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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF POINT HOPE, et al.,

Petitioners,

vs.

KENNETH SALAZAR, Secretary of the Interior, and BUREAU OF OCEAN ENERGY MANAGEMENT,

Respondents

and

SHELL OFFSHORE INC. and STATE OF ALASKA,

Intervenor-Respondents.

On Petition for Review from Department of Interior Decisions

STATE OF ALASKA'S INTERVENOR'S BRIEF IN SUPPORT OF RESPONDENTS IN RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

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Intervenor the State of Alaska ("State") supports BOEM's decision to approve Shell's 2012 Chukchi Exploration Plan. As the owner of adjacent land, the State has a keen interest in ensuring that BOEM fully evaluates environmental and safety concerns. The State is satisfied with BOEM's analysis. As the state whose government and residents stand to gain from the jobs, revenue, and economic development at stake, the State also has an interest in seeing this area explored. BOEM's decision strikes a balance between the need for development and domestic energy sources and the need to protect the environment. Congress created the Outer Continental Shelf Lands Act ("OCSLA") to strike just such a balance.

The State joins in the arguments submitted by BOEM and Shell in their briefs, and in the interest of efficiency will not repeat them here. The State would, however, like to underscore some points on a few of the issues raised by the Petitioners.

I. THE DEEPWATER HORIZON SPILL DOES NOT INFORM THIS DECISION.

Petitioners' repeated references to the *Deepwater Horizon* spill in the Gulf of Mexico are inapposite. The State previously has pointed out the distinctions between that tragic event and Shell's Exploration Plan for the Beaufort Sea. (Dkt. 35 at 1-3.). Those same distinctions are no less applicable with respect to Shell's Chukchi Exploration Plan. The lessons learned about the difficulty of

responding to a deepwater spill have no application here for Shell's shallow water proposal. And since shallow water drilling involves different technologies, any lessons learned about the technologies involved in the *Deepwater Horizon* spill have no application here either. Once again, Shell's Exploration Plan is an important fact-gathering step in determining whether the Alaska Region OCS is a viable domestic source of oil and gas. Because the proposed drilling is for exploration, not production, its scope is constrained; however, the potential contribution of eventual production to meeting this country's energy needs and offsetting dependence on foreign oil remains a significant domestic economic issue both nationally and locally.

II. BOEM'S DECISION IS NOT ARBITRARY OR CAPRICIOUS.

Petitioners fail to support their contention that BOEM acted arbitrarily when it approved Shell's Chukchi Exploration Plan. The Petitioners concede that BOEM "subjected the Chukchi Exploration Plan to the complete OCSLA review procedures" pursuant to the pertinent Code of Federal Regulations and that "Shell responded to BOEM's request for additional safety procedures that Shell planned to undertake in the Arctic in light of the *Deepwater Horizon* disaster." (Dkt. 72 at 11-12.) This court has explained that it will reverse an agency decision under the arbitrary and capricious standard "only if the agency has relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the

problem, offered an explanation for its decision contrary to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See Envtl. Defense Ctr., Inc. v. United States Envtl. Prot. Agency*, 344 F.3d 832, 871 (9th Cir. 2003) (explaining in part that EPA's failure to designate industrial sources of storm water pollution for permitting requirements was not arbitrary and capricious). In light of the Petitioner's concession that Shell's Chukchi Exploration Plan was subjected to the complete OCSLA review procedures and that Shell responded to BOEM's request for additional safety procedures, BOEM's approval of Shell's exploration plan hardly seems arbitrary or capricious.

Petitioners also fail to show that BOEM's decision is arbitrary or capricious regarding specific aspects of Shell's Chukchi Exploration Plan, such as potential spills. Petitioners argue that although Shell identified several techniques either for preventing a potential offshore spill or discharge or containing an offshore spill or discharge, BOEM's approval of Shell's Chukchi Exploration Plan is arbitrary and capricious because Shell either historically rejected well-capping in its Arctic exploration operations or proposed well-capping in the Arctic for the first time. (Dkt. 72 at 12-13.) Shell can, despite its history, adopt a different position regarding its Arctic exploration operations. This is no different from the well-settled, basic principle that adjudicators generally, and government agencies in

particular, are free to change their minds. *See*, *e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1810-11 (2009) (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it"); *Arkema Inc. v. Envt. Prot. Agency*, 618 F.3d 1, 6 (D.D.C. 2010) ("[T]he Agency is entitled to change its mind as long as its new direction falls within the ambit of its authorizing statute and the policy shift is adequately explained. . . . [T]here is no requirement that the policy change be justified by reasons more substantial than those the agency relied on to adopt the policy in the first place.").

Just so here. Shell, as conceded by the Petitioners, has identified three techniques for gaining well control in the event of an offshore spill or discharge: dynamic surface control measures, well-capping and relief well drilling. (Dkt. 72 at 13.) Merely because Shell in the past has declined to well-cap in its Arctic exploration operations doesn't foreclose the opportunity for Shell to change its mind in the future. If a governmental agency is allowed as a matter of law the opportunity to change its mind, then certainly a private entity should be allowed the same opportunity.

Similarly, Petitioners' contention that BOEM has acted arbitrarily by approving Shell's Chukchi Exploration Plan is undermined by the Petitioners'

acknowledgment that BOEM "conditionally approved the Chukchi Exploration Plan." (Dkt. 72 at 19-20.) I-ER 1-7. The Petitioners hope that BOEM's statement that Shell's subsea well-capping and containments system "is currently in the design stage" will sound the alarm as support for their challenge to this enterprise. (Dkt. 72 at 19.) Even the most cursory perusal of the December 16, 2011 BOEM letter approving the Chukchi Sea Exploration Plan, however, shows that Shell's Exploration Plan is "subject to the conditions" listed in that letter. (I-ER 1-7.) Paragraphs 8-10 of the BOEM letter specifically set forth Shell's obligations regarding its exploratory drilling operations. (I-ER 3.) These obligations and conditions, of course, are imposed by the BOEM after what Petitioners concede was BOEM's solicitation of public comment and performance of its review of the adequacy of Shell's Exploration Plan. (Dkt. 72 at 16.) In short, BOEM effectively has informed Shell that if the conditions set forth in the December 16, 2011 letter are not met, then Shell's Exploratory Plan will not go forward. Petitioners further concede that BOEM imposed additional conditions subject to BSEE's approval where "[u]nlike the Beaufort, BOEM imposed a temporal limitation on Shell's drilling in the Chukchi Sea" and has required that Shell stop drilling into hydrocarbon bearing zones on September 24, 2012. (Dkt. 72 at 19-20.) So, even if Shell complies with all of the conditions set forth in the BOEM's December 16, 2011 letter, Shell still has to cease drilling as of September 24, 2012.

The Petitioners' contentions, when considered in light of the evidence contained in the administrative record – and in light of their concessions – shows that the agency's decision here is anything but arbitrary.

Dated: April 3, 2012

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 1216 words.

Dated: April 3, 2012

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STATEMENT OF RELATED CASES

Undersigned counsel for the State of Alaska hereby certifies that she is not aware of any interested parties other than those participating in this case, and knows of no related cases, other than these consolidated cases, that this Court might wish to consider in the instant appeal.

Dated: April 3, 2012

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STATUTES AND REGULATIONS

The applicable statutes and regulations are contained in the brief or addendum of the Petitioners.

9th Circuit Case Number(s)

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