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Oil and Gas - Offshore Leasing

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OIL AND GAS—OFFSHORE LEASING

OIL AND GAS—OFFSHORE LEASING: The Alaska Supreme Court upholds the finding of the Commissioner of the Department of Natural Resources permitting the leasing of offshore tracts for oil and gas exploration and development despite incomplete data regarding the impact of these activities on the wildlife and human inhabitants in the area. *Hammond v. North Slope Borough*, 645 P.2d 750 (Alaska 1982).

On December 7, 1979, after five years of planning, the State of Alaska sold leases for oil and gas exploration and development of offshore tracts in the Beaufort Sea.¹ The Beaufort Sea, the nearshore portion of the Arctic Ocean bordering Alaska's north shore, boasts a dark, hostile, and frigid climate.² This formidable environment is the habitat for many wildlife species, most notably the federally protected bowhead whale.³ Already in danger of extinction, the bowhead whale is the focus of additional concern by environmentalists because of its importance to the Inupiat Eskimos. The whale represents both the primary food source for the Inupiat and an important part of the Inupiat social and cultural identification with a traditional and unique lifestyle.⁴ Predictably, leasing this area for mineral development aroused the concern of environmentalists and area residents. Countering this environmental interest are the promising nature of the Beaufort tracts as oil and gas producers—the tracts lie near the already productive Prudhoe Bay field⁵—and the state policy of encouraging development of the state's resources.⁶

North Slope Borough and its officials challenged the lease sale in state court. In Alaska, a borough is a political subdivision of the state, generally corresponding to the county in other states.⁷ Several Inupiat villages within the Borough joined in the suit.⁸ The Governor of Alaska, the

1. *Hammond v. North Slope Borough*, 645 P.2d 750, 756 (Alaska 1982).

2. *North Slope Borough v. Andrus*, 642 F.2d 589, 593 (D.C. Cir. 1980).

3. *Hammond*, 645 P.2d at 754.

4. *Id.*

5. *Andrus*, 642 F.2d at 593.

6. Alaska Const. art. VIII, § 1.

7. *Walters v. Cease*, 388 P.2d 263, 264 n. 1 (Alaska 1964).

8. The other villages named as plaintiffs are Kaktovik, Wainwright, Anaktuvak Pass, Point Hope, Niqсут, and Point Lay.

Commissioner of the Natural Resources Department, and the oil companies⁹ involved in the sale defended the suit.

Under Alaska law, the Commissioner may approve contracts for leasing state resource interests only if he determines such a lease "will best serve the interests of the state."¹⁰ North Slope claimed the Commissioner's best interest determination in support of the lease sales was invalid, thus making the sale unlawful. They argued the Commissioner lacked complete current information about the impact of exploration and development on the bowhead whale and, consequently, on the Inupiat subsistence lifestyle. In addition, North Slope asserted the Commissioner failed to meet the conditions of the Alaska Coastal Management Act¹¹ (hereafter ACMA), which requires that industrial and commercial development be consistent with environmental and cultural interests.

The Commissioner argued that his best interest determination was valid despite uncertainties about the impact of the leasing activities on the animal and human inhabitants in the region. He claimed that certain lease provisions provided for restricted exploration and development until his department could gather complete data on the impact of these activities.

The Alaska Supreme Court held that the Commissioner may make a valid best interest determination regarding the advisability of leasing state-owned mineral interests despite uncertainty as to the impact of mineral exploration and development on wildlife and humans living in the immediate area. The court applied a reasonable basis test to review the Commissioner's best interest determination. As employed by the court, however, this test establishes a low standard which virtually assures court approval of agency action. Further, in seeking to balance the competing concerns of natural resource development and environmental preservation, the court lost sight of the interests of the Inupiat people.

BACKGROUND

The federal government granted the power to lease mineral interests on state-owned property to the individual states through statehood legislation and the School Lands Act of 1927.¹² Through the Submerged Lands Act¹³ Congress also granted to the coastal states the proprietary rights of ownership, management, administration and development of natural resources in submerged lands extending three geographical miles

9. The oil companies named as defendants are Amoco Co., Atlantic Richfield Co., Conoco Inc., Exxon Corp., Gulf Oil Corp., Mobil Oil Corp., Phillips Petroleum Co., Shell Oil Co., Sohio Alaska Petroleum Co., Tenneco Oil Co., and Union Oil Co.

10. Alaska Stat. § 38.05.035(a)(14) (Supp. 1980).

11. Alaska Stat. §§ 46.40.110-.210 (1977).

12. 43 U.S.C. § 870 (1964), cited in *State v. Lewis*, 559 P.2d 630, 636 (Alaska 1977).

13. 43 U.S.C. §§ 1301-1315 (1964).

from the coastline. In Alaska,¹⁴ as in other states,¹⁵ a state agency retains the power to lease state-owned minerals. Such agencies have broad discretionary power subject to constitutional and statutory constraints.¹⁶ Agency discretion shapes the public policy regarding resource development based on the available scientific and economic information.¹⁷

The primary objective in leasing state mineral interests is securing the largest measure of good possible for the people of the state.¹⁸ In other words, the lease should protect the state's interest and generally benefit the citizens. Leasing policies strive to maximize economic return and minimize environmental injury.¹⁹ They reflect states' desires to develop resources in an orderly fashion while still receiving proper compensation.²⁰

Constitutional and statutory requirements limit administrative agency decisions to lease state mineral interests; thus, such decisions are subject to judicial review for compliance.²¹ Two types of questions may confront the courts in reviewing agency action, the first involving statutory interpretation and analysis of legal relationships, and the second requiring particularized knowledge of the specific agency area.²² In the first type of question, agency expertise provides little guidance.²³ Courts have the specialized knowledge for deciding legal issues.²⁴

The second type of question involves complex subject matter or fundamental policy formulation.²⁵ When resolving questions of this type, courts recognize the agency's specialized knowledge in a particular field and accord deference to the agency decision.²⁶ Courts limit review to determining whether the decision has a reasonable basis in law and fact.²⁷ Under this reasonable basis test, the court decides whether the record of agency action demonstrates that the administrator had a reasonable basis supporting his best interest determination.²⁸ The court may not substitute its own judgment for that of the agency.²⁹

14. Alaska Stat. § 38.05.035(a)(14) (Supp. 1980).

15. See, *State v. Texas Co.*, 205 La. 417, 17 So.2d 569, 571 (1944); *Curtis v. Center Realty Co.*, 502 P.2d 365, 367 (Wyo. 1972).

16. *State v. Babcock*, 147 Mont. 46, 409 P.2d 808, 811 (1966); see, e.g., Alaska Stat. § 38.05.020 (1977).

17. *Moore v. State*, 553 P.2d 8, 22 n. 23 (Alaska 1976).

18. *Rathbone v. State Bd. of Land Comm'rs of Montana*, 100 Mont. 109, 47 P.2d 47, 48 (1935).

19. *Babcock*, 409 P.2d at 812.

20. *Kelly v. Zamarello*, 486 P.2d 906, 912 (Alaska 1971).

21. *Alyeska Ski Corp. v. Holdsworth*, 426 P.2d 1006, 1011 (Alaska 1967).

22. *Swindle v. Kelly*, 499 P.2d 291, 298 (Alaska 1972).

23. *Id.*

24. *Zamarello*, 486 P.2d at 916.

25. *Swindle*, at 298.

26. *Zamarello*, at 916.

27. *Weaver Bros., Inc. v. Alaska Transp. Comm'n*, 588 P.2d 819, 821 (Alaska 1978).

28. *Champlin Oil Co. v. Herbert*, 578 P.2d 961, 964 (Alaska 1978), cert. denied, 439 U.S. 980 (1978).

29. *Carter v. Small Bus. Admin.*, 40 Colo. App. 271, 573 P.2d 564, 568 (1977).

STATEMENT OF THE PRINCIPAL CASE

In *Hammond v. North Slope Borough*, the conflict between North Slope and the Commissioner of the Department of Natural Resources involved both constitutional and statutory issues. Alaska's constitution declares state policy is to encourage development of the state's resources by making them available for maximum use consistent with the public interest.³⁰ The ACMA reflects this policy. The Act vests in the Commissioner the power to lease state mineral interests subject to his determination that the lease will be in the state's best interest.³¹ The parties thus focused on the Commissioner's best interest determination.

In defending his decision, the Commissioner argued that, despite the lack of complete information available at the time of the lease sale about the effect of the oil and gas development on the subsistence resources and activities in the Beaufort Sea area, the impact on the Inupiat people would be minimal.³² In addition, the Commissioner argued that the lease restrictions on development activities provided adequate protection for the wildlife until complete information on the effects of the lease activities could be gathered. These lease restrictions included a yearly limitation on exploratory drilling and testing so as not to disturb the migration of the whales, a prohibition on drilling until test structures survived two winter seasons in water depths in excess of thirteen meters, and a requirement that companies submit a Spill Prevention, Control and Countermeasure Plan before lease operations could begin.³³

Plaintiffs sought to cancel the entire lease sale or, alternatively, to enjoin the leasing of tracts lying outside the Barrier Islands.³⁴ North Slope claimed that the lack of complete information about the effect of the development activities on the animal and human inhabitants precluded a reasonable basis for the Commissioner's best interest determination. They argued that the Commissioner's conclusion that the impact of the activities would be minimal involved a fact question and was thus reviewable under a substantial evidence test.³⁵ North Slope also argued that the Commissioner did not properly consider the environmental consequences of proceeding but rather considered only the economic consequences of delaying the lease sale.

The trial court ruled that the lease sale did not violate the federal or state wildlife protection acts.³⁶ However, the court held for North Slope

30. Alaska Const. art. VIII, § 1.

31. Alaska Stat. § 38.05.035 (Supp. 1980).

32. *Hammond*, at 759.

33. *Id.* at 760.

34. *Id.* at 756.

35. *Id.* at 759.

36. *Id.* at 757. The federal acts in question were the Endangered Species Act, the Marine Mammal Protection Act, and the Migratory Bird Treaty Act. The state acts were Alaska's Endangered Species Act and its Coastal Management Act.

in ruling that the Commissioner failed to adequately determine the impact of the development activities on the Inupiat lifestyle from a cultural, economic, and social standpoint. The Commissioner submitted additional findings as ordered by the judge. The judge ruled that the enhanced record failed to demonstrate a reasonable basis for the Commissioner's finding of minimal impact on the Inupiat's subsistence resources and lifestyle. Based on this ruling, the trial judge invalidated lease sales beyond the Barrier Islands and enjoined the state and the oil companies from entering this area. The court stayed the injunction pending the Commissioner's appeal. The judge affirmed the Commissioner's best interest determination with regard to the tracts inside the Barrier Islands.³⁷

The Alaska Supreme Court held that the Commissioner's best interest determination was "almost entirely a policy decision involving complex issues that are beyond the court's ability to decide."³⁸ The court therefore applied the reasonable basis test as the standard for review. This application, based on holdings from prior state cases involving similar agency determinations,³⁹ reflects the deference given to agency decisions by the judiciary. The policy decision in *Hammond* involved balancing the environmental cost of proceeding with exploration and development against the economic cost of waiting until complete information regarding the impact of these activities on the area residents was available.⁴⁰

The court found that the Commissioner's decision to proceed did have a reasonable basis and that therefore, the lack of information about the impact on the Inupiat was not fatal to the best interest determination. First, the court did not require the Commissioner to have complete certainty as to a project's effect; rather, the Commissioner must have only "some information."⁴¹ Additionally, the Commissioner demonstrated that measures had been taken to provide protection in the area where information was lacking, thus lessening the potential for serious problems resulting from incomplete information. These measures included lease restrictions designed to mitigate any adverse effects of the present lack of information and findings demonstrating consideration of the costs of proceeding and the costs of waiting. The court found the restrictions used information already known about the wildlife and Inupiat to control development activities until complete data could be gathered. According to the court, the lease restrictions counterbalanced the void created by the lack of complete information.

The Commissioner's findings demonstrated to the court that he had considered a "wide range of views on the propriety of proceeding with

37. *Hammond*, at 757.

38. *Id.* at 758-759.

39. *Moore*, 553 P.2d at 8; *Zamarello*, 486 P.2d at 916.

40. *Hammond*, at 759.

41. *Id.*

the sale in light of the existing fund of information.”⁴² In particular, the court noted the Commissioner’s finding that immediate leasing would allow sufficient lead time for development of the area, thus avoiding crisis management where the pressure of demand for oil and gas might lead to a compromise in environmental safeguards. The Commissioner reasoned that each day’s delay in exploration and development in the Beaufort Sea tracts moved the state closer to the time when current supplies would run out.⁴³ The court agreed with the Commissioner that immediate exploration and development of the Beaufort Sea would prevent the need for decisionmaking during a crisis caused by shortages.

While the court seemed convinced of the validity of the best interest determination, the case was remanded for the Commissioner to reconsider his determination in light of the procedural requirements of the ACMA. The Commissioner failed to make clear which of two alternative methods he had used initially to determine that the sale complied with the Act. The Act requires the Commissioner to find either that the lease activities are consistent with state and local environmental standards or that there is a significant need for the activities, there is no feasible prudent alternative to meet the need, and there has been maximum conformance with the standards under the circumstances. The Commissioner’s failure to indicate which line of reasoning he applied created a procedural deficiency violating the Act.⁴⁴

Other issues raised by North Slope involved certain procedural matters surrounding the lease sale. First, North Slope claimed the bidding method chosen by the Commissioner was substantively invalid because the method failed to maximize economic return to the state. The court ruled the Commissioner’s choice of bidding method should be reviewed in light of the circumstances existing at the time the decision was made and that the record supported the Commissioner’s selection. Second, North Slope argued that the Public Meetings Act had been violated and that, consequently, the sales were invalid. Again the court held for the Commissioner, ruling that there had been adequate opportunity for public comment prior to the decision to lease. The court also rejected the Commissioner’s argument that the United States was an indispensable party to the litigation, holding that the United States’ interest in the tracts being leased had not been firmly established.

ANALYSIS

The *Hammond* court undertook a line-drawing process in its review of the Commissioner’s best interest determination. This process entailed a

42. *Id.* at 761.

43. *Id.* at 760.

44. *Id.* at 762.

decision as to how much information is required to form a reasonable basis for the administrative best interest determination. After such a decision there should be some functional standard by which future best interest determinations may be gauged. The *Hammond* court's decision, however, results in only two certainties: a reasonable basis finding is unlikely if there is no information; and, complete information is not required in order to find a reasonable basis.

The court's description of the Commissioner's effort in researching the aspects of the project as "extraordinary" does little to establish a useful standard for future cases. The Commissioner did go to great lengths to gather and incorporate existing information bearing on the advisability of proceeding with the sale, but the court left open the question of how much information is enough. In this respect, *Hammond* does not provide clear guidance to agency administrators facing review of similar determinations. As applied by the court, the reasonable basis test is a low standard which can be met despite incomplete information on the effects of the proposed activities.

The court's adoption of the Commissioner's crisis management argument creates another flaw in the *Hammond* decision. The Commissioner's argument that immediate exploration and development would prevent decisionmaking during a shortage-induced crisis is undercut by the court's recognition that the Commissioner is not required to do anything further to protect either the wildlife or the Inupiat once he makes his best interest determination in favor of development.⁴⁵ The court's decision thus requires no guarantee that the lead time allowed for adjustment in lease activities will be profitably utilized by the Commissioner. The *Hammond* court's adoption of this crisis management argument, along with the low standard set for the reasonable basis test, demonstrate the court's deference to the Commissioner's best interest determination. In turn, this deference explains the differing results reached by the trial and supreme courts.

At the trial level, North Slope succeeded in focusing the court's concern on the Inupiat Indians. As a result of this focus, the trial court held the Commissioner had no reasonable basis for his best interest determination. The Commissioner had incomplete information about the effect of the lease activities on the Inupiat. In contrast, the supreme court's application of the reasonable basis test resulted in an affirmation of the Commissioner's determination. The supreme court focused on the role of the court in reviewing administrative policy decisions rather than on the plight of the Inupiat Indians. This change in focus and the consequent deference to the Commissioner resulted in the low standard set for the reasonable basis test.

45. *Id.* at 759 n. 5.

The *Hammond* decision does set up an analytical scheme for reviewing this type of agency determination in future cases. This analysis involves determining: (1) whether missing information is crucial to the best interest determination, (2) whether precautions have been taken to protect areas of uncertainty, (3) whether the project provides for adjustment as new information is acquired. This scheme is not explicit in the opinion, but rather is implicit in the court's analysis of the issue. As with the reasonable basis test, the court failed to clarify the standard for measuring the elements of the scheme. This failure, too, is attributable to the court's perception of its role in reviewing this agency action. By deferring to the Commissioner's findings in this case, the *Hammond* court leaves to future courts the demarcation between those administrative decisions that are based on sufficient information and those that are not.

In light of the decision to uphold the Commissioner's best interest determination on substantive grounds, the court's order to remand the case to meet the procedural requirements of the ACMA seems pointless, especially since the court did not require written findings from the Commissioner before it reviewed the decision. Although not clear from the opinion, it is likely the court ordered this remand with an eye towards future cases. By requiring strict adherence to procedural requirements in the most convincing case, the requirements become that much more important in the less convincing cases. This remand is the only victory scored by North Slope with the supreme court. In similar situations in the future, this ruling will work to the environmentalists' advantage as it will place a heavier burden on the developers and administrators in preparing their cases for review.

CONCLUSION

After *Hammond*, agency decisions to allow mineral development may be validated by judicial review despite uncertainties as to the impact of development on wildlife and human inhabitants. This decision reflects the deference given administrative determinations when the issue involves an evaluation of complex and technical subject matter for the purpose of policy formulation. The court balances competing environmental and economic concerns and develops an analytical scheme of value to other courts dealing with similar reviews of agency procedures and decisions. Within this scheme, however, the court fails to establish a functional standard for measuring the adequacy of an agency's informational base.

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