

Nos. 11-72891, 11-72943, 12-70440, 12-70459

ORAL ARGUMENT SCHEDULED: May 15, 2012
BEFORE: Kozinski, Chief Judge, Bea, and Ikuta, Circuit Judges

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIVE VILLAGE OF POINT HOPE, *et al.*,

**INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
*Petitioners,***

v.

**KEN SALAZAR, Secretary of the Interior, *et al.*,
*Respondents,***

and

**SHELL OFFSHORE INC., and STATE OF ALASKA,
*Intervenor-Respondents.***

Petitions for Review of Department of Interior Decisions

**SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE AMERICAN
PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF
MANUFACTURERS, INTERNATIONAL ASSOCIATION OF DRILLING
CONTRACTORS, AND U.S. OIL AND GAS ASSOCIATION IN SUPPORT
OF RESPONDENTS**

**Steven J. Rosenbaum
Bradley K. Ervin
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044-7566
(202) 662-5568
(202) 778-5568 fax
Attorneys for Amici**

April 3, 2012

Of Counsel:

**Harry M. Ng
Stacy R. Linden
American Petroleum Institute
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8248**

**Robin S. Conrad
Rachel L. Brand
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Suite 214
Washington, D.C. 20062
(202) 463-5337**

**Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Suite 600
Washington, D.C. 20004
(202) 637-3058**

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici the American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Manufacturers, International Association of Drilling Contractors and U.S. Oil and Gas Association disclose that they are not for profit corporations, that they have no parent corporations, and that no publicly held company has a ten percent or greater ownership interest in any of them.

April 3, 2012

/s/ Steven J. Rosenbaum
Counsel for Amici

TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	2
I. The OCS Review Process Has Operated As Intended by Congress	2
A. The Five-Year Leasing Program	2
B. Lease Sale 193	6
C. Shell’s 2012 Revised Chukchi Sea Exploration Plan	10
II. Petitioners Are Not Entitled to the Relief They Seek	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Center for Biological Diversity v. U.S. Dep’t of the Interior</i> , 563 F.3d 466 (D.C. Cir. 2009).....	4
<i>Native Village of Point Hope v. Salazar</i> , 730 F. Supp. 2d 1009 (D. Alaska 2010)	8
<i>Native Village of Point Hope v. Salazar</i> , No. 1:08-cv-00004 (D. Ak. Feb. 13, 2012), slip op. at 3.....	10
STATUTES	
43 U.S.C. § 1344(a)(2).....	4
43 U.S.C. § 1344(d)(2).....	3
43 U.S.C. § 1349(c)(1).....	3
OTHER AUTHORITIES	
30 C.F.R. § 250.233(b)(1).....	14

Consistent with the Court's March 12, 2012 Order, Amici trade associations limit this supplemental brief to the application to the Chukchi Sea revised exploration plan approval of the principles they elucidated in their February 3, 2012 amicus brief addressing the Beaufort Sea revised exploration plan approval.¹

As was the case with their challenge to the approval of Shell's revised Beaufort Sea exploration plan, petitioners' challenge to the approval of Shell's revised Chukchi Sea exploration plan would frustrate fundamental congressional objectives regarding the timing and character of the four stage approval process for offshore oil and gas activities in the Outer Continental Shelf ("OCS"), and Congress's explicit goal of encouraging the "expeditious" exploration and production of OCS oil and gas resources. The Government recently estimated that the Chukchi Sea OCS contains over 11 billion barrels of undiscovered oil, economically recoverable at roughly current oil prices.² The exploration for those reserves should be allowed to proceed.

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person, other than the amici curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

² Bureau of Ocean Energy Management, Assessment of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf, 2011, Table 2, http://www.boem.gov/uploadedFiles/2011_National_Assessment_Factsheet.pdf.

ARGUMENT

The multi-phase OCS process, including the federal government's review of Shell's original and revised exploration plans, has operated as Congress intended, and there is no basis for judicial interference with that process now.

I. The OCS Review Process Has Operated As Intended by Congress.

A. The Five-Year Leasing Program.

Promulgation of a five-year leasing program requires an examination of the “economic, social, and environmental values of the renewable and nonrenewable resources contained in the” OCS; the “potential impact of oil and gas exploration on other resource values of the [OCS] and the marine, coastal, and human environments;” and an evaluation of the relative environmental sensitivity and marine productivity of the different OCS areas, an equitable sharing of developmental benefits and environmental risks among the various regions, and the relative needs of national energy markets. *See* Beaufort Sea Amicus Br. 10-11.

The 2007-12 Five-Year Leasing Program, which resulted in issuance of the leases that Shell intends to explore, was the subject of extensive environmental analysis and careful judicial review. Interior started developing the Five-Year Program on August 24, 2005, by publishing a request for relevant information in the Federal Register. 70 Fed. Reg. 49,669. Interior then developed a “Draft Proposed Plan,” which it also published. 71 Fed. Reg. 7064 (Feb. 10, 2006). After

reviewing further comments, Interior published a “Proposed Plan” on August 24, 2006,³ along with an accompanying draft Environmental Impact Statement (“EIS”).⁴ Interior in April 2007 published a 146-page Proposed Final Program,⁵ backed up by a three volume, 1,400-page Final EIS.⁶ Interior submitted the Proposed Final Plan to Congress and the President as required by law, 43 U.S.C. § 1344(d)(2), and, after the specified sixty-day review period, the Secretary approved the Program.

Three of the petitioners in this action challenged the five-year leasing program, alleging violations of the OCS Lands Act and the National Environmental Policy Act (“NEPA”).⁷ While rejecting most of their claims, the D.C. Circuit remanded the program, finding that Interior failed properly to analyze

³ Minerals Management Service, Proposed Program, Outer Continental Shelf Oil and Gas Leasing Program 2007-2012, <http://www.boemre.gov/5-year/PDFs/ProposedProgram2007-2012.pdf>.

⁴ Minerals Management Service, Outer Continental Shelf Oil & Gas Leasing Program: 2007 - 2012 Draft Environmental Impact Statement, <http://www.boemre.gov/5-year/2007-2012DEIS.htm>.

⁵ Proposed Final Program, Outer Continental Shelf Oil and Gas Leasing Program 2007-2012, <http://www.boemre.gov/5-year/PDFs/MMSProposedFinalProgram2007-2012.pdf>.

⁶ Minerals Management Service, Outer Continental Shelf Oil & Gas Leasing Program: 2007-2012, Final Environmental Impact Statement April 2007, <http://www.boemre.gov/5-year/2007-2012FEIS.htm>.

⁷ Such challenges to five year leasing programs must be brought in the D.C. Circuit, *see* 43 U.S.C. § 1349(c)(1).

the environmental sensitivity of different areas of the OCS, thus hindering Interior's ability to perform the required balancing of the relative environmental sensitivity and marine productivity of the different areas of the OCS, 43 U.S.C. § 1344(a)(2). *Center for Biological Diversity v. U.S. Dep't of the Interior*, 563 F.3d 466 (D.C. Cir. 2009).

Interior proceeded to conduct a more complete environmental sensitivity review of all 26 OCS planning areas, and identified those areas whose environments are most and least sensitive to OCS oil and gas activity.⁸ After reviewing the new analysis and rebalancing the factors required by the OCS Lands Act, Secretary Salazar announced his Preliminary Revised Program for 2007-2012 on March 31, 2010.⁹ The Preliminary Revised Program was submitted to the President, Congress and the public, with Interior announcing a 30-day public comment period, during which it received over 118,000 comments.¹⁰

⁸ Minerals Management Service, Preliminary Revised Program Outer Continental Shelf Oil and Gas Leasing Program 2007-2012, <http://www.boemre.gov/5-year/PDFs/PRP2007-2012.pdf>.

⁹ *Id.*

¹⁰ Bureau of Ocean Energy Management, 2007-2012 Outer Continental Shelf Leasing Program, <http://www.boem.gov/Oil-and-Gas-Energy-Program/Leasing/Five-Year-Program/2012-2017/History.aspx>.

On December 23, 2010, the Secretary released the final Revised 2007-12 Five-Year Leasing Program.¹¹ While making some revisions in the remanded Program, the Secretary *inter alia* decided to retain the Chukchi Sea lease sale that had already taken place pursuant to the program (Lease Sale 193), concluding that “exploration of existing [Chukchi Sea] leases should proceed in order to (1) secure important environmental monitoring information; (2) allow industry to assess the economic viability of oil and gas resources and infrastructure needs; (3) support orderly leasing, and (4) maximize revenues from future sales in the area.”¹²

The Secretary reached that conclusion after assessing, *inter alia*, that the relative environmental sensitivity of the Chukchi Sea ranked as follows: 18th out of the 26 OCS planning areas with respect to coastal habitats (based on sensitivity to spilled oil); 20th out of 26 with respect to marine fauna (based upon sensitivity to OCS oil and gas operations of fish, birds, marine mammals and sea turtles); 23rd out of 26 with respect to marine productivity (based upon the amount of plant or animal biomass produced annually per acre of ocean surface); and 14th out of 26

¹¹ Revised Program, Outer Continental Shelf Oil and Gas Leasing Program 2007-2012, <http://www.boemre.gov/5-year/PDFs/RP.pdf>.

¹² *Id.* at p. 53.

with respect to marine habitats (based on sensitivity to OCS oil and gas activities).¹³

The D.C. Circuit set a briefing schedule to be followed should the petitioners contend that the Revised 2007-12 Five-Year Leasing Program failed to overcome the deficiencies identified in the Court's earlier decision.¹⁴ The petitioners chose not to do so.¹⁵ Thus, the adequacy of the Revised 2007-12 Five-Year Leasing Program's environmental and related analyses, as well as the Secretary's rationales for continuing to include Chukchi Sea Lease Sale 193 in the leasing program, cannot now be challenged.

B. Lease Sale 193.

As with the 2007-12 Five Year Leasing Program, Lease Sale 193 was the subject of exhaustive environmental and judicial review.

Two Chukchi Sea OCS lease sales were conducted pursuant to five-year programs preceding the 2007-12 program.¹⁶ Interior in 2007 prepared a three-

¹³ *Id.* at pp. 121, 126, 133, 153-54, 165-57.

¹⁴ *See* Docket Entries 1288325 and 1290170, Docket No. 07-1247 (D.C. Circuit).

¹⁵ *See* Docket Entry 1296578, Docket No. 07-1247 (D.C. Circuit).

¹⁶ BOEM, Alaska Region Lease Sales, http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/Regional_Leasing/Alaska_Region/Alaska_Lease_Sales/Alaska%20Lease%20Sale%20Summary%20Table.pdf (“*Alaska Lease Sales*”).

volume environmental impact statement analyzing the potential environmental impact of the first Chukchi Sea lease sale proposed to take place pursuant to the 2007-12 leasing program, scheduled to occur in 2008 (Lease Sale 193).¹⁷

This environmental impact statement focused exclusively on the Chukchi Sea, and analyzed in depth, *inter alia*, issues relating to “effects from accidental oil spills on the environment”; “disturbance to bowhead whale-migration patterns from resulting activities;” “protection of subsistence resources and the Inupiat culture and way of life;” “habitat disturbances and alterations, including discharges and noise;” and “cumulative effects of past, present, and reasonably foreseeable future activities on the people and environment of Alaska’s North Slope.”¹⁸

Lease Sale 193 took place as scheduled, with 487 leases sold, including the six leases on which Shell now intends to conduct exploratory drilling.¹⁹

All but one of the petitioners in the instant action filed a lawsuit in Alaska federal district court, challenging Lease Sale 193 and alleging seven separate NEPA violations. The district court rejected most of these claims, but remanded to Interior for further analysis of the impact of potential natural gas exploration, and for determinations whether missing information identified by the agency was

¹⁷ Chukchi Sea Planning Area, Oil and Gas Lease Sale 193, Final Environmental Impact Statement, Administrative Record (“AR”) Doc. 3-6.

¹⁸ AR Doc. 3, 20th page.

relevant or essential, and whether the cost of obtaining the missing information was exorbitant or the means of doing so unknown. *Native Village of Point Hope v. Salazar*, 730 F. Supp. 2d 1009 (D. Alaska 2010).

Although not required by the remand order, Interior publicly announced that it would fulfill the remand order through the preparation of a Supplemental EIS, *see* 75 Fed. Reg. 61511 (Oct. 5, 2010), with a draft made available to the public, *see* 75 Fed. Reg. 63504 (Oct. 15, 2010). The Draft Supplemental EIS augmented the analysis in the prior Lease Sale 193 EIS by analyzing the environmental impact of natural gas development, and evaluating incomplete, missing, or unavailable information. A 45-day comment period followed, during which over 150,000 comments were submitted.²⁰

Many commenters requested that Interior perform an analysis that took into account the possibility of a blowout during exploration activities, in view of the Deepwater Horizon event. In March 2011, Interior announced that a “Very Large Oil Spill” analysis would be included in the Supplemental EIS. The analysis was completed and integrated within a Revised Draft SEIS, which was released to the public on May 27, 2011, *see* 76 Fed. Reg. 30956. In June 2011, Interior held public hearings in Alaska communities and government-to-government

¹⁹ *Alaska Lease Sales*.

consultations with affected tribes. In addition, approximately 360,000 comment letters or cards were received during a public comment period.²¹

Interior subsequently issued on August 18, 2011 a 1,440 page Final Supplemental EIS, addressing each of the matters that had been identified by the district court, as well as the Very Large Oil Spill analysis.²² Relying on this analysis, the Secretary on October 3, 2011 issued a 41-page Record of Decision reaffirming the decision to conduct Lease Sale 193,²³ concluding *inter alia* that “[t]here is incomplete or unavailable information about the Arctic and Arctic species, but that information is not essential for a reasoned choice between the alternatives identified in the Sale 193” Final EIS.²⁴

The plaintiffs’ subsequent challenges to the sufficiency of the Final Supplemental EIS were rebuffed by the Alaska district court:

BOEM has adequately considered and disclosed the environmental impact of development of Lease Sale 193. The decision to approve the sale was certainly not arbitrary or capricious. Admittedly, no one has a crystal ball and can see the future perfectly. But the Court is now satisfied that BOEM has sufficiently studied and

²⁰ AR Doc. 31, 6th page.

²¹ *Id.*

²² AR Docs. 31, 32.

²³ Chukchi Sea OCS Oil & Gas Sale 193 Record of Decision, <http://www.boemre.gov/pdfs/Sale193RODwoFINAL.pdf>.

²⁴ *Id.* at p. 33.

evaluated the future impacts of resource development in this region.

Native Village of Point Hope v. Salazar, No. 1:08-cv-00004 (D. Alaska Feb. 13, 2012), slip op. at 3.²⁵

C. Shell's 2012 Revised Chukchi Sea Exploration Plan.

Shell proposes to drill a total of six exploratory wells on six leases Shell acquired in Lease Sale 193.²⁶ After these planned exploratory wells have been drilled and evaluated, they will be permanently plugged and abandoned.²⁷

Thirty-five exploratory wells were previously drilled on the Alaska OCS, with five of those wells in the Chukchi Sea. One of these wells was drilled in the same area where Shell now proposes to drill.²⁸

Approval of Shell's revised Chukchi Sea exploration plan is subject to the OCS Lands Act's strict thirty-day deadline for Secretarial action; the requirement that decisions be based upon "*available* relevant environmental information;" and the requirement that the exploration plan be approved unless the Secretary determines that the activity proposed under the plan *would* result in serious harm or damage to life, property, mineral, the national security or defense, or the marine,

²⁵ Docket Entry 269, Docket No. 1:08-cv-00004 (D. Ak.).

²⁶ AR Doc. 36, p. 1-2.

²⁷ *Id.* at p. 1-3.

²⁸ AR Doc. 352, p. 8.

coastal, or human environment, and that such proposed activity cannot be modified to avoid such condition.” *see* Beaufort Sea Amicus Br. 15-17. Shell submitted a wealth of information in connection with its revised plan, including a detailed, 526-page environmental impact analysis,²⁹ as well as numerous environmental safeguards and mitigation measures,³⁰ with additional safeguards imposed by Interior.³¹ Shell’s revised exploration plan sets forth multiple additional environmental provisions over those included in the 2010 Chukchi Sea exploration plan whose approval this Court previously upheld. By way of example:

— Offshore wells employ a Blowout Preventer (“BOP”) whose systems typically allow activation of selected components to sever the drill pipe and seal off the wellbore were that to become necessary due to a loss of well control. Shell’s revised exploration plan proposes to employ two shearing rams in the BOP for added redundancy, and the capacity to activate the BOP using remotely operated vehicles.³²

— In the highly unlikely event of a loss of well control and inoperability of the BOP, Shell will have on site a capping system capable of either sealing the well

²⁹ AR Doc. 42.

³⁰ *Id.* at pp. 2-30 through 2-34.

³¹ AR Docs. 36-50.

³² AR Doc. 36, p. 12-4.

against further flow, or attaching one or more devices to the well and diverting flow to surface vessels equipped for the separation and disposal of hydrocarbons.³³ Available storage capacity would be sufficient to contain all the oil produced.³⁴

— Should the foregoing measures somehow prove insufficient, and the original drilling rig also be damaged and unable to drill a relief well, a second drilling vessel will be available, in Alaska, to perform that function.³⁵

The Secretary prepared an environmental assessment of Shell's exploration plan.³⁶ That 301-page assessment explicitly relied upon, *e.g.*, the EIS for the 2007-12 Five Year Leasing Program;³⁷ the draft EIS for the proposed 2012-17 Five Year Leasing Program;³⁸ the EIS and Supplemental EIS prepared for Chukchi Sea Lease Sale 193;³⁹ and the Environmental Assessment for the previously-approved 2010 Shell Chukchi Sea exploration plan.⁴⁰ Interior also had available a draft EIS prepared in 2008 that addressed proposed future lease sales in the Beaufort and

³³ AR Doc. 36, pp. 9-3 to 9-4; AR Doc. 48.

³⁴ AR Doc. 42, p. 2-26.

³⁵ AR Doc. 36, pp. 2-1, 12-4.

³⁶ AR Doc. 351.

³⁷ *Id.* at pp. 3, 152.

³⁸ *Id.* at p. A-20.

³⁹ *Id.* at pp. 3, 151-52.

⁴⁰ *Id.* at pp. 3, 152.

Chukchi Seas.⁴¹ In addition, Interior had the benefit of its comprehensive safety review of OCS energy development, conducted in the wake of the Deepwater Horizon oil spill, and of the myriad new safety measures imposed as a result. *See* Beaufort Sea Amicus Br. 20-23.

Interior appropriately concluded that the effects of Shell's proposed operations on species in the vicinity of the drill sites are expected to be negligible to minor, that effects on subsistence activities and related sociocultural systems are expected to be negligible, that the probability of a large oil spill is so low as to not constitute a reasonably foreseeable significant impact, and that air and water quality impacts would be negligible.⁴²

Based on its review of the proposed exploration drilling activities and relevant scientific information, Interior issued a "Finding of No Significant Impact," concluding that no potentially significant adverse effects are expected to occur from the proposed drilling operations.⁴³

Petitioners' two attacks on this approval process fall far short of the exceedingly high showing requisite to the disapproval of an exploration plan, *see* pp. 10-11, *supra*:

⁴¹ *Id.*

⁴² AR Doc. 352, pp. 5-6.

⁴³ AR Doc. 352, p. 11.

First, as Amici have already shown in our earlier brief, *see* Beaufort Sea Br. 26-27, Petitioners' contention that Interior's exploration plan approval decision could not be conditioned on Shell's providing additional information about its capping and containment system (Pet. Br. 19) lacks a factual basis and is also irreconcilable with both long established case law and a specific regulatory provision:

— The capping and containment system was not itself required to be part of the exploration plan, so the Government's treatment of it cannot provide a basis for challenging that plan approval.

— Imposing a condition on an approval decision is appropriate as long as the condition is rational and consistent with the Secretary's statutory and regulatory powers to regulate offshore oil and gas activities, the terms of the lease, and the Government's contractual obligations as a lessor.

— Interior regulations explicitly provide for conditional approvals of exploration plans, *see* 30 C.F.R. § 250.233(b)(1).

Second, Interior's estimate of the time needed to drill a relief well in the extremely unlikely event that one were necessary lies at the core of agency expertise and judgment. Interior had before it a full factual explanation from Shell as to how quickly that well could be drilled, and Interior's acceptance of that data does not approach being arbitrary or capricious.

II. Petitioners Are Not Entitled to the Relief They Seek.

Petitioners' request that the plan approval decision be set aside or vacated constitutes a request for injunctive relief barring the drilling activities pending additional environmental review, *see* Beaufort Sea Amicus Br. 28-30. Yet as with the Beaufort Sea EP, they rely upon purely speculative and remote concern over a major oil spill, a speculative harm far outweighed by the deep public interest in the expeditious exploration and development of these potentially massive OCS oil and gas resources, the resultant enormous economic benefit to the State of Alaska and its workers, and the Government's and Shell's significant financial, contractual and reliance interests in the exploration of the Chukchi Sea. *See* Beaufort Sea Amicus Br. 4-8, 30-33.

The petitions should be denied.

Respectfully submitted,

/s/ Steven J. Rosenbaum
Steven J. Rosenbaum
Bradley K. Ervin
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20044-7566
(202) 662-5568
(202) 778-5568 fax

April 3, 2012

Attorneys for Amici

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with 14-point Times New Roman font.

Dated: April 3, 2012

/s/ Steven J. Rosenbaum
Attorney for Amici

CERTIFICATE OF SERVICE

I, Steven J. Rosenbaum, a member of the Bar of this Court, hereby certify that on April 3, 2012, I electronically filed the foregoing “Motion of the American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Manufacturers, International Association of Drilling Contractors, and U.S. Oil and Gas Association for Leave to File Supplemental Brief Amicus Curiae,” and “Supplemental Brief Amicus Curiae of The American Petroleum Institute, Chamber of Commerce of the United States of America, National Association of Manufacturers, International Association of Drilling Contractors, and U.S. Oil and Gas Association” with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Steven J. Rosenbaum