil spill along with the consequences to local populations if such an accident occurred.<sup>109</sup> The court stated that because the agency assessed the consequences of an oil spill, regardless of the probability of such an event occurring, this section of the environmental assessment satisfied the NEPA guidelines.<sup>110</sup>

Next, the court discussed whether the potential environmental reactions were enough to warrant the revision of the environmental assessment or the preparation of an EIS.<sup>111</sup> The court held that MMS erred by not undertaking a more thorough analysis before issuing a FONSI as opposed to an EIS.<sup>112</sup> The court also held that MMS violated the NEPA by failing to take a “hard look” at several significant factors, including the frailty of the Beaufort Sea ecosystem, the controversial nature of the project, the unknown risk to subsistence activities, the effect on endangered species in the area, and the increasing unknowns as the project would move from the development to production stage.<sup>113</sup> Thus, the agency must review these important factors and revise its environmental assessment to address these factors, or if significant impacts are possible, an EIS must be submitted.<sup>114</sup> The court emphasized that the regulations were to be considered with flexibility, therefore allowing the statutory timelines to only begin once the initial exploration plan is filed.<sup>115</sup>

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<sup>107</sup> *Id.* at 830-31.

<sup>108</sup> *Id.* at 832.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 833.

<sup>112</sup> *Id.* at 834.

<sup>113</sup> *Id.* at 833-34.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 834.

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The MMS's approval of Shell's drilling project also violated provisions in OCSLA.<sup>116</sup> The court pointed out that OCSLA regulations specifically require exploration plans to be "project specific" and detail all "resources, conditions, and activities" that could be affected by the proposed project.<sup>117</sup> The information in the exploration plan only provided specific, detailed drilling and well locations for one of the three years of this project's duration.<sup>118</sup> OCSLA specifically states that an agency must consider site specific impacts before it can approve any exploration plan.<sup>119</sup> Without specific information about future well locations for 2008 and 2009, the court determined that MMS could not meet the obligation to "approve proposed well locations and spacing" and, as a result, the agency erred in approving the exploration plan for 2007, 2008, and 2009.<sup>120</sup> In addition, OCSLA specifies that in order for a well to be approved, it must have been included in the approved exploration plan.<sup>121</sup> The court also added that OCSLA does not contain regulations which authorize MMS to check on Shell's actions and well locations, at a later date, after the exploration plan has already been approved.<sup>122</sup>

Ultimately, the court held that MMS should not have approved the environmental assessment without knowing the specific locations for all three years of the project because the implications of the project could not fully be known without this information.<sup>123</sup> The agency provided an inadequate environmental assessment by not considering the specific impact to bowhead whales and Inupiat activities in the area and by not stating site-specific information for locations of the project.<sup>124</sup> The court also stated that when there is a possibility of significant impacts on the water, land, air, wildlife, or humans in the affected area, there is a duty by

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (quoting 30 C.F.R. § 250.227 (2008)).

<sup>118</sup> *Id.* at 834-35 (stating that a specific well location was stated for 2007, but the exploration plan did not specify where it wished to drill in 2008 and 2009 and that future well locations would depend on what Shell found at the 2007 exploratory well location).

<sup>119</sup> *Id.* at 828.

<sup>120</sup> *Id.* at 835 (citing 30 C.F.R. § 250.203).

<sup>121</sup> *Id.* (quoting 30 C.F.R. § 250.410(b)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 825.

<sup>124</sup> *Id.*

the proposing party to fully consider all risks and consequences of its suggested plan.<sup>125</sup>

### B. *The Dissenting Opinion*

Judge Carlos Bea dissented because he believed that MMS's approval of the exploration plan was "neither arbitrary nor capricious," the court had no authority to overturn MMS's approval of the plan, and the majority opinion conflicted with the Ninth Circuit's recent en banc decision in *Lands Council*.<sup>126</sup> In fact, Judge Bea even stated that one could conclude that the majority in *Alaska Wilderness League* is simply "overruling *Lands Council* *sub silentio*."<sup>127</sup> The dissent points out that in *Lands Council*, the court held "it is not [the court's] proper role to make fine-grained judgments about the weight of specific studies" which an agency's decision hinges upon.<sup>128</sup> In *Lands Council*, the court listed three instances in which the judiciary should step forward and take a more detailed look into the agency's environmental assessment of the plan,<sup>129</sup> and the dissent in *Alaska Wilderness League* stated that none of the instances are present in this case; therefore, the court should have deferred to the federal agency's expertise.<sup>130</sup>

In addition, the dissent stated that MMS took the NEPA's required "hard look," but that the majority wants the agency to have to consider every possibility or consequence of the proposed action, which is much more in-depth than required by the NEPA.<sup>131</sup> The dissent continued to argue that because the parties could not determine any failures in the MMS's assessment of the project or any adverse effects that can be avoided by the gathering of more data, the majority erred by remanding the case for the preparation of a revised environmental assessment or an

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 835.

<sup>127</sup> *Id.* at 843.

<sup>128</sup> *Id.* at 842 (quoting *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008)).

<sup>129</sup> *Lands Council*, 537 F.3d at 993 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

<sup>130</sup> *Alaska Wilderness*, 537 F.3d at 843.

<sup>131</sup> *Id.* at 844.



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EIS.<sup>132</sup> The dissent further maintained that OCSLA requires only “the general location of each well to be drilled.”<sup>133</sup> Judge Bea explained that because the location of the wells during 2008 and 2009 will depend on resources found during the first year of drilling, the general proposition of the wells should be considered “sufficient under the regulation.”<sup>134</sup>

### V. COMMENT

In the past, the Ninth Circuit had been looked to as an authority and advocate in environmental law issues. The court has advocated for responsible development, preservation of wildlife and ecosystems, and the overall advancement and construction of environmental law. Just a few months before the decision in *Alaska Wilderness League* was handed down, the court veered from its past course of advocating for the environment by handing down its ambiguous and vague decision in *Lands Council*.<sup>135</sup> In *Lands Council*, the court took an unsuspected deviation from its normally pro-environment reputation when it held that a federal agency does not have to consider all possibilities or consequences when determining if a specific action should be allowed or rejected when that action could significantly affect the environment.<sup>136</sup> While the NEPA’s “hard look” guidelines and details that must be included in an environmental assessment have been interpreted differently by many courts,<sup>137</sup> the Ninth Circuit has customarily held that the parties proposing an action must provide as many details as possible, including any and all consequences, detrimental or otherwise, that could affect the land, wildlife, and humans in the area.<sup>138</sup> The decision in *Alaska Wilderness League* is a transition back to the comprehensive and unambiguous

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<sup>132</sup> *Id.* at 844-45.

<sup>133</sup> *Id.* at 846 (citing 43 U.S.C. § 1340(c)(3)(C) (2006)).

<sup>134</sup> *Id.* at 846.

<sup>135</sup> *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008) was decided on July 2, 2008. *Alaska Wilderness*, 548 F.3d 815 was decided on Nov. 20, 2008.

<sup>136</sup> *Lands Council*, 537 F.3d at 1001-02.

<sup>137</sup> *See id.* at 1001.

<sup>138</sup> *Alaska Wilderness*, 548 F.3d at 824.

environmental advocacy for which the Ninth Circuit is customarily known.

Because of the conflicting nature of the *Alaska Wilderness League* and *Lands Council* decisions, the future direction of Ninth Circuit environmental law is unclear. Future decisions of the Ninth Circuit relating to environmental issues will undoubtedly be affected by the *Alaska Wilderness League* decision. Although this case was declared moot due to Shell's withdrawal of its exploration plan, it does not diminish the significance of the court's legal analysis of *Alaska Wilderness League*. This decision will undoubtedly be referred back to as the way the Ninth Circuit last ruled and advocated for environmental responsibility and awareness. Regardless of the factual scenario raised in *Alaska Wilderness League*, the court's rationale will be the precedent determining how the Ninth Circuit will advance on environmental issues. The direction of the Ninth Circuit's environmental agenda will largely be influenced by the next case the court hears on this environmental issue. Because the Ninth Circuit's decisions have been influential in the environmental law area, the route the Ninth Circuit decides to take regarding the circumstances in which an environmental assessment and EIS are accepted or rejected under the NEPA, will not only affect future West Coast decisions but other NEPA "hard look" cases across the country.

The Ninth Circuit is relied on by many jurisdictions to obtain an understanding of developments in environmental law. When an authority and pioneer in environmental law is unclear about the direction in which it intends to take future decisions, it affects other jurisdictions throughout the country, including Missouri courts. If the Ninth Circuit reaffirms the holding in *Alaska Wilderness League*, it will be more difficult for private entities to begin projects that could adversely affect the environment. However, if the court departs from the rationale of *Alaska Wilderness League* and goes on a path more indicative of the *Lands Council* decision, there will be less of an opportunity for federal regulation and prevention of potentially environmentally damaging projects. Courts will undoubtedly have to reconsider the circumstances and laws applied in *Alaska Wilderness League* to cases with similar factual situations in the near future. With the Outer Continental Shelf of the Beaufort Sea potentially containing 8.2 billion barrels of recoverable oil and 27.6 trillion cubic feet

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of recoverable natural gas,<sup>139</sup> it is certain another entity will attempt to extract this oil and gas from its ocean floor abode. In fact, it has been reported that Shell intends to replace its withdrawn 2007-2009 exploration plan with a “scaled back” exploration drilling plan in 2010.<sup>140</sup> Shell’s plan will supposedly scale back its previous environmental plan from two drilling rigs to one and from four oil wells to two.<sup>141</sup> Even though Shell’s drilling never started and the decision in *Alaska Wilderness League* case was held moot, the Court’s rationale is still applicable and is even being realistically employed, as can be evidenced by Shell’s smaller and more specific proposed plan.

In addition, the decision in these two interwoven cases does not only affect the oil drilling industry, but also every industry in the United States in different, yet significant, ways. Whether an entity is submitting plans for building a new school, constructing a new road, or drilling in the Beaufort Sea off the coast of Alaska, an environmental assessment must initially be filed to discuss any significant environmental impacts those projects could potentially cause.

Because of the far reaching environmental impact of any of these decisions, courts must adopt an unambiguous standard which federal agencies may use as a guide when determining whether the consequences produced by the proposed project in an environmental subject will have “significant” effects on the environment. Currently, each federal agency responsible for the oversight of environmental assessments in its particular field of expertise has its own definition of “significant.” For example, MMS defines a “significant” environmental impact as a chronic disruption of socio-cultural systems that occurs for a period of two to five years, with a tendency toward displacement of existing social patterns.”<sup>142</sup> In order to eliminate confusion and constant, unnecessary judicial interference, there must be a homogenous, standardized way to determine if a time-consuming EIS must be prepared. The standardization of this requirement will benefit the private parties, who propose these projects and present

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<sup>139</sup> Yereth Rosen, *Drilling: Shell Drops Beaufort Exploration Proposal, Plans to File Scaled-Back Program for 2010*, DAILY ENV’T REP. (BNA), May 11, 2009.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Alaska Wilderness*, 548 F.3d at 829.

their environmental assessments for review, as well as the federal agencies that review these assessments.

Continuous litigation involving black letter interpretations of the NEPA and OCSLA provisions is a no-win situation for any party involved. For the proposing party, litigation and research is time-consuming and costly, not to mention the project could be delayed indefinitely if the federal agency or the courts do not believe the assessment takes a hard enough look at the potential impacts of the project. In addition, the federal agencies assigned to review a particular proposal must spend tax dollars to devote time to further research if there are critical environmental concerns that have not been properly addressed by the proposing party in the environmental assessment. There are also significant time and cost constraints on the judiciary, which must interpret the requisite statutory guideline every time there is a disagreement in the standard used. These are just a few additional reasons why an unambiguous, standardized guideline with some flexibility on exact timing deadlines must be introduced to handle all situations with reasonably the same rules with a small amount of deference to flexibility in time-sensitive situations.

## VI. CONCLUSION

Although the Ninth Circuit's decision in *Alaska Wilderness League* was held moot after Shell withdrew its exploration plans, the court's rationale and legal analysis is still valid and convincing. *Alaska Wilderness League* strengthened regulations providing for environmental assessment under the NEPA. Essentially, the court echoed rulings of its past position of strictly adhering to regulations and advocating environmental responsibility when proposed project plans could have undesirable effects on the environment. In essence, the court held that the environmental assessment of a proposed project must contain as much detailed information regarding the project as is possible. The more specific the locations and communities of wildlife and humans that will be affected are identified, the more likely the assessment will be approved by the overseeing federal agency. If the court deems the federal agency's approval of the project to be inadequate or premature, the assessment must be revised to include all details the court deems relevant. Alternatively,

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the court could mandate the creation of a more in-depth EIS that requires even more details, potential problems, and those problem's conclusions.

The court also made clear that the proposing party has a strict duty to fully assess any aspects of the project that could cause a significant impact on the environment. The agency must not consider just one population that could be affected by these consequences, but all wildlife, humans, water, land, or air in the area. Instead of providing developers a free reign to expand as they wish without thought as to the consequences to the local environment, the court's decision in *Alaska Wilderness League* also ensures there is a governmental body overseeing the expansion and protecting the environment as the development continues. While there are many questions yet to be answered about how the NEPA regulations will be interpreted and implemented, ensuring an adequate assessment of the risks and development of contingency plans, especially where significant and devastating impacts are possible, is a first step to protecting our environment for future generations.

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