



Ninth Circuit Finds Environmental Document for Chukchi Sea Lease Sale Violates NEPA

02.03.2014 | By [David J. Miller](#), [Benjamin Z. Rubin](#), [Paul S. Weiland](#)

On January 22, 2014, the United States Court of Appeals for the Ninth Circuit held that the Final Environmental Impact Statement ("FEIS") and Supplemental Environmental Impact Statement ("SEIS") regarding the effects of proposed leases for oil and gas development in the Chukchi Sea off the northwest coast of Alaska and prepared by the Bureau of Ocean Energy Management ("BOEM") violated the National Environmental Policy Act ("NEPA"), although the agency had properly taken account of incomplete or unavailable information. As such, the Ninth Circuit's ruling in *Native Village of Point Hope v. Jewell* (Jan. 22, 2014) 2014 U.S. App. LEXIS 1150 upheld, for a second time, a challenge to the federal government's environmental analyses for the proposed action.

In *Native Village of Point Hope v. Jewell*, the BOEM proposed to lease parcels, known as Lease Sale 193, for oil and gas development in the Chukchi Sea, which contains a variety of wildlife, including a number of species listed under the Endangered Species Act ("ESA"). BOEM completed a five-year leasing plan for the Chukchi Sea, and it decided to offer a large portion for oil and gas leasing. It prepared the FEIS for the "lease sale" stage that analyzed four alternatives, ultimately electing to proceed with an alternative under which development would occur close to the coast of Alaska.

Plaintiffs filed suit under NEPA, asserting seven deficiencies in the FEIS. While the district court found that much of the FEIS complied with NEPA, including the assumption that there would be one billion barrels of economically recoverable oil, it concluded that the analysis was flawed in three significant respects. Accordingly, the district court issued a limited injunction and remanded the matter to BOEM for additional analyses. The BOEM completed the additional analyses and prepared the SEIS. Plaintiffs subsequently challenged the adequacy of the SEIS, and the district court granted BOEM's motion for summary judgment, finding that the SEIS identified missing or incomplete information and adequately evaluated such information in a manner sufficient in light of the current stage of the development process.

On appeal to the Ninth Circuit, plaintiffs argued that the SEIS was inadequate because BOEM had abused its discretion. Plaintiffs argued that the FEIS and SEIS were missing "essential" information. The Ninth Circuit disagreed, holding that BOEM reasonably concluded that the missing information was not "essential" at the lease sale stage, and that compliance with statutes such as the Marine Mammal Protection Act and ESA will provide adequate protection for animals covered by those statutes. With respect to BOEM's analyses, much of the information missing from the SEIS concerned animal populations that could be affected by oil exploration and production under the leases, including information regarding population levels, the location of various animal populations during the year, the feeding and breeding habits of various populations, and the vulnerability of various populations to drilling and other exploration and production-related activities. The Ninth Circuit explained that when a project proponent actually submits a plan for oil and gas exploration, development, or production activities, it is at that stage that BOEM is required to perform a site-specific environmental analysis, and any missing or incomplete information that was not essential at the lease sale stage of the process may become "essential."

The Ninth Circuit did, however, agree with plaintiffs that the environmental analyses relied on an unrealistically low estimate of the economically recoverable oil for the lease area, and that, as a result, the FEIS and SEIS underestimated the adverse environmental impact of the lease sales. The estimate of the amount of recoverable oil for Lease Sale 193 was based on the projected production from the "first offshore oil field" that would be developed within the area of the leases. The Ninth Circuit held that BOEM's use of this estimate was arbitrary for three reasons: (1) once BOEM made the determination that production of oil is reasonably foreseeable, it was required to consider the full cumulative impact of that production if such production does occur; (2) it ignored the fact that the amount of economically recoverable oil varies considerably based on oil prices, with the amount increasing as oil prices increase; and (3) it did not provide an adequate explanation for its decision to use the one billion barrel estimate, and how that estimate was derived. This last reason was punctuated by a statement by the government's own expert that the agency's position is "entirely speculative." The Ninth Circuit further held that these deficiencies could not be remedied in subsequent site-specific EISs because they would consider only the particular project's environmental effects, and not the cumulative effects of the lease sale on the environment.

The Ninth Circuit's decision is a strong reminder that the extent of the deference courts will grant to government agencies is not without a limit. Reliance on assumptions in the course of analyses is often necessary, but in such cases an adequate explanation of the bases for the assumptions may be the difference between a project that is lawful and one that is not.