Narratives in Conflict: Alaska Natives and Offshore Drilling in the Arctic

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Abstract

This Symposium Essay examines and elucidates the ways in which the narrative constructions that constitute the "imaginary Arctic" factor into litigation surrounding Shell Oil's highly controversial attempts to drill for oil and gas in the Beaufort and Chukchi seas off Alaska's North Slope. Judges, lawyers and litigants involved in the Shell litigation have deployed a number of well-established storylines against each other: the Arctic as Classical Frontier, the Arctic as Spiritualized Frontier, the Arctic as Ancestral Homeland, the Arctic as Developing World, and the Arctic as Neutral Space. The litigation literature produced by this "battle for the Arctic" offers an opportunity to observe how conflicting narratives about nature figure into the rhetorical strategies of lawyers and judges – and thus how they factor into the law. In addition, the role of Inupiat narratives in the litigation and underlying administrative proceedings illustrates that -- accepting the bargain struck in the 1971 Alaska Native Claims Settlement Act as a given -- the layered United States system of administrative permitting and judicial review does not violate indigenous peoples' rights under relevant provisions of international law.

I. Introduction

This Essay provides a close reading and interpretation of the legal pleadings, briefs and memoranda, and judicial opinions involved in the litigation surrounding Royal Dutch Shell's attempt to drill for oil in the Beaufort and Chukchi seas, off Alaska's northern coastline. Shell's program in the region has provoked a series of lawsuits by representatives of and individuals from the indigenous Inupiat population of the North Slope, as well as from state and national environmental organizations. The litigation literature produced by this "battle for the Arctic" offers an opportunity to observe how conflicting narratives about nature (or Nature) factor into the rhetorical strategies of lawyers and judges – and thus how they factor into the law. Here, entrenched and competing storylines that seek to define the Arctic – visions of homeland and frontier told by indigenous peoples, environmental advocates, extractive industry representatives, and state boosters – connect the law to familiar expressions of the environmental imagination, and thereby situate the law within a broader environmental discourse. Indeed, in their written submissions to the courts litigants and their lawyers construct alternative visions of "the Arctic" which infuse the place, its inhabitants and its resources with different kinds and degrees of significance. These significations, however, even though sometimes acknowledged or even internalized by the courts, are in turn, and ultimately, made indifferent by their subjugation to the dominant narrative contained in the technocratic, managerial regime of domestic administrative law.

This process of narrative presentation and neutralization raises interesting questions about

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the content and purposes of environmental and natural resources law in the United States.[1] For instance, is this process evidence of the law's appropriate functioning as an instrument for the mediation of disputes over resource management and pollution? Is it evidence of the law's imposition of an independent set of values that stand in conflict with those subject to the law? Is it an example of "law's empire"?[2] Moreover, both the process and the questions it raises are worth considering in the comparative, trans-Arctic context of this Symposium, as the substance and form of the conflicting narratives likely differ from one country or region to the next, as might their treatment in other domestic and international tribunals. In this Essay, I do not attempt to directly answer those big questions, nor do I undertake a comparative analysis of Arctic tropes (though it is certainly my hope that the Essay will take on added dimension by virtue of the company it keeps). Rather, the Essay has three far more limited tasks. First, Parts II-IV situate the story of Shell and the Alaskan Arctic—of "the Eskimo and the oil man," as one journalist has it[3]—within the broader contexts of United States law. Second, Part V proves out the process of narrative presentation and neutralization through textual examination. Third, Part VI argues that though the role of story, narrative and rhetoric indicates the need to further examine the relationship between law and culture, the way in which Inupiat narratives have been heard in and actually impacted the direction of drilling in the Arctic illustrates that the layered United States system of administrative permitting and judicial review does not violate indigenous peoples' rights under international law. Part VII briefly concludes.

II. Oil and Gas Resources in Alaska's Arctic waters

There are significant oil and gas resources in the offshore areas of the Alaskan Arctic. The United States Geological Survey estimates that the Beaufort Sea and Chukchi Sea areas contain approximately 30 billion barrels (bb) of crude oil, and 221 trillion cubic feet (tcf) of natural gas.[4] This accounts for approximately 33 percent of all undiscovered Arctic oil, and approximately 7.5 percent of the global region's as-yet untapped natural gas supply. Given the Alaskan Arctic's access to the Trans-Alaska Pipeline System, which runs from Prudhoe Bay on the North Slope to Valdez on the state's southern coast, and the favorable political climate for oil development in Alaska, industry's long-running interest in offshore oil exploration in the Beaufort and Chukchi seas makes perfect business sense.[5] However, natural gas, once extracted, currently has no way to reach market; thus, development of the natural gas fields would require construction of a liquefied natural gas terminal or pipeline, making it somewhat less enticing.[6]

A number of existing offshore oil production sites in shallow areas of the Beaufort Sea already exist.[7] In addition, approximately 30 exploratory wells have been drilled in offshore areas in the

[1] *See* Michael Burger, *Environmental Law/Environmental Literature*, 40 Ecology L. Q. 1 (2013).

[2] *See* Ronald Dworkin, Law's Empire (1998) (arguing that law is best understood to provide political community with means to act in a coherent and principled manner in respect to those subject to the law).

[3] Bob Reiss, The Eskimo and the Oil Man: The Battle at the Top of the World for America's Future (2012).

[4] U.S. Geological Survey, Circum-Arctic Resource Appraisal: Estimates Of Undiscovered Oil And Gas North Of The Arctic Circle at 4 (2008), *available at* http://pubs.usgs.gov/fs/2008/3049/ (last visited April 4, 2014).

[5] *See generally*, Ernst & Young, Arctic Oil And Gas (2012).

[6] U.S. Energy Information Administration, Alaska, State Profile and Energy Estimates, Profile Analysis, http://www.eia.gov/state/analysis.cfm?sid=AK (last visited April 4, 2014).

[7] Nuka Research And Planning Group, U.S. Arctic Program, PEW Environment Group, Oil Spill Preven-

Beaufort and Chukchi seas, none of which has been found to be economical to develop.[8] The litigation that is the subject of this study, though, involves Shell's decade-long program to drill new exploratory wells in recently leased areas on the Alaskan Outer Continental Shelf, an area of special importance to the traditional subsistence cultures of the North Slope's indigenous Inupiat peoples.

III. The Governance and Legal Rights of Alaska Natives

The indigenous people of Alaska are often referred to collectively as Alaska Natives, and are subdivided into 227 recognized tribes split among five major groupings: Inupiat (Aleuts, Northern Eskimos), Yupik (Southern Eskimos), Athabascans (Interior Indians), Tlingit and Haida (Southeast Coastal Indians). Climate change impacts in the Arctic, and the rush toward natural resources exploration and extraction there, primarily impact the Inupiat. There are, of course, numerous climate change impacts in these areas of the Arctic, including changes in ocean pH levels, thawing of permafrost, melting sea ice, coastal erosion, decreased water quality, and increasingly variable and unpredictable weather, all of which produce direct and indirect impacts on subsistence culture, and collectively present a fundamentally existential threat.[9]

The Alaska Native Claims Settlement Act (ANCSA), which the U.S. Congress passed in 1971, following the discovery a few years earlier of oil on Alaska's North Slope, is central to an understanding of this story.[10] ANCSA resolved the vast majority of Alaska Native land claims and extinguished aboriginal title, including inland and offshore hunting and fishing rights.[11] The U.S. Court of Appeals for the Ninth Circuit has extended the effect of ANCSA to sea ice many miles offshore.[12] That court has also held that the federal paramountcy doctrine bars Alaska Native claims to the Outer Continental Shelf.[13] Notably, ANCSA did not address the issue of Alaska Natives' sovereignty or the status of the tribal governments.[14] Native Alaska tribes are now treated on the "same footing" as tribes in the lower 48 states,[15] though their lands are not considered part of "Indian country" for purposes of federal Indian law.[16]

As part of the deal, ANCSA divided Alaska into 12 geographic regions, and assigned a "Regional Corporation" for each region.[17] The regional corporations were authorized to select lands that would become their private property. Each of the 12 geographic regions also contains numerous smaller "Village Corporations,"

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tion And Response In The U.S. Arctic Ocean, Unexamined Risks, Unacceptable Consequences 28 (Nov. 2010).

[8] *Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program*, Rep. to the Sec'y of the Interior (March 8, 2013), *available at* www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf.

[9] For a useful summary of climate change impacts and their influence on subsistence culture, *see* Elizabeth Barrett Ristroph, *Alaska Tribes' Melting Subsistence Rights*, 1 Ariz. J. Envtl. L. & Pol'y 47, 51–66 (2010); *see also* Hinzman, et al., *Evidence and Implications of Recent Climate Change in Northern Alaska and Other Arctic Regions*, 72 Climate Change 251 (2005) (providing a scientific background).

[10] 43 U.S.C. §§ 1601–1629(a) (2006) (Alaska Native Claims Settlement Act).

[11] 43 U.S.C. § 1603(b).

[12] Iñupiat Community of the Arctic Slope v. United States, 746 F.2d 570, 571 (9th Cir. 1984).

[13] Native Village of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998).

[14] *See generally*, Thomas R. Berger, *Village Journey: The Report of the Alaska Native Review Commission* 151, 164 (1985, Inuit Circumpolar Conference) 4th Printing published in 1995 with a new preface (Douglas & McIntyre, Hill & Wang) (discussing Native Alaska views of tribal government).

[15] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993)

[16] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998).

[17] *See generally*, 43 U.S.C. §§ 1611, 1613, 1618 (2010).

which amount to about 225 altogether. The village corporations were authorized to select surface lands in and around their villages (while the regional corporations held subsurface rights to village lands). Importantly, ANCSA required every regional and village corporation to be organized under Alaska law. Accordingly, the Alaska Native Corporations were organized as private corporations, not as tribal governments; moreover, while regional corporations were required to choose for-profit entity status, all of the village corporations have opted to do so.[18] In addition, a thirteenth regional corporation was subsequently formed for non-resident Alaska Natives. The regional and village corporations exist independently of the native villages and other organizations that govern Alaska Natives, a fact which sometimes puts the interests of the corporations and the tribal governments at odds.[19]

Opinion of ANCSA is mixed. Many people, including Alaska Natives, characterize the ANCSA settlement as a "win." Proponents of the settlement can point to the fact that today the Alaska Native Corporations are a powerful economic force in Alaska, and around the world. Taken together, they are the largest private landowners in the state, with title to approximately 44 million acres of selected land among them, with billions of dollars in annual revenue.[20] However, others disparage the settlement as a "partial settlement" that gave up too much for far too little.[21] The acreage now owned by the corporations represents approximately 11 percent of the lands to which Alaska Natives could have claimed aboriginal title. In exchange, Alaska Natives were given $462.5 million in federal appropriations over an 11-year period, and $500 million in oil and gas revenues, a fraction of the real value of the lands and their natural resources. In addition, some argue that the statute itself was a violation of the Alaska Natives' rights under various provisions of international law, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[22]

Whatever one's assessment of its merits, however, ANCSA unquestionably provides the legal background for Alaska Native rights and sets the stage for the unfolding drama in offshore areas in the Beaufort and Chukchi seas. Importantly, the Arctic Slope Regional Corporation (ASRC), which is based in Barrow and has offices in Anchorage and elsewhere, has title to nearly five million acres of land in northern Alaska. The ASRC has long been involved in the oil and gas support services sector, and has had direct involvement in Shell's efforts to obtain permits and conduct seismic testing in offshore areas.[23] The ASRC is also involved in the extraction of bituminous coal, and in engineering, venture capital and financial management, consulting, civil con-

[18] For a discussion of the relationship between corporate organization and traditional Alaska Native culture, *see* James Allaway & Byron Mallott, *ANCSA Unrealized: Our Lives Are Not Measured in Dollars*, 25 J. Land Resources & Envtl. L. 139, 140-42 (2005). *See also* Gavin Kentch, *A Corporate Culture? The Environmental Justice Challenges of the Alaska Native Claims Settlement Act*, 81 Miss. L.J. 813 (2012) (examining the environmental justice implications).

[19] *See* Kentch, *supra* note 19, at 827–37.

[20] U.S. Gov't Accountability Office, GA0 13-121, Regional Alaska Native Corporations: Status 40 Years After Establishment and Future Considerations 39 (2012).

[21] Assessments are manifold. Some useful starting points include Charles Edwardsen, Jr., "The New Harpoon," in H.G. Gallagher, Etok: A Story of Eskimo Power 26, 61 (G.P. Putnam's sons, N.Y. 1974); Frederick Seagayuk Bigjim & James Ito-Adler, Letters to Howard: An Interpretation of the Alaska Native Land Claims (Anchorage, Alaska Methodist University Press, 1975); Mary Clay Berry, The Alaska Pipeline: The Politics of Oil and Native Land Claims (Alaska Native Federation, Anchorage 1976).

[22] *See* David Case and Dalee Sambo Dorough, *Tribes and Self-Determination in Alaska*, 33 SPG-Hum. Rts. 13 (2006).

[23] *See* Ristroph, *supra* note 10, at 78-79.

struction, and communications. The corporation employs nearly 10,000 people, and has a shareholder population of around 11,000 members, to whom ASRC had allocated dividends totaling over $500 million through 2010.[24] As we shall see, the ASRC provides a critical counterpoint to Inupiat opponents of extractive industry in the U.S. Arctic.

IV. The Legal and Regulatory Framework for Offshore Oil and Gas Drilling in Arctic Alaska

A full explanation of the regulatory universe surrounding offshore oil and gas exploration in the United States is beyond the scope of this essay.[25] Nonetheless, there are a number of federal statutes that apply to offshore oil and gas drilling on the OCS that, as a preliminary matter, bear noting. The National Environmental Policy Act (NEPA) imposes environmental review requirements on the federal government in order to ensure that the government makes major decisions potentially affecting the environment only after considering the environmental impacts of those decisions and exploring possible alternatives to proposed actions.[26] The Clean Water Act requires a leaseholder on the OCS to submit an oil spill response plan (OSRP), which is "a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance."[27] The Endangered Species Act requires leaseholders whose otherwise lawful activities might result in the taking of a listed threatened or endangered species to obtain an incidental take permit.[28] The Marine Mammal Protection Act requires leaseholders to obtain incidental take and/or incidental harassment authorizations for maritime activities in certain circumstances.[29] The Clean Air Act requires that drill ships obtain permits and/or satisfy certain technology-based standards.[30]

The Outer Continental Shelf Lands Act (OCSLA) is the primary legislation affecting offshore oil and gas development in the Alaskan Arctic.[31] According to the U.S. Congress, OCSLA was created because "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."[32]

The OCSLA prescribes a four-stage process for offshore oil and gas development in a given offshore area. First, the U.S. Department of Interior formulates a five-year lease sale schedule and crafts an accompanying programmatic environmental impact statement pursuant to

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[24] Alaska Oil and Gas Association (AOGA), 2011 North Slope Borough Report *available at* http://www.aoga.org/facts-and-figures/economic-impact-reports/2011-north-slope-borough

[25] For a more comprehensive account *see* Polar Law Textbook II, 175-183, (Natalia Loukacheva ed., Nordic Council of Ministers, Norden 2013) (chapter focusing on "Oil and Gas Regulation in the United States Arctic Offshore"); Betsy Baker and Roman Sidortsov, *The Legal and Regulatory Regime for Offshore Hydrocarbon Resources in the U.S. Arctic*, 2014 A.B.A. Sec. Env't, Energy, Resources.

[26] 42 U.S.C. §§ 4321, 4331. Notably, among NEPA's many analytic requirements is the requirement that the government and/or permit or lease applicant analyze "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b) (5). NEPA, however, does not require consideration of risks that are "merely speculative" or "infinitesimal." No GWEN Alliance v. Aldridge, 855 F.2d 1380, 1386 (9th Cir.1988); Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy, 383 F.3d 1082, 1090 (9th Cir.2004).

[27] 33 U.S.C. § 1321(j) (5) (A)(i).

[28] 16 U.S.C. § 1539(a)(1)(B).

[29] 16 U.S.C. § 1371(a)(5).

[30] 42 U.S.C. § 7627.

[31] 43 U.S.C. § 1301 *et seq.* (2012); 30 C.F.R. pt. 250 (2013) (together comprising the OCSLA).

[32] 14 U.S.C. § 1332(3).

NEPA. Second, the Department conducts lease sales for specific tracts on the outer continental shelf, providing an area-wide environmental impact statement for each lease sale. Third, the lessee must obtain government approval of an exploration plan ("EP"). The EP must include a project-specific environmental impact analysis assessing the potential effects of the proposed exploration activities. The agency then conducts its environmental review pursuant to NEPA, and must disapprove the EP if any activity would result in "serious harm or damage" to the marine, coastal, or human environment.[33] Fourth, and finally, offshore oil and gas lessees must submit and have approved development and production plans, which, again, must go through environmental review and comply with other permit requirements. (The Department of Interior recently issued new implementing regulations rules specific for offshore oil and gas exploration in the Arctic.[34] However, because those rules post-date the litigation discussed in this essay I will not discuss them any further herein.)

The litigation that is the subject of this study originates in 2002, when the federal agency formerly known as the Minerals Management Service (MMS) issued a five-year plan establishing lease sale schedules on the Outer Continental Shelf in Alaska. The agency conducted an environmental review pursuant to the NEPA and then a supplemental environmental review, and in 2003 sold a lease to Shell Oil for offshore areas in the Beaufort Sea. Subsequently, Shell submitted an Exploratory Plan, proposing to drill up to twelve exploratory wells in several prospects over a three-year period. After some back and forth, in 2007 MMS approved the Exploratory Plan and issued an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) pursuant to NEPA.

There are a number of major problems confronting Arctic oil and gas exploration in any circumstance: the harsh climate and extended periods of darkness, the presence of sea ice, the remoteness of the area, the need for specially designed equipment, and the lack of fully operational search-and-rescue infrastructure, to name a few.[35] The possibility of an oil spill represents perhaps the most significant problem, certainly in regards to mobilizing opposition.[36] Compounding these necessarily complicating factors, Shell in 2007 proposed to drill in areas within the migratory path of the bowhead whale, a species at the center of Inupiat subsistence culture on the North Slope. Several lawsuits were quickly filed by Alaska Natives and by environmental advocacy groups. In these lawsuits and those that followed, the conflicting narratives regarding the meanings of the Arctic and applicability of the law to it are made apparent.

V. Arctic Tales

As climate change impacts in the Arctic have become increasingly visible and more accessibly broadcast, and as scholars from various

[33] 43 U.S.C. § 1340(c); 30 C.F.R. § 250.202(e).

[34] Department of Interior: Bureau of Ocean Energy Management (BOEM) & Bureau of Safety and Environment and Enforcement (BSEE) Review of Alaska Outer Continental Shelf Oil & Gas Drilling Standards, Docket ID: BOEM-2013-0035, www.regulations.gov/#!docketDetail;D=BOEM-2013-0035 (last visited July 30, 2013);

[35] *See, e.g.*, *Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program*, Rep. to the Sec'y of the Interior (March 8, 2013), *available at* www.doi.gov/news/pressreleases/upload/Shell-report-3-8-13-Final.pdf.

[36] *See e.g.*, Charles Emerson Glada Lahn & Chatham House, Lloyd's, Arctic Opening: Opportunity And Risk In The High North 39 (2012); Ernst & Young, *supra* note 6, at 5; Arctic Monitoring and Assessment Programme (AMAP), Arctic Council, AMAP Assessment 2007, *Oil and Gas Activities in the Arctic*, Vol. 1, at 2-212 (2010); Nuka Research And Planning Group, U.S. Arctic Program, PEW Environment Group, Oil Spill Prevention And Response In The U.S. Arctic Ocean, Unexamined Risks, Unacceptable Consequences 28 (Nov. 2010).

disciplines and journalists working different beats have turned their attentions to the North, a number of discourses have emerged to define the "new" space. At the risk of being absurdly reductionist, I would suggest that the Arctic is now characterized by five general discourses: (1) the scientific discourse, which emphasizes the study of climate change impacts in the Arctic and the role of a changing Arctic in amplifying global climate change effects; (2) the indigenous discourse, which emphasizes the rights, status, and voice of indigenous peoples who inhabit the region; (3) the economic discourse, which emphasizes the natural resources extraction and economic development opportunities available in the region; (4) the preservationist discourse, which emphasizes the conceptualization of the Artic as a kind of planetary wilderness; and (5) the international discourse, which emphasizes the military and governance issues surrounding the region's newfound accessibility to people from the south.

The litigation over Shell's attempt to drill in the Beaufort Sea is a useful case study because it has become a battleground for competing narratives about the Arctic that are deeply imbedded in American environmental thought and that reflect several of the central discourses mentioned just above. At its core, the battle pits three well-established storylines against each other:

- The Arctic as Classical Frontier: An extractive periphery that primarily serves the businesses and consumers at civilization's core.
- The Arctic as Spiritualized Frontier: A region beyond the known world containing a romantic wilderness that deserves, or demands, preservation.
- The Arctic as Neutral Space: A geographical area largely though not entirely devoid of symbolic significance, appropriately subject to the same technocratic, managerial organization imposed elsewhere by environmental and natural resources law.[37]

In addition, two other storylines feature importantly in the litigation, incorporating into the fray indigenous perspectives too often marginalized or excluded:

- The Arctic as Ancestral Homeland: A place of ancient stories and memories and of contemporary subsistence culture.
- The Arctic as Developing World: An economically disadvantaged region in a globalized world that is in need of sustainable development.

It is unnecessary, for my purposes here, to weigh or assess the comparative legitimacy of these competing storylines. The important thing here is that each one would have a particular vision of the region, indeed an entire worldview, encapsulated by the word "Arctic." In the next sections I describe how it is that these storylines have come to be so directly in conflict.

A. Alaska Wilderness League v. Kempthorne

In 2007, representatives of the North Slope Inupiat communities and a number of environmental groups filed separate lawsuits in the Ninth Circuit Court of Appeals, challenging MMS's approval of Shell's Exploratory Plan.[38] The lawsuits, the government and industry responses, and the Ninth Circuit Court of Appeals' opinion deploy several of the competing Arctic narratives described earlier: *Arctic as Ancestral Homeland*, *Arctic as Spiritualized Frontier*, *Arctic as Classical Frontier*, and *Arctic as Neutral Space*.

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[37] The first two characterizations derive from the set of tropes discussed in The Environmental Imagination, and in Greg Garrard, Ecocriticism (2004). The final characterization is discussed in Burger, *Environmental Law/Environmental Literature*, *supra* note 2.

[38] Alaska Wilderness League v. Kempthorne, 548 F.3d 815, 819 (9th Cir. 2008), *withdrawn*, 559 F.3d 916, *dismissed as moot*, 571 F.3d 859.

(i) The Arctic as Ancestral Homeland

The North Slope Inupiat plaintiffs (the North Slope Borough and the Alaskan Eskimo Whaling Council) argued MMS did not take the required "hard look" at the potential impacts to subsistence resources—including bowhead whales, beluga whales, caribou, and fish—and Inupiats' use of them.[39] The Inupiat plaintiffs argued the proposed drilling and icebreaking activities, occurring at an "unprecedented" scale,[40] would disrupt bowhead migration patterns, which would increase the risk to whale hunters, who would have to follow the bowheads further offshore. They also argued that movement of drilling rigs, icebreakers, and other vessels through the Chukchi Sea en route to the Beaufort would alter beluga migration patterns, affecting the traditional beluga hunt at Pt. Lay,[41] and that increased activities associated with drilling, including helicopter and truck traffic, could disrupt caribou, another important traditional subsistence resource.[42] Thus, the North Slope Inupiat plaintiffs emphasized the centrality of subsistence hunting to the life and culture of the Inupiat villages, a way of life that has existed "for thousands of years" and that embodies "cultural, social and spiritual values that are the essence of Inupiat heritage."[43]

(ii) The Arctic as Spiritualized Frontier

The environmental groups described the Arctic in ways that will be familiar to anyone familiar with the American idea of wilderness. First, the groups noted the potential impacts on three icons of the American wilderness movement: the Arctic National Wildlife Refuge, the bowhead whale, and the polar bear.[44] Second, they highlighted the wilderness qualities of the region, describing how "[v]ast expanses of this area are untouched by industrial activity and provide important habitat for thousands of species of animals, birds, and fish, including endangered and threatened species."[45] Finally, they warned of the "potentially catastrophic impacts of a crude oil spill,"[46] noting that an oil spill would be particularly harmful because scientists and regulators know so little about the effects of such an event in the Arctic and because there are no proven methods for dealing with it. Thus, in emphasizing the area's relationship to wilderness icons and its wilderness qualities the environmentalists situated it within the familiar storyline of America's spiritualized frontier.

(iii) The Arctic as Neutral Space

In its brief, the U.S. Department of Justice (DOJ) laid out the overlapping environmental review and oil and gas leasing processes in a clear sequence and referred to the authority given to federal agencies to grant authorizations for incidental takes and harassment of marine mammals and polar bears.[47] Also, in direct contrast to plaintiffs' claims that the proposed scale of drilling in the region would be "unprecedented," the DOJ explained that "[o]il and gas exploration is not a new phenomenon in the Beaufort Sea" and indicated that seven lease sales were held "in the same area of the OCS between 1979 and 1988,

[39] Brief of Petitioners North Slope Borough and Alaska Eskimo Whaling Commission in 07-72183 at 5, *Alaska Wilderness League*, 548 F.3d 815 (No. 07–72183), 2007 WL 3114589 ("Pet. N. Sl. Br. 1").
[40] *Id*. at 23.
[41] *Id*. at 12–13.
[42] *Id*. at 14–15.
[43] *Id*. at 8.
[44] Petitioners' Consolidated Brief in Numbers 07-71457 and 07-71989 at 1, 13, *Alaska Wilderness League*, 548 F.3d 815 (Nos. 07-71457, 07-71989), 2007 WL 3114590 ("Pet. Con. Br.").
[45] *Id*. at 5.
[46] *Id*. at 1, 13.
[47] Brief of Respondents in 07–71457, 07–71989, 07–72183 at 7–8, *Alaska Wilderness League*, 548 F.3d 815 (Nos. 07-71457, 07-71989, 07-72183) ("DOJ Br.").

resulting in the issuance of 688 leases and the drilling of 30 exploration wells."[48] This experience in the region has resulted in one offshore field being in active production for more than a decade,[49] federal agencies' possessing "extensive knowledge of wildlife resources and subsistence harvest patterns," "protective measures for these resources" being put into place, and a "workable method" for applying NEPA to oil and gas production in the region.[50] Thus, the federal government advanced the vision of the "Alaska Arctic" as a place already largely impacted by industrialization and properly managed under existing environmental laws.

(iv) The Arctic as Classical Frontier

Shell offered its own gloss on the facts presented by DOJ, painting a picture of the Arctic as an extractive periphery, a resource frontier that exists to serve the nation's energy interests. According to Shell, the important thing is not that the Beaufort Sea is in the Arctic but that it is on the Outer Continental Shelf.[51] In this construction of the Arctic, concerns about impacts on the human, marine, and coastal environment are properly balanced against the more weighty interests of industrial expansion and energy independence.

(v) The Ninth Circuit Court of Appeals' Opinion

The Ninth Circuit held MMS did not adequately analyze the site-specific impacts of noise on bowhead whales and their migratory patterns or the impacts of drilling on other subsistence hunting and fishing activities at the specific proposed sites.[52] In reaching this decision, the court mediated between the two sides, voicing its dissatisfaction with the agency's discounting its own experts' concerns about these impacts[53] but finding the analysis of a potential oil spills impact was adequate.[54] The court also evinced sympathy for the competing narratives: Its recitation of facts largely tracked plaintiffs' accounts of the geography and wildlife resources in the Beaufort, noise impacts, and the centrality of subsistence hunting to the Inupiat way of life,[55] and acknowledged that Shell's drilling would be the first in an potential wave of new operations,[56] all "located in an increasingly fragile ecosystem." On the other hand, the court also recognized that the project is located in a "region [that] continues to develop,"[57] thereby explicitly acknowledging the government's view that development is already ongoing and further development is inevitable.

A dissenting opinion offered an alternative response, essentially adopting the trope of the Classical Frontier. The dissent announced at the outset that "Under OCSLA, the Secretary of the Interior and, by delegation, MMS, are charged with ensuring the 'vital national resource reserve' of the Outer Continental Shelf be made available for expeditious and orderly development, subject to environmental safeguards."[58] Thus, like Shell, the dissent urged that development under OCSLA trumps protection under NEPA. In addition, the dissent accepted the government's storyline of the Arctic as neutral space, properly subject to the expertise of the government. Deci-

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[48] *Id*. at 8.

[49] *Id*.; *See also AOGCC Pool Statistics, Northstar Unit, Northstar Oil Pool*, Alaska Oil and Gas Conservation Commission, *available at* http://doa.alaska.gov/ogc/annual/current/18_Oil_Pools/Northstar-%20Oil/1_Oil_1.htm (last visited Apr. 29, 2013).

[50] DOJ Br., *supra* note 48, at 9.

[51] Brief of Respondent-Intervenor Offshore Inc. in 07–71457, 07–71989, 07–72183 at 3, *Alaska Wilderness League*, 548 F.3d 815 (Nos. 07-71457, 07-71989, 07-72183) ("Shell Br.").

[52] *Alaska Wilderness League*, 548 F.3d at 825.

[53] *Id*. at 819.

[54] *Id*. at 832–33.

[55] *Id*. at 820.

[56] *Id*. at 818.

[57] *Id*. at 833–34.

[58] *Id*. at 840–41.

sions made by the experts, especially when on the "frontiers of science," warrant extraordinary deference, which the dissent found lacking.[59]

B. Round Two: Village of Point Hope v. Salazar

In 2009, Shell submitted a new Exploratory Plan for the Beaufort Sea and proposed to drill up to two exploration wells on either of two separate prospects during the open-water season in 2010, using a single drill ship. Shell agreed to measures that would avoid interference with the fall subsistence bowhead whale hunt by the Native villages of Kaktovik and Nuiqsut. At around the same time, Shell also submitted an Exploratory Plan to drill up to three wells for the same season on leases in the Chukchi Sea that Shell had acquired in a separate lease sale. Shell proposed to use the same single drill ship in both the Beaufort and Chukchi seas. MMS approved both plans and issued EAs and FONSIs in support of the approvals.

Again, Shell's plans were met with immediate resistance. A coalition including the Native Village of Point Hope; a network of Alaska Natives of the Inupiat, Yupik, Aleut, Tlingit, Gwich'in, Eyak, and Denaiana Athabascan tribes called Resisting Environmental Destruction on Indigenous Land (REDOIL); and environmental advocacy organizations filed suit, challenging both actions (the Environmental/Native Plaintiffs).[60] The Alaska Eskimo Whaling Commission and the Inupiat Community of the North Slope (the North Slope Inupiat Plaintiffs) also again brought suit.[61] The conflicting narratives from the previous lawsuit were revived, but with several interesting twists.

For example, the Environmental/Native Plaintiffs hybridized the tropes of the Spiritualized Frontier and Ancestral Homeland, emphasizing the close associations between subsistence hunting, cultural practices, and community values and identity; the importance of certain wildlife species, including bowhead, beluga, Pacific walrus, long-tailed ducks, and murres; the threat of a catastrophic oil spill; and the severity of Arctic conditions.[62] The North Slope Inupiat Plaintiffs offered something of a more romantic view of the indigenous perspective than in the previous case, claiming that "The Inupiat have relied on the subsistence resources of the Arctic Ocean *since time immemorial* to carry on their indigenous traditions,"[63] and providing a far more nuanced, intimate, and humanized description of the bowhead's breeding, migration habits, and physiology.[64] These rhetorical moves stake a claim to nativity, traditional knowledge, and subsistence culture in an ancestral homeland. The federal government again adopted the trope of Arctic as Neutral Space, though arguably the government's narrative stance was even more extreme.[65] Indeed, the government's defense was almost wholly procedural, involving the quantity and quality of information analyzed and the satisfaction of the forgiving arbitrary and capricious standard of judicial review. Shell also adopted the same storyline as in the first case, but

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[59] *Id*. at 842–44.

[60] Petitioners' Consolidated Brief in Numbers 09–73942 and 10–70166, Native Village of Point Hope v. Salazar, 378 Fed. Appx. 747 (9th Cir. 2010) (Nos. 09–73942, 10–70166), 2010 WL 1219036 ("Pet. NVPH Br.").

[61] Petitioners Alaska Eskimo Whaling Commission and Inupiat Community of the Arctic Slope's Opening Brief on the Merits, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650115 ("Pet. N. Sl. Br. 2").

[62] Petitioners' Consolidated Brief in Numbers 09–73942 and 10–70166, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 09–73942, 10–70166), 2010 WL 1219036 ("Pet. NVPH Br.").

[63] Pet. N. Sl. Br. 2, *supra* note 62, at 1 (emphasis supplied).

[64] *See id*. at 10–15.

[65] Brief of Respondents, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650117 ("DOJ Br.").

here Shell told a story in which drilling in the Arctic is a necessary part of President Obama's economic development and energy security policies.[66]

In addition, two new storylines were introduced:

(i) The Arctic as Developing World

Several Alaska Native Corporations with shareholders who reside on the coast of the Beaufort and Chukchi seas, including the Arctic Slope Regional Corporation, submitted amicus briefs in support of Shell's proposal.[67] The ANCs' express goal in entering the litigation was "to provide the Court with a more comprehensive picture of Iñupiaq Eskimos' views of North Slope offshore outer continental shelf ('OCS') oil and gas exploration and development than the Court could glean from" the plaintiffs' various briefs.[68] Thus, ANCs instituted a competition over who represented the Native Alaskan community and whose self-description was the better one.

The ANCs presented a storyline in which communities and cultures in dire economic circumstances would be saved by oil and gas drilling in the Arctic Ocean. According to the ANCs, the majority of jobs (55 percent) in the North Slope are government positions, and the region experiences depopulation in down economic times. The communities of the North Slope also experience high dropout rates and unemployment.[69] Oil and gas exploration and development, however, promise to provide jobs, prosperity, and an economic core to the region, thereby strengthening the security of its most vulnerable residents. Moreover, the ANCs would receive direct financial benefits from Shell's projects; using their hiring preference and payment of stock dividends, ANCs would build up local capacity and directly pass benefits on to local Iñupiaq Eskimo communities. In addition, Shell's drilling plan would also produce secondary benefits for both the North Slope and Alaska, such as increasing tax revenues and benefitting local suppliers and the service industry.[70] Ultimately, the ANCs argued, millions of dollars in operations contracts, aviation contracts, and secondary benefits were at stake.

(ii) The Arctic as Alaska

The State of Alaska also weighed in as amicus in this case, and crafted a portrait of the Arctic that resonated with other storylines presented by Shell, the federal government, and the ANCs. "As the owner of adjacent land and the state whose government and residents stand to gain from the jobs, revenue and economic development at stake," the State, like the ANCs, supported approval of the Exploration Plans for economic reasons. "As a sovereign that must itself make difficult decisions about public land use," the State, like the federal government, commended the balance struck between environmental protection and energy production and the rule of law through which the decision was made.[71] Also, like Shell, the State depicted the Arctic as a tradi-

[66] Brief of Respondents-Intervenors Shell Offshore Inc. and Shell Gulf of Mexico Inc., *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650118, ("Shell Br.").

[67] *See* Joint Brief Amici Curiae of Ukpeagvik Iñupiat Corporation, Olgoonik Corporation, and Kaktovik Inupiat Corporation in Support of Briefs by Federal Respondents and Respondents-Intervenors, *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650120 ("ANC Amicus Br."). *See also* Brief for Amici Curiae Arctic Slope Regional Corporation and Tikigaq Corporation in Support of Respondents-Intervenors Shell Offshore Inc. and Shell Gulf of Mexico Inc., *Native Village of Point Hope*, 378 F. App'x. 747 (Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650119.

[68] ANC Amicus Br., *supra* note 68, at iii.

[69] *Id*. at 10–11.

[70] *Id*. at 9–10.

[71] Intervenor State of Alaska's Brief in Support of Respondents *Native Village of Point Hope*, 378 F. App'x. 747

tional resource frontier, noting that the "Beaufort and Chukchi are massive areas roughly the size of Texas and California combined that are largely untapped as a natural resource"[72] and that domestic energy production would improve the nation's energy security.[73] Interestingly, the State also added an international environmental justice component to this storyline: by not exploiting domestic resources, the nation exports the environmental costs of production to foreign nations, where environmental protections are often less stringent than in the United States.[74]

(iii) The Ninth Circuit Opinion

The Ninth Circuit's decision was remarkably concise, declaring that the court had reviewed the record but that under the deference owed to the administrative agency the permits would stand.[75] In its brevity, its focus on the narrow legal arguments presented by plaintiffs and its adherence to the formal standards of deference to the agency the decision implicitly affirmed the construction of the Arctic as a neutral space while dissociating the court's process from the narrative content of the parties' briefs.

C. Round Three: The Petition for Rehearing En Banc

Explicit reference to "the Arctic" was notably absent from the litigation literature, up to this point. To succeed in obtaining a rehearing *en banc*, however, the plaintiffs had to demonstrate that reconsideration was necessary because the matter is of "exceptional importance."[76] Accordingly, the Environmental/Native Plaintiffs and the North Slope Inupiat Plaintiffs both argued that the Arctic, as "the Arctic," is of national significance.

The Inupiat plaintiffs declared, "This case involves issues of exceptional importance to the Nation's interests in the natural and non-renewable resources of the U.S. Arctic," including the wildlife and the "subsistence-based economy of the Inupiat coastal communities of Northern Alaska."[77] They warned that the risk of an oil spill is great in "the Arctic, a region defined not only by unique wildlife but also by rough seas and notorious weather made worse by climate change, floating pack ice, and limited shore-based infrastructure,"[78] and that "[i]ncreased industrial activity threatens to impose unprecedented harm on the wildlife and people of the Arctic, who already struggle with the rapidly increasing impacts of climate change."[79]

The Environmental/Native Plaintiffs told a similar story, but one that specifically called attention to the traditional resource frontier storyline underlying Shell's arguments: "In their search for oil, companies are embarking on a new era of offshore drilling in deeper water, as in the Gulf of Mexico, and in more remote and sensitive areas, as in the Arctic Ocean at issue in this case."[80] These remote and sensitive areas are, in fact, "new frontiers."[81] And the Arctic is a unique and special instance of the category:

> "[The] Arctic supports an extraordinary diversity of species and a vibrant indigenous subsistence culture found nowhere else in the world, but the delicate balance that creates this biological and cultural splendor is under stress. Climate change has decreased

(Nos. 10-70368, 09-73942, 09-73944, 10-70166), 2010 WL 5650116 ("Alaska Br.") at 1.

[72] *Id*. at 2.

[73] *Id*. at 4–5.

[74] *Id*. at 7–8.

[75] Native Village of Point Hope v. Salazar, 378 F. App'x. 747 (9th Cir. 2010).

[76] Fed. R. App. P. 35(a) (2009).

[77] Pet. AEWC En Banc Br. at 4.

[78] *Id*. at 5.

[79] *Id*. at 5.

[80] Pet. NVPH En Banc Br., *supra* note 61, at 1.

[81] *Id*.

> the sea-ice upon which much of the wildlife of the Arctic depends, altering habitat and threatening species such as the polar bear with extinction. Now, Shell's drilling plans, which are only the first in a series of new offshore drilling prospects in the Arctic Ocean, bring further strain from noise and disturbance – and the threat of a devastating oil spill to the Arctic, its wildlife, and its people.[82]

The briefs submitted by the federal government, Shell, and Alaska in opposition to the *en banc* petition all denied that there is anything special about "the Arctic." Instead, consistent with the trope of the Arctic as Neutral Space, the briefs focused on the narrower, technical question of agency expertise and the relative unimportance of the specific legal questions posed for review.

The petition was denied.

D. Round Four: Native Village of Point Hope v. Salazar II

Due to a federal moratorium imposed in the wake of the Deepwater Horizon blowout, Shell did not drill in 2010.[83] The next year, the company submitted a revised Exploration Plan to the Bureau of Ocean Energy Management (BOEM) and a revised oil spill response plan to the Bureau of Safety and Environmental Enforcement (BSEE), MMS's successor agencies. Again, there was litigation. But the tone of the litigation is emblematic of the triangulation of the competing narratives. In the period between the imposition of the moratorium and the new plans, U.S. environmental groups had made drilling in the Arctic a central part of their political and fundraising platforms, calling for members to "Save the Polar Bear Seas," to "Protect the Fragile Arctic Ocean." to "Keep Shell Out of the Arctic," and to make "national treasure" of "the Arctic's remote and undeveloped seas" should be "off limits to oil drilling." Yet, the complaint focused on the highly technical issue of the alleged inadequacy of the emergency oil spill containment and response plan in a fragile environment already impacted by climate change.[84] Tellingly, the attorney arguing the case for the Environmental/Native plaintiffs announced to the Ninth Circuit panel at oral argument that although the issues "strike at the heart of an oil company's ability to stop and control an oil spill on the outer continental shelf, the court's resolution of these issues will be founded … in nothing more than the hallmark principles of administrative law."[85]

E. Postscript

The saga has reached an anticlimactic end for Shell – at least as of the time of this writing. In September 2012 Shell began drilling its first pilot hole in the Chukchi Sea. It stopped the next day, when it had to move its rig to avoid sea ice. The company did begin drilling again, but shut down after only a week, announcing that it was done for the season. Shell similarly halted exploratory drilling in the Beaufort after only three weeks. Subsequently, in December 2012, the oil rig Kulluk, one of Shell's two rigs, ran aground in the Gulf of Alaska. And ten days later the United States Environmental Protection Agency announced that both drill ships had violated their Clean Air Act permits. In March

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[82] *Id*. at 2–3.

[83] U.S. Dep't of the Interior, Decision Memorandum Regarding the Suspension of Certain Offshore Permitting and Drilling Activities on the Outer Continental Shelf, July 12, 2010, at 1, *available at* http://www.doi.gov/deepwaterhorizon/upload/Salazar-Bromwich-July-12-Final.pdf.

[84] *See e.g.*, Petitions for Review of Department of Interior Decisions (Apr. 3, 2012), 2012 WL 1232359, at 28–34.

[85] Recording of the Oral Argument, Native Village of Point Hope v. Salazar, 680 F.3d 1123 (9th Cir. 2012) (No. 11-72891) (available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000009186).

2013, the Department of Interior announced it would investigate Shell's Arctic operations. Soon thereafter, Shell declared that it would not drill in 2013. DOI's report ultimately concluded that Shell was not fully prepared to drill in the Arctic and recommended that company further study and improve its program.[86]

The federal government and Shell continued to host public meetings and other forums on the North Slope and around Alaska. But, in January 2014 the Ninth Circuit held that the environmental review prepared for the 2008 lease sale in the Chukchi Sea failed to adequately evaluate the scale of production that could result.[87] The next week Shell announced that it would not drill, again, during the upcoming summer season, and raised questions about the likelihood of drilling at all in the near future.[88]

VI. Offshore Oil and Gas Activities in the U.S. Arctic and Indigenous Peoples Rights

This Symposium called on the gathered presenters and participants to examine extractive industries in the Arctic and ask: "What about environmental law and indigenous peoples' rights?" The above account demonstrates that environmental and natural resources law in the U.S. functions in the Arctic much the same as it does everywhere else within the nation's domestic territory, with courts serving as a critical backstop that ensures a degree of environmental protection while ultimately deferring to agency expertise where clear errors are lacking and adequate process has been provided. But what about indigenous peoples rights?

In "Extractive Industries and Indigenous Peoples" the report of the Special Rapporteur on the Rights of Indigenous Peoples,[89] James Anaya identifies numerous provisions of international law[90] that pertain to the operation of extractive industries in indigenous territories, in areas "that are of cultural or religious significance to [indigenous peoples] or in which they traditionally have access to resources that are important to their physical well-being or cultural practices," and in instances where "extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights."[91] The extension of indigenous peoples rights to areas beyond those over which they claim sovereignty or exclusive jurisdiction, and even potentially beyond indigenous territories, is important because the Outer Continental Shelf is not, under U.S. law, under Inupiat control, and because at least some of the areas where drilling is to occur are not traditional whaling, fishing or hunting areas. Looking, then, at the Shell litigation in light of the Report—without revisiting the legitimacy of the previous determination of rights under ANCSA, without analyzing the status of Native Alaska lands as something other than "Indian Country" under U.S. law, and with the awareness that this analysis is of a general and preliminary nature—

[86] Review of Shell's 2012 Alaska Offshore Oil and Gas Exploration Program, *supra* note 9.

[87] Native Village of Point Hope v. Jewell, 740 F.3d 489, 505 (9th Cir. 2014).

[88] *See, e.g.*, Steven Mufson, *Shell says it won't drill in Alaska in 2014, cites court challenge*, Wash. Post, Jan. 30, 2014.

[89] U.N. Human Rights Council, *Report of the Special Rapporteur on the right of indigenous peoples*, A/HRC/24/41 (Sept. 6, 2013) (*prepared by* James Anaya).

[90] Among other things, Special Rapporteur Anaya points to the United Nations Declaration on the Rights of Indigenous Peoples, the International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries, arts. 13–15; the International Covenant on Civil and Political Rights, arts. 1 and 27; and the International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (d) (v), as well as the Principle of Free, Prior and Informed Consent. *See Report*, at 8–11, 19, 26, 37, 44, 52, notes 5–7, 13, 19.

[91] *Id.* at 27.

I would argue that the system in place in the U.S. appears to comport with the rights to freedom of expression and to participation; the principle of free, prior and informed consent; and the requirement that the U.S. create a regulatory regime that protects indigenous peoples rights.

Special Rapporteur Anaya explains that, consistent with the rights to freedom of expression and participation, "indigenous individuals and peoples have the right to oppose and actively express opposition to extractive projects, both in the context of State decision-making about the projects and otherwise."[92] Clearly, Alaska Natives have exercised these rights, as participants in administrative processes and as plaintiffs in lawsuits – both winning and losing. At the same time, Alaska Natives have exercised the right to express their support for offshore oil and gas exploration, as well, participating as amici in the litigation in support of Shell and the federal government. This resonates with Special Rapporteur Anaya's observation that "it must not be assumed that the interests of extractive industries and indigenous peoples are entirely or always at odds with each other" and that "in many cases indigenous peoples are open to discussions about extraction of natural resources from their territories in ways beneficial to them and respectful of their rights."[93]

Given the complicated history of U.S.-Alaska Native relations and the internal divisions within Inupiat communities over offshore drilling, consistency with the principle of free, prior and informed consent is a tougher issue. On the one hand, the U.S. Supreme Court has not definitively resolved the outstanding questions of aboriginal title and Alaska Native hunting and fishing rights on the OCS, leaving open the question of whether ANCSA can be read as a form of consent.[94] On the other hand, one might point to the visible support of drilling within Inupiat communities, including from political and business leaders as evidence of consent. In addition, it could be argued that one of the exceptions to the principle of free, prior and informed consent applies in this instance – for instance, it could be argued that the impacts of offshore oil and gas drilling in Alaska's Arctic waters on Inupiat subsistence practices "would only impose such limitations on indigenous peoples' substantive rights as are permissible within certain narrow bounds established by international human rights law."[95] Nonetheless, it is likely that consultation, at a minimum, is required. Such consultation would be consistent with the rights to participation and self-determination, as well as rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects.[96] Although there may have been some issues in this regard in the early years, Shell's amendment to its plans in order to avoid undue impacts on bowhead and beluga populations and the federal government's intensive involvement in the unfolding events satisfy the consultation requirement.[97]

Finally, Special Rapporteur Anaya writes that States must provide "a regulatory framework that fully recognizes indigenous peoples' rights…that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in the behavior of extractive companies; and that provides effective sanctions and remedies when those rights are infringed either by government or corporate actors."[98] The litiga-

[92] *Id.* at 19.
[93] *Id.* at 2.
[94] *See* David S. Case and David A. Voluk, Alaska Natives and American Laws 77-78 (2012) (3d ed.).
[95] *Id.* at 31.
[96] *Id.* at 27, 37.
[97] *See also id.* at 52–57 (discussing due diligence).
[98] *Id.* at 44.

tion story described above—and the background administrative procedures, including the tiers of environmental review and other required opportunities for public comment—offers evidence that the U.S. regulatory regime complies with this requirement. Indeed, the Department of Interior's recognition of the national importance of Inupiat culture and the central significance the review of impacts on subsistence practice has been given under NEPA underscore this point, as do the original court-ordered injunction in 2008 and the most recent one in 2014. Thus, even though the Inupiat plaintiffs, and their narrative of the ancestral indigenous homeland, have not and cannot stop drilling forever, their rights are recognized and judicial review provides a remedy for infringement.

VI. Conclusion

At the outset of this Essay I noted that the ways in which litigants and courts put forward and respond to conflicting narratives about nature—about the frontier, about the Arctic—and about the proper relationship between nature and culture raise a number of big questions about the law and its dominion. I do not pretend that my argument that the pro-managerial narrative that reads the Arctic as a neutral space gives an answer to those questions. Rather, the preceding pages have sought to clarify the important elements of domestic law—primarily under ANCSA and OCSLA—that set the stage for the Shell litigation, and to elucidate the ways in which these conflicting narratives have factored into it. In addition, I briefly addressed whether and how the Inupiat's narrative submissions comport with indigenous peoples' rights under international law. This study, though, may mark a first step. A comparative study of trans-Arctic narratives in extractive resource conflicts would be of real value, illuminating not only how indigenous peoples and others value and understand the place but also whether and how those values and understanding—whether and how those stories—matter for the law.