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USDI's Outer Continental Shelf - Lease Sale in the Beaufort Sea Contested

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COMMENT

USDI'S OUTER CONTINENTAL SHELF LEASE SALE IN THE BEAUFORT SEA CONTESTED

ENVIRONMENTAL LAW: Department of Interior's outer continental shelf lease sale in the Beaufort Sea off the northern coast of Alaska is challenged by Alaskan native villages and environmental groups alleging that the Beaufort Sea is an environmentally sensitive area. The Secretary of Interior's actions in regard to the lease sale were held to effectuate the will of the legislature in balancing the quest for oil and gas with its attendant impact on Native American cultures. *North Slope Borough v. Andrus, National Wildlife Federation v. Andrus, Village of Kaktovik v. Andrus,* 642 F.2d 589 (D.C. Cir. 1980).

The coastal zone is subject to unusual pressures, both from natural causes and human activities. The land and water resources which support the environments and economies of coastal communities are in danger of depletion. . . . I support efforts to improve our understanding of these coastal issues, and I heartily endorse the designation by conservation organizations of the year 1980 as the "Year of the Coast."

President Carter's Environmental Message to Congress, August 2, 1979.

THE SETTING

The Beaufort Sea Lease Sale is an example of an environmental shotgun approach to halt resource development in an environmentally sensitive area. Plaintiff's arsenal was comprised of congressional environmental enactments such as the National Environmental Policy Act of 1969,[1] the Endangered Species Act,[2] the Outer Continental Shelf Lands Act,[3] and the Marine Mammal Protection Act.[4] While these environmental mandates are important to the disposition of this case, the federal trust responsibility that the United States may hold toward the Eskimos and their culture is unique. If trust duties exist, the scope of those federal fiduciary duties will determine future regulations concerning the conservation of marine mammals. Any regulation of the whale will have important economic and political

1. 42 U.S.C. § 4321 (1976 & Supp. II 1978).
2. 16 U.S.C. § 1531 (1976 & Supp. III 1979).
3. 43 U.S.C. § 1331 (1976 & Supp. II 1978).
4. 16 U.S.C. § 1361 (1976 & Supp. III 1979).

effects on the Inupiat Eskimos, subsistence hunters who for centuries have depended upon the Bowhead whale.

The Beaufort Sea touches northern Alaska from Point Barrow eastward into Canada. "The environment of the Beaufort Sea region is dark and hostile; frigid temperatures prevail throughout much of the year. . . . Life is nasty, brutish, and sometimes short."[5] The Eskimos who inhabit this precarious northern slope of North America depend upon the bounty of the Beaufort Sea for their existence.

The Beaufort Sea region is permanent or migratory home to various animal species. Principal among the migratory animals is the Bowhead whale, which migrates through the Beaufort Sea in spring and in autumn. The Bowhead, which falls under the special protection of the Endangered Species Act, supplies half of the meat needed by the inhabitants of nine whaling villages along Alaska's northern coast.[6] During their yearly six to eight week spring hunt, native Alaskans arm themselves with nineteenth century weapons and undertake their search for the *Balaena mysticetus,* or Bowhead whale. Whaling is a way of life for these Alaskans. Elaborate rituals, magic songs, and traditions exemplify the symbiotic relationship between the Inupiat whalers and the Bowhead whale.[7] Without the preservation of the Bowhead, the Eskimos' way of life would be severely threatened.

The Beaufort Sea is also rich in oil and gas deposits, and the Department of Interior (DOI) scheduled it for a lease sale in December 1979. Local Alaskan groups challenged the DOI, alleging violation of federal protection statutes and requesting that the DOI be enjoined from proceeding with the sale. In October 1980, the United States Court of Appeals for the District of Columbia held that the Secretary of Interior had successfully balanced congressional intent to develop national oil resources with environmental concerns and allowed the lease sale to continue.

LEGISLATION

Controversies such as that involving the Beaufort Sea sale have been anticipated by Congress. Recognizing the need to strike a balance between conflicting goals of environmental protection and economic development, Congress passed a variety of legislation designed to satisfy both. The National Environmental Policy Act of 1969

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

6. The nine whaling villages are Barrow, Point Hope, Gambell, Savoohga, Wales, Kivalina, Wainwright, Kaktovik and Nuiqsut. *See* 43 Fed. Reg. (1978) for information on the hunting seasons of these villages.

7. Rosenblatt, *The Federal Trust Responsibility and Eskimo Whaling,* 7 B. C. ENVT'L. AFF. L. REV. 505, 506 (1979).

(NEPA) declares that "a national policy will encourage productive and enjoyable harmony between man and his environment; . . . prevent or eliminate damage to the environment and . . . stimulate the health and welfare of man; enrich the understanding of the ecological systems and natural resources important to the Nation."[8] NEPA establishes guidelines for ensuring "that a detailed environmental assessment is made before implementing major federal projects which could significantly (affect) the quality of the human environment."[9]

The Endangered Species Act (ESA)[10] was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of (other treaties and conventions)."[11]

The development of the Beaufort Sea could endanger the existence of the Bowhead whale, which is listed as an endangered species under the ESA.[12] In 1970, the United States added the Bowhead whale, and the seven other largest whale species to its endangered species list.[13] So exploited that it was economically and biologically depleted by the early years of the 20th century, the Bowhead today remains the most endangered species of whale. Other wildlife in possible jeopardy include polar bears, gray whales, migratory birds, and fish, which are all intended to receive special protection by statute and international treaty.[14]

Even earlier, Congress enacted the Outer Continental Shelf Lands Act (OCSLA) in 1953[15] "to assert federal jurisdiction over lands lying seaward of a three mile coastal zone given to the states."[16] Under the act, the Secretary of Interior was vested with authority to lease OCS lands for mineral exploration and to prescribe rules and regulations necessary to administer leasing of the OCS. The few guidelines in the act itself left the Secretary with wide discretion. Be-

8. 42 U.S.C. § 4321 (1976 & Supp. II 1978).
9. *Id.*
10. 16 U.S.C. § 1531 (1976 & Supp. III 1979).
11. Other treaties and conventions listed in the ESA are migratory bird treaties with Canada and Mexico, the Migratory and Endangered Bird Treaty with Japan, the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the International Convention for the Northwest Atlantic Fisheries, the International Convention for the High Seas Fisheries of the Northern Pacific Ocean, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. *Id.* § 1531(a)(4)(A)-(F).
12. *Id.*
13. 50 C.F.R. § 17.11 (1980).
14. *Id.*
15. 43 U.S.C. § 1331 (1976 & Supp. II 1978).
16. *Id.*

cause local governments and affected coastal states alleged that they were not adequately involved in the decision-making process of coastal development, the act was amended in 1978. The amendment to the OCSLA set out significant policy objectives which include rapidly making oil and other natural resources available to meet domestic needs, balancing economic development with protection of the environment, and providing coastal states with an opportunity to participate in any planning decisions relating to the resources of the outer continental shelf.[17] The OCSLA directed the Secretary to

> conduct a study of any area or region included in any oil and gas lease sale in order to establish information needed for assessment and management of environmental impacts in the human, marine, and coastal environment of the OCS and the coastal areas which may be affected by oil and gas development in such area or region.[18]

Under the OCSLA, the Secretary is empowered to cancel a lease if he determines, after a hearing that

> (i) continued activity . . . would probably cause serious harm or damage to life, to property, to any mineral, . . . or to the marine, coastal or human environment;
> (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and
> (iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force.[19]

PROCEEDINGS

Against this legislative background, the court of appeals determined that the Secretary of Interior may undertake all lawful activities of the lease phase of the Beaufort Sea region. The Bureau of Land Management (BLM) had proposed this area for lease sale development of oil and gas as early as November 1974. The documents in proceedings before the court of appeals' decision are voluminous.

In 1979, before the courts were involved, a coalition of 33 environmental, conservation and wildlife groups and an Alaskan organization urged President Carter to order the DOI to cancel its plans to hold the OCS oil and gas lease sale in the Beaufort Sea. The coalition claimed that the delicate Arctic environment could not withstand the environmental risks of oil and gas drilling.[20]

Despite those strong pleas, the Secretary of Interior, Cecil D.

17. *Id.* § 1332(1)-(5).
18. *Id.* § 1346(a)(1).
19. *Id.* § 1334(a)(2)(A).
20. B.N.A. 10 ENVIR. REP. 1501 (1979).

Andrus, and Governor Jay Hammond of Alaska agreed to proceed offering offshore oil and gas leases in the nearshore waters of the Beaufort Sea. A total of 17 tracts covering 514,202 acres were offered for sale.[21] This was the first sale in the Arctic area. Secretary Andrus gave his assurance that the DOI had taken a cautious approach to this undertaking, and that "very stringent requirements (would be) placed on the lessees in order that the rich biological resources of the area, which are intimately linked to the way of life of the Inupiat Eskimo, would not be put in jeopardy."[22]

Three suits were filed in the United States District Court for the District of Columbia[23] to enjoin the Department of Interior's December 11 sale of the OCS leases. On December 7, 1979, the court denied plaintiffs' motion for a preliminary injunction to enjoin the lease sale. The court reasoned that immediate relief was not necessary because the plaintiffs had failed to demonstrate the probability of irreparable harm. On January 22, 1980, the court ruled on cross motions for summary judgment in separate actions brought by the North Slope Borough, the National Wildlife Federation, and the Village of Kaktovik against Cecil D. Andrus.

The plaintiffs requested a permanent injunction, alleging violations of a federal trust responsibility to Native Americans, ESA, NEPA, OCSLA, the Marine Mammal Protection Act (MMPA),[24] the Migratory Bird Treaty Act (MBTA),[25] and an agreement on the Conservation of Polar Bears.[26] The district court granted plaintiffs' motions for summary judgment under the federal trust responsibility of NEPA[27] and Sections 7(a)(2) and 7(b) of the ESA.[28] All other claims were granted in favor of the defendants. The Secretary was enjoined from accepting bids for the OCS lease sale until requirements of the trust responsibility, the NEPA, and the ESA were met.

The United States Court of Appeals for the District of Columbia issued an opinion on October 9, 1980,[29] holding that the "Secretary

21. The Geological Survey estimates that undiscovered resources from .5 billion to 1.25 billion barrels of oil and from .87 trillion to 3,125 trillion cubic feet of gas may lie in the proposed sale area, which includes both state, federal, and disputed land. *Id.* at 1502.

22. *Id.*

23. North Slope Borough v. Andrus, National Wildlife Federation v. Andrus, and Village of Kaktovik v. Andrus, 487 F. Supp. 326 (D.D.C. 1979).

24. 16 U.S.C. § 1361 (1976 & Supp. III 1979).

25. 16 U.S.C. § 703 (1976 & Supp. III 1979).

26. North Slope Borough v. Andrus, 486 F. Supp. 332, 339 (D.D.C. 1979).

27. Plaintiffs' motion for summary judgment, as they related to claims under the Federal Trust Responsibility, Section 102(2)(c) of the National Environmental Policy Act, and Sections 7(a)(2) and 7(b) of the Endangered Species Act, were granted.

28. *Id.*

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

may undertake, and permit to be undertaken all lawful activities attendant upon the 'lease' phase of the Beaufort Sea Oil and Gas Project."[30]

THE LEASE STAGE

The court of appeals emphasized that "drilling may still be at least two years away and will remain subject both to routine and extraordinary administrative and judicial review."[31] Once the leases are accepted by the Secretary, the lessees must adhere to federal law, department regulations, and lease stipulations by engaging only in preliminary activities. Only "[g]eological, geophysical, and other surveys necessary to develop a comprehensive exploration plan"[32] are allowed. The court determined that, without such preliminary activities, the Secretary would not be able to properly appraise the Beaufort Sea region development pursuant to the congressional mandate "which established a clear program for thoughtful, graduated, and a tightly controlled development of oil lands on the other continental shelf of the United States."[33]

Thirteen lease stipulations were drafted by the Secretary to minimize the possibility of injury to the environment in the Beaufort Sea area. Those stipulations were published in the "Final Notice of Sale for the Proposed Joint Federal/State Beaufort Sea Lease Sale" in the *Federal Register*.[34] The court specifically set apart federal stipula-

30. *Id.* at 592.

31. *Id.* at 593. The OCSLA provides that the "lease sale . . . is only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to implementation of each of the major stages: leasing, exploring, producing, . . ." 43 U.S.C. § 1331 (1976).

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

33. No "physical penetration of the seabed of greater than 300 feet of unconsolidated formations or 50 feet of consolidated formations" would constitute a permissive preliminary activity. 44 Fed. Reg. 70238 (1979).

34. Lease Terms and Stipulations, 44 Fed. Reg. 64752, 64761-63 (1979).

Federal Stipulation No. 1 provides for "any site, structure, or object of historic or archaeologic significance" which may be discovered during oil and gas explorations.

Federal Stipulation No. 3 provides for restoration of an exploratory drilling site, in areas of less than 10 meters of water depth, after drilling is completed.

Federal Stipulation No. 4 states that "[s]olid waste disposal on artificial islands or in marine waters within the lease area is prohibited."

Federal Stipulation No. 5 provides for criteria that must be met where pipelines are required.

Federal Stipulation No. 6 provides for regulation of discharge of produced waters, drilling muds and cuttings into marine waters.

Federal Stipulation No. 8. Exploratory drilling and testing, and other downhole exploratory activities are to be limited to the period between Nov. 1 through March 31, "unless the Supervisor determines that continued operations are necessary to prevent a loss of well control or to ensure human safety."

Federal Stipulation No. 9. Exempts lease block 700 from exploratory work.

tions Nos. 2 and 7 as evidencing concern for the exigencies of a sensitive environment.

Federal stipulation No. 2 states that the lessee shall provide an "environmental training program for all personnel involved in exploration or development activities."[35] Stipulation No. 7 requires that the lessee conduct certain environmental surveys to determine the composition of biological populations or habitats and the effects of oil operations on these groups.[36]

Not only do the lessees have to fulfill the requirements of the lease stipulations, but the Final Notice of Sale[37] mandates additional obligations.[38] For example, the lessees must allow "free movement and safe passage to fish and mammals, both onshore and offshore."[39] The lessees must also comply with requirements for advance testing of drilling structures. Circuit Judges Mackinna and Wilkey and United States District Court Judge Penn found that the Secretary "has responded thoughtfully in reconciling the quest for oil with meaningful deference to nature"[40] by having drafted lease stipulations and other obligations which circumscribe the lessees' activities.

ANALYSIS

National Environmental Policy Act

The District Court for the District of Columbia held that the DOI's environmental policy impact statement (EIS) on the sale violated the NEPA and it therefore enjoined the government from selling the OCS leases. The district court concluded that the EIS had not adequately analyzed the cumulative effects of the Beaufort Sea sale and other energy projects on the North Slope of Alaska and determined that the EIS did not amply address the use of lease stipulations as an effective mechanism for limiting adverse environmental impacts. The plaintiffs argued that the EIS, prepared in conjunction with the lease

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Federal Stipulation No. 10 provides for royalty rates.

Federal Stipulation No. 11 provides that the "lease is subject to the 'Agreement Between the United States and State of Alaska Pursuant to Section 7 of the Outer Continental Shelf Lands Act, and Alaska Statutes 38.05.137, . . .' " and that the lessees consent to every term of that "Interim Agreement."

Federal Stipulation No. 12. "This lease is subject to the 'Agreement Regarding Unitization for the Proposed Joint Federal/State Beaufort Sea Lease Sale' executed by the United States and State of Alaska on October 26, 1979, and the lessee is bound by the terms of that agreement."

35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 64766.
39. North Slope Borough v. Andrus, 624 F.2d 589, 596 (D.C. Cir. 1980).
40. *Id.* at 16.

sale, did not satisfy the requirements of Section 4332(2)(c) of NEPA. That section requires that an EIS include an analysis of the relative environmental merits and reasonable alternatives to any proposed major federal action "significantly affecting the quality of the human environment.[41]

The court of appeals, agreeing with the lower court, reiterated that the court's role is to determine "whether the EIS provides the decision maker with sufficient detail to permit a reasoned choice of alternatives so far as environmental aspects are concerned."[42] "Reasonable considerations to all significant impacts is all that can be demanded of an agency."[43] The appellate court then analyzed the specific holdings of the district court as they pertained to the Beaufort Sea EIS and reversed.[44]

Cumulative Impact

Several significant federal and state energy development projects are progressing in the North Slope region.[45] When multiple projects will have a cumulative impact "upon a region so that the environmental consequences of a particular project cannot be considered in isolation, the decision maker must be alerted to those cumulative impacts."[46] The standard used to determine if a particular EIS satisfactorily discusses environmental consequences is whether it "furnishes such information as appears to be reasonably necessary under the circumstances for evaluation of the project."[47]

The district court ruled that the EIS was inadequate because it had failed to "alert the decision maker to the qualitative nature of likely cumulative effects."[48] The appellate court reversed this decision, referring to the EIS, which adverted to the cumulative impact of the project on at least 16 pages. The court determined that the EIS clearly delineated the potential harm arising from the lease sale:

> The most likely effect (of all the proposed Federal and State governments' actions) will be a limiting of the subsistence lifestyle because of less availability of some species some years, and a slightly limited

41. 42 U.S.C. § 4332(2)(C) (1976).
42. N.R.D.C v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).
43. North Slope Borough v. Andrus, 624 F.2d 589, 599 (D.C. Cir. 1980).
44. The EIS, prepared by the Department of Interior, includes three volumes.
45. Drilling in Prudoe Bay, the Alaska Natural Gas Pipeline, and the Tans-Alaska Pipeline are some examples.
46. North Slope Borough v. Andrus, 486 F. Supp. 332, 347 (D.D.C. 1979); *see:* Kleppe v. Sierra Club, 427 U.S. 390, 409-10 (1976).
47. N.R.D.C. v. Callaway, 524 F.2d 79, 88 (2nd Cir. 1975).
48. *Id.* at 348. Cumulative effects on some species, such as polar bears and caribou, were not addressed.

habitat to hunt and fish in. This could drastically impact the Inupiat social and physical well-being; however, the amount of this potential change cannot be estimated.[49]

Alternatives to the Proposal

In the lower court, the plaintiffs maintained that the Beaufort Sea EIS failed to adequately consider the following alternatives as required by NEPA:

(i) alternative energy sources
(ii) alternative mitigation measures
(iii) alternative management schemes for the Beaufort Sea area.

The NEPA provides that an agency must list and discuss proposed alternatives to a project, including any possible environmental consequences of the alternatives.[50] The agency's determination of proposed alternatives is guided by a rule of reason; the agency itself determines how much detail to include in the EIS. A discussion of proposed alternatives need only provide "information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned."[51]

The lower court dismissed plaintiffs' first allegation that alternative energy sources had been inadequately discussed. The EIS was found to be satisfactory because NEPA requires only a "reasonable" treatment of any proposed energy source alternative. The appellate court affirmed this ruling, stating that "[t]wenty pages of discussing a spectrum of other energy sources is plainly sufficient under NEPA."[52]

Alternative mitigation measures were considered next by the lower court. That court commented that the EIS did not adequately alert the fact finder to the probable effect of each lease stipulation and to reasonable alternative stipulations. The appellate court rejected this ruling, asserting that "[i]t is difficult to imagine how the EIS[53] could be much more helpful than 'merely set[ting] forth the content of each stipulation and is general rationale.' "[54] The court found that the highly restrictive nature of the lease stipulations anticipate any environmental protective problems that may arise: "The stipulations . . . are not simple *elements* of the decisionmaking process, but

49. EIS at 259.
50. N.R.D.C. v. Callaway, 524 F.2d 79, 92 (2nd Cir. 1975); N.R.D.C. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).
51. N.R.D.C. v. Morton, 458 F.2d at 836; *see:* North Slope Borough v. Andrus, 486 F. Supp. 332, 345 (D.D.C. 1979).
52. North Slope Borough v. Andrus, 642 F.2d 589, 601 (D.C. Cir. 1980).
53. *Id.* at 602.
54. *Id.*

rather, they are complex *products* of decisionmaking analogous to interlocutory decisions by the Secretary and are informed themselves by surrounding analysis and discussion within the EIS."[55]

The appellate court then considered plaintiffs' argument that the alternative management schemes for the Beaufort Sea area were not fully addressed. The lower court stipulated that the EIS did not include a discussion of management alternatives pursuant to other federal statutory schemes.[56] The court found that to be crucial to holding the EIS defective. The court of appeals reversed, regarding the Secretary's consideration of the Marine Sanctuary Act (MSA) alternative as adequate "under the instant circumstances."[57] Under the MSA, the "Secretary of Commerce can designate portions of the Outer Continental Shelf as marine sanctuaries, which would give the Secretary authority to issue and enforce 'necessary and reasonable regulations to control any activities permitted within the designated marine sanctuary.' "[58] The appellate court affirmed the Secretary's treatment of the MSA alternative on two bases. First, the EIS spoke directly to such an alternative:

> If the proposed Beaufort Sea area is designated as a Marine Sanctuary with delegation of management authority to the Department of Commerce, oil and gas operations in the area could be severely reduced from that which would occur under a national management strategy of balancing conflicing uses of the area.[59]

Second, the Beaufort Sea area has never been designated as an "active candidate" for marine sanctuary status by the National Oceanic and Atmospheric Administration,[60] and it is therefore free from any additional environmental safeguards which could be promulgated by the Secretary of Commerce.

Worst Case Analysis

The Council on Environmental Quality Regulations requires the inclusion of a worst case analysis in an EIS when gaps in relevant information or scientific uncertainty exist.[61] The analysis is an assessment of worst possible impacts of drilling on the Bowhead whales and on the Beaufort Sea environment.

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55. *Id.*
56. 16 U.S.C. § 1431-34 (1972).
57. North Slope Borough v. Andrus, 642 F.2d 589, 604 (D.C. Cir. 1980).
58. Commonwealth v. Andrus, 594 F.2d 872, 884-85 (1st Cir. 1979), *citing,* 16 U.S.C. § 1432(f) (1972).
59. EIS at 395; *see generally Id.* at 393-96.
60. The sub-agency in the Department of Commerce in charge of marine affairs.
61. 40 C.F.R. § 1502.2 (1980).

The lower court determined that a worst case analysis was not required in this case because the draft EIS was prepared before the effective date of the council's regulations.[62] The plaintiffs still argued in the lower court that the worst case analysis which the DOI voluntarily chose to include in its EIS was not really the worst possible case. The appellate court affirmed the district court's holding that "[t]he worst case analysis contained in the EIS was a reasonable means of alerting the decision maker to the dangers presented by proceeding in the face of uncertainty."[63] Because this opinion was limited to the lease phase of the Beaufort Sea project, the court was primarily concerned with the limited preliminary hazards. The appellate court reasoned that the Secretary would be able to assess a possible worst case analysis only when the location and the amount of the oil are discovered.

The Endangered Species Act

The district court held that the DOI violated the ESA because of its failure to obtain a biological opinion from the National Marine Fisheries Services (NMFS) concerning the possible effects of Beaufort sea oil production on the endangered Bowhead whale. A biological opinion is a statement written by the agency with jurisdiction over an endangered species (NMFS) stating the agency's opinion of how future action may jeopardize the continued existence of the species. In the lower court, the plaintiffs claimed that the Secretary had violated sections 7(a)(2), 7(b), and 7(d) of the ESA. Those sections of the ESA require that an agency not make any "irretrievable commitment of resources" which would foreclose implementation of alternatives to the proposed action, and that an agency not jeopardize the continued existence of the Bowhead whale.[64]

The lower court determined that the government may pursue activities in the face of inadequate information if there is a reasonable likelihood of ultimate compliance, there was no 7(d) violation, and the intermediate steps taken pursuant to the agency action comply with 7(a)(2). The district court found that the defendants could not satisfy the last step of that analysis. The appellate court reversed, holding that the ESA had not violated section 7(a)(2).

Before addressing the statutory issues, the court of appeals assessed the scope of agency action. That court affirmed the decision that "agency action constitutes the lease sale and all resulting activities."[65]

62. *Id.* at § 1505.12.
63. North Slope Borough v. Andrus, 486 F. Supp. 332, 347 (D.D.C. 1979).
64. 16 U.S.C. § 1536(a)(2), § 1536(b), § 1536(d) (1973).
65. North Slope Borough v. Andrus, 486 F. Supp. at 350-51.

The lease sale and all subsequent activities were therefore held to be subject to ESA scrutiny. The appellate court determined that satisfaction of the ESA requirements are to be "measured in view of the full contingent of OCSLA checks and balances and all mitigating measures adopted in pursuance thereof."[66] As compliance with "OCSLA makes ESA requirements more likely to be satisfied both in an ultimate and a proximate sense,"[67] the court held that the Secretary "did perform [ ] a comprehensive analysis of all the ramifications of the lease sale."[68]

The 7(b) Biological Opinion Claim

The legislative purposes of a biological opinion, as required by the ESA, are twofold. First, the opinion "is designed to attenuate any conflicts between the agency action and the welfare of the endangered species."[69] Second, the opinion provides courts with substantive evidence of an agency's compliance with 7(a)(2).

The sole 7(b) issue before both courts in the instant case was whether a November 6, 1979, letter from NMFS to the Bureau of Land Management (BLM) constituted a biological opinion within the meaning of the act.[70] The lower court determined that the letter failed to satisfy both the statutory requirements and the legislative purposes of a biological opinion. The appellate court reversed this determination because it found that the letter was intended to be a biological opinion.[71] The letter incorporated by reference two separate biological documents, which demonstrated to the court that the biological opinion had been carefully thought out.

The 7(d) Claim: "Irreversible or Irretrievable" Commitments

The appellate court affirmed the district court's ruling that section 7(d) of the ESA had not been violated. The court determined that the preliminary activities permitted by the lease sale did not result in any "irreversible or irretrievable commitment of resources . . . , which has the effect of foreclosing . . . alternative measures which avoid jeopardizing the continued existence of any endangered or threatened species. . . ."[72]

66. North Slope Borough v. Andrus, 642 F.2d 589, 609 (D.C. Cir. 1980).
67. *Id.*
68. *Id.*
69. *Id.*
70. A November 6, 1979, letter from Mr. Terry Leitzell of N.M.F.S. to Mr. Frank Gregg, director of B.L.M.
71. North Slope Borough v. Andrus, 642 F.2d 589, 610 (D.C. Cir. 1980).
72. 16 U.S.C. § 1536(d) (Supp. II, 1978).

Federal Trust Responsibility

The plaintiffs maintained that the federal government had a trust responsibility to protect the Native Alaskans' way of life which had been violated here. The district court, after determining that such a trust did exist, concluded that the Secretary had shirked those trust responsibilities by failing to comply fully with the ESA. The appellate court agreed with the district court's holding that a trust responsibility can only arise from a statute, a treaty, or an executive order.[73] The court of appeals noted the lack of any specific provision imposing such a fiduciary relationship and held that the Secretary had complied with the pertinent environment statutes.[74]

The appellate court looked to the recent Supreme Court decision in *United States v. Mitchell,*[75] which held that "the United States bore no fiduciary responsibility to Native Americans under a statute which contained no specific provision in the terms of the statute."[76] The Supreme Court strictly construed the statute involved in *Mitchell.* The United States appellate court noted, however, that *Mitchell* "left open the questions of whether, on remand, other statutes might support the assertion of a trust responsibility, or whether a 'special relationship' between the United States and Indian tribes" could support that claim.[77] The Supreme Court has not yet fully delineated the facets of the United States' trust responsibility toward Native Americans. It may therefore be helpful to examine lower federal court decisions to clarify those issues.

The court of appeals considered two grounds which directly vindicated the Secretary's trust responsibility towards the Native Americans. "First, the primary threat to the Inupiats can only be viewed as one of a possibly deleterious intrusion into their land."[78] Second, it was found that the Secretary amply focused on the fears and concerns of the Inupiats in the EIS, under the headings of "Protection of Subsistence Harvest Activities"[79] and "Subsistence Food Gathering Impacts."[80] The Secretary, empowered with discretion, must necessarily balance competing interests. The appellate court remarked that such a balancing process "invokes tension and compromise of dual values, that are disappointing in some degree."[81]

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73. North Slope Borough v. Andrus, 642 F.2d 589, 611 (D.C. Cir. 1980).
74. *Id.*
75. United States v. Mitchell, ____ U.S. ____, 100 S.Ct. 1349 (1980).
76. North Slope Borough v. Andrus, 642 F.2d 589, 611 (D.C. Cir. 1980).
77. *Id.* at 611, n. 148.
78. *Id.* at 612.
79. EIS at 337.
80. *Id.* at 254-59.
81. North Slpe Borough v. Andrus, 642 F.2d 589, 613 (D.C. Cir. 1980).

CONCLUSION

The recent *North Slope Borough* decision is an illustration of a federal appellate court's concern with legitimate environmental and human problems along with the exploration and production of our nation's natural resources. By enacting the ESA and NEPA, Congress has expressed a strong public interest in ensuring the preservation of endangered species, such as the Bowhead, and in preventing damage to the environment. Congress mandated development of resources in the OCS through the OCSLA because of the pressing national interest in developing available domestic energy supplies. The tension resulting from those legislative enactments was recognized by the appellate court. Referring to *Mitchell,* the court of appeals specifically left open the question of whether a trust responsibility may be found on remand given the proper showing. Either environmental statutes or the existence of a special relationship between the United States and Native Americans could be held to impose a trust responsibility on the United States to protect the Eskimos' rights to subsistence hunting. Because all parties to this action are pressing appeals, it is necessary to examine whether a federal trust responsibility could be found on remand on either statutory or special relationship grounds.

The appellate court noted that the lower court's rationale in *North Slope Borough*[82] is consistent with the Supreme Court's reasoning in *U.S. v. Mitchell,* wherein a majority of the court ruled that the General Allotment Act of 1887 did not unequivocally demonstrate congressional intent to create a trust for Native Americans.[83] The court of appeals delineated the standard for determining the existence of a federal trust: "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only."[84] The court defined a limited fiduciary obligation and found that the Secretary had fulfilled that obligation in this case. If a court should ascertain on remand that a federal trust responsibility exists, however, the Secretary will be held to a higher standard in scrutinizing the possible adverse effects that oil and gas exploration activity would have upon the Inupiat society and upon their environment. A higher standard of scrutiny would mean first, that environmental statutes could not be used to "undermine the subsistence cultures,"[85] second, that the Secretary would have to be acutely aware of the

82. North Slope Borough v. Andrus, 486 F. Supp. 332, 334 (D.D.C. 1979).

83. United States v. Mitchell, ___ U.S. ___, 100 S.Ct. 1349 (1980).

84. North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980); *see:* United States v. Mitchell, ___ U.S. ___, 100 S.Ct. 1349, 1354-56 (1980).

85. North Slope Borough v. Andrus, 486 F. Supp. 332, 344 (D.D.C. 1979).

Native Alaskans' fears, concerns, and needs, and third, that the courts would vigorously enforce environmental legislation to protect the Eskimos' rights of subsistence hunting.

The existence of a statutory trust provision was not argued before the court of appeals. The court did, however, recognize that "every statute and treaty designed to protect animals or birds (e.g., Marine Mammal Protection Act;[86] ESA[87]) specifically exempts Native Alaskans who hunt the species for subsistence. These statutes have been construed[88] as specifically imposing on the Federal government a trust responsibility. . . ."[89]

In *People of Togiak v. U.S.*, the district court for the District of Columbia stated that "[i]n addition to . . . express constitutional power, federal authorities have long been held to have a trust responsibility toward . . . Alaskan Natives."[90] Because the MMPA and the ESA expressly exempt Alaskan Natives from certain environmental responsibilities, it is clear that Congress intended that the Eskimos continue to depend upon the bounty of the Beaufort Sea for their existence. That exemption and the ensuing relinquishment of responsibilities should not be ignored.

The Alaska Native Claims Settlement Act (ANSCA)[91] could create a stumbling block for the plaintiffs on remand. In 1976, Congress enacted the ANSCA, which extinguished "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land beneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing right. . . ."[92]

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86. 16 U.S.C. § 1371(b).
Exemptions for Alaskan Natives:
> The provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking (1) is for the subsistence purposes by Alaskan Natives who reside in Alaska, or (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing. . . .

87. 16 U.S.C. § 1539(e).
Exemption for Native Alaskans:
> [p]rovisions of the chapter shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by (A) any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska, . . .

88. People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979).

89. North Slope Borough v. Andrus, 642 F.2d 589, 612 (D.C. Cir. 1980). *Cf.* North Slpe Borough v. Andrus, 486 F. Supp. 332, 344 (D.D.C. 1979).

90. People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979); *see:* Alaska Pacific Fisheries v. United States, 249 U.S. 53 (1918); *see:* Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973).

91. 43 U.S.C. § 1601-1627 (1976).

92. *Id.* § 1603(b).

Arguably, the ANSCA extinguishes all aboriginal land related claims and any trust obligation to the Alaskans which may depend on such land claims. The appellate court noted this possible interpretation of the ANSCA when citing to *Cape Fox Corp. v. U.S.*[93] Nonetheless, "the termination of a federal trust responsibility with regard to land does not necessarily extinguish a trust relationship based on subsistence and cultural needs."[94]

A federal trust responsibility may also be enforced if there is an adequate showing of a special relationship between the United States and the Native Alaskans.[95] Two factors arguably support such a special relationship. First, one may analogize the fiduciary relationship between the federal government and native Indians of the lower 48 states to the relationship between the federal government and the Native Alaskans. Both Indians and Eskimos are included in the modern "Native American" term.[96] Second, the historical relationship between the federal government and the Alaskan natives is not to be slighted. As early as 1964, Presidential concern was demonstrated for the Alaskans' way of life. President Theodore Roosevelt, in his Fourth Annual Message to Congress announced that "their (Native Alaskans') country is being overrun by strangers, the game slaughtered and driven away, the streams depleted of fish. . . ."[97]

If the plaintiffs on remand demonstrate congressional intent to consider Native Alaskans' interests in preserving their delicate environment, to construe statutes in their favor, and to permit Eskimos to continue their subsistence way of life, the special relationship strand may be met.

We must not lose sight of the adverse impacts on the environment and on our Native American cultures caused by oil and gas exploration. The reduction of America's dependence on insecure and costly supplies of foreign oil is certainly a primary goal of the Department of Interior. The multiple local, state, and federal coastal demands must blend into a single environmental continuum. Through the en-

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93. North Slope Borough v. Andrus, 642 F.2d 589, 612, n. 151 (D.C. Cir. 1980); *c.f.* Cape Fox Corp. v. U.S., 456 F. Supp. 784, 799 (D. Alaska 1978).

94. Rosenblatt, *The Federal Trust Responsibility and Eskimo Whaling*, 7 B. C. ENVT'L. AFF. L. REV. 505 (1979).

95. Nathaniel Rosenblatt notes in his article that "(a) fiduciary relationship has long been recognized between Indian tribes of the lower forty-eight states and the federal government." *Id.* at 528. *Cf.* U.S. v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Seminole Nation v. U.S., 316 U.S. 286 (1942).

96. The Native American Programs Act of 1974, 42 U.S.C. § 2991-2992(d) (Supp. V 1975) covers American Indians, Hawaiian Natives, and Alaskan Natives.

97. President Theodore Roosevelt, Fourth Annual Message to Congress, Dec. 6, 1904, *reprinted in 9 Messages and Papers of the Presidents*, 7024, 7050 (1911); *see: Act of May 17, 1884*, ch. 53.

actment of NEPA, ESA, and other environmental mandates,[98] Congress has recognized its duty to safeguard the environment for the benefit of all. Through the ESA and NEPA, Congress has expressed a strong public interest in ensuring the preservation of endangered species, such as the Bowhead, and in preventing damage to the environment. Congress has mandated development of resources on the outer continental shelf by enacting the OCS because of the pressing national interest in developing all domestic energy supplies. The courts must continue to enforce those environmental regulations, keeping public confidence in the energy trend in mind.

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98. Through the enactment of the *Whale Conservation and Protection Study Act* of 1976, U.S.C. 16 § 917 (1976), Congress extended "its authority to conserve and protect all marine mammals, including whales, out to a two hundred nautical mile limit by enactment of the Fishery Conservation and Management Act of 1976." The Whale Conservation and Protection Study Act specifically considers the conservation and protection of the Bowhead whale of particular interest. Studies are to be undertaken concerning all of the relevant factors regarding the effects of man's activities, which include disruption of migration patterns and the introduction of pesticides and other chemicals into their habitable waters.

Marine Mammal Protection Act, 16 U.S.C. § 1361 was enacted in 1972. In its findings, Congress determined that certain species and population stocks of marine mammals may be in danger of extinction. This depletion of marine mammals is due to man's activities, in the rookeries, mating grounds, and other habitable areas. Congress declared in this act that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully." U.S.C. § 1361(3). By the enactment of the MMPA, the Marine Mammal Commission was established. The commission has the duty to recommend to the Secretary of State, other appropriate Federal officials, and Congress such additional measures that it deems necessary in order to protect Indians, Eskimos, and Aleuts whose livelihood may be adversely affected by any actions taken pursuant to the Act.