

Are We Out of the Woods Yet? Arctic Leasing Reform in the Trump Administration

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ABSTRACT

This Note examines the main statutes governing the Outer Continental Shelf (OCS) leasing process, including their interpretation by the courts. The interests of affected states and indigenous people, as well as how courts have minimized these voices will be explored, focusing on the state of Alaska. Finally, this Note argues for statutory reform as well as a change in the leasing process to increase state and indigenous participation.

INTRODUCTION

The 2010 Deepwater Horizon gulf oil spill focused the nation's attention upon the dangers of a mismanaged offshore drilling operation. Not since the 1989 *Exxon Valdez* disaster¹ had the nation seen an oil spill with such widespread environmental consequences. The Deepwater Horizon oil rig spilled nearly 5 million gallons of oil into the Gulf of Mexico.² British Petroleum (BP) eventually agreed to pay over \$20 billion to settle litigation regarding the spill.³ In the wake of the disaster, President

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1. The *Exxon Valdez* spill released over 11 million gallons of oil into ocean, resulting in damage to over 1,300 miles of coastline. The spill resulted in permanent damage to the coastal ecosystem, and less than half of the monitored wildlife populations have recovered. Marybeth Holleman, Opinion, *After 25 Years, Exxon Valdez Oil Spill Hasn't Ended*, CNN (Mar. 25 2014), <http://www.cnn.com/2014/03/23/opinion/holleman-exxon-valdez-anniversary/index.html> [https://perma.cc/UDW9-JB3G].

2. NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEPWATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 87 (2011) [hereinafter DEEPWATER REPORT], <https://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf> [https://perma.cc/VZP4-ZTC6].

3. Alan Neuhauser, *Judge Approves \$20B Settlement in 2010 BP Oil Spill*, US NEWS (Apr. 4, 2016), <http://www.usnews.com/news/articles/2016-04-04/judge-approves-20b-settlement-in-2010-bp-deepwater-horizon-oil-spill>.

Obama created a national commission to investigate the spill.⁴ The commission, in a lengthy report, stated that a “comprehensive overhaul of both leasing and the regulatory policies and institutions used to oversee offshore oil activities is required.”⁵ The report stressed that technological and policy adaptations were required as the oil industry sought to move into ever more challenging environments.⁶ The report further acknowledged that the Arctic contains complex geology, making it a potentially high-risk area for offshore drilling.⁷

An increased national focus on climate change and the environment has created an intense scrutiny of the production of fossil fuels.⁸ The adoption of the Paris Climate Agreement by 195 countries in 2015 led to a heightened focus on the reduction of greenhouse gases.⁹ Ratification of this agreement by the United States and its subsequent withdrawal¹⁰ rekindled debate about the contribution of fossil fuels to greenhouse gas emissions.¹¹ States that are dependent on energy production have fought efforts to curtail fossil fuel production.¹² Scholars have also called for improved energy security through increased domestic production.¹³ The nearly 36 million acres of leased Outer Continental Shelf¹⁴ land account

4. DEEPWATER REPORT, *supra* note 2, at vi.

5. *Id.* at 250.

6. *Id.*

7. *Id.* at 253.

8. *What is Climate Change?*, BBC (Sept. 19, 2017), <http://www.bbc.com/news/science-environment-24021772> [<https://perma.cc/X9AF-CFZW>].

9. *Paris Agreement*, EUROPEAN COMM’N, https://ec.europa.eu/clima/policies/international/negotiations/paris_en [<https://perma.cc/2H5B-GWPJ>].

10. Andrew Restuccia, *Trump Administration Delivers Notice U.S. Intends to Withdraw from Paris Climate Deal*, POLITICO (Aug. 4, 2017, 12:40 PM), <http://www.politico.com/story/2017/08/04/trump-notice-withdraw-from-paris-climate-deal-241331> [<https://perma.cc/G7WE-NTXZ>].

11. Tom Philips et al., *Breakthrough as US and China Agree to Ratify Paris Climate Deal*, GUARDIAN (Sept. 3, 2016, 10:12 AM), <https://www.theguardian.com/environment/2016/sep/03/breakthrough-us-china-agree-ratify-paris-climate-change-deal> [<https://perma.cc/9H7S-6TN9>]; Press Release, David Turnbull, Campaigns Director of Oil Change International, *Paris Agreement Ratification Means No New Fossil Fuels* (Oct. 5, 2016), <http://priceofoil.org/2016/10/05/release-paris-agreement-ratification-means-no-new-fossil-fuels/> [<https://perma.cc/S64R-SZRW>].

12. Alex DeMarban, *New Natural Resources Commissioner Says He’s Working to Put More Oil in Alaska’s Future*, ALA. DISPATCH NEWS (Aug. 29, 2016), <https://www.adn.com/business-economy/energy/2016/08/29/new-natural-resources-director-says-hes-working-to-put-more-oil-in-alaskas-future/> [<https://perma.cc/X82R-9838>]; *Natural Resources Secretary Pushes for more Oil and Gas Business*, LA. DEP’T NAT. RESOURCES (Jan. 19, 2007), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=737> [<https://perma.cc/74HH-WV98>].

13. See Lynn S. Sletto, *Piecemeal Legislative Proposals: An Inappropriate Approach to Managing Offshore Oil Drilling*, 33 GOLDEN GATE U. L. REV. 557, 580 (2003).

14. The Outer Continental Shelf is made up of the submerged lands beginning three nautical miles off the shore of most coastal states and ends around 200 nautical miles from the coastline. See Sletto, *supra* note 13, at 580.

for roughly twenty-four percent of America's domestic oil production.¹⁵ Thus, it is no surprise that these lands have been especially contentious in the fight over differing economic, energy, and environmental interests.

Federal statutes such as the Outer Continental Shelf Lands Act and the Coastal Zone Management Act gave states a role in both the leasing and development of the Outer Continental Shelf.¹⁶ However, courts have subsequently eroded this role to nothing more than a symbolic one.¹⁷ Alaska, where all U.S. Arctic leasing occurs, has a unique relationship with the oil and gas sector since it relies upon production taxes for almost all of its revenue.¹⁸ Alaska is also home to a vast array of unique environmental features, the value of which cannot be measured. The state has numerous federally-recognized Indian tribes, many of whom have a rich cultural history with the waters in and adjacent to the Outer Continental Shelf.¹⁹

In this Note, I will first provide a background of the OCS leasing process, focusing on recent executive actions to be followed by an exploration of industry interest and activity in the Arctic. Next, the interests of states and local actors will be explored, focusing on the tension between economic benefits provided by leasing activity and the subsequent environmental consequences. A recap of the increase in leasing activity begun in the 1980s by the Reagan administration provides a background for a critique of the statutory schemes instituted by Congress to allow state participation in the leasing process. Following these critiques, recommended reforms allowing for increased state and local input as well as smaller scale leasing activity will be described in detail.

I. THE OUTER CONTINENTAL SHELF

The OCS is made up of the submerged lands beginning three nautical miles off the shore of most coastal states and ending around 200 nautical miles from the coastline.²⁰ The Outer Continental Shelf Lands Act (OCSLA) mandates the "expeditious and orderly development"²¹ of the Outer Continental Shelf resource, "subject to environmental safeguards, in

15. BUREAU OF OCEAN ENERGY MGMT., OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF 1, https://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf [<https://perma.cc/U82E-MRCK>].

16. *See infra* Section IV.

17. *See infra* Section VI.

18. *Facts and Figures*, ALA. OIL & GAS ASS'N, <http://www.aoga.org/facts-and-figures> [<https://perma.cc/L4BT-K3L2>].

19. *See infra* Section IV.

20. OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF, *supra* note 15, at 1.

21. 43 U.S.C. § 1332(3) (2006).

a manner consistent with the maintenance of competition and other national needs.”²² Section 18 orders the Secretary to develop a leasing program that will best meet the national energy needs for the five-year period following its approval.²³ The Secretary must consider a variety of statutory factors in deciding the location and timing of exploration and development activities.²⁴ The Act was amended in 1978 to focus on increasing the economic return to the United States as well as to increase the role of coastal states in making leasing decisions.²⁵

The Bureau of Ocean Energy Management (BOEM) is the bureau within the Department of the Interior (DOI) that manages OCS offshore energy resources.²⁶ The 1978 amendments to OCSLA created a four-stage leasing program.²⁷ In the first stage, the Department of the Interior develops a five-year leasing plan describing the size, timing, and location of leasing activity.²⁸ Only those leases listed in the plan can be utilized during that time.²⁹ Second, once the department has finalized a five-year plan, it can award individual leases included in the leasing plan.³⁰ Leases

22. *Id.*

23. 43 U.S.C. § 1334(a) (2006).

24. *Id.* § (a)(2) lists the following factors that the Secretary must consider:

(A) existing information concerning the geographical, geological, and ecological characteristics of such regions; (B) an equitable sharing of developmental benefits and environmental risks among the various regions; (C) the location of such regions with respect to, and the relative needs of, regional and national energy markets; (D) the location of such regions with respect to the other uses of the sea and seabed, including fisheries, navigation, existing or proposed sealanes, potential sties of deepwater ports, and other anticipated uses of the resources and space of the outer Continental Shelf; (E) the interest of potential oil and gas producers in the development of oil and gas resources as indicated by exploration or nomination; (F) laws, goals, and policies of affected States which have been specifically identified by the Governors of such States as relevant matters for the Secretary’s consideration; (G) the relative environmental sensitivity and marine productivity of different areas of the outer Continental Shelf; and (H) relevant environmental and predictive information for different areas of the outer Continental Shelf.

Id.

25. OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF, *supra* note 15, at 1.

26. *Id.*

27. *Id.*; Sam Kalen, *Cruise Control and Speed Bumps: Energy Policy and Limits for Outer Continental Shelf Leasing*, 7 ENVTL & ENERGY L. & POL’Y J. 155 (2013) [hereinafter Kalen, *Cruise Control*].

28. *Sec’y of the Interior v. California*, 464 U.S. 312, 337 (1984).

29. John D. Leshy, U.S. Dep’t of the Interior, Memorandum on What Are “Significant” Revisions in the Five-Year Outer Continental Shelf (OCS) Oil and Gas Leasing Program? (Feb. 12, 1996), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-36983.pdf> [https://perma.cc/NZ7D-K45B].

30. *Sec’y of the Interior*, 464 U.S. at 337.

are awarded to the highest-qualified bidder through a competitive bidding process.³¹ Leases grant the exclusive right to explore, develop, and produce oil and natural gas for an initial period of time; the DOI may extend the lease as long as oil or natural gas is produced in paying quantities, or so long as approved drilling activities are being conducted.³² At the third stage, a lessee can engage in exploration activity, subject to approval by the Secretary of the Interior.³³ Finally, at the fourth stage of the leasing process, the lessee can undertake development activities.³⁴

II. INDUSTRY INTEREST

The oil industry has shown an increased interest in OCS activity in the Arctic.³⁵ In response, BOEM introduced Arctic-specific leasing regulations.³⁶ The 2017–2022 Proposed Program issued by BOEM included requirements that the operator account for challenging and often unpredictable Arctic weather; have access to source containment equipment; develop a spill response program that specifically addresses unique Arctic conditions; and have access to a separate relief rig.³⁷ These requirements have estimated compliance costs of \$1.74 billion.³⁸

Despite this increased interest, Arctic OCS activity has scaled down in recent years with the industry citing disappointing exploration results and a “challenging and unpredictable federal regulatory environment in offshore Alaska.”³⁹ In the 2017–2022 Proposed Final Program issued on

31. 43 U.S.C. § 1337(a)(1) (2012).

32. *Id.*

33. *Sec’y of the Interior*, 464 U.S. at 337.

34. *Id.*

35. DARRELL L. CONNOR ET AL., K&L GATES, REGULATING EXPLORATION ON THE ARCTIC OCS: U.S. FEDERAL REGULATORS PROPOSE RULES FOR OIL AND GAS EXPLORATORY DRILLING ON THE ARCTIC OUTER CONTINENTAL SHELF (Feb. 23, 2015), http://www.klgates.com/files/Publication/26ae8645-21c8-4aca-b58f-0142a9ef58d7/Presentation/PublicationAttachment/5b96da27-4a62-4b12-b98e-0fbd7792d7f7/Arctic_Alert_02242015.pdf [<https://perma.cc/CHV4-U8NB>]; Elizabeth Harball, *Italian Company Submits Plan to Drill for Oil in the Arctic*, KTOO PUB. MEDIA (Mar. 17, 2017), <http://www.ktoo.org/2017/03/17/italian-company-submits-plan-drill-oil-arctic/> [<https://perma.cc/R3GG-DPQD>].

36. Louisiana W. Cutler et al., *The Implications of Final Rule Regulating Arctic OCS Drilling*, ALA. J. COM. (Sept. 14, 2016, 1:56 PM), <http://www.alaskajournal.com/2016-09-14/implications-final-rule-regulating-arctic-ocs-drilling#.WA6xJHj1KCQ> [<https://perma.cc/5U2Y-YCD5>].

37. *Id.*

38. *Id.*

39. Dan Joling, *Shell Says It Will Abandon Oil Exploration in Alaska Arctic*, ALA. DISPATCH NEWS (Sept. 27, 2015), <https://www.adn.com/economy/article/shell-says-it-will-abandon-oil-exploration-alaska-arctic/2015/09/28/> [<https://perma.cc/7T7K-RU5X>] (explaining Shell’s decision to pull out of Alaska despite spending over \$7 billion on exploration efforts); Yereth Rosen, *Shell Isn’t the Only Oil Company Leaving Alaska’s Arctic*, ALA. DISPATCH NEWS (May 10, 2016), <https://www.adn.com/energy/article/industry-exodus-chukchi-follows-shells-decision-end-alaska->

November 18, 2016, BOEM ultimately decided against holding any lease sales in the Chukchi or Beaufort Seas—the two Arctic areas included in the plan.⁴⁰ This was a change of course from the Proposed Program issued in March of 2016, which recommended two Arctic lease sales in the Chukchi and Beaufort Seas.⁴¹

The recent downturn of industry activity is by no means permanent. Despite the decision not to hold Arctic lease sales for the 2017–2022 Proposed Program, there are still massive oil discoveries being made in the area.⁴² The U.S. Energy Information Administration estimates that crude oil prices will recover from current lows to over \$100/barrel after 2017.⁴³ For this reason, owners of existing leases continue to operate in the Arctic.⁴⁴ Furthermore, the Arctic is currently experiencing record low sea ice levels, opening up the Northeast passage to shipping and other industries,⁴⁵ potentially making it easier to develop crucial infrastructure to support activity.⁴⁶

In December 2016, President Obama ordered the closure of 125 million acres of the Arctic Ocean to drilling.⁴⁷ The executive order barred new leases in the majority of U.S. Arctic waters.⁴⁸ The order came in conjunction with a Canadian bar on Arctic offshore activity that will be reviewed every five years.⁴⁹ While this seemingly signaled an end to

program/2016/05/10/ [https://perma.cc/X7E3-QEBQ] (explaining that ConocoPhillips, Statoil, Total, Armstrong, Eni and other industry groups have pulled out of the Alaska Arctic).

40. BUREAU OF OCEAN ENERGY MGMT., 2017-2022 PROPOSED FINAL PROGRAM S-8 (2016) [hereinafter BOEM PROPOSED PROG. 2017-2022], <https://www.boem.gov/2017-2022-OCS-Oil-and-Gas-Leasing-PFP/> [https://perma.cc/C9KT-6U6L].

41. *Id.* at S-5 to S-8.

42. Alex DeMarban, *Caelus Claims Arctic Oil Discovery That Could Rank Among Alaska's Biggest Ever*, ALA. DISPATCH NEWS (Oct. 4, 2016), <https://www.adn.com/business-economy/energy/2016/10/04/caelus-claims-world-class-offshore-arctic-oil-discovery-that-could-among-alaskas-biggest/> [https://perma.cc/XGD8-L4S8].

43. U.S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2016 26 (2017), [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf) [https://perma.cc/AHF8-FZKW].

44. Alan Bailey, *BOEM Reviewing Eni's Plan for Directional Drilling Into Nikaitchuq North*, PETROLEUM NEWS (Mar. 26, 2017), <http://www.petroleumnews.com/pntruncate/562505680.shtml> [https://perma.cc/3TNW-YS8X].

45. Chris Dolce, *Arctic Sea Ice Extent in April Continues String of Record Lows to Begin in 2017*, WEATHER UNDERGROUND (May 4, 2017), <https://www.wunderground.com/news/arctic-sea-ice-april-2017-record-low> [https://perma.cc/5A9H-F9E4].

46. Yereth Rosen, *Arctic Sea Ice Reaches Record-Low Maximum Extent for 3rd Winter in a Row*, ALA. DISPATCH NEWS (Mar. 22, 2017), <https://www.adn.com/arctic/2017/03/22/arctic-sea-ice-sets-a-new-record-for-its-lowest-maximum-for-the-third-year-in-a-row/> [https://perma.cc/PYP5-835U].

47. Erica Martinson, *Obama Prohibits Offshore Oil Drilling in Most U.S. Arctic Waters*, ALA. DISPATCH NEWS (Dec. 20, 2016), <https://www.adn.com/politics/2016/12/20/obama-prohibits-offshore-drilling-in-most-of-us-arctic-waters/> [https://perma.cc/PYP5-835U].

48. *Id.*

49. *Id.*

offshore activity in the Arctic, experts predict that the Trump administration may try to undo the closure via a new executive order.⁵⁰ In 2008, President George W. Bush overturned the previous closure of parts of the OCS to leasing, signaling a precedent for such a move.⁵¹ President Trump's recent actions show a willingness to use executive orders to overturn Obama-era environmental regulations.⁵² If Trump chooses not to issue an executive order, Congress could act to override the closure.⁵³ Alaska's congressional delegation has expressed harsh criticism of Obama's executive order,⁵⁴ and Republican control of both houses would ease the passage of any action overturning Obama's withdrawal.

With a new administration in place, decision makers in D.C. may change their minds about the appropriateness of Arctic leasing. BOEM's decision not to issue leases, therefore, does not remove the Arctic from development activities in the future, and the need to reform the process is still essential. The current low activity level, coupled with BOEM's decision not to issue any Arctic leases in the 2017–2022 Proposed Final Program, makes now the perfect time to reform the leasing process because it gives decision makers some breathing room to facilitate reforms.

III. STATES' INTERESTS

States affected by OCS activity have a multitude of interests in regulating offshore exploration and drilling. Economic, environmental, energy security, tribal rights, and other interests all concern state governments and other actors residing within the states. Alaska, where all U.S. Arctic OCS activity takes place, has a complex history with offshore drilling.⁵⁵

50. Coral Davenport, *Obama Bans Drilling in Parts of the Atlantic and the Arctic*, N.Y. TIMES (Dec. 20, 2016), https://www.nytimes.com/2016/12/20/us/obama-drilling-ban-arctic-atlantic.html?_r=0; Robinson Meyer, *Can Trump Reverse Obama's Arctic-Drilling Ban?*, ATLANTIC (Dec. 21 2016), <https://www.theatlantic.com/science/archive/2016/12/can-trump-reverse-obamas-arctic-drilling-ban/511376/> [https://perma.cc/9GCV-LDWM].

51. See Martinson, *supra* note 47.

52. Tom DiChristopher, *Trump Signs Executive Order to Roll Back Obama-Era Climate Actions, Power Plant Emissions Rule*, CNBC (Mar. 28, 2017, 11:00 PM), <http://www.cnbc.com/2017/03/27/trump-to-roll-back-obama-climate-actions-power-plant-emissions-rule.html> [https://perma.cc/KJG7-2R9X]; Erica Martinson, *Interior Secretary Moves to Speed up Alaska's Oil and Gas Permit Process*, ALA. DISPATCH NEWS (July 26, 2017), <https://www.adn.com/politics/2017/07/06/interior-secretarys-new-order-aims-to-speed-alaskas-oil-gas-permit-process/> [https://perma.cc/9CDD-4C5Y].

53. See Davenport, *supra* note 50.

54. Alan Bailey, *Most Arctic OCS Out*, PETROLEUM NEWS (Dec. 25, 2016), <http://www.petroleumnews.com/pntruncate/577564673.shtml> [https://perma.cc/ED5M-SSNL].

55. See discussion below.

Alaska is stuck in a love–hate relationship with oil. Oil revenues make up roughly ninety percent of state government revenue.⁵⁶ The petroleum industry supports roughly one-third of all jobs in Alaska, and the state pays an annual dividend (drawn from oil revenue) to its residents.⁵⁷ However, the industry also gave Alaska its greatest environmental disaster when the *Exxon Valdez* oil tanker spilled 11 million gallons of crude oil into Prince William Sound in 1989, contaminating more than 1,200 miles of shoreline.⁵⁸ This history underlies the intense focus on oil and gas activity in the state, with business and environmental interests continually clashing over the appropriate level of development.

Businesses in Alaska advocate for increased OCS activity to spur job growth and support the continued health of the Trans-Alaska Pipeline System.⁵⁹ Recently, business and labor groups started a six-figure ad campaign in *The Washington Post* to influence decision makers to include more Arctic waters in the 2017–2022 leasing program.⁶⁰ The state’s elected federal officials and governor all support increased drilling activity in the Arctic.⁶¹ A recent report by the Alaska Arctic Policy Commission—a policy group made up of state legislators and experts from throughout the state—advocated for increased development in the Arctic as well.⁶²

Environmental groups, on the other hand, want to limit industry’s ability to engage in offshore exploration and drilling.⁶³ These groups, along with senators from other states, successfully petitioned President Obama to permanently exclude the Arctic from offshore development.⁶⁴

56. *Facts and Figures*, *supra* note 18.

57. *Id.*; see also *Frequently Asked Questions*, ALA. PERMANENT FUND CORP., <http://www.apfc.org/home/Content/aboutFund/fundFAQ.cfm> [https://perma.cc/K7EF-PH34].

58. Edward Canuel, *U.S. Arctic Hydrocarbon Extraction: Exploring the Confluence of Law and Identity*, 11 TEX. J. OIL GAS & ENERGY L. 299, 306 (2016).

59. Dan Joling, *Arctic Waters Should Be in Lease Plan Business and Labor Groups Say*, VALDEZ STAR (Sept. 14, 2016), <http://www.valdezstar.net/story/2016/09/14/main-news/arctic-waters-should-be-in-lease-plan-business-and-labor-groups-say/1363.html> [https://perma.cc/JGB7-AKY3].

60. *Id.*

61. *Walker Nominates Arctic, Cook Inlet Waters for OCS Program*, CORDOVA TIMES (Oct. 14, 2016), <http://www.thecordovaitimes.com/2016/10/14/walker-nominates-arctic-cook-inlet-waters-for-ocs-program/> [https://perma.cc/A5VF-J6NN].

62. See ALA. ARCTIC POL’Y COMM’N, FINAL REPORT OF THE ALASKA ARCTIC POLICY COMMISSION 3 (2015), http://www.akarctic.com/wp-content/uploads/2015/01/AAPC_final_report_lowres.pdf [https://perma.cc/Q62U-MCUS].

63. Yereth Rosen, *Environmental Groups Want a Say in Shell’s Arctic Lease-Extension Appeal*, ALA. DISPATCH NEWS (Jan. 14, 2016), <https://www.adn.com/energy/article/environmental-groups-weigh-shell-lease-extension-appeal/2016/01/14/> [https://perma.cc/53TP-PSD8].

64. Liz Ruskin, *Senators Want to Forever Bar Offshore Rigs From Arctic*, ALASKA PUB. MEDIA (Oct. 6, 2016), <http://www.alaskapublic.org/2016/10/06/senators-want-to-forever-bar-offshore-rigs-from-arctic/> [https://perma.cc/R97Q-2TSN].

Among the Native population of Alaska, support for offshore drilling is split. Many tribes and groups support drilling because of the jobs and infrastructure drilling brings to the region.⁶⁵ Conversely, some tribes have seen their way of life and, indeed, their very homes affected by rising sea levels caused by global warming;⁶⁶ therefore, they are wary of further offshore development—believed to be a contributing factor to global warming.⁶⁷

The Alaskan village of Kivalina has seen erosion caused by reduced sea ice levels; this erosion threatens to destroy the land upon which the village sits.⁶⁸ The village went so far as to bring a federal nuisance claim against a collection of oil, energy, and utility companies that it alleged were responsible for emissions of greenhouse gases leading to the reduced sea ice levels.⁶⁹ While the lawsuit was ultimately dismissed for raising a political question, it showcases the disenchantment many tribes feel regarding Arctic development.⁷⁰ Frustration over lack of involvement in decision-making processes has led many tribes to call for outright bans on further development.⁷¹ Many tribal members feel that offshore oil development and exploration endangers their sovereign fishing and hunting rights.⁷²

On the other hand, some tribal groups continue to favor offshore drilling due to their shared goal with the industry of increasing and

65. Tim Bradner, *BOEM Director Hears Support for Drilling in Alaska*, ALA. J. COM. (Aug. 17, 2016), <http://www.alaskajournal.com/2016-08-17/boem-director-hears-support-ocs-drilling-alaska#.WBQrcHj1Low> [https://perma.cc/FPS2-WZC7]; Craig Welch, *Why Alaska's Inupiat are Warming to Offshore Drilling*, NAT'L GEOGRAPHIC (May 22, 2015), <http://news.nationalgeographic.com/2015/05/150522-Inupiat-Shell-offshore-oil-Arctic-Alaska-ocean-whale-sea/> [https://perma.cc/YR2P-PCEB].

66. Stephanie March, *Shrinking Alaskan Village of Kivalina Leaves Locals Fearing Destiny as America's First Climate Change Refugees*, ABC NEWS (Nov. 25, 2015), <http://www.abc.net.au/news/2015-11-26/alaskan-village-kivalina-shrinking-climate-change-locals-say/6975994> [https://perma.cc/HGG8-5VRE].

67. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009); see Chris Mooney, *The Remote Alaskan Village That Needs to be Relocated Due to Climate Change*, WASH. POST (Feb. 24, 2015), https://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change/?utm_term=.064acc82c369 [https://perma.cc/7R8W-RP5V].

68. Mooney, *supra* note 67.

69. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 869.

70. *Id.*

71. Ben Anderson, *Swift Reaction as Shell Suspends 2013 Arctic Alaska Offshore Drilling*, ALA. DISPATCH NEWS (Feb. 27, 2013), <https://www.adn.com/energy/article/shell-announces-suspension-2013-arctic-alaska-drilling-season/2013/02/28/> [https://perma.cc/82TW-HRYW] (explaining that REDOIL, a group of Alaska Natives, want the temporary halt to drilling to become permanent).

72. Dune Lankard, *Alaskans to Rally Against Offshore Oil Drilling During Tuesday's Hearing*, CTR. FOR BIOLOGICAL DIVERSITY (Apr. 4, 2016), http://www.biologicaldiversity.org/news/press_releases/2016/alaska-rally-04-04-2016.html [https://perma.cc/E68M-EW6R].

maintaining infrastructure in the Arctic.⁷³ Tribal groups also favor the jobs created by OCS activities, and in some cases, tribal members receive payments tied to taxes generated from OCS activities.⁷⁴ Village Corporations and Alaska Native Corporations, which are for profit companies created under the 1971 Alaska Native Claims Settlement Act, have partnered with oil companies engaged in OCS activities.⁷⁵ Investments by Alaska Native Corporations and Villages Corporations have paid off, giving Native groups the opportunity to buy into Shell's Chukchi Sea oil leases and to receive concessions from Shell to protect migrating whales that the villages rely on for subsistence hunting.⁷⁶ The Native Corporation representing the North Slope of Alaska (where many affected communities are located) has chosen to purchase two federal leases outright from Shell.⁷⁷ The tension between the economic benefits afforded to many Native Alaskans by offshore development and the environmental impacts of such action continue to fuel debate in the Native community with both sides adamantly advocating for either reduced or increased development and production of oil resources.

IV. A CHANGE IN LEASING STRATEGY

Beginning in the 1980s, the DOI ramped up leasing activity nationwide.⁷⁸ A switch in policy favoring larger scale leases provided operators with larger swaths of land to explore and ultimately bid on.⁷⁹ However, this approach has faced criticism that such large-scale leasing hinders meaningful environmental review of proposed leasing areas.⁸⁰ The

73. Paul Barret, *Why Native Alaskans Support Shell's Arctic Drilling*, BLOOMBERG NEWS (Aug. 6, 2015), <http://www.bloomberg.com/news/articles/2015-08-06/why-native-alaskans-support-shell-s-arctic-drilling>.

74. *Id.*

75. Rachel D'oro, *Shell, Alaska Natives to Share in Oil Profits*, USA TODAY (July 31, 2014), <http://www.usatoday.com/story/money/business/2014/07/31/shell-alaska-natives-to-share-in-offshore-profits/13435949/> [<https://perma.cc/NBM7-A9GQ>].

76. Paul Barret, *Why Native Alaskan Support Shell's Arctic Drilling*, BLOOMBERG NEWS (AUG. 6, 2015), <http://www.bloomberg.com/news/articles/2015-08-06/why-native-alaskans-support-shell-s-arctic-drilling>; Joel K. Bourne, Jr., *What Obama's Drilling Bans Mean for Alaska and the Arctic*, NAT'L GEOGRAPHIC (Feb. 5, 2015), <http://news.nationalgeographic.com/news/2015/02/150205-obama-alaska-oil-anwr-arctic-offshore-drilling/> [<https://perma.cc/BSSF-NUPW>].

77. Elizabeth Harball, *Alaska Native Corporation Acquires Oil and Gas Leases in Arctic Waters*, ALA. PUBL. MEDIA (Nov. 17, 2016), <http://www.alaskapublic.org/2016/11/17/alaska-native-corporation-acquires-leases-arctic-waters/> [<https://perma.cc/9WND-3CU6>].

78. Sam Kalen, *Cruise Control and Speed Bumps: Energy Policy and Limits for Outer Continental Shelf Leasing*, 7 ENVTL & ENERGY L. & POL'Y J. 155, 164-65 (2012).

79. *Id.*

80. Andrew Hartsig et al., *Next Steps to Reform the Regulations Governing Offshore Oil and Gas Planning and Leasing*, 33 ALA. L. REV. 1, 23 (2016).

Obama-era brought a shift back to smaller scale leasing, although it is by no means a permanent return.

In 1980, President Reagan appointed James Watt as Secretary of the Interior.⁸¹ Watt oversaw a marked increase in the number of OCS leases sold,⁸² switching from a tract-by-tract leasing process to area-wide leasing. OCSLA requires that tracts be no larger than 5,760 acres, “unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit.”⁸³ This statutory deference allowed Secretary Watt to increase the amount of land included in a single lease as long as industry was willing to bid on the lease.⁸⁴ In the first eighteen months of area-wide leasing, DOI offered almost four times as many acres for lease as it had in the previous twenty-nine years.⁸⁵ Since it instituted area-wide leasing in 1980, the Department has continued to utilize it as the framework it bases its leasing parcels upon.⁸⁶ This continued use has led to criticisms that the environmental impacts of leasing such large areas cannot be accurately predicted.⁸⁷ The 2007–2012 Environmental Impact Statement (EIS) for Chukchi Sea Lease Sale 193 alone covered 34 million acres.⁸⁸ A sale of such a large area of land naturally leads to questions regarding the ability of the Department to accurately assess the environmental consequences of these large lease sales.

The 2012–2017 OCS Leasing Program included a switch to a targeted leasing program, which was the first shift away from area-wide leasing since the Watt era.⁸⁹ For its Arctic leases, BOEM stated that targeted leasing would move towards a focus on geographically distinct lease areas that have high resource potential and clear indications of industry interest, while also protecting Arctic environments and subsistence needs.⁹⁰ This targeted leasing would request information from industry groups and local stakeholders to identify areas where

81. Kalen, *supra* note 78 at 165.

82. *Id.*

83. 43 U.S.C § 1337(b)(1) (2012).

84. *Id.*

85. *Id.*

86. Hartsig et al., *supra* note 80 at 23.

87. *Id.*

88. DEEPWATER REPORT, *supra* note 2, at 261.

89. BOEM PROPOSED PROG. 2017-2022, *supra* note 40 at 4-5.

90. BUREAU OF OCEAN ENERGY MGMT., *Enhancements to Alaska Outer Continental Shelf Lease Sales Process*, (2012) [hereinafter *Lease Sales Process*], <https://www.boem.gov/About-BOEM/BOEM-Regions/Alaska-Region/Leasing-and-Plans/Leasing/Lease-Sales/Enhancements-AK-Lease-Sales.aspx> [<https://perma.cc/ES8V-XF93>].

development would be appropriate and areas that should not be considered or may require additional protections.⁹¹

The Department signaled a continued preference for targeted leasing for Arctic Leases in the 2017–2022 Proposed Program. The Proposed Program included targeted leasing as one of three options considered by BOEM.⁹² The targeted leasing option in the 2017–2022 Proposed Program—the precursor to the Final Proposed Program—identified one potential sale in the Beaufort Sea, Cook Inlet, and Chukchi Sea Program areas for targeted leasing.⁹³ Lease sales in these areas would have been pushed back to later in the five-year leasing period in order to allow for increased study and evaluation regarding infrastructure capabilities, environmental issues, subsistence use needs, and results from exploratory activities associated with existing leases.⁹⁴

The Final Proposed Program ultimately decided against a lease sale in either the Beaufort Sea or Chukchi Sea Program Areas, but it listed targeted leasing as the proposed strategy if a lease sale were to occur.⁹⁵ The Final Proposed Program lists targeted leasing as the methodology for the one Alaska lease sale included in the program—the non-Artic Cook Inlet Program Area.⁹⁶ While the Department of the Interior ultimately decided against granting lease sales in the Beaufort Sea or Chukchi Sea, it is worth noting that the Final Proposed Program listed targeted leasing as the preferred option if a sale were to take place.⁹⁷

The draft EIS for the 2017–2022 leasing program was done on a regional and national scale.⁹⁸ The EIS states that its programmatic level analysis is much more general than an analysis for the impact of individual lease sales.⁹⁹ The large scope of this EIS is problematic in that it brushes aside environmental concerns by stating that more detailed analysis will be done by the agency further down the line. While targeted leasing could make this more localized analysis a reality, there is no statutory command

91. *Id.*

92. BUREAU OF OCEAN ENERGY MGMT., 2017–2022 OCS OIL AND GAS LEASING PROPOSED PROGRAM 4.1.4 (2016) [hereinafter BOEM PRECURSOR PROGRAM 2017–2022], <https://www.boem.gov/2017-2022-Proposed-Program-Decision> [<https://perma.cc/576V-7RRB>].

93. *Id.* at S.2.2.

94. *Id.*

95. BOEM PROPOSED PROG. 2017–2022, *supra* note 40, at 11-1 tbl. 11-1.

96. *Id.*

97. *Id.*

98. BUREAU OF OCEAN ENERGY MGMT., 2017–2022 OCS OIL AND GAS LEASING PROGRAM DRAFT PROGRAMMATIC EIS 1.1 to 1.4 (2017) [hereinafter DRAFT EIS], https://www.boem.gov/uploadedFiles/BOEM/5-Year/2012-2017/PEIS/Combined_2012-2017_OCS_Oil_and_Gas_Leasing_Draft_Programmatic.pdf [<https://perma.cc/FG7R-9X5E>].

99. *Id.* at 1.4.

that BOEM engage in targeted leasing,¹⁰⁰ and indeed the agency could switch back to an area-wide leasing plan if ordered to do so by the new administration. The justification for a large scale EIS is thus not as clear when targeted leasing further down the line is not required by law and can be ignored at the discretion of the agency.

The EIS for the 2017–2022 program lists environmentally important areas within the Arctic leases. This list includes areas such as Kaktovik at 484,436 acres, Walrus Foraging area at 4,936,975 acres, and the Cross Island area at 1,396,164 acres.¹⁰¹ Stakeholders brought these areas to the Department of the Interior's attention during the public comment period.¹⁰² Important species and habitats for a variety of animals, as well as historical subsistence hunting grounds for a variety of tribes are contained in these areas.¹⁰³ These environmentally important areas are small in comparison to the overall size of the proposed Arctic leasing program. However, their size still leaves questions as to whether effective study can be done on such large areas, especially considering the challenging weather and environmental factors at play in Arctic waters. The lack of a statutory requirement to carry out such targeted leasing analysis leaves open the possibility that areas such as these will be governed by an area-wide leasing policy in the future. Current BOEM policy does not require BOEM to utilize targeted leasing methodology, leaving it up to the agency to choose whether area-wide or targeted leasing should be used. While the last two leasing programs have shown a preference of DOI to utilize the targeted leasing approach, a change in administration could bring a shift back to area-wide leasing.

V. STATUTORY SCHEMES

There are three principle statutes that allow parties interested in Arctic drilling to have their concerns heard by the federal government. While these statutes aimed for increase state participation, agency policy and the courts have rendered them a largely symbolic form of state participation.

A. *Coastal Zone Management Act*

The Coastal Zone Management Act (CZMA) of 1972 seemingly offers states the ability to demand that federal agencies abide by state decisions regarding management of coastal zones. However, the act

100. *Compare Lease Sales Process*, *supra* note 90, with Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1953).

101. *Id.* at 3-39 tbl. 3.4-2.

102. DRAFT EIS, *supra* note 98, at 1.4.

103. *Id.* at 2.4.1.

provides a hollow promise in that federal regulators can easily bypass state management decisions. A brief history of the act showcases the unfulfilled promise of federal and state cooperation.

CZMA gives states the opportunity to participate in development affecting their respective coastal zones through the creation of management plans that give full consideration to “ecological, cultural, historic, and esthetic values, as well as the needs for compatible economic development.”¹⁰⁴ States are given federal grants to develop management programs for their coastal areas. The programs are then submitted to the Department of Commerce for federal approval.¹⁰⁵ CZMA requires that federal agencies, with a few executive exemptions, carry out activities in states’ coastal zones in a way that is consistent with a state’s federally approved management plan.¹⁰⁶ Federal agencies must carry out a consistency review and provide it to the state ninety days before final approval of the federal activity.¹⁰⁷ The goal of CZMA is to encourage states to cooperate in activities affecting their coastal zones.¹⁰⁸ The cooperative-federalism approach enacted by the statute allows states to take a more direct role in managing their coastal zones through the incentive of federal funding for the creation of such plans and the promise of federal compliance with approved state plans.

A state with a coastal management plan, approved by the Department of Commerce, can review a proposed five-year leasing program and assess whether the proposed lease plan is, to the extent practicable, consistent with the state’s own management plan and preferences.¹⁰⁹ Once the Secretary approves a state plan, the Act requires that any applicant seeking a federal license in order to conduct activity that will affect the coastal zone must show that the activity will be conducted in a manner consistent with the state management plan.¹¹⁰ No license may be granted to the party until the state has certified that the activity is consistent with its management plan.¹¹¹

However, any disagreement over the consistency of the federal action (granting a permit) with the state management plan will be decided in favor of the federal agency.¹¹² The Secretary may, through their own

104. 16 U.S.C. § 1452 (2006).

105. *Id.* § 1454.

106. *Id.* § 1456(c).

107. *Id.* § 1456(c)(1)(C).

108. *Id.* §§ 1452 (1)–(5).

109. *Id.* § 1456(c)(1)(A).

110. *Id.* § 1456(c)(1)(C).

111. *Id.* § 1456(c)(3)(A).

112. 15 C.F.R. § 930.43(d) (2011).

initiative, find that the activity is of national interest and complies with the purposes of the CZMA.¹¹³ This allows the Secretary to bypass state objections and rubberstamp federal actions affecting states' coastal zones. Scholars have noted the hesitancy of the Department of the Interior to apply CZMA to OCS activities.¹¹⁴

B. Outer Continental Shelf Lands Act Section 19

Another option for states wishing to exercise influence in the OCS leasing process is found in the Outer Continental Shelf Lands Act (OCSLA). While the act provides powerful language mandating federal acceptance of state recommendations regarding leasing activity, subsequent court decisions have stripped states of their power under the act.¹¹⁵ Courts have given extreme deference to federal regulators, allowing them to overrule state recommendations in favor of national interest.

In its declaration of policy, the OCSLA states that because exploration, development, and production on the OCS will have significant impacts on the coastal states, these states are entitled to an opportunity to participate in the policy and planning decisions made by the federal government in relation to exploration and development of the OCS.¹¹⁶ OCSLA Section 1345(a) states:

Any Governor of any affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan. Prior to submitting recommendations to the Secretary, the executive of any affected local government in any affected State must forward his recommendations to the Governor of such State.¹¹⁷

OCSLA goes on to say that “the Secretary *shall* accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State.”¹¹⁸ The Secretary must provide his reasons

113. 16 U.S.C.A. § 1456(c)(3)(a) (Westlaw 2009).

114. See Sam Kalen, *The BP Macondo Well Exploration Plan: Wither the Coastal Zone Management Act*, 40 ENVTL. L. REP. 1079 (2010); Sam Kalen et al., *Lingering Relevance of the Coastal Zone Management Act to Energy Development in our Nation's Coastal Waters?*, 24 TULANE ENVTL. L.J. 73 (2010).

115. See *Tribal Vill. of Akutan v. Hodel*, 869 F.2d 1185, 1190 (9th Cir. 1988); *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir. 1982).

116. 43 U.S.C. § 1332(4)(c) (2006).

117. *Id.* § 1345(a).

118. *Id.* § 1345(c) (emphasis added).

for accepting or rejecting the recommendations in writing.¹¹⁹ The Act states the Secretary's determination that recommendations either do or do not strike a reasonable balance between the national and individual states' interests is final and cannot by itself be a basis for judicial review or invalidation of a lease sale.¹²⁰

While Section 19, in theory, would allow an interested state to give a voice to interested parties within the state, Section 19 has not proven to be an effective tool for influencing OCS activities. The Interior Department treats Section 19 as an essay requirement that compels the department to merely explain itself to the state.¹²¹ Courts have consistently supported this interpretation and read Section 19 as not requiring the Secretary to defer to state recommendations that strike a reasonable balance between the national interest and the well-being of the affected states.¹²²

Courts have given no credence to the argument that the statute requires the Secretary to accept states' recommendations if they provided the reasonable balance called for in the plain language. Instead, courts have given the Secretary enormous deference, upholding the rejection of states' plans as long as the plans are not arbitrary and capricious.¹²³ The Ninth Circuit stated that its review was limited to "reviewing the rationality of the Secretary's determination,"¹²⁴ rather than deciding if the states' recommendations strike an appropriate balance between local and federal interests. This interpretation of the statute seems contrary to the plain language of the statute, which states that the Secretary *shall* accept the recommendations of the interested states if they provide a reasonable balance between state and national interests.

C. National Environmental Policy Act

With OCSLA effectively off the table as a legitimate means to influence OCS activity, states have attempted to use the National Environmental Policy Act (NEPA) to impact OCS decisions. NEPA is a procedural statute designed to ensure that federal agencies are fully aware of the environmental impacts of their actions.¹²⁵ The Act requires all agencies to include in all major federal action proposals, which affect the environment, a detailed statement on:

119. *Id.*

120. *Id.* § 1345(d).

121. Kalen, *Cruise Control*, *supra* note 27, at 172.

122. *See* Tribal Vill. of Akutan v. Hodel, 869 F.2d 1185, 1190 (9th Cir. 1988); *California v. Watt*, 683 F.2d 1253, 1268 (9th Cir. 1982).

123. *Tribal Vill. of Akutan*, 869 F.2d at 1190.

124. *Id.*

125. 42 U.S.C. § 4332 (1975).

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹²⁶

This statement is commonly referred to as an Environmental Impact Statement (EIS). When evaluating an EIS, courts must determine whether the EIS contains a reasonably thorough discussion of the significant impacts of the probable environmental consequences.¹²⁷ NEPA is only a procedural act and has no substantive environmental protections. An agency can choose to act in an environmentally damaging manner as long as it is fully informed of the environmental impacts.¹²⁸ Courts have repeatedly held that NEPA's requirements are procedural in nature, and agencies are entitled to deference as long as the decision is fully informed.¹²⁹ Thus, the only protection NEPA offers states is a potential procedural hiccup for the agency, which can be overcome by engaging in proper agency environmental analysis. States wishing to encourage increased or decreased OCS activity only have the option of interrupting the agency as it takes its predetermined course. An actor wishing to affect OCS activity in a state can only hope to influence the agency by making the OCS activity seem more or less attractive to the agency by influencing the factors used in the environmental analysis. A state wishing to increase OCS activity would behoove itself to couch the environmental impacts as minimal, while environmental groups will seek to point out the vast environmental consequences of OCS activity.

NEPA does not allow for truly effective input from states in the agency decision-making process because it only requires that an agency be well-informed of the environmental consequences of its actions, not that the agency take affirmative action based on the environmental consequences.

126. *Id.* §§ 4332(C)(i)-(v).

127. *Tribal Vill. of Akutan*, 869 F.2d at 1191.

128. *See Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (citing *N. Slope Borough v. Andrus*, 642 F.2d 589, 599 (D.C. Cir. 1980)).

129. *Id.*

VI. RECOMMENDED REFORMS

The current low activity level in the Arctic presents the perfect atmosphere for reform. Low oil prices and uncertain regulatory conditions have pushed most industry activity out of the Arctic for the time being.¹³⁰ The current leasing plan for the next five years contains no Arctic lease sales.¹³¹ However, given the historical fluctuations in oil prices, continued discoveries of new oil, and calls for increased energy security, the Arctic is certainly not off the table when it comes to oil production. The Trump administration promises to bring a new approach to domestic energy production.¹³² As increased Arctic production is a likely possibility under the new administration, the need for reform only increases. In the current political climate, the following reforms may still be possible mainly because they give increased power to the states, something that current Republican majorities in Congress may find favorable.¹³³

A. Codify Targeted Leasing to Ensure the End of Area-Wide Leasing

Perhaps the most important reform for adequate protection of Arctic environments is the need to make targeted leasing a permanent requirement of the OCS process. While the last two leasing programs have utilized targeted leasing, no requirement exists to do so, and a switch back to area-wide leasing is very possible under the new administration. Codification of targeted leasing serves three important goals.

First, it drastically shrinks the area under review during the mandatory Environmental Impact Statement. The reduced scope of the EIS would save agencies money and create geographically-tailored information that can be utilized by operators and government agencies. The 2007–2012 EIS for the Chukchi Sea alone covered 34 million acres. By reducing the required area of study under the EIS, agencies can reduce costs and provide in-depth analysis on specific areas, rather than broad assertions about areas in general.

Second, targeted leasing allows for informed decision-making by both operators and local actors; it allows local groups such as state government, Native Alaskan tribes, or groups of concerned citizens to

130. See Section III discussion.

131. BOEM PRECURSOR PROGRAM 2017–2022, *supra* note 92, at 11-2 table 11-1.

132. *An America First Energy Plan*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/america-first-energy> [<https://perma.cc/79AC-WH93>].

133. See *GOP Platform, Section 2, The Tenth Amendment: Federalism as the Foundation of Personal Liberty*, GOP.GOV (2017), <https://www.gop.com/platform/we-the-people/> [<https://perma.cc/P5XJ-MKDQ>] (arguing for increased power and decision making to return to the states).

fully understand the impact of proposed leasing activity. The large scale of current leases hinders the ability of local actors to fully comprehend the effects of potential drilling activity. OCSLA requires that tracts be no larger than 5,760 acres, “unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit.”¹³⁴ As already mentioned, this deference has led to a ballooning of leases from Congress’s initial choice of 5,760 acres to leases that comprise tens of millions of acres.¹³⁵

Imagine a local tribe or citizen group attempting to give input on the effects of a lease sale when it must analyze potential impacts over millions of acres. With such large leases, local groups are stuck between a rock and a hard place. The magnitude of the leased area gives rise to a vast array of potential problems: will the lease sale disrupt local fishing or whaling? Does it interfere with nesting ground for migrating birds? If the operator chooses to lease on one portion of the multi-million-acre lease, which community will benefit economically? Local actors are left guessing. On the other hand, local actors must remain involved, or risk the lease process occurring without their input. Codification of smaller targeted leases would combat this problem by allowing local actors greater certainty of potential impacts on their interests.

Lastly, targeted leasing would allow the industry to tailor safety measures to geographically specific locations for ensuring adequate protection against challenging Arctic conditions. The Arctic presents a challenging environment for lease operators.¹³⁶ The National Commission on the BP Deepwater Horizon Oil Spill stated in its 2011 report that more in-depth scientific and engineering data was needed for oil production activities in the Arctic.¹³⁷ Targeted leasing’s localized approach would allow the industry to easier identify high-risk areas listed in the Deepwater report, such as areas with complex geology or deep-water production.¹³⁸ Using this data, the industry could create proactive safety standards individualized to each lease or production area.¹³⁹

134. 43 U.S.C § 1337(b)(1) (2012).

135. Hartsig et al., *supra* note 80, at 23.

136. DEEPWATER REPORT, *supra* note 2, at 253.

137. *Id.* at 253–63.

138. *Id.* at 253.

139. *Id.* at 252 (suggesting that a proactive, risk-based approach to individual operations and environments should be taken).

B. Redefine the Role of the States in the Leasing Process by Requiring the Secretary to Adopt Proper State Recommendations

OCSLA should be amended to provide the states a more determinative role in the OCS process. OCSLA has a stated goal of providing states an opportunity to participate in the policy and planning decisions related to exploration and development, as well as recognition of the rights of states to protect their marine, human, and coastal environments.¹⁴⁰ Furthermore, the language of the Act states that “[t]he Secretary shall accept recommendations of the Governor . . . if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected state.”¹⁴¹

Requiring the Secretary to adopt recommendations given by a state under Section 19 of OCSLA would ensure that both the policy and statutory commands of the Act are met. Requiring state recommendations to strike the proper balance between national and state interests called for in the Act would ensure that recommendations are not arbitrarily adopted. The Secretary could promulgate guidelines clarifying the proper balance of the national and state interests. The guidelines could be similar to those used by the Secretary in deciding the location and timing of exploration and development activities.¹⁴² The Secretary could publish guidelines regarding the national interest with help from other agencies, such as the Energy Information Administration, to provide states with information on national energy demands so as to adequately balance interests.

The Act already contemplates information sharing between the Secretary and states, as Section 1345(e) authorizes the Secretary to enter into cooperative agreements with states affected by OCS activity regarding the sharing of information and joint planning.¹⁴³ Moving the decision-making process to the state level would merely support what the statutory language details—that states are in a better position to make decisions because they have localized knowledge. This promulgation would delegate power to the states, which are in a better position to represent local stakeholders.

To ensure that all actors are given an appropriate voice, the amendment should create a process requiring the Executive Branch to hear from a variety of interested parties and utilize their comments in the balancing process. This would add an element of procedural fairness to the process, and ensure that a state executive branch does not favor special interest

140. 43 U.S.C. § 1332(4)(c)(5) (2006).

141. *Id.* § 1345(c).

142. *See id.* § 1344(a)(2) (showing the required balancing of geographical, economic, environmental and legal considerations in deciding the location of development activities).

143. *Id.* § 1345(e).

groups who can afford large-scale political access. While the process might not be perfect, it will move the debate from the national level to the state level—those being directly affected by the action—and thus in a better place to evaluate the benefits and costs of the action. Particularly, in Alaska, the unique environmental and tribal considerations give local actors increased interest in the OCS process. Utilization of tribal actors is key, not only to ensure their particular interests in the land are respected, but also to ensure that unique tribal knowledge is used in any leasing decisions.¹⁴⁴ By moving the process to the local level, this knowledge can be better utilized, and those directly affected by OCS activities will be given the appropriate voice in the leasing process.

The Secretary would only be required to adopt the recommendations *if* they strike the appropriate balance between state and national interests, thus precluding states from placing their own interests above those of the nation. The decision over which areas to open to leasing would still lie with the Secretary if the states are unable to adopt the appropriate balance or if they simply choose not to exercise their authority to do so. This would prohibit states from engaging in bidding wars to attract industry interest through escalating de-regulation. Granting states the ability to take an active role in the management of their coastal lands and resources places decision-making power where it belongs—in the hands of those affected by the OCS process.

CONCLUSION

The decision of BOEM not to grant any Arctic leases in the 2017–2022 leasing plan is the culmination of a gradual reduction in Arctic activity caused by lack of industry interest, heightened awareness of challenging Arctic conditions, and the need for increased protections of the unique Arctic environment. However, oil development in the Arctic is by no means finished, and the continued support by Alaska’s elected officials and business groups for increased Arctic activity is likely to find a supportive ear in the newly elected Trump administration.¹⁴⁵

The current statutory frameworks governing OCS activity have the admirable goal of allowing affected states to participate in the leasing

144. See Henry P. Huntington, *Using Traditional Ecological Knowledge in Science: Methods and Applications*, 10 *ECOLOGICAL APPLICATIONS* 1270 (2000) (arguing that unique ecological knowledge of tribal groups has been successfully utilized in different ecological management strategies).

145. Erica Martinson, *Ten Things Alaska Senators Discussed in Meeting with Trump and Zinke*, *ALA. DISPATCH NEWS*, <https://www.adn.com/politics/2017/03/08/alaskas-senators-and-the-interior-secretary-to-meet-with-trump/> [<https://perma.cc/Z642-7E2L>].

process.¹⁴⁶ But courts and federal agencies have transformed these statutes into little more than symbolic gestures allowing states—including indigenous groups and other local interests—to voice their opinions, only to have them disregarded by federal decision makers.

Reform to the OCS leasing process could not come at a better time. The current lull of activity provides an opportunity for decision-makers to step back and evaluate at arms-length the procedures used in deciding the appropriate level of Arctic development.¹⁴⁷ BOEM has made some admirable progress already, but these changes must be further enhanced and made permanent. Reforming OCSLA to mandate targeted leasing, along with requiring the Secretary of the Interior to accept state recommendations under OCSLA Section 19 will allow states and local stakeholders to pinpoint the best areas for potential development. Shifting this process from the federal level to the states will allow the intended purposes of both OCSLA and CZMA to come to fruition by permitting states to have a truly impactful voice in the decisions affecting their coastal zones and citizens. In Alaska, the unique Arctic environmental and tribal considerations give local actors increased knowledge over federal officials, as the current federal program does not sufficiently balance these local interests.

146. See 16 U.S.C. § 1456(c) (2006); 43 U.S.C. § 1332(4)(c) (2006); 42 U.S.C. §§ 4332(C) (i)–(v) (1975).

147. See DEEPWATER REPORT, *supra* note 2, for an analysis of the complex geological and atmospheric conditions necessitating increased protections for Arctic drilling operations.