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STRENGTHENING INSTITUTIONS: LOCAL INVOLVEMENT IN OFFSHORE OIL AND GAS MANAGEMENT

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The dramatic run-up in oil prices between 2001 and 2008 fueled keen interest in oil and gas exploration worldwide. In Alaska, observers were startled by record breaking bids totaling more than $2.6 billion for leases offered by the U.S. Minerals Management Service (MMS) in a remote area of the Chukchi Sea. Shell Offshore Inc. (Shell), which paid $2.1 billion for Chukchi leases, was eager to begin exploration activities both in the Chukchi and in the Beaufort where it is also a major lease holder. While federal agencies approved Shell’s 2008 plan for exploration in the Beaufort Sea (and state agencies concurred), no drilling occurred because of a legal challenge asserting that the environmental review process did not adequately consider potential for harm to migrating whales and traditional Inupiat hunting. While the 9th Circuit Court of Appeals initially agreed with the plaintiffs, the case is not over (Alaska Wilderness League v. Kempthorne, November, 2008).

This is just the latest chapter in a 30 year saga of conflict over oil and gas development offshore Alaska. The conflict of interest between surface users—Inupiat subsistence hunters—and subsurface owners—the state and federal governments who own the oil and gas rights, plus the oil industry that wants to develop the resource—is structural. Can good institutional design help mitigate the conflict? In this paper we use theories of institutional analysis, participatory democracy and conflict resolution to critique the current institutional regime and assess policy options for strengthening institutions for management of offshore oil and gas.

Current Management Regimes and Opportunities for Local Participation

Regulation of offshore oil and gas activities in Alaska involves a complex management framework of state and federal agencies. The State of Alaska has primary responsibility for state waters three nautical miles from the shoreline while the federal government has authority for activities in the Outer Continental Shelf (OCS). The major federal laws related to offshore oil and gas activities include the OCS Lands Act, the National Environmental Policy Act (NEPA), the Coastal Zone Management Act (CZMA), the Marine Mammals Protection Act, the Clean Water Act (CWA) and the Clean Air Act (CAA). Alaska statutes give state agencies authority to regulate certain activities in state waters. Through the CZMA, the State of Alaska reviews activities for consistency with state standards and regulations, including coastal district enforceable policies.

Both state and federal review processes provide opportunities for local participation throughout the lease sale, exploration and development phases. For federal sales, local participation is sought four times during preparation of a five-year leasing program and subsequent sales: during the scoping process, the comment periods on the draft Environmental Impact Statement (EIS),
the final EIS, and the proposed notice of sale. Under Section 19 of the OCS Lands Act, MMS is required to accept the state’s recommendations for a lease sale or development project if the recommendations provide a reasonable balance between the national interest and well-being of local citizens; no deference is required for the comments of local governments. For state lease sales, public involvement is concentrated at the beginning of a 10-year planning period when the state’s Best Interest Finding is being prepared for leasing over large areas.

Opportunities for public review of OCS exploration projects under the OCS Lands Act are more limited due to the requirement that the agency make its decision within 30 days an exploration plan is deemed complete. MMS approval is contingent upon the state’s consistency determination which must be issued within 90 days under the ACMP. On the state side, exploration projects do not usually require either a NEPA review or a best interest finding. An ACMP review is usually required, but the scope of review may be limited to activities directly related to required permits.

Offshore development projects undergo a more thorough review than exploration projects because they involve longer time periods and the potential for greater effects. Yet there can be issues related to the timing of agency reviews. For example, because the applicant determines when the ACMP and state permit reviews begin, there may not be adequate information for the public if the review is initiated before federal agencies issue their records of decision on the project.

Another avenue for participation occurs in the ACMP consistency review process for both state and federal lease sales and exploration and development projects. According to state law, ACMP reviews must be completed within 90 days. This timeline may not be sufficient for complex OCS exploration projects when questions arise about the adequacy of information. The scope of an ACMP review may be limited to only certain activities or certain effects to coastal uses or resources. For example, OCS seismic survey activities are not subject to review even though they are known to affect the migration patterns of bowhead whales. In addition, state legislation passed in 2003 directs ADNR to reduce the number of consistency reviews by adding as many activities as possible to lists of activities that do not require individual review. Limitations to coastal district enforceable policies and statewide ACMP standards implemented in 2004 have resulted in the inability of coastal districts to comment on certain effects to coastal resources and uses during ACMP reviews. For example, under state law, subsistence concerns cannot be considered during a review unless DNR approves designation of an area for a specific type of subsistence use. Since federal waters cannot be designated, effects on subsistence are limited in OCS reviews to impacts on designated areas in state waters.

While there are many opportunities for local involvement in offshore decision making, these opportunities are not always effective due to cultural factors, local capacity and competing interests. The oral traditions of Inupiaq people result in more emphasis on public testimony rather than written comments, and they do not always understand it is necessary to repeat their testimony for each agency that initiates a public review. There is a limited capacity in villages affected by oil and gas activities to understand and participate effectively in agency processes. In addition, the competing interests of tribes, local government and Native corporations sometimes results in a less than unified position among the North Slope residents.
Theories of inclusion

Theories of participatory and deliberative democracy explain how social capital and trust are built and buy-in is achieved among diverse groups of stakeholders, and why bottom-up and inclusive approaches are more effective and resilient than top-down approaches. The trust and “buy-in” that are the foundation of institutional sustainability can be best achieved when decision-making processes account for the individual calculations of interest of stakeholders and where shared values are developed within flexible arrangements for making and implementing policies (Ager et al., 2005; Lipschutz 1996; Janicke 1996). To understand how participatory practices might enhance the efficiency of outcomes for a diverse set of stakeholders, therefore, we need to examine both the cross-scale linkages needed to aggregate the preferences of local, national and international actors, as well as ways to satisfy at least some of the material interests of actors at all those three levels.

Formal democratic processes and the rule of law will not be enough. Janicke (1996) notes that even in developed, politically liberal countries like the United States and Canada, effective environmental policy often requires new democratic forms that are more inclusive and participatory than established national electoral, legislative, judicial and administrative processes. Institutional forms for effective participation: (1) provide regular and reliable opportunities for substantive input into decisions about processes as well as outcomes; (2) allow serious consideration of the preferences of all stakeholders; (3) provide mechanisms for reaching compromises and resolving conflict; and (4) include the capacity to recognize and correct error. Processes for making, implementing and modifying policy decisions should all reflect stakeholder preferences. Institutions must be able to identify additional stakeholders, and give stakeholders the capacity to self-identify by keeping affected groups and the general public informed, and by actively preparing stakeholders of different backgrounds, cultures and educational levels for constructive interaction (Agrawal and Gibson 1999; Chambers 1995; 1993; Rosenberg 2007). Institution-building, following these precepts, will be more an act of discovery than an act of creation.

The economic theory of externalities also shows that when stakeholders lack well defined rights and roles in resource allocation decisions that affect them, the resulting allocations may be inefficient for the society as a whole.

Risks to Local Users

Inupiat hunters use the Beaufort and Chukchi Seas intensively for marine mammal harvesting. This customary and traditional use is of critical importance culturally, socially and spiritually as well as nutritionally and economically. The observation-based local environmental knowledge developed through these traditional activities is also valuable for science and for safety and emergency response.

Oil and gas activities in particular, and marine traffic in general, pose some level of risk to the health and distribution of marine mammals, hunter access, and the marine ecosystem. The question of what level of risk is acceptable, as well as the proper level of avoidance, mitigation or compensation for unique social and cultural risks, lies at the heart of the conflict. In its most
recent EIS, the Minerals Management Service estimated the risk$^4$ of a large oil spill in the
Beaufort Sea as a result of productive fields over the next 20 years at 26% percent (DEIS 2008:
Appendix A.1-23). The agency also estimated that development of leases in the Chukchi Sea
would result in 0.51 oil spills over the 25 year production life of the field (ibid). The cumulative
impact of a major oil spill on animals and people is estimated to be major (DEIS 2008: 4-552).
As required by Executive Order 12898, MMS does analyze subsistence use as a unique risk class
subject to review for environmental justice issues. For instance, they estimate that the lack of a
mechanism for conflict avoidance between producers and subsistence hunters would result in,
“major impacts to the subsistence resources and hunts for bowhead and beluga whales, walrus,
bearded seals, and polar bears” (DEIS 2008 4-549).

**Institutional Options**

It is an artifact of Western concepts of land ownership that aboriginal claims based on use and
occupancy have been recognized on land but not the sea. The legal question is still evolving,
however: in *People of Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir 1989) (Gambell III),
the 9th Circuit Court of Appeals held that the federal government’s paramount interested in the
Outer Continental Shelf (OCS) did not extinguish the aboriginal rights of the villages, nor did the
Alaska Native Claims Settlement Act (ANCSA) which was limited to the geographical
boundaries of the state of Alaska and its territorial waters. The villages’ rights in the OCS are not
of sovereignty, but rights of occupancy and use that are subordinate to and consistent with
national interests. The court went on to discuss at length the aboriginal rights doctrine expressed
by the US Supreme Court in Johnson 21 U.S. at 589-90, concluding “‘Humanity demands and a
wise policy requires’ that the aboriginal subsistence rights of the Villages not be ignored.”(869
F.2d 1273:16)

The principal mechanisms currently used by federal and state agencies to protect local and
Inupiat interests in the marine environment include deferrals of leasing surrounding community
whaling areas on the North Slope, mitigation measures and stipulations written into lease
agreements, conflict avoidance agreements, and alternative measures required through
consistency reviews under the Coastal Zone Management Act.

The Alaska Eskimo Whaling Commission (AEWC) and industry have directly negotiated a
series of Conflict Avoidance Agreements (CAA) governing oil and gas activities. The heart of
the agreement is to schedule oil activities so that they do not interfere with whaling. The
agreements are not required by federal law or state statute, but are encouraged by MMS through
lease stipulations. The agreements serve to document that industry permit holders are in
compliance with the Marine Mammal Protection Act’s provision protecting subsistence hunting
from any “unmitigable” adverse impact (Section 101 (D)(5)(A)(i)(I)). The MMS is now
considering a proposal to remove the lease stipulations and substitute advisory language that the
lessee must show how they will comply with the requirements of the Endangered Species Act
and Marine Mammal Protection Act through an Adaptive Management and Mitigation Plan
(AMMP).

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$^4$ This risk assessment is proposed for a particular level of development, which MMS points
out, may be higher than what actually transpires.
Both ADNR and MMS have chosen to defer leasing in whaling areas near Barrow and Kaktovik. Notably, neither ADNR nor MMS have deferred leasing near Cross Island, the whaling grounds for Nuiqsut, located offshore from Prudhoe Bay. In his 2004 decision to reduce the scope of the Eastern Deferral, the commissioner of ADNR wrote:

The 10-year best interest finding for the Beaufort Sea Areawide determined that leasing the entire lease area, including the deferred tracts, is in the state’s best interest. However, ADNR decided at the time that due to the low expected interest in the tracts in the frontier areas weighed against the concerns over impacts to subsistence hunting activities, ADNR should defer leasing on those tracts nearest Barrow and from Kaktovik east to the Canadian border. … Based on a reassessment of the potential interest in the deferred tracts, ADNR has determined that it will … lift the eastern two-thirds of the eastern deferral area—specifically tracts 1 through 26. These tracts are adjacent to MMS’s Eastern Whaling Deferral, which was recently removed from deferral status and offered for lease by MMS in 2003. This area is far enough from the hunting grounds used by the residents of Kaktovik to reduce concerns associated with industry impacts on subsistence whale hunting. Concerns have also been expressed over impacts to whale feeding patterns in this area. Recent research indicates, however, that while this area is used by the whales for feeding, it is no more important than any other area along their migration route. For these reasons, it is appropriate and timely to partially lift the deferral, and offer for sale tracts 1 through 26.

This record of decision shows that: (1) ADNR and MMS seek to coordinate their leasing policies, (2) subsistence interests are weighed against industry interest in the tracts, and (3) previous deferrals may be revoked at any time. The decision goes on to note that the North Slope Borough (NSB), Alaska Eskimo Whaling Commission (AEWC), Inupiat Community of the Arctic Slope (ICAS) and ADNR’s own Office of Habitat Management & Permitting were all on record opposing this finding, asserting that the deferral areas should remain intact and that existing mitigation measures are not sufficient to protect subsistence gathering activities and bowhead whale harvesting.

One way to secure Inupiat interests in critical subsistence use areas might be to designate a marine protected area (MPA). At present, a near-shore region of the Chukchi Sea is included in the Alaska Maritime National Refuge. MPA goals range from conservation of biodiversity and habitat, preservation or restoration of ecosystems and their services, preservation of cultural heritage and education to research and fisheries management. A successful designation of an MPA integrates multiple dimensions, including ecological, social, economic, cultural, and institutional, of the system in which it will be introduced.

More comprehensive approaches in other U.S. and foreign jurisdictions include integrated oceans management, marine spatial planning or ocean governance (Rutherford et al. 2005; Crowder et. al 2006; Young et al. 2007). The task of managing multiple, sometimes competing uses in the ocean is more complex than the existing tools available to address the problems (Crowder et al. 2006). Similar to the CZMA, ocean governance would not replace existing institutions (e.g. for oil and gas development, fisheries, marine mammal conservation, shipping, etc.), but would overlay a process of determining where compatible uses could occur, and then designing monitoring programs to manage for or against particular ecosystem thresholds (Crowder et al. 2006), such as a particular noise level or a level of disturbance to subsistence activities.
Another way to protect Inupiat interests might be to expand or strengthen co-management regimes. Co-management functions through long term arrangements between stakeholders and governmental agencies to pursue joint goals. These are formalized into an agreement, memorandum of understanding, a contract for services, or sometimes written into law. What distinguishes co-management of marine mammals in Alaska from other types of collaborative processes is the recognition of the unique trust relationship the federal government has with recognized tribes, who have a unique sovereign status in federal law. When seeking to understand new rules or mitigate a federally approved development project, tribes can request formal consultations through their government-to-government relationship with federal agencies, as described by Presidential Executive Order 13175.

The strongest example of co-management in Alaska is the Alaska Eskimo Whaling Commission (AEWC), a governing body made up of whaling captains from all of the whaling communities in Alaska. The AEWC signs multi-year agreements with the National Marine Fisheries Service to engage in specific management functions such as harvest assessment, research, decision-making, allocation of authorized catch limits among the legally recognized whaling communities, and sanctioning whalers who break rules relating to the bowhead whale harvest. Other co-management bodies in Arctic Alaska, such as the Alaska Beluga Whale Committee, the Nanuuq Commission, the Ice Seals Committee, and the Eskimo Walrus Commission, typically do not have these powers. The strength of co-management boards lies not only in legal authorities but also in common ways the agencies and boards relate to each other (de facto rules) (Pomeroy and Berkes 1997; Kruse et al. 1998; Kofinas 2005; Meek, 2009). A strong co-management agreement relies on high levels of mutual trust or specific rules requiring consensus decision-making.

A final means for strengthening the local role in decision-making is to restore and strengthen local powers under the Alaska coastal management Act (ACMA). Potential development in the OCS provided one of the most important reasons the Alaska State Legislature passed the Alaska Coastal Management Act in 1977. Amendments to the federal Coastal Zone Management Act (CZMA) in 1976 gave states a more powerful role in influencing federal decisions because activities permitted in the OCS must be consistent with the state’s environmental standards, including enforceable policies of a state’s coastal management program. The enforceable policies of the ACMP include the statewide standards in regulation (11 AAC 112) and the enforceable policies contained in each coastal district’s approved coastal management plan.

The original emphasis of the ACMP provided local coastal districts with a powerful role in project review and approval. However, the scope of authority of the coastal districts to address offshore issues decreased significantly in 2003 as a result of a major amendment to the Act and a subsequent revision of the ACMP regulations. There were three major changes to the program. First, the amendments eliminated the ability for local coastal districts to establish meaningful enforceable policies that address certain impacts of development to coastal resources and uses. As a result, no district policies have been approved that deal specifically with oil and gas activities or offshore development. In addition, the ADNR revised the ACMP statewide standards to limit their application to certain issues and limited areas of the coastal zone.

Second, the legislation removed activities permitted by the Alaska Department of Environmental Conservation (ADEC) from the coordinated ACMP consistency review process. This means the ACMP no longer provides an avenue for public involvement in air or water quality issues related
to OCS oil and gas activities. For example, coastal districts such as the North Slope Borough can no longer address impacts of a potential oil spill to subsistence resources and uses through the ACMP.

Third, the program concentrated coastal decision making power into a single agency, the Department of Natural Resources. Before 2003, the program had been housed in the Office of the Governor which provided an important role in resolving disputes because it was perceived as a neutral party that did not issue permits. In addition to moving the program to the ADNR, the legislation also eliminated the Coastal Policy Council, a body made up of coastal districts and state agency representatives. This body had oversight for the program including approval of coastal district plans, approval of program changes and responsibility for the consistency review process.

One of the cornerstones of the ACMP is the state regulatory provision (11 AAC 110.250) that gives review participants such as agencies or local coastal districts “due deference” for their comments during a consistency review. Due deference means that appropriate deference will be given to commentors in the context of (a) their expertise or area of responsibility and (b) all the evidence available to support any factual assertion of the commentor. This provision has withstood regulatory revisions and continues in force today. This cornerstone can potentially shift a decision to the commentor who receives the deference. In reality, agencies have usually held the upper hand given their expertise and information gathering abilities. There have been cases however, where local districts have had enough background and evidence to shift a decision given the due deference they received. For example, during the review of the McCovey Exploration project in the late 1990s, the State of Alaska gave deference to the NSB because Inupiaq people had centuries of experience dealing with ice hazards and the state did not have in-house expertise. Another example of local expertise involves the NSB’s traditional knowledge about marine mammals and through scientific studies conducted by its Wildlife Department. Traditional knowledge has gained acceptance for use as evidence in coastal management reviews (Kuitsarak Corp. v. Swope, 1994). Changes to the ACMP regulations in 2004, however, has placed additional burdens on local coastal districts regarding substantiation of local knowledge. At the heart of coastal management is the concept that those who are closest to the impact, who are often the true experts, should have a say over it. Due deference carries out that belief.

**Conclusion**

There is no magic bullet to resolve the long standing conflicts over the terms of development for offshore oil and gas in Arctic Alaska. But strengthening institutions for local involvement in decision making may help. The North Slope Borough is not necessarily opposed to offshore oil development: property taxes on oil and gas facilities comprise nearly 80 percent of NSB revenues and production onshore is declining Borough Mayor Edward Itta seeks “a cooperative approach to establish the world’s most effective array of safeguards, based on the best scientific data, technology, and operational standards. If it is too expensive to meet high standards, then [we are] not ready to drill offshore.” (North by 2020, 2008) Until Inupiat believe that their core values are adequately protected, litigation will continue; there is no room for good faith negotiation until the bottom line is secure. Empowering local people to become more involved in oil and gas decision-making will ensure the people most likely to be impacted have a meaningful seat at the table.
References


*Alaska Wilderness League v. Kempthorne*, 548 F.3d 815 (9th Cir. Nov 20, 2008)


*People of Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir 1989) (Gambell III).


