ADMINISTRATIVE DISCRETION IN THE MANAGEMENT OF OUTER CONTINENTAL SHELF MINERALS

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Mineral developers face varying kinds of risks and uncertainties associated with the exploration, development, and production of minerals from a marine deposit.[1] These risks can be geologic (*e.g.*, ore grade), environmental (*e.g.*, storm frequency), or legal (*e.g.*, lease suspension). To the miner, these types of risks all have the same result: they raise the private costs of proving-out and working a deposit. Both geologic and environmental risks could be reduced through the efforts of exploration and meteorological forecasting, for example. In the case of U.S. public minerals, legal risks might be reduced through the promulgation of new regulations, the enactment of a new law, or a favorable allocation decision made by the resource manager. This essay is concerned with the special case of legal risks arising out of the exercise of administrative discretion by a resource manager over the rights to work publicly-controlled ocean minerals.

Under authority found in the Outer Continental Shelf Lands Act (OCSLA),[2] the U.S. Minerals Management Service (MMS) presently is devising marine nonfuel mineral development regulations.[3] Additionally, there is a legislative proposal currently before Congress known as the National Seabed Hard Minerals Act (NSHMA), whose intent to repeal nonfuel mineral disposal authority in OCSLA and to substitute a new system in its place.[4] Both of these proposed management regimes may contain provisions that allow resource managers to use administrative discretion, which may impose legal risks on prospective mineral developers. Since there is little practice under these proposed systems for OCS nonfuel minerals, this analysis is focused on the experience with oil and gas management under OCSLA,[5] and examines the opportunities found in OCSLA for the resource manager (in this instance the Secretary of Interior, or the MMS

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acting on his behalf) to apply administrative discretion to modify, suspend, or otherwise alter activities relating to the development of OCS minerals. It is useful to understand the reasons for which discretion is given to the resource manager, and important to understand the extent to which the application of administrative discretion may raise the costs associated with marine nonfuel mineral development. This paper should be regarded as exploratory in the sense that we identify several areas that deserve further research.

Meaning of Discretion

One of the leading authorities in the field of marine mining has voiced the general position of many nonfuel minerals interests concerning the use of a leasing system such as OCSLA:

> This [OCSLA] may be (and according to the record is) a fine regime for EEZ oil and gas development, which has a half-century history to guide government and industry decisionmakers. However, it presents to the pioneering hard rock miner an unfamiliar, unpredictable, and inappropriate mix of early economic burdens, undefined time delays, and multiple administrative roadblocks, all governed solely by *administrative discretion*. Thus the 'cash-bonus competitive bidding' reference in the otherwise short and unenlightened Paragraph 8k of OCSLA is short-hand for a complex, inflexible, and *discretionary* access system which is inappropriate for hard minerals in general, and a disincentive to a pioneering marine hard minerals industry in particular.[6]

The discretionary nature of a management system for public minerals is often referred to without further elaboration.[7] In a legal sense, the term "discretion" probably refers primarily to the resource manager's freedom to decide whether or not to grant an entitlement, such as an OCS lease, to a private firm.[8] In a recent study that examines federal interference with existing (or prospective) property interests acquired from the United States, two researchers examine "executive discretion" mainly in the context of the *acquisition* of protectible interests from the United States.[9] However, under OCSLA the grant of a lease does not necessarily entitle the lessee to explore and produce minerals.[10] In a policy sense, a broader definition of administrative discretion can be formulated that would include all iterations (not just the entitlement grant) in the management of offshore minerals at which the resource manager is able to make a decision that affects the private cost calculus of the mineral developer. It is the existence of these decision points that imposes "risks" in a legal-regulatory sense on the developer.[11]

Under the broad definition of discretion above, it might be argued that other federal agencies or governments with statutory responsibility for the management of ocean resources have opportunities to apply their discretion to condition the nature of OCS entitlements. For example, the Environmental Protection Agency must issue a National Pollution Discharge Elimination System (NPDES) permit to OCS operators for the discharge of drilling muds and cuttings on the OCS.[12] "Affected" coastal states have the opportunity to review exploration and development-production plans to determine the "consistency" of these plans with federally-approved state coastal management plans.[13] Decisions made by these entities certainly may add to the legal risk faced by private firms in OCS development. However, MMS, as the lead agency, has more opportunities than other agencies or governments to apply discretion.

Iterations in OCS Minerals Management

Figures 1 and 2 provide a detailed representation of iterations in the management of OCS minerals, primarily oil and gas.[14] (Note that not all of these iterations provide opportunities for discretionary decisionmaking.) Two recent court cases make clear the limited nature of the rights acquired by an OCS lessee at a lease sale and the iterative (sometimes called "phased" or "staged") process by which the rights to conduct postlease activities are gained.[15] While these cases concern issues other than administrative discretion, they are built upon a foundation that requires the existence of stages at which discretion may be applied, and ultimately, this may be their most important aspect.[16] In *Secretary of the Interior v. California*, a case concerning the intergovernmental aspects of OCS leasing, the U.S. Supreme Court declared that:

> by purchasing a lease, lessees acquire no right to do anything more. Under the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production that might trigger CZMA [Coastal Zone Management Act] sec. 307(c)(3)(B); the lessee acquires only a priority in submitting plans to conduct those activities. If these plans, when ultimately submitted, are disapproved, no further exploration or development is permitted.[17]

Thus there are at least three iterations which characterize the transfer of entitlements from the public to a private developer and during which administrative discretion might be applied: the lease sale, postlease exploration, and development-production.[18]

In a second case, concerning the decision of the Secretary of the Interior to hold a lease sale in the Bering Sea off Alaska, a federal district court considered whether the Secretary had failed to insure, under provisions of

OCSLA, that OCS oil and gas activities were conducted in a balanced manner. More specifically the court was asked to examine whether the Secretary had failed to insure that marine biological resources were not subject to unreasonable risk from prospective industrial activities on the OCS. Upon examining OCSLA, the court concluded that:

> [f]irst, Congress has decided to allow key decisions having serious environmental consequences to be made at the exploration and production and development stages instead of requiring all decisions to be made at the preleasing and leasing stages. Second, in order to protect environmental values, Congress has given the Secretary broad, continuing powers of supervision, including the power to modify, suspend, or even cancel the leases during the course of development when necessary to protect the environment. . . .[19]

Both of these cases make clear the point that OCSLA is a "discretionary" system and that administrative discretion might affect a lessee's entitlements beyond the stage at which a decision to accept or reject a bid is made.

Opportunities for the Application of Discretion

Following the steps in figures 1 and 2, there are numerous points at which decisions that might affect the rights to explore, develop, or produce OCS minerals are made by the resource manager and at which his broadly defined "discretion" might impose legal risks on private firms. A brief outline considering some of the most salient steps follows:

a. Issuance of prelease geological and geophysical exploration permits [43 U.S.C.S. 1340(a)].
b. Balancing national goals in the determination of individual tracts for a lease sale (the "timing and location of leasing") [43 U.S.C.S. 1344(a)(3)].
c. Specific "discretion" to choose among bidding systems [43 U.S.C.S. 1337(a)(1)].
d. Decision to accept/reject bids on specific tracts:
    1. In the public interest for "precision, care, and certainty" of bids [*Superior Oil Co. v. Udall*, 409 F.2d 1115, 1119 (D.C. Cir. 1969)].
    2. "Broad discretion to insure that the government exacts a fair return" [*Kerr-McGee Corp. v. Watt*, 517 F.Supp. 1209, 1211 (D.C. Cir. 1981)].

    3. Where insufficient competition to guarantee receipt of fair market value [*Superior Oil Co. v. Watt*, 548 F. Supp. 70, 72 (Del. 1982)].
    4. If made in a "careful and systematic manner" [*Kerr-McGee Corp. v. Watt*, 517 F.Supp. 1209, 1214 (D.C. Cir. 1981)].
    5. In situation inconsistent with antitrust laws [43 U.S.C.S. 1337(c)(3)].
    6. When a bid is too low [*Kerr-McGee Corp. v. Morton*, 527 F.2d 838, 839 (D.C. Cir. 1975)].
    7. If due diligence requirements on other leases are not being met [43 U.S.C.S. 1337(d)].
e. Specific "discretion" to defer payment of the cash bonus for up to five years [43 U.S.C.S. 1337(a)(2)].
f. Authority to prescribe "rental and other provisions" [43 U.S.C.S. 1337(b)(6)].
g. Approval of an exploration plan [43 U.S.C.S. 1340(c)].
h. Authority to enlarge tract size to comprise a "reasonable economic production unit" [43 U.S.C.S. 1337(b)(1)].
i. Approval of a development-production plan [43 U.S.C.S. 1351(a)].
j. Issuance of a drilling permit [43 U.S.C.S. 1340(d)].
k. Issuance of other permits, easements, or rights of way.
l. Reduction or elimination of royalty on any lease to "promote increased production" [43 U.S.C.S. 1337(a)(3)].
m. Inclusion of termination and other clauses in leases [*State of Alaska v. Andrus*, 580 F.2d 465, 483 (D.C. Cir. 1978)].
n. Terms of a lease are invalid, if found inconsistent with OCSLA [*Union Oil Co. of California v. Morton*, 512 F.2d 743, 748 (9th Cir. 1975)].
o. Authority to prescribe and amend regulations including provisions to suspend or prohibit temporarily operations or activities under a lease or permit [43 U.S.C.S. 1334(a)(1); *Village of False Pass v. Watt*, 565 F.Supp. 1123, (Alaska, 1983)]:
    1. At the request of a lessee.
    2. In the national interest.
    3. To facilitate proper development of a lease.
    4. To allow for the construction or negotiation for use of transportation facilities.
    5. If threat of serious, irreparable, or immediate harm or damage to:
        i. life (including fish and other aquatic life);

ii. property;
iii. any mineral deposits; or
iv. the marine, coastal, or human environment.

p. Authority to prescribe or amend regulations including provisions to cancel a lease or permit (entitling the lessee to receive compensation) [43 U.S.C.S. 1344(a)(2)]:
   1. if determined after a hearing that continued activity would cause serious harm or damage to:
      i. life (including fish and other aquatic life);
      ii. property;
      iii. any mineral;
      iv. the national security or defense; or
      v. the marine, coastal, or human environment;

q. Authority to cancel producing and nonproducing leases, if failure to comply with OCSLA, Interior regulations, or lease [43 U.S.C.S. 1344(b–c)].

r. Approval for sale, exchange, assignment, or other transfer of a lease [43 U.S.C.S. 1337(e)].

A cursory examination of this list of discretionary opportunities may result in the following general impression: the longer the list, the more discretion is accorded to the managing agency. This impression is not necessarily correct, and, in any case, is not the intent of this analysis. In fact, because the language of any statute clearly sets boundaries on the exercise of discretion by a resource manager,[20] a strong argument may be put forth that the larger the number of *specified* discretionary decision points in a statute, the more restricted becomes the exercise of discretion.[21] In the context of this argument, pervasive amendments of OCSLA made in 1978 may have acted to restrict the Secretary of Interior's administrative discretion. Moreover, to the extent that significant portions of the Act may be inapplicable to the management of marine nonfuel minerals (see note 5 above), then the Secretary may retain relatively more discretionary authority in their management when compared with oil and gas minerals. As a result, the promotion of an alternative management regime, represented by NSHMA, might be seen as an attempt to place limits on the resource manager's discretion. Thus, in the words of the authority quoted earlier:

> I distrust that discretion which is not guided by clear policy from above. The bureaucrat, I feel, must operate within policy, and according to broad criteria, established in law by people who are elected and

> responsible directly to the people. If not, we have a government of men—not laws.[22]

Rationale for Discretion

The basic reason for a public resource disposal system to be discretionary is that the development of the resource needs to be managed in the "public interest." Public interest is a broad concept that leaves much room for interpretation and reinterpretation over time; however, it certainly implies that a mineral resource will be managed so as to result in a net benefit (even if nonmonetary) for the public, the resource "owner."

Public interest may be defined for the purposes of a specific piece of legislation according to expressed "goals." The goals of OCSLA are diverse and sometimes conflicting, often requiring the Secretary of Interior to strike a balance (apply discretion). OCSLA goals include those stated in the congressional declaration of policy: the OCS "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."[23]

At least one commentator has hypothesized that the kinds of discretionary mineral disposal systems created in the United States during this century are derivations of the progressive movement of the late 19th and early 20th centuries.[24] In this view, public minerals might be managed "scientifically" by resource managers, who wield some control over the timing and rate of mineral development activities and who seek a "return" for the public as specified in congressionally-stated goals.[25] Thus OCSLA states:

> The Secretary [of Interior] may at any time prescribe and amend such rules and regulations *as he determines to be necessary and proper* in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of the correlative rights therein. . . .[26]

Theoretically, Congress could exercise its constitutional authority to dispose of public property[27] by holding lease sales and managing OCS lands itself. Yet this scenario would impose extraordinary costs upon the resources of Congress in order to manage the large number of leaseholds in a scientific fashion.[28] Alternatively, the Congress might give private firms complete freedom to explore and develop OCS mineral deposits. But this would make it difficult for the federal government to insure the achievement of public goals (like resource development, environmental protection, or the receipt of fair market value) in the sale of its assets—the primary reason for disposal. Congress saw a benefit to the close oversight found in a discretionary system and delegated its disposal authority along with broad

discretionary powers to the Department of the Interior to handle variable and changing economic, resource, and environmental conditions.

Although there now exist many iterations at which the Secretary of Interior may apply discretion under OCSLA, there is a limit. The administrative actions of the Department may be reviewable under the provisions of the federal Administrative Procedure Act, and if an "abuse" of discretion is found, it could be set aside.[29] Prior to the extensive amendments to OCSLA in 1978, the courts held that it was beyond the authority of the Interior Department to "take" mineral rights without explicit authorization from Congress.[30] However, the 1978 amendments authorized the Secretary to promulgate regulations under which leases could be canceled under certain circumstances after an initial suspension period and a hearing.[31] Predictably, these circumstances include consideration of impacts on other ocean uses, implying a scientific balancing of competing uses.[32]

Effect of Administrative Discretion

Costs to the Mineral Developer. Although the rationale for a discretionary system of disposal of OCS lands for minerals development may be found in the congressional preference for scientific, goal-oriented management, such a system is not costless. Of particular concern to private firms is the probability that they may invest in exploration, development, or even production activities and then encounter delays associated with suspensions or additional requirements unforeseen at the lease stage. For example, in the case of *Sun Oil Co. v. United States*, three major oil companies holding an OCS lease as a group sought to recover damages resulting from a total delay of 189 days (due to the processing or approval of required permits and applications) which slowed the onset of production from "Platform Hillhouse" in the Santa Barbara Channel.[33]

An important point is that because the management process is sequential, discretionary actions that modify entitlements at an early stage in the process might not be as costly for the private firm as those made at a later stage. For example, at a lease sale a decision by the government to reject a bid as being too low means that the bidding firm would have made a wasteful investment in prelease exploration and in determining the amount to bid. However, this loss to the firm could be relatively small in comparison to the costs associated with the suspension or other modification of postlease development or production activities. If a private firm devotes capital and labor resources in systematic exploration and development activities on a lease, delays due to suspensions or prohibition of specific activities have the potential for incurring substantial costs (interest payments, insurance, payment of subcontractors for scheduled services, etc.).

If private firms can establish the likelihood of an unfavorable discretionary decision or set of decisions, then (assuming a royalty charge fixed in advance) they may assign a premium to this type of risk and reduce the size of bonus payments that they are willing to bid to obtain leases by the size of the premium.[34] On the other hand, if private firms are truly uncertain about discretionary decisions, then the likelihood of incurring costs to the private firm are equally uncertain. This might raise the size of the risk premium or—in the extreme—dissuade firms from participating in ocean mineral activity. Such a scenario appears less important for many of the oil and gas deposits on the OCS, where resource rents can be substantial. However, the private costs associated with discretion could be important in the case of marginally productive deposits, such as many of the nonfuels.

Administrative Costs. From the public's perspective, the existence of steps during which discretion may be applied requires a higher level of financial commitment from the government than a nondiscretionary system. Thus the added costs of administering OCSLA in a discretionary manner will subtract from the financial return that the public otherwise might have received.[35] In effect, the public is "spending" some of its return on discretionary management.[36] In addition, discretionary actions might increase the likelihood of litigation, which would incur additional costs for both the public and the private firm.[37]

In the case of a marginally productive deposit, the "discretionary" costs could be high enough to foreclose its commercial exploitation. Even if private risk-associated costs do not consume the entire resource rent, it is possible that the government's administrative costs could consume the rent and more. In this situation, it would be inappropriate from an economic efficiency standpoint for the government to sell rights to explore and exploit the deposit. While this discussion appears to be largely hypothetical, it may be particularly relevant to OCS nonfuel minerals, many of which are marginally productive, if at all.[38]

NSHMA Proposal

One of the primary motivations behind the proposed NSHMA alternative legislation has been the discretionary nature of OCSLA, which ocean nonfuel mineral interests find unpalatable. It is a useful exercise, therefore, to examine the NSHMA proposal to determine whether or not it can be considered to be truly nondiscretionary. NSHMA, like OCSLA, contains goals which relate to the encouragement of exploration, technological research and development, commercial development, and "the protection, conservation, and wise management of resources."[39] On a "national seabed," the bill provides for exclusive rights to explore for nonfuel minerals under a license and to recover them under a permit. These rights are

allocated on a first come, first serve basis. Licenses and permits may be issued only to "eligible and qualified applicants,"[40] and there are specific requirements for license and permit applications,[41] and criteria for the resource manager to use in deciding to certify applications.[42] Prior to issuing a license, the resource manager must "find," among other things, that exploration or commercial recovery activities:

> are not likely to result in significant adverse effects, cumulative or otherwise, on the marine or coastal environment, taking into account the analyses and information contained in any applicable environmental impact statement and the imposition of reasonable restrictions and mitigation and monitoring measures. . . .[43]

Further measures incorporated into the bill allow the resource manager to modify, revoke, or suspend all or a portion of licenses or permits for "substantial failure" to comply with the bill or in an emergency.[44]

These basic provisions, and others found in the language of the bill, make clear that, under the broad definition, as discussed here, there are several opportunities for the resource manager to apply discretion. This discretion has been included in the bill so that specific goals might be achieved, as is the case with OCSLA. However, there is an interesting facet to the bill concerning fees charged for administrative costs. The bill proposes two types of fees: one for reviewing and processing license and permit applications for certification,[45] and another to cover the cost of reviewing and processing these applications for issuance.[46] To the extent that these fees transfer the burden of the resource manager's administrative costs (a subset of which would be costs of discretion) to private firms, these firms would shoulder all of the costs associated with discretionary decisions. This transfer would not affect the risks faced by the private firm resulting from opportunities for the resource manager to apply discretion, but it may make it easier for the resource manager to perceive situations where certain marginal deposits should not be developed. This is because the sum (in these cases) of administrative costs and the private costs of risk associated with discretion will drive the deposit into a submarginal status; thus, the private firm faced with these costs will not proceed with its application.

Administrative discretion is an important management tool by which resource managers scientifically attempt to dispose of public mineral assets with the aim of achieving specified public goals. Because these goals may sometimes conflict, and the conflicts may be unforeseen at the stage at which

entitlements are acquired, resource managers are called upon to make resource allocation decisions at multiple stages in the development of minerals.

Administrative discretion imposes two types of costs: the costs of devoting the efforts of resource managers toward making discretionary decisions, and those faced by private firms associated with the likelihood of an unfavorable discretionary decision. Assuming that the public—as the resource "owner" for OCS minerals—expects to receive the entire resource rent from the disposal of these minerals, it is spending a portion of its expected financial return to cover the costs of administrative discretion. Where the sum of administrative costs of disposal (including the government's costs of exercising discretion) plus the costs to the private firm of risk associated with a discretionary management regime exceed the resource rent to a deposit, the deposit should not be disposed of or developed (unless, of course, one public goal is to subsidize development).

Increased specification of opportunities for the exercise of discretion can be viewed as a balancing of these two kinds of costs. As the resource manager is required to perform an increased number of specific management tasks (each requiring an exertion of effort to make decisions), administrative costs may rise. At the same time, however, because discretionary opportunities may shrink with increasing statutory specificity, the risks of decisions unfavorable to private firms may fall, thus reducing their costs. An interesting area for future research concerns whether the total risk due to administrative discretion can be reduced through the redistribution of costs by varying the number of discretionary opportunities.[47]

Finally, because NSHMA contains provisions that allow the resource manager to apply discretion at certain stages in order to achieve specified public goals, like OCSLA it is a discretionary management system. But because administrative costs are transferred to private firms under the NSHMA bill, it might be easier for the resource manager to make a disposal decision for OCS nonfuel minerals under this proposed regime.

Notes

1. "Risk" and "uncertainty" are similar concepts; risk can be used as a statement of the degree of uncertainty about the occurrence of an event. Generally, an estimate of risk is expected to change as more information about the occurrence of an event accumulates. *See* Wilson and Crouch, "Risk Assessment and Comparisons: An Introduction," 236 *Science* 267 (1987). The term "risk" is used here in a broad sense to encompass the probability of an event occurring (such as a resource manager's decision to suspend

mineral development on a lease), even if there exists much uncertainty about its occurrence. Generally our analysis ignores questions about risk aversion and diversifiable risk, which may be important in understanding the extent to which risks affect the costs of mineral development to private firms. *See generally* W. Mead, A. Moseidjord, D. Muraoka, P. Sorensen, *Offshore Lands: Oil and Gas Leasing and Conservation on the Outer Continental Shelf* 77 (1985).

2. 43 U.S.C.S. 1337(k).

3. For example, see Minerals Management Service, "Prelease Prospecting for Marine Mining Minerals Other Than Oil and Gas," 52 *Fed. Reg.* 9758 (1987) [proposed rule].

4. H.R. 1260, 100th Cong., 2d sess. (1986). This bill has undergone several revisions. The version referred to here was reported from the House Committee on Merchant Marine and Fisheries on February 24, 1988: "Amendment in the Nature of a Substitute for H.R 1260 Offered by Mr. Lowry (For Himself, Mr. Jones, Mr. Davis, and Mr. Shumway)," also known as the "Lowry Bill."

5. Some observers have raised the issue that substantial portions of OCSLA apply only to the oil and gas minerals and may be irrelevant to the case of the nonfuel minerals. Some sections of OCSLA specifically name oil and gas minerals, while others refer to "minerals" in a broader sense. Those sections specific to oil and gas minerals include: the OCS leasing program (43 U.S.C.S. 1344); exploration on a lease, including the preparation of an exploration plan (43 U.S.C.S. 1340(b–f)); environmental studies (43 U.S.C.S. 1346); development and production plans (43 U.S.C.S. 1351); the oil and gas information program (43 U.S.C.S. 1352); and others. This is an important issue, especially because—under the broad definition of administrative discretion found below—the Interior Department may have an expanded scope for the exercise of discretion in the case of the disposal of OCS lands for nonfuel minerals if the above sections are found to be inapplicable. This is discussed in greater depth below.

6. Richard J. Greenwald, Prepared statement before the Subcommittee on Panama Canal/Outer Continental Shelf, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, Exclusive Economic Zone (EEZ) Hearing, June 26, 1986, at 8 (emphasis added).

7. R. Hildreth and R. Johnson, *Ocean and Coastal Law* 244 (1983); R. Tank, *Legal Aspects of Geology* 297 (1983).

8. J. Leshy, *The Mining Law: A Study in Perpetual Motion* 328 (1987).

9. Laitos and Westfall, "Government Interference with Private Interests in Public Resources," 11 *Harv. Environ. L. Rev.* 1, 48 (1987).

10. For the OCS oil and gas minerals, this would seem to contradict OCSLA which states: "An oil and gas lease issued pursuant to this section shall— . . . entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this Act . . . ." 43 U.S.C.S. 1337(b)(4). Yet this is the outcome of two of the cases discussed below. Leases also provide for suspension or cancellation by the resource manager in certain circumstances. 43 U.S.C.S. 1337(b)(5).

11. This analysis is directed at the disposal of publicly-controlled mineral assets. The decision to dispose of these minerals is a political decision made by elected officials in the "public interest." As such, Congress has decided to delegate management authority primarily to MMS, with limited influence by other government agencies in this management. To the extent that the managing agency may act in a manner contrary to the perception of the definition of "public interest" held by an individual or groups of individuals (*i.e.*, environmental interests, local or state governments), the latter may see themselves at "risk" from the agency's discretionary decisions. This issue is distinguishable from the technical problem of risk associated with the use of administrative discretion in the mineral disposal process. It is an issue concerned more fundamentally with (1) the allocation of management authority, (2) the distribution of the external effects of industrial activity in the oceans, and (3) the distribution of benefits from the disposal of public property.

12. 40 C.F.R. 122 (1987).

13. Eichenberg and Archer, "The Federal Consistency Doctrine: Coastal Zone Management and 'New Federalism,'" 14 *Ecol. L. Q.* 15 (1987).

14. P.M. Nikituk and V.A. Farris, *OCS National Compendium* 70, 84 (1986). These iterations are diagrammed for the oil and gas minerals because there is no current disposal of OCS lands for nonfuel minerals (other than sulfur and salt). It is expected that proposed regulations for the nonfuel minerals will include a (possibly similar) set of iterations. Note that not all of these iterations present legal risks, and some iterations may be viewed as riskier than others.

15. *Secretary of the Interior v. California*, 464 U.S. 312 (1984) and *Village of False Pass v. Clark*, 733 F.2d 605 (9th Cir. 1984).

16. G. Coggins and C. Wilkinson, *Federal Public Land and Resources Law* 572 (2d ed. 1987).

17. 464 U.S. 339.

18. The court identified four "distinct statutory stages" under OCSLA. These include the three mentioned here as well as the formulation of a five-year leasing plan. Although the Secretary may be considered to apply discretion in the construction of a five-year leasing plan, legal risks faced by private firms in the development of the plan are believed to be small.

19. *Village of False Pass v. Watt*, 565 F.Supp. 1123, 1134 (1983), *aff'd.* 733 F.2d 605 (9th Cir. 1984).

20. *See generally* Mitchell, Stein and Mezines, *Administrative Law* 4–18 (1982) [4.02[4]—Powers and Duties].

21. In effect, the gaps between statutory directives may shrink as the statute becomes increasingly more specific. The author is indebted to Jack Archer and John Noyes for elucidating this point.

22. Richard J. Greenwald, President, Ocean Mining Associates, Personal communication, May 3, 1988.

23. 43 U.S.C.S. 1332(3). There are many other goals, defined with greater specificity in the Act. For example, in scheduling oil and gas lease sales (thus perhaps irrelevant to the nonfuels case), the Secretary must consider eight different factors and, in addition, conduct leasing to assure receipt of "fair market value." 43 U.S.C.S. 1344(a)(2),(4). Furthermore, "the Secretary shall select the timing and location of leasing, to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C.S. 1344(a)(3).

24. R. Nelson, *The Making of Federal Coal Policy* 17 (1983).

25. For example, a discretionary system might allow the resource manager to correct for market failure such as the external effects of industrial development on renewable resource stocks or other environmental amenities.

26. 43 U.S.C.S. 1334(a) (emphasis added).

27. U.S. Const., art. IV, § 3.

28. Congress does, in fact, maintain a role in the management of OCS minerals through an oversight capacity and by preventing lease sales through the imposition of "moratoria" attached to Department of the Interior appropriations measures.

29. This section provides for reviewing courts to "hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary, capricious, an *abuse of discretion*, or otherwise not in accordance with law (emphasis added)." 5 U.S.C.S. 706(2)(A). Agency action "committed to agency discretion by law" normally would be excluded from such review. 5 U.S.C.S. 701(a)(2). Courts have held, however, that the Secretary's decision to reject a bid on an OCS lease tract is subject to judicial review under this Act. *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1389-91 (5th Cir. 1979, cert. denied 444 U.S. 879 (1979); *Kerr-McGee Corp. v. Morton* 527 F.2d 838, 839 (D.C. Cir. 1975).

30. *Union Oil Co. of California v. Morton*, 512 F.2d 743, 750 (9th Cir. 1975). *See also, Sun Oil Co. v. United States*, 572 F.2d 786, 802 (1978).

31. 43 U.S.C.S. 1334(a). Lessees may be compensated for lease cancellations, according to rules found in OCSLA. 43 U.S.C.S. 1334(a)(2)(C).

32. 43 U.S.C.S. 1334(a)(2)(A).

33. 572 F.2d 786 (1978). The oil company plaintiffs were unsuccessful on this claim in part because the delays were caused by caution on the federal government's part in light of a blowout from an adjacent lease held by the Union Oil group—the infamous 1969 Santa Barbara Channel blowout and oil spill.

34. An interesting area for further research would be to construct a model of private estimation of risk from administrative discretion. Ideally, the model would assign a probability (based upon historical relative frequency) of an adverse decision to each discretionary decision point. Discretionary decision points could be assigned weights according to their position in the sequence of management decisions, because adverse decisions made at later stages are more costly.

35. These "additional" administrative costs would be justified in the case where, for example, the benefits of protecting environmental amenities exceed the administrative costs.

36. The private firm subtracts its risk premium from the resource rent as well. If we assume the public expects to receive the full resource rent, then it is paying for the full cost of discretion from potential rents.

37. Because of the potential for incurring litigation or having to compensate leaseholders for cancelling their existing rights, there may be institutional factors that work against the exercise of discretion by the resource manager. Consider, in this context, the position of California in *Secretary of the Interior v. California* cited earlier: "It is argued, nonetheless, that a lease sale is a crucial step. Large sums of money change hands, and the sale may therefore generate momentum that makes eventual exploration, development, and production inevitable." 464 U.S. 342.

38. Broadus, "Seabed Materials," 253 *Science* 853 (1987). The existence of substantial administrative costs of disposal for OCS minerals may be one reason why some interested parties bolster arguments for disposal in terms of "strategic" mineral supply concerns. *See* Proclamation No. 5030, 48 *Fed. Reg.* 10605 (1983) [U.S. Exclusive Economic Zone Proclamation].

39. NSHMA, § 102(b).

40. NSHMA, § 301(a).

41. NSHMA, § 303(a), (b). Applications for exploration licenses must include a plan of exploration, and applications for commercial recovery permits must include a plan for commercial recovery.

42. NSHMA, § 304(b).

43. NSHMA, § 305(a)(2)(b).

44. NSHMA, § 310(a), 311(a), (b).

45. NSHMA, § 304(c).

46. NSHMA, § 305(b).

47. It might be feasible to compare the administrative costs associated with OCS disposals prior and subsequent to the 1978 amendments to OCSLA. Such an analysis would have to consider external influences, including the requirements of other statutes (NEPA, MPRSA, CZMA, others) that might affect the types of discretionary decisions faced by the resource manager.

Figure Captions

Fig. 1. The iterative nature of OCS management—*prelease* iterations. From: Nikituk and Farris (1986), note 14.

Fig. 2. The iterative nature of OCS management—*postlease* iterations. From: Nikituk and Farris (1986), note 14.

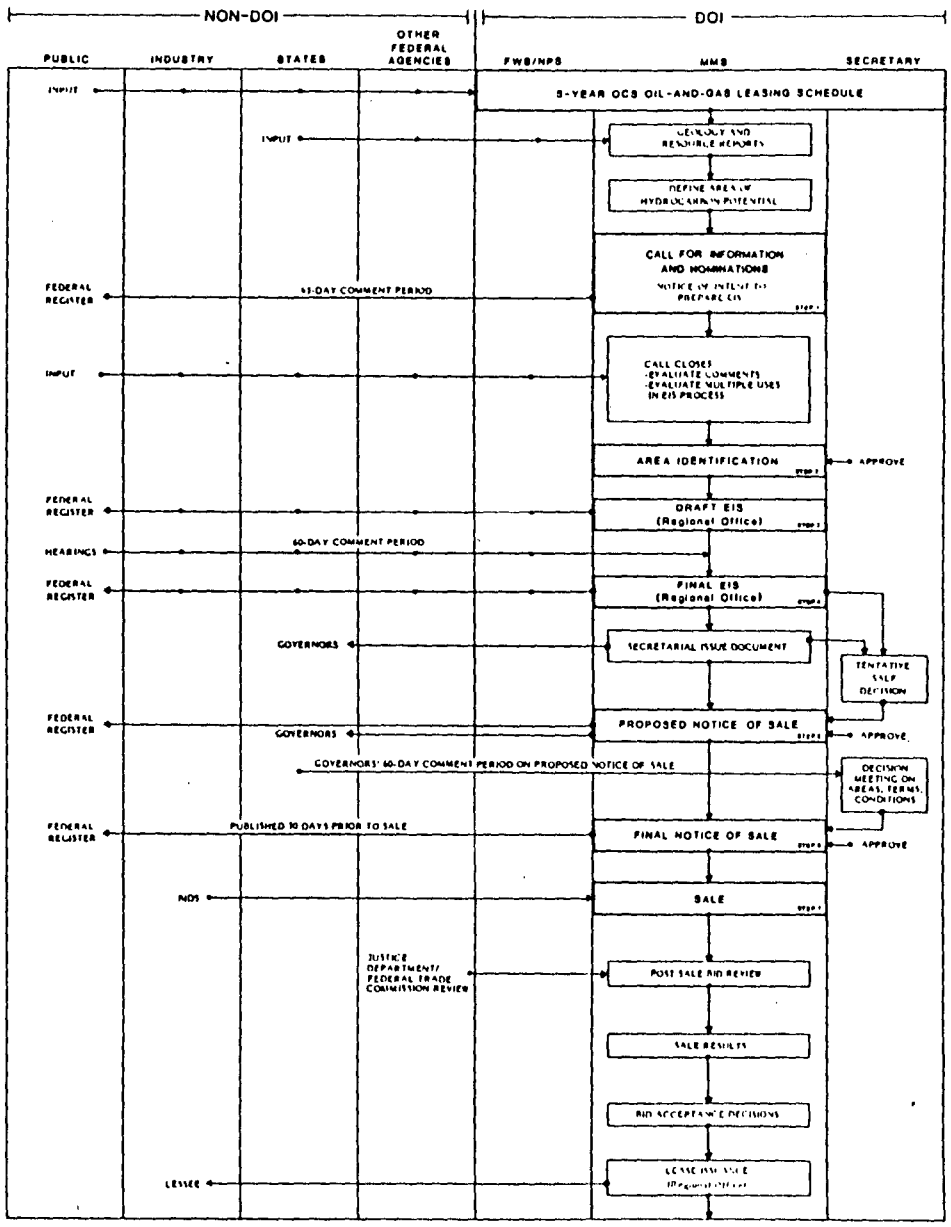
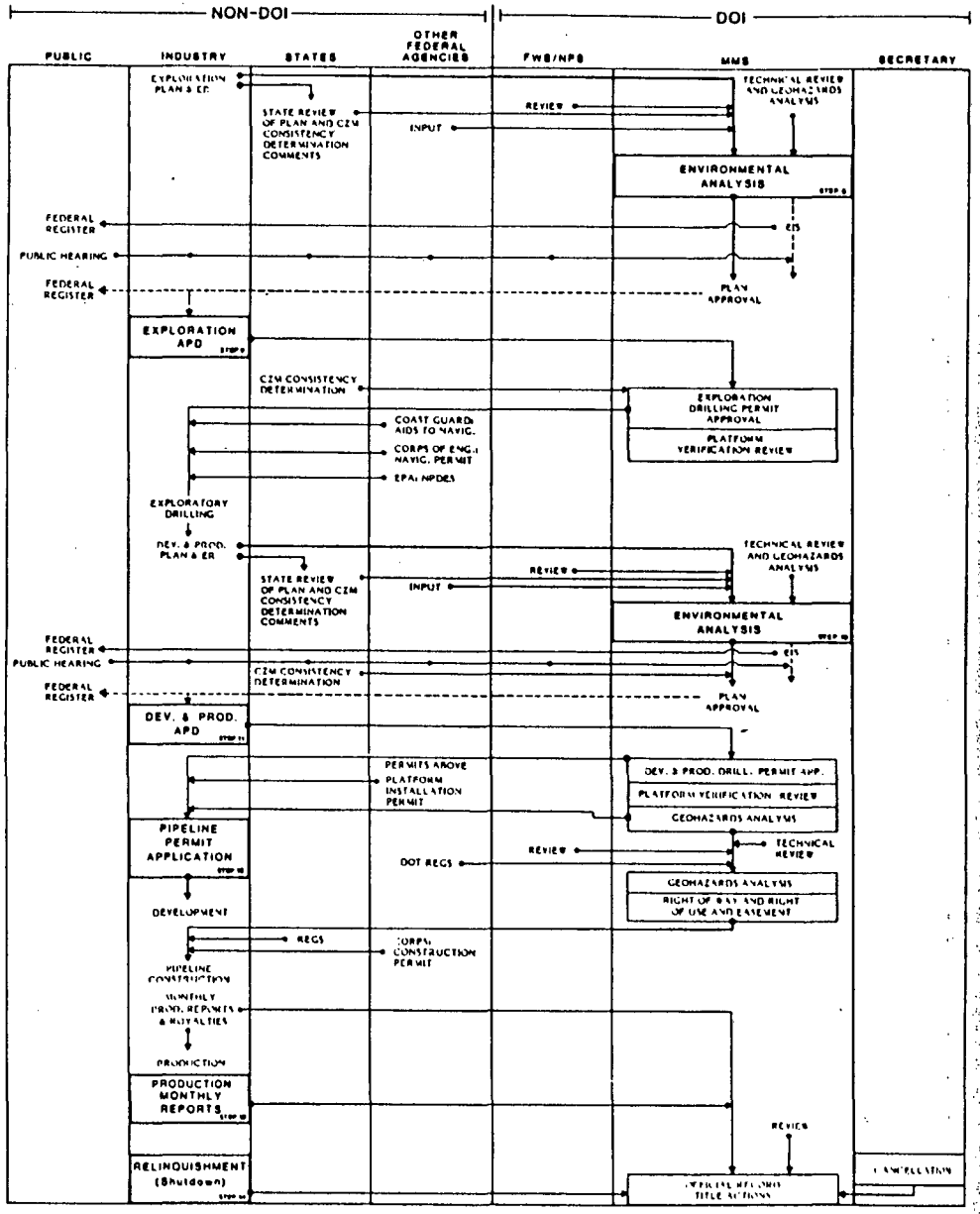


Figure 1.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SECRETARY
EXPLORATION PLAN & ER
STATE REVIEW OF PLAN AND CZM CONSISTENCY DETERMINATION COMMENTS
REVIEW
INPUT
TECHNICAL REVIEW AND GEOHAZARDS ANALYSIS
ENVIRONMENTAL ANALYSIS
FEDERAL REGISTER
EIS
PUBLIC HEARING
FEDERAL REGISTER
PLAN APPROVAL
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PLATFORM VERIFICATION REVIEW
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CORPS OF ENG.: NAVIG. PERMIT
EPA: NPDES
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DEV. & PROD. PLAN & ER
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DEV. & PROD. DRILL. PERMIT APP.
PLATFORM VERIFICATION REVIEW
GEOHAZARDS ANALYSIS
PIPELINE PERMIT APPLICATION
REVIEW
TECHNICAL REVIEW
DOT REGS
GEOHAZARDS ANALYSIS
RIGHT OF WAY AND RIGHT OF USE AND EASEMENT
DEVELOPMENT
REGS
CORPS CONSTRUCTION PERMIT
PIPELINE CONSTRUCTION
MONTHLY PROD. REPORTS & ROYALTIES
PRODUCTION
PRODUCTION MONTHLY REPORTS
REVIEW
RELINQUISHMENT (Shutdown)
CANCELLATION
TITLE ACTIONS

Figure 2.