

January 4, 2019

2019 Beaufort Sea Lease Sale EIS Notice of Intent
ATTN: Sharon Randall, Chief of Environmental Analysis Section
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*Regarding Comments on the Scope of the Environmental Impact Statement (EIS)
for the Proposed 2019 Beaufort Sea Lease Sale*

Ms. Sharon Randall,

ALERT, a project of Earth Island Institute, a California-based 501(c)3 non-profit organization, and other entities and individuals are submitting comments as, or on behalf of, beneficiaries of the Public Trust Doctrine. Our comments are focused on the federal government's fiduciary duty to protect the ocean and other resources critical for survival and benefit of present and future generations under the Public Trust Doctrine, relative to the proposed 2019 Beaufort Sea Lease Sale and the draft alternatives. ALERT filed similar comments on the Draft Proposed Program (DPP) for the 2019-2024 Outer Continental Shelf Oil and Gas Leasing Program.

We find the duties of government trustees under the Public Trust Doctrine must be considered in the Environmental Impact Statement (EIS) for the proposed 2019 Beaufort Sea Lease Sales. The ocean, its shores, and the marine life are critical natural resources under the Public Trust Doctrine. Submerged lands, including the outer continental shelf lands, are also critical resources under the Public Trust Doctrine, as are nonrenewable resources including oil and gas reserves. Governments have a firm duty to protect the public's access to and use of these critical resources, and governments cannot favor present generations at the expense of future generations.¹

As such, public trust interest and duties are embedded in the Outer Continental Shelf Lands Act, the authority for the OCS lease sales: "...the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs" (emphasis added). 43 U.S. Code § 1332(3)

¹ The Public Trust Doctrine arises from Roman law that predates the U.S. Constitution by almost 1,500 years and was carried through English common law into U.S. law. Under this ancient law, governments have a firm duty to protect and maintain certain natural resources that are critical to the survival and benefit of present and future generations. The reserved powers doctrine serves as the implicit constitutional basis for the Public Trust Doctrine. Under the reserved powers doctrine, the legislature, as the main governing branch, is the principal trustee. The executive branch, however, bears equal responsibility as the agent of the legislature to fulfill the duties of a trustee. (Douglas Quirke, 2016, The Public Trust Doctrine: A Primer. The Environmental & Natural Resources Law Center, University of Oregon School of Law.)

Under the OCSLA, Congress delegated the Dept. of Interior as its agent to administer and fulfill the spirit of the law. The Dept. of Interior charged BOEM with ocean energy management. Because agencies have significant discretion when implementing statutes passed by the legislature, agencies must consider their public trust obligations when implementing statutes, promulgating regulations, and carrying out their mandate to enforce the law.² Therefore, DOI and BOEM, as agents of the trustees under the Public Trust Doctrine, are to be held accountable under the narrow OCSLA and NEPA regulations and their broader Public Trust Doctrine duties.

However, we find that, in issuing the proposed 2019 Beaufort Sea Lease Sale, BOEM has not fulfilled numerous substantive and procedural duties under the Public Trust Doctrine. The following seven examples are not exhaustive.

1. *Substantive Duty Against Alienation*

Trustees have a statutory duty against wholesale alienation of trust resources to private industry as this action contravenes the entire purpose of the Public Trust Doctrine. Despite this duty, the proposed lease sale area includes all available OCS blocks in the Beaufort Sea Planning Area.

The duty against alienation is evident in the reserved powers doctrine, which recognizes the rights and powers of future citizens to self-govern, to elect legislatures, and to have those legislatures secure their rights and powers. Wholesale alienation of trust resources to private industry would limit the rights and powers of future generations to self-govern through wholesale depletion of resources that sustain citizen survival.³ The Court in *Illinois Central* observed:

[E]very succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment – neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.⁴

In other words, the reserved powers doctrine, as applied to natural resources through the Public Trust Doctrine, establishes intergenerational equity – intergenerational justice and

² Id., Quirke, Public Trust Doctrine Primer, Footnote (FN) 1.

https://law.uoregon.edu/images/uploads/entries/PTD_primer_7-27-15_EK_revision.pdf

³ Id., Quirke, Public Trust Doctrine Primer, p. 4, FN 1.

⁴ Id., Quirke, Public Trust Doctrine Primer, p. 5, (*Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 459), FN 1.

intergenerational sovereignty – and represents a societal contract between “Those who are dead, those who are living, and those who are yet to be born.”⁵

We find that the Public Trust Doctrine prevents the federal trustees from wholesale alienation of all available OCS blocks in the Beaufort Sea Planning Area.

2. Substantive Duty of Protection

The proposed lease sale area includes all available OCS blocks in the Beaufort Sea Planning Area. Trustees have a statutory duty to protect and maintain public trust resources including, the ocean, its shores, marine life, submerged lands (including the outer continental shelf), and nonrenewable resources such as oil and gas reserves for the use and benefit of present and future generations.

Pursuant to its statutory duty, BOEM conducts public scoping meetings and solicits public comment to fulfill its procedural obligations under law (OCSLA and NEPA). However, statutory and regulatory compliance is not the sum total of the government’s duty. Responsibilities of federal agencies as trustees under the Public Trust Doctrine include a duty to ensure that public trust resources are being managed for the benefit of both present and future generations. BOEM cannot abrogate or evade this duty. Pursuing its statutory mandates, BOEM has addressed ecological systems and natural resources in a piecemeal process that has allowed, and is continuing to allow, wholesale destruction of the public trust resources.

For example, increasing ocean acidification threatens all marine life, especially in cold water ecosystems. The Arctic ocean’s changing chemistry is already affecting the ability of shelled pelagic molluscs and crustaceans to survive. These small creatures, along with other calcifiers like corals and echinoderms, are keystone species in the Arctic marine ecosystem. The precipitous decline of these creatures will affect all other species in the food web, including humans.

Ocean acidification is driven by increased emissions of CO₂ into the atmosphere. The Stockholm Environmental Institute estimates that cessation of offshore leasing would lead to a net reduction of global CO₂ emissions from oil of 31 million metric tons by 2030 – with 85% of this total (26 Mn Mt) attributed to elimination of offshore oil leases covered by BOEM’s 2019–2024 plan.⁶

Therefore, we find that BOEM must consider the considerable global and Arctic-specific impacts of additional atmospheric loading from CO₂, methane, and other greenhouse gas emissions

⁵ Id., Quirke, Public Trust Doctrine Primer, p. 5, (*W.J.F. Realty Corp. v. New York*, 672 N.Y.S. 2d 1007, 1012, NY Sup Ct. 1998, quoting Edmund Burke, 1949), FN 1.

⁶ U.S. DOI, BOEM, Area Identification Recommendation, Proposed 2019 Beaufort Sea OCS Oil and Gas Lease Sale; Attachment 1: Draft summary of substantive responses received, Nov. 13, 2018; comment by World Wildlife Fund, -37011, p. 8. www.boem.gov/Proposed-2019-Beaufort-Sea-Area-ID/

that would result from oil and gas activities derived from offshore oil leases. Further, in order to fulfill its substantive duty to protect the ocean, BOEM should consider withdrawing its proposed lease sale in entirety.

3. Substantive Duty to Protect Posterity's Property

The Arctic holds about 30% of the world's undiscovered natural gas and 13% of its undiscovered oil. As much of 90% of this resource endowment is expected to occur in less than 100 meters of water.⁷ This nearshore environment supports tremendous biological productivity that in turn drives the entire Arctic marine ecosystem. This same nearshore area and the adjacent coastline are critical to the survival of the Arctic peoples.

Should this proposed 2019 Beaufort Sea Lease Sale go forward, even with all of the proposed exclusion areas excluded, we find that citizens will be deprived of essential natural and cultural resources critical for their present and future survival and wellbeing, as well as access to and use of these resources, for the following reasons.

Regarding renewable resources, we believe the patchwork of proposed exclusion areas is insufficient to protect the whole. It seems obvious that the whole biological-chemical-geological-and-physical ecosystem that supports whales, for example, is necessary to produce whales to harvest. It follows that only excluding whale harvest areas without protecting the full ecosystem and food web that nurtures whales would lead, eventually, to no whales to harvest – and no need for whale harvest exclusion areas.

While various agreements have allowed subsistence hunters and oil and gas developers to share the Arctic waters, this has been very short term – 30 years or so⁸ – and nowhere near on the scale of the proposed 2019 Beaufort Sea Lease Sale. Further, what is 30 years when compared to life cycles of whales and 10,000+ years of continuous inhabitation by Arctic Native peoples?

What is needed before any (more) lease sales go forward is a thorough understanding of the existing ecosystem and existing and/or anticipated impacts of stressors, like ocean acidification, and potential stressors, like oil spills and chemicals used in oil spill response, or like oil and gas activities associated with lease sales. According to BOEM, this can only happen if the entire area is offered for sale, as any parts excluded will be dropped from impact analyses.⁹

However, we find such rationale falls short of the federal trustees' duty under the Public Trust Doctrine to protect the property of present and future generations. We find that the lease sales

⁷ Id., BOEM Area Identification Recommendation, Attachment 1, FN 5; comment by National Ocean Industries Association, -35457, p. 5.

⁸ Id., BOEM Area Identification Recommendation, Attachment 1, FN 5; comment by Voice of the Arctic Inupiat, -37648, p. 12.

⁹ U.S. DOI, BOEM, Area Identification Recommendation, Proposed 2019 Beaufort Sea OCS Oil and Gas Lease Sale, Memo, Nov. 13, 2018, p. 2-3.

cannot proceed without first providing this critical information to the public and decision-makers.

Regarding nonrenewable resources, if the Arctic is thought to hold 30% of the world's undiscovered unrennewable oil and gas resources, this means that during the past 150+ years since oil was produced commercially, these resources have been utilized at rates that benefitted present generations (and private industry) at the expense of future generations. We find that continuing on this path, now in full knowledge of impacts on youth and future generations and other life on the planet, is unconscionable. Therefore, we find that the “no drilling” alternative is the only option to safeguard posterity's property, as decisions to offer the lease sales would (continue to) benefit the present generation at the expense of future generations.

4. Substantive Duty to Maximize Social Value

Under the Public Trust Doctrine, agencies as trustees have a duty to maximize social value of public trust resources. This duty is also a duty against harming (wasting) other trust resources. Lease sales lead to oil and gas activities that can result in substantial impairment of marine life through, for example, seismic exploration, daily operations, and oil spills.

For example, during oil spill response, the government continues to allow use of Corexit dispersants that are now known to cause more harm than good – to the environment and people.¹⁰ Thus, federal law shields polluters, allowing them to evade liability for their products against any harm caused to humans or the environment.¹¹ Further, the oil and gas industry is allowed to discharge toxic drilling waste into the U.S. waters, despite state-of-the-art practices for zero discharge operational in offshore oil and gas development in the Barents Sea.

Therefore, we find that BOEM has a duty as a trustee under the Public Trust Doctrine to implement state-of-art zero discharge practices in all future OCS oil and gas lease sales – no exceptions, and to implement other policies to minimize harm to marine life, such as banning seismic activities when whales are present and banning toxic dispersants during oil spill response.

5. Substantive Duty to Restore Trust Resources When Damaged

¹⁰ M Alexander, et al., The BP Deepwater Horizon oil spill Coast Guard cohort study: A cross-sectional study of acute respiratory health symptoms, *Envir Res.* 2018 Apr, 162:196–202. doi: 10.1016/j.envres.2017.11.044

C McGowan, et al., Respiratory, dermal, and eye irritation symptoms associated with Corexit EC9527A/EC9500A following the BP Deepwater Horizon oil spill: Findings from the Gulf STUDY. *Environ Health Perspect.* 2017 Sep, 125(9):097015. doi: 10.1289/EHP1677

L Peres, et al., The BP Deepwater Horizon oil spill and physical health among adult women in southern Louisiana: The women and their children's health (WaTCH) study. *Environ Health Perspect.* 2016, 124(8):1208–13. doi: 10.1289/ehp.1510348

¹¹ Margaret Cronin Fisk, Ecolab unit dismissed from oil spill lawsuits, *Star Tribune*, Apr. 15, 2013; www.startribune.com/ecolab-unit-dismissed-from-oil-spill-lawsuits/181291731/

The Oil Pollution Act and the Comprehensive Environmental Response, Cleanup, Liability Act provide for, but does not require, the recovery of natural resources damages after an oil spill disaster. Funds secured through these statutory duties often fall short, however, for actually restoring injured resources and lost ecological services for several reasons.

Natural Resource Damage Assessment (NRDA) initially did not address long-term, comprehensive harm to the injured ecosystem, because such impacts were not anticipated or known before the 1989 *Exxon Valdez* oil spill. Thirty years after this disaster, scientists are still studying the slow recovery of long-term, comprehensive ecosystem injury. Meanwhile, herring fishermen are still waiting for oil-impacted fisheries to reopen, and the Prince William Sound food web is still adjusting to cascading ecosystem effects from functional loss of a keystone species; i.e., herring. NRDA funds fell far short of addressing these long-term harms.

NRDA funds still fall short of addressing long-term harms, because the costs of these harms are now found to be staggering. For example, during the 2010 BP Deepwater Horizon oil spill disaster, bottlenose dolphins died in unusually high numbers in oil spill-impacted coastal regions,¹² and unusually high losses occurred over the next three years. NOAA studies on a small subset of the injured dolphins estimated the time to recovery to 95% of the pre-spill baseline at 39 years, and loss of cetacean years at 30,347, based on loss of future reproductive potential from death or chronic health impacts to reproducing females.¹³

Another obstacle to restoring damages to wildlife is that the Marine Mammal Protection Act specifically exempts “incidental takings” of marine mammals for offshore energy and minerals exploration, development, and production.¹⁴ Because of this exemption, for example, the substantial loss of orcas in Prince William Sound from the *Exxon Valdez* oil spill could not be calculated as natural resource damages.

Because NRDA funding does not recoup damages to wildlife and other ecosystem services on the scale of the losses, we find that BOEM, as a trustee, has to either anticipate long-term large-scale losses and recover funds accordingly to fulfill its duty to restore trust resources damaged by oil spills, or exercise its procedural duty of precaution (see below) and not offer this lease sale in order to prevent substantial impairment of public trust resources from occurring in the first place.

6. Procedural Duty of Loyalty

¹² Lori Schwacke, et al., Health of Common Bottlenose Dolphins (*Tursiops truncatus*) in Barataria Bay, Louisiana, Following the BP Deepwater Horizon Oil Spill, *Environ. Sci. Technol.* 2014, 48:93–103. [dx.doi.org/10.1021/es403610f](https://doi.org/10.1021/es403610f)

¹³ Trent McDonald, et al., Survival, density, and abundance of common bottlenose dolphins in Barataria Bay following the BP Deepwater Horizon Oil Spill. *Endangered Species Research*, 2017, 33:193–209. [10.3354/esr00806](https://doi.org/10.3354/esr00806).

¹⁴ Marine Mammal Protection Act, 1972, U.S.C. 1361 et seq. www.boem.gov/Environmental-Stewardship/Environmental-Assessment/MMPA/index.aspx

The 2019 Beaufort Sea lease sale plan includes all of the exclusion areas, despite public comments recommending exclusion, especially of the Barrow, Kaktovik, and Nuiqsut Whaling Areas. We find that BOEM's decision not only ignores the agency's duty to protect these critical resources, as discussed above, but it also breaches the agency's procedural duty of loyalty to trust beneficiaries.

Under the Public Trust Doctrine, present and future generations – citizens, not industry – are the sole beneficiaries. Trustees have a firm duty of loyalty to administer the affairs of the trust solely for the interests of the beneficiaries, not for the benefit of third parties.¹⁵ In private trust law, a court will set aside a decision that violates the trust duty of loyalty. For example, if the matter involves legislative action, the court may return the matter to the legislature to remove the bias, a process is known as a “legislative remand.”¹⁶

We find that BOEM, as a trustee under the Public Trust Doctrine, has violated its duty of loyalty in its decision to offer the 2019 Beaufort Sea lease sale, and therefore, this decision in its entirety should be retracted.

7. Procedural Duty of (Pre-)Caution

In its decision to offer all of the available OCS blocks in the Beaufort Sea Planning Area, BOEM throws caution to the wind. In private and public trust law, trustees have a duty of caution that translates to the use of a precautionary approach. This procedural duty requires erring on the side of caution where uncertainty exists. As the uncertainty increases, it is obvious that the level of precaution should also increase.¹⁷

Given the potential threats from ultrahazardous oil and gas activity, the extreme weather conditions of the Arctic, the lack of practical, proven methods for oil spill response and recovery under ice conditions (and in the dark one-third of the year), and the lack of full scientific certainty about ways to mitigate environmental degradation, we find that the potential effects of leasing, exploration, development, and production of oil and natural gas in the proposed lease sale area are extremely risky and uncertain business. Also, we find that by offering this lease sale, BOEM is violating its trust duty of precaution.

In summary, we find that BOEM is creating a danger to our public trust resources by offering the 2019 Beaufort Sea Lease Sale. The ocean, its shores, and the marine life are critical natural resources under the Public Trust Doctrine, as are submerged lands, including the outer

¹⁵ Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge Univ. Press: 2014)

¹⁶ Quirke, *Public Trust Doctrine Primer*, p. 18, FN 1.

¹⁷ *Id.*, Quirke, *Public Trust Doctrine Primer*, p. 20, FN 1.

continental shelf lands, and the nonrenewable oil and gas reserves. Governments have a firm duty to protect and maintain these critical resources for present and future generations. No government can legitimately abdicate its core sovereign duty as trustees under the Public Trust Doctrine.

We, the beneficiaries, of these public trust resources find that BOEM's 2019 Beaufort Sea Lease Sale plan violates numerous duties under the Public Trust Doctrine by alienating critical and nonrenewable resources wholesale to a third party, by failing to exercise precaution to protect critical trust resources, by benefiting present generations at the expense of future generations, and by allowing wasteful practices that contribute to impairment of critical renewable resources, among other breaches of duty. We find that this proposed lease sale not only threatens the public beneficiaries' survival, but it also excludes the public beneficiaries from use and enjoyment of these critical resources.

We find BOEM's 2019 Beaufort Sea Lease Sale plan infringes on our rights as beneficiaries under the Public Trust Doctrine. We therefore request that this plan be withdrawn in its entirety.

Sincerely,

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